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NORTH EAST LAW REVIEW

Volume 12 2026
Issue 1

North East Law Review 2026

Volume 12, Issue 1

Newcastle University

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.

This issue should be cited as (2026) 12 (1) NELR

ISSN (Print) 2056-2918

ISSN (Online) 2056-2926

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Foreword by the Editor-in-Chief and Deputy

We are delighted to present Volume 12, Issue 1 of the North East Law Review. This edition, like its predecessors, showcases the outstanding scholarship that has been produced by the students at Newcastle Law School and reflects the exceptional talent within our community. The North East Law Review provides a valuable opportunity for students to make unique contributions to legal academia, and the essays in this volume are a testament to the high standard of intellectual curiosity that exists within the law school. It is with great pride that we present this collection of essays.

The volume features a range of academic commentary across diverse areas of law, reflecting the breadth of legal inquiry our students participate in. It bridges traditional legal thought with contemporary legal challenges like AI, environmental justice and technological development. Fay Greenway and Lara Rutler explore the changing human rights landscape in modern contexts. A historical legal analysis is conducted by Millie Pearce with regard to slavery and coverture, and by Madeleine Smith, referencing women's rights in the 20th century. The impact of technology is acknowledged by Isabel Chantry with regards to employment law, and Ruvimbo Mafuta assesses the impact of AI technology on human rights. In the bioethics field, Georgia Friar addresses inadequacies of assisted suicide law, and Ruvimbo analyses gene-editing ethics in the best interest of the child. Ruby Simcock critiques areas of Australian environmental law that disregard indigenous rights. Traditional private law is addressed, including Alice Bradley's case for common law reform within succession law, and Olivia Lancashire's examination of intellectual property protection within the fashion industry. Charlotte Sinnett explores the implications of legal reform with the field of animal rights. this range of work displays the array of legal research our students engage with.

We would like to extend our gratitude to those who made the production of this issue possible. Firstly, thank you to Dr Jiarong Zhang, our academic lead, for her guidance, encouragement and enthusiasm through the preparation of this edition. Her expertise was invaluable in supporting and guiding a new team of editors. We would also like to thank the Editorial Team for their hard work and commitment to maintaining the highest standards of quality. Their dedication to the journal made our roles as Chief and Deputy Editor considerably easier. Finally, we thank our talented contributors, whose outstanding scholarship has made this volume possible. It is a privilege to share their meaningful thoughts with our readers.

We hope that those reading this edition are inspired by the insight of our authors, and that you enjoy reading this volume as much as we have enjoyed bringing it together.

Lucy Peterson, Deputy Editor-in-Chief

North East Law Review Editorial Board 2025-6

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Reform Without Replacement: The Future of *Banks v Goodfellow*

Alice Bradley

1. Introduction

Testamentary freedom lies at the heart of succession law,[1] yet it is undermined by the coexistence of two conflicting tests for capacity: *Banks v Goodfellow*[2] and the Mental Capacity Act 2005.[3] While the Law Commission advocates for a single statutory test,[4] This article argues that such reform risks deepening doctrinal inconsistencies, favouring instead more subtle reforms within the common law framework.

2. Structural Weaknesses in the Banks v Goodfellow Test

Several faults can be identified with the common law test for capacity in *Banks*, as well as inconsistencies with the statutory approach of the MCA 2005. Certainly, if not resolved, these may constitute a breakdown in doctrinal coherence and reform of the current law is necessary. Firstly, the Law Commission is critical of the archaic language of the *Banks* test,[5] something which is unsurprising given its age. Cockburn CJ was no time traveller and he could not contemplate many of the contemporary issues we face, nor the subsequent developments of clinical neuroscience. Consequently, the test contains antiquated wording which is imprecise. Purser questions whether the *Banks* test needs to be updated for 21st century dilemmas,[6] including application of the fourth 'limb', which specifically refers to "insane delusions" and "disorders of the mind".[7] It is important to question how cognitive abilities might be adequately and reliably assessed within the *Banks* framework, given the increased incidents of dementia and other cognitive diseases. It is anticipated that one in three people over the age of 65 will

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[1] Law Commission, 'Making a Will' (Law Com CP No 231, 2017) Ch 2, at 2.11 Making a will (2017): consultation and summary – Law Commission last accessed 31 March 2026.
[2] *Banks v Goodfellow* [1870] L.R. 5. Q.B. 549.
[3] Mental Capacity Act 2005.
[4] Law Commission (n1) 2.65.
[5] ibid.
[6] Kelly Purser, 'Assessing Testamentary Capacity in the 21st Century: Is *Banks v Goodfellow* still relevant?' (2015) 38(3), NSW Law Journal 845 UNSW Law Journal Volume 38 (2015) last accessed 31 March 2026.
[7] Goodfellow 1870 (n2) 565.

die with a dementia diagnosis,[8] and people over 55 fear being diagnosed with dementia more so than any other disease.[9] However, there is little literature mapping the cognitive markers for dementia directly against the relevant legal framework.[10] Given the increasing transdisciplinary approach to assessing testamentary capacity, with the existence of the MCA, the dearth of relevant literature is not only surprising, but also concerning. As Martin Frost observed, "Today the test might be expressed a little more scientifically;"[11] Wider empirical studies are necessary to inform better legal application of the archaic language in *Banks* as the current focus does not reflect the wide range of factors which can affect capacity.[12]

The courts have similarly picked up on the separate and conflicting capacity tests; *Re Walker* identified three differences between the test in statute and in common law.[13] A major difference is the rational approach of the *Banks* test as opposed to the functional approach of the MCA. *Banks* repeatedly stresses the importance of rationality,[14] whilst the courts have been careful to acknowledge there are different ways of balancing competing claims, all of which are rational and not outcome-based. In *White v Philips,* the court stated "in this context, fairness, rationality and justice have a number of permutations."[15] A will is therefore only irrational if it falls outside of a range of decisions that the testator might be *expected* to make. *Banks* aims to ascertain whether the testator has the functional abilities required to produce a just disposition, so "an irrational, unjust, and unfair will must be upheld" if the testator has the "capacity to make a rational, just and fair one".[16] Yet, if no explanation can be found for an unjust outcome, then it will form part of the evidence for establishing incapacity, alongside other medical evidence of the disorder.[17]

[8] Shih-Yin Lin and Frances Marcus Lewis, 'Dementia Friendly, Dementia Capable, and Dementia Positive: Concepts to Prepare for the Future' (2015) 55(2) The Gerontologist 237 https://pubmed.ncbi.nlm.nih.gov/26035599/ last accessed 31 March 2026.

[9] Department of Health, 'Prime Minister's Challenge on Dementia 2020' (Policy Paper, 21 February 2015) https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/414344/pm-dementia2020.pdf last accessed 31 March 2026.

[10] Kelly Purser and Jane Lonie, 'Mapping Dementia and Cognitive Decline in Testamentary Capacity' (2019) 66 International Journal of Law and Psychiatry 101450 https://pubmed.ncbi.nlm.nih.gov/31706409/ last accessed 31 March 2026.

[11] Martin Frost, Stephen Lawson and Robin Jacoby, *Testamentary Capacity: Law, Practice and Medicine* (OUP 2015) 46.

[12] Law Commission (n1) 2.41.

[13] *Re Walker* [2014] EWHC 71 (Ch), Per Nicholas Strauss QC.

[14] Goodfellow 1870 (n2), Per Cockburn CJ at 565.

[15] *White v Philips* [2017] EWHC 386 (Ch), per Saffman J at 71.

[16] *Sharp v Adam* [2006] EWCA Civ 449*,* Per May LJ at 79; See also *St Clair v King* [2022] EWHC 40 (Ch) at 67.

[17] *Re Ritchie (Deceased)* [2009] EWHC 709 (Ch), per Behrens J at 190.

Conversely, the MCA holds a strict causal nexus, as it must be established that the impairment was the 'effective material' or 'operative cause' of the inability.[18] Mackenzie and Rogers identify the MCA's advantages in identifying cognitive competency and procedural reasoning.[19] The assessment evaluates the soundness of the reasoning process that results in a decision; the "premises or inputs" are a person's "beliefs, desires and values" and a person is held to have capacity if they can produce a "recognisable outcome" from these.[20] This is meant to ensure a value neutral approach to capacity as it focuses on logical rather than moral consistency, whereas *Banks* explicitly looks towards the rationality of the result.

This divergence means that similar factual scenarios could yield different conclusions, with *Banks* focusing on the rational coherence of the outcome and the MCA prioritising the procedural process. This dissonance can lead to conflicting conclusions across jurisdictions, as highlighted in *Re Walker*[21] and *White v Phillips*,[22] where fairness and justice were interpreted differently. Such inconsistencies challenge practitioners conducting capacity assessments, creating uncertainty and the risk of a breakdown between courts.

3. The Law Commission's Proposal - A Misguided Solution

The consultation paper proposes a single test for testamentary capacity by adopting the MCA 2005.[23] Despite the flaws of the *Banks* test, the proposals are overly idealistic and lack the nuance required for assessing testamentary capacity, failing to provide a clear improvement over the current law.

The courts have shied away from clarifying the relationships between the two tests. Cumber was highly critical of the Court of Appeal's "missed opportunity" in *Simon v Byford*[24] to "offer

[18] MCA 2005 (n3) s2(1).
[19] Catriona Mackenzie and Wendy Rogers, 'Autonomy, Vulnerability and Capacity: A Philosophical Appraisal of the Mental Capacity Act' (2013) 9 Intl JLC 37, 39 https://doi.org/10.1017/S174455231200047X last accessed 31 March 2026.
[20] Natalie Banner, 'Can Procedural and Substantive Elements of Decision-Making Be Reconciled in Assessments of Mental Capacity?' (2013) 9 Intl JLC 71, 75 https://doi.org/10.1017/S1744552312000493 last accessed 31 March 2026.
[21] Re Walker 2014 (n13)
[22] White v Philips 2017 (n15)
[23] Law Commission (n1) 2.65.
[24] Hugh Cumber, 'Case Note: Simon v Byford in the Court of Appeal: Banks v Goodfellow Revisited' (2014) 3 PCB 142

much needed clarity on the role of the MCA in retrospective assessments of testamentary capacity."[25] However, this appears to be a rather common trend of the chancery courts' subtle preference towards *Banks.* Similarly, *Re Wilson* declined to make a finding as to whether the test was different, beyond noting that the common law test is "more expressly tailored" to the decision in capacity cases[26]. Far more judicial discretion seems to settle that the MCA has not superseded the "simple and succinct"[27] common law test in the eyes of the courts.[28] The MCA code clarifies that its test does not replace *Banks,*[29] allowing the judiciary discretion in its use. Its limited application in case law highlights its unsuitability for testamentary capacity. Designed for financial, healthcare, and welfare decisions for the living, the MCA's focus on 'best interests'[30] is irrelevant for wills, which take effect posthumously, making it impractical as the sole test for testamentary capacity.

The Law Commission's proposals adopt a statutory presumption of capacity, to align with the principles of the MCA. One of the broader criticisms of *Banks,* is the doctrinal differences regarding the burden of proof.[31] Under *Banks,* the burden shifts depending on whether the propounder can prove the will is *prima facie* rational. However, the MCA's inter vivos assessment begins with a clear presumption of capacity; something which the Commission considers a benefit .[32] Evans contends that in practice, the burden of proof under *Banks* is not dissimilar from a presumption of capacity.[33] Testamentary capacity cases are not decided on presumptions, but rather evidence which is used to the credit or discredit of the testator's capacity. In *Re Key,* evidence of the testator's physical and psychiatric infirmity was submitted as evidence of a radical departure from his previous testamentary intentions.[34] Together this

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[25] *Simon v Byford* [2014] EWCA Civ 280
[26] *Re Wilson (Deceased)* [2013] EWhC 499 (Ch) at 39
[27] Judge Lush, '*Banks v Goodfellow* (1870)' (STEP Journal, October 2012) https://journal.step.org/tqr-october-2012/banks-v-goodfellow-1870 last accessed 31 March 2026.
[28] See *Re MM* [2007] EWHC 2003; *Scammell v Farmer* [2008] WTLR 1261; *Pearce v Beverly* [2014] WTLR 85; *Saulle v Nouvet* [2008] WTLR; *Walker v Badmin* [2014] EWHC 71; *Kicks v Leigh* [2014] EWHC.
[29] Steve Evans, 'Law Commission Consultation C.P 231 "Making a Will": A Response on Behalf of the Society of Legal Scholars. Property and Trusts Law Section' (Society of Legal Scholars) Making-A-Will-SLS-Response.pdf last accessed 31 March 2026.
[30] MCA 2005 (n3) (provision).
[31] Daniel Bedford, Juliet Brook, 'Reform of testamentary capacity: the hidden pitfalls of replacing *Banks v Goodfellow* with the Mental Capacity Act 2005' L.Q.R. 2024, 140(Jan), 34-60 Reform of testamentary capacity: the hidden pitfalls of replacing Banks v Goodfellow with the Mental Capacity Act 2005 - University of Portsmouth last accessed 31 March 2026.
[32] Law Commission (n1) 2.88.
[33] Evans (n29).
[34] *Re Key (Deceased)* [2010] EWHC 408 (Ch).

indicates that only *evidence* of potential mental impairment or other disorders are likely to raise doubt as to capacity.[35]

Moreover, fully adopting the MCA would cause inconsistencies with the rule in *Parker v Felgate.*[36] This exception works in practice to better detect incapacity as a testator's mental decline can be observed within the timeframe of instruction to execution of the will. If the Commission's proposals were strictly followed, it is possible that a testator who doesn't quite meet the criteria for a statutory will at an inter vivos assessment could then be taken advantage of by external influences when instructing and executing their will. The combination of *Banks* and *Parker* therefore works better to protect vulnerable testators in retrospective assessments of capacity.

Indeed, applications of the MCA's presumption have been far from straightforward when applied retrospectively. Keene observes that the presumption is framed in the present tense, so is "silent to the approach that is required to take in respect of past assessments of capacity"[37]. Despite the context differing, *A Local Authority v E* held that for the advance decision to be valid there should be "clear evidence… that the maker had capacity at the relevant time";[38] highlighting that retrospective analysis of capacity using the MCA is issue specific, requiring proof as capacity, just as *Banks.* This overlap and lack of clarity in application suggest that the proposed reform may not meaningfully resolve existing differences, making it overly idealistic. The recommendation of the Law Commission is therefore unnecessary.

4. The Case for Common Law Reform

The current state of the law is unsatisfactory and requires reform, however both the main and supplementary recommendations of the Law Commission are unnecessary or promote further doctrinal coherence. It remains that more subtle reforms can be incorporated, using the inherent flexibility of the common law, to achieve more satisfactory results.

[35] See also *Sharp v Adam* [2006] W.T.L.R 1059, per May LJ at 76.
[36] *Parker v Felgate* (1883) LR 8 PD 171.
[37] Alex Ruck Keene, 'Advanced Decisions: Getting It Right' (Mental Capacity Law and Policy, June 2020) 13-17 Advance-Decisions-getting-it-right.pdf last accessed 31 March 2026.
[38] *A Local Authority v E* [2012] EWHC 1639 (COP); [2012] H.R.L.R 29, Per Jackson J at 55.

As previously discussed, the language of the *Banks* test appears archaic. However, the subjectivity of the test also gives it flexibility to potentially adapt to modern understandings of mental capacity. In *Sharp v Adam* the fourth 'limb' was extended to be "concerned as much with mood as with cognition,"[39] leading to the decision in *Re Key* where the 'limb' was held to encompass affective disorders such as depression or bereavement that are "more likely to affect powers of decision-making than comprehension."[40] This highlights that if the opportunity arises, the courts are happy to extend the scope of the *Banks* test to reflect modern medical developments. If the test is completely consigned to statute due to the incorporation of *Banks*, it may become set in stone due to the time it takes to debate and pass reforms. In another 150 years, the statutory test which the Law Commission advocates for may face the same allegations of outdated language in the wake of future medical advancements, without the same flexibility to update it. The British Columbia Law Institute reflected upon the ability of the common law test to respond to "emerging trends and new fact patterns,"[41] emphasising the courts' power to update the test to incorporate modern medical findings.

Instead of shying away from the opportunity to clarify arising issues, the courts should use it to update the *Banks* criteria to attend the broad array of psychiatric, neurological and medical conditions rather than a global notion of "disorders of the mind" or "insane delusions."[42] This has already been accomplished by the Australian courts in *Read v Carmody* where the definition of 'mental disorders' was expanded, encompassing psychosis, dementia, and other more transient disturbances of intellectual functioning;[43] all of which are circumstances where a person's cognition, and thus capacity, can be affected.

To adapt to modern complexities, the legal profession must expand its knowledge base on mentally disabling conditions. This would enhance the law's ability to effectively address issues related to testamentary capacity.[44] Further guidelines refining the application of each 'limb' should be developed to identify the updated information that should be provided and

[39] *Sharp v Adam* [2006] W.T.L.R 1059, Per May LJ at 93.
[40] Re Key (Deceased) 2010 (n34), per Briggs J at 96.
[41] British Columbia Law Institute, 'Report on Common-Law Tests of Capacity' (BCLI Report No 73, 2013) 43 http://dx.doi.org/10.2139/ssrn.2343790 last accessed 31 March 2026.
[42] Goodfellow 1870 (n2) 565.
[43] *Read v Carmody* [1998] NSWCA 182, Per Powell J at 185
[44] Kenneth I Schulman and others, 'Assessment of Testamentary Capacity and Vulnerability to Undue Influence' (2007) 164 American Journal of Psychiatry 725 https://pubmed.ncbi.nlm.nih.gov/17475729/ last accessed 31 March 2026.

sought, addressing the Commission's concern for greater clarity. The Canadian Bar Review suggested a *Banks* test which references an understanding of capacity that is timing, situation, person and task specific,[45] proposing a new list of criteria; including recollection and appreciation of the significant conflict or complexity in their life situation and the recall of previously expressed wishes with respect to estate distribution and prior wills.[46] These proposals seem unsuitable, as they would work to make assessments overly complex; courts would require exhaustive investigation into the testator's prior choices, raising litigation costs and protracted disputes. One of the strengths of the *Banks* test is its relative simplicity, which is crucial for practical application by legal professionals and medical experts. The approach of the Australian courts is therefore preferable, extending the qualifications of incapacity in light of modern medical knowledge, whilst retaining the simple four-limbed' test in *Banks* which has evidently stood the test of time.

5. Conclusion

To conclude, whilst the current law is conflicting and requires reform, the Law Commission's recommendations risk creating further inconsistencies. The *Banks* test, despite its archaic language, offers the flexibility needed to adapt to modern medical advancements and case-specific complexities. Rather than replacing it with a rigid statutory test, more nuanced updates to the common law would preserve its simplicity while broadening its applicability. Courts should continue refining *Banks* to address emerging medical knowledge, ensuring it remains a robust framework for balancing testamentary freedom and the need for doctrinal coherence.

[45] Kenneth I Shulman and others, 'Banks v Goodfellow (1870): Time to Update the Test for Testamentary Capacity' (2017) 95 Canadian Bar Review 251-267 BANKS V GOODFELLOW (1870): TIME TO UPDATE THE TEST FOR TESTAMENTARY CAPACITY | The Canadian Bar Review last accessed 31 March 2026.

[46] ibid. 266

Extension or Invention? Rethinking the case for a separate Animal Bill of Rights

Charlotte Sinnett

1. Introduction

The protection of animals is best regulated through the extension of existing fundamental rights frameworks, rather than the creation of a new separate Animal Bill of Rights. Historically, animal protection has developed through the adaptation of established legal concepts, not the invention of new rights regimes, and current frameworks already recognise animal interests in ways that approximate rights-based protection. When fundamental rights are grounded in sentience rather than species membership, they are sufficiently flexible to include animals without conceptual rupture. While abolitionist critiques rightly expose the structural inadequacies of current animal protection, the pursuit of entirely new, animal-specific rights risks normative and practical fragmentation. By contrast, the new welfarist strategy of extending established rights frameworks offers a more coherent, institutionally viable, and normatively defensible route to enhancing animal protection.

2. Adaptability of the law

Historically, the protection of animals has developed not through the attribution of fundamental rights, but through the law's capacity to adapt moral concern into enforceable duties and standards.[1] This is a pattern that strongly supports Adenitire and Fasel's claim that an animal bill of rights is unnecessary.[2] As Kelch demonstrates, the concern for animal suffering long predates rights discourse.[3] For example, ancient philosophers such as Plutarch and Porphyry condemned cruelty on ethical grounds, while religious frameworks (from Asoka's Edicts to Judeo-Christian stewardship traditions) embedded compassion and restraint without

[1] Thomas Kelch, 'A short history of (mostly) western animal law: Part I' (2012) 19 Animal Law 23 https://lawcommons.lclark.edu/cgi/viewcontent.cgi?article=1180&context=alr ; Thomas Kelch, 'A short history of (mostly) western animal law: Part II' (2012) 19 Animal Law 347 https://lawcommons.lclark.edu/cgi/viewcontent.cgi?article=1190&context=alr last accessed 4 April 2026.
[2] John Olusegun Adenitire and Raffael Fasel, *Animals and the Constitution: Towards Sentience-Based Constitutionalism* (Oxford University Press 2025) 200–201.
[3] Kelch (n1) Part I; Kelch (n1) Part II.

recognising animals as legal subjects.[4] Even where animals were treated as property, legal systems showed flexibility by incorporating non-economic moral considerations, illustrating that protection could expand within existing categories rather than replacing them.[5] This incremental, duty-based approach persisted into English law, most clearly in Lord Erskine's 1809 speech, which framed animal protection as moral obligation and a matter of public justice, not as a function of animal rights.[6] The same adaptive logic underpins modern cruelty offences: as Chiesa shows, contemporary criminal law condemns animal cruelty even where no human harm or economic loss occurs, treating animal suffering as intrinsically relevant without invoking rights language.[7] Crucially, scientific developments exposing the continuity of animal and human cognition have further strengthen this trajectory, not by demanding constitutional rupture, but by enabling welfare law to evolve towards sentience-based protection.[8] UK legislation exemplifies this historical adaptability: statutes such as the Animal Welfare Act 2006 impose positive duties of care and criminalise unnecessary suffering, achieving substantive protection without formal rights recognition.[9] Moreover, this history confirms that animal protection has consistently advanced through internal legal evolution, by absorbing moral, religious, and scientific progress incrementally. Thereby validating the view that extending existing rights frameworks to accommodate animals is both conceptually possible and institutionally preferable to creating a standalone Animal Bill of Rights.[10]

3. Contemporary legal protection of animal interest

UK law already protects animal interests in ways that closely resemble a rights-based framework, making a separate Animal Bill of Rights legally unnecessary.[11] When assessed

[4] Kelch (n1) Part I; Kelch (n1) Part II; Lisa Kemmerer,
Animals and world religions (Oxford University Press 2011) ch 5.
[5] Kelch (n1) Part I; Kelch (n1) Part II.
[6] HL Deb 15 May 1809, vol 14, cols 554-571 (Lord Erskine).
[7] Luis Chiesa, 'Why is it a crime to stomp on a goldfish?' (2008) 78 Mississippi Law Journal 1 https://digitalcommons.law.buffalo.edu/cgi/viewcontent.cgi?article=1725&context=journal_articles last accessed 4 April 2026.
[8] Franz de Waal, 'What I Learned from Tickling Apes' New York Times (New York, 8 April 2016) https://www.nytimes.com/2016/04/10/opinion/sunday/what-i-learned-from-tickling-apes.html ; Mark Bekoff, 'Animals Are Conscious and Should Be Treated as Such' New Scientist (London, 19 September 2012) https://doi.org/10.1016/S0262-4079(12)62435-X ; Heather Browning and Walter Veit, 'The Sentience Shift in Animal Research' (2022) BioScience https://doi.org/10.1080/20502877.2022.2077681 last accessed 4 April 2026.
[9] Animal Welfare Act 2006.
[10] Adenitire and Fasel (n2).
[11] ibid.

functionally rather than formally, the Animal Welfare Act 2006 provides a core quasi-rights framework.[12] This is through protecting animal interests beyond ownership status (ss1-2), criminalising the infliction of unnecessary suffering (s4), and imposing a positive duty of care to meet animals' welfare needs (diet, environment etc.) (s9).[13] These features mirror modern rights regimes, particularly socio-economic rights, which are defined by duties and standards rather than absolute entitlements.[14] The Act's justificatory framework balances animal suffering against necessity in a way resembling proportionality reasoning in human rights law, while codes of practice under s14 function as soft law instruments shaping interpretation and enforcement.[15] This quasi-rights structure is reinforced by the Animal Welfare (Sentience) Act 2022, which formally recognises animals as sentient beings and embeds their interests within governmental decision-making through institutional scrutiny.[16] As Dunn and Jowitt argue, this represents an evolutionary extension of existing constitutional techniques rather than a radical normative change, restoring the policy-integration function previously provided by Article 13 TFEU.[17] Nurse similarly characterises the Sentience Act as institutionalism rather than transformation: it does not create new rights-holders but embeds a procedural duty of regard to animals interests within executive governance.[18] Moreover, these developments show that the UK law already accommodates animal protection through enforceable duties, institutional oversight, and balancing mechanisms that function in substance as quasi-rights.

This conclusion is reinforced by European and international legal frameworks, which demonstrate that animal welfare has long been constitutionalised without recourse to formal animal rights.[19] Article 13 TFEU explicitly recognises animals as sentient beings and requires

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[12] Animal Welfare Act 2006.
[13] Animal Welfare Act 2006, ss1-2; s4; s9.
[14] Geordie Duckler, 'Animals as Criminals' (2018) 10(1) Journal of Animal and Environmental Law 20 https://heinonline.org/HOL/P?h=hein.journals/jael10&i=26 last accessed 4 April 2026.
[15] Animal Welfare Act 2006, s14.
[16] Animal Welfare (Sentience) Act 2022.
[17] Rachel Dunn and Joshua Jowitt, 'The Animal Sentience Committee: Evolution or Revolution in the Legal Recognition of Animal Sentience in the UK?' in Jane Kotzmann and Marcelo B Rodriguez-Ferrere (eds), *The Legal Recognition of Animal Sentience* (Hart Publishing 2024) 207-224; Consolidated Version of the Treaty on the Functioning of the European Union [2012] OJ C326/47, art 13.
[18] Animal Welfare (Sentience) Act 2022; Angus Nurse, 'A Question of Sentience: Brexit, Animal Welfare and Animal Protection Law' (2019) 10 J Animal & Envtl L 32 https://heinonline.org/HOL/P?h=hein.journals/jael10&i=148 last accessed 4 April 2026.
[19] Consolidated Version of the Treaty on the Functioning of the European Union [2012] OJ C326/47, art 13; Margot Michel and Eveline Schneider Kayasseh, 'The Legal Situation of Animals in Switzerland: Two Steps Forward, One Step Back – Many Steps to Go' (2011) 7 Journal of Animal Law https://www.animallaw.info/sites/default/files/Journal%20of%20Animal%20Law%20Vol%207.pdf ; Anne Peters, 'Global Animal Law: What It Is and Why We Need It' (2016) 5(1) Transnational Environmental Law 9 https://doi.org/10.1017/S2047102516000066 ; Gieri Bolliger, 'Legal protection of animal dignity in Switzerland: Status quo and future perspectives' (2016) 22 Animal Law 311 https://lawcommons.lclark.edu/cgi/viewcontent.cgi?article=1141&context=alr last accessed 4 April 2026.

their welfare to be integrated across policy areas, embedding animal interests at a constitutional level while stopping short of enforceable animal rights.[20] EU regimes governing farming, slaughter, scientific research, and zoos impose welfare standards grounded in scientific evidence, limit permissible harm, and require justification and alternatives, notably through the 3Rs principle.[21] Replacement, Reduction, and Refinement require that animal use in research be avoided where possible, minimised where necessary, and conducted in ways that reduce suffering.[22] Functionally, these operate as context-specific rights, even though they are framed as regulatory obligations. Council of Europe instruments similarly establish baseline welfare entitlements, reinforcing the idea that animal protection is treated as a matter of constitutional principle, not merely policy discretion.[23] Duckler reinforces this view through the analysis of animals as responsible subjects.[24] This is because if animals can already be incorporated into legal systems as bearers of responsibility within existing structures, it follows that those same structures can accommodate animals as bearers of protected interests.[25] The barrier to stronger protection is therefore normative rather than conceptual.[26]

Despite Switzerland's constitutional recognition of "animal dignity", Bolliger shows that although this legal system goes further symbolically than that of the UK, it continues to struggle with enforcement and anthropocentric balancing.[27] This illustrates that formal recognition alone does not guarantee stronger protection.[28] As Peters argues, effective animal protection is more likely to emerge through the incremental mainstreaming of animal interests within existing legal systems than through the creation of an Animal Bill of Rights.[29] While welfare regimes undeniably suffer from uneven enforcement and effectiveness, these weaknesses concern governance and political will, not the absences of a rights label.[30] Cumulatively, domestic and comparative law supports that contemporary legal protection already amounts to

[20] Consolidated Version of the Treaty on the Functioning of the European Union [2012] OJ C326/47, art 13.
[21] Directive 2010/63/EU on the protection of animals used for scientific purposes [2010] OJ L276/33, art 4; Animals (Scientific Procedures) Act 1986 s 5B, also sch 2.
[22] Directive 2010/63/EU on the protection of animals used for scientific purposes [2010] OJ L276/33, art 4; Animals (Scientific Procedures) Act 1986 s 5B, also sch 2.
[23] European Convention for the Protection of Animals Kept for Farming Purposes (adopted 10 March 1976, entered into force 10 September 1978).
[24] Duckler (n14).
[25] ibid.
[26] ibid.
[27] Bolliger (n19); Michel and Kayasseh (n19).
[28] Bolliger (n19).
[29] Anne Peters, 'Global Animal Law: What It Is and Why We Need It' (2016) 5(1) Transnational Environmental Law 9 https://doi.org/10.1017/S2047102516000066 last accessed 4 April 2026.
[30] Bolliger (n19); Michel and Kayasseh (n19).

quasi-rights protection, and the more compelling reform lies in refinement, extension, and stronger enforcement of existing frameworks.

4. Legal plausibility and normative implications of extending existing rights to animals

Extending existing fundamental rights to animals is doctrinally coherent if the grounds of rights are understood in terms already operative within contemporary rights, rather than species membership. Singer's principle of equal consideration provides a clear starting point: once the capacity to suffer is treated as morally relevant, comparable interests such as avoiding pain or severe harm must be given equal weight regardless of the species in which they arise.[31] This mirrors the logic by which modern human rights law protects non-autonomous humans, including children and persons with profound cognitive disabilities, whose rights are justified not by rational agency but by vulnerability to serious harm.[32] The analytical implication is that the criteria already used to justify rights for vulnerable humans also plausibly extend to many animals, making inclusion a matter of scope rather than kind.[33] Regan's account of animals as "subjects-of-a-life" reinforces this conclusion by grounding strong protections in inherent value rather than autonomy, aligning with rights doctrines that prohibit instrumentalization of beings who have welfare and interests of their own.[34] Nussbaum's capabilities approach similarly departs from utilitarianism, grounding justice in the protection of species-specific flourishing rather than abstract rational agency.[35] These theories support that recognising animals as beneficiaries of existing fundamental rights does not require the invention of a separate Animal Bill of Rights; it requires only that the justificatory logic already underpinning rights for vulnerable humans be applied consistently, without a speciesism.[36]

Extension is also doctrinally coherent on leading legal theories of rights-holding, since rights in law do not require full autonomy or direct control. The classic Will theory struggles to account for children and profoundly disabled persons, yet both are treated as rights-holders in

[31] Peter Singer, *Animal Liberation* (Jonathan Cape 1975).
[32] Paul J McLaughlin, 'If Animals Are Like Our Children Let Us Treat Them Alike: Creating Tests of an Animal's Intelligence for Determinations of Legal Personhood' (2019) Library Faculty Publications 13, 17 https://commons.law.famu.edu/cgi/viewcontent.cgi?article=1013&context=library-facpub last accessed 4 April 2026.
[33] ibid.
[34] Tom Regan, *The Case for Animal Rights* (2nd edn, University of California Press 2004) ch 7, 232–265.
[35] Martha C Nussbaum and Cass R Sunstein (eds), *Animal Rights: Current Debates and New Directions* (Oxford University Press 2004).
[36] Bernard Williams, '*The Human Prejudice' in Philosophy as a Humanistic Discipline* (Princeton University Press 2006); Regan (n34); Nussbaum and Sunstein (n35); McLaughlin (n32).

practice; indicating that rights can attach to beings whose agency is mediated.[37] Interest-based accounts accommodate this more naturally, and Sreenivasan's hybrid model makes the point especially clear: claims-rights track (i) a duty in another, (ii) the right-holder's significant interest in performance, and (iii) some measure of control, which can be exercised through guardians, courts, or other representatives.[38] On that structure, animals are conceptually no more problematic than young children: their interests are obvious and enforcement can be proxy-based.[39] Kurki's "bundle" view of legal personhood further supports an extension strategy by rejecting an all-or-nothing conception of rights. This is because personhood consists of discrete legal incidents (standing or immunity), the law can grant animals specific protections like standing via representatives without creating a new legal status.[40] Stucki's distinction between "simple" and "fundamental" animal rights shows how this operates within existing law.[41] Welfare statutes already impose duties for animals' sake, from which limited rights can be derived, while recognising fundamental rights would mainly raise the standard for justifying harm, rather than create a new rights bill.[42] Even critical work such as Deckha's "beingness" thesis can strengthen this approach: her diagnosis that property and liberal personhood are anthropocentric is powerful.[43] However, Kurki's and Stucki's reconceptualization's suggest that existing legal categories can be internally de-anthropocentrised by grounding rights in vulnerability and interests rather than in a narrow ideal of rational autonomy.[44]

Normatively, an "extension not invention" strategy is especially compelling when animal protection is framed as a part of a broader social justice project.[45] Intersectional and decolonial accounts warn against isolating animal issues, emphasising that species hierarchy is entangled

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[37] Gopal Sreenivasan, 'A Hybrid Theory of Claim-Rights' (2005) 25(2) Oxford Journal of Legal Studies 257 https://doi.org/10.1093/ojls/gqi013 last accessed 4 April 2026.
[38] Sreenivasan (n37).
[39] McLaughlin (n32).
[40] Visa Kurki, 'Legal Personhood and Animal Rights' (2021) 11(1) Journal of Animal Ethics 47 https://doi.org/10.5406/janimalethics.11.1.0047 last accessed 4 April 2026.
[41] Saskia Stucki, 'Towards a Theory of Legal Animal Rights: Simple and Fundamental Rights' (2020) 40(3) Oxford Journal of Legal Studies 533 https://doi.org/10.1093/ojls/gqaa007 last accessed 4 April 2026.
[42] ibid.
[43] Maneesha Deckha, 'Animals as Legal Beings: Contesting Anthropocentric Legal Orders' (Cambridge Centre for Animal Rights Law, Talking Animals, Law and Philosophy lecture, 26 January 2021) https://doi.org/10.1017/cls.2021.25 last accessed 4 April 2026.
[44] Kurki (n40); Stucki (n41); Deckha (n43).
[45] Nekeisha Alayna Alexis, 'Beyond Compare: Intersectionality and Interspeciesism for Co-liberation with Other Animals' in Bob Fischer (ed), *The Routledge Handbook of Animal Ethics* (Routledge 2019); Mathilde Cohen, 'Animal Colonialism: The Case of Milk' (2017) 111 AJIL Unbound 267 https://doi.org/10.1017/aju.2017.66 ; Luis Cordeiro-Rodrigues, 'Animal Abolitionism and "Racism without Racists"' (2017) 30(6) Journal of Agricultural & Environmental Ethics 745 https://link.springer.com/content/pdf/10.1007/s10806-017-9697-0.pdf last accessed 4 April 2026.

with other systems of domination and that "animalisation" has historically been used to subordinate racialised humans.[46] Embedding animals within mainstream rights frameworks (dignity, equality, socio-economic rights, environmental justice) therefore better supports co-liberation than a segregated animal rights bill.[47] Cochrane's proposal to reconceive "human rights" as "sentient rights" provides a clear normative basis for this approach: the difficulty lies not in the absence of appropriate rights (freedom from cruelty etc.) but in the restriction of beneficiaries by species.[48] Waldron's account of dignity as "equalised rank" complements this, showing that rights derive much of their expressive force from expanding inclusion within an existing status framework; extending dignity to some animals can be understood as the next inclusionary step.[49]

It is argued that only an explicit Animal Bill of Rights can symbolically repudiate animals' property status and reject speciesism. However, as Waldau shows, moral progress more often occurs through incremental challenges to entrenched hierarchies.[50] Browning and Veit's account of the "sentience shift" similarly demonstrates that centring sentience can produce protection functionally equivalent to rights without formal rights attribution, consistent with the UK's pragmatic, evolutionary legal tradition.[51] Concerns that anthropocentrism within welfare and balancing frameworks may permit excessive override point to the need for higher justificatory thresholds and stronger enforcement, rather than a new rights instrument.[52] Overall, existing rights concepts already accommodate non-autonomous holders and can be extended to animals with significant normative gain. While remaining weaknesses concern institutional design and commitment, not the necessity of a separate Animal Bill of Rights.[53]

5. Abolitionism vs new welfarism

A central challenge to the extending approach comes from abolitionist theory. Gary Francione argues that as long as animals remain legally classified as property, neither welfare regulation

[46] Alexis (n45); Cohen (n45); Cordeiro-Rodrigues (n45).
[47] ibid.
[48] Alasdair Cochrane, 'From Human Rights to Sentient Rights' (2013) 16(5) Critical Review of International Social and Political Philosophy 655 https://doi.org/10.1080/13698230.2012.691235 last accessed 4 April 2026.
[49] Jeremy Waldron, 'Lecture 1: Dignity and Rank' in Jeremy Waldron and Meir Dan-Cohen (eds), *Dignity, Rank, and Rights* (Oxford University Press 2012) 13–19 (secs 1–2), 21–22 (sec 4), 34–36 (sec 9).
[50] Paul Waldau, *The Specter of Speciesism* (Oxford University Press 2011) ch 1.
[51] Browning and Veit (n8).
[52] Cochrane (n48); Stucki (n41); Kemmerer (n4).
[53] Sreenivasan (n37); Kurki (n40).

nor extending rights incrementally can deliver justice.[54] Within his debates with Robert Garner, Francione maintains that welfare reforms merely regulate conditions of exploitation rather than challenging permissibility.[55] This is because animal interests are always balanced against owners' economic interests, property status ensures their systematic subordination.[56] Following this, extending existing legal frameworks to animals is structurally compromised: it may marginally reduce suffering, but it leaves intact the deeper belief that animals exist for human use. Some abolitionists therefore conclude that only the end of domestication and institutionalised animal use can overcome the limits of human-centred legal systems.[57] A related but distinct critique is developed by Donaldson and Kymlicka.[58] Although not abolitionist in Francione's extinction sense, they share scepticism towards welfare and threshold-based approaches.[59] Their concern is not merely the amount of suffering permitted, but animals' status within the political community.[60] Treating domesticated animals as permanent dependants protected only to a minimal standard entrenches them as second-class beings lacking political membership.[61] On this view, justice requires recognising animals as political co-members with citizenship-like protections against domination and entitlements to public provision.[62] Together, abolitionism and Zoopolis identify two limits of extension: its failure to disrupt property and commodification, and its tendency to preserve anthropocentric frameworks that deny animals full normative standing.[63]

New welfarism responds to abolitionist critiques while rejecting the conclusion that a separate Animal Bill of Rights is required. Garner defends a rights-sensitive, incremental strategy that operates within existing legal frameworks to reduce suffering immediately while progressively constraining exploitative practices.[64] Combatting Francione's claim that property status renders protection impossible, Garner points to the extensive erosion of owners' prerogatives across jurisdictions: bans on fur farming, certain forms of hunting, and cosmetic testing show

[54] Gary L Francione, 'Animal Rights and Animal Welfare' (1996) 48 Rutgers Law Review 397–400; 422–446 https://heinonline.org/HOL/P?h=hein.journals/rutlr48&i=407 last accessed 4 April 2026.
[55] Gary L Francione and Robert Garner, *The Animal Rights Debate: Abolition or Regulation?* (Columbia University Press 2010) 120-146
[56] ibid.
[57] Francione (n54) 397–400, 422–46.
[58] Sue Donaldson and Will Kymlicka, *Zoopolis: A Political Theory of Animal Rights* (Oxford University Press 2011) ch 4.
[59] ibid; Francione (n54) 397–400, 422–46.
[60] Donaldson and Kymlicka (n58).
[61] ibid.
[62] ibid.
[63] ibid.
[64] Robert Garner, 'The politics of animal rights' (2008) British Politics, 3(1), 110-119 https://tier-im-fokus.ch/wp-content/uploads/2009/10/garner08.pdf last accessed 16 April 2026; Francione and Garner (n55).

that property rights in animals are already heavily qualified in light of sentience.[65] On an interest-based theory of rights, these constraints can be understood as recognising animals as bearers of morally significant interests that impose duties on humans, a structure familiar to rights doctrine.[66] New welfarism also challenges the claim that incremental reform merely legitimises exploitation. Garner argues that there is no evidence that welfare improvements entrench harmful practices; rather, reforms targeting "unnecessary suffering" have often catalysed broader normative change.[67] Comparative practice supports this view. As Tannenbaum and Blumenauer show, reforms within existing frameworks have both improved animals lived conditions and reframed their suffering as morally relevant.[68] Chiesa's analysis of cruelty offences likewise demonstrates that criminal law already treats animal suffering as an intrinsic wrong, undermining the claim that welfare law is conceptually incapable of supporting stronger protection.[69] Importantly, new welfarism is not confined to "bigger cages" but also encompasses rights-based litigation and conceptual innovation that press existing categories to their limits.[70] Steven Wise illustrates this extension strategy by testing the limits of existing doctrines through habeas corpus claims for cognitively complex animals, drawing analogies with cases such as *Somerset v Stewart*.[71] McLaughlin's proposal for intelligence and capacity-based personhood tests reinforce this incremental strategy by analogy with children and other non-autonomous humans whose rights are exercised through representatives.[72]

The abolitionism and new welfarism debate clarifies rather than undermines the extension strategy. Property status and weak enforcement matter, yet comparatively it shows that reinterpretation and extension of existing law have already produced abolitionist inspired outcomes in specific domains.[73] Reinforced by Singer' and Cochrane's beliefs, new welfarism

[65] Animal Welfare (Sentience) Act 2022; Francione and Garner (n55).
[66] Sreenivasan (n37); Kurki (n40).
[67] Robert Garner (n64), Francione and Garner (n55).
[68] Jerrold Tannenbaum, 'Animals and the Law: Property, Cruelty, Rights' (1995) 62(3) Social Research 539 https://www.jstor.org/stable/40971109 last accessed 4 April 2026; Earl Blumenauer, 'Changing Humanity: Fifteen Years of Progress in Animal Welfare and Protection' (2016) 22 Animal Law 203 https://lawcommons.lclark.edu/cgi/viewcontent.cgi?article=1137&context=alr last accessed 4 April 2026.
[69] Chiesa (n7).
[70] Robert Garner (n64); Francione and Garner (n55).
[71] Somerset v Stewart (1772) Lofft 1; 98 ER 499; Steven Wise, 'Legal Personhood and the Nonhuman Rights Project' (2010) 17 Animal Law 1 https://lawcommons.lclark.edu/cgi/viewcontent.cgi?article=1333&context=alr last accessed 4 April 2026.
[72] McLaughlin (n32).
[73] Animal Welfare (Sentience) Act 2022; Nurse (n18); Directive 2010/63/EU on the protection of animals used for scientific purposes [2010] OJ L276/33, art 4; Animals (Scientific Procedures) Act 1986 s 5B, also sch 2; Consolidated Version of the Treaty on the Functioning of the European Union [2012] OJ C326/47, art 13.

supports the claim that meaningful animal protection can be achieved through sustained extension of existing frameworks.[74]

6. Conclusion

Overall, this analysis shows that the central question in animal protection is not whether law can recognise animals' interests, but how far existing frameworks are willing to take that recognition. The doctrinal tools, moral foundations, and institutional pathways already exist; the challenge lies in their consistent application and enforcement. New welfarism offers a credible route for securing durable legal protection grounded in sentience, without the fragmentation or uncertainty that a separate Animal Bill of Rights would introduce.[75]

[74] Robert Garner (n64); Singer (n31); Cochrane (n48).
[75] Adenitire and Fasel (n2).

The Erosion of the International Human Rights Order Since the Vienna Conference

Fay Greenway

1. Introduction

The contemporary human rights regime faces growing uncertainty. As Sabatini argues, despite enduring popular commitment to universal rights, the formal infrastructure of treaties, monitoring bodies, and international processes has weakened, and the consensus that emerged after the 1993 Vienna Conference has increasingly frayed.[1] The crucial legal issue is therefore whether the erosion of state protections and institutions amounts to a broader decline in human rights, or whether efforts remain resilient in other forms. This article argues that although state compliance, multilateral cooperation, and the authority of international institutions have weakened, human rights themselves have not collapsed. Instead, their vitality has shifted towards non-governmental organisations (NGOs), civil society, and transnational activism. Human rights remain a relatively young and evolving concept, and current tensions should be seen as a call for recalibration rather than evidence of a terminal decline. This article examines the historical developments of the modern human rights system, analyses the contemporary challenges contributing to institutional erosion, explores key scholarly critiques, and considers how the regime might adapt to remain effective in a changing global landscape.

2. The development of modern human rights

Human rights, though often viewed as a post-World War II innovation, have deeper philosophical roots in natural law and enlightenment theory, as seen in Locke's social contract theory.[2] However, it was the global instability following World War II that transformed these ideas into a formal international legal framework. The Charter of the United Nations in 1945 first embedded universal human rights into international law,[3] followed by the Universal

[1] Christopher Sabatini, *Reclaiming Human Rights in a Changing World Order* (Chatham House/Brookings Institution Press Insights 2023) 23.
[2] John Locke, *Two Treatises of Government* (Awnsham Churchill 1689).
[3] Charter of the United Nations (adopted 26 June 1945, entered into force 24 October 1945) 1 UNTS XVI.

Declaration of Human Rights (UDHR) in 1948.[4] Although non-binding, the UDHR ambitiously declared a broad range of civil, political, economic, social, and cultural rights as universal prerogatives. As Bernstorff notes, the UDHR 'symbolised unity in an increasingly fragmented and contentious political environment', highlighting its role as a political statement of shared values amidst post-war tensions.[5] Simmons' assertion that human rights are possessed 'simply by the virtue of humanity' reflects the idealistic universality that underpins the regime.[6] Yet, the Cold War's ideological divisions complicated the translation of these principles into binding legal obligations, with the 1966 ICCPR[7] and ICESCR[8] dividing rights into civil and political or socio-economic categories, reflecting competing Western and socialist priorities.

The post-Cold War era marked a significant expansion in human rights, with states increasingly accepting international scrutiny and new enforcement mechanisms. The creation of the International Criminal Tribunal for the Former Yugoslavia in 1993, for example, demonstrates the active expansion and investigation of potential human rights violations.[9] Furthermore, the establishment of the International Criminal Court (ICC) in 1998 signalled an unprecedented willingness to hold perpetrators accountable for grave violations. However, critiques of the ICC's low number of convictions and its perceived disproportionate focus on African states have raised doubts about the regime's impartiality and universality.[10] These concerns fuel arguments that human rights law remains unevenly applied, reinforcing power imbalances rather than resolving them. Nevertheless, the establishment of such institutions marks an important shift: grave abuses of rights are no longer shielded by state sovereignty, highlighting a form of resilience within the human rights system despite institutional weaknesses.

The 1993 Vienna Declaration reaffirmed the universality of human rights while also recognising the importance of cultural and religious differences, in response to critiques of the

[4] Universal Declaration of Human Rights (adopted 10 December 1948) UNGA Res 217 A (III).
[5] Johann Von Bernstorff, 'The Changing Fortunes of the Universal Declaration of Human Rights: Genesis and Symbolic Dimensions of the Turn to Rights in International Law' (2008) 19 European Journal of International Law 903 https://ejil.org/pdfs/19/5/1710.pdf last accessed 31 March 2026.
[6] John Simmons, *Justification and Legitimacy: Essays on Rights and Obligations* (Cambridge University Press 2001) 185.
[7] International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171.
[8] International Covenant on Economic, Social and Cultural Rights (adopted 16 December 1966, entered into force 3 January 1976) 993 UNTS 3.
[9] UNSC Res 827 (25 May 1993) UN Doc S/RES/827.
[10] Mary Kimani, 'Pursuit of Justice or Western Plot?' (2009) 23 Africa Renewal 12 Pursuit of justice or Western plot? | Africa Renewal last accessed 31 March 2026.

Western dominance of the regime.[11] The establishment of the United Nations High Commissioner for Human Rights institutionalised this renewed commitment. Yet, ongoing tensions between Western states and rising powers, such as China and Iran, expose the fragility of international consensus. It is important to consider the vital role of non-governmental organisations (NGOs) in sustaining human rights globally. The surge in human rights NGOs during the 1970s and 1980s, documented by Keck and Sikkink, brought new energy to the regime, pressuring states by generating greater public discourse.[12] Clifford's analysis illustrates how political grievances are converted into rights-based claims and institutionalised as legal norms, demonstrating the adaptive capacity of human rights beyond formal institutions.[13] This activism depicts that although there has been erosion in state-led mechanisms, human rights retain adaptive capacity, supporting the view that human rights are in a phase of reform, rather than the reductionist claim of decline.

3. Challenges Facing the Human Rights Regime

Despite significant achievements, human rights law today faces notable regressions and uneven successes. Progress has often been selective and geographically uneven. While human rights influence has gained power in smaller or less powerful states, such as areas of Africa or Cuba, large autocratic states with significant economic power, notably China and Saudi Arabia, have largely evaded effective international criticism.[14] This unevenness highlights the enduring tension between universal human rights and state sovereignty. Powerful states leverage economic resources and geopolitical influence to shield themselves from accountability, exposing a fundamental weakness: dependence on state consent undermines consistent enforcement of its rules. This tension is evident in the backlash against supranational bodies; for example, after the European Court of Human Rights held that UK restrictions on prisoners' voting rights were incompatible with the Convention, then Prime Minister David Cameron condemned the Court's intervention as an intrusion into the authority of the national

[11] Office of the United Nations High Commissioner for Human Rights, 'Vienna Declaration and Programme of Action,' (1993) https://www.ohchr.org/sites/default/files/vienna.pdf last accessed 31 March 2026.
[12] Margaret Keck and Kathryn Sikkink, *Activists beyond Borders: Advocacy Networks in International Politics* (Cornell University Press 1998) 90.
[13] Bob Clifford, 'Introduction: Fighting for New Rights,' Bob Clifford (eds), *The International Struggle for New Human Rights* (University of Pennsylvania Press 2009) 4.
[14] Sabatini (n 1) 24.

Parliament.[15] Furthermore, debates surrounding the proposed 'British Bill of Rights', intended to replace the Human Rights Act 1998 and reduce the influence of the European Convention on Human Rights in UK law, illustrate a broader political desire for divergence from international human rights standards, despite the proposal ultimately being scrapped.[16] Such conversations reveal the fragility of international human rights enforcement, where national sovereignty and political considerations often take precedence, threatening to delegitimise aspects of the human rights framework.

Contemporary global challenges have further complicated the international human rights landscape. Rising nationalist populism, increasing geopolitical tensions (such as those surrounding Ukraine and Palestine), and the fallout from the COVID-19 pandemic have exacerbated economic insecurities and social inequalities worldwide. These factors contribute to diminished multilateral cooperation, leaving human rights institutions less able to coordinate effective responses. Brexit, the rise of far-right parties, global warming, and financial instability have all influenced national policies and foreign relations in ways that weaken collective commitment to human rights.[17] Moreover, the ability of authoritarian regimes to avoid accountability sets a dangerous precedent, emboldening other autocrats by demonstrating that international human rights mechanisms can be bypassed. This trend accelerates the decline of human rights protections worldwide and weakens international institutions' authority.

Scholarly debates also expose foundational challenges within the human rights framework. Critics highlight the Western-centric origins and ongoing dominance in shaping human rights discourse and law. Charlesworth and Chinkin argue that early human rights frameworks were constructed around the rights of 'the man', largely excluding women and other marginalised groups, reflecting the gender bias embedded in legal systems.[18] The notion of sovereignty again complicates matters when Western countries impose their ideals on non-Western societies, leading to accusations of cultural homogenisation. The Convention on Elimination of All Forms of Discrimination Against Women exemplifies this tension: some states resist its

[15] BBC News, 'Concept of Human Rights Being Distorted, Warns Cameron' (25 January 2012) https://www.bbc.co.uk/news/uk-politics-16708845 last accessed 31 March 2026.
[16] Paul Arnell and others, 'The UK's Illegal Migration Bill: Human Rights Violated' (2023) 63 Medicine, Science and the Law 267 https://doi.org/10.1177/00258024231186736 last accessed 31 March 2026.
[17] Sabatini (n 1) 26.
[18] Hilary Charlesworth and Christine Chinkin, 'Human Rights' in Hilary Charlesworth and Christine Chinkin, *The boundaries of international law: A feminist analysis, with a new introduction* (Manchester University Press 2022) 218.

provisions, framing them as Western impositions incompatible with local norms.[19] Yet, cultural relativism should not be used as a shield to justify harmful practices such as female genital mutilation. Public opinion surveys, such as the 2020 Pew Global Survey showing 74% support for gender equality, demonstrate the widespread aspiration for inclusive rights.[20] This illustrates the fundamentally political character of human rights, as standards are continually contested and redefined within contexts of conflicting values, unequal power, and cultural differences. These ongoing debates suggest that without addressing structural biases and tensions, the human rights regime risks further fragmentation and diminished legitimacy.

4. The future of human rights

Although contemporary human rights structures are showing signs of erosion, it would be reductionist to claim this as evidence of their obsolescence. Rather, the pressures currently straining human rights highlight the need to adapt a framework conceived in the mid-twentieth century to the far more complex realities of the twenty-first. Human rights are still relatively new in historical terms, and it is unsurprising that institutions built in 1948 struggle to respond to modern pressures, including climate change, technological advances, and geopolitical fragmentation. A central challenge moving forward is to confront the structural biases inherent in the original adaptation of human rights. As mentioned, foundational concepts were shaped through assumptions about the male legal subject, meaning that equality often amounted to granting women the same treatment as men, without questioning whether male norms were themselves acceptable.[21] This narrow conception of equality has obscured the power relations embedded in political participation, economic structures, and social life. A credible human rights agenda must therefore address gendered and other structural hierarchies, rather than merely extending formal rights. Such recalibration requires engaging more directly with feminist critiques, the lived effects of economic inequality, and the ways in which global governance has historically reproduced Western political preferences. Simultaneously, the substantive content of human rights must evolve. Academics such as Moyn argue that the

[19] Convention on the Elimination of All Forms of Discrimination Against Women (adopted 18 December 1979, entered into force 3 September 1981) 1249 UNTS 13.
[20] Richard Wike and Shannon Schumacher, 'Attitudes Toward Democratic Rights and Institutions,' (Pew Research Centre, February 7 2020) https://www.pewresearch.org/global/2020/02/27/attitudes-toward-democratic-rights-and-institutions/ last accessed 31 March 2026.
[21] Charlesworth and Chinkin (n 18) 209.

traditional focus on minimalist protections has allowed vast socioeconomic disparities to persist unchecked; rights cannot secure meaningful freedom if individuals lack material security.[22] Integrating distributive justice, environmental justice, and global economic equality into the core of human rights practice is, therefore, necessary if the institutions are to maintain legitimacy and relevance. These developments should not be understood as abandoning the universality of rights, but as strengthening it, ensuring that universality responds to real inequalities rather than abstract legal ideals.

Institutional renewal is equally urgent. Seventy years of human rights practice have expanded global expectations of dignity and state accountability, yet the system's enforcement mechanisms remain politically constrained. The abolition of the UN Commission on Human Rights, criticised for political bargaining 'behind closed doors' and persistent inaction, was an early attempt to address institutional shortcomings. However, the Human Rights Council continues to face challenges of inconsistent scrutiny and participation of states with poor human rights records.[23] Reform must therefore address independence, membership criteria, and the authority of investigative mechanisms. Proposals such as a world court of human rights illustrate a desire for stronger enforcement, but they face the enduring problem of state consent and the reluctance of powerful states to submit to external judgment.[24] Awareness of these limits has fuelled more radical critiques. Kennedy's argument that human rights rhetoric has at times legitimised war, coercive intervention, or oppressive policies underscores the need for pragmatic reassessment of the field's most entrenched assumptions.[25] His suggestion that the human rights framework clings to a political order that no longer exists is provocative but valuable; it demands honest reflection about what a future global governance system should look like, and whether human rights will form its core or simply one component.[26] Yet even Kennedy's scepticism does not necessarily negate the future of human rights; instead, it highlights the need for intellectual discussion and advancement. The way forward lies in transforming human rights, rather than abandoning them, recentering socioeconomic and

[22] Samuel Moyn, 'Human Rights Have Lost Their Monopoly as a Framework for Reform' (2021) https://campuspress.yale.edu/samuelmoyn/human-rights-have-lost-their-monopoly-as-a-framework-for-reform/ last accessed 31 March 2026.
[23] Bernstorff (n 5).
[24] Manfred Nowak, 'The Need for a World Court of Human Rights' (2007) 7 Human Rights Law Review 251 https://doi.org/10.1093/hrlr/ngl026 last accessed 31 March 2026.
[25] David Kennedy, 'The Dark Sides of Virtue, Reassessing International Humanitarianism' (2004) 35 Harvard International Law Journal 1 https://www.jstor.org/stable/j.ctt7rsjc last accessed 31 March 2026.
[26] David Kennedy, 'The International Human Rights Regime: Still Part of the Problem?' in R Dickinson and others (eds), *Examining Critical Perspectives on Human Rights* (Cambridge University Press 2012) 20.

gender justice, tackling structural inequalities, and rethinking global institutions to operate effectively in a fractured geopolitical landscape.

5. Conclusion

Overall, while the infrastructure supporting human rights, such as treaties, institutions, and state compliance, has weakened since the 1993 Vienna Conference, this does not signify the collapse of human rights themselves. Instead, human rights remain a vital and evolving framework, sustained by non-governmental organisations and civil society. The historical development of human rights shows a progression from philosophical ideals to legally binding norms and institutions, despite geopolitical tensions and uneven enforcement. Contemporary challenges, including the rise of nationalism, geopolitical tensions, and institutional limitations, expose significant vulnerabilities, particularly in relation to state sovereignty and the selective application of rights. Critical scholarly debates reveal foundational issues around Western dominance, gender bias, and cultural relativism that must be addressed to prevent further fragmentation. Yet, the ongoing vitality of human rights lies in their capacity for adaptation, recalibrating goals to include distributive justice, gender equality, and environmental concerns while reforming institutions to meet twenty-first century demands. Therefore, the fraying consensus identified by Sabatini is better understood not as a terminal decline but as a moment of transformation, ensuring human rights remain relevant and effective in a complex and changing global landscape.

The Terminally Ill Adults (End of Life) Bill: Addressing the Inadequacies of Assisted Suicide Law in England and Wales

Georgia Friar

1. Introduction

This article seeks to answer how does the Terminally Ill Adults (End of Life) Bill address the inadequacies of the current legal framework on assisted suicide in England and Wales, particularly in relation to decision-making capacity and autonomy. Assisted suicide refers to a situation in which 'a physician intentionally help[s] a person to terminate their life by providing drugs for self-administration, at that person's voluntary and competent request'.[1] It is one of the most hotly debated topics in contemporary medico-legal discourse, driven by constant judicial and parliamentary activity.[2] Whilst the question of whether assisted suicide should be legalised in England and Wales has long been the subject of ethical and legal debate, there has been considerable controversy since the introduction of the Terminally Ill Adults (End of Life) Bill.[3] As the population ages, end-of-life discussions are becoming more prominent, and the rise in dementia and other neurodegenerative diseases is emerging as a critical issue that requires consideration. This article, therefore, seeks to contribute to end-of-life discussions, with a particular focus on the concepts of decision-making capacity and individual autonomy. By examining the inadequacies within the current legal framework governing assisted suicide, and evaluating how these shortcomings are addressed by the proposed Terminally Ill Adults (End of Life) Bill,[4] this research aims to assess the extent to which the proposed reforms strike an appropriate balance between respecting individual autonomy of capacitous adults and protecting vulnerable people from coercion or undue influence.

In the second part, I examine the existing legal position on assisted suicide in England and Wales. To provide context for the Suicide Act 1961, this part begins with a review of the history of the suicide law, tracing key statutory developments and highlighting a more general shift

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[1] Andreas Fontalis, Efthymia Prousali and Kunal Kulkarni, 'Euthanasia and Assisted Dying: What is the Current Position and What Are the Key Arguments Informing the Debate' (2018) Journal of the Royal Society of Medicine, Vol 111(11), 407, 407 10.1177/0141076818803452 last accessed 31 March 2026.

[2] Anne-Maree Farrell and Edward S Dove, *Mason and McCall Smith's Law and Medical Ethics* (12th edn, Oxford University Press 2023) 598.

[3] Terminally Ill Adults (End of Life) HC Bill (2024-25) [12].

[4] ibid.

from a punitive to preventative legal approach that focuses on the protection of vulnerable people. After outlining the development of the law, I examine the current legal framework governing suicide in England and Wales – the Suicide Act 1961, which decriminalised suicide itself while simultaneously creating a new statutory offence of assisting suicide.[5] The second half of this part is concerned with the considerable legal challenges and ethical controversies associated with this assisted suicide legislation. It will become apparent that the current law is, in a sense, discriminatory because the absolute prohibition on assisted suicide means that someone with a genuine wish to end their life, but not physically capable of doing so unaided, cannot die on their own terms. As a consequence, there is a disparity between the law's written text and its application in practice. By highlighting the shortcomings of the current legislation, I aim to show that it disproportionately favours able-bodied individuals over those who have disabilities, and fails to differentiate between individuals capable of making an informed, autonomous decision to end their lives with assistance, from those that may have been subject to coercion.[6] What is considered next is that, whilst the Suicide Act 1961 serves to safeguard vulnerable people from harm, its absolute prohibition of assisted suicide renders the law open to challenge in circumstances where an individual has the requisite mental capacity to make a free and informed decision to die.

In part three, I consider the concepts of capacity and consent within the context of assisted suicide. I start by outlining these concepts, drawing substantially on the provisions of the Mental Capacity Act 2005. Having established that capacity is a fundamental aspect of medical ethics, I go on to examine the effect that capacity to consent to assisted suicide has on autonomy. The core argument I seek to advance is that the law's current approach to assisted suicide is fundamentally flawed, as it constitutes a major incursion on individual autonomy. With particular focus on the case of *Nicklinson*,[7] which ultimately fails to fully support the principle of autonomy, I aim to reinforce the argument presented in part two: that it is difficult to understand why able-bodied individuals are permitted to end their lives through suicide, yet those that have decision-making capacity, but physical disabilities, are denied the same right.

In the next section, I explore how technology can offer a potential solution to certain legal challenges of assisted suicide. By explaining how technology can be utilised to address the practical difficulties faced by individuals who want to end their own lives, but lack the physical capacity to do so unaided, I argue that technology can effectively remove doctors from the final

[5] Suicide Act 1961, s 2.
[6] Elizabeth Wicks, *Suicide and the Law* (1st edn, Hart Publishing 2023) 189.
[7] *R (Nicklinson) v Ministry of Justice; R (AM) v Director of Public Prosecutions* [2014] UKSC 38.

stage of the assisted dying process – thereby providing a means of support that avoids crossing the legal and ethical boundary between assisted suicide and euthanasia.[8] Despite this, technology does not yet esolve more complex issues such as determining fluctuating capacity, which is common in people with dementia and other neurodegenerative diseases.[9] In the final section of this part, I therefore consider decision-making capacity of people with dementia. As will be demonstrated, this area presents unique challenges for assessing capacity. 'The interplay of common ethical rationales for permitting assisted dying such as autonomy and the alleviation of suffering' often clashes with the common features of dementia, such as 'loss of competence before the terminal phase of the illness, and loss of capacity to communicate before the loss of capacity to suffer'.[10] Nevertheless, by drawing on the case of Sandra Bem, I intend to show that dementia patients also desire to exercise control over the end of their lives, even though it may be more difficult to determine their capacity.

Building on the argument presented in part three, that assisted suicide does not need to be prevented when the individual requesting it has decision-making capacity, part four turns to the legalisation of assisted suicide. As a foundation for the main discussion concerning the Terminally Ill Adults (End of Life) Bill,[11] the final part begins with a brief overview of the most notable previous attempts to legalise assisted suicide in England and Wales. After establishing that all previous attempts to amend section 2 of the Suicide Act 1961 have been unsuccessful, I go on to examine the key provisions of Kim Leadbeater's Terminally Ill Adults (End of Life) Bill,[12] which is making significant progress through Parliament. To bring together the arguments developed in the previous two parts, I primarily focus on the clauses of the Bill that concern decision-making capacity, highlighting the shortcoming and limitations in this regard. What I intend to show is that in its current form, the Bill risks perpetuating injustice and continued human rights challenges, because its scope is far too narrow, effectively only authorising assisted suicide for a small subset of the population in England and Wales. Ultimately, this final part assesses the extent to which the proposed legal changes respect the principle of autonomy, and offer a viable means of assistance for people who wish to end their own lives, but unable to do so unaided.

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[8] Exit International, 'Inventions by Exit Have Been the Subject of a Number of International Installations' https://www.exitinternational.net/about-exit/installations/ last accessed 31 March 2026.

[9] Jocelyn Downie and Georgia Lloyd-Smith, 'Assisted Dying for Individuals with Dementia: Challenges for Translating Ethical Positions into Law' in Michael Cholbi and Jukka Varelius (eds), *New Directions in the Ethics of Assisted Suicide and Euthanasia* (Springer 2015) 103.

[10] ibid 98.

[11] Terminally Ill Adults (End of Life) HC Bill (2024-25) [12].

[12] ibid.

2. An examination of the current suicide law

2.1. Background

The evolution of suicide law in the UK has been shaped by change in society through new attitudes towards mental health and views on personal autonomy. The history of suicide law is 'one of judgement and condemnation',[13] which for centuries regarded suicide as a criminal offence and imposed legal penalties on those who died by suicide and their families. Through the nineteenth and twentieth centuries, there was a shift from punishment, towards suicide prevention and protection of vulnerable people. The abolition of the legal penalties for suicide, the decriminalisation of suicide itself, as well as the introduction of a new statutory offence for assisted suicide, is evidence that the law today is more focused on preventing suicide and protecting vulnerable people. The current law on suicide is found in the Suicide Act 1961 (as amended by the Coroners and Justice Act 2009). However, judicial and prosecutorial discretion has created confusion which has led to inconsistent applications of the law regarding assisted suicide. In statute, assisted suicide is prohibited, but in practice the law is turning a blind eye to potential violations. High-profile cases that have received guidance from the Director of Public Prosecutions (DPP) have illustrated grey areas in enforcement, and highlighted the tension between legal certainty and personal autonomy. Case law portrays the English approach to assisted suicide as a 'cautious and indirect step towards flexibility under the blanket ban on assisted suicide'.[14] It is clear that the law is struggling to find the balance between protecting vulnerable people from coercion and exploitation, whilst respecting the personal autonomy of people who wish to end their lives but are unable to.

2.2. The history of suicide law

In mid thirteenth-century England, 'self-murder' was a criminal offence under the common law. This meant that it was a felony 'for a sane person of the age of responsibility to kill himself either intentionally or in the course of trying to kill another'.[15] At the time, Christianity

[13] Wicks, *Suicide and the Law* (n 6) 15.
[14] Derya Nur Kayacan, *The Right to Die with Dignity: How Far Do Human Rights Extend?* (Springer International Publishing 2022) 105.
[15] David Ormerod and Karl Laird, *Smith, Hogan and Ormerod's Criminal Law* (16th edn, Oxford University Press 2021) 650.

regarded suicide as a mortal sin because it was believed to be both a personal failure, and a crime against God.[16] The religious influence on the law meant that if a person was found 'felo de se', they were denied a Christian burial, and their family's property was forfeited to the crown. The consequences of suicide were harsh, with the law not only punishing the deceased, but their family too. MacDonald and Murphy noted that the 'suicide of an adult male could reduce survivors to pauperism'.[17]

At the start of the nineteenth century, penalties for suicide were still firmly entrenched in the law. However, as legal reform began, the severity of punishment led to its non-enforcement.[18] The first legal change occurred when Parliament passed the Right to Burial Act 1823.[19] This legislation amended the law relating to the intermittent remains of a person found 'felo de se', to allow their burial in a churchyard, but only at night and without a Christian service. Effectively, the Act signalled a shift towards less punitive measures by allowing individuals who had committed suicide to have a more dignified burial. This shift continued as the Law Amendment Act 1880,[20] and the Internments (Felo de se) Act 1882,[21] eased the restriction on religious burials for those who committed suicide. The penalty of forfeiture was also removed from the law under the abolition of the Forfeiture Act 1870.[22] Thus, by the end of the nineteenth century, the approach to suicide law had softened because most sanctions against completed suicide victims had ceased.[23] There were no longer any legal penalties for either the body or the property of the deceased.[24] However, as the law stopped punishing successful suicides, it began to criminalise unsuccessful suicides. It is ironic that as the legal penalties for suicide were being removed, the offence of attempted suicide was being developed.[25]

In the late nineteenth to early twentieth-century, the focus of suicide law had shifted from punishment to prevention as attempts to stop suicide began to take precedence.[26] This shift developed the offence of attempted suicide, which was then confirmed in the case of *R v*

[16] Leonardo Tondo, *A Concise Guide to Understanding Suicide – Brief history of suicide in Western cultures* (1st edn, Cambridge University Press 2014) 3, 5.
[17] Michael MacDonald and Terence Murphy, *Sleepless Souls: Suicide in Early Modern England* (Oxford University Press 1990).
[18] Wicks, *Suicide and the Law* (n 6) 24.
[19] Right to Burial Act 1823.
[20] Burial Law Amendment Act 1880.
[21] Internments (Felo de se) Act 1882.
[22] Abolition of Forfeiture Act 1870.
[23] Jan Neeleman, 'Suicide as a Crime in the UK: Legal History, International Comparisons and Present Implications' (1996) Acta Psychiatrica Scandinavica, Vol 94(4), 252, 253 https://doi.org/10.1111/j.1600-0447.1996.tb09857.x last accessed 31 March 2026.
[24] Wicks, *Suicide and the Law* (n 6) 25.
[25] ibid.
[26] ibid 29.

Doody.[27] By 1878, there was no doubt that attempted suicide was a serious criminal offence, but being charged with it did not inevitably lead to being tried for it.[28] The Criminal Justice Act 1925 then facilitated a significant development in relation to the prosecution of attempted suicide, by allowing it to be tried summarily.[29] Anderson proposes that this legal intervention was not about suicide itself, as it was 'less in order to punish or prevent attempts at suicide for their own sake, than as part of a general effort to enforce higher standards of public order, decency and safety'.[30] This suggests the Act was aimed at eroding the belief self-murder was a crime appropriate for the court's attention and punishment. In 1959, Parliament passed the Mental Health Act.[31] This was an important, wide-ranging piece of legislation, without which decriminalisation of suicide would not have been proposed. The purpose of the Act was to 'make fresh provision with respect to the treatment and care of mentally disordered persons',[32] and did so by removing offenders, with mental illness, from the criminal jurisdiction and placing them under the protection of the medical jurisdiction.[33] Effectively, the statute held that 'whatever the circumstances, the appropriate response to mental disorder should be medical treatment, not criminal sanction'.[34] The legal change means that the government is finally able to act in a prescriptive way, intervening in the management of attempted suicide, and actively promoting psychiatric attention.[35] This was a 'triumph' for positivists, and a clear gain for advocates of the medicalisation of deviance.[36] By the mid-twentieth century, the law, which once sought to condemn and punish suicide, only sought to prevent it by placing more emphasis on support and treatment.[37] Wicks states that 'the way in which the law has dealt with attempted suicide illustrates its approach to suicide more generally, with a clear evolution from punishment to prevention'.[38] The law's transition aligns with broader societal changes, as medical and psychological understandings of suicide evolved.

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[27] *R v Doody* [1854] 6 Cox CC 463.
[28] Wicks, *Suicide and the Law* (n 6) 26.
[29] The Criminal Justice Act 1925.
[30] Olive Anderson, *Suicide in Victorian and Edwardian England* (Oxford, Clarendon Press 1987) 289-290.
[31] The Mental Health Act 1959.
[32] ibid Chapter 72.
[33] Sheila Moore, *The Decriminalisation of Suicide* (PhD Thesis, LSE, 2000) 104.
[34] ibid.
[35] Chris Millard, *A History of Self-Harm in Britain* (1st edn, Palgrave Macmillan London 2015) 98.
[36] Moore, *The Decriminalisation of Suicide* (n 33) 131.
[37] Wicks, *Suicide and the Law* (n 6) 33.
[38] ibid.

2.3. The current suicide law

By virtue of the Suicide Act 1961, suicide, and by implication attempted suicide, ceased to be a criminal offence under English law.[39] Section 1 of the Act simply provides that 'the rule of law whereby it is a crime for a person to commit suicide is hereby abrogated'.[40] Hart praises the decriminalisation of suicide as 'the first Act of Parliament for nearly a century to remove altogether the penalties of the criminal law from a practice both clearly condemned by conventional Christian morality and punishable by law'.[41] Suicide was decriminalised 'to relieve people who unsuccessfully attempt suicide from being liable to criminal proceedings'.[42] Lord Sumption suggested this was because the law had finally recognised that imposing criminal sanctions was inhumane and ineffective, not because it had become morally acceptable.[43] Ironically, the decriminalisation of suicide represented a tightening of control over those who attempted suicide by shifting the focus of the law onto suicide prevention. Rather than relinquishing control over suicide, there was more of a transfer of control from the police, courts and prisons to doctors, social workers and hospitals.[44] The move to treat suicide as a public health issue is an important milestone because it suggests there is a responsibility to care for suicidal people, and raises important concerns about the role of the state and medical institutions regarding suicide prevention. Atkinson suggests that the Suicide Act 'represented the transition of the free-will model (suicide as a matter of free choice and hence punishable as an offence) to the deterministic model (suicide as the consequence of uncontrollable and hence excusable conditions, such as mental illness) of suicidal behaviour'.[45] The determinist approach removed the responsibility from the perpetrator, rendering the criminalisation of suicide inappropriate, but more importantly, reconfirmed the state's responsibility to take steps to prevent suicide.[46]

The decriminalisation of suicide, and by implication attempted suicide, was undoubtedly a positive move. However, the question whether suicide should be condemned or respected; prevented or assisted; understood or treated, remains a deeply contentious issue, often depending on one's perspective of personal autonomy against state intervention.[47] Not only did

[39] Suicide Act 1961.
[40] ibid s 1.
[41] Peter Hennessy, *Having It So Good* (Penguin 2006) 510 (Quoted H.L.A. Hart).
[42] HC Deb 6 February 1958, vol 581.
[43] *R (Nicklinson) v Ministry of Justice; R (AM) v Director of Public Prosecutions* [2014] UKSC 38.
[44] Wicks, *Suicide and the Law* (n 6) 37.
[45] Neeleman, 'Suicide as a Crime in the UK' (n 23) 256.
[46] Moore, *The Decriminalisation of Suicide* (n 33) 68-72.
[47] Wicks, *Suicide and the Law* (n 6) 35.

the Suicide Act 1961 decriminalise suicide, but it created a new statutory offence of assisted suicide.[48] Section 2 of the Act, as originally enacted, explains that 'a person who aids, abets, counsels or procures the suicide of another, or attempt by another to commit suicide shall be liable on conviction on indictment to imprisonment for a term not exceeding 14 years'.[49] The law here draws a distinction between what is acceptable (a person deciding to end their own life) and what is unacceptable (a person encouraging or assisting someone to end their own life). By criminalising assisted suicide, the law is trying to protect vulnerable people from being coerced or manipulated into ending their lives. The new statutory offence is unique because it criminalises assisting an action that, in itself, is perfectly lawful. Since there is no principal crime committed by the suicidal person, there is no crime for the defendant to aid and abet.[50] Ormerod and Laird describe the form of the offence as 'an odd one'.[51]

At the start of the twenty-first century, the Coroners and Justice Act 2009 (CJA) reaffirmed Parliament's commitment to an offence of assisted suicide.[52] Section 59 of the Act 'substantially amended' section 2 of the Suicide Act by replacing the two offences of aiding, abetting, counselling or procuring suicide, and attempting to do so with a single offence.[53] The law now applies in circumstances where a person does an act capable of encouraging or assisting another person to commit or attempt to commit suicide, and intends their action to so encourage or assist.[54] The amendment was designed to 'simplify and modernise the language of section 2 of the 1961 Act' so that it was clear and could be easily understood.[55] In the House of Commons debate about the Coroners and Justice Bill, Howarth was concerned about the distinction between encouraging suicide and assisting suicide. In his view, encouraging suicide is always wrong because it takes place before a person has decided to commit suicide, whereas assisting suicide may not always be wrong, because it occurs after a person has made the decision to commit suicide.[56] The reprehensibility of assisted suicide was further debated by the House of Lords in relation to the Coroners and Justice Bill, and has been the subject of public, political and legal conversations ever since.[57]

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[48] Neeleman, 'Suicide as a Crime in the UK' (n 23).
[49] Suicide Act 1961, s 2.
[50] Ormerod and Laird, *Smith, Hogan and Ormerod's Criminal Law* (n 15) 651.
[51] ibid.
[52] Wicks, *Suicide and the Law* (n 6) 57.
[53] Susan F Welsh, 'Crossing the Rubicon? Legal Developments in Assisted Suicide' (2014) Advances in Psychiatric Treatment, Vol 20(6), 369, 372.
[54] ibid.
[55] HC Deb 26 January 2009, vol 487, cols 35 and 68.
[56] HC Deb 26 January 2009, vol 487, col 26.
[57] ibid.

2.4. Legal challenges and ethical controversies with assisted suicide legislation

As the blanket ban on assisted suicide encompasses a wide range of culpability, it does not account for the nuances of each individual case. The current law does not provide any differentiation between cases where people have made the autonomous decision to have an assisted suicide, and cases where people have been coerced into having an assisted death because it treats all self-inflicted deaths the same.[58] This raises concerns about the fairness and flexibility of the law, particularly regarding personal autonomy and the capacity to make informed decisions. In *R v Hough*, Lord Lane CJ explains that in terms of gravity, assisted suicide 'can vary from the borders of cold-blooded murder down to the shadowy area of mercy killing or common humanity'.[59] The broad ambit of behaviour presents a challenge in terms of how the law interprets and applies concepts of intent and morality. This means that in some cases, assisted suicide is considered a serious criminal offence, and in other cases, it is regarded as merciful and 'on the brink of praiseworthy'.[60] This creates a challenge for the legal system as it needs to balance the respect for individual autonomy with the need to prevent harm to vulnerable people. The law on assisted suicide is controversial to its core because of the conflict between autonomy and the state's duty to protect life. In *Pretty v DPP*, the claimant sought an undertaking from the DPP that her husband would not be prosecuted for assisting her suicide, on the basis that the current law was incompatible with her Article 2, 3, 8, 9 and 14 rights under the European Convention on Human Rights (ECHR). The courts were asked to consider whether section 2 of the Suicide Act 1961 was compatible with her rights under the ECHR, and whether the absolute prohibition of assisted suicide was necessary and proportionate to the need to protect other members of society.[61] In this landmark case, both the House of Lords and the European Court of Human Rights (ECtHR) confirmed that the existing law on suicide was compatible with Mrs Pretty's ECHR rights because, even though the absolute prohibition of suicide was an interference with her right to make an autonomous decision about how and when to die, such an interference was justified. As a result, it was held that the DPP had no power to issue an undertaking that a crime, yet to be committed, should be immune from prosecution, because it was deemed necessary in a democratic society to protect the rights of

[58] Wicks, *Suicide and the Law* (n 6).
[59] *R v Hough* [1984] 6 Cr App R (S) 406.
[60] Wicks, *Suicide and the Law* (n 6) 172.
[61] *R (On the application of Pretty) v Director of Public Prosecutions* [2002] 1 ALL ER 1 (HL); *Pretty v United Kingdom* ECHR 2002-III (2002) 35 EHRR 1 (ECtHR).

other vulnerable members of society.[62] Therefore, neither the prohibition of assisted suicide, nor the DPP's refusal to issue an advance undertaking, violated Mrs Pretty's ECHR rights.[63] End-of-life clinics, such as Dignitas, are being increasingly utilised by British citizens to obtain assistance for ending their lives.[64] The assistance of relatives is often essential to facilitate the necessary travel abroad, but such actions are rarely the subject of prosecution.[65] While assisted suicide is criminalised under the Suicide Act 1961, the reality is that many people aren't facing prosecution for their actions. In practice, prosecutions under section 2(1) of the Suicide Act are relatively rare.[66] Between April 2009 and March 2024, the Crown Prosecution Service (CPS) indicated that 187 cases recorded as assisted suicide, had been referred to it by the police. Out of these, 36 were withdrawn by the police whilst the other 127 were deemed unworthy of further action by the CPS. Out of the cases which led to action, only four have been successfully prosecuted.[67] These statistics highlight a tension between the legal framework and the practical enforcement of the law, and suggest that there may be a tolerance of this kind of behaviour.[68] Luzon has described the UK's approach to assisted suicide as a 'de-prioritisation approach', in which there is a distinction between the law on paper and the law in practice in order to quieten concerns about the harsh consequences of blanket prohibition.[69] He argues that this 'de-prioritisation' approach is a de facto criminalisation of assisted suicide because there is a clear policy of avoiding imposing sanctions on offenders, whilst the definition of the Act, as a criminal offence, continues to avoid repeal. This is a soft approach to legislation in which there are no specific laws or regulations, rather there are guidelines about what exactly is permissible under the law.[70] The apparent tolerance of assisted suicide could be due to the public perception of assisted suicide, where many people see it as a compassionate response to extreme and unnecessary pain and suffering, rather than a criminal act.

[62] ibid.
[63] ibid.
[64] See Dignitas http://www.dignitas.ch last accessed 31 March 2026.
[65] Wicks, *Suicide and the Law* (n 6) 171.
[66] Suicide Act 1961, s 2(1).
[67] Crown Prosecution Service,'Assisted Suicide' (CPS, 8 April 2024) https://www.cps.gov.uk/publication/assisted-suicide last accessed 31 March 2026.
[68] Wicks, *Suicide and the Law* (n 6) 170.
[69] Golan Luzon, 'The Practice of Euthanasia and Assisted Suicide Meets the Concept of Legalization' (2019) 13 Criminal Law and Philosophy, 329, 340-341 The Practice of Euthanasia and Assisted Suicide Meets the Concept of Legalization last accessed 31 March 2026.
[70] ibid.

Before a prosecution can proceed, under section 2 of the Suicide Act, the permission of the DPP is required.[71] Section 2(4) of the Act provides that 'no proceedings shall be instituted for an offence under this section except by or with the consent of the Director of Public Prosecutions'.[72] This means that the DPP has discretion to prosecute people in relation to the offence of assisted suicide. Sir Hartley Shawcross explains that the DPP only intervenes 'to direct a prosecution when they consider it in the public interest to do so'.[73] The DPP is less likely to prosecute individuals who, acting in good faith and with compassionate motives, assist a loved one to travel to a clinic where assisted suicide is lawful, on the basis that prosecution may not be in the public interest.[74] Assisted suicide is not unique in involving the public interest in decisions to prosecute, but sufficient guidance has not been made available to people about whether certain actions are likely to result in prosecution or not.[75] In *Purdy v DPP*, the claimant applied to the court for clarity on whether her husband would be prosecuted, if he helped her to travel abroad for assisted suicide.[76] Unlike *Pretty*,[77] Ms Purdy did not commence legal proceedings to seek immunity from prosecution for her husband, but to require the DPP to publish an offence-specific policy outlining the circumstances in which a prosecution under section 2(1) of the Suicide Act 1961 would or would not be appropriate. Ms Purdy's counsel contended that the lack of clear policy from the DPP regarding section 2(1) of the Suicide Act 1961, violated her rights under Article 8 of the ECHR.[78] Her claim focused on whether the absolute prohibition of assisted suicide, and the variable enforcement of the offence by means of prosecution discretion, prevented the offence being 'in accordance with the law'.[79] Departing from its previous decision in *Pretty*,[80] the House of Lords allowed Ms Purdy's appeal,[81] and ordered the DPP to 'promulgate an offence-specific policy identifying the facts and circumstances which he will take into account in deciding […] whether or not to consent

[71] Roger Daw and Alex Solomon, 'Assisted Suicide and Identifying the Public Interest in the Decision to Prosecute' (2010) Criminal Law Review 737 https://search.informit.org/doi/10.3316/agispt.20201020038522 last access 31 March 2026.
[72] Suicide Act 1961, s 2(4).
[73] HC Deb 29 January 1951, vol 483, cols 681–82.
[74] Wicks, *Suicide and the Law* (n 6) 171.
[75] ibid.
[76] *R (On the application of Purdy) v Director of Public Prosecutions* [2009] UKHL 45.
[77] *R (On the application of Pretty) v Director of Public Prosecutions* [2002] 1 ALL ER 1 (HL); *Pretty v United Kingdom* ECHR 2002-III (2002) 35 EHRR 1 (ECtHR).
[78] *R (On the application of Purdy) v Director of Public Prosecutions* [2009] UKHL 45.
[79] ibid, [40].
[80] *R (On the application of Pretty) v Director of Public Prosecutions* [2002] 1 ALL ER 1 (HL); *Pretty v United Kingdom* ECHR 2002-III (2002) 35 EHRR 1 (ECtHR).
[81] Sally Lipscombe, Joanna Dawson and Elizabeth Rough, 'The Law on Assisted Suicide' (House of Commons, 25 April 2024) https://researchbriefings.files.parliament.uk/documents/SN04857/SN04857.pdf last accessed 31 March 2026.

to a prosecution under section 2(1) of the 1961 Act'.[82] Consequently, the DPP published an interim policy which outlined the factors that would be considered in assisted suicide cases. The policy set out that the criminal law should rarely, if ever, be used against those who compassionately assist a loved one to die at their request so long as that person had reached a voluntary, clear, settled and informed decision to end their life; and that very strong safeguards are needed to protect individuals who are at risk of coercion.[83] *Purdy*[84] was significant because it demonstrated the need for greater clarity in prosecutorial discretion regarding sensitive, personal matters like assisted suicide, and highlighted the need for the law to balance respect for personal autonomy with public interest.

One of the key issues with the current law is that it fundamentally relies upon prosecutorial discretion. Despite the unlikelihood of prosecution, anyone who assists a capacitated and autonomous choice to die does so under a 'cloud of criminalisation'.[85] The current suicide law was again challenged before the Supreme Court in the *Nicklinson* litigation,[86] where it was argued that section 2 of the Suicide Act 1961 was incompatible with Article 8 of the Human Rights Act 1998 (HRA).[87] In this case, the claimant also sought a declaration that it would not be unlawful for a doctor to assist the termination of his life, on the basis of necessity. Unfortunately, the claim was unsuccessful, and after defeat in the High Court, Nicklinson ended his own life by refusing food and water. His death highlights the callousness of the law's restrictive stance on assisted suicide and exemplifies how unsustainable the current legislative framework is. Wicks draws attention to the fact that just half a century after suicide itself was regarded as a serious criminal offence, 'two of the highest judges in the land wanted to declare the offence of assisted suicide to be incompatible with human rights'.[88] She argues that this demonstrates the 'rapid evolution of legal thinking on suicide',[89] and it suggests that the tension between the desire for autonomy and the current legal structure is only growing more intense. *Nicklinson*[90] certainly brought the complexities of assisted suicide into focus, highlighting the tension between legal frameworks and individual autonomy in the face of terminal illness and unbearable suffering.

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[82] *R (On the application of Purdy) v Director of Public Prosecutions* [2009] UKHL 45 [56].
[83] HC Deb 11 September 2015, vol 599, col 672.
[84] *R (On the application of Purdy) v Director of Public Prosecutions* [2009] UKHL 45.
[85] Elizabeth Wicks, *Suicide and the Law* (n 6).
[86] *R (Nicklinson) v Ministry of Justice; R (AM) v Director of Public Prosecutions* [2014] UKSC 38.
[87] ibid.
[88] Wicks, *Suicide and the Law* (n 6) 176.
[89] ibid.
[90] *R (Nicklinson) v Ministry of Justice; R (AM) v Director of Public Prosecutions* [2014] UKSC 38.

2.5. Inherent tensions

The history of suicide law in English law is a fascinating evolution, deeply tied to changing social, religious and legal perspectives. Through the nineteenth and twentieth century, there were many significant legal developments that shifted the law from one of punishment to one of prevention. Most importantly, the Suicide Act 1961 (as amended by the Coroners and Justice Act 2009) was a significant legislative framework, which marked a clear departure from the earlier, more punitive approach. Prior to the Act, individuals who committed suicide were treated as criminals, and survivors of suicide attempts could face prosecution. Since the implementation of the Suicide Act 1961, it has been codified in English law that the act of suicide is not a criminal offence, but assisting suicide is.[91] Despite the statutory law, prosecutions for assisted suicide are rare, which suggests there is a gap between the law's written text and its application in practice. This leads to one of the most pressing questions that remains today – whether there is a legal duty to prevent suicide, and in exactly what circumstances that applies. Public and Parliamentary opinion remains starkly divided on whether there should be a legal duty to prevent all suicides, or whether assistance to commit suicide should ever be lawful. The current state of the law is problematic, so clarification and enforcement of section 2 of the Suicide Act 1961 needs to be resolved.

3. Capacity and consent in the context of assisted suicide

3.1. Shifting dynamics

The change in suicide law, from punishment to prevention, indicates a clear shift to tackle suicide, but this preventative approach should only apply in circumstances where the individual does not have decision-making capacity. As the UK has advanced towards a rights-based system of law, through the incorporation of the ECHR into domestic law via the HRA, there has been more of a focus on self-determination and the protection of individual rights. This has shifted medical practice away from the traditional paternalistic model encapsulated by the adage of 'doctor knows best'.[92] Today, it is a fundamental ethical and legal principle that adults

[91] Martin Curtice and Charlotte Field, 'Assisted Suicide and Human Rights in the UK' (2010) The Psychiatrist, Vol 35(4), 187 https://doi.org/10.1192/pb.bp.108.024059 last accessed 31 March 2026.

[92] Sarah Walker, 'Autonomy or Preservation of Life? Advance Directives and Patients with Dementia' (2011) UCL Jurisprudence Review 17, 100 https://heinonline.org/HOL/P?h=hein.journals/ucljurev18&i=118 last accessed 31 March 2026.

have the right to autonomy and to make decisions about their healthcare,[93] when they are appropriately informed, and have the capacity to do so.[94] Whilst the Mental Capacity Act 2005 (MCA) purports to uphold the importance of self-determination, in practice, respect for autonomy is often compromised by the moral imperative to protect vulnerable people and preserve life. Technological advancements have enabled a 'technological fix' to address the legal challenges surrounding assisted suicide, yet there remains a clear ethical challenge to protect individuals rights. Determining capacity, in the context of assisted suicide, is particularly challenging for individuals with intellectual disabilities, or those affected by progressive brain disorders, so when a person is deemed to lack capacity, tension arises between respecting their autonomous wishes and ensuring they receive the necessary care and protection to prevent harm.[95]

3.2. Understanding capacity and consent in medical practice

A fundamental principle of medical ethics is that a competent individual must consent to treatment. In *Scholendorff,* Judge Cardozo emphasised that 'every human being of adult years and sound mind has a right to determine what shall be done with his own body',[96] and in *Re T*, Lord Donaldson reinforced the idea that an adult patient has the right to 'choose whether to consent to medical treatment'.[97] Consent safeguards a competent patient's autonomy and bodily integrity.[98] So for it to be legally valid, an adult patient must: have been appropriately informed; have made the decision voluntarily; and have the capacity to make the decision.[99]
Capacity refers to the 'functional determination of whether an individual patient has the ability to adequately make a specific decision'.[100] For a person to have capacity, they must be able to understand information relevant to the particular decision, retain it, and then use to make a choice.[101] The two-stage test of capacity allows for a comprehensive and context-specific

[93] British Medical Association, 'Autonomy or Self-Determination as a Medical Student' (British Medical Association, 28 June 2024) https://www.bma.org.uk/advice-and-support/ethics/medical-students/ethics-toolkit-for-medical-students/autonomy-or-self-determination last accessed 31 March 2026.
[94] JG Wong, IC Clare, MJ Gunn and AJ Holland, 'Capacity to Make Health Care Decisions: Its Importance in Clinical Practice' (1999) Psychological Medicine, Vol 29, 437 https://doi.org/10.1017/s0033291798008113 last accessed 31 March 2026.
[95] ibid.
[96] *Scholendorff v Society of New York Hospital* 105 NE 92 (NY, 1914) (Cardozo J).
[97] *Re T (Adult: Refusal of Treatment)* [1993] Fam 95 (Lord Donaldson MR).
[98] Emily Jackson, *Medical Law* (6th edn, Oxford University Press 2022) Ch 5, 250.
[99] *Re T (Adult: Refusal of Treatment)* [1993] Fam 95 (Lord Donaldson MR).
[100] Ryan Darby and Bradford Dickerson, 'Dementia, Decision-making, and Capacity' (2017) Harv Rev Psychiatry, Vol 25(6), 4 https://doi.org/10.1097/hrp.0000000000000163 last accessed 31 March 2026.
[101] Jackson, *Medical Law* (n 98) 260.

assessment of a person's decision-making ability, by combining a functional approach with a diagnostic threshold.[102] The first stage, (diagnostic test) examines whether the individual has 'an impairment of, or a disturbance in the functioning of the mind or brain',[103] and the second stage, (functional test) determines whether the impairment or disturbance prevents the individual from making a decision at the relevant time.[104] Since capacity is both decision and time specific, an individual is only deemed incapacitated if, at the time a decision needs to be made, they are unable to make or communicate a choice on the matter in question.[105]

Lack of capacity often leads to proxy decision-making in a patient's 'best interests'.[106] While the term is not explicitly defined in the MCA, it is generally understood as a decision or action that is best for the individual at the time the decision needs to be made, or action needs to be taken.[107] In *Re F*, Lord Brandon explained that the definition of 'best interests' is primarily focused on a patient's medical needs and is aimed at saving lives.[108] However, the National Institute for Care Excellence (NICE) instructs decision-makers to consider the patient's wishes, feelings and personal beliefs, so that decisions reflect the broader perspective of their values.[109] In *Aintree University Hospitals NHS Foundation Trust v James*, it was held that the purpose of the 'best interests' test is 'to consider matters from the patient's point of view, insofar as it is possible'.[110] *Wye Valley NHS Trust v B* highlights the importance of a patient's past decisions, views and wishes in the evaluation of their 'best interests', when found to lack capacity under the MCA.[111] Advance directives are also utilised to ensure patient's wishes are honoured when they lose decision-making capacity. Section 24 of the MCA holds that an advance directive is a future decision made by an adult when they have capacity.[112] Wong et al argue that advance directives are more respectful of an individual's right to self-determination because they are direct expressions of a patient's personal wishes.[113] Effectively, advance directives represent

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[102] Ben Alderson, Christian Walsh, Michael Kennedy and Nick Brindle, *A Clinician's Brief Guide to Dementia and the Law* (Cambridge University Press 2023) 53.
[103] Mental Capacity Act 2005, s 2(1).
[104] ibid s 3.
[105] Soumya Hegde and Ratnavalli Ellajosyula, 'Capacity Issues and Decision-Making in Dementia' (2016) Annals of Indian Academy of Neurology, Vol 19(1), 35 https://doi.org/10.4103/0972-2327.192890 last accessed 31 March 2026.
[106] Mental Capacity Act 2005, s 4(1).
[107] Alderson, Walsh, Kennedy and Brindle, *A Clinician's Brief Guide to Dementia and the Law* (n 102) 29.
[108] *Re F (Mental Patient: Sterilisation)* [1990] 2 AC 1 (HL) (Lord Brandon).
[109] NICE 'Decision-Making and Mental Capacity' (NICE, 3 October 2018) https://www.nice.org.uk/guidance/ng108/chapter/recommendations#best-interests-decision-making last accessed 31 March 2026.
[110] *Aintree University Hospitals NHS Foundation Trust v James* [2013] UKSC 67 (Baroness Hale).
[111] *Wye Valley NHS Trust v B* [2015] EWCOP 60.
[112] Mental Capacity Act 2005, s 24.
[113] Wong, Clare, Gunn and Holland, 'Capacity to Make Health Care Decisions' (n 94) 442.

the autonomous choice of a competent individual,[114] and respect the autonomy of a now-incompetent individual.[115] According to Menzel and Steinbock, advance directives enable people to maintain some level of control over the way they die, which serves as an important reflection of the way they have lived.[116]

3.3. Capacity to consent to assisted suicide and the effect on autonomy

Despite reaffirmation from Lord Donaldson that 'the right of the individual is paramount',[117] the bulk of case law fails to fully support this principle, because a patient's refusal of life-sustaining treatment, or wish to die, can be difficult for doctors to accept. This is due to the notion that doctors should aim to benefit, or more importantly, not do any harm to their patient[118] – a philosophy deeply embedded in the Hippocratic Oath.[119] Peel explains that there is 'unease about the active role of doctors' in assisted suicide, driven by the underlying belief that it is their duty 'to help people and preserve life, rather than end it intentionally'.[120] Consequently, when faced with a healthcare choice, many decision-makers intuitively prioritise the preservation of life.[121] This leads MacLean to suggest that the MCA is 'more concerned with protecting the welfare of the patient, and facilitating healthcare provision than with individual autonomy'.[122] This issue is particularly evident in assisted suicide, with the perceived injustice of people like Dianne Pretty and Tony Nicklinson at the heart of the debate.[123]

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[114] Walker, 'Autonomy or Preservation of Life?' (n 92) 113.
[115] Rebecca Dresser and John Robertson, 'Quality of Life and Non-Treatment Decisions for Incompetent Patients' (1989) Law, Medicine & Health Care, Vol 17(3) 235 https://doi.org/10.1111/j.1748-720x.1989.tb01101.x last accessed 31 March 2026.
[116] Paul Menzel and Bonnie Steinbock, 'Advance Directives, Dementia and Physician-Assisted Death' (2013) Journal of Law, Medicine and Ethics, Vol 41(2) 496 https://doi.org/10.1111/jlme.12057 last accessed 31 March 2026.
[117] *Re T (Adult: Refusal of Treatment)* [1993] Fam 95 [112] (Lord Donaldson).
[118] Fontalis, Prousali and Kulkarni (n 1) 410.
[119] Daniel Sokol, 'A guide to the Hippocratic Oath' (BBC News, 26 October 2008) http://news.bbc.co.uk/1/hi/7654432.stm last accessed 31 March 2026.
[120] Edwin Peel, 'Orientations, Spectra and Absolutes: An Exploration of the Attitudes Towards Assisted Dying Expressed by Respiratory and Palliative Medicine Physicians, and the Influence of their Specialist Organisations' (DPhil thesis, Newcastle University 2020) 123 Peel Edwin Timothy e-copy.pdf last accessed 31 March 2026.
[121] Walker, 'Autonomy or Preservation of Life?' (n 92) 117.
[122] Alasdair MacLean, 'Advance Directives and the Rocky Waters of Anticipatory Decision-Making' (2008) 16(1) Medical Law Review 1, 20 https://doi.org/10.1093/medlaw/fwm019 last accessed 31 March 2026.
[123] Wicks, *Suicide and the Law* (n 6) 197.

Although the ruling in *Nicklinson*[124] was consistent with the Suicide Act,[125] it did not respect the principle of individual autonomy. Nicklinson suffered from a rare neurological disorder characterised by paralysis of all voluntary muscles, except those which control the eyes. Notwithstanding his severe physical disabilities, his mental processes were unimpaired, and he was able to communicate via an eye-blink computer.[126] He wished to end his life but was physically unable to without assistance due to his paralysed state. He therefore sought legal recognition of his right to end his life with assistance, and applied to the court for a declaration that it would be lawful for a doctor to assist him in terminating his life, or, alternatively, that the current law on assisted suicide was incompatible with his rights under Article 8 ECHR.[127] Effectively, Nicklinson contested that he should not be denied the right to die, when able-bodied people have that right, and only his disability prevents him from exercising that right. The court was left to decide whether the criminalisation of assisted suicide, in relation to individuals who wish to end their own lives but are unable to do so unaided, is a necessary restriction on the right to respect for private life and a proportionate means to manage the risk to vulnerable people.[128]

The High Court refused Nicklinson's requests on the basis that such a significant change to the law was a matter for Parliament, not the judiciary.[129] In the Supreme Court, the appeal was dismissed by a majority of seven to two.[130] Considering the moral complexity and controversiality of the subject matter, the Lords in favour of the previous ruling rendered it 'institutionally inappropriate' for the court to consider the compatibility of the ban with the ECHR without giving Parliament the opportunity to consider the issue first.[131] However, by making no exception for those whose expressed wish to die reflects an autonomous desire, rather than undue pressure, Lady Hale and Lord Kerr determined the ban on assisted suicide as incompatible with Article 8.[132] To the judges, it is clear that the ECHR confers a right on a

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[124] *R (Nicklinson) v Ministry of Justice; R (AM) v Director of Public Prosecutions* [2014] UKSC 38.
[125] Suicide Act 1961.
[126] *R (Nicklinson) v Ministry of Justice; R (AM) v Director of Public Prosecutions* [2012] EWHC 2381.
[127] ibid.
[128] Mark Elliott, 'The Right to Die: Deference, Dialogue and the Division of Constitutional Authority' (Public Law for Everyone, 26 June 2014) https://publiclawforeveryone.com/2014/06/26/the-right-to-die-deference-dialogue-and-constitutional-authority/ last accessed 31 March 2026.
[129] *R (Nicklinson) v Ministry of Justice; R (AM) v Director of Public Prosecutions* [2012] EWHC 2381 [150]-[152].
[130] *R (Nicklinson) v Ministry of Justice; R (AM) v Director of Public Prosecutions* [2014] UKSC 38.
[131] Stevie Martin, 'Assisted Suicide and the Right to Private Life: the Enduring Repercussions of *Nicklinson*' (UK Human Rights Blog, 22 March 2017) https://ukhumanrightsblog.com/2017/03/22/assisted-suicide-and-the-right-to-private-life-the-enduring-repercussions-of-nicklinson-stevie-martin/ last accessed 31 March 2026.
[132] *R (Nicklinson) v Ministry of Justice; R (AM) v Director of Public Prosecutions* [2014] UKSC 38 [300]-[336] (Lady Hale and Lord Kerr).

competent individual to decide by what means, and at what point, their life will end. Lord Kerr also held that there is no rational connection between the aim of section 2(1) of the Suicide Act and the interference with Article 8.[133] Although *Nicklinson* was not in favour of allowing a capacitated person to choose an assisted death,[134] it is important to note that two senior judges were prepared to declare the statutory offence of assisted suicide as incompatible with the ECHR.[135] The judgement is therefore significant for its sympathetic acceptance of the flawed nature of the current prohibition of assisted suicide and marks a considerable step towards a revised law on assisted dying.[136] Farrell and Dove argue that the 'remarkable "non-decision" in *Nicklinson*, is as clear a message as possible for a UK court to send the legislature that circumstances must change'.[137]

Preventing someone, like Nicklinson, from lawfully obtaining assistance to end their life is 'a major incursion into the autonomy value lying at the heart of the right to respect for private life',[138] and the refusal of a competent individual's choice to die effectively prioritises the preservation of life and protection of vulnerable people over individual autonomy. *Tower Hamlets LBC v PB* seemingly condemns the *Nicklinson* judgement by ruling that the instinct to protect vulnerable people, from unwise and potentially catastrophic decisions, must never be permitted to eclipse a person's fundamental right to make their own decisions when they have capacity.[139]

3.4. Technology as a solution to the legal challenges of assisted suicide

Nicklinson highlights the shortcomings of the law when a competent individual autonomously wishes to end their life, but is physically unable to. To address these shortcomings, technological solutions, such as the 'Deliverance Machine' and 'Sarco' suicide pod, have been proposed as a potential option to circumvent the issues preventing legalised assisted suicide.[140] A 'technological fix' could make it possible for someone like Nicklinson to initiate their own

[133] ibid [350] (Lord Kerr).
[134] *R (Nicklinson) v Ministry of Justice; R (AM) v Director of Public Prosecutions* [2014] UKSC 38.
[135] Elizabeth Wicks, 'The Supreme Court Judgement in *Nicklinson*: One Step Forward on Assisted Dying; Two Steps Back on Human Rights' (2014) Medical Law Review, Vol 23(1), 144 https://doi.org/10.1093/medlaw/fwu031 last accessed 31 March 2026.
[136] ibid.
[137] Farrell and Dove, *Mason and McCall Smith's Law and Medical Ethics* (n 2) 612.
[138] Elliott, 'The Right to Die: Deference, Dialogue and the Division of Constitutional Authority' (n 128).
[139] *Tower Hamlets LBC v PB* [2020] EWCOP 34.
[140] Exit international, 'Inventions by Exit have been the subject of a number of international installations' https://www.exitinternational.net/about-exit/installations/ last accessed 31 March 2026.

death because as long as an adult has the capacity to make their own decisions, there should be no barrier to an assisted suicide.

Dr Nitschke developed the 'Sarco' suicide pod to provide a viable option of suicide for individuals that have an autonomous wish to die, but require third party assistance. He designed 'Sarco' to operate without direct medical intervention, effectively allowing any adult, with decision-making capacity, to enable a self-administered and controlled process of death.[141] The capsule can only be operated from the inside, by users pressing a button, blinking or gesturing to release nitrogen gas that induces a state of hypoxia and eventually, death.[142] 'Sarco' therefore offers a solution to individuals who are unable to administer the lethal substance independently, which consequently allows the law to maintain the distinction between assisted suicide and euthanasia. Parallels can be drawn between assisted suicide and abortion in that both have been transformed by medical technologies. The 'Sarco' suicide pod and the abortion pill have successfully removed healthcare professionals from the final stage of their respective processes, thereby enabling individuals to carry out their autonomous wishes.

Whilst technological advancements can support people's desires for greater control over end-of-life decisions, they can also risk blurring the line between personal autonomy and accountability in AI driven decisions about life and death.[143] Nitschke envisions an AI screening system to verify a person's identity and capacity for informed consent before activating the capsule,[144] effectively removing healthcare professionals from the assisted dying process altogether. Ostensibly, he wants to promote personal autonomy by allowing people to make decisions without doctors input, but since his algorithm will determine capacity, decision-making power is simply being transferred from doctors and psychiatrists to Nitschke and his algorithm.[145] Pies and Geppert argue that even if Nitschke succeeds in de-medicalising assisted suicide, it will remain impossible for those seeking suicide to make a truly informed

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[141] Exit International, 'The Exit Approach to Assisted Dying' https://www.exitinternational.net/about-exit/our-philosophy/ last accessed 31 March 2026.

[142] Tom Bateman, 'The Sarco Suicide Pod Aims to Take Assisted Dying Out of Doctors' Hands with AI and 3D Printing' (Euro news, 8 December 2021) https://www.euronews.com/health/2021/12/08/the-sarco-suicide-pod-aims-to-take-assisted-dying-out-of-doctors-hands last accessed 31 March 2026.

[143] Bateman (n142).

[144] Clare O'Dea, 'Sarco Suicide Capsule Hopes to Enter Switzerland' (SWI, 11 December 2021) https://www.swissinfo.ch/eng/sci-tech/sarco-suicide-capsule-hopes-to-enter-switzerland/46966510 last accessed 31 March 2026.

[145] Bryan Just, 'Death Pods: Suicide Is Still Never the Answer' (The Center for Bioethics & Human Dignity, 1 June 2022) https://www.cbhd.org/cbhd-resources/death-pods-suicide-is-still-never-the-answer last accessed 31 March 2026.

or autonomous choice.[146] Furthermore, if Nitschke's succeeds in removing doctors from the equation, cognitive and emotional pressures would only be heightened. Ironically, interest in granting people greater autonomy in end-of-life decisions would result in less autonomy because when medical professionals are removed from the process, it actually becomes harder for those considering assisted suicide to make an informed, autonomous choice.[147]

As technology in this controversial area continues to emerge, AI-driven systems are likely to redefine how society navigates end-of-life choices, but this raises profound questions regarding how technology can provide effective support in complex end-of-life decisions whilst ensuring these choices remain humane and ethically sound.[148] Although technological advancements have proposed an effective means to remove doctors from the final stage of the assisted dying process, AI-driven systems for determining capacity should be met with more apprehension. The core issue here is fluctuating capacity, as technology does not solve the problem of determining decision-making capacity for people with fluctuating cognitive mental states. Accurately assessing such capacity requires knowledge of the patient, something which AI cannot reliably replicate.

3.5. Decision-making capacity of people with dementia

Decision-making capacity is central to medical treatment, so in the context of dementia, where a person's capacity may be compromised, discussion about dying is 'especially fraught'.[149] Due to the progressive nature of most dementias, autonomy and choice are too often perceived as 'redundant' once a person's capacity is questionable.[150] However, it is important to recognise that a psychiatric disturbance, cognitive impairment or other abnormality of mental state, does not, in itself, indicate that capacity is lacking.[151] Even when cognitive functioning may be compromised, an individual may still be able to express important deep-rooted values

[146] Ronald Pies and Cynthia Geppert, 'Physician-Assisted Suicide and the Autonomy Myth' (Psychiatric Times, 27 October 2021) https://www.psychiatrictimes.com/view/physician-assisted-suicide-and-the-autonomy-myth last accessed 31 March 2026.
[147] Just, 'Death Pods: Suicide Is Still Never the Answer' (n 145).
[148] Hannah van Kolfschooten, 'The "Sacro Suicide Pod" and Beyond' (Bioethics Today, 31 October 2024) https://bioethicstoday.org/blog/the-sarco-suicide-pod-and-beyond-ai-in-the-future-of-end-of-life-decisions/# last accessed 31 March 2026.
[149] Elizabeth Peel and Rosie Harding, 'A Right to "Dying Well" with Dementia? Capacity, "Choice" and Relationality' (2015) Feminism & Psychology, Vol 25(1), 137 https://doi.org/10.1177/0959353514562811 last accessed 31 March 2026.
[150] ibid 140.
[151] Alderson, Walsh, Kennedy and Brindle, *A Clinician's Brief Guide to Dementia and the Law* (n 102) 60.

underpinning their decisions.[152] This means that it cannot be assumed that dementia patients are wholly incapable of making their own decisions.[153]

It is common for dementia patients to experience fluctuating capacity, due to varying sensitivity in their cognitive systems, which are often characterised by 'periods of behavioural confusion, inattention, and incoherent speech alternating with episodes of lucidity and capable task performance'.[154] The spontaneous, periodic and transient quality of these fluctuations interrupts the ongoing flow of awareness and attention that impacts functional abilities,[155] so the draft MCA Code of Practice recommends that a decision should be deferred until a patient's cognitive abilities are either optimised or appropriately supported.[156] Physicians should therefore aim to assess a dementia patient's capacity when they are in a relatively good cognitive state.[157] According to Article 12 of the United Nations Convention on the Rights of Persons with Disabilities, people with intellectual and psychological disabilities are entitled to support in making their decisions,[158] meaning dementia patients should be supported to ensure their preferences are established, and insofar as they can be, incorporated into decisions which concern them.[159] The purpose of supported decision-making is to preserve individual autonomy,[160] which is most at risk in discussions concerning dementia and assisted suicide. To minimise the risk of harm, while maximising patient autonomy, Drane has developed a sliding-scale model for decision-making, in which a patient's capacity is judged with increasing stringency as the decision becomes potentially more harmful.[161] This means that when the benefit to risk ratio is less favourable, the patient's decision-making capacity needs to be held to a higher standard. Whilst this framework is better suited to assessing the capacity of a dementia patient, Fellows argues that it may be necessary to rely on other standards if a patient is so incapacitated that it seems impossible to determine their point of view.[162]

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[152] ibid 52.
[153] Hegde and Ellajosyula, 'Capacity issues and decision-making in dementia' (n 105).
[154] Manuel Trachsel, Helena Hermann and Nikola Biller-Andorno, 'Cognitive Fluctuations as a Challenge for the Assessment of Decision-Making Capacity in Patients With Dementia' (2015) American Journal of Alzheimer's Disease & Other Dementias, Vol 30(4) 361 https://doi.org/10.1177/1533317514539377 last accessed 31 March 2026.
[155] ibid.
[156] Department for Constitutional Affairs, 'Mental Capacity Act 2005 Code of Practice' https://assets.publishing.service.gov.uk/media/5f6cc6138fa8f541f6763295/Mental-capacity-act-code-of-practice.pdf last accessed 31 March 2026.
[157] Trachsel, Hermann and Biller-Andorno, (n 154).
[158] Peel and Harding, 'A Right to "Dying Well" with Dementia?' (n 149) 139.
[159] Alderson, Walsh, Kennedy and Brindle, *A Clinician's Brief Guide to Dementia and the Law* (n 102) 61.
[160] ibid.
[161] Lesley K Fellows, 'Competency and Consent in Dementia' (1998) The American Geriatrics Society, Vol 46(7) 923 https://doi.org/10.1111/j.1532-5415.1998.tb02734.x last accessed 31 March 2026.
[162] ibid 926.

Advance directives would seem appropriate in the context of dementia, because they allow a previously competent individual's wishes to be respected. Similarly to Walker, Dworkin acknowledges that a person's interests can change radically in dementia, but he maintains that this does not undercut the moral authority of an advance directive.[163] To uphold the validity of an advance directive, he specifically relies on the notion of autonomy, and thus bases his argument on the idea that a person should be allowed to make a decision albeit not necessarily in their 'best interests'.[164] A dementia patient can either be viewed as 'a demented person, emphasising his present situation and capacities, or as a person who has become demented, having an eye to the course of his whole life'.[165] It should be emphasised that the loss of capacity does not override respect for personal autonomy, and in *Avon and Wiltshire Mental Health Partnership v WA*, it was held that 'protecting the autonomy of the incapacitous is every bit as important as protecting the autonomy of the capacitous'.[166]

However, in the context of assisted suicide, Gather and Vollmann argue that an advance directive is not, and should not be, sufficient for the death of a person lacking the capacity to continue to make that choice, because 'simply handing out barbiturates to dementia patients at a stage when they are still capable […] is problematic'.[167] Wicks explains that 'when one's very self is disrupted, decisions of the previous self, on matters as significant as life and death, cannot satisfy the standards of diachronic continuity'.[168] Dresser and Robertson also contend that the now-incompetent individual is not an autonomous chooser, as the autonomous chooser who made the advance directive no longer exists. They explain that 'it is difficult, if not impossible for competent individuals to predict their interests in future treatment situations when they are incompetent' because their needs and desires could change so radically that the original directive may no longer reflect what is best for them.[169] To deal with these concerns, Lewis proposes dementia-only exclusions, on advance directives, which would be utilised to disapply advance directives that conflict with a dementia patient's best medical interests. However, such exclusions would be contested under Articles 8 and 14 of the ECHR, like in

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[163] Menzel and Steinbock, 'Advance Directives, Dementia and Physician-Assisted Death' (n 116) 489.
[164] Ronald Dworkin, *Life's Dominion: An Argument About Abortion, Euthanasia and Individual Freedom* (Vintage Books 1993) 221.
[165] ibid.
[166] *Avon and Wiltshire Mental Health Partnership v WA* [2020] EWCOP 37 (Hayden J).
[167] Jakov Gather and Jochen Vollmann, 'Physician-assisted Suicide of Patients with Dementia: A Medical Ethical Analysis with a Special Focus on Patient Autonomy' (2013) International Journal of Law and Psychiatry 450 https://doi.org/10.1016/j.ijlp.2013.06.016 last accessed 31 March 2026.
[168] Wicks, *Suicide and the Law* (n 6) 192.
[169] Dresser and Robertson, 'Quality of Life and Non-Treatment Decisions for Incompetent Patients' (n 115) 239.

Pretty.[170] Not only would dementia-only exclusions garner protection from the Convention, they would also undermine the fundamental purpose of creating an advance directive in the first place.

Many people are more afraid of living in a severely demented state for years than they are of suffering for a few months at the end of their lives. So Menzel and Steinbock argue that people have as much right to choose death to avoid living with dementia as they do when terminally ill.[171] Sandra Bem's case powerfully demonstrates this mentality. When Bem was diagnosed with Alzheimer's, she resolved that before the disease stole her mind, she would kill herself.[172] Having been a psychology professor at Cornell and a pioneer in the field of gender studies, the prospect of mental decay was particularly painful as she 'felt terror at the prospect of becoming a hollowed-out person with no memory, mind or sense of identity, as well as fury that she was powerless to do anything but endure it'.[173] Determined to die on her own terms, Bem committed suicide earlier than she otherwise might have, because the law left her no other option. Even if she lived in a State where assisted dying was legalised, her Alzheimer's disease would have prevented her from getting assistance to take her own life because the law requires a person to have a prognosis of less than six months to live and be declared 'of sound mind' – criteria which most dementia patients cannot meet.[174] Bem's case is a prime example of legal constraints which force people into a premature death, and highlights why dementia patients should not be excluded from assisted dying legislation.

3.6. Autonomy reassessed

Whilst respect for autonomy is enshrined in the MCA, regardless of whether the reasons behind decisions are irrational or potentially harmful,[175] in practice autonomy is often compromised with the preservation of life and protection of vulnerable people. When a decision concerns death, medical professionals and the courts tend to prioritise the preservation of life over respecting an individual's choice,[176] like in *Pretty* and *Nicklinson* where the claimants were unable to implement their capacitated choice to die, because they could not achieve it without

[170] Walker, 'Autonomy or Preservation of Life?' (n 92) 119.
[171] Menzel and Steinbock, 'Advance Directives, Dementia and Physician-Assisted Death' (n 116) 484.
[172] Robin Marantz Henig, 'The Last Day of Her Life' (The New York Times, 14 May 2015) https://www.nytimes.com/2015/05/17/magazine/the-last-day-of-her-life.html last accessed 31 March 2026.
[173] Henig (n172).
[174] ibid.
[175] *Re T (Adult: Refusal of Treatment)* [1993] Fam 95 (Lord Donaldson MR).
[176] Walker, 'Autonomy or Preservation of Life?' (n 92) 101.

assistance.[177] When an individual with capacity decides to end their life, but is physically incapable of doing so, due to illness or disability, the law should explicitly allow for assistance, in accordance with their autonomous wishes. Whilst technological advancements, like the 'Sarco' suicide pod, have provided a 'technological fix' to this issue, the challenge of determining a person's capacity, when they have cognitive fluctuations, remains unresolved. Although technology and AI is not a comprehensive solution, it can support certain aspects of the assisted dying process and help facilitate the law in England and Wales to legalise assisted suicide. An assisted dying law must also ensure the right for equal treatment for people with disabilities, and their right to choose death. Failure to strike this balance may force people with dementia, like Sandra Bem, to confront the tragic reality that if they are to exercise any 'choice' about the end of their life arrangements, it might lead to a death earlier than necessary.[178] Therefore, the threshold for determining capacity must not be set so low that it fails to protect vulnerable people, nor so high that it restricts the right to self-determination.[179]

4. The legalisation of assisted suicide

4.1. Parliamentary assessment

Since Parliament passed the Suicide Act 1961, there has been increasing pressure to legalise assisted suicide in England and Wales. Despite a growing demand for reform, repeated attempts to legislate exceptions for absolute prohibition on assisted suicide have been unsuccessful, in part due to concerns relating to the protection of vulnerable people and the preservation of life.[180] Failure of Parliament to legislate on this matter has meant that prosecutors have been left to arbitrarily build flexibility into the system which statute lacks.[181] However, following the *Nicklinson* case,[182] Parliament now has the perfect opportunity to take significant steps to reform the current law. The continued failure to effectively legislate in this area risks further judicial challenges and violations of individual rights which are protected under the ECHR.[183]

[177] Wicks, *Suicide and the Law* (n 6) 197.
[178] Peel and Harding, 'A Right to "Dying Well" with Dementia?' (n 149) 140.
[179] Wong, Clare, Gunn and Holland, 'Capacity to Make Health Care Decisions' (n 94) 438.
[180] Wicks, *Suicide and the Law* (n 6) 169.
[181] Alex Goodman, 'Reflections on the Terminally Ill Adults (End of Life) Bill 2024 – Part 1' (Landmark Chambers, 29 November 2024) https://www.landmarkchambers.co.uk/news-and-cases/reflections-on-the-terminally-ill-adults-end-of-life-bill-2024-part-i last accessed 31 March 2026.
[182] *R (Nicklinson) v Ministry of Justice; R (AM) v Director of Public Prosecutions* [2014] UKSC 38.
[183] Wicks, 'The Supreme Court Judgement in *Nicklinson*' (n 135) 155.

A more nuanced exception to the general prohibition should be introduced, one that explicitly permits assisted suicide in accordance with an individual's wishes when they have capacity, but are physically incapable of ending their own life due to illness or disability. More generally, the law needs to furthermore recognise and respect a capacitated individual's right to choose an assisted death.

4.2. Previous attempts to legalise assisted suicide

The complexity of suicide law, especially assisted suicide, is reaffirmed by Parliamentary attempts at decriminalisation. Over the past decade, Parliament has steadfastly refused to join a global trend of legalising assisted suicide, resisting various attempts to do so. In 2014, Lord Falconer introduced the Assisted Dying Bill to the House of Lords, which sought to 'enable competent adults who are terminally ill, to be provided at their request with specified assistance to end their own life'.[184] After more than ten hours of debate, the Bill received a second reading and was subsequently considered for a further two days in Committee before the 2014-15 parliamentary session ended.[185] Shortly after in 2015, Rob Marris tabled the Assisted Dying (No.2) Bill in the House of Commons, with a similar aim to 'enable competent adults who are terminally ill to choose to be provided with medically supervised assistance to end their own life'.[186] Following a four hour debate, the Bill was defeated in its second reading by a majority of 330 to 118.[187] Although the Bill failed to achieve the status of law, successive discussions led to a unanimous vote in the House of Lords, on an amendment brought by Lord Pannick, that required judicial confirmation in the High Court that a terminally ill person had reached a 'voluntary, clear, settled and informed' decision.[188] In 2021, Baroness Meacher subsequently introduced a new Assisted Dying Bill, which included Lord Pannick's amendment, along with additional safeguards, to 'enable adults who are terminally ill to be provided at their request with specified assistance to end their own life'.[189] However, the Bill again did not proceed any further than its second reading after the 2021-22 parliamentary session concluded.[190]

[184] Assisted Dying HL Bill (2014-15) 6.
[185] Campaign for dignity in dying, 'Assisted Dying Bill' (Dignity in Dying) https://www.dignityindying.org.uk/assisted-dying/assisted-dying-bill/ last accessed 31 March 2026.
[186] Assisted Dying (No.2) HC Bill (2015-16) [7].
[187] Campaign for dignity in dying, 'Assisted Dying Bill' (n185).
[188] Farrell and Dove, *Mason and McCall Smith's Law and Medical Ethics* (n 2) 634.
[189] Assisted Dying HL Bill (2021-22) 13.
[190] Farrell and Dove, *Mason and McCall Smith's Law and Medical Ethics* (n 2) 634.

4.3. The Terminally Ill Adults (End of Life) Bill [as introduced]

The latest attempt to legalise assisted suicide, currently progressing through Parliament, is Kim Leadbeater's Terminally Ill Adults (End of Life) Bill, which seeks to 'allow adults who are terminally ill, subject to safeguards and protections, to request and be provided with assistance to end their own life'.[191] The legal framework of the Bill is most akin to the Abortion Act 1967,[192] which provides that no crime is committed, as long as the procedures specified in the Act are followed.[193] The Bill also draws inspiration from the Oregon Death with Dignity Act 1994, which 'allows terminally ill patients who meet specific qualifications to end their lives through voluntary self-administration of a lethal dose of medications prescribed by a physician for that purpose'.[194] The Terminally Ill Adults (End of Life) Bill seeks to amend section 2 of the Suicide Act 1961 so that in closely prescribed circumstances, and following a rigorous process, a doctor can provide an approved substance for a patient to self-administer in order to end their life.[195]

Clause 1 of the Bill sets out the basic eligibility criteria by outlining that to lawfully receive assistance to die, an individual must be over eighteen years old, be terminally ill, and possess the mental capacity to make the decision to end their own life.[196] Clauses 2 and 3 provide further detail on the criteria relating to terminal illness and mental capacity. For the purposes of the Bill, a terminally ill person is defined as someone suffering from 'an inevitably progressive illness, disease or medical condition which cannot be reversed by treatment' and consequently, whose death is reasonably expected within six months.[197] Decision-making capacity must also be interpreted 'in accordance with the Mental Capacity Act 2005'.[198] The Bill stipulates that both conditions be met simultaneously, which is particularly challenging for individuals with fluctuating capacity or those with neurodegenerative diseases. Furthermore, the Bill contains numerous procedures, safeguards and protections designed to make the

[191] Terminally Ill Adults (End of Life) HC Bill (2024-25) [12].
[192] Abortion Act 1967 s 1(1).
[193] Fiona Scolding and David Lock, 'Physician Assisted Dying: A Guide to Some of the Legal Issues Arising in the Forthcoming Debates' (Landmark Chambers, 23 October 2024) https://www.landmarkchambers.co.uk/news-and-cases/physician-assisted-dying-a-guide-to-some-of-the-legal-issues-arising-in-the-forthcoming-debates last accessed 31 March 2026.
[194] Death With Dignity Act 1994.
[195] Goodman, 'Reflections on the Terminally Ill Adults (End of Life) Bill 2024 – Part 1' (n 181).
[196] Terminally Ill Adults (End of Life) HC Bill (2024-25) [12] cl 1.
[197] ibid cl 2.
[198] ibid cl 3.

legislation safer in practice which 'will make it the strictest set of rules in the world'.[199] These include mandatory periods of reflection, approval by two independent doctors, judicial oversight, and the creation of criminal offences specifically targeting the risk of coercion.[200]
Under the 'provision of assistance to end life' in the Bill, clause 18(7) stipulates that the 'decision to self-administer the approved substance and the final act of doing so must be taken by the person to whom the substance has been provided'.[201] This provision ensures that the Bill only legislates for assisted suicide, and does not facilitate euthanasia. Preceding this requirement, clause 18(6) outlines the responsibilities of the coordinating doctor in cases where an approved substance is provided under subsection (2).[202] The coordinating doctor may either 'prepare that substance for self-administration by that person',[203] 'prepare a medical device which will enable that person to self-administer the substance',[204] or 'assist that person to ingest or otherwise self-administer the substance'.[205] Clause 18(6b) is particularly significant for individuals with severe physical impairments, like Nicklinson, because it enables lawful access to assisted suicide through the use of technology. Should the Bill be enacted, the incorporation of medical devices as a 'technological fix' is crucial to ensuring that people who possess the mental capacity to make informed end-of-life decisions are not excluded merely because of their physical incapacity. Without this provision, the Bill risks either denying this group access to assisted suicide or inadvertently crossing the boundary into legalising euthanasia.

4.4. Pitfalls of the Terminally Ill Adults (End of Life) Bill

Key aspects of the Terminally Ill Adults (End of Life) Bill concern issues of mental capacity and adult safeguarding.[206] While the eligibility criteria and safeguards are essential to prevent abuse, and ensure that the decision to die lies solely with the terminally ill individual,[207] the proposed legislation ultimately fails to grant assistance to a large number of people who

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199 Fergus Walsh, 'How Assisted Dying has Spread Across the World and How Laws Differ' (BBC, 27 November 2024) https://www.bbc.co.uk/news/articles/c1dpwg1lq9yo last accessed 31 March 2026.
200 Emily Thornberry, 'Terminally Ill Adults (End of Life) Bill' (Labour, 29 November 2024) https://www.emilythornberry.com/your-campaigns/2024/11/29/terminally-ill-adults-end-of-life-bill/ last accessed 31 March 2026.
201 Terminally Ill Adults (End of Life) HC Bill (2024-25) [12] cl 18(7).
202 ibid cl 18(6).
203 ibid cl 18(6a).
204 ibid cl 18(6b).
205 ibid cl 18(6c).
206 British Association of Social Workers, 'Terminally Ill Adults (End of Life) Bill' HC Deb 3 February 2025, 26, para 1 W.
207 Thornberry, 'Terminally Ill Adults (End of Life) Bill' (n 200).

genuinely need it. As Peel and Harding note, 'many of those who find their lives intolerable would be excluded from its provision of a peaceful and dignified death'.[208] In its current form, the Bill creates a catch-22 scenario and fails to recognise the concept of fluctuating mental capacity. As a result, if the Bill is passed without significant amendments, the legislation will only benefit a small subset of those seeking assistance in ending their life, leaving the majority without recourse, unable to exercise their autonomous wishes.

By restricting access to assisted suicide, to those who are both terminally ill and competent, the Bill is creating a catch-22 scenario: the closer to death a person needs to be, the less likely they are to have the requisite decision-making capacity.[209] This is particularly problematic for people with neurodegenerative diseases, like dementia, because whilst dementia patients have decision-making capacity, they are not classified as terminally ill, yet once they become terminally ill, they no longer have decision-making capacity. The progressive nature of dementia therefore means that many elderly people face the loss of autonomy towards the end of their lives when any potential 'escape route' via suicide, assisted or not, is closed off to them.[210] This paradox traps people with neurodegenerative diseases in a situation where it is impossible to exercise their autonomous wishes. In written evidence submitted during the Committee Stage of the Bill, Sharma claims the six-month life expectancy requirement disproportionately discriminates against people with neurodegenerative conditions,[211] so thus argues that the Bill should be amended to 'not unfairly disadvantage those with neurodegenerative diseases such as common dementias, who will typically lose capacity before they reach the current life expectancy eligibility'.[212] Support can be drawn from Scolding and Lock who suggest that such a restriction could amount to a violation of Article 8 ECHR.[213] The unpredictable symptoms and progressive nature of the disease therefore means that there is often a 'lack of correlation between meeting common legal conditions for access and meeting the actual conditions for desire for an assisted death'.[214] To address this issue, and ensure the law is responsive to the specific needs of people with dementia, the Bill requires an amendment. It should either allow people access to assisted suicide, before they are terminally ill, or allow people to request an assisted death through an advance directive, made while still mentally

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[208] Peel and Harding, 'A Right to "Dying Well" with Dementia?' (n 149) 139.
[209] Wicks, *Suicide and the Law* (n 6) 192.
[210] Wicks, *Suicide and the Law* (n 6) 192.
[211] Kanch Sharma, 'Terminally Ill Adults (End of Life) Bill' HC Deb 26 March 2025, 443 W.
[212] ibid.
[213] Scolding and Lock, 'Physician Assisted Dying' (n 193).
[214] Downie and Lloyd-Smith, 'Assisted Dying for Individuals with Dementia' (n 9) 119.

competent (like Dutch law).[215] In 2020, the Dutch Supreme Court ruled that patients with advanced dementia who have made a written advance request for euthanasia can receive it.[216] This means that in the Netherlands it possible for a patient to end their life when they are not cognitively able to do so, as long as they laid out their intention while still mentally competent.[217] Essentially, if someone with Alzheimer's disease has an advance directive, declaring their wish to die when their dementia reaches a point they consider intolerable, that document is sufficient to expedite ending their life.

The Terminally Ill Adults (End of Life) Bill also lacks provisions to address the common clinical scenario of fluctuating capacity. 'This will not only affect people with a primary neurological problem such as dementia, Parkinson's disease, and brain cancer but any terminal illness which develops co-morbid delirium'.[218] This is particularly concerning for these groups of people because there are no measures to address their clinical needs when they start to experience fluctuating capacity. The Bill [as introduced] also requires individuals seeking assisted suicide to demonstrate decision-making capacity at every stage of the assisted dying process. This includes the ability to understand and retain relevant information about ending their life, in order to reach an informed decision and communicate a choice.[219] Effectively, this means that an individual must be able to maintain a consistent intention to end their life over a period of several weeks, if they want to receive legal assistance.[220] However, this is particularly difficult for people with fluctuating capacity who may not be able to meet this requirement, even if they are terminally ill and suffering terribly.[221] In written evidence submitted during the Committee Stage of the Bill, Sharma explains that the time specificity of capacity is a particularly important consideration in the context of declining health, as it might result in fluctuating capacity.[222] Through the mandate for contemporary competence at each stage of the assisted dying process, the Terminally Ill Adults (End of Life) Bill effectively ignores individuals who experience fluctuating capacity. To address these issues, there must be a 'rigorous assurance process that explicitly details how to manage cases of fluctuating

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[215] ibid 117.
[216] 'Euthanasia: Dutch Court Expands Law on Dementia Cases' (BBC, 21 April 2020) https://www.bbc.co.uk/news/world-europe-52367644 last accessed 31 March 2026.
[217] Henig, 'The Last Day of Her Life' (n 172).
[218] British Association of Social Workers, 'Terminally Ill Adults (End of Life) Bill' (n 206) para 14 W.
[219] Michael Armstrong and Hannah Mantle, 'The Terminally Ill Adults (End of Life) Bill – difficult decisions ahead?' (Forsters LLP, 29 November 2024) https://www.forsters.co.uk/news-and-views/the-terminally-ill-adults-end-of-life-bill-difficult-decisions-ahead last accessed 31 March 2026.
[220] Goodman, 'Reflections on the Terminally Ill Adults (End of Life) Bill 2024 – Part 1' (n 181).
[221] Menzel and Steinbock, 'Advance Directives, Dementia and Physician-Assisted Death' (n 116) 484.
[222] British Association of Social Workers, 'Terminally Ill Adults (End of Life) Bill' (n 206) para 14 W.

capacity',[223] as well as tailored considerations for people with neurodegenerative dementia.[224] Specifically, the Bill should provide guidance for when: the person requesting assisted suicide has capacity at the first doctors assessment, but has a temporary loss of capacity at the second doctors assessment; the person requesting assisted suicide has capacity at the first and second doctors' assessment, but has a temporary or permanent loss of capacity at any time point following this and; the person requesting assisted suicide has capacity at the first and second doctors' assessment, but has a temporary or permanent loss of capacity when they request to cancel their declaration.[225]

It should also be noted that most doctors, unless they are psychiatrists with expertise in assessing mental capacity, are not trained in identifying fluctuating capacity.[226] Consequently, when a doctor is unsure as to whether an individual has capacity to make the decision to end their life, fluctuating capacity may be missed, and a referral to a psychiatrist therefore considered not to be needed.[227] Clause 9(3) of the Bill effectively states that an appropriate specialist 'must' be referred to if terminal illness is doubted,[228] whereas a psychiatrist 'may' be referred to if capacity is doubted.[229] In written evidence submitted during the Committee Stage of the Bill, Lobb argued that this means there is no requirement in the Bill for experts to formally assess an individual's capacity, who is requesting assisted dying,[230] and there is also no requirement for experts in assessing fluctuating capacity to be involved in the assisted suicide process.[231] However, the Terminally Ill Adults (End of Life) Bill [as amended in Public Committee] recently addressed this concern, so that if a doctor has doubt as to the capacity of the person being assessed, they now 'must' refer the individual for assessment by a registered practitioner who is a practicing psychiatrist.[232]

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[223] Sharma, 'Terminally Ill Adults (End of Life) Bill' (n 211).
[224] ibid.
[225] ibid.
[226] Catherine Lobb, 'Terminally Ill Adults (End of Life) Bill' HC Deb 11 February 2025, 212 W.
[227] Jess Carrington, 'Terminally Ill Adults (End of Life) Bill' HC Deb 29 January 2025, 07 W.
[228] Terminally Ill Adults (End of Life) HC Bill (2024-25) [12] cl 9(3a).
[229] ibid cl 9(3b).
[230] Lobb, 'Terminally Ill Adults (End of Life) Bill' (n 226).
[231] Carrington, 'Terminally Ill Adults (End of Life) Bill' (n 227).
[232] Terminally Ill Adults (End of Life) HC Bill (2024-25) [212] cl 11(6b).

4.5. The Terminally Ill Adults (End of Life) Bill [as amended in Public Bill Committee]

After undergoing extensive amendments, the Terminally Ill (End of Life) Bill has recently passed the Committee stage.[233] Key changes relevant to mental capacity include modifications to the consent assessment criteria and strengthened training requirements for assessing decision-making capacity. Whilst these amendments aim to refine the Bill's provisions, enhance its safeguards, and ensure clarity in its application, the Bill continues to create a catch-22 scenario and fails to appropriately consider fluctuating mental capacity.

4.6. Legislative gaps

Unsuccessful attempts at reform through Lord Falconer's, Rob Marris' and Baroness Meacher's Assisted Dying Bills has meant that legislative change is yet to materialise. However, Kim Leadbeater's Terminally Ill Adults (End of Life) Bill now 'presents an opportunity to prioritise dignity, compassion, and freedom of choice for those close to death'.[234] With its high eligibility thresholds and stringent safeguards, the Bill proposes a narrow exception to the blanket ban on assisted suicide, effectively legalising it only in limited and controlled circumstances. Whilst many see the Bill as a significant step in the right direction, in its current draft, it arguably risks creating further injustices and inequalities. Its overly restrictive eligibility criteria means that people with cognitive impairments are unduly excluded. Those with fluctuating capacity may be left without recourse and any viable route to exercise their autonomy, even if they are capable of making a 'clear, settled and informed wish to end their own life.[235] In practice, this means that the Bill can only offer assistance to a minority of people, rather than presenting a comprehensive solution for anyone who wishes to end their life. The narrow scope of the legislation therefore underscores the persistent tension between protecting vulnerable people and respecting the right of personal autonomy. Given the gravity of the decision to end human life, and the ethical implications of assisted suicide, the law must respond in a way that is both 'appropriate and effective',[236] so it is extremely

[233] 'Assisted Dying Bill Committee passes Bill' (Humanists UK, 26 March 2025) https://humanists.uk/2025/03/26/assisted-dying-bill-committee-passes-bill/ last accessed 31 March 2026.
[234] Thornberry, 'Terminally Ill Adults (End of Life) Bill' (n 200).
[235] Terminally Ill Adults (End of Life) HC Bill (2024-25) [212] cl 1(2a).
[236] Wicks, *Suicide and the Law* (n 6) 66.

important that the legislation ensures access to assisted death is granted to 'exactly (all and only) the people intended'.[237]

5. Conclusion

An examination of the existing legal position on assisted suicide in England and Wales reveals a pressing need for reform. Whilst the law on suicide has evolved significantly, shifting its focus from punishment to prevention and the protection of vulnerable people, it is too restrictive. A carefully regulated assisted dying law is needed to 'remedy the excessive protectionism of the current legislation',[238] aligning the law more closely with individual autonomy and contemporary attitudes towards assisted suicide. It is apparent that the absolute prohibition on assisted suicide disproportionately favours able-bodied individuals over those who have disabilities – whilst able-bodied individuals can end their lives without assistance, those who are physically incapable of doing so are effectively denied the same autonomy. Moreover, the current law does not differentiate between cases where an individual has made the autonomous decision to have an assisted death, and those where an individual has been coerced into requesting an assisted death. By treating all self-inflicted deaths the same,[239] the law overlooks important contextual differences, thereby failing to strike an appropriate balance between respect for personal autonomy and the protection of vulnerable people. Thus, there is a disparity between the law's written text and its application in practice, leaving many people in a legal grey area, caught between the threat of prosecution and the hope for prosecutorial discretion. To address these shortcomings, a regulatory framework needs to be introduced, one which creates formal mechanisms for an assisted death, and would therefore provide legal clarity for those in the liminal place between prosecution and non-prosecution for assistance.[240] Specifically, section 2 of the Suicide Act 1961 should be amended to address the right to individual autonomy, whilst still offering appropriate safeguards to protect vulnerable people against the risk of abuse.

An analysis of capacity and consent in the context of assisted suicide reveals that the current legal approach to assisted suicide is fundamentally flawed because it significantly infringes personal autonomy. The case of *Nicklinson* specifically highlights the tension between

[237] Downie and Lloyd-Smith, 'Assisted Dying for Individuals with Dementia' (n 9) 120.
[238] Sue Westwood, *Regulating the End of Life: Death Rights* (Routledge 2021) 335.
[239] Wicks, *Suicide and the Law* (n 6).
[240] Westwood, *Regulating the End of Life: Death Rights* (n 238) 333.

statutory law and the autonomous wishes of a capacitous adult: despite his clear and informed wish to die, Nicklinson was prevented from ending his own life due to the blanket ban on assisted suicide.[241] By failing to accommodate assistance for individuals with decision-making capacity, the law significantly undermines the principle of autonomy. Since individual autonomy refers to an individual's right to shape their own life through personal choices, and more specifically, bodily autonomy refers to an individual's right to control their own body and make decisions about it with undue interference, respecting autonomy inherently involves the prima facie right of an individual to request assistance in dying.[242] Autonomy, therefore, has a 'pivotal role' in end-of-life decision-making – 'permitting people the opportunity to decide the timing and circumstances of their own demise if that is what they wish'.[243] The central argument here is that 'an individual human being with capacity should have the right to choose when and how their life ends, and to be empowered in making this choice by the assistance of others when they want it'.[244] The right to die is therefore derived from a more general right to direct the course of our own lives.[245] Consequently, section 2 of the Suicide Act 1961 should be amended to create an exception for people with decision-making capacity seeking an assisted death. Crucially, enabling the death of a person who wishes to die, but whose disabilities prevent them from being able to do so, 'should not only not be prohibited but be actively permitted in order to empower such individuals and provide them with parity alongside non-disabled individuals'.[246]

Whilst technological developments, like the 'Sarco' suicide pod, address the practical challenges of assisted suicide for physically incapacitated people (so that assisted suicide can be 'actively permitted'), such developments are not yet able to resolve the more complex issue of assessing capacity in individuals with cognitive fluctuations. Therefore, a 'technological fix' is not a comprehensive solution to all the ethical and legal issues surrounding assisted suicide. Ultimately, it is essential that Parliament amends section 2 of the Suicide Act 1961 by creating an exception to assisted suicide for individuals with a clear and capacitous wish to die – such reform should also incorporate technological advancements and carefully address how to support individuals with fluctuating capacity. Assisted suicide legislation needs to recognise

[241] *R (Nicklinson) v Ministry of Justice; R (AM) v Director of Public Prosecutions* [2014] UKSC 38.
[242] Fontalis, Prousali and Kulkarni, 'Euthanasia and Assisted Dying: What is the Current Position and What Are the Key Arguments Informing the Debate?' (n 1) 409.
[243] Emma Bullock, 'Assisted Dying and the Proper Role of Patient Autonomy' in Michale Cholbi and Jukka Varelius (eds) *New Directions in the Ethics of Assisted Suicide and Euthanasia* (Springer 2015) 12-13.
[244] Westwood, *Regulating the End of Life: Death Rights* (n 238) 329.
[245] Bullock, 'Assisted Dying and the Proper Role of Patient Autonomy' (n 243).
[246] Westwood, *Regulating the End of Life: Death Rights* (n 238).

and support the right of individuals with decision-making capacity to choose how and when to end their own lives. To curtail human rights challenges, the law must strike a careful balance, ensuring that the threshold for determining capacity is not set so low that it fails to protect vulnerable people, nor so high that it unduly restricts the right to self-determination.[247]

A review of Kim Leadbeater's Terminally Ill Adults (End of Life) Bill reveals that in its current form, the Bill's limited scope risks reinforcing existing inequalities, potentially leading to further challenges under the ECHR. Whilst the Bill is a step in the right direction, it proposes an extremely narrow exception to the blanket ban on assisted suicide, effectively only legalising it in highly limited and tightly regulated circumstances – thereby excluding many interested groups. In practice, the proposed Bill would only benefit a small subset of the population in England and Wales, falling short of a comprehensive solution for all competent individuals who are seeking assistance to end their lives. An assisted dying regime should not be limited to the terminally ill but should extend to individuals who are suffering intolerably as a result of a grievous and irremediable medical condition.[248] The legislation therefore sustains the ongoing tension between protection of vulnerable people and respect for individual autonomy. This issue is especially concerning in the context of an ageing population, where the demand for end-of-life autonomy is likely to grow. The whole matter of how we age and how we deal with ageing is going to be a real problem because whilst medical science can keep the body going, it can't give an individual quality of life.

Due to developments in biomedicine, human life expectancy continues to rise worldwide,[249] with most people expecting to live into their sixties and beyond.[250] The World Health Organisation (WHO) highlights that the 'pace of the population is ageing much faster than in the past',[251] and predicts that by 2030, one in six people worldwide will be aged sixty or over.[252] Between 2015 and 2050, the proportion of the global population over sixty years old is projected to nearly double, from 12% to 22%,[253] with the number of people aged sixty and

[247] Wong, Clare, Gunn and Holland, 'Capacity to Make Health Care Decisions' (n 94) 438.
[248] Stevie Martin, 'Differentiation in Dying: Can Limiting Assisted Suicide to the Terminally Ill be Justified?' (UKCLA Blog, 27 November 2024) https://ukconstitutionallaw.org/2024/11/27/stevie-martin-differentiation-in-dying-can-limiting-assisted-suicide-to-the-terminally-ill-be-justified/ last accessed 31 March 2026.
[249] Joshua Drake and Zhen Yan, 'Targeting Healthspan to Optimally Combat Non-Communicable Disease in an Ageing World' (2019) Sports Medicine and Health Science, Vol 1, 59 https://doi.org/10.1016/j.smhs.2019.08.005 last accessed 31 March 2026.
[250] World Health Organization, 'Ageing and Health' (WHO, 1 October 2024) https://www.who.int/news-room/fact-sheets/detail/ageing-and-health last accessed 31 March 2026.
[251] ibid.
[252] ibid.
[253] ibid.

above reaching approximately 2.1 billion by 2050.[254] The number of people aged eighty or older, is also expected to triple between 2020 and 2050, reaching 426 million.[255] With this demographic shift, the prevalence of neurodegenerative diseases and dementia, such as Alzheimer's disease, will only increase[256] because during ageing, progressive deterioration of the body's structure and function 'hampers its active and adaptive responses to various stimuli', rendering individuals more vulnerable to neurodegenerative diseases.[257] 'Ageing is the primary risk factor for neurodegenerative diseases and their associated comorbidities'.[258] Currently over fifty-five million people worldwide live with dementia, a staggering figure projected to reach seventy-eight million by 2030,[259] and in 2022 dementia was the UK's leading cause of death in the UK accounting for 11.3% of all deaths.[260] These statistics reflect a universal concern that ageing and its consequences is going to affect a wider group of the population. In light of this, assisted suicide is an increasingly pressing issue, that is only going to gain momentum. Therefore, the main concern with the Terminally Ill Adults (End of Life) Bill is that its provisions exclude those with fluctuating capacity and those suffering from neurodegenerative diseases, effectively discriminating against a large section of the population that will only continue to expand. If the issue is not addressed now, the law risks denying a vast majority of people, who want and need it, access to assisted suicide. As we are now better able to understand the impact that dementia and other neurodegenerative diseases can have, it is time for the law to also acknowledge people's choice to avoid prolonged suffering and loss of self.

[254] ibid.
[255] ibid.
[256] Qiu Jiang, Jie Liu, Shan Huang et al, 'Antiageing Strategy for Neurodegenerative Diseases: From Mechanisms to Clinical Advances' (2025) Signal Transduction Targeted Therapy, Vol 10(1), 76, 1 https://doi.org/10.1038/s41392-025-02145-7 last accessed 31 March 2026.
[257] Jiang, Liu, Huang et al (n256).
[258] ibid.
[259] Serge Gauthier, Pedro Rosa-Neto, José Morais and Claire Webster, 'World Alzheimer Report 2021: Journey Through the Diagnosis of Dementia' (2021) Alzheimer's Disease International, 19 World Alzheimer Report 2021: Journey through the diagnosis of dementia last accessed 31 March 2026.
[260] Dementia statistics hub, 'Deaths Due to Dementia' (Alzheimer's Research UK, 2025) https://dementiastatistics.org/about-dementia/deaths/ last accessed 31 March 2026.

Algorithmic Discrimination in Recruitment: To What Extent Is the Equality Act 2010 an Adequate Means of Regulation?

Isabel Chantry

1. Introduction

In 2023, Derek Mobley, a highly qualified Black man over 40 with anxiety and depression, filed a landmark claim in the United States (US) against Workday, a leading provider of algorithmic recruitment tools (ARTs).[1] Rejected from over 100 jobs by Workday's ARTs, Mobley suspected unlawful discrimination based on age, disability, and race.[2] He believes that his race was inferred from the proxy of the historically Black education institutions he attended; 'his age from his graduation year'; and his mental health conditions from his performance on personality assessments.[3] Whilst rejection is a natural part of job-seeking, this fails to explain Mobley's systematic exclusion given his qualifications and experience. Most notably, Mobley alleges that he 'was rejected without an interview' 'for a job he was already performing as a contractor'.[4] Evidently a disheartening experience, Mobley's frustration peaked after "[receiving] a rejection at 1:50 am, less than one hour after he had submitted his application".[5] Mobley's experience of being continuously filtered out before a human could ever consider him on merit emphasises that the proliferation of ARTs has resulted in a broken system.

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[1] *Derek Mobley v Workday Inc* [2024] No. 3:23-CV-00770-RFL; Mallory Acheson and Jason I Epstein, 'AI "Agency" Liability: The Workday Wake-Up Call?' (*The National Law Review*, 9 September 2024) <https://natlawreview.com/article/ai-agency-liability-workday-wake-call> accessed 3 February 2025; Lindsay Clark, 'Watchdog finds AI tools can be used unlawfully to filter candidates by race, gender' *The Register* (London, 8 November 2024) <https://www.theregister.com/2024/11/08/ico_finds_ai_tools_can/> accessed 11 November 2024; Dan Clarke, 'Mobley v Workday: A Shift in Employment Discrimination Liability for AI Deployers and Builders' (*Truyo*, 7 November 2024) <https://truyo.com/mobley-v-workday-a-shift-in-employment-discrimination-liability/> accessed 3 February 2025; 'Derek Mobley v Workday Inc (2024)' (FindLaw 2024) <https://caselaw.findlaw.com/court/us-dis-crt-n-d-cal/116378658.html> accessed 3 February 2025; Evandro Gigante, Edward Young and Hannah Morris, 'Job Applicant's Algorithmic Bias Discrimination Lawsuit Survives Motion to Dismiss' (*Proskauer*, 25 July 2024) <https://www.lawandtheworkplace.com/2024/07/job-applicants-algorithmic-bias-discrimination-lawsuit-survives-motion-to-dismiss/> accessed 3 February 2025; HR Works, 'Implications of Mobley v Workday' (*HR Works*, 12 August 2024) <https://hrworks-inc.com/industry-update/implications-of-mobley-v-workday/> accessed 3 February 2025; Rachel V See and Annette Tyman, 'Mobley v Workday: Court Holds AI Service Providers Could Be Directly Liable for Employment Discrimination Under 'Agent' Theory' (*Seyfarth*, 19 July 2024) <https://www.seyfarth.com/news-insights/mobley-v-workday-court-holds-ai-service-providers-could-be-directly-liable-for-employment-discrimination-under-agent-theory.html> accessed 3 February 2025.

[2] Clark (n1); 'Derek Mobley v Workday Inc (2024)' (FindLaw 2024) <https://caselaw.findlaw.com/court/us-dis-crt-n-d-cal/116378658.html> accessed 3 February 2025; HR Works (n1).

[3] HR Works (n1).

[4] Gigante, Young and Morris (n1).

[5] See and Tyman (n1).

Mobley's experience is not an isolated one. Employers globally are increasingly adopting ARTs to streamline recruitment.[6] Yet, as Mobley's case demonstrates, many ARTs perpetuate historic bias, unchecked by adequate human oversight due to the flawed assumption that machines are inherently objective.[7] Consequently, algorithmic discrimination in recruitment requires urgent regulatory attention. As algorithmic discrimination currently falls primarily under the Equality Act 2010's (EA) remit in the United Kingdom (UK), this article evaluates the adequacy of the legislation in this novel context. Whilst the US's dominance in artificial intelligence (AI) innovation and the European Union's (EU) leading regulatory efforts in enacting the EU AI Act have attracted substantial academic comment on these jurisdictions, the UK's framework remains under-explored.[8] This article fills this gap by offering in-depth scrutiny of the EA's shortcomings in the algorithmic context through doctrinal analysis of legislation, case law, and secondary literature. This is enriched by interdisciplinary insights from computer science to assess the statistical workability of legal standards, and sociology in considering the complexities of social class and intersectionality as important dimensions of algorithmic discrimination.

In its analysis of the adequacy of the EA, this article proceeds in Part 2 by contextualising algorithmic discrimination as a pressing concern by examining the proliferation of ARTs and their potential to perpetuate historic bias. It then outlines the UK's regulatory landscape and the EA's pivotal role, whilst considering the influence of international developments in the EU and US. Having established the EA as the primary regulatory mechanism, Part 3 identifies four key weaknesses that hinder its effectiveness, namely the omission of class as a protected characteristic; the neglect of intersectionality; the evidential burdens on claimants; and the individualistic enforcement model. In analysing these deficiencies in the algorithmic context, it is highlighted that the systemic and opaque nature of algorithmic harm exacerbates these shortcomings. Recognising the EA's current inadequacy, Part 4 assesses the options for reform, evaluating existing legislation, self-regulation, AI-specific formal regulation, and co-regulation as means of regulating AI. Additionally, technological solutions are considered as a supplementary evidential tool.

[6] See 2.1.
[7] See 2.1.2-2.1.3.
[8] Luiza Jarovsky, Interview with Anu Bradford on 'The Global AI Race: Regulation and Power' (Online Webinar, 12 February 2025) https://www.youtube.com/watch?v=Oq511peSrUY last accessed 4 April 2026; Regulation (EU) 2024/1689 of the European Parliament and of the Council of 13 June 2024 laying down harmonised rules on artificial intelligence (EU AI Act) [2024] OJ L168/1.

Based on this analysis, this article's core thesis is that the EA requires urgent reform. The necessary revisions include recognising intersectional discrimination; including class as a protected characteristic; narrowing the potential for employers to justify indirect algorithmic discrimination; and providing systemic remedies. However, even with these improvements, the EA alone cannot address algorithmic discrimination. Consequently, it is advocated that the EA's limitations in its ex-post, individualistic remit must be supplemented by co-regulation's preventive capacity to address systemic harm. Additionally, supplementation with technological solutions which utilise AI to audit ARTs would provide preventive and evidential functions which humans are unable to fulfil. Without such a robust regulatory strategy, individuals like Mobley will be left without meaningful protection, facing injustices capable of derailing their livelihood prospects. This article consequently urges for equality law to be reimagined to meet the challenges of the algorithmic age.

2. The UK's current approach to algorithmic discrimination

The increasing reliance on automated decision-making in employment has brought both efficiency and controversy.[9] Whilst employers are utilising ARTs to standardise hiring and handle overwhelming application volumes, concerns persist surrounding their potential to perpetuate bias.[10] The perception that ARTs are inherently objective has been challenged by studies linking decisive proxies to protected characteristics rather than job-related criteria.[11] This part begins by exploring how ARTs work and the discrimination risks posed. It then examines the UK's current approach to algorithmic discrimination which relies on the EA and data protection laws in the absence of AI-specific legislation. Finally, international approaches are considered, including the EU AI Act and US anti-discrimination laws, discussing their influence on the UK. Understanding the discrimination risks posed and applicable frameworks is essential at this pivotal moment for AI regulation.

[9] See 2.1-2.1.3.
[10] ibid.
[11] See 2.1.2

2.1. Automated decision-making in recruitment

Barfield and Barfield characterise algorithms as 'a set of problem-solving procedures which when followed produce a certain output' which can be used for automated decision-making.[12] Whilst automated decision-making is not new and can be incredibly simplistic, its use in complex and highly controversial decisions like credit evaluations and parole eligibility has necessitated machine learning.[13] Models trained using supervised learning use labelled data to identify patterns in historic human decision-making, before applying to new stimuli.[14]

Arguably one of the most significant applications lies in recruitment considering the high-stakes implications of decisions impacting livelihoods. ARTs have become increasingly popular, with '99 percent of Fortune 500 companies' using them.[15] ARTs are utilised by well-known employers including Goldman Sachs,[16] HMRC,[17] IBM,[18] and Unilever.[19] ARTs are also used for hourly wage jobs in retail and hospitality; McDonald's 'McHire' reportedly improved hiring efficiency by 65%.[20] The technology on offer includes CV screeners, video interview analysis, and game-based personality assessments. HireVue, a major ART provider, 'estimates that the "pre-hire assessment" market is worth £2.14 billion per year'.[21]

ARTs analyse successful employees to develop selection criteria. CV screeners detect commonly used keywords whilst video interview analysis assesses facial expressions, tone, and speech patterns.[22] HireVue even evaluates a candidate's '*I* and *me* versus *we*, *team*, and *people*, pronoun usage' to gauge teamwork and associates muscle and eye movements with the

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[12] Woodrow Barfield and Jessica Barfield, 'An Introduction to Law and Algorithms' in Woodrow Barfield (ed), *The Cambridge Handbook of the Law of Algorithms* (Cambridge University Press 2020) 4; Flynn Coleman, *A Human Algorithm: How Artificial Intelligence Is Redefining Who We Are* (Melville House UK 2020) 30.
[13] Barfield and Barfield (n12) 3; Channarong Intahchomphoo and Odd Erik Gundersen, 'Artificial intelligence and race: a systematic review' (2020) 20(2) LIM 74, 78 https://doi.org/10.1017/S1472669620000183 last accessed 4 April 2026; Coleman (n12) 110; Mark Deem and Peter Warren, *AI on Trial* (Bloomsbury Professional 2022) 45.
[14] Coleman (n12) 30-31, 34; Deem and Warren (n13) 36.
[15] Hilke Schellmann, *The Algorithm* (Hurst 2024) xiii.
[16] Ifeoma Ajunwa, *The Quantified Worker: Law and Technology in the Modern Workplace* (Cambridge University Press 2023) 77.
[17] Morven Ross, 'Disability discrimination in UK recruitment and the impact of AI' (2024) 13(3) CRJ 12 https://uk.westlaw.com/Document/I6BA7F3302D0511EF9BC8FCCA1BBE3E13/View/FullText.html last accessed 16 April 2026.
[18] Schellmann (n15) xv, 52.
[19] ibid x.
[20] Ajunwa (n16) 81; HRD Connect, 'Inside "McHire": How AI reduced McDonald's time-to-hire by 65%' (*HRD Connect*, 20 March 2023) <https://www.hrdconnect.com/casestudy/inside-mchire-how-ai-helped-mcdonalds-drop-time-to-hire-by-65/?utm_source=hrd&utm_medium=email&utm_campaign=hrd-daily-dose&utm_content=2025-01-26-how-ai-helped-mcdonalds-drop-time-to-hire-by-65> accessed 26 January 2025.
[21] Aislinn Kelly-Lyth, 'Challenging Hiring Algorithms' (2021) 41(4) O.J.L.S. 899, 899 https://doi.org/10.1093/ojls/gqab006 last accessed 4 April 2026.
[22] Schellmann (n15) 7, 85, 102.

depth and creativity of their 'thinking style'.[23] Personality games analyse 'every click, every drag, every time interval, every mouse move – generating potentially hundreds or even thousands of data points' to detect desirable personality traits.[24] Once candidates have been scored, they are ranked and selected based on a cut-off score, with their applications often never having passed the gaze of a human being.[25]

2.1.1. The appeal for employers

It is easy to see why ARTs have won the favour of overwhelmed employers. 'The Institute of Student Employers reported receiving a record 1.2mn applications for 17,000 graduate vacancies [in 2024]'.[26] Similarly, Workday has stated that job applications are increasing four times faster than job openings.[27] The prevalence of AI-aided applications has exacerbated the issue, with 'almost half of jobseekers' admitting the use of AI tools.[28] ARTs able to process large volumes of applications quickly and consistently not only offer cost efficiency, but promise to democratise and diversify hiring by deferring to the objectivity of a machine.[29] Game-based assessments further claim to reveal candidates' true abilities behind their carefully crafted CVs.[30] Consequently, as Benjamin expresses, ARTs appear 'magical for employers… looking to streamline the gruelling work of recruitment'.[31]

[23] ibid 102, 106-107.
[24] ibid 63, 70.
[25] ibid 92.
[26] Elaine Moore, 'Blame AI for your gruelling job interview' *Financial Times* (London, 4 December 2024) <https://www.ft.com/content/afeaab73-94c3-4698-84df-6557ab1f3c71> accessed 11 January 2025.
[27] ibid.
[28] Laura Whitcombe, 'AI tools to help job-hunters get past the recruiters' bots' *Financial Times* (London, 24 October 2024) <https://www.ft.com/content/279bf0b0-97ef-4186-9156-6f0f4ae697ed?desktop=true&segmentId=d8d3e364-5197-20eb-17cf-2437841d178a#myft:notification:instant-email:content> accessed 24 October 2024; Sarah O'Connor, 'The AI arms race in hiring is a huge mess for everyone' *Financial Times* (London, 6 May 2025) <https://www.ft.com/content/43cd01f9-ab95-4691-bc74-2403c87f5c17?desktop=true&segmentId=d8d3e364-5197-20eb-17cf-2437841d178a#myft:notification:instant-email:content> accessed 6 May 2025; Moore (n26).
[29] O'Connor (n28); Schellmann (n15) xiv.
[30] ibid 55.
[31] Ruha Benjamin, *Race After Technology* (Polity Press 2019) 141-142.

2.1.2. The risks of bias and discrimination

Although hailed as an efficient and objective solution, Khan expresses her Orwellian fear that "AI benefits all humans equally. But AI benefits some humans more equally than others".[32] Ajunwa discusses a CV screener which deemed being named 'Jared' and playing high school lacrosse as the most important factors – proxies for race and socioeconomic status given the 'racially coded' name and elite nature of the sport.[33] Infamously, Amazon received backlash for its CV screener, discontinued after five years in 2019, after 'downgrading resumes that it judged to be women candidates based on factors such as… having the word *women's* on the resume'.[34] Therefore, CV screeners' reductive keyword assessment method poses serious discrimination concerns.

Likewise, although algorithmically assessed asynchronous interviews promise to 'democratize hiring' by removing location barriers and offering flexibility, similar discrimination concerns threaten their value.[35] Facial recognition software (FRS) and Ekman's underlying theory of the universality of facial expressions have been heavily criticised as pseudo-scientific.[36] Studies have shown that FRS is less accurate for Black individuals, with some technology even unable to 'detect Black people as having a face'.[37] Rhue found FRS interpreted Black people as

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[32] Ruhi Khan, 'Patriarchal AI: How ChatGPT can harm a woman's career' (*LSE Blogs*, 26 April 2024) <https://blogs.lse.ac.uk/medialse/2024/04/26/patriarchal-ai-how-chatgpt-can-harm-a-womans-career/> accessed 24 October 2024.

[33] Ajunwa (n16) 86-88; Benjamin (n31) 1; Intahchomphoo and Gundersen (n13) 77.

[34] Ajunwa (n16) 84; Benjamin (n31) 142-143; Moira Campbell, 'Using AI to make or influence workplace decisions: legal considerations and mitigating risk' (2024) 13(4) CRJ 2, 2-3 https://uk.westlaw.com/Document/I429F86F0456111EFA724B628A695AF49/View/FullText.html; Schellmann (n15) 5-6; Ronald Yu and Gabriele Spina Ali, 'What's inside the black box? AI challenges for lawyers and researchers' (2019) 19(1) LIM 2, 4 https://doi.org/10.1017/S1472669619000021 last accessed 4 April 2026.

[35] Schellmann (n15) 91.

[36] ibid 112-117, 129-139; Ajunwa (n16) 138-152; European Commission, 'Annex to the Communication to the Commission: Approval of the content of the draft Communication from the Commission - Commission Guidelines on prohibited artificial intelligence practices established by Regulation (EU) 2024/1689 (AI Act)' (C(2025) 884, 4 February 2025) 81, para (241) <https://digital-strategy.ec.europa.eu/en/library/commission-publishes-guidelines-prohibited-artificial-intelligence-ai-practices-defined-ai-act> accessed 27 February 2025; EU AI Act (n8) Recital 44; Special Staffing Group, 'AI in recruitment: focus on the outcomes' (*Specialist Staffing Group*, 19 June 2024) <https://www.specialiststaffinggroup.com/en-us/insights-and-research/digitalisation/ai-in-recruitment-focus-on-the-outcomes/?utm_source=tldr&utm_medium=referral&utm_campaign=sponsored_content> accessed 17 September 2024.

[37] Joy Buolamwini, 'When the Robot Doesn't See Dark Skin' *The New York Times* (New York, 21 June 2018) <https://www.nytimes.com/2018/06/21/opinion/facial-analysis-technology-bias.html#:~:text=Buolamwini%20is%20the%20founder%20of%20the%20Algorithmic%20Justice%20League.&text=When%20I%20was%20a%20college,face%20to%20finish%20the%20assignment> accessed 24 January 2025; Joy Buolamwini and Timnit Gebru, 'Gender Shades: Intersectional Accuracy Disparities in Commercial Gender Classification' (2018) 81 *Proceedings of Machine Learning Research* 1 https://dam-prod.media.mit.edu/x/2018/02/06/Gender%20Shades%20Intersectional%20Accuracy%20Disparities.pdf last accessed 4 April 2026; Coleman (n12) 110-111; Yu and Ali (n34) 3-4.

displaying more negative emotions.[38] A Black Uber Eats driver suffered the reality of this, settling a claim that racially discriminatory FRS led to his suspension.[39] Disabilities and neurodivergence also present issues; Schellmann warns of biases against conditions like cerebral palsy.[40] Although HireVue announced the discontinuation of FRS and tone-of-voice analysis in 2021 and 2022 respectively, other vendors have not followed suit, and Ajunwa has flagged the lack of independent audits confirming HireVue's word.[41] Alternative techniques also bear similar issues. Speech-to-text transcription disadvantages non-native English speakers and those with speech impairments, with Schellmann confirming that, whilst minor stuttering and repetition are not an issue, 'when applicants repeat whole strings of words', their scores can suffer.[42] Additionally, Ajunwa raises concerns about technology detecting racial proxies like dialect and syntax as an 'audit found that HireVue's [ART] had trouble scoring answers given by minority candidates who were more likely to structure responses using shorter sentences'.[43]

Similarly, equating speed of movement to processing ability and intelligence in game-based assessments risks age and disability discrimination where the scores of candidates with 'less dexterity in their use of [the] keyboard' suffer.[44] Plum's assessments were only able to predict between '1.7' and '18.5 percent of someone's job performance', raising concerns about their reliability versus discriminatory impact.[45] Consequently, ARTs' reductive assessment methods, which are inadequately supported by science, leave them plagued with bias and discrimination risks.

[38] Lauren Rhue, 'Racial Influence on Automated Perceptions of Emotions' (SSRN, 9 November 2018) <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3281765> accessed 17 January 2025.

[39] 'Mr P E Manjang v Uber Eats UK Ltd and others: 3206212/2021' (GOV.UK, 25 July 2022) <https://www.gov.uk/employment-tribunal-decisions/mr-p-e-manjang-v-uber-eats-uk-ltd-and-others-3206212-slash-2021> accessed 28 January 2025; Campbell (n34) 4; Rob Moss, 'Ubers Eats settles driver's facial recognition discrimination claim' (*Personnel Today*, 26 March 2024) <https://www.personneltoday.com/hr/uber-eats-settles-drivers-facial-recognition-discrimination-claim/> accessed 28 January 2025.

[40] Michal Luria and others, 'Screened Out: The Impact of Digitized Hiring Assessments on Disabled Workers' (Center for Democracy & Technology, 20 November 2024) 24-25 <https://cdt.org/insights/screened-out-the-impact-of-digitized-hiring-assessments-on-disabled-workers/> accessed 24 January 2025; Ross (n17) 13; Schellmann (n15) 146.

[41] Ajunwa (n16) 139-140, 148; Schellmann (n15) 115-117.

[42] Schellmann (n15) 89, 163.

[43] Ajunwa (n16) 299.

[44] Schellmann (n15) 142-155, 164; Luria and others (n40).

[45] Schellmann (n15) 75.

2.1.3. Causes of algorithmic bias

These issues of bias are attributable to the fact that models are limited by the scope of their training data. The ambiguity of what constitutes a successful employee is problematic.[46] Human recruiters are 50% more likely to shortlist candidates with white-sounding names and 'the unemployment rate for people with disabilities is… 20 to 30 percentage points higher'.[47] Given the historic underrepresentation of minorities in the workforce, training data is rarely representative of the candidate pool. As Amazon found with the gender disparity in its training data, this results in the perpetuation of historic bias as ARTs simply 'match what already exists'.[48]

ARTs are limited to matching as they are unable to infer meaning and differentiate causation and correlation.[49] Consequently, a candidate's skills and experience are given no greater weight than their name or other irrelevant variables.[50] As Schellmann explains, technology trained on a male-dominated data set may pick up on facial expressions and words related to gender characteristics rather than suitability for the role.[51] Due to the magnitude of data collected and the opacity of these models, many of these correlations go unchallenged.[52] Not only should this concern applicants whose livelihoods are on the line, but also employers. Schellmann emphasises that 'science has shown that diverse groups of people produce better business results'.[53]

The perception of objectivity surrounding ARTs is a dangerous fallacy which, when combined with a drive for cost efficiency, often results in inadequate human oversight which exacerbates these discrimination risks.[54] By treating the outputs of ARTs as conclusive, employers fail to interrogate the potential flaws in predictions which are merely based on statistical inferences. Whilst human recruiters are arguably no less flawed or biased, Ajunwa counters that 'one biased human manager can affect thousands of resumes in their lifetime, but a biased automated

[46] ibid 64, 108-109; Manish Raghavan and others, 'Mitigating Bias in Algorithmic Hiring: Evaluating Claims and Practices' (FAT* '20: Proceedings of the 2020 Conference on Fairness, Accountability, and Transparency, Barcelona, 27 January 2020) 469, 474 <https://dl.acm.org/doi/pdf/10.1145/3351095.3372828> accessed 20 January 2025.
[47] Yu and Ali (n34) 4; Schellmann (n15) 142.
[48] Ajunwa (n16) 84.
[49] Schellmann (n15) 136-137; Yu and Ali (n34) 4.
[50] Schellmann (n15) 13.
[51] ibid 20, 108.
[52] ibid 10.
[53] ibid 109.
[54] Yu and Ali (n34) 3.

hiring system can affect millions of resumes over an indefinite span of time'.[55] Schellmann reports that 'one [HireVue] customer interviewed fifty thousand applicants for jobs in fifteen hundred locations over one weekend'.[56] Benjamin further notes that 'at least [for humans] there's a *diversity* of biases'.[57] Therefore, the prevalence of ARTs that are subject to inadequate oversight raises serious discrimination risks, threatening all stakeholders involved.

2.2. Regulatory frameworks for AI and equality laws

2.2.1. The lack of UK AI-specific regulation

Deniston, Edwards and Bond argue Labour's AI regulation approach remains unclear.[58] Whilst the King's speech promised AI legislation, no bill has yet been introduced.[59] As Deniston, Edwards and Bond note, this intent to introduce 'binding measures on AI in its first parliamentary term' diverges from their Conservative predecessors who instead 'took an agile, non-binding approach'.[60] As a pivotal moment for UK AI regulation, it is vital to assess the suitability of existing technology-neutral legislation.

2.2.2. Equality and data protection law

As acknowledged by Ivey and Drake, there is already extensive non-AI-specific legislation fit to cover ARTs, including the EA.[61] The EA consolidated the previous mass of equality laws 'spread across 116 separate legislative provisions' and aims to facilitate equality being achieved in the sense that 'all groups [get] a proportionate or fair share of the opportunities

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[55] Alex P Miller, 'Want Less-Biased Decisions? Use Algorithms' [2018] Harv.Bus.Rev. 2, 4-5 <https://research-ebsco-com.libproxy.ncl.ac.uk/c/uavknn/search/details/fgmvyjyjdr?db=bsu&limiters=None&q=TI algorithms AND AU miller> accessed 10 February 2025; Special Staffing Group (n36).
[56] Schellmann (n15) 90.
[57] Benjamin (n31) 142.
[58] Kate Deniston, Ian Edwards and Toby Bond, 'Labour's plans for AI regulation in the King's speech' (Bird & Bird, 17 July 2024) <https://www.twobirds.com/en/insights/2024/uk/labours-plans-for-ai-regulation--in-the-kings-speech> accessed 6 February 2025.
[59] ibid.
[60] ibid.
[61] 'Employment & AI: Navigating a new technological frontier' (Bird & Bird, 12 June 2024) <https://www.twobirds.com/en/twobirds-tv/global/employment-and-ai-navigating-a-new-technological-frontier> accessed 30 October 2024; 'Recording: HR Data Essentials Webinar 10 Sept 2024 - AI In Employment' (Bird & Bird, 12 September 2024) <https://www.twobirds.com/en/twobirds-tv/global/hr-data-essentials-webinar-10-sept-2024-ai-in-employment> last accessed 30 October 2024.

available'.[62] Under s 39(1), the scope of the EA includes an employer's discriminatory actions in their recruitment practices.[63] Discrimination can be alleged on one of nine grounds of protected characteristics listed in s 4, namely: 'age; disability; gender reassignment; marriage and civil partnership; pregnancy and maternity; race; religion or belief; sex; sexual orientation'.[64]

The EA distinguishes between direct and indirect discrimination. Direct discrimination under s 13(1) covers situations where 'an employer treats an applicant… less favourably than others "because of" the applicant's protected characteristic', requiring a causative link.[65] For disability discrimination, the EA further stipulates that discrimination will be found where employers fail to make '"reasonable adjustments" to… accommodate disabled applicants' where they ought reasonably to have known that the candidate had the disability.[66] For automated recruitment, alternatives could include modified assessments (as offered by Pymetrics for 'ADHD, dyslexia, and colour blindness') or a human-assessed parallel route.[67] In contrast, indirect discrimination under s 19 occurs 'when an employer applies a facially neutral provision, criterion or practice (PCP) [equally to all]… that puts people with a protected characteristic at a "particular disadvantage"'.[68] Indirect discrimination differs in that it 'can be lawful if justified as a proportionate means of achieving a legitimate aim' (beyond 'mere cost saving').[69]

The relevant type of discrimination in the algorithmic context has attracted debate. The dominant opinion is that most algorithmic discrimination (such as that produced by the ART which favoured high school lacrosse and being named 'Jared') falls under indirect discrimination.[70] This is because tools assess candidates using neutral PCPs like word choice, tone, facial expressions, or speed which are equally applied to all. Indirect discrimination fits well because 'there is no need to provide reasons as to why a PCP places one group at a

[62] Rachel Verdin, *Architectures of inequality: Gender Pay Inequity and Britain's Finance Sector* (Bristol University Press 2024) 42; Gwyneth Pitt and Sandhya Drew, *Pitt's Employment Law* (12th edn, Sweet & Maxwell 2022) 55.
[63] Equality Act 2010 (EA), s 39(1).
[64] EA, s 4.
[65] EA, s 13(1); Kelly-Lyth (n21) 905; Pitt and Drew (n62) 69.
[66] EA, s 15; Kelly-Lyth (n21) 908; Ross (n17).
[67] Schellmann (n15) 144.
[68] EA, s 19; Kelly-Lyth (n21) 905.
[69] EA, s 19(2)(d); Ross (n17) 13; Kelly-Lyth (n21) 906.
[70] Jeremias Adams-Prassl, Reuben Binns and Aislinn Kelly-Lyth, 'Directly Discriminatory Algorithms' (2023) 86(1) 144, 150; Kelly-Lyth (n21) 906; Ross (n17) 13 https://doi.org/10.1111/1468-2230.12759 last accessed 4 April 2026.

disadvantage to another: "it is enough that it does"'.[71] This is because, as Lady Hale explains, 'indirect discrimination "is dealing with hidden barriers which are not easy to anticipate or spot"'.[72] Therefore, indirect discrimination is suited to combatting the black box problem, wherein the opacity of these models often means the reason behind an output eludes even the developers.[73]

However, Adams-Prassl, Binns and Kelly-Lyth have explored the applicability of direct discrimination to circumvent the possibility of indirect algorithmic discrimination being justifiable.[74] As established in *James v Eastleigh Borough Council*, direct discrimination can be found regardless of motive.[75] However, although Adams-Prassl, Binns, and Kelly-Lyth argue that the irrelevance of intention allows direct discrimination to cover a wide scope of algorithmic discrimination cases, their argument is overstated.[76] Direct discrimination will be the more natural fit where proxies 'directly [correlate] with a protected characteristic' (as with Amazon's 'women's colleges' proxy).[77] However, in *Lee v Ashers*, it was held insufficient to argue that the discriminatory treatment had 'something to do with the sexual orientation of some people' as there must be 'an "exact correspondence" between the group disadvantaged by its application and the group defined by the protected characteristic'.[78] Consequently, indirect discrimination is the correct classification for most algorithmic discrimination.

As Kelly-Lyth explains, in its application to algorithmic discrimination, the EA '[works] in tandem' with the General Data Protection Regulation (GDPR), as supplemented by the Data Protection Act 2018.[79] Articles 12-15 of the GDPR grant applicants rights to access information about how their data is used in recruitment decisions, which may assist individuals in identifying and challenging discriminatory outcomes.[80] Additionally, under Article 22 'an

[71] *Essop v Home Office* [2017] UKSC 27, [2017] 1 WLR 1343; Jed Meers, 'Discrimination at the Interface: The Equality Act 2010 and Platform Interface Design' (2024) 87(3) MLR 640, 658 https://onlinelibrary.wiley.com/doi/epdf/10.1111/1468-2230.12855?msockid=242ac4c5d5c865271cd9d231d4fc644c last accessed 4 April 2026.
[72] *Essop* (n71); Meers (n71) 658.
[73] Yu and Ali (n34) 5.
[74] Adams-Prassl, Binns and Kelly-Lyth (n70); see 2.3.2.
[75] James v Eastleigh Borough Council [1990] 2 AC 751.
[76] Adams-Prassl, Binns and Kelly-Lyth (n70).
[77] Kelly-Lyth (n21) 905; Ajunwa (n16) 84; ibid 167.
[78] *Lee v Ashers Baking Co Ltd* [2018] UKSC 49, [2020] AC 413, 433; Adams-Prassl, Binns and Kelly-Lyth (n70) 161.
[79] Kelly-Lyth (n21) 917; Regulation (EU) 2016/679 (General Data Protection Regulation, GDPR) [2016] OJ L119/1.
[80] GDPR (n79) Articles 12-15; Javier Sánchez-Monedero, Lina Dencik and Lilian Edwards, 'What does it mean to 'solve' the problem of discrimination in hiring? Social, technical and legal perspectives from the UK on automated hiring systems' (FAT* '20: Proceedings of the 2020 Conference on Fairness, Accountability, and Transparency, Barcelona, 27 January 2020) 464 <https://dl.acm.org/doi/10.1145/3351095.3372849> accessed 24 January 2025.

individual also has the right not to be subject to a "decision based solely on automated processing" which produces legal [or similarly significant] effects for that individual.'[81] Whilst outside the scope of this article's equality law focus, it has been considered elsewhere whether the consent exception applies in employment situations considering the power imbalance.[82] Article 35 further requires employers using high-risk ARTs to conduct a Data Protection Impact Assessment (DPIA) to evaluate and mitigate potential discrimination risks.[83] Consequently, data protection law provides preventative mechanisms for mitigating the risks before discrimination even occurs, contrasting the EA's primarily reactive approach. Therefore, together the EA and data protection law provide a legal framework that can address algorithmic discrimination in the absence of AI-specific regulation, demonstrating that the UK is not without relevant legislation.

2.3. International approaches

Whilst the UK is yet to enact AI-specific legislation, the EU has passed the world's first comprehensive AI regulatory framework.[84] This framework 'adopts a technology-neutral perspective, categorising AI systems based on their risk level'.[85] The EU AI Act applies to 'AI systems', defined as machine-based systems, varying in autonomy and adaptiveness which, 'for explicit or implicit objectives, [infer], from the input…, how to generate outputs… that can influence physical or virtual environments'.[86]

Video interview ARTs which use FRS or tone-of-voice analysis are prohibited by Article 5 as they 'infer emotions' in the workplace context using biometric data.[87] The provisions on prohibited practices came into force on 2nd February 2025.[88] Non-compliance will attract fines

[81] GDPR (n79) Article 22(1); Campbell (n34) 3; Kelly-Lyth (n21) 909, 916; Sánchez-Monedero, Dencik and Edwards (n80) 464-465.
[82] GDPR (n79) Article 22(2)(c); Kelly-Lyth (n21) 911; Sánchez-Monedero, Dencik and Edwards (n80) 465.
[83] GDPR (n79) Article 35; Kelly-Lyth (n21) 914-916; Sánchez-Monedero, Dencik and Edwards (n80) 465.
[84] Francesca Palmiotto, 'The AI Act Roller Coaster: The Evolution of Fundamental Rights Protection in the Legislative Process and the Future of the Regulation' [2025] EJRR 1, 2 https://doi.org/10.1017/err.2024.97 last accessed 4 April 2026; Marco Almada and Nicolas Petit, 'The EU AI Act: a medley of product safety and fundamental rights?' (RSC 2023/59, Robert Schuman Centre for Advanced Studies 2023) 7 <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4308072> accessed 31 August 2024.
[85] Benoit Van Asbroeck and others, 'European Union Artificial Intelligence Act: a guide' (Bird & Bird LLP, 6 November 2024) 3 <https://www.twobirds.com/-/media/new-website-content/pdfs/capabilities/artificial-intelligence/european-union-artificial-intelligence-act-guide.pdf> accessed 29 January 2025.
[86] EU AI Act (n8) Article 3(1); ibid 4.
[87] EU AI Act (n8) Article 5(1)(f); European Commission (n36) 80-90, paras (239)-(270).
[88] Van Asbroeck and others (n85) 8.

of up to €35 million or '7% of [the offender's] total worldwide annual turnover for the preceding financial year, whichever is higher'.[89]

ARTs which do not fall under Article 5 (including CV screeners, game-based assessments and video interview ARTs which do not involve FRS or tone-of-voice analysis) are categorised as high-risk meaning providers are obligated to document development, use high-quality training data, and maintain 'accuracy, robustness, and cybersecurity'.[90] They must also register the AI system in a public EU database.[91] Van Asbroeck and others clarify that the data governance provisions require providers to 'take measures to mitigate biases in datasets that could lead to prohibited discrimination, including by processing special categories of personal data under specific conditions'.[92] The Act emphasises the need for transparency, mandating that high-risk AI deployers receive 'clear, comprehensive instructions' on the system's purpose, risks, capabilities, and oversight, with documentation tailored to their expertise.[93]

Additionally, providers must ensure AI-generated content, including recruitment assessments, is clearly marked and that candidates subjected to 'emotion recognition [systems]' are notified.[94] This transparency will be essential in combating many employers' limited understanding of how ARTs work and will hopefully challenge the objectivity fallacy. Article 14 requires providers to design tools in a way that facilitates human oversight, with Article 26 obligating deployers to 'assign human oversight to natural persons who have the necessary competence, training and authority, as well as the necessary support'.[95] The majority of provisions relating to high-risk AI systems will come into force on 2 August 2026, with breach attracting fines of up to €15 million or '3% of [the offender's] total worldwide annual turnover for the preceding year, whichever is higher'.[96]

Not only is the EU AI Act relevant to the UK as a "blueprint" but also due to its territorial scope.[97] The Act applies to AI systems made available or used in the EU market, or affecting those in the EU, regardless of where the provider is based.[98] Consequently, despite Brexit, the Act will apply to UK companies if their ARTs are available to EU users or used in hiring

[89] EU AI Act (n8) Article 99(3); Van Asbroeck and others (n85) 16, 20.
[90] EU AI Act (n8) Article 6(2), Annex III(4)(a); Van Asbroeck and others (n85) 6.
[91] Van Asbroeck and others (n85) 6.
[92] EU AI Act (n8) Article 10; ibid 28.
[93] EU AI Act (n8) Article 13; Van Asbroeck (n85) 28.
[94] EU AI Act (n8) Article 50; Van Asbroeck (n85) 39-41.
[95] EU AI Act (n8) Articles 14, 26; Van Asbroeck (n85) 28-29.
[96] EU AI Act (n8) Article 99(4); Van Asbroeck (n85) 8.
[97] Jarovsky, Interview with Bradford (n8); 'Recording: HR Data Essentials Webinar 10 Sept 2024 - AI In Employment' (Bird & Bird, 12 September 2024) <https://www.twobirds.com/en/twobirds-tv/global/hr-data-essentials-webinar-10-sept-2024-ai-in-employment> accessed 30 October 2024.
[98] Van Asbroeck (n85) 3, 14.

processes involving candidates in the EU.[99] The EU also enjoys the 'Brussels Effect', which Bradford defines as '[referring] to the EU's unilateral power to regulate global markets'.[100] Due to 'market forces', companies are forced to choose between complying with the EU's standards 'or else forgo the EU market entirely'.[101] Therefore, to retain access whilst avoiding the expense of creating a custom product, many UK developers will see no choice but to comply with the EU AI Act.[102] Consequently, as both legislative inspiration and a regulatory model likely to capture many UK businesses in their contact with the EU market, the EU AI Act will have significant influence in the UK.

The US's legislative approach is similarly influential given its dominance in the technology market.[103] Despite no federal-level legislation specific to ARTs, local and state-level legislation has bridged this gap.[104] New York City '[mandates] bias audits and transparency for [ARTs]' and Illinois '[requires] applicants to be notified and provide consent if their video interviews will be analysed by [AI]'.[105] The lack of federal-level regulation means that like the UK, anti-discrimination law plays a significant role. Title VII of the Civil Rights Act 1964 'prohibits employment discrimination based on race, colour, religion, sex and national origin'.[106] The Americans with Disabilities Act 1990 in turn covers disability discrimination. As disparate treatment under Title VII requires intent, disparate impact is the focus for algorithmic discrimination.[107] Disparate impact is defined as 'discrimination that occurs when a neutral-appearing practice or policy actually has a discriminatory effect on a protected class'.[108] Where the discrimination is 'unjustified or avoidable', disparate impact will be found if the disparity fails the four-fifths rule, '[requiring] that the ratio of the… selection of candidates…, of the highest passing and lowest-passing demographic categories' is not

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[99] ibid; Anu Bradford, *The Brussels Effect: How the European Union Rules the World* (Oxford University Press 2020) xvi, 277-283.
[100] Bradford (n99) xiv; Jarovsky, Interview with Bradford (n8).
[101] Bradford (n99) xiv; Jarovsky, Interview with Bradford (n8).
[102] Bradford (n99) 54-63; Jarovsky, Interview with Bradford (n8).
[103] Jarovsky, Interview with Bradford (n8).
[104] Matt Scherer, 'Report - Regulating Robo-Bosses: Surveying the Civil Rights Policy Landscape for Automated Employment Decision Systems' (Center for Democracy & Technology, 23 July 2024) <https://cdt.org/insights/report-regulating-robo-bosses-surveying-the-civil-rights-policy-landscape-for-automated-employment-decision-systems/> accessed 13 January 2025.
[105] ibid; New York City Local Law No 144 of 2021 (NYC LL144); Illinois Artificial Intelligence Video Interview Act, 820 ILCS 42 (2019); Acheson and Epstein (n1); HR Works (n1); Kelly-Lyth (n21) 926; Raghavan and others (n46) 475; Special Staffing Group (n36).
[106] 'Title VII of the Civil Rights Act of 1964' (US Equal Employment Opportunity Commission) <https://www.eeoc.gov/statutes/title-vii-civil-rights-act-1964#> accessed 9 February 2025.
[107] Ajunwa (n16) 153.
[108] 'Glossary Disparate Impact' (Thomson Reuters Practical Law) <https://uk.practicallaw.thomsonreuters.com/1-502-2874?transitionType=Default&contextData=(sc.Default)&firstPage=true> accessed 9 February 2025.

'smaller than 0.80'.[109] Whilst the legislation itself does not refer to algorithmic discrimination, Mobley's live claim discussed in the Introduction presents a landmark opportunity for US precedent on findings of algorithmic discrimination in recruitment.[110]

As Raghavan and others emphasise, the US framework is hugely influential not only in ART litigation but also in their development.[111] This is clear from the explicit references made by most US providers to the four-fifths rule.[112] In contrast, Sánchez-Monedero, Dencik and Edwards found that most UK providers 'made no claims as to debiasing'.[113] Consequently, the US's quantified requirements are more compatible with software development than the UK's abstract notions of discrimination. Not only does the dominance of this statistical approach threaten to diminish UK law but risks the normalisation of a reductive approach to bias mitigation which ignores equality's complexities.[114]

The potential impact of the US's approach has been intensified by Trump's recent threats against Brussels concerning their regulation of US companies through the EU AI Act.[115] This strained relationship exemplifies international diverging values, with Bradford explaining that the EU is rights-driven, the US market-driven, and China state-driven.[116] The recent International AI Safety Report concluded that for general-purpose AI in particular, the risks create an 'urgent need to work towards international agreement'.[117] Although several international agreements have received the support of numerous countries, none of these have yet imposed binding obligations.[118] Whilst the Council of Europe's Convention on Artificial

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[109] Raghavan and others (n46) 471, 476; Sánchez-Monedero, Dencik and Edwards (n80) 461.
[110] *Mobley* (n1); Acheson and Epstein (n1); Clark (n1); Clarke (n1); 'Derek Mobley v Workday Inc (2024)' (FindLaw 2024) <https://caselaw.findlaw.com/court/us-dis-crt-n-d-cal/116378658.html> accessed 3 February 2025; Gigante, Young and Morris (n1); HR Works (n1); See and Tyman (n1).
[111] Raghavan and others (n46) 472.
[112] ibid; Sánchez-Monedero, Dencik and Edwards (n80) 463.
[113] Sánchez-Monedero, Dencik and Edwards (n80) 459.
[114] ibid; Raghavan and others (n46) 477-478.
[115] Barbara Moens, Henry Foy and Melissa Heikkilä, 'EU pushes ahead with enforcing AI Act despite Donald Trump warnings' *Financial Times* (London, 4 February 2025) <https://www.ft.com/content/b4e10389-1a66-4c3e-922e-a4d74b616ec6?desktop=true&segmentId=d8d3e364-5197-20eb-17cf-2437841d178a#myft:notification:instant-email:content> accessed 5 February 2025.
[116] Jarovsky, Interview with Bradford (n8).
[117] Department for Science, Innovation and Technology, 'International AI Safety Report 2025' (Department for Science, Innovation and Technology, 18 February 2025) <https://www.gov.uk/government/publications/international-ai-safety-report-2025/international-ai-safety-report-2025> accessed 1 May 2025.
[118] 'About GPAI' (The Global Partnership on Artificial Intelligence) <https://gpai.ai/about/> accessed 1 May 2025; G7, 'Hiroshima Process International Code of Conduct for Organizations Developing Advanced AI Systems' (G7, 30 October 2023) <https://www.mofa.go.jp/files/100573473.pdf> accessed 1 May 2025; OECD, 'Recommendation of the Council on Artificial Intelligence' (OECD/LEGAL/0449, 22 May 2019) <https://legalinstruments.oecd.org/en/instruments/OECD-LEGAL-0449> accessed 1 May 2025; 'Statement on Inclusive and Sustainable Artificial Intelligence for People and the Planet' (Government of France, 11 February 2025) <https://www.elysee.fr/en/emmanuel-macron/2025/02/11/statement-on-inclusive-and-sustainable-artificial-intelligence-for-people-and-the-planet> accessed 1 May 2025; UK Government, 'The Bletchley

Intelligence and Human Rights, Democracy, and the Rule of Law seeks to impose binding principles extending to 'equality and non-discrimination', it is yet to be ratified.[119] Given Trump's hostility towards the EU AI Act and the UK's recent alignment with his administration's values in refusing to sign the Paris AI Summit joint communique, US and UK receptivity to international regulatory harmony is uncertain.[120] Consequently, as Bradford cautions, political tensions within the AI race (particularly between the US and China) threaten the workability of international cooperation.[121] Therefore, given the political uncertainty of international harmony, this article will focus on the domestic regulation of algorithmic discrimination. Given the likelihood of regulatory divergence, if the UK is to avoid the market disregarding its approach, it must urgently clarify its regulatory stance before the EU and the US fight to establish hegemony renders UK law obsolete in the international sphere.[122]

Although ARTs promise efficiency, they raise discrimination risks, particularly given their opacity and employers' over-confidence in their objectivity. The UK currently lacks AI-specific legislation, instead relying on the EA and data protection laws to regulate algorithmic discrimination. In contrast, international approaches tackle algorithmic discrimination more directly. The EU AI Act's emphasis on transparency and bias mitigation will be felt by UK companies even in a post-Brexit world and offers a potential model for reform. Similarly, the US's dominance in the technology market highlights the influence of its four-fifths rule internationally, creating friction with the UK's abstract equality standards. As ARTs become ever more prevalent, the UK must decide whether its existing legal framework is sufficient or if reform is needed to safeguard against algorithmic discrimination and secure its international influence. Consequently, Part 3 will analyse the misgivings of the EA when applied to the algorithmic discrimination context to establish the extent to which there is a need for reform.

Declaration by Countries Attending the AI Safety Summit, 1-2 November 2023' (UK Government, 1-2 November 2023) <https://www.gov.uk/government/publications/ai-safety-summit-2023-the-bletchley-declaration/the-bletchley-declaration-by-countries-attending-the-ai-safety-summit-1-2-november-2023> accessed 1 May 2025; UNESCO, 'Recommendation on the Ethics of Artificial Intelligence' (SHS/BIO/PI/2021/1, 23 November 2021) <https://unesdoc.unesco.org/ark:/48223/pf0000381137> accessed 1 May 2025.

[119] Council of Europe, 'Framework Convention on Artificial Intelligence, Human Rights, Democracy and the Rule of Law' (Treaty Series No 225, 5 September 2024) Article 10 <https://rm.coe.int/1680afae3c> accessed 1 May 2025.

[120] Anna Gross and others, 'Keir Starmer chooses AI security over "woke" safety concerns to align with Donald Trump' *Financial Times* (London, 14 February 2025) <https://www.ft.com/content/2fef46bf-b924-4636-890e-a1caae147e40?desktop=true&segmentId=d8d3e364-5197-20eb-17cf-2437841d178a#myft:notification:instant-email:content> accessed 30 April 2025; Moens, Foy and Heikkilä (n115).

[121] Jarovsky, Interview with Bradford (n8).

[122] Sánchez-Monedero, Dencik and Edwards (n80) 459.

3. Key issues with the Equality Act 2010

As established in Part 2, the proliferation of ARTs poses significant discrimination risks currently not specifically addressed in UK law. Consequently, this part moves on to assess the limitations of the UK's existing framework, the EA, in the algorithmic context. Flaws are identified in each of the three stages of bringing a claim: the grounds for claims, establishing discrimination, and remedies. Firstly, it is argued that the lived experiences of claimants are inadequately reflected in the law due to the omission of class and artificial atomisation of individuals' multi-layered perspectives.[123] Where claimants do find sufficient grounding for their claim, successfully establishing discrimination is problematic considering the difficulty of acquiring evidence from black box systems.[124] The lengths to which some may go to obtain evidence may be in vain, however, where employers are able to justify indirect algorithmic discrimination.[125] Finally, the individualistic nature of the available remedies means that successful claimants will be unable to initiate systemic change, meaning that the scale of algorithmic discrimination will be unstemmed by individual enforcement.[126] Consequently, the EA's multiple deficiencies in ignoring classism and intersectionality; placing unrealistic evidential burdens on claimants; and failing to provide systemic remedies highlight that it is currently an inadequate means of tackling algorithmic discrimination and so requires urgent reform.

3.1. Oversights in the grounds for algorithmic discrimination claims

3.1.1. The omission of class as a protected characteristic

It is first necessary to establish the characteristics relevant to algorithmic discrimination to determine the grounds on which claimants will need to be able to bring their claims. As Malleson emphasises, 'in the UK today the most determinative fact in relation to most people's life chances is their socio-economic origin and status'.[127] The significance of class extends to the algorithmic context, as seen by the CV screener discussed in Part 2 which placed decisive

[123] See 3.1.
[124] See 3.2.1.
[125] See 3.2.2.
[126] See 3.3.
[127] Kate Malleson, 'Equality Law and the Protected Characteristics' (2018) 81(4) MLR 598, 612.

weight on the socially elite sport of high school lacrosse.[128] Ajunwa has further identified the role of class in video interviews, explaining that one algorithm was found to favour middle-class applicants based on how they spoke and the language used.[129]

In the UK, the most infamous example of algorithmic class bias was the 2020 COVID exam results algorithm which moderated teacher-assessed grades based on 'the school's performances in each subject over the previous three years'.[130] Whilst this pattern-matching approach succeeded in producing results 'consistent with how schools had done in the past', it was deeply flawed on an individual level as 'a bright student from an underperforming school was likely to have their results downgraded through no fault of their own'.[131] Results for smaller class sizes were determined with greater weight given to their teachers' estimates, contributing to a skew that saw private schools enjoy a rise in A*/As of 4.7%, compared to a mere 2% and 0.3% rise for state schools and further education colleges respectively.[132] As Cowburn reported, despite the regulator refusing to admit "systemic bias", 'the biggest reduction in the proportion of students awarded C grades and above after moderation was recorded within those from disadvantaged backgrounds'.[133] Consequently, class discrimination is clearly relevant to algorithmic discrimination.

Those wishing to bring a claim under the EA must first establish which of the nine protected characteristics the alleged discrimination relates to.[134] For example, Amazon's biased automated outputs constitute sex discrimination as women's CVs were downgraded for references to the word 'women's'.[135] However, despite the prevalence of algorithmic class discrimination, prospective claims are left groundless as Parliament failed to recognise class as a protected characteristic.[136]

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[128] See 2.1.2.
[129] Special Staffing Group (n36).
[130] 'A-levels and GSCEs: How did the exam algorithm work?' (BBC News, 20 August 2020) <https://www.bbc.co.uk/news/explainers-53807730> accessed 23 March 2025.
[131] ibid.
[132] ibid; Ashley Cowburn, 'A-level results: Gavin Williamson facing backlash over grading system as private schools see biggest increase in top grades' *The Independent* (London, 13 August 2020) <https://www.independent.co.uk/news/uk/politics/a-level-results-private-school-state-gavin-williamson-grades-a9669571.html> accessed 23 March 2025.
[133] Cowburn (n132).
[134] EA, ss 13, 19.
[135] Ajunwa (n16) 84; see 2.1.2.
[136] Alex Benn, 'The Big Gap in Discrimination Law: Class and the Equality Act 2010' [2020] *University of Oxford Human Rights Hub Journal* 30, 31 U-of-OxHRH-J-The-Big-Gap-1-1.pdf ; Andrew Fagan, 'Taking Class Seriously' (2023) 45(2) Hum.Rts.Q. 260, fn 50 https://doi.org/10.1353/hrq.2023.0013; James Morgan, 'The class ceiling - how companies should tackle the issue of social mobility' (2023) 12(5) CRJ 12 https://uk.westlaw.com/Document/I49E42420695C11EE97B6AF4A7E10DB2F/View/FullText.html last accessed 16 April 2026.

Many have cited issues of definition as the reason for this omission.[137] Fagan concedes that 'class identity is a notoriously complex and debated social fact… class cannot be reduced to any singular and universal set of defining… attributes'.[138] Following Bourdieu's conception of class as comprised of social, cultural, and economic capital, Benn identifies a broad range of markers, including an individual's heritage, living situation, education, financial circumstances, social connections, and accent.[139] However, many have argued that conceptual difficulty alone is an insufficient reason for the law not to operate.[140] For example, the protected characteristic of belief is self-circularly defined as including 'any religious or philosophical belief', as well as 'a lack of belief'.[141] The development of such definitions through judicial interpretation has consequently been vital for the sake of clarity and keeping definitions relevant.[142] Accordingly, belief has been interpreted to extend as far as veganism.[143] Therefore, as Benn explains, a rigid definition is both unnecessary and undesirable for a protected characteristic to be recognised in a way that sufficiently represents the complexity of individuals lived experiences.[144]

Another explanation for the exclusion of class is that most protected characteristics are symmetrical.[145] However, a symmetrical conception of class risks exploitation by the socioeconomically elite seeking to claim that diversity initiatives discriminate against them by preferring lower-class individuals.[146] Consequently, Morgan and Fredman advocate for an asymmetrical conception centred on socioeconomic disadvantage.[147] The recognition of other asymmetrical characteristics, including pregnancy and maternity, gender reassignment, and

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137 Benn (n136) 34-35; Morgan (n136) 12.

138 Fagan (n136) 265.

139 Benn (n136) 31, 37; Pierre Bourdieu, 'The Forms of Capital' in Nicole W Biggart (ed), *Readings in Economic Sociology* (Blackwell Publishers 2002) 280-288; Diane Reay, *Miseducation: Inequality, education and the working classes* (Bristol University Press 2017) 15, 26.

140 Benn (n136) 35-39; Morgan (n136) 12-13; Geraldine Van Bueren, 'Inclusivity and the law: do we need to prohibit class discrimination?' (2021) 3 E.H.R.L.R. 274, 281 https://www.biicl.org/documents/138_inclusivity_and_the_law_-_ehrr_article.pdf last accessed 4 April 2026.

141 EA, s 10(2).

142 Benn (n136) 36; Morgan (n136) 13.

143 'Mr J Casamitjana Costa v The League Against Cruel Sports: 3331129/2018' (GOV.UK, 3 February 2020) <https://www.gov.uk/employment-tribunal-decisions/mr-j-casamitjana-costa-v-the-league-against-cruel-sports-3331129-2018> accessed 6 April 2025; Benn (n136) 36; Morgan (n136) 13; Van Bueren (n140) 283.

144 Benn (n136) 35-39; Morgan (n136) 12-13; Van Bueren (n140) 281.

145 Benn (n136) 59; Morgan (n136) 12.

146 Benn (n136) 60; Sandra Fredman, 'Positive duties and socio-economic disadvantage: bringing disadvantage onto the equality agenda' (2010) 3 E.H.R.L.R. 290, 294 https://www.researchgate.net/profile/Sandra-Fredman-2/publication/228183978_Positive_Duties_and_Socio-Economic_Disadvantage_Bringing_Disadvantage_onto_the_Equality_Agenda/links/53ee49c90cf23733e80ba00b/Positive-Duties-and-Socio-Economic-Disadvantage-Bringing-Disadvantage-onto-the-Equality-Agenda.pdf?_tp=eyJjb250ZXh0Ijp7ImZpcnN0UGFnZSI6InB1YmxpY2F0aW9uIiwicGFnZSI6InB1YmxpY2F0aW9uIn19 last accessed 4 April 2026; Morgan (n136) 12.

147 Fredman (n146) 294; Morgan (n136) 12.

disability demonstrates that this would not be an anomaly.[148] However, these characteristics are naturally asymmetric as individuals who represent the antithesis are labelled in the negative as *not* pregnant, *not* having gone through gender reassignment, and *not* disabled. In contrast, socioeconomically privileged individuals remain within the spectrum of the characteristic as upper-/middle-class, making class akin to symmetrical characteristics like age, race, and gender. Therefore, socioeconomic disadvantage would be artificially asymmetric.

Furthermore, socioeconomic disadvantage would fail to adequately recognise all three of Bourdieu's forms of capital as the term predominantly focuses on an individual's economic status.[149] As Benn explains, the risk of the exploitation of symmetrical protected characteristics by traditionally advantaged groups is not unique to class, with positive action provisions provided under the EA to tackle this issue.[150] Fredman criticises that in the context of recruitment, this remains narrow as positive action is limited to circumstances where the candidate is 'equally well qualified' as their comparatively advantaged rival.[151] However, as this issue is not class-specific, the solution lies in reforming positive action, not denying recognition to an entire type of discrimination. Therefore, the risk of exploitation does not warrant the omission of class but rather points to the value that consideration of classism brings to the development of the law.[152]

Class does differ, however, in the fact that socioeconomic disadvantage is both a symptom and a cause of inequality. As Fagan explains, the EA takes a 'politics of recognition' approach which deems that all characteristics in the spectrum are equally desirable meaning they should be equally represented.[153] Fagan argues that 'as opposed to providing opportunities to take pride in being poor and marginalized', addressing classism requires systemic change which works to eradicate the socioeconomic inequalities in society.[154] Section 1 of the EA promised this by '[requiring] public bodies to consider the impacts of public policy decisions on socio-economic markers'.[155] However, the provision was never brought into force in England.[156] Van

[148] Morgan (n136) 12.
[149] Benn (n136) 61.
[150] ibid 63-64; EA, s 159.
[151] Sandra Fredman, *Discrimination Law* (3rd edn, Oxford University Press 2023) 393; EA, s 159(4)(a); Benn (n136) 63.
[152] Benn (n136) 63-64.
[153] Fagan (n136) 275.
[154] ibid 273, 281; Malleson (n127) 615.
[155] Verdin (n62) 44; Benn (n136) 32; Van Bueren (n140) 278.
[156] Verdin (n62) 44; Benn (n136) 32; Sandra Fredman, 'The public sector equality duty' (2011) 40(4) ILJ 405, 407 https://doi.org/10.1093/indlaw/dwr019 last accessed 4 April 2026; IDS Employment Law Brief, 'The Equality Act 2010 - ten years on' (2020) 1130 IDS Emp. L. Brief 2 https://uk.westlaw.com/Document/I5934900014C211EB83D4D10FC4114473/View/FullText.html last accessed 16 April 2026; Van Bueren (n140) 278.

Bueren cautions that even if enacted, s 1 should have been a 'complement rather than… a substitute to prohibiting class discrimination'.[157] Public law systemic change provides a gradual means of addressing the root causes of inequality. For individuals suffering specific acts of classism, including algorithmic discrimination, a targeted means of addressing the symptoms is consequently needed in private law.

This has been recognised by legislators in multiple jurisdictions, with provisions addressing class discrimination in force in Canada, Cyprus, India, and South Africa.[158] The inclusion of class as a protected characteristic has consequently been advocated for by many, with Van Bueren condemning the current omission as 'an extraordinary lacuna'.[159] The preferential outcomes for private schools and participants of socially elite sports under automated decision-making demonstrate the perpetuation of classism by algorithms. Therefore, without recognition of class as the tenth protected characteristic, the EA remains unfit to tackle algorithmic discrimination.

3.1.2. Intersectional discrimination

However, even with the addition of class as a protected characteristic, the grounds for discrimination fail to sufficiently reflect individuals lived experiences.[160] Scholarship on intersectional discrimination was first developed through a focus on the unique experiences of Black women, recognising the artificiality of treating racism and sexism 'as hermetically sealed categories'.[161] Crenshaw's seminal work explains that feminist perspectives have traditionally centralised the experiences of white women, whilst understandings of racial discrimination have prioritised the viewpoint of Black men, leaving neither reflective of Black women's unique experiences.[162] Crenshaw coined the term 'intersectionality' to reflect that Black women's experiences are 'greater than the sum of racism and sexism', recognising the 'matrix

[157] Van Bueren (n140) 278.
[158] Fagan (n136) 271; Fredman (n146) 294; Morgan (n136) 13; Van Bueren (n140) 281, 283.
[159] Van Bueren (n140) 274; Benn (n136); Morgan (n136).
[160] Shreya Atrey, 'On the Central Case Methodology in Discrimination Law' (2021) 41(3) O.J.L.S. 776 https://doi.org/10.1093/ojls/gqab003 last accessed 4 April 2026.
[161] ibid 785; Kimberle Crenshaw, 'Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics' (1989) 1 U.Chi.Legal F. 139 https://doi.org/10.1093/oso/9780198782063.003.0016 last accessed 4 April 2026.
[162] Crenshaw (n148); Atrey (n147) 785; Kimberle Crenshaw, 'Mapping the Margins: Intersectionality, Identity Politics, and Violence Against Women of Color' (1991) 43(6) Stan.L.Rev. 1241, 1244 https://www.jstor.org/stable/1229039 last accessed 4 April 2026.

of oppression'.[163] Application of the concept has since extended to cover the intersection of many different oppressions based on the overarching idea that 'intersectional paradigms remind us that oppression cannot be reduced to one fundamental type and that oppressions work together in producing injustice'.[164]

Intersectionality has been developed to cover 'algorithmic misogynoir' which explains how the "anti-Black racist misogyny that Black women experience" '[plays] out online and in code for Black women'.[165] Accordingly, Buolamwini and Gebru found that FRS used to identify subjects' genders was more accurate in classifying males than females, and lighter than darker subjects.[166] In line with 'algorithmic misogynoir' scholarship, 'an intersectional breakdown [revealed] that all classifiers performed worst on darker female subjects', with the error difference between lighter males and darker females as high as 34.4%.[167] However, intersectionality remains absent from most audits due to 'the complexity of expressing the concept of intersectionality in a mathematical way'.[168] Even more concerningly, Schellmann reveals that after discovering 'Black women did not pass the four-fifths rule compared to white men', Pymetrics omitted findings on intersectional fairness in their audit because they believed it unfair to include something they were unable to correct.[169] Therefore, despite its prevalence in the algorithmic context, intersectional discrimination remains a neglected concern by technology companies, highlighting the need for the law to intervene.

However, the EA is again deficient due to its restriction to a single-axis conception of discrimination.[170] Recognition of multiple discrimination is limited to additive discrimination, covering less favourable treatment 'because of more than one protected characteristic at one time' where 'the forms of discrimination are distinct', '[increasing] in size and not nature'.[171] Intersectional discrimination based on the "unique combination of characteristics" remains outside the law's scope.[172] Section 14 of the EA promised to change this by recognising

[163] Crenshaw (n161) 140; Ajunwa (n16) 315; Atrey (n160) 790-791; Benn (n136) 55; Rand Shahin, '"Intersectionality": A Blind-Spot Missed in the British Equality Framework?' (2020) 6(1) *LSE Law Review* 32, 33 https://lawreview.lse.ac.uk/articles/10.61315/lselr.85 last accessed 4 April 2026.
[164] Patrica Hill Collins, *Black Feminist Thought: Knowledge, Consciousness, and the Politics of Empowerment* (Routledge 1990) 21.
[165] Brandeis Marshall, 'Algorithmic misogynoir in content moderation practice' (Heinrich-Böll-Stiftung June 2021) 4 <https://eu.boell.org/sites/default/files/2021-06/HBS-e-paper-Algorithmic-Misogynoir-in-Content-Moderation-Practice-200621_FINAL.pdf> accessed 2 November 2024.
[166] Buolamwini and Gebru (n37) 8.
[167] Marshall (n165) 4; ibid 8.
[168] Sánchez-Monedero, Dencik and Edwards (n80) 463.
[169] Schellmann (n15) 173.
[170] Atrey (n160) 777.
[171] James Hand, 'Combined Discrimination - section 14 of the Equality Act 2010: a partial and redundant provision?' [2011] P.L. 482, 483-484; Shahin (n163) 42.
[172] Hand (n171) 484; Shahin (n163) 43.

discriminatory treatment 'because of a combination of two relevant protected characteristics' which results in the claimant being treated 'less favourably' than 'a person who does not share either of those characteristics'.[173] However, s 14 was never brought into force to limit the burden on businesses.[174] Solanke criticises this reasoning for placing the interests of employers above the insurmountable costs to 'society when those who suffer discrimination are unable to access a remedy'.[175]

Even those in support of recognising intersectionality have criticised its formulation in s 14, due to its limitation to two characteristics and direct discrimination.[176] Whilst done for pragmatic reasons, again to recognise the interests of businesses, Hand argues this ironically undermines intersectionality's fundamental idea that individuals' multi-faceted lived experiences must not be artificially restricted.[177] Consequently, neither the law's current single-axis conception nor the prospective provision's limited form adequately covers the complexity of intersectional discrimination.

Some have argued that the intersectionality gap has been filled by judicial interpretation.[178] In *Lewis* and *Mackie*, the claimants were successful in establishing their claims of intersectional discrimination as a Black woman and an Indian woman respectively.[179] The Employment Tribunal recognised that their experiences were 'qualitatively different' from that of the sum of the constituent characteristics.[180] However, the Court of Appeal has since 'rejected the possibility of intersectional discrimination achieving recognition', overturning the Employment Tribunal's decision in *Bahl* on the basis that racism and sexism must be considered separately.[181] Shahin highlights the injury caused by this approach, explaining that, 'by requiring Bahl to break down her intersectional experiences into manageable claims, the [Court of Appeal] effectively failed to reflect her multi-layered experience and the true extent of their suffered injustice'.[182] Whilst the Employment Tribunal has subsequently appeared to acknowledge intersectional discrimination, this has not been explicitly endorsed by the

[173] Verdin (n62) 44.
[174] ibid 45; Iyiola Solanke, 'Infusing the silos in the Equality Act 2010 with synergy' (2011) 40(4) ILJ 336, 355 https://doi.org/10.1093/indlaw/dwr024 last accessed 4 April 2026.
[175] Solanke (n174) 355-356.
[176] Hand (n171) 485-486; Solanke (n174) 346-347.
[177] Hand (n171) 486.
[178] ibid 490.
[179] *Lewis v Tabard Gardens TMC Ltd* [2005] 2303327/04; *Mackie v G & N Car Sales Ltd t/a Britannia Motor Co* 1806128/03; Shahin (n151) 43.
[180] Shahin (n163) 43.
[181] ibid 44-45; *Bahl v Law Society* [2004] EWCA Civ 1070, [2004] I.R.L.R. 799; Pitt and Drew (n62) 73.
[182] Shahin (n163) 44-45.

appellate courts.[183] Therefore, recognition of intersectional discrimination remains unstable, highlighting the need for legislative clarification. Consequently, the neglect of intersectionality in technical audits and the law means that the 'full complexity and intensity' of algorithmic discrimination goes unrecognised, rendering the EA deficient.[184]

3.2. Challenges in establishing algorithmic discrimination

3.2.1. Evidential difficulties

Even where a sole grounding characteristic does sufficiently cover the claimant's lived experience, they will meet subsequent hurdles in seeking to prove their claim. In the employment context, recruitment in particular, employers yield significant power. Ajunwa explains that 'platform authoritarianism makes clear the unequal power relationship between the job applicant and the platform, which allows the platform to dictate how the job applicant may use the platform'.[185] Many employers do not provide feedback to candidates rejected in early rounds, particularly where ARTs are utilised. Consequently, as Kelly-Lyth emphasises, 'while a job applicant might intuit human bias in a traditional recruitment process, a rejection email telling them that they have failed to satisfy the required metrics will probably not inspire suspicions of unlawful discrimination'.[186] Due to the absence of human markers of bias, algorithmic discrimination only becomes clear across large numbers of applications.[187] Whilst Mobley, discussed in the Introduction, was able to identify his disadvantage on individual insight alone, he had accumulated over 100 rejections before bringing the claim.[188] Therefore, isolated instances of discrimination will likely go unidentified meaning that claimants will not only have difficulty evidencing their claim but are likely to miss the injustice in the first place.

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[183] ibid 46; Catriona Cannon, 'Muslim women in the workplace and the Equality Act 2010: Opportunities for an intersectional analysis' (2023) 23(3) I.J.D.L. 185, 192-193 https://doi.org/10.1177/13582291231176513 last accessed 4 April 2026; *Ministry of Defence v DeBique* [2010] I.R.L.R. 471; *O'Reilly v BBC & Anor* 2200423/2010.
[184] Atrey (n160) 781.
[185] Ajunwa (n16) 352-353.
[186] Kelly-Lyth (n21) 919; Sandra Wachter, Brent Mittelstadt and Chris Russell, 'Why Fairness Cannot Be Automated: Bridging the Gap Between EU Non-Discrimination Law and AI' (2021) 43 C.L.S.Rev. 1, 67 <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3547922> accessed 30 April 2025.
[187] Katya Hosking and Roseanne Russell, 'Discrimination Law, Equality Law, and Implicit Bias' in Michael Brownstein and Jennifer Saul (eds) *Implicit Bias and Philosophy, Volume 2: Moral Responsibility, Structural Injustice, and Ethics* (Oxford University Press 2016) 257; Wachter, Mittelstadt and Russell (n186) 67.
[188] *Mobley* (n1); Clark (n1); 'Derek Mobley v Workday Inc (2024)' (FindLaw 2024) <https://caselaw.findlaw.com/court/us-dis-crt-n-d-cal/116378658.html> accessed 3 February 2025; HR Works (n1).

Where discrimination is suspected, gathering the necessary evidence is problematic. As Kelly-Lyth explains, 'most rejected applicants will have neither the resources nor the access to test the algorithm's discriminatory tendencies, and a generalised argument that machine learning algorithms have been shown to exhibit biases is unlikely to succeed'.[189] Although held in *Dean* and *Essop* that 'candidates who suffer discrimination because of an opaque assessment' do not need to be able to explain why the assessment has disadvantaged them based on their protected characteristics, there still must be sufficient evidence that the disadvantage has in fact occurred.[190] Candidates are disadvantaged by an information asymmetry which prevents them from interrogating the ART in question to obtain the necessary evidence.[191] Kelly-Lyth notes that DPIAs 'should contain precisely the information necessary to identify [discrimination]'.[192] However, as 'DPIA publication is wholly voluntary', this paradoxically means that 'few [companies] will publicise their use of an algorithm which disadvantages historically marginalised groups', thereby maintaining the information asymmetry which disadvantages claimants.[193]

Beyond this, a deeper challenge in evidencing algorithmic discrimination lies in the opacity of these black box machines which withhold insight not only from claimants but also from developers themselves.[194] Campbell explains that 'machine learning models generate their results by operating on high dimensional correlations that are often beyond the interpretative capabilities of human scale reasoning'.[195] Ajunwa furthers that, 'given that employment algorithms consider thousands of different data points, it may be nearly impossible to prove that the [protected characteristic] in question was the deciding factor in the algorithm's ultimate employment recommendation'.[196] Accordingly, it was felt that the algorithmic decision regarding Glenn Rodriguez's parole eligibility was impossible to challenge because 'no-one was willing to go against the software's apparently objective, fact-based decision, which was based on over 100 different factors, as well as lots of different weightings'.[197] Therefore, if employers and developers themselves struggle to understand the basis of outputs, claimants

[189] Kelly-Lyth (n21) 919.
[190] ibid 919-920; *Dean v Home Office* 3301456/2010; *Essop* (n71).
[191] Ajunwa (n16) 155, 161; Kelly-Lyth (n21) 919.
[192] Kelly-Lyth (n21) 924.
[193] ibid 925.
[194] ibid 904; Ajunwa (n16) 161; Alysia Blackham, 'Setting the Framework for Accountability for Algorithmic Discrimination at Work' (2023) 47(1) MULR 63, 72-73 https://classic.austlii.edu.au/au/journals/MelbULawRw/2023/16.html last accessed 4 April 2026 ; Campbell (n34) 3; Schellmann (n15) 135; Yu and Ali (n34) 5.
[195] Campbell (n34) 3.
[196] Ajunwa (n16) 161.
[197] Deem and Warren (n13) 45.

lacking technical expertise have very little hope of obtaining the necessary evidence. Consequently, the significant hurdles obstructing claimants from successfully establishing algorithmic discrimination further highlight the EA's deficiencies.

3.2.2. Justification of indirect discrimination

If a claimant does manage to acquire the evidence needed to establish *prima facie* indirect discrimination, the defendant may still be able to justify the PCP as a 'proportionate means of achieving a legitimate aim'.[198] As established in Part 2, this possibility is relevant to algorithmic discrimination as most cases will fall under indirect discrimination.[199]

Employers will be unable to argue that the use of an ART is justified merely based on cost-efficiency alone.[200] However, Kelly-Lyth warns that employers may argue that 'using an algorithm to sift applications… [enables] a reallocation of staff time, so that more candidates are called to interview'.[201] The exploitation of this justification is particularly likely given that 'HireVue's mission is to democratize hiring' and increase the talent pool by removing the restrictions of location and travel.[202] Whilst human recruiters interview an average of only six candidates per position, the capacity of ARTs is theoretically unlimited.[203] Consequently, there is clear scope for an argument that this diversification of the talent pool is a 'legitimate aim'.[204] Subsequently, the proportionality of the PCP is assessed based on the alternatives available.[205] Therefore, where non-job-specific variables (such as names or hobbies) are identified as decisive which, if removed, would have reduced bias, the court may find a lack of proportionality.[206] Similarly, Ross argues that FRS 'is likely to encounter difficulties from a proportionality perspective because traditional recruitment methods (i.e. a face-to-face interview) could be used to fairly assess a candidate in a more nuanced manner'.[207] As there is yet to be a case in which this justification has been trialled, the judicial stance on such arguments remains to be seen. However, the potential for justification of algorithmic discrimination with such ease highlights further problems with the EA. Consequently, the

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[198] EA, s 19(2)(d).
[199] See 2.2.2.
[200] Kelly-Lyth (n21) 906.
[201] ibid 906-907.
[202] Schellmann (n15) 91.
[203] Andrew Fennell, 'Job interview statistics UK' (*StandOut CV*, 6 March 2025) <https://standout-cv.com/stats/job-interview-statistics#:~:text=Only 2%25 of candidates who,consists of 2 interview stages.> accessed 5 April 2025.
[204] EA, s 19(2)(d).
[205] Kelly-Lyth (n21) 907; Ross (n17) 13.
[206] Kelly-Lyth (n21) 907.
[207] Ross (n17) 13.

evidential difficulties yielded by the information asymmetry and black box problem, combined with the potential for the justification of indirect algorithmic discrimination, result in the likelihood that claimants will be able to successfully establish their claim being low.

3.3. Limitations of individualistic remedies

Where claimants do manage to circumvent these issues and are successful in their claim, they will typically be compensated with an award of damages.[208] This follows the individualistic nature of UK equality law.[209] The inability to 'bring class actions' means that 'group disadvantage therefore goes unchallenged unless each individual has the means, time, confidence, and courage to contest the alleged discriminatory treatment'.[210] As Blackham emphasises, this individualistic environment proves particularly problematic in the recruitment context, with such claims rarely reaching litigation as candidates are left either unaware of the discriminatory conduct or without the support to pursue it.[211] This is exacerbated by the scale of algorithmic discrimination. No longer does discrimination impact only the unlucky few assessed by a biased human recruiter. Each human recruiter has a limited capacity and whilst they may 'affect thousands of resumes in their lifetime', this pales in comparison to the 'millions of resumes' a biased ART can affect 'over an indefinite span of time'.[212] Consequently, whilst individualistic remedies may be sufficient to combat human bias, the threat of perpetual discrimination at such scale highlights the need for broader remedial powers.[213]

3.3.1. Repeal of the power to make wider recommendations

Broader remedial scope was originally provided in the judicial power to make wider recommendations, targeted at combating systemic failings.[214] To prevent future occurrences of discriminatory behaviour, judges were able to require the employer to take steps such as implementing an equality policy, setting up a review panel, publicising selection criteria, or

[208] EA, s 124(2)(b); Paula Chan, 'Non-financial remedies in discrimination' (2012) 112 ELB 3 https://uk.westlaw.com/Document/I45E39E40701711E298C697132F0CC9E9/View/FullText.html last accessed 16 April 2026.
[209] Hosking and Russell (n187) 257.
[210] ibid.
[211] Blackham (n194) 106.
[212] Special Staffing Group (n36).
[213] Blackham (n194) 93.
[214] EA, s 124(3)(b); Hosking and Russell (n187) 266.

undertaking training.[215] At the point of the initial consultation for repeal, there were four cases in which wider recommendations had been made.[216] In all four, the courts recommended that management undertake equal opportunities training, with one case bearing the additional requirement that the employer's discrimination policies be updated.[217] As elaborated on in the EA's explanatory notes, any recommendations were required to relate to a 'specific action' to be completed in 'a specified period of time'.[218] However, the power had weak enforceability, limited to consideration of past failures to implement recommendations where similar complaints were brought against the same defendant.[219]

The power to make wider recommendations was repealed under s 2 of the Deregulation Act 2015.[220] The Government cited its 'belief that it is an unnecessary burden on business', based on the estimated cost of £2,000 to employers who did implement wider recommendations.[221] Somewhat paradoxically, it was also reasoned that the power was too rarely used to be worth retaining.[222]

Opponents of the repeal (making up 79% of respondents to the government consultation) primarily contested the change because they deemed the Government's decision unduly hasty.[223] The power had been in force for less than two years and utilised in a limited number

[215] 'Equality Act 2010 Explanatory Notes' (legislation.gov.uk Revised Edition August 2010) para 406 <https://www.legislation.gov.uk/ukpga/2010/15/notes> accessed 2 November 2024; Hosking and Russell (n187) 266.

[216] Government Equalities Office, 'Equality Act 2010: employment tribunals' power to make wider recommendations in discrimination cases and obtaining information procedure: Government response to the consultation' (Government Equalities Office October 2012) 6-7 <https://assets.publishing.service.gov.uk/media/5a7a5d3c40f0b66eab99babd/consultation-response.pdf> accessed 2 November 2024.

[217] ibid; *Austin v Samuel Grant (North East) Ltd* 2503956/2011; *Crisp v Iceland Foods* 1604478/11, 1600000/12; *Stone v Ramsay Health Care UK Operations Ltd* 1400762/11; *Why v Enfield Grammar School* 3303944/2011.

[218] 'Equality Act 2010 Explanatory Notes' (legislation.gov.uk Revised Edition August 2010) para 404 <https://www.legislation.gov.uk/ukpga/2010/15/notes> accessed 2 November 2024.

[219] Paula Chan and Claire Nisbet, 'Proposals to amend the Equality Act 2010' (2012) 110 ELB 5, 6 https://uk.westlaw.com/Document/IABD825E0E5BB11E19B27B9BC6D35765F/View/FullText.html last accessed 16 April 2026; Government Equalities Office (n216) 6.

[220] Hosking and Russell (n187) 266.

[221] Chan and Nisbet (n219) 6; Government Equalities Office (n216) 3; 'Written questions, answers and statements, Employment: Discrimination: Questions for Women and Equalities' (UK Parliament 2020) <https://questions-statements.parliament.uk/written-questions/detail/2020-03-04/25001#> accessed 2 November 2024.

[222] Chan and Nisbet (n219) 6; Government Equalities Office (n216) 11.

[223] 'Association of Teachers and Lecturers - Written evidence' (UK Parliament Committees 2013) <https://committees.parliament.uk/writtenevidence/45562/html/> accessed 2 November 2024; Government Equalities Office (n216) 4, 8-9; The Law Society of Scotland, 'Government Equalities Office Consultation: Equality Act 2010, removing (a) employment tribunals power to make wider recommendations in discrimination cases, (b) the procedure for obtaining information: The Law Society of Scotland's Response' (The Law Society of Scotland August 2012) 2 <https://assets.publishing.service.gov.uk/media/5a7b1d15e5274a319e77d1cf/RET_LSS.pdf> accessed 2 November 2024.

of cases when the Government first set out its proposals for repeal.[224] It was further argued that the power provided a powerful systemic remedy, capable of reducing the total number of discrimination claims.[225] This demonstrates a potential to not only alleviate the strain on the public purse but also the burden on defendants by preventing the same employers from facing future litigation on similar, avoidable grounds.[226] Therefore, particularly considering the sparing use of the power, the remedy arguably benefitted employers as much as anyone.[227]

Support for repeal cited the limited need for systemic remedies where discrimination was attributable to isolated human error rather than company-wide policy.[228] This reasoning does not hold up in the algorithmic context where discrimination is likely to reflect a systemic fault. Many employers have jumped to implement ARTs without a proper understanding of the technology. Consequently, wider recommendations would provide guidance beyond mere common sense, seeing judicial input fill the gaps overlooked by employers in their naivety and hunger for efficiency. Wider recommendations could include requirements of regular audits, minimum levels of human supervision, or training on the technical side of how ARTs reach decisions and the translated discrimination risks. As the Association of Teachers and Lecturers submitted in their consultation evidence, utilisation of the power when in force was 'clearly proportionate and directly linked to the treatment the claimant had endured'.[229] Therefore, if wider recommendations were reintroduced and utilised in the algorithmic context, it can be confidently supported that similar proportionality would be exercised. Not only would the power be an effective way to tackle systemic algorithmic discrimination but would also likely be an economical remedy for both the justice system and employers in stemming the overwhelming number of algorithmic discrimination cases.[230] Therefore, until systemic remedies are reintroduced, the EA will remain an inadequate means of regulating algorithmic discrimination.

This part has demonstrated that the EA is currently an ineffective means of addressing algorithmic discrimination. The law fails to capture the complexity of claimants' lived experiences by enforcing a single-axis approach that omits class altogether. Even where claimants are able to ground their claim within the scope of the EA, the opacity of algorithmic

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[224] The Law Society of Scotland (n223) 2-3.
[225] Government Equalities Office (n216) 9; IDS Employment Law Brief (n156) 2.
[226] Chan and Nisbet (n219) 6.
[227] ibid; 'Association of Teachers and Lecturers - Written evidence' (UK Parliament Committees 2013) <https://committees.parliament.uk/writtenevidence/45562/html/> accessed 2 November 2024.
[228] Government Equalities Office (n216) 10.
[229] 'Association of Teachers and Lecturers - Written evidence' (UK Parliament Committees 2013) <https://committees.parliament.uk/writtenevidence/45562/html/> accessed 2 November 2024.
[230] Chan and Nisbet (n219) 6; Government Equalities Office (n216) 9; IDS Employment Law Brief (n156) 2.

systems and the resulting evidential burdens restrict access to justice. Furthermore, the EA's reliance on individual enforcement and its lack of systemic remedies means that the scale of algorithmic discrimination is inadequately addressed. These deficiencies reveal that the EA must be reformed if it is to adequately respond to algorithmic harm. Part 4 will move on to discuss that, as adequate regulation will be unachievable through reform of the EA alone (particularly in tackling algorithmic discrimination's systemic nature and the black box problem), the EA's regulatory remit must be supplemented.[231] This will include an evaluation of the range of regulatory options to consider how the EA's response to algorithmic discrimination would be best supplemented to meet the demands of these novel challenges.

4. Establishing a strong regulatory strategy

Having established in Part 3 that the EA is currently ill-equipped to address algorithmic discrimination, this part evaluates the regulatory approaches available to supplement a reformed EA. Using Brownsword's paradigms of 'Law 1.0' (rule-based coherence), 'Law 2.0' ('regulatory-instrumentalism'), and 'Law 3.0' (technological solutions), four regulatory strategies are considered, namely existing legislation, self-regulation, AI-specific formal regulation, and co-regulation.[232] Whilst existing legislation provides valuable ex-post recourse, its inability to disincentivise systemic harm necessitates supplementation with ex-ante measures. In avoiding self-regulation's limited enforceability and formal regulation's lack of adaptability, co-regulation is the ideal candidate. If bolstered by strong enforcement powers and adequate funding, the UK's co-regulatory environment would effectively complement the EA. In line with Brownsword's 'Law 3.0', technological solutions are subsequently considered as preventative and evidentiary tools capable of addressing the black box problem.[233] In considering this spectrum of regulatory options, it emerges that no single approach can adequately address algorithmic discrimination alone. Consequently, a multi-layered regulatory strategy, that improves the EA's address of systemic harm, empowers regulators in their collaboration with industry, and integrates technical safeguards, is the ideal approach.

[231] See 4.1.1.
[232] Roger Brownsword, *Law 3.0: Rules, Regulation, and Technology* (Routledge 2020) 3-4, 33.
[233] ibid.

4.1. Approaches to AI regulation

4.1.1. Existing technology-neutral legislation

As discussed in Part 2, whilst the UK may lack AI-specific legislation, this does not mean that ARTs escape regulation.[234] The EA and GDPR fill the AI-specific legislative gap, albeit with deficiencies requiring rectification. This aligns with the approach to lawmaking that Brownsword terms 'coherentism' or 'Law 1.0' which values the consistent application of general rules to novel situations.[235] Kaminski emphasises that 'AI harms are very different in different contexts' due to the diverse potential applications.[236] Consequently, although the risks of different applications can be 'traced back to a pattern of similar problems' such as 'biased training data', sector-led approaches that utilise existing technology-neutral legislation are arguably most appropriate.[237]

Despite its beneficial context sensitivity to algorithmic discrimination, the EA is limited in its ex-post remit of compensating harms that have already occurred.[238] Whilst sufficient for addressing isolated instances of human discrimination, Black and Murray explain that 'where risks are systemic even though still compensatable… ex ante regulation is required as well as ex post remediation'.[239] As discussed in Part 3, given ex-post measures are designed to compensate individual victims of isolated harms, they are ill-equipped to tackle algorithmic discrimination's scale and potentially perpetual nature.[240] Kaminski furthers that the need to establish causality ex post under US anti-discrimination law is complicated by the black box problem.[241] The irrelevance of intention or foreseeability under the EA avoids this problem. However, it remains applicable that ex-post regulation of unforeseen harms fails to incentivise developers to fix unknown problems.[242] Regulation must encourage proactive prevention. Therefore, whilst the EA's sensitivity to individual circumstances should be retained, it must

[234] See 2.2.2.
[235] Brownsword (n232) 3, 31-32.
[236] Margot E Kaminski, 'Regulating the Risks of AI' (2023) 103(5) B.U.L.Rev. 1347, 1356 https://papers.ssrn.com/sol3/Delivery.cfm/SSRN_ID4691581_code1735610.pdf?abstractid=4195066&mirid=1&type=2 last accessed 4 April 2026.
[237] ibid.
[238] Julia Black and Andrew Murray, 'Regulating AI and Machine Learning: Setting the Regulatory Agenda' (2019) 10(3) EJLT 1, 13 <https://www.ejlt.org/index.php/ejlt/article/view/722> accessed 17 April 2025.
[239] ibid.
[240] See 3.3.
[241] Kaminski (n236) 1365-1366.
[242] ibid.

be complemented with ex-ante risk regulation that 'targets a system's design and attempts to mitigate risk before harms occur', capable of addressing systemic harm.[243]

4.1.2. Self-regulation

Where existing legislation fails to regulate emerging technologies in their entirety (as with the EA's deficiencies), self-regulation provides the default solution.[244] Market forces typically dominate early emerging technology regulation, as legal understanding of the risks often fails to keep pace with innovation.[245] Self-regulation refers to measures free from external oversight voluntarily implemented by companies in their corporate social responsibility efforts, including internal auditing, codes of conduct, and ethics committees.[246]

Amazon's discontinuation of its discriminatory CV screener in 2019, as discussed in Part 2, arguably evidences how self-regulation can effectively address algorithmic discrimination.[247] However, the five-year delay highlights industry's regulatory tardiness. The harm potentially suffered by thousands would likely have been preventable earlier if subject to external oversight. As Clarke cautions, although 'it might seem attractive to organisations to face few legal obligations', where taken as a warrant to ignore corporate social responsibility in pursuit of their own interests, companies risk reputational damage that regulation provides a 'protective shield against'.[248] In choosing to disclose its ART's deficiencies and accepting the public backlash, Schellmann emphasises that Amazon's experience has disincentivised transparent self-regulation as others fear a similar fate.[249]

This highlights that self-regulation is limited by its weak enforceability.[250] Roberts and others explain that 'there have been several examples of large technology companies firing teams designed to provide ethical oversight when it does not align with their core business

[243] ibid 1369.
[244] Black and Murray (n238) 4; Roger Clarke, 'Regulatory alternatives for AI' (2019) 35 C.L.S.Rev. 398, 401 https://doi.org/10.1016/j.clsr.2019.04.008 ; Roxanna Yaghmai, 'A Critical Examination of How Artificial Intelligence Should Be Regulated in the United Kingdom' [2021] *Bristol Law Review* 59, 73 https://doi.org/10.14763/2023.2.1709 last accessed 4 April 2026.
[245] Black and Murray (n238) 4; Clarke (n244) 401; Yaghmai (n244).
[246] Clarke (n244) 404; Yaghmai (n244) 73.
[247] Blackham (n194); see 2.1.2.
[248] Clarke (n244) 400; Huw Roberts and others, 'Artificial intelligence regulation in the United Kingdom: A path to good governance and global leadership?' (2023) 12(2) *Internet Policy Review* 1, 16 <https://www.econstor.eu/handle/10419/278798> accessed 19 April 2025.
[249] Schellmann (n15) 5-6.
[250] Sonia K Katyal, 'Private Accountability in an Age of Artificial Intelligence' in Woodrow Barfield (ed), *The Cambridge Handbook of the Law of Algorithms* (Cambridge University Press 2020) 83; Yaghmai (n244) 72-73.

interests'.[251] As discussed in Part 3, Pymetrics pressured its auditors to omit intersectionality findings as they were unable to correct the issue.[252] Consequently, if market forces are left to regulate AI, enforcement limitations risk cementing industry standards that neglect mathematically complex issues like intersectionality. This was emphasised in the recent International AI Safety Report which highlighted that 'while research is emerging on detecting compounding bias in AI models progress on mitigating these biases has been slower'.[253] Additionally, as noted in Part 2, the overly simplistic US four-fifths rule has emerged as the market standard for certifying bias mitigation.[254] Therefore, self-regulation is limited by its weak enforceability but also the encouragement of insufficiently rigorous standards which oversimplify discrimination's complexity.[255]

These deficient industry standards suggest that AI regulation left to market forces will culminate in an industry plagued by corporate whitewashing.[256] Yaghmai highlights that internal codes of conduct are often deliberately vague to leave room for interpretative creativity.[257] Company law compounds this issue by incentivising directors to prioritise profit maximisation under their 'duty to promote the success of the company'.[258] Where, for example, compliance with equality commitments risks product launch delays threatening lucrative contracts, the voluntary nature of ethical duties will see them deprioritised.[259] The eye-watering valuations of technology giants highlight the imbalance between corporate and public interests, with Apple's valuation exceeding $3 trillion, representing 'over twice the annual GDP of Spain'.[260] Consequently, such voluntary measures are only appropriate where all stakeholders enjoy equal bargaining power – a far reality from the recruitment power imbalance.[261] Industry standardisation of skewed values further risks undermining subsequent public policy-focused formal regulation.[262]

However, it is not only the imbalance between technology companies and applicants that exposes self-regulation's deficiencies but also the sector's structural inequalities which secure

[251] Roberts and others (n248) 16.
[252] Schellmann (n15) 173; see 3.1.2.
[253] Department for Science, Innovation and Technology (n117).
[254] Raghavan and others (n46) 472; see 2.3.
[255] Wachter, Mittelstadt and Russell (n186) 5-6.
[256] Roberts and others (n248) 11.
[257] Yaghmai (n244) 73.
[258] Companies Act 2006, s 172; Black and Murray (n238) 8; Yaghmai (n244) 74.
[259] Black and Murray (n238) 8; Yaghmai (n244) 74.
[260] Deem and Warren (n13) 319; Shashwat Chauhan and Medha Singh, 'Apple approaches $4 trillion valuation as investors bet on AI momentum' (*Reuters*, 23 December 2024) <https://www.reuters.com/technology/apple-approaches-4-trillion-valuation-investors-bet-ai-momentum-2024-12-23/> accessed 27 April 2025.
[261] Deem and Warren (n13) 319; Clarke (n244) 404-405; Schellmann (n15) 271.
[262] Yaghmai (n244) 75.

the dominance of industry giants.[263] As Yaghmai argues, voluntary regulation risks exacerbating market asymmetries.[264] As those dominant in the market can absorb the costs of litigation, their greater legal, financial, and reputational resilience makes them more likely to risk implementing less stringent ethical standards, reinforcing monopolies.[265] Therefore, the power imbalances within the sector highlight that self-regulation is an inadequate means of regulating ARTs in a way that protects all stakeholders.

4.1.3. AI-specific formal regulation

Compared to self-regulation's weak enforceability and lack of regulatory coherence, AI-specific formal regulation may appear the solution. Clarke explains that 'formal regulation demands compliance with requirements that are expressed in… specific terms' and 'complemented by [state] sanctions and enforcement powers'.[266] Tutt advocates for stringent measures comparable to the 'rigorous safety testing' involved in the pre-approval process for medicines.[267] Requiring developers to obtain pre-market approval appears the ultimate safeguard against discrimination.[268] However, blanket licensing proposals ignore the diverse risks posed by different AI applications.[269] As Black and Murray emphasise, whilst such stringent measures may be necessary where 'the risks are systemic and the harms non-compensatable' (such as in the context of automated parole decisions), ARTs do not pose a risk level warranting such measures.[270] Additionally, machine learning's dynamic nature risks licences quickly becoming meaningless as models rapidly evolve.[271] This would render the ethical certification superficial, risking the misplacement of public confidence and assurance. Consequently, pre-market licensing would be inappropriate as it would impose heavy financial burdens on public resources and developers, stifling innovation, without meaningfully safeguarding against discrimination in a way capable of matching technological development's pace.[272]

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[263] Black and Murray (n238) 7; Yaghmai (n244) 73.
[264] Yaghmai (n244) 73.
[265] Black and Murray (n238) 7; Yaghmai (n244) 73.
[266] Clarke (n244) 403.
[267] Yaghmai (n244) 71-72; Andrew Tutt, 'An FDA for Algorithms' (2017) 69(1) Adm.L.Rev. 83 https://www.administrativelawreview.org/wp-content/uploads/2019/09/69-1-Andrew-Tutt.pdf last accessed 4 April 2026; Ajunwa (n16) 371-372; Schellmann (n15) 174.
[268] Schellmann (n15) 174.
[269] Yaghmai (n244) 72.
[270] Black and Murray (n238) 13.
[271] Deem and Warren (n13) 269; Yaghmai (n244) 72; Yu and Ali (n34) 6.
[272] Deem and Warren (n13) 269; Yaghmai (n244) 72; Yu and Ali (n34) 6.

As an improvement to pre-market licensing, the EU AI Act tailors its requirements in proportion to risk.[273] As outlined in Part 2, it imposes extensive obligations concerning accuracy, data governance, cybersecurity, human oversight, and transparency.[274] These requirements are enforced through a multi-level implementation structure, with EU-level bodies including the new European AI Board and AI Office overseeing coordination, and market surveillance and notifying authorities responsible for domestic enforcement.[275] Notified bodies also play a key role in conducting conformity assessments of high-risk AI systems.[276] These bodies are bolstered by strong enforcement powers. However, this is again proportionate to risk level, with systems posing unacceptable risk threatened with the highest fines of up to €35 million or '7% of [the offender's] total worldwide annual turnover'.[277] Unlike the UK's arguably strained application of existing legislation, this exemplifies a 'Law 2.0', or 'regulatory-instrumentalism', approach.[278] Therefore, the EU AI Act arguably supports the idea that purpose-built regulation focusing on policy over consistency of principles achieves greater regulatory coherence.[279] Consequently, the EU AI Act represents a robust yet proportionate regulatory model from which the UK could take inspiration.[280]

However, as noted in Part 2, despite committing to AI legislation in the King's speech, the UK Government's desire to legislate remains dubious considering a bill is yet to materialise.[281] This is primarily attributable to concern that premature legislation will stifle innovation.[282] Given that 'the UK AI market is predicted to grow to over $1 trillion… by 2035', the Government are clearly economically motivated to deliver a regulatory environment that facilitates the UK's reputation as an AI leader.[283] Achievement of this is threatened by formal

[273] EU AI Act (n8); Van Asbroeck and others (n85) 3.
[274] See 2.3.
[275] Van Asbroeck and others (n85) 7, 10, 20, 50.
[276] ibid 7.
[277] EU AI Act (n8) Article 99(3); Van Asbroeck and others (n85) 16, 20.
[278] Brownsword (n232) 3, 33.
[279] ibid 3, 33.
[280] 'Recording: HR Data Essentials Webinar 10 Sept 2024 - AI In Employment' (Bird & Bird, 12 September 2024) <https://www.twobirds.com/en/twobirds-tv/global/hr-data-essentials-webinar-10-sept-2024-ai-in-employment> accessed 30 October 2024.
[281] Deniston, Edwards and Bond (n58); see 2.2.1.
[282] Department for Science, Innovation and Technology, *A pro-innovation approach to AI regulation* (White Paper, Cmd 815, 2023) paras 28, 55 <https://www.gov.uk/government/publications/ai-regulation-a-pro-innovation-approach/white-paper#annex-a-implementation-of-the-principles-by-regulators> accessed 31 August 2024; Chris Reed, 'How should we regulate artificial intelligence' (2018) 376(2128) *Philosophical Transactions of the Royal Society A: Mathematical, Physical and Engineering Sciences* 1, 2 <https://royalsocietypublishing.org/doi/full/10.1098/rsta.2017.0360> accessed 17 April 2025; Yaghmai (n244) 64.
[283] Department for Science, Innovation and Technology, *A pro-innovation approach to AI regulation: Government response to consultation* (CP 1019, 2024) 3 <https://assets.publishing.service.gov.uk/media/65c1e399c43191000d1a45f4/a-pro-innovation-approach-to-ai-

regulation's inflexibility, with legislative delays risking measures becoming quickly obsolete in the face of rapid innovation.[284]

Consequently, a rush to legislate may be counterproductive.[285] Additionally, legislative eagerness ignores the extensive body of technology-neutral legislation that already applies to AI with context sensitivity.[286] Whilst the EA requires reform before fit for purpose, these comparatively minor adjustments are more achievable than comprehensive AI-specific legislation. Therefore, as Reed argues, 'masterly inactivity in regulation is likely to achieve a better long-term solution than a rush to regulate in ignorance'.[287] Reed further emphasises that 'a regulatory regime which aimed to deal with *all* uses of AI technology would be impossibly wide in scope' given the diverse challenges posed by applications ranging from 'autonomous vehicles' to 'smart refrigerators'.[288] Context sensitivity is achieved by New York City's sector-specific formal regulation of ARTs in mandating independent audits.[289] However, the constraints of legislative timelines suggest that even ART-specific legislation would suffer from insufficiently thorough and sustained dialogue with industry experts. Therefore, as concluded by the previous Government in its white paper consultation, until the risks of AI have 'matured', legislative action should be delayed.[290] The more novel risks of general-purpose AI systems may call for AI-specific regulation in the immediate future.[291] However, with the rectification of the issues identified in Part 3, the risks posed by ARTs will mostly be addressed by existing legislation, suggesting that premature formal regulation would do more harm than good.

4.1.4. Co-regulation

Although existing legislation is a more appropriate regulatory tool than AI-specific formal regulation, the EA remains limited by its ex-post application, making it unable to adequately regulate systemic algorithmic discrimination alone.[292] Circumventing self-regulation's weak

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regulation-amended-governement-response-web-ready.pdf> accessed 27 April 2025; Department for Science, Innovation and Technology (n282) para 26.

[284] Clarke (n244) 406; Schellmann (n15) 266; Yaghmai (n244) 64.

[285] Reed (n282).

[286] Department for Science, Innovation and Technology (n282) paras 26, 47.

[287] Reed (n282) 1.

[288] ibid 2.

[289] NYC LL144 (n105); Acheson and Epstein (n1); HR Works (n1); Kelly-Lyth (n21) 926; Special Staffing Group (n36).

[290] Department for Science, Innovation and Technology (n283) 7.

[291] Roberts and others (n248) 16-17.

[292] Black and Murray (n238) 13.

enforceability and formal regulation's inflexibility, a hybrid co-regulatory approach appears the most suitable ex-ante method.[293] Co-regulation refers to a spectrum of collaborative governance between the public and private sectors.[294]

Co-regulation characterises the UK's current AI strategy, as set out in the previous Government's white paper which emphasised the need for 'collaboration between government, regulators and business'.[295] This was exemplified in the non-binding agreement signed by 'leading companies including OpenAI, Google DeepMind, Anthropic, Amazon, Mistral, Microsoft and Meta' at the 2023 AI Safety Summit.[296] The agreement permits 'partner governments' to 'test the companies' latest and forthcoming models for risks and vulnerabilities'.[297] However, this agreement focuses only on the most serious risks, highlighting the need for similar measures that address bias and discrimination. The political desire for such an agreement is dubious, however, as the UK refused to sign a joint communique at the Paris AI Summit 'that pledged to ensure "AI is open, inclusive, transparent, ethical, safe, secure and trustworthy"'.[298] Similarly, in changing its name to the 'AI Security Institute', it was recently announced that the government body 'will no longer focus on risks associated with bias…, but on "advancing our understanding of the most serious risks posed by the technology"'.[299] As Gross and others explain, this demonstrates a strategic shift which has deprioritised attention to discrimination risks in an attempt 'to strengthen diplomatic ties with Donald Trump's administration'.[300] The failure to treat discrimination as an important risk is deeply concerning and threatens to undermine the UK's position as an AI leader. Therefore, the UK's co-regulatory efforts must extend to discrimination risks to prevent technology giants from exercising inappropriate discretion in this important area.

Regulatory efforts have extended to discrimination risks in a limited way through the remit of the Information Commissioner's Office (ICO) over data protection and the Equality and

[293] Yaghmai (n244) 76.
[294] ibid; Clarke (n244) 404-405; Kaminski (236) 126-127.
[295] Department for Science, Innovation and Technology (n282); James Clark and others, 'A pro-innovation approach: UK Government publishes White Paper on the future of governance and regulation of artificial intelligence' (2023) DLA Piper https://privacymatters.dlapiper.com/2023/03/a-pro-innovation-approach-uk-government-publishes-white-paper-on-the-future-of-governance-and-regulation-of-artificial-intelligence/ last accessed 4 April 2026; Roberts and others (n248) 11.
[296] Anna Gross and George Parker, 'UK's AI bill to focus on ChatGPT-style models' *Financial Times* (London, 1 August 2024) <https://www.ft.com/content/ce53d233-073e-4b95-8579-e80d960377a4?utm_source=chatgpt.com> accessed 27 April 2025; Anna Gross and Stephanie Stacey, 'UK will legislate against AI risks in next year, pledges Kyle' *Financial Times* (London, 6 November 2024) <https://www.ft.com/content/79fedc1c-579d-4b23-8404-e4cb9e7bbae3> accessed 11 January 2025.
[297] Gross and Stacey (n296); Gross and Parker (n296).
[298] Gross and others (n120).
[299] ibid.
[300] ibid.

Human Rights Commission (EHRC) over the EA.[301] Both contributed to guidance on 'Responsible AI in Recruitment'.[302] This resource advises employers on their obligations under the GDPR and EA, along with guidance on risk assessments, transparency and accountability requirements, and bias mitigation.[303] Similarly, in its recent report, the ICO discussed its engagement with industry through consensual audits, culminating in 'almost 300 recommendations to improve compliance' with data protection law.[304] Respondents rated the guidance's impact on 'improving their understanding of the requirements of UK data protection law' as a '9.3' 'out of 10'.[305] Therefore, this exemplifies the positive dynamic being fostered between regulators and industry. The ICO has committed to continuing this dialogue by producing guidance on the automated processing of biometric data (relevant to the use of FRS in video interviews) later this year.[306] However, the guidance to date is limited by its weak enforceability, highlighting that efforts regarding discrimination risks have not progressed far past self-regulation.[307]

Enforcement deficiencies are partially mitigated by the EHRC's investigation and enforcement powers.[308] Kelly-Lyth explains that 'the EHRC has the power to investigate compliance with the [EA] and take action against non-compliance'.[309] The EHRC can also 'support individual complainants in bringing their cases' where 'necessary to "clarify the law" or to "challenge… practices that cause significant disadvantage"'.[310] Accordingly, the EHRC supported the

[301] Campbell (n34) 4; Roberts and others (n248) 5-6, fn 3.
[302] Department for Science, Innovation and Technology, 'Responsible AI in Recruitment: Guidance' (Department for Science, Innovation & Technology, March 2024) <https://assets.publishing.service.gov.uk/media/65fda1b9f1d3a0001132ae5b/Responsible_AI_in_Recruitment.pdf> accessed 19 April 2025; Campbell (n34) 4.
[303] Department for Science, Innovation and Technology (n302); Campbell (n34) 4.
[304] Information Commissioner's Office, 'AI tools in recruitment: Audit outcomes report' (Information Commissioner's Office, November 2024) 3-4 <https://ico.org.uk/media/about-the-ico/documents/4031620/ai-in-recruitment-outcomes-report.pdf> accessed 11 November 2024; Clark (n1).
[305] Information Commissioner's Office (n304) 12.
[306] ibid 8; 'ICO warns of 'real danger' of discrimination in new technologies that monitor the brain' (Information Commissioner's Office, 8 June 2023) <https://ico.org.uk/about-the-ico/media-centre/news-and-blogs/2023/06/ico-warns-of-real-danger-of-discrimination-in-new-technologies-that-monitor-the-brain> accessed 30 April 2025.
[307] 'Guidance on AI and data protection' (Information Commissioner's Office, 15 March 2023) https://ico.org.uk/for-organisations/uk-gdpr-guidance-and-resources/artificial-intelligence/guidance-on-ai-and-data-protection/ accessed 19 April 2025; Information Commissioner's Office (n304) 12.
[308] Equality Act 2006, ss 20-24; Kelly-Lyth (n21) 921; 'Our enforcement powers' (Equality and Human Rights Commission, 25 June 2021) <https://www.equalityhumanrights.com/our-work/our-legal-work/our-legal-powers/our-litigation-and-enforcement-policy-2022-2025/our-0#:~:text=notice (Section 32)-,The general equality duty,the Public Sector Equality Duty).> accessed 19 April 2025.
[309] Kelly-Lyth (n21) 921.
[310] Equality Act 2006, s 28; ibid.

claimant in the FRS case against Uber Eats discussed in Part 2.[311] As Campbell expresses, although the case ultimately settled outside of court, the EHRC's involvement demonstrates that regulators are attuned to the 'significant public interest in the potential for discrimination by AI in the workplace'.[312] However, the central role of regulators like the EHRC in AI co-regulation is undermined by their inadequate resourcing.[313] The EHRC, whose 'budget has remained static at £17.1 million since 2016… [amounting] to more than a 30% cut over that time', has emphasised its inability to exercise its 'regulatory powers against larger multinational technology firms'.[314] Consequently, as Kelly-Lyth argues, if regulators' extensive context-specific expertise is to be harnessed, adequate funding is vital.[315] This funding should be directed towards bolstering the enforceability of the EHRC and ICO's guidance, solidifying a co-regulatory approach led by regulators rather than market forces.[316] Enforcement measures could include the power to issue unlawful act notices where the EHRC discovers failures to comply with its guidance. With such enforcement powers and adequate funding, co-regulation would be the ideal complement to the EA.[317]

Co-regulation has been characterised by some as leaving industry players to enjoy inappropriate discretion.[318] However, the ICO's positive dialogue with industry accords with Ajunwa's determination that collaboration is needed to bring agility to AI regulation.[319] If developments in the risk landscape necessitate future formal regulation, the co-regulatory spectrum offers a smoother transition than self-regulation, which characterises law and industry as opposing forces. However, the current superficial guidance must be strengthened into effective co-regulation. If regulators are granted strong enforcement powers facilitated by adequate funding, co-regulation will prove a powerful component of AI regulation.

[311] 'Mr P E Manjang v Uber Eats UK Ltd and others: 3206212/2021' (GOV.UK, 25 July 2022) <https://www.gov.uk/employment-tribunal-decisions/mr-p-e-manjang-v-uber-eats-uk-ltd-and-others-3206212-slash-2021> accessed 28 January 2025; Campbell (n34) 4; Moss (n39); see 2.1.2.
[312] Campbell (n34) 4.
[313] 'An update on our approach to regulating artificial intelligence' (Equality and Human Rights Commission, 30 April 2024) <https://www.equalityhumanrights.com/media-centre/news/update-our-approach-regulating-artificial-intelligence> accessed 19 April 2025; Kelly-Lyth (n21) 922; Roberts and others (n248) 13-14.
[314] 'An update on our approach to regulating artificial intelligence' (Equality and Human Rights Commission, 30 April 2024) <https://www.equalityhumanrights.com/media-centre/news/update-our-approach-regulating-artificial-intelligence> accessed 19 April 2025.
[315] Kelly-Lyth (n21) 928; Clarke (n244) 406; Roberts and other (n248) 16.
[316] Kelly-Lyth (n21) 928; Roberts and other (n248) 16.
[317] Clarke (n244) 406; Roberts and others (n248) 13.
[318] Ajunwa (n16) 351.
[319] ibid; Information Commissioner's Office (n304) 12.

4.2. Technological solutions

Co-regulation appears the most appropriate traditional regulatory supplement to the EA. However, given that AI has transformed the technological landscape, it seems fitting that the legal landscape explores a similarly revolutionary approach. Accordingly, in his conception of 'Law 3.0', Brownsword probes the idea of moving away from rule-based regulation towards technological solutions.[320] As Wachter, Mittelstadt and Russel emphasise, the reliance on judicial 'intuition' required by abstract equality notions 'is poorly suited to detect automated discrimination that does not… resemble human discrimination, and can be altogether more subtle, widespread, and based on complex patterns and correlations'.[321] This is particularly where the role of a protected characteristic is concealed by a proxy.[322] Consequently, 'this is precisely the accountability gap the technical community can help solve… by designing systems and tools that support consistent detection and assessment of *prima facie* automated discrimination'.[323] Overcoming the black box problem, this could include using AI itself as an auditing tool or even coding proportionate shortlisting by demographic into the ARTs.[324] Ajunwa expresses that, unlike 'the human mind' as 'the biggest black box that exists', AI 'can allow us to discover bias' if audited effectively.[325] Therefore, in line with technological utopianism, the potential for statistical interrogation suggests that algorithmic hiring may one day revolutionise recruitment into a fairer industry than its human-dominated past.[326]

However, technological solutions require equality to be a statistically representable goal, conflicting with the nuances that enrich UK equality law.[327] As discussed in Part 3, the US four-fifths standard fails to account for intersectionality or any contextual depth.[328] Wachter, Mittelstadt and Russell's proposed 'Conditional Demographic Disparity' (CDD) standard assesses whether ARTs disproportionately disadvantage individuals with protected characteristics after controlling for relevant qualifications.[329] For example, if women with over five years' experience comprise 80% of rejected candidates but only 40% of those interviewed,

[320] Brownsword (n232).
[321] Wachter, Mittelstadt and Russell (n186) 48, 67.
[322] ibid 67.
[323] ibid 48.
[324] ibid.
[325] Special Staffing Group (n36).
[326] ibid; 'Technological Utopianism' (Massachusetts Institute of Technology) <https://web.mit.edu/m-i-t/science_fiction/jenkins/jenkins_1.html> accessed 1 May 2025.
[327] Wachter, Mittelstadt and Russell (n186) 5-6, 66.
[328] Department for Science, Innovation and Technology (n117); Sánchez-Monedero, Dencik and Edwards (n80) 463; see 3.1.2.
[329] Wachter, Mittelstadt and Russell (n186) 54-64.

a conditional disparity exists. This indicates potential discrimination, not because the female applicants were less qualified, but because they were disproportionately disadvantaged compared to equally qualified men. However, despite this contextualisation, CDD remains flawed in overlooking structural factors like career breaks for maternity, which may affect women's experience levels. This highlights that statistical standards alone lack the nuance needed to adequately assess algorithmic discrimination.[330]

However, despite the shortcomings, lawmakers cannot ignore technological solutions, as a failure to engage allows developers to 'arbitrarily' choose how to quantify equality.[331] As seen in the proliferation of the US four-fifths rule, deficient standards can quickly become '"frozen" in code'.[332] Consequently, reform should see lawmakers and technology experts collaborate to marry equality law's interpretative agility with the investigative insight of statistical analysis.[333] Wachter, Mittelstadt and Russell envisage technology's role taking the form of systems designed to 'produce the types of statistical evidence necessary for the judiciary to make well-informed normative decisions, and for system controllers to systematically detect potential discrimination before it occurs'.[334] This aligns with Brownsword's wisdom that emerging technologies are best regulated through a combination of 'Law 1.0', '2.0', and '3.0'.[335] Consequently, it is not a failure of the EA that it alone cannot tackle the challenge presented by algorithmic discrimination but an expected reality and exciting opportunity.

The preceding analysis of the regulatory options, framed through Brownsword's 'Law 1.0', '2.0', and '3.0', highlights that sole reliance on the EA will be insufficient in mitigating systemic algorithmic harm.[336] Self-regulation, although an immediate remedy to legislative gaps, is hampered by weak enforceability and industry inequalities. Whilst AI-specific legislation, as exemplified by the EU AI Act, offers stronger safeguards, it risks being outpaced by innovation, contributing to the UK Government's dubious legislative desire.[337] Consequently, co-regulation promises an attractive hybrid, leveraging the regulators' expertise in a collaborative dialogue with industry. However, as a complement to the EA, co-regulation's success hinges on adequate resourcing and enforcement powers.[338] Finally, adopting technological solutions would further strengthen the UK's regulatory strategy by providing

[330] ibid 47.
[331] ibid 7.
[332] ibid; Raghavan and others (n46) 472.
[333] Wachter, Mittelstadt and Russell (n186) 47, 64.
[334] ibid 47.
[335] Brownsword (n232) 5.
[336] ibid.
[337] Deniston, Edwards and Bond (n58).
[338] Kelly-Lyth (n21) 928; Clarke (n244) 406; Roberts and other (n248) 16.

preventive and evidential tools capable of overcoming the black box problem.[339] The complementary strengths of the EA, co-regulation, and technological solutions highlight that the effective regulation of algorithmic discrimination demands the embrace of all three in a multi-layered regulatory strategy. Building on this strategy, the final part of this article synthesises the analysis of algorithmic discrimination's nuances, exploring how the EA's deficiencies can be addressed to unlock its potential within the framework.

5. Conclusion

Successive industrial revolutions have brought new regulatory challenges, with AI no exception.[340] As Roberts and others emphasise, striking the right balance is vital to promote fairness and 'achieve the reputational benefits of leadership' that will encourage 'international alignment with UK values'.[341] Using recruitment as a case study, this article has evaluated the EA's adequacy as the primary regulatory mechanism. The analysis has revealed that the EA, in its current form, is ill-equipped to address algorithmic discrimination's nuances. Its deficiencies, owed to legislative compromises and excessive concern for reducing burdens on business, have resulted in the neglect of key areas like classism; intersectionality; evidential burdens on claimants; and systemic harm. Whilst these issues pre-date the rise of ARTs, the novel challenges exacerbate these failings.

These gaps provide an ideal starting point for reform. First, the inclusion of class as a protected characteristic is demanded by classism's detrimental role in algorithmic decision-making, exemplified by the 2020 COVID exam algorithm.[342] Second, given the multiplicity of factors considered by ARTs, algorithmic discrimination will only be accurately reflected in law following the implementation of a revised s 14 of the EA. However, the provision must be expanded beyond the narrow scope of two characteristics and direct discrimination.[343] Third, the ability to justify indirect algorithmic discrimination must be narrowed through judicial clarification. Employers should not be permitted to rely on increased interview capacity as a 'proportionate means of achieving a legitimate aim' without demonstrating proportionally

[339] Wachter, Mittelstadt and Russell (n186).
[340] Black and Murray (n238) 2.
[341] Roberts and others (n248) 3.
[342] 'A-levels and GSCEs: How did the exam algorithm work?' (BBC News, 20 August 2020) <https://www.bbc.co.uk/news/explainers-53807730> accessed 23 March 2025; Cowburn (n132).
[343] Hand (n171) 485-486; Solanke (n174) 346-347.

scaled bias mitigation efforts.[344] Finally, recognising algorithmic discrimination's systemic nature, the reintroduction of the power to make wider recommendations, reformulated to strengthen the enforceability of recommendations, is crucial. Yet, even with these reforms, the EA's effectiveness is handicapped by its ex-post, individualised enforcement model.

The capacity of ARTs to perpetuate bias at scale renders individual redress insufficient. If algorithmic discrimination is to be effectively tackled, it must be met with ex-ante regulation capable of proactively addressing systemic harm. This article therefore advocates for a multi-layered regulatory strategy. This framework should combine the EA's sensitivity to individual circumstances with proactive, industry-attuned co-regulation. Enforceable co-regulatory safeguards should include impact assessments, auditing requirements, and transparency obligations. This powerful regulatory framework would be further strengthened by technological solutions that utilise AI to audit ARTs, alleviating evidential difficulties.[345]

Whilst a US case, the strength of this strategy is illustrated through its hypothetical application to Mobley's case, discussed in the Introduction.[346] Mobley's lived experience as a Black man over 40 with anxiety and depression cannot be atomised. Mobley's determination that all these factors contributed to the disadvantage he faced can only be adequately assessed if brought as a case of intersectional discrimination. Technological solutions would further aid the court in providing evidence that neither Mobley nor possibly even the developers could otherwise obtain. If successful, Mobley's case would lead to enforceable wider recommendations, ensuring change that would break the cycle of systemic harm. More significantly, had co-regulatory measures been diligently enforced, the discrimination could likely have been prevented altogether. Consequently, whilst AI regulation is often framed in collective terms, application of the proposed framework to Mobley's case evidences its significance on an individual level.

Ultimately, if the EA is to form part of an effective regulatory landscape capable of addressing the complexities of algorithmic discrimination, it must not only be reformed but also complemented by ex-ante measures, namely co-regulation and technological solutions. Until the necessary political will is fostered, the EA will remain inadequate. Considering the proliferation of automated decision-making in this area fundamental to people's livelihoods, it is vital that the UK seizes this regulatory opportunity. Whilst the appeal of prioritising

[344] EA, s 19(2)(d).
[345] Wachter, Mittelstadt and Russell (n186).
[346] *Mobley* (n1).

unfettered innovation may be economically attractive, the greater imperative lies in building a balanced framework upon which innovation can thrive responsibly.

From Consensus to Contestation: The Changing Landscape of International Human Rights

Lara Rutler

1. Introduction

Since the Vienna Conference, the consensus surrounding human rights has arguably weakened as Sabatini asserts.[1] This erosion is driven both by structural gender bias embedded in the early human rights framework and by a worrying shift in state attitudes, reflected in the growing influence of authoritarian and populist leadership. Despite these pressures, the human rights system, though imperfect, is still preferable to the absence of any. Therefore, strengthening consensus and reinforcing commitment to human rights remains essential to ensure protection for individuals.

2. Evolution and achievements of human rights

Before addressing the recent erosion of the human rights framework, it is first necessary to outline its origins and key achievements. The international human rights movement arose in the aftermath of World War II in an effort by States to prevent resurgence by safeguarding fundamental rights of individuals. This took form in the creation of the United Nations in 1945 and adoption of the UN Charter which crucially marked a shift from a state-centric to a people-centric international legal order.[2] Individuals were no longer regarded as mere objects of their States, but instead as the 'ultimate subject of international law', entitled to protections under international norms.[3]

Following this, described as a 'milestone document in the history of human rights', 'the Universal Declaration of Human Rights' (UDHR) was adopted outlining fundamental human rights to be universally protected.[4] Although non-binding, the UDHR has had a profound

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[1] Christopher Sabatini, *Reclaiming Human Rights in a Changing World Order* (Brookings Inst Press/Chatham House 2022) 23.

[2] Li Thio, 'The Historical Origins and Contemporary Evolution of International Human Rights Law: Retrospect and Prospect' (2009) 21 Singapore Academy of Law Journal, Microsoft Word - 10 Thio Li-ann _Human Rights 1__rvsed_.doc last accessed 31 March 2026.

[3] Hersch Lauterpacht, *International Law and Human Rights* (New York, F A Praeger 1950) 70.

[4] United Nations, 'Universal Declaration of Human Rights' (*United Nations* 10 December 1948) <https://www.un.org/en/about-us/universal-declaration-of-human-rights> last accessed 31 March 2026.

influence on the evolution of human rights systems.[5] It not only serves as a foundational reference point for drafting national constitutions and policies, advancing human rights domestically, but has also paved the way for the development of international legally binding instruments, such as the 'International Covenant on Economic, Social and Cultural Rights' (ICESCR)[6] and the 'International Covenant on Civil and Political Rights' (ICCPR),[7] which place a responsibility on states to implement the rights outlined in the UDHR.[8] However, these responsibilities remain fundamentally dependent on state consent since states cannot be legally compelled to comply beyond what they voluntarily accept. While states may assume extensive human rights commitments by ratifying treaties, human rights frameworks lack a powerful enforcement mechanism to hold states accountable if they fail to respect a treaty they have signed, giving rise to the critique that treaties risk becoming a 'paradox of empty promises.'[9] This tension between the enjoyment of human rights and state sovereignty is a persisting challenge to the effectiveness of human rights systems, allowing governments to restrict rights with limited legal consequences.

Furthermore, despite the purported indivisibility of these rights during the Vienna Conference, states weighted them unevenly.[10] For example, Sabatini acknowledged Western states' reluctance to accord the same importance to economic and social rights, giving them an apparent secondary status, evident in the much stronger wording of the 'ICCPR' compared to the 'ICESCR'.[11] Another structural weakness lies in the gendered development of the human rights framework.[12] At the time these core instruments were drafted, prevailing societal norms positioned men above women, resulting in women's experiences being inadequately reflected, laying the groundwork for some of the contemporary challenges faced today.

Nonetheless, the substantial achievement of establishing a global human rights framework should not be overlooked. The shift towards prioritising human dignity over absolute state

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[5] Universal Declaration of Human Rights (adopted 10 December 1948 UNGA Res 217 A(III) (UDHR) Preamble.

[6] International Covenant on Economic, Social and Cultural Rights adopted 16 December 1966, entered into force 3 January 1976) 993 UNTS 3 (ICESCR).

[7] International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171 (ICCPR).

[8] Sabatini (n1) 14.

[9] Emilie Hafner Burton and Kiyoteru Tsutsui, 'Human Rights in a Globalizing World: The Paradox of Empty Promises' (2005) 110(5) American Journal of Sociology, 1373-1411 https://www.jstor.org/stable/10.1086/428442 last accessed 31 March 2026.

[10] Office of the United Nations High Commissioner for Human Rights, "Vienna Declaration and Programme of Action," 1993, Vienna Declaration and Programme of Action | OHCHR last accessed 31 March 2026.

[11] Sabatini (n1) 14.

[12] 'see Hilary Charlesworth and Christine Chinkin, *The Boundaries of International Law: A Feminist Analysis* (Manchester University Press 2022)'

sovereignty, alongside the creation of widely ratified treaties, reflects a genuine international commitment to improving rights protection. However, these early weaknesses continue to shape present difficulties, ultimately contributing to the erosion of the implementation of rights, which this article will now turn to discuss.

3. Challenges to human rights protection

3.1. Gendered bias

As identified, the early gendered bias in the drafting of human rights frameworks has inevitably shaped their contemporary application, allowing a continuation of the marginalising of women, contributing to the erosion of rights protection.

This is particularly evident in the entrenched public/private divide, where an historical focus on protecting men within public life has resulted in a persistent reluctance to recognise and address harms experienced by women in the private sphere.[13] This can be seen in the early interpretation of the right to liberty and security, which was understood only in relation to state action, excluding women's fear of sexual violence in private settings.[14] Additionally, although the 'Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW)'[15] explicitly acknowledged women's contributions within the home, it failed to recognise violence in this context, a gap widely criticised by feminist scholars as a significant barrier to protecting women from gender-based violence.[16] However, these concerns prompted key developments, culminating at the Vienna Conference, in the adoption of the 'Declaration on the Elimination of Violence against Women (DEVAW)', which significantly recognised violence within the family.[17] Although, despite this recognition, in practice, actions are not forthcoming. Coomaraswamy's referral to women's rights as fourth-generation rights suggests this may be because states continue to treat them as subsidiary to other human rights.[18] Domestically, the continuing impact of the divide remains visible, for example in 2024, UK

[13] Charlesworth and Chinkin (n12) 217.
[14] ibid 236.
[15] Convention on the Elimination of All Forms of Discrimination against Women (adopted 18 December 1979, entered into force 3 September 1981) 1249 UNTS 13.
[16] Parisi L, 'Feminist Perspectives on Human Rights' (2010) 1 Journal of Human Rights (PDF) Feminist Perspectives on Human Rights last accessed 31 March 2026.
[17] Declaration on the Elimination of Violence against Women, (adopted 20 December 1993) UNGA Res 48/104
[18] Radhika Coomaraswamy, 'Reinventing International Law: Women's Rights as Human Rights in the International Community' (1997) 23 Commonwealth Law Bulletin https://doi.org/10.1080/03050718.1997.9986487 last accessed 31 March 2026.

police chiefs declared violence against women and girls a national emergency, reflecting the scale of the problem and enduring legacy of this divide.[19] Internationally, CEDAW is subject to the most state reservations than any other treaty, highlighting how women's rights continue to be challenged by alternative cultural expressions, regarding the family as a unit protected from state interference.[20] This is evident in South Africa, where a national shutdown from all economic activities took place on the 21st November 2025 in response to widespread gender-based violence.[21] The need for this national movement demonstrates that, despite international obligations, the state has allowed cultural norms to prevail over effective intervention in the private sphere, leaving women inadequately protected within the family home.

Thus, despite notable progress in recognising the nature of the problems faced by women, the early gendered bias of human rights frameworks still hinders the full protection of women's rights due to their continued association with the family, emphasising the need for further efforts to overcome this deep-rooted divide.[22]

3.2. Shifting attitude

5.1.

A further dimension of the erosion of human rights globally arises from the shifting attitudes of States. For instance, as Sabatini rightly identifies, in today's society we are seeing a significant rise in authoritarian populist regimes which is dangerously limiting the enjoyment of human rights protection, both domestically and internationally.[23] Authoritarian-populist parties are widely recognised as being hostile towards multi-culturalism, racial equality and minority rights, ethnic diversity and immigration, all of which directly impinge on rights protection.[24]

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[19] DCC Maggie Blyth, 'National Policing Statement 2024 For Violence Against Women and Girls (VAWG)' (2024) College of Policing https://cdn.prgloo.com/media/034ed60aa6564c1fbdcfb03fd8e6a210.pdf last accessed 31 March 2026.

[20] Coomaraswamy (n18) 25.

[21] Keren Beya, 'Women are not just victims but leaders: nationwide shutdown planned in South Africa by rights group a day before G20' (*Forbes Africa*, 16 November 2025)<https://www.forbesafrica.com/current-affairs/2025/11/16/women-are-not-just-victims-but-leaders-nationwide-shutdown-planned-in-south-africa-by-rights-group-a-day-before-g20> last accessed 31 March 2026.

[22] Charlotte bunch 'Feminism and Human Rights: The Legacy of Vienna' (2019) 33(1-2) Canadian Woman Studies Les Cahiers De La Femm*e*, 24 https://cws.journals.yorku.ca/index.php/cws/article/view/37753 last accessed 31 March 2026.

[23] Sabatini (n1).

[24] Pippa Norris and Ronald Inglehart, *Cultural Backlash: Trump, Brexit and the Rise of Authoritarian Populism* (Cambridge University Press 2019) 182.

Focussing first domestically within the UK, concerns of erosion over human rights are intensifying alongside the rise of populist far-right politics, particularly anti-immigration movements. The current trajectory mirrors the political climate during the previous rise of the UK Independence Party, who weaponised the discourse surrounding migrants as part of their campaign to drive support for Brexit.[25] Arguably, this fired a degree of anti-European sentiment, sidelining the EU's role in facilitating key developments in the protection of human rights.[26] Today, these narratives have intensified through the rising Reform Party, whose strong anti-immigration stance continues to gain momentum, reflected in their November 2025 polling at 26% of the vote.[27] As these populist views become more influential, calls for the UK to withdraw from the European Convention on Human Rights (ECHR) are becoming increasingly mainstream and consequently the fundamental legal protections guaranteed under the ECHR could face unprecedented threat.[28] This reflects the broader trend of states seeking to reassert their sovereignty, directly reflecting Sabatini's warning of the erosion of the human rights consensus.

While it may be argued that political volatility is not unusual and does not inherently signify a collapse in human rights consensus, arguably this perspective overlooks the severity of current developments, where populism is gaining significant ground in Europe.[29] The fact that a democratic United Kingdom is contemplating withdrawal from a key human rights treaty is entering dangerous territory, threatening the EU's social cohesion and democratic values. Amnesty International's warning that this move would 'make everyone less safe' highlights the potential for a serious decline in legal protections for individuals, reflecting the severity of risk the far-right poses to human rights.[30]

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[25]Jürgen Essletzbichler, Franziska Disslbacher and Mathias Moser 'The victims of neoliberal globalisation and the rise of the populist vote: a comparative analysis of three recent electoral decisions' (2018) 11 *Cambridge Journal of Regions, Economy and Society*, 79 https://doi.org/10.1093/cjres/rsx025 last accessed 31 March 2026.

[26] Patrick Birkinshaw, 'An Historical Perspective of the UK in the EU' in Emmanuel Guinchard and Carlo Panara (eds), *The New Relationship between the United Kingdom and the European Union* (Springer Cham 2025) 7–24 Page 11 <https://content.e-bookshelf.de/media/reading/L-24556630-70d9adf927.pdf> last accessed 31 March 2026.

[27] YouGov, 'Voting Intention' (YouGov)<https://yougov.co.uk/topics/politics/trackers/voting-intention> accessed 17 November 2025.

[28] Alistair Gray, 'How would Reform UK's 'legal reset' on migration work? (*Financial Times* August 26 2025)< https://www.ft.com/content/edd1f2be-db84-4223-a410-fc5771a2dbf1> last accessed 31 March 2026.

[29] Statista, 'Share of adults with a favorable view of populist parties in selected European countries as of 2022' https://www.statista.com/statistics/1108333/favorability-populist-parties-in-europe/ last accessed 31 March 2026.

[30] Amnesty International, 'UK: Leaving the ECHR 'would be cowardly' and make everyone less safe' (Amnesty International UK 04th October 2025) https://www.amnesty.org.uk/press-releases/uk-leaving-echr-would-be-cowardly-and-make-everyone-less-safe last accessed 31 March 2026.

Furthermore, Trump's populist policies are driving a concerning global demise of efforts to protect human rights.[31] Following his second inauguration, the threat is escalating, particularly in relation to reproductive rights. Body autonomy is a widely recognised right under international law, including within the ICESCR and CEDAW which require states to ensure equitable access to reproductive healthcare.[32] Yet the administration's decision to rejoin the Geneva Consensus Declaration, claiming there is no international right to abortion directly contradicts these obligations and undermines global consensus that this right is a key element of the right to health.[33] This mirrors the early hierarchy between civil and political rights, versus economic and social rights, one which Trump continues to reinforce by failing to accord proper respect to the latter. It also risks states which are reliant upon US assistance feeling pressured to adopt similar positions, further diminishing protections regarding body autonomy.[34] Additionally, beyond the threat to reproductive rights, the US's willingness to disregard rights protected under a treaty it has signed, may embolden other governments to similarly challenge existing protections within the UN, following the lead of the global superpower.[35] This reflects the earlier point regarding weak enforcement, which allows states to prioritise sovereignty over human rights commitments with limited repercussions, highlighting how effectiveness relies heavily on political will, a fragile foundation which is becoming increasingly strained. Therefore overall, populism 'poses systematic and inherent threats to due process rights' and its growing global influence is actively eroding the human rights consensus.[36]

4. Looking forward: how to strengthen human rights protection

It is therefore clear we are currently facing a challenging period in the protection of human rights, which raises the question of whether efforts to strengthen human rights are worthwhile or whether we are beyond the point of improvement. This scepticism has led to the talk of an 'end to human rights'. Notably, Douzinas warns that where human rights are becoming re-

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[31] Philippe Bolopian, 'Will Human Rights Survive a Trumpian World?' (*Human Rights Watch World Report* 2026) https://www.hrw.org/world-report/2026 last accessed 31 March 2026.
[32] Winona Xu, 'The US Administration's Assault on Global Reproductive Health and Autonomy' (June 2025) 27(1) Health and Human Rights, 99 https://www.jstor.org/stable/48828334 last accessed 31 March 2026.
[33] Marco Rubio, 'United States Renewed Membership in the Geneva Consensus Declaration on Promoting Women's Health and Strengthening the Family' Press statement Jan 2025 https://www.state.gov/united-states-renewed-membership-in-the-geneva-consensus-declaration-on-promoting-womens-health-and-strengthening-the-family last accessed 31 March 2026.
[34] Xu (n32) 97.
[35] ibid.
[36] Alison Brysk, *Populism and Human Rights in a Turbulent Era* (Edward Elgar Publishing 2023), 6.

imagined within self-interested structures of global power, they risk collapsing.[37] This raises serious concerns since states are evidently not taking their human rights obligations seriously enough. However, abandoning the human rights system is not desirable. A human rights framework remains essential as a benchmark against which states conduct can be assessed, albeit there are difficulties in ensuring compliance. In this regard, Kennedy's critique is helpful where he cautions against the idolatry of human rights, warning that an unquestioning belief in rights, obscures the real costs and complexities associated with them.[38] Therefore, as Kennedy suggests, to avoid these dangers, human rights activists ought to embrace an 'enhanced appetite for political conflict', and recognise the difficult trade-offs inherent in advancing rights.[39]

This approach is particularly valuable in confronting the rise of authoritarian/populist leadership, as the initial acknowledgment of the severity of these threats is imperative to driving meaningful change. Progress in this area is particularly complex, but arguably achievable through a multi-faceted strategy. Education can play an important role by raising public awareness about the connection between populist leadership and the threat to human rights. Incorporating this education early can result in a more informed citizenry who would recognise the dangers of electing such leaders, reversing their current growing influence.[40] In combination with this, as Sabatini suggests, rights-respecting states could collaborate through the UN to identify authoritarian/ populist threats and coordinate collective responses such as diplomatic pressure or targeted isolation to reinforce state accountability internationally.[41]

To address the gendered issue and further challenge the private/public distinction, rights focussed on the harms sustained by women need to be identified and developed to ensure they are given higher priority by states.[42] Developing clearer legal protections, with the aim of reducing treaty reservations, would strengthen women's rights domestically and internationally and redress the long-term resistance of states to address violations occurring within the domestic setting.

[37] Costas Douzinas, *The End of Human Rights* (Bloomsbury Publishing 2000) 380.
[38] David W. Kennedy, *The International Human Rights Regime: Still Part of the Problem?* (Harvard Law School 2002) 24.
[39] ibid 33.
[40] Sabatini (n1) 342.
[41] Sabatini (n1) 341.
[42] Charlesworth and Chinkin (n12) 249.

5. Conclusion

In conclusion, while the consensus surrounding human rights has frayed since the Vienna Conference due to ongoing systemic gender bias and the global rise of authoritarian populist regimes, the human rights system remains essential. Its development from absolute state sovereignty, where there were no international obligations to a comprehensive framework against which states actions can be held, is significant. Thus, strengthening protections for women and countering populism are important and necessary to further advance human rights globally.

From Reform to Reality: Women and Conditional Citizenship in the Post-1919 Legal System

Madeleine Smith

1. Introduction

Baker observes that changes in the law are less automatic than might be supposed, as law operates 'in direct connection with real life.' He adds that 'many of the larger changes in the law came about less through the explicit reversal of settled law than through unconscious shifts in the underlying assumptions,'[1] which is supported by the idea that legal development often reflects the interests of dominant social groups, and this is invariably reflected in their practical application. Whilst Nonet and Selznick distinguish between repressive law, that subordinates itself to power politics (which fails to preserve an 'aura of legality'),[2] and responsive law which facilitates social needs and aspirations,[3] these ideas can exist simultaneously. It is perhaps somewhat axiomatic that recent legal changes cannot, in and of themselves, overcome longstanding ideologies, thus resulting in local legal and administrative cultures subverting and resisting their implementation. And, as Sachs rather succinctly puts it, 'if the rules are not satisfied, there is no change.'[4]

To demonstrate, the Sex Disqualification (Removal) Act 1919[5] and the advent of women jurors offers a lens to understand the uneven and conditional nature of women's citizenship in the interwar period. It is not enough to suppose that opening the franchise to women in 1918[6] predicated 'full citizenship on something other than male gender' for the first time,[7] because citizenship entails a broader combination of rights and responsibilities.[8] Indeed, it instead began

[1] John Baker, *Introduction to English Legal History* (5th edn, OUP 2019) v-vi.
[2] Philippe Nonet and Philip Selznick, *Law and Society in Transition: Toward Responsive Law* (1st edn, Routledge 2001) 16.
[3] ibid 14.
[4] Stephen E Sachs, 'Originalism as a Theory of Legal Change' (2015) 38(3) *Harvard Journal of Law and Public Policy* 817, 840 https://journals.law.harvard.edu/jlpp/wp-content/uploads/sites/90/2010/01/Sachs_4.pdf last accessed 10 April 26 .
[5] *Sex Disqualification (Removal) Act 1919*.
[6] *Representation of the People Act 1918*.
[7] Nicola Gullace, *'The Blood of our Sons': Men, Women and the Regeneration of British Citizenship during the Great War* (Palgrave Macmillan 2002) 198.
[8] Anne Logan, 'In Search of Equal Citizenship: The Campaign for Women Magistrates in England and Wales, 1910–1939' (2007) 16(4) *Women's History Review* 489, 502 https://doi.org/10.1080/09612020701445784 last accessed 10 April 2026.

being linked with public service,[9] conceptualised along the ancient Greek tradition of the civic republic.[10] Therefore, as Innes notes, equal citizenship from a liberal feminist perspective requires active inclusion in the public sphere.[11] Yet republicanism, 'in its classical formulations… is far from woman-friendly,'[12] revealing an ideological dissonance at the heart of post-suffrage political thought.

Situated in this context, the developments in 1919, though they seemed responsive to broader social changes, revealed how law selectively accommodated women in ways that reinforced traditional gendered assumptions and thus operated in repressive forms. By exploring a broader context of citizenship, this article will add that for both the magistracy and the jury, although women brought valuable skills, the repressive nature of the law's application, which was more concerned with preserving patriarchal authority than delivering a just and effective legal system, undermined the legitimacy and semblance of legality the law sought to preserve.

2. The Sex Disqualification (Removal) Act 1919

Implicit gendered assumptions dominated the public sphere, which emphasised the 'lives of famous white men.'[13] Naturally this was exhibited in the 1919 Act, which, despite having the 'instant' effect of granting women access to the legal profession, did not remove structural barriers. That said, while the Act's limitations are evident, framing it as a complete failure ignores the historical constraints under which it was enacted. 1919 offered the 'most unfavourable' political climate,[14] and achievements at this time 'must not be judged by some abstract standard, but in relation to the difficulties faced.'[15] Indeed, one may frame the fact that it took until the late 1940s to see only a quarter of the lay magistracy represented by women largely as a failure, particularly since calls for women magistrates had first been articulated

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[9] Julia Parker, *Citizenship Work and Welfare: Searching for the Good Society* (Springer 1998) 194.

[10] Andrea Geddes Poole, *Philanthropy and the Construction of Victorian Women's Citizenship* (University of Toronto Press 2014) 11.

[11] Sue Innes, 'Constructing Women's Citizenship in the Interwar Period: the Edinburgh Women Citizens' Association' (2004) 13 Women's History Review 4, 623 https://www.tandfonline.com/doi/epdf/10.1080/09612020400200414?needAccess=true last accessed 10 April 2026.

[12] Anne Phillips, 'Feminism and Republicanism: Is This a Plausible Alliance' (2000) 8(2) Journal of Political Philosophy 279 https://doi.org/10.1111/1467-9760.00103 last accessed 10 April 2026.

[13] Erika Rackley and Rosemary Auchmuty, 'The Case for Feminist Legal History' (2020) 40(4) Oxford Journal of Legal Studies890 https://doi.org/10.1093/ojls/gqaa023 last accessed 10 April 2026.

[14] Brian Harrison, *Prudent Revolutionaries: Portraits of British Feminists between the Wars* (Oxford: Clarendon Press, 1987) 323.

[15] ibid 323.

clearly around 1910.[16] There were, of course, greater disappointments with women's representation in the House of Commons and the legal profession which are beyond the scope of this article.[17] However, concerning this argument the contrast to numbers of women Justices of the Peace (JPs) warrants further analysis. This is important because, as Lewis and Lobban note, 'it must not be forgotten that lawyers are not necessarily the prime movers in the legal process,'[18] which is supplemented by Takayanagi detailing the many subsequent acts that they helped to facilitate.[19]

Such achievements were possible in this context largely due to women's role in professionalising the magistracy. It first must be addressed that JPs worked on a voluntary basis, but 'professionalism could be inherent in, and expressed through**…** voluntary forms of work.'[20] This aligns with Perkin's 'professional ideal' which emphasised a commitment to the public good free from self-interest.[21] Despite women being deemed not 'up to' the rigours of professional life,[22] the opposite had been shown. An 1893 report found that by working in charities, well over half a million women were 'occupied continuously and more or less professionally' and more than twenty thousand could support themselves financially as a result.[23] These organisations were highly structured and offered opportunities to carry out activities akin to professional work.[24] The boundaries and hierarchies of professional society are therefore evidently flexible in nature,[25] leaving one to question why it took until 1919 before women were deemed sufficiently capable to sit on the bench.

An obvious gendered concept of professionalism, as a constituent aspect of citizenship, emerges,[26] whereby the 'degree to which professions were open or closed became politicised

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[16] Logan (n 8) 504.
[17] ibid503.
[18] Andrew Lewis and Michael Lobban (eds), *Law and History: Current Legal Issues 2003, vol 6* (OUP 2004) 25.
[19] Mari Takayanagi**, '**Sacred Year or Broken Reed? The Sex Disqualification (Removal) Act 1919' (2020) 29(4) Women's History Review 576 https://doi.org/10.1080/09612025.2019.1702782 last accessed 10 April 2026.
[20] Heidi Egginton and Zoë Thomas, 'Introduction' in Heidi Egginton and Zoë Thomas (eds), *Precarious Professionals: Gender, Identities and Social Change in Modern Britain* (University of London Press 2021), 13-14.
[21] William Cornish and others, *Law and Society in England 1750-1850* (2nd edn, Hart 2019) 96.
[22] Judith Bourne and Gillian Murphy**, '**Professional women: the public, the private, and the political (2023) 32(6)Women's History Review 789 https://doi.org/10.1080/09612025.2022.2138016 last accessed 10 April 10, 2026.
[23] Geddes Poole (n 10) 3.
[24] ibid.
[25] Egginton and Thomas (n 20) 14.
[26] Angela Woollacott, 'From moral to Professional Authority: Secularism, Social Work, and Middle-Class Women's Self-Construction in World War 1 Britain' (1998) 10(1) Journal of Women's History 87 https://doi.org/10.1353/jowh.2010.0388 last accessed 10 April 2026.

at different moments,'[27] reflects the tension between professionalism's requisite ethical societal commitment and its social status.[28] To this end, Witz's account that 'gendered forms of exclusionary strategy… [were] used to secure for men privileged access to rewards and opportunities in the labour market'[29] is supported by the fact that many men fell short of Perkin's ideal through their reliance on, as Cornish and others have noted, private clients and individualistic liberal views.[30] Therefore, subjugation of social responsibility within the legal profession may explain how philanthropic work was modernised through men and women working together to 'bring about new standards of prevention, early treatment on scientific lines, and more curative methods of punishment,'[31] whilst the criminal justice system lagged behind. This is epitomised in Macadam's contemporaneous finding that 'the scientific treatment of crime is still ... almost entirely left to volunteer zeal and experiment.'[32] An opening was consequently available where women could educate themselves and press for legislative change.

It should be noted at this point that, whilst Logan largely credits the agency of early female magistrates and their organisations,[33] Gordon sees law as evolving through evolutionary functionalism (developing over time in response to the needs and functions of the society it serves),[34] and because law has been historically shaped by patriarchal norms, it often responds to those needs by prioritising the interests of dominant groups. Professionalisation was therefore an argument that worked to further women's causes because it was already in the interests of government to increase 'efficiency and professional management' through shifting governmental roles away from JPs at quarter sessions to the new county councils.[35] Moreover, this was fraught with tensions between different layers of authority,[36] offering a climate of uncertainty where one can reasonably evince that the lay magistracy laid open to change, particularly where this could restore stability and coherence. It is not that men were necessarily willing to give up what they perceived to be their reward for years of devoted political service

[27] Egginton and Thomas (n 20) 14.
[28] Anne Logan, 'Professionalism and the Impact of England's First Women Justices, 1920-1950' (2006) 49(3) The Historical Law Journal 835 https://www.jstor.org/stable/4091583 last accessed 10 April 2026.
[29] Anne Witz, *Professions and Patriarchy* (Routledge 1992) 41.
[30] Cornish and others (n 22) 96.
[31] Elizabeth Macadam, *The New Philanthropy* (George Allen & Unwin 1934) 223.
[32] ibid 236.
[33] Logan (n 8) 503.
[34] Robert Gordon, 'Critical Legal Histories' (1984) 36(1) Stanford Law Review 57, 59 https://www.jstor.org/stable/41349680 last accessed 10 April 2026.
[35] Cornish (n 21) 90-1.
[36] ibid.

to facilitate the inclusion of women.[37] Rather, women's 'fresh interest and enthusiasm'[38] and the background assumption from 1910 that the magistracy should be a microcosm of society, offered a climate whereby women could 'assist men,' as was posited in a 1921 newspaper.[39] Shifts in society had clearly contributed to the development of the law, but it is important to note that the reasons it did so were not wholly in the interests of those it applied to.

In this vein, dominant ideas permeate despite legislative change, evidenced through women being effectively pigeonholed into areas perceived to be 'women's issues.' Whilst this might be seen to undermine the earlier point made by Innes, since drawing upon women's domestic experiences reinforces the 'separate spheres' dynamic and therefore further removes them from the public sphere. It should be added that academics have begun to convincingly argue that it is illogical to set up 'separate spheres' as 'a theory whose only utility lies in the insights we can develop by disproving it'. Instead, an assessment of how 'the rhetoric of domesticity operated and was made meaningful in particular contexts, how contemporaries used it to make sense of their experiences, how it shaped the actions of particular individuals or groups, and how it changed over time' should be employed.[40]

To exemplify, women's domestic and moral qualities were seen to offer them a necessary compassion and moral sensitivity. This had value in the criminal law which tended to fall most heavily on the lower tiers of society,[41] to echo that justice, when viewed from a prioritarian lens, involves giving priority to those that are most disadvantaged and marginalised.[42] Applying Macadam's account however suggests that the fairness and justice demanded of legal theory wasoften overshadowed by the emphasis on impartiality, which served to reinforce masculine prejudices by finding that women had 'not the judicial mind.'[43] Women magistrates however were able to apply criminological approaches, which favoured the study of the individual, to the law by making visits to penal institutions, for example, a compulsory part of their training.[44] The application of theories of justice here certainly refocuses the public good element within the professional ideal, though this was not considered sufficient universally; as

[37] Logan (n 8) 508.
[38] Macadam (n 31) 225.
[39] 'Women on Bench and Jury', *Western Daily Press* (Yeovil, 22 March 1921) Volume 126, Issue 19580.
[40] Ben Griffin, Lucy Delap and Abigail Wills, 'Introduction', in Ben Griffin, Lucy Delap and Abigail Wills (eds), *The Politics of Domestic Authority in Britain since 1800* (Basingstoke: Palgrave Macmillan 2009), 11—12.
[41] Cornish (n 21) 76
[42] Nils Holtug, 'Prioritarianism and Population Ethics' in Gustaf Arrhenius and others (eds), *The Oxford Handbook of Population Ethics* (Oxford University Press 2022) 38.
[43] Logan (n 28) 841.
[44] ibid 847.

Torstendahl posits, the identification of a body of knowledge is the key to professional definition, rather than 'institutional education.'[45] However, Torstendahl's analysis makes it difficult to see how the male conception of professionalism could be upheld since 'male JPs were by and large as untrained in the law as women were.'[46] In this way, the education provided by women (limited as it was) was surely more desirable than the pre-existing 'common sense' condition (which lacked any clear definition).[47]

Still, it should not be forgotten that change was slow. It was found that the distribution of magistrates was uneven and at least seventy non-county borough commissions had no women at all.[48] To what extent this was a development is called into question when considering that Lord Esher M.R. found nearly three decades prior that 'women in general are not deemed capable of exercising public functions, though there are exceptional cases where a well-recognised custom to the contrary has been established.'[49] This time however it seems different. Whilst undoubtedly pigeonholed, Logan's conjecture that these practices also had the 'potential for widening eventually what was regarded women's proper sphere and for drawing individual women into the realms of public policy hitherto dominated by men' should not be overlooked.[50]

Women ergo illustrated that their inclusion mattered not only symbolically but because it served broader ideological and reformist goals. This does not overcome deeply entrenched gendered ideologies as women's inclusion was still to a certain extent predicated on the fact that they were experts (not citizensin the full sense), though a broader lens of citizenship suggests that the foundations for greater progress had been made in a way that perhaps has not gained traditional recognition. Evidently, Logan recognises that they initiated the modernisation of England's busiest courts whilst retaining the essential voluntarism of the JP's role, showing that professionalism can be broad and need not be confined to male-dominated, paid occupations.[51]

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[45] Rolf Torstendahl, 'Essential Properties, Strategic Aims and Historical Development: Three Approaches to Theories of Professionalism', in Michael Burrage and Rolf Torstendahl (eds) (1990) *Professions in Theory History*, 54.

[46] Margaret Nevinson *Life's Fitful Fever: A Volume of Memories* (London: A. C. Black 1926), 253.

[47] Logan (n 28) 841.

[48] Logan (n 8) 509.

[49] *De Souza v Cobden* [1891] 1 Q.B. 687, per Lord Esher M.R.

[50] Anne Logan, *Feminism and Criminal Justice: A Historical Perspective* (Basingstoke: Palgrave Macmillan 2008) 47.

[51] Logan (n 28) 850.

3. The jury after 1919

The fact that the 1919 Act also enabled women to sit on juries outside of the extremely limited areas they had previously been confined to, appears on its face to be relatively responsive to calls for equal citizenship from women's organisations – 'jury service stood as an expression of citizenship, understood as the participation of the people in their own governance'[52] – particularly relative to New Zealand for example, which did not allow women onto the jury until 1942.[53] However, a more nuanced evaluation of statistical evidence and regional practice reveals a more constrained reality whereby legal rights were inconsistently realised and tightly managed through formal legal mechanisms and cultural resistance.

Turning first to the legal structures that removed women from the jury, judges had an 'unfettered discretion'[54] to use peremptory challenges in felony trials and judicial discretion under the 1919 Act to order single-sex juries. This reflected gendered ideas put forward by lawyers that women were too innocent or prudish to hear cases of sexual propriety, or that they were too squeamish, sentimental and unreliable.[55] This however was a narrative that was largely imposed onto them, with press coverage particularly interested in hearing the struggles women had in 'shocking' cases. Whilst the increasing length and contentiousness of trials may have simply offered the press more material coverage,[56] the notion that 'the mental and physical strain was far too great'[57] for women jurors supports that the media is largely a male preserve.[58] Indeed, because the jury were consequently more visible and doing more 'cultural work' than ever before,[59] it likely became easier to suggest that some women's aversion to particularly brutal trials was evidence that they were unsuitable for jury service.[60] This left

[52] Kay Crosby, 'Creating the Citizen Juror in Interwar England and Wales' (2023) 44(1) The Journal of Legal History 33 https://doi.org/10.1080/01440365.2023.2184540 last accessed 10 April 2026.
[53] Woman Jurors Act 1942 (New Zealand).
[54] *R v Mahon* (24 August 1924) The Times 4 (CAA).
[55] Anne Logan, '"Building a New and Better Order"? Women and Jury Service in England and Wales, c.1920–70' (2013) 22(5) Women's History Review 707-8 https://doi.org/10.1080/09612025.2013.769381 last accessed 10 April 2026.
[56] Martin Wiener, 'Judges v. Jurors: Courtroom Tensions in Murder Trials and the Law of Criminal Responsibility in Nineteenth-Century England' (1999) 17(3) Law and History Review 472-3 https://www.jstor.org/stable/744379 last accessed 10 April 2026.
[57] 'Strain Too Great', Western Daily Press (Yeovil, 23 August 1921) Volume 127, issue 19711.
[58] Denis McQuail, *McQuail's Mass Communication Theory* (6th edn, Sage 2010) Para 5.4, 'Gender and the Mass Media'.
[59] Wiener (n 56) 473.
[60] Kay Crosby, 'Keeping Women off the Jury in 1920s England and Wales' (2017) 37 Legal Studies 4, 696 https://onlinelibrary.wiley.com/doi/10.1111/lest.12169?msockid=242ac4c5d5c865271cd9d231d4fc644c last accessed 10 April 2026.

ample space to argue that women were 'presuming the rights of citizenship without being willing to take on its burdens,'[61] though these questions were rarely asked of men To what extent this was exaggerated however is called into question with examples such as all the selected women refusing to stand down when invited to do so in a 1925 case involving homosexual conduct and wife-beating.[62]

Hence, what might have been thought of as a chivalrous approach (which Bourne observes was deeply entrenched into the law)[63] in a noble effort to protect the 'True Woman' who was considered delicate and weak,[64] was a way of disguising inequality and discrimination.[65] This discrimination went to the heart of citizenship which was seen as both a means of sacrificing yourself to your community, and as a way of developing individual character.[66] Yet it is arguably in the most difficult of cases where the greatest prospect to do so lies, since jury service can be stressful and unpleasant and involve an immense responsibility to make potentially life altering decisions (reflecting these two ideas respectively).[67] The removal of women from such cases and the disproportionate level of interest in their experiences hence leaned into the dominant belief that they lacked the requisite fortitude, despite the argument that jury service would, for any person, be mentally taxing. Underpinning this was an apprehension about turning the masculine law courts into sites of sexual politics,[68] which is exposed through the fact that women serving as magistrates required 'much more experience and judgment than is possessed by the average juror,'[69] yet 'lawyers resisted women's

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[61] ibid p702.

[62] James Morton, 'Exotic flowers in the jury box' (22 May 2017) *Law Society Gazette,* Available at: https://www.lawgazette.co.uk/obiter/exotic-flowers-in-the-jury-box/5061206.article last accessed 10 April 2026.

[63] Judith Bourne, 'Great Expectations and Hard Times: The Advent of the Sex Disqualification (Removal) Act 1919 and Women's Entry to the Legal Profession' 32(6) Women's History Review 797 https://research.stmarys.ac.uk/id/eprint/5847 last accessed 10 April 2026.

[64] Susan Cruea, 'Changing Ideals of Womanhood During the Nineteenth-Century Woman Movement' (2005) 19(3) American Theatre Quarterly, 189 https://scholarworks.bgsu.edu/cgi/viewcontent.cgi?article=1000&context=gsw_pub last accessed 10 April 2026.

[65] Bourne (n 63).

[66] Laura Uggolini, 'The "Recruiting Muddle": Married Men, Conscription and Masculinity in First World War England' (2018) 9(1) First World War Studies, 73 https://doi.org/10.1080/19475020.2018.1520138 last accessed 10 April 2026.

[67] Meredith Claunch, 'A Disturbing Verdict: The Need for a More Proactive Approach to Jury Trauma' (2022-2023) 47 Law and Psychology Review162 https://www.thefreelibrary.com/A+Disturbing+Verdict%3a+The+Need+for+a+More+Proactive+Approach+to+Jury...-a0782232801 last accessed 10 April 2026.

[68] Logan (n 55) 713.

[69] D. M. Northcroft, '"Ladies and Gentlemen of the Jury!" Restoration of women's ancient right' *The Vote* (London 6 Aug 1920) 149.

participation in the jury box more successfully than they did on the magistrates' bench.'[70] It is notable here that the question was therefore perhaps not about women's capacity to act as jurors, but rather a concern about the political statements they might make (though the former could, of course, be used as a proxy for the latter).

However, it would be wrong to merely accept the account proffered at the time that it was 'ridiculous' to continue summoning women as they would be systematically challenged off as this ignores that no such systematic removal was seen.[71] Their exclusion started far earlier, with Crosby's work demonstrating that the decisions of local officials regarding who to summon often had a greater impact.[72] Drawing deeper into what jury service meant, a 1913 Mersey Committee uncovered that professional conceptions of the good, legitimate juror were fundamentally shaped by socio-economic status.[73] It is useful here to examine the Juries Act 1825[74] which limited eligibility for jury service by imposing property qualifications. These restrictions should not be underestimated. On average only about 5% of the populace in the assize regions Crosby has studied would be eligible and the disproportionate effect on women meant a representative jury in Leicester 1925, for example, would feature 1.8 women in every twelve.[75] Clearly, those that could serve were from an incredibly small group of select women, whose professions and social status (though they can sometimes be difficult to ascertain) appear to be rather elitist.[76]

The discretion that ten assize boroughs had to bypass these qualifications as removed in 1920,[77] stemming in part from a reignited interest in resolving the deeper longstanding tensions between 'local customary rules of governance, and national, codified rules on the other.'[78] Yet, it is somewhat paradoxical that whilst nationalised rules should surely reflect political aims,

[70] Logan (n 55) 713.
[71] 'Women Jurors: "Ridiculous Bringing Them when not Asked to Serve"' *Northern Whig and Belfast Post* (Belfast, 13 December 1929) 10.
[72] Crosby (n 52) 37-9.
[73] Crosby (n 52) 40.
[74] Juries Act 1825.
[75] Crosby (n 60) 707.
[76] Kay Crosby in Erika Rackley and Sharon Thompson, 'Episode 3: Women Jurors – The "Restoration of Women's Ancient Right"', Not for Want of Trying: Women's Legal Landmarks (Apple Podcasts 2024) Available at: https://podcasts.apple.com/gb/podcast/episode-3-women-jurors-the-restoration-of-womens/id1765293037?i=1000670153942 last accessed 10 April 2026. Crosby notes that two of the first women jurors lived near each other and a third became one of the first female JPs, suggesting that they were likely elite, high-status women.
[77] Jury (Emergency) Act 1920.
[78] Kay Crosby, 'The Jury Franchise and Ideals of Citizenship in Interwar Britain' (2025) Law and History Review, Available at: https://lawandhistoryreview.org/article/the-jury-franchise-and-ideals-of-citizenship-in-interwar-britain/ last accessed 10 April 2026

such as the Conservative Party stating that they wished to 'remove all existing inequalities between men and women,'[79] Crosby found that there was a steady decline in female jurors over time.[80] To determine who qualified, advice in 1920 discussed that, inter alia, summoned women had to specifically be advised that they could apply for an exemption based on 'pregnancy or other feminine condition or ailment' and that the number of women should be proportionate, or as close as possible, to the number of men.[81] The application varied in different regions, with it being found that authorities in Leicester had ignored the latter condition here for three decades,[82] making it clear that the impact of legal change may only be felt insofar as legal and administrative cultures could accept the reform.[83] There was seemingly some awareness that this reform (among others) sat uneasily, as whilst they were thoroughly debated, great care was taken to prevent them from becoming well-publicised political issues.[84] Interestingly, this also speaks to the idea that those who viewed equal representation on the jury as an important step toward egalitarianism were not the sorts of people who should have an equal say in the administration of public functions and the rules that governed them as ideas of citizenship required – it was the male dominated political structures that mattered. Nonetheless, the National Council of Women did attempt in the 1930s to replace this provision with a broader exemption that would apply to anyone for whom jury service posed a hardship, whether due to physical incapacity or domestic responsibilities,[85] but this fell on deaf ears. It did however make clear that the concern was not over having a quality jury who could perform their civic duties effectively but rather maintaining gendered norms both about women's position in society and that their presence was not valued to the same extent men's. Furthermore, the notion here that citizenship was to some extent optional for women in a way that it was not for men arguably offends the thought that citizenship is strongly linked to ideas of service discussed earlier and raises questions about how real this aspect of women's citizenship was going to be.

Looking from another angle, judge's demographics also mattered for witnesses and defendants. As aforementioned, those on trial were often from the lower classes and the

[79] Iain Dale, 'Conservative Party General Election Manifesto 1918' in Iain Dale (ed), *Conservative Party General Election Manifestos 1900-1997* (London: Routledge, 2000), 21.
[80] Crosby (n 60) 704-5.
[81] Rules of the Supreme Court (Women Jurors) 1920.
[82] Crosby (n 60) 716.
[83] Crosby (n 60) 701.
[84] Crosby (n 78).
[85] HC Deb, *Parliamentary Debates* (5th series, 20 June 1933) Volume 279, Column 649.

individuals judging them, according to Lord Devlin in 1956, were 'predominantly male, middle-aged, middle-minded and middle-class.'[86] This class and gender asymmetry suggests that full participatory citizenship was limited to a narrow demographic. At a time where judges were frequently summing up cases in a manner that implicitly favoured the prosecution,[87] the inclusion of a greater number of women could have offered a counterbalance. Mock trial studies, for instance, found that women were initially more likely to convict, but also more likely to reconsider and change their views during deliberation,[88] suggesting a reflective, deliberative approach that could have enriched the justice process. Notwithstanding issues associated with mock trial data, the question of who judged mattered not only for the cases regarding women's lives (which has been beyond the scope of the present article), but also more generally. Their continued exclusion and broader disregard for the interests of individuals from lower socio-economic backgrounds strengthens the argument that citizenship was male-centric, tied to wealth, with these attributes taking precedence over progressivist ideals or notions of justice.

4. Conclusion

In sum, Barker's assertion that changes in the law are less automatic than might be supposed is underpinned by the fact that the 1919 Act offered women formal legal inclusion but did so in ways that reinforced gendered assumptions about expertise and civic responsibility. If the Act was to 'get outside its brackets,'[89] inclusion had to be meaningful, but the analysis here suggests that citizenship was selective and conditional, reserved for a specific group of women. This is evidenced in that although women's presence on the lay magistracy was higher than in other legal professions, their participation was contingent upon their womanly expertise and mattered not because they were considered equal, but because of their professionalism which aligned with broader perceptions at that time. Similarly, whilst the admission of women to the jury pool appears relatively progressivist compared to other jurisdictions; such women were selected from an incredibly small, elite group.

[86] Sir Patrick Devlin, *Trial by Jury* (Hamlyn Lectures, 8th Series, Steven & Sons Ltd 1956) 20.
[87] Wiener (n 57) 475.
[88] Cheryl Thomas, 'Are juries fair?' (2010) Ministry of Justice Research Series No. 1/10, 2 https://www.ucl.ac.uk/laws/sites/laws/files/arejuriesfair.pdf last accessed 10 April 2026.
[89] Vera Brittain, *Testament of Youth* (London: Virago, 2004; first published 1933), 534.

The critique advanced here supports the conclusion that women were both effective and capable of carrying out their roles on the magistracy and in the jury box, at times perhaps to a greater extent than men. Yet, adding dimension to Barker's account, the failure of legal and administrative cultures to fully embrace the reform demonstrates that the repressive nature of the law's application failed to preserve an 'aura of legality' as patriarchal ideologies of the interwar period were prioritised over efficacy and justice. This matters because those who were deciding who would count as citizens clearly had envisioned a particular ideal of society, evidenced by the continued emphasis on classical republicanism ideals which limited women's inclusion and sought to emphasise masculine values over core legal principles. Change therefore did not occur through explicit reversals of these assumptions; rather, women's potential value and skills were first recognised in relation to 'women's issues' and only gradually extended to the wider legal system as underlying assumptions about gender and legal competence began to shift.

The Interdependence of Law and Society: How Slavery and Coverture Were Transformed

Millie Pearce

1. Introduction

Law undeniably operates in direct connection with real life, with any legal change impacting the society within its jurisdiction and any widescale shifting societal views usually being exhibited via changes to that legal system. However, changes to laws regulating the slave trade in the 18th century[1] predominantly came about due to the explicit reversal of settled law, albeit driven by wider political changes to monarchical revenue sources, casting doubt upon the idea that 'unconscious shifts in underlying assumptions'[2] are not the primary factor in effecting legal reform. That said, shifts in underlying assumptions, largely generated by these legal changes, were undoubtedly a significant factor in the continuation of these laws facilitating the slave trade for over a century, supporting the idea that societal assumptions and larger changes in the law are intrinsically linked.[3] Therefore, this article will argue that whilst these legal changes essentially came about due to the explicit reversal of settled law, changes to underlying assumptions were crucial in legitimating these judicially imposed laws, leading to their continued operation until 1807,[4] indicating that unconscious shifts in underlying assumptions are essential for *lasting* larger legal change to occur.

Similarly, legal change to the doctrine of coverture at the start of the 19th century – preventing women living separately from their husbands under private separation agreements from contracting freely[5] – could irrefutably not have occurred without the authoritative legal writings of Blackstone[6] providing an alternative explanation for coverture's necessity, thus maintaining its contemporary relevance. At the same time, it appears societal shifts in attitudes occurring during the 1790s were also essential in triggering this legal development, since it didn't come about until 1800, despite Blackstone's *Commentaries* being published in the 1760s. Therefore, a combination of authoritative legal change and societal change led to the

[1] *Butts v Penny* (1677) 83 E.R. 518; *Sir Thomas Grantham's Case* (1687)
[2] John Baker, *Introduction to English Legal History* (5th edn, OUP 2019) v-vi
[3] ibid.
[4] Abolition of the Slave Trade Act 1807 (47 Geo 3 Sess 1 c 36).
[5] *Marshall v Mary Rutton* (1800) 8 TR 545, 101 ER 1538 (K.B.).
[6] William Blackstone, *Commentaries on the Laws of England*, 1-4 (William S. Hein & Co 1992; first Published 1765-1769).

adoption of a restrictive version of coverture, demonstrating that both are essential in bringing about larger changes in the law. Ultimately, this article will reveal, through an analysis of legal reform surrounding both the slave trade and coverture, that a combination of societal change and authoritative overturning of settled law is required to bring about enduring legal change.

2. Slave trade

2.1. Top-down legal reform and the reversal of settled law

The argument that larger changes to laws regulating the slave trade fundamentally came about due to the explicit reversal of settled laws – rather than changes to underlying assumptions – cannot be contested. Support for this can be drawn from Brewer's claim that top-down legal change was a necessity in legitimating the slave trade and that, without this, the slave trade could not have endured for so long.[7] This is highly convincing because the Royal African Company (RAC) primarily failed due to its inability to legally enforce contracts, of which people were the subject,[8] although the Anglo-Dutch wars were inevitably a contributary factor.[9] Whilst trade in humans was feasible without a legally viable system of credit, the prospect of making sufficient funds to equal internal sources of revenue granted to James I[10] was a near impossibility. Without this economic security, the business could never have lasted, even where the risk was reversed onto the planters rather than the RAC.[11] Therefore, *Butts v Penny* – classifying *Negroes* as property and thus making their ownership legally enforceable[12] – was undoubtedly a necessary step in legalising contracts concerning people, thereby granting a new lease of life to the dwindling slave trade business. That *Butts v Penny* represented this explicit reversal of settled laws, impelled by Charles II, cannot be contested in light of Atkins'

[7] Holly Brewer, 'Creating a Common Law of Slavery for England and its New World Empire' (2022) 39(4) *Law and History Review* 765, 772 https://doi.org/10.1017/S0738248021000407 last accessed 10 April 2026.
[8] Ellis Leighton, Royal African Company, The *Answer of the Company of Royal Adventurers of England trading into Africa*, (London 1667)*Early English Books Online*, http://name.umdl.umich.edu/A25508.0001.001 last accessed 10 April 2026; ibid 779, 782.
[9] ibid; Anne Ruderman and Marlous van Waijenburg, '(Un)principled agents: monitoring loyalty after the end of the Royal African Company monopoly', (2023) 97(2) *Business History Review*247, 261 https://doi.org/10.1017/S0007680523000351 last accessed 10 April 2026.
[10] Brewer (n7) 778.
[11] ibid 783-784.
[12] *Butts v* Penny (n1); Creswell Levinz, *Reports of Cases Heard and Determined in the Court of King's Bench* (first published 1702, Nutt & Gosling 1722) vol 2, 201; Brewer (n 7) 792.

plea to the king for direct intervention[13] the case's elevation to the highest court[14] and the fact that Butts was personally rewarded afterwards by the king for bringing the case.[15] These points, along with the evident inability of the slave trade to function without judicial intervention, prove that the legal development set forth in *Butts v Penny* was actioned by an explicit overriding of settled law, monarchically-driven but judicially effectuated.

2.2. Judicial reasoning and the illusion of societal custom

That said, on first glance, the judicial reasoning in *Butts v Penny*, specifically the citing of two factors relied upon by the court,[16] implies that societal change was the driving force behind any legal development articulated in the case. The first factor – that the buying and selling of *Negroes* as Merchandise was the 'Custom of Merchants'[17] – suggests that the judges were simply bringing the law in line with societal practices. However, Brewer cogently discredits this idea.[18] Support for this can be drawn from the fact that, in reality, the custom of merchants was to sell slaves 'for goods exchanged on the spot' and wait until slaves were 'attached' to estates before reselling them.[19] Moreover, these customs had frequently led to issues with ownership, sale and inheritance,[20] resulting in Atkins' plea to the King for the introduction of 'laws for better support of credit',[21] so a judgment providing this support is indisputably changing the previous custom. That the custom of merchants necessarily didn't involve enforceable contracts is shown most strikingly by the RAC's bankruptcy resulting from creditors failing to pay for their slaves and the RAC being powerless to do anything about it.[22] The fact that the company didn't struggle financially post-1677[23] demonstrates a tangible shift in the custom of merchants. Furthermore, this legal rationale is fallacious because, even if one accepts that the buying and selling of *Negroes* as merchandise was customary among merchants, it doesn't necessarily follow that the doctrine of *Trover* can be used to litigate

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13 Brewer (n7) 788.
14 ibid 787.
15 ibid 790-791.
16 Levinz (n12)
17 ibid.
18 Brewer (n7) 794.
19 ibid 776.
20 Brewer (n7) 788-789.
21 Sir Jonathan Atkins Commission and Instructions (February 6, 1673/4) TNA CO 1/30, No 90 CSPC Item 1183, vol 7,540; 'Sir Jonathan Atkin's proposals concerning some things to be added to his Commission and Instructions' (December 1673) CSPC vol 7, 535–544, item 1183; Brewer (n 7) 788.
22 Brewer (n7) 782.
23 ibid 803.

problems of ownership.[24] Therefore, Brewer's argument that a 'legal fiction' was invoked in order to arrive at this conclusion is convincing.[25] For this reason, it seems this reference to 'Custom' was a tactic deliberately employed by the judiciary to disguise the monumental legal shift produced by the judgment. The second factor used to justify this legal outcome was slaves' unchristian nature,[26] also suggesting that societal change was the impetus behind the decision, as this was a common belief held in society at the time.[27] However, although theology was employed to justify these new laws, undoubtedly facilitating their introduction and social acceptance, it seems highly unlikely that societal religious beliefs played a greater role than monarchical supervision in bringing about this legal change. Judicial reference to societal shifts as grounds for the judgment evidently doesn't translate to the legal change being societally driven – it merely obfuscates the actual reasoning for legal development, which was likely due to the economy, imperialism and monarchical pressure.[28] Moreover, neither factor could amount to legal precedent, again validating Brewer's claim that the case involved considerable 'legal innovation'.[29] Therefore, the explicit reversal of settled law was undoubtedly the main driving force behind *Butts v Penny* and further legal changes facilitating the slave trade,[30] despite judicial reasoning suggesting otherwise. However, whilst this initial legal reform clearly demonstrates authoritative legal transformation, Brewer's account fails to recognise the significant role shifts in societal attitudes played in preserving these laws for over a century.

2.3. Enlightenment thought and the racialisation of society

Where previously theology had justified the laws facilitating trade in human beings,[31] religion's waning influence upon society – partly due to the inception of the age of reason – meant that an alternative rationale was required .[32] By the late 18th century, an increasing number of academics were both questioning religious justifications of the slave trade[33] and

[24] Levinz (n12).
[25] Brewer (n7) 796.
[26] Levinz (n12)
[27] Madge Dresser, *Slavery Obscured: The Social History of the Slave Trade in an English Provincial Port* (Bloomsbury Publishing 2016) 58; Richard Pares, *A West Indian Fortune* (Longmans Green 1950) 121.
[28] Brewer (n7) 794.
[29] ibid 794.
[30] *Butts v Penny* (n1).
[31] Robert Worthington Smith, 'Slavery and Christianity in the British West Indies', (1950) 19(3),*Church History* 171, 171-172 https://doi.org/10.2307/3161292 last accessed 10 April 2026.
[32] Michael Craton, 'Christianity and Slavery in the British West Indies 1750-1865'(1978) 5(2) *Historical Reflections/Réflexions Historiques*141, 144 https://www.jstor.org/stable/41298714 last accessed 10 April 2026.
[33] Claude-Adrien Helvétius, *De l'esprit*(1758) 252; Antoine Boudet, *Journal oeconomique* (1768) 135.

turning to science instead.[34] Rabin cogently argues that this reliance on Enlightenment thought went hand in hand with 'the process of racialisation' caused by legal changes.[35] Curran supports this claim by highlighting the nexus between philosophers' expansion upon Buffon's Climate Theory[36] and the 'birth of new racial categories' in the late 18th-century.[37] Long's *History of Jamaica*,[38] which was likely widely available, with at least one excerpt being published in the *Caledonian Mercury* in 1774,[39] reveals the extent to which racial classification had become entrenched within British society. Long, along with other academics writing at the time,[40] suggested that black people displayed more animalistic behaviour[41] and unequivocally tied race intrinsically to cognitive ability.[42] The pronouncement that 'intellectual faculty' corresponded to skin tone, with 'pure White' representing intellectual 'perfection'[43] exemplifies the titanic shift in underlying assumptions that had occurred over the past century. This shift was no doubt encouraged, if not directly caused, by legal change creating the precedent that 'negroes' were no longer legally people,[44] the societal effect of which is evidenced by the fact that post-1677 black people were no longer named in any records unless with a white person.[45] This legally driven racial segregation within society likely led to the Enlightenment desire to 'rationalise' the distinction, thus resulting in the racialisation of black people in Britain. The law is therefore ultimately responsible for this initial racial subordination, although done for 'religious' reasons, with society – primarily the intelligentsia

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[34] Rousselot de Surgy, *Mélanges intéressans et curieux, ou Abrégé d'histoire naturelle, morale, civile, et politique, de l'Asie, l'Afrique, l'Amérique, et des terres polaires*, (1763-1766)vols 1-10; Cornelius De Pauw, *Recherches philosophiques sur les Américains, ou Mémoires intéressants pour servir à l'Histoire de l'Espèce Humaine*, 1 (George Jacques Decker 1768); Claude-Nicolas Le Cat, *Traité de la couleur de la peau humaine en général, de celle des nègres en particulier, et de la métamorphose d'une de ces couleurs en l'autre, soit de naissance, soit accidentellemen*, (1765).

[35] Dana Y Rabin, 'Slavery, Law, and Race in England and its New World Empire' (2022) 40 *Law and History Review* 581, 582 – 587 https://www.jstor.org/stable/27362801 last accessed 10 April 2026.

[36] Georges-Louis Leclerc, Comte de Buffon *Histoire naturelle, générale et particulière avec la description du Cabinet du Roi*vol 1(de l'imprimerie royale 1749).

[37] Andrew S Curran, *The Anatomy of Blackness: Science and Slavery in an Age of Enlightenment* (JHU Press 2011)169.

[38] Edward Long, *The History of Jamaica: Or, General Survey of the Antient and Modern State of the Island: with Reflections of Its Situation Settlements, Inhabitants, Climate, Products, Commerce, Laws, and Government* vol 2 (T. Lowndes 1774).

[39] Dania Dwyer, '*The History of Jamaica or, General Survey of the Antient and Modern State of that Island, Volume II* (1774): A Scholarly Introduction', The Early Caribbean Digital Archive, (Boston: Northeastern University Digital Repository Service 2016) https://ecda.northeastern.edu/item/neu:m04109796/ last accessed 10 April 2026.

[40] Victor Riqueti, Marquis de Mirabeau, *L'ami des hommes, ou Traité de la population*, (1758), 204-205; de Surgy (n34) 165.

[41] Long (n38) 373 – 375.

[42] ibid 375.

[43] ibid.

[44] Levinz (n12).

[45] Imtiaz Habib, *Black lives in the English archives, 1500–1677: imprints of the invisible* (Routledge 2017).

– then expanding upon these foundations and 'scientifically' justifying law's position, verifying Rabin's claim that 'laws about slavery contributed to racial formation.'[46] Furthermore, this racial formation was arguably a necessary corollary of Enlightenment thought and imperial expansion since it was commonly argued that it was Britain's duty to introduce values such as the rule of law to these 'developmentally inferior' people.[47] This irrefutably demonstrates that 'race was a "feature not a bug" of Lockean society'[48] and that these 'empirical findings' didn't merely 'infiltrate' Enlightenment thought,[49] but were the force behind it, proving society played a role in sustaining law's position. The fact Holt's rulings attempting to overturn these laws were ignored after his death[50] is further evidence that, despite the explicit reversal of settled law making the slave trade economically viable, the retention of such laws until 1807 was by and large due to a shift in societal attitudes, essentially caused by this legal reform.

2.4. Societal change and the lasting impact of slave trade laws

However, it could be argued that these changes to underlying assumptions weren't exhibited via the legal system and remained merely societal shifts. Support for this can be drawn from the fact that the association of whiteness and biological superiority in contemporaneous academic literature[51] fuelled both pro-[52] and anti-slavery[53] movements,[54] suggesting that, despite undoubtedly contributing significantly by providing the law with an accompanying 'scientific' rationale to its economic[55] and theological reasoning,[56] the picture is more complex than shifting societal attitudes simply resulting in the slave trade's perpetuation until 1807. Additionally, one could argue that the lack of explicit references to these Enlightenment ideas of race in case judgments demonstrates that they didn't have a significant impact on the English legal system. However, this would indisputably be a misguided view of the law due to the level of discretion involved at most stages of the English justice system, enabling these societal

46 Rabin (n35) 582.
47 Bharat Malkani, *Racial Justice and the Limits of Law*, (Bristol University Press 2024), 29.
48 Rabin (n35) 587.
49 Curran (n37) 178-9, 220.
50 Brewer (n7) 826.
51 Long (n38); Mirabeau (n38); de Surgy (n34).
52 de Surgy (n34) 164; Long (n38).
53 Mirabeau (n40); Charles Louis de Secondat de Montesquieu, *De l'esprit des lois*, (1748).
54 Curran (n37) 178-9.
55 Winthrop D Jordan, *The white man's burden: Historical origins of racism in the United States*, 402, (Oxford University Press 1974), 50.
56 Levinz (n12); Dresser (n27).

views to infiltrate judgments and sentence lengths without explicit referencing.[57] Therefore, the presence of explicit references to racialisation within legal judgments is undeniably too restrictive a measure by which to judge the impact of these legally driven societal changes, which had far-reaching consequences within the English legal system stretching beyond the mere repeal of these laws. The effects of Enlightenment 'scientific' racial categorisation are arguably still seen in society[58] and the application of laws[59] today in the form of racism. For this reason, there can be no doubt that legal change facilitating the slave trade led to widespread societal change, which in turn impacted back upon the legal system, that even the reversal of said laws cannot countermand. Therefore, it cannot be disputed that this back-and-forth between law and society – with legal actors being responsible for the initial legal change, society reacting and adjusting its underlying assumptions as a result, and these assumptions then being mirrored back within the legal system – proves the necessity of both in realising sustained legal change. The above examination of changes to laws regulating the slave trade clearly demonstrates that both the explicit reversal of settled law and shifts in underlying assumptions were essential in generating lasting legal change – without an authoritative reversal of law, no larger legal change would have occurred, and, without societal shifts, this larger legal change would likely have been overturned when the power of religion began to diminish. Therefore, Baker plainly places too much significance on societal change, when, in fact, explicit doctrinal reform is equally important.[60]

3. Coverture

3.1. Blackstone and the authoritative reformulation of coverture

[57] Shima Baradaran, 'Race, prediction and discretion'(2013) 81*George Washington Law Review* 157 https://www.gwlr.org/wp-content/uploads/2018/04/81-Geo.-Wash.-L.-Rev.-157.pdf; Angela J Davis, 'Prosecution and race: The power and privilege of discretion'(1998) 67 *Fordham Law Review*13 https://ir.lawnet.fordham.edu/cgi/viewcontent.cgi?article=3499&context=flr last accessed 10 April 2026.
[58] Home Office, 'Hate crime, England and Wales, year ending March 2024', Key Results https://www.gov.uk/government/statistics/hate-crime-england-and-wales-year-ending-march-2024/hate-crime-england-and-wales-year-ending-march-2024#section1 last accessed 10 April 2026.
[59] Ministry of Justice, 'Statistics on Ethnicity and the Criminal Justice System, 2022: Executive Summary' https://www.gov.uk/government/statistics/ethnicity-and-the-criminal-justice-system-2022/statistics-on-ethnicity-and-the-criminal-justice-system-2022-html#:~:text=Between%202019%2F20%20and%202021%2F22%2C%2068%25%20of,from%20the%20other%20ethnic%20group. last accessed 10 April 2026.
[60] Baker (n2) v-vi.

Similarly, the advancement of the doctrine of coverture[61] within the English legal system, despite not involving an explicit reversal of settled law, was largely the result of authoritatively imposed legal reform, as opposed to law naturally developing to reflect shifts in societal attitudes, undermining Baker's argument.[62] Although the principle of coverture was legally recognised prior to publication of Blackstone's *Commentaries*,[63] its strength and scope were much reduced,[64] and the reasoning propounded for its existence differed significantly.[65] Blackstone was unquestionably instrumental in catalysing this transformation, however, that is not to say that societal change didn't play a role in shaping his furtherance of the principle. Like laws on slavery, coverture laws were indisputably influenced by societal change triggered by the Enlightenment period. Where previously Christianity had validated laws on slavery[66] and coverture,[67] the Bible was no longer an 'unshakeable authority'[68] so science became the more desirable means by which to justify these already established[69] laws.[70] Blackstone was no doubt aware of the growing need to rationalise every piece of legislation belonging to the English legal system, in part due to Britain's recent imperial expansion,[71] which derived its legitimacy from the imposition of English law, representing 'the perfection of reason'.[72] Therefore, Stretton's argument that the all-encompassing 'unity of person' provided a 'logical and almost universal explanation'[73] to the various conflicting legal rules is highly compelling. Enlightenment age thinking also led to shifts in how society viewed male violence against women.[74] Not only are these changes explicitly referenced by Blackstone, through

[61] William Blackstone, *Commentaries on the Laws of England* vol 1 (William S. Hein & Co 1992, first published Oxford: Clarendon Press 1765) 430-433.
[62] Baker (n2) v-vi.
[63] Mary Ritter Beard, *Woman as a force in history: A study in traditions and realities*, (Collier Books 1973) 93-94.
[64] Henry de Bracton, *On the Laws and Customs of England*,tr SE Thornevol 4, (Cambridge MA 1968-1977), 166, 335; Thomas Littleton, *Littleton's Tenures in English* (ed) Eugene Wambaugh (1903) 80; Edward Coke, *The First Part of the Institutes of the Lawes of England, Or A Commentarie upon Littleton* (1629) fos 112-112v; Tim Stretton, 'Coverture and Unity of Person in Blackstone's Commentaries' in Wilfrid Prest (ed), *Blackstone and his Commentaries: biography, law, history* (Hart 2009) 111, 115-6.
[65] Stretton (n64) 126.
[66] Levinz (n12).
[67] *Manby v Scott* (1663) 83 ER 902, 1043; Thomas Edgar (ed), *The Lawes Resolutions of Women's Rights* (London 1632) 120; Stretton (n64) 116-9, 120.
[68] Stretton (n64) 126.
[69] *Butts v Penny* (n1); Beard (n63).
[70] Rouselott de surgy (n34); Stretton (n64), 119-120.
[71] Ann Laura Stoler, 'Reason Aside: Reflections on Enlightenment and Empire', in Graham Huggan (ed), *The oxford handbook of postcolonial studies*, (Oxford University Press 2013)39, 42-43.
[72] William Blackstone, *Commentaries on the Laws of England*, 1 (William S. Hein & Co 1992; Originally Published: Oxford Clarendon Press 1765), 3-4.
[73] Stretton (n64) 120.
[74] John Locke, *Some Thoughts Concerning Education*, (Scolar Press 1970; first published: 1693); Philip Carter, *Men and the Emergence of Polite Society, Britain 1660-1800*(Pearson Education Limited 2001) 53-54.

observations on how husbands' unconstrained 'power[s] of correction' of wives began to be 'doubted' during the 'politer reign of Charles the Second',[75] but Blackstone's very advocacy of coverture and the concept of unity of person was arguably a result of these changing views – that the use of masculine brute force to control wives was no longer socially acceptable[76] amongst the upper echelons of society.[77] Support for this can be drawn from the fact that Blackstone was setting out the law for 'educated, property-holding English gentlemen',[78] so the law's previous justification that men's greater physical power warranted their increased legal standing[79] would have likely been difficult to endorse to this audience in light of this societal shift.[80] Evidently, Blackstone provided the grounds for retaining laws already accepted and embedded within the English legal system[81] by suggesting an alternative rationale for their continued operation. Although plainly achieved by one legal actor,[82] societal shifts in underlying assumptions demonstrably contributed to this ideological change. Despite laws on coverture existing before Blackstone, it seems unlikely that reliance on these outdated explanations would have sustained them or accounted for their stricter interpretation at the start of the 19th-century. Therefore, Blackstone was undoubtedly a necessary factor in creating the conditions for legal change in 1800. Overall, despite societal change contributing to Blackstone's delineation of coverture, it cannot be denied that this development was predominantly law-based.

3.2. Commercial practice and the flexible application of coverture

However, this change of rationale induced by Blackstone's *Commentaries* arguably wasn't sufficient, in itself, to effect lasting legal change reflecting Blackstone's ideology. Support for this can be drawn from the fact that, following publication of Blackstone's *Commentaries*, married women who had separated from their husbands by private separation agreement could legally contract in their own name,[83] indicating that until 1800, a 'concept of flexible coverture'

[75] Blackstone (n72) 433.
[76] Stretton (n64) 120, 126-127.
[77]Blackstone (n72) 433.
[78] Stretton (n64) 119.
[79] *Manby v Scott* (1663) 83 ER 902, 1043; Stretton (n64) 119.
[80] Stretton (n64) 120, 126-7.
[81] Beard (n63) 93-94.
[82] ibid 88.
[83] Karen Pearlston, 'Judging the Judges: Mansfield and Kenyon on Coverture'(2007)6 https://amesfoundation.law.harvard.edu/BLHC07/Pearlston%20Judging%20the%20Judges%20vers%203.3.pdf last accessed 10 April 2026.

existed.[84] Furthermore, Wakelam makes the compelling argument that, in society, 'coverture bent to serve the needs of commerce'.[85] An analysis of 18th-century debtors' prison, revealing that some married women were inmates,[86] supports this. The fact that some women were imprisoned for crimes that, in law, they were incapable of committing, proves that many in society did not accept Blackstone's strict definition of coverture, at least not where it posed a threat to trade or profits.[87] However, one could even expand upon Wakelam's thesis and argue that pre-1800's coverture 'bent to serve the needs of commerce' in law too, as this societal unwillingness to place coverture above financial needs was reflected back in law through many of Lord Mansfield's judgments.[88] For example, it was held in *Lavie v Phillips* that where both husband and wife had gone bankrupt, the wife's creditors would have priority over the husband's creditors to her assets.[89] This directly contravenes Blackstone's definition of coverture, since, firstly, according to that definition, the wife wouldn't have any assets as these would belong to the husband, and secondly, the husband's creditors would obviously take precedence due to the wife's inability to legally contract. However, this judgment was 'widely accepted' within society,[90] illustrating the magnitude of difference between coverture law during the mid-18th-century and at the start of the 19th-century. Therefore, although coverture had legally existed throughout the 18th-century, the fact that the societal need for commerce occasionally outweighed the need for strict adherence to the doctrine, causing a disconnect between Blackstone's ideology of the law and its practical application within society (as demonstrated by the confinement of some married women to debtors' prison),[91] clearly shows that pre-1800 laws on coverture were subject to societal needs and changes and, moreover, that Blackstone's offering of a societally apposite explanation for coverture wasn't enough alone to instigate lasting legal change unaffected by economic fluctuation and commercial needs.

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[84] Alexander Wakelam, 'Coverture and the Debtors' Prison in the Long Eighteenth Century', (2015) 44(4) *Journal for Eighteenth-Century Studies* 343, 355 https://doi.org/10.1111/1754-0208.12801 last accessed 10 April 2026; Pearlston (n83) 3.
[85] Wakelam (n84).
[86] ibid 355.
[87] ibid.
[88] Allan C. Hutchinson, *Laughing at the Gods – Great Judges and How They Made the Common Law*, (Cambridge University Press 2012)30; Susan Staves, *Married Women's Separate Property in England, 1660-1833*(Harvard University Press 1990)179; James Oldham, 'Creditors and the Feme Covert', in Matthew Dyson and David Ibbetson (eds), *Law and Legal Process – Substantive Law and Procedure in English Legal History* (Cambridge University Press 2013) 217-222.
[89] *Lavie v. Phillips* (1765), 3 Burr. 1776, 97 ER 1094 (KB); *La Vie v. Phillips* (1765)1 BlW 570, 96 ER 329 (KB); Pearlston (n83) 7-8.
[90] Pearlston (n83) 8.
[91] Wakelam (n84) 355.

3.3. Moral panic, gender anxiety and legal change in the 1790s

For this reason, whilst Blackstone arguably 'single-handedly' altered the *justification* for the legal doctrine of coverture,[92] it would be oversimplistic to assume that the adoption of this rationale into the law and case judgments[93] wasn't primarily the result of societal shifts in underlying assumptions, giving weight to Baker's claim.[94] A significant factor leading to this 19th-century development was arguably the 'moral panic' that ensued mid-to-late-18th-century, which manifested itself most notably in 'the Monster affair' of 1790.[95] McCreery argues that this resulted in an increased focus within society paradoxically on both the vulnerability of women and their need for male protection,[96] and on the sexual activities of women.[97] This is highly convincing as one 1790 satirical print simultaneously portrays women as victims and prostitutes.[98] Whilst this 'moral sexuality' attitude had previously beset British society, presenting itself in anti-Catholic propaganda[99] and popular literature,[100] these old fears were evidently rebirthed following the Monster affair. Although McGreery acknowledges the direct legislative changes stemming from the Monster affair, which prompted 'a more attentive and proactive magistracy',[101] it seems equally plausible that these resulting societal shifts also led to legal change. The plethora of press reports, public debates and satirical prints about the Monster[102] increased public awareness about the affair, thereby intensifying society-wide concerns about female sexual deviance and women's requirement of male protection.[103] These anxieties were further heightened and politicised by the French Revolution in 1789 and Burke's amalgamation of political anarchy and female sexuality,[104] which, Jones cogently argues, led to a 'distinct contextual mistrust' of women and female sexuality, in turn causing 'a re-stressing

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92 Beard (n63) 88; Stretton (n64) 114.
93 *Phillips v Barnet* (1876) 1 QB 436, 441.
94 Baker (n2) v-vi.
95 Cindy McCreery, 'A Moral Panic in Eighteenth-Century London? The 'Monster' and the Press'in *Moral Panics, the media and the law in Early Modern England* (Palgrave Macmillan UK 2009) 195.
96 ibid 205, 207.
97 ibid 206, 207, 210.
98 Isaac Cruikshank, *The Monster Cutting a Lady/Copper Bottoms to Prevent being Cut*; ibid. 208.
99 *Converte Angliam* (1685); Anna Battigelli and Laura M. Stevens, 'Eighteenth-Century Women and English Catholicism', (2012) 31(1/2) *Tulsa Studies in Women's Literature* 7, 9 https://www.jstor.org/stable/pdf/43653587.pdf last accessed 10 April 2026.
100 Samuel Richardson, *The History of Sir Charles Grandison*, vol 6(1820; Originally Published 1753-1754)379.
101 McCreery (n95) 214.
102 Donna T. Andrew, *London Debating Societies*, 283, 827-889(5 May, 12 July, 19 July 1790); James Gillray, *Swearing to the Cutting Monster or a Scene in Bow Street*(20 May 1790) BM Satires 7648; McCreery (n95) 199, 203.
103 Andrew (n102) 215.
104 Edmund Burke, *Reflections on the Revolution in France*, ed Conor Cruise O'Brien (Harmondsworth 1968) 164; Darryl Jones, 'Frekes, Monsters and the Ladies: Attitudes to Female Sexuality in the 1790s'(1995) 4(2) *Literature & History* 1, 8.

of domestic values' and 'family morality'.[105] That patriarchal moral order was being emphasised within society with renewed vigour by propaganda from both politicians and journalists, suggests this societal shift at least contributed to, if not directly caused, the change in legal direction that occurred in 1800. That is not to say that this change could have occurred without Blackstone laying the foundations for it by providing a temporally relevant justification for the coverture laws of the 17th-century. However, equally, without this societal change to underlying assumptions, it seems unlikely that this increasingly restrictive version of coverture would have come into legal existence, as commercial interests would probably have continued to be placed above the need for patriarchal order. For this reason, it cannot be denied that both authoritative legal reform and changes to societal attitudes were required for enduring legal change, disputing Baker's assertion that societal changes are more important in generating legal development than explicit reversals of settled law.[106]

4. Conclusion

In conclusion, there can be no doubt that, although Baker acknowledges the innate link between law and society, he downplays the role of the explicit reversal of settled law by focusing more on that of unconscious shifts in underlying assumptions, when examining causes of legal change.[107] By weighing these two measures up against one another, Baker fails to recognise the necessity of both measures collectively bringing about lasting legal change. That both measures are interconnected and required for enduring legal development is demonstrated by changes to both laws regulating the slave trade and laws on coverture. *Butts v Penny* – epitomising top-down legal reform – and other legal judgments that followed, along with changing societal attitudes (because of these laws and Enlightenment thought), were both instrumental in bringing about lasting legal change facilitating slavery and the slave trade. Additionally, Blackstone's authoritative description of coverture and a change in societal attitudes during the 1790s were both crucial in giving rise to the legal development making coverture more rigid at the turn of the 19th-century.

[105] Burke (n104).
[106] Baker (n2) v-vi.
[107] ibid.

Imitation Is Not Always Flattering: How Successful Is Intellectual Property Law in Protecting Original Designs from Infringement in The Fashion Industry?

Olivia Clare Lancashire

1. Introduction

1.1. Background

Imitation is the sincerest form of flattery, until an independent designer's livelihood is at stake. This research is important because, globally, the law does not favour all fashion designers equally, despite the law on fashion being very limited in itself. The concept of fashion law is notable because, in short, it does not exist as a branch of law.[1] The World Intellectual Property Office (WIPO) describes design protection in the UK as a "complex patchwork of different and overlapping rights", namely intellectual property (IP) rights such as copyright, design rights and trade marks.[2] IP rights enable owners to earn recognition or financial benefit from what they create, aiming "to foster an environment in which creativity and innovation can flourish" by preventing the stealing or copying of ideas, better described as intangible assets.[3] The IP rights in question are copyright, design rights and trademarks. Copyright protects original works of authorship automatically once fixed in a tangible form. The copyright holder has exclusive rights to reproduce, distribute, display, and adapt the work.[4] Infringement occurs when a substantial part of the original work is copied without consent, which need not be a large portion quantitatively.[5] Remedies include injunctions, damages, account of profits, and delivery up or destruction of infringing goods.[6] Copyright does not protect garments as a whole, but patterns, surface decorations, and graphic elements - meaning copyright in fashion is more useful for the original artistic expression, like 2D sketches, illustrations, or graphic patterns.[7]

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[1] Joanna Buchalska, 'Fashion Law: A New Approach.' (2016) 7 QMLJ 13 https://www.researchgate.net/publication/311888709_Fashion_Law_A_New_Approach last accessed 1 April 2026.

[2] Dids Macdonald, 'Safeguarding Design Assets: A UK Perspective' (*WIPO Magazine*, 24 February 2012) www.wipo.int/web/wipo-magazine/articles/safeguarding-design-assets-a-uk-perspective-38001 last accessed 1 April 2026.

[3] 'About IP' (*WIPO*) https://www.wipo.int/en/web/about-ip last accessed 1April 2026.

[4] Copyright, Designs and Patents Act 1988 (CDPA 1988), s16 (1)

[5] CDPA 1988, s16 (3)(a)

[6] CDPA 1988, s96-100 and 114

[7] CDPA 1988, s4(1)(a)

In the UK, registered design rights protect appearance, including shape, lines, texture, and ornamentation of the whole, or part of a product.[8] They must be formally registered with the UK Intellectual Property Office (UKIPO), and they grant an exclusive right to use the design.[9] Infringement occurs when a design is used commercially, without permission, and the resulting product does not create a different overall impression on the informed user.[10] Whereas, unregistered design rights (UDR) protect just the shape and configuration of 3D products.[11] UDR are only enforceable if direct copying occurs. As with copyright, remedies for both include injunctions, damages, account of profits, and delivery up or destruction of infringing products.[12] Design rights are particularly useful in fashion as they protect the '3D' piece itself. Trade marks protect brand identifiers, such as logos, colours, names and surface patterns.[13] They are usually registered, although unregistered 'goodwill' protection is possible based on use and reputation in the market, provided through the common law tort of passing off.[14] This is crucial in a market where brand identity is central to value and counterfeits are rife. Infringement occurs where identical or similar marks are used on identical or similar goods, causing "a likelihood of confusion on the part of the public".[15] Remedies include injunctions, damages, account of profits, and potentially criminal sanctions for counterfeiting, which makes trade mark protection particularly strong and useful for luxury brands.[16]

It is a long-known fact that copying between luxury and high street brands is common practice, evident in the 18th and 19th centuries, where English designers who created calico clothing "complained of piracy causing problems, which were emotively described at the time as novel and unmatched challenges that threatened to ruin the industry".[17] However, it has been argued that the fashion industry thrives on copying. Copying of designs 'induces obsolescence', driving demand for the next new thing.[18] A quicker fashion cycle increases economic activity, which benefits brands that can keep up with it. The global apparel market is estimated to be

[8] Registered Designs Act 1949, s1(2)
[9] Registered Designs Act 1949, s7(1)
[10] Registered Designs Act 1949, s7-7A
[11] CDPA 1988, s213(2)
[12] CDPA 1988, 229-230.
[13] Trade Marks Act 1994, s1
[14] Reckitt & Colman Products Ltd v Borden Inc (No.3) [1990] 1 W.L.R. 491 [492].
[15] Trade Mark Act 1994, s10(2)
[16] Trade Mark Act 1994, s14 and 92
[17] Alice Wickens, 'From calico to catwalk: Addressing the UK's enduring issue of fashion piracy' (2025) 20 (2) Journal of Intellectual Property Law and Practice, 71 https://doi.org/10.1093/jiplp/jpae107 last accessed 1 April 2026.
[18] Kal Raustiala and Christopher Sprigman, 'The Piracy Paradox: Innovation and Intellectual Property in Fashion Design' (2006) 92 (8) Virginia Law Review, 1687, 1722 https://papers.ssrn.com/sol3/Delivery.cfm/SSRN_ID1302102_code370802.pdf?abstractid=878401&mirid=1&type=2 last accessed 1 April 2026.

valued at $1.84 trillion in 2025, accounting for 1.63% of the world's GDP.[19] Strong enforcement of IP rights could counterintuitively harm the fashion industry by dramatically slowing down the cycle – this is the basis of Sprigman and Raustiala's Piracy Paradox theory, which attempts to justify design copying.[20] This article addresses the ethical concerns I have when this theory is applied to copying from independent designers who have had their lifelong work replicated without recognition or compensation.

The widespread use of 'referencing' rather than outright 'copying' often falls just short of infringement, yet still raises serious questions about fairness, attribution, and respect for creative labour. The dividing line between inspiration and imitation may not matter for the Piracy Paradox, but it is key to the enforcement of IP rights, as explored by Hemphill and Suk.[21] The few protections offered to fashion designs are often not enforced, as many small designers do not have the time or money to take legal action, and the unregistered rights that many rely on are more difficult to enforce.[22] This means designers resort to non-legal methods such as social media posts.

Wang writes that "the copying of small, independent fashion designers poses a unique and significant problem that has yet to be fully addressed by existing IP laws or attempts at reform",[23] and this is because "fashion has long been dismissed as unworthy of significant intellectual attention [and is therefore] relegated to the realm of the frivolous and the feminine".[24] This article devotes overdue attention to this issue, highlighting how the gendered nature of this oversight reinforces broader societal tendencies to undervalue industries and forms of creativity traditionally associated with women.

1.2. Problem statement

Most seriously, copyright, design right and trade mark protections for fashion designs are not successful at protecting independent designers (sometimes referred to as small to medium enterprises or SMEs) from having their original designs stolen and replicated. Copying has long been justified as beneficial to the industry by the Piracy Paradox, in that "piracy

[19] Nancy Cardona, 'Global Apparel Industry Statistics (2025)' (*Uniform Market*, 3 February 2025) www.uniformmarket.com/statistics/global-apparel-industry-statistics last accessed 1 April 2026.
[20] Kal Raustiala and Christopher Sprigman (n18) 1689.
[21] Scott Hemphill and Jeannie Suk, 'The Law, Culture and Economics of Fashion' (2009) 61 (5) Stanford Law Review, 1147 https://www.jstor.org/stable/40379706 last accessed 1 April 2026.
[22] Macdonald (n2).
[23] Lisa Wang, 'The Copying of Independent Fashion Designers: Perils and Potential Remedies in a Post-*Star Athletica* World' (2023) 75 Stanford Law Review, 979 The Copying of Independent Fashion Designers: Perils and Potential Remedies in a Post–Star Athletica World last accessed 1 April 2026.
[24] ibid 984.

paradoxically benefits designers by inducing more rapid turnover and additional sales".[25] I believe this theory is correct, insofar as luxury brands and high street brands are not negatively impacted. This is because replication of luxury designs helps to promote the original design and increase its status, and in turn, "mimicry of big label designers and haute couture [is often] the foundations of success for high street brands".[26] However, when ideas from independent designers are stolen in a bottom-up approach, justified as "a rite of passage", this is morally incorrect and a failure of IP, especially from a labour theory perspective.[27] The Piracy Paradox does not acknowledge this adequately.

1.3. The relevance of the piracy paradox

The Piracy Paradox is uniquely relevant to fashion because the industry operates in a low-IP equilibrium, unlike other creative fields. A 'low-IP equilibrium' means that IP law provides "very limited protection for fashion designs, and yet this low level of legal protection is politically stable", meaning copying is tolerated or even functional, so there is no major political or economic conflict arising from the lack of protection.[28] The Piracy Paradox theory was introduced in 2006 by Raustiala and Sprigman (hereafter, RS), and it claims copying is justified because "rather than suppressing the incentive to create new designs, the freedom to copy paradoxically enhances it".[29] This theory is central to this article because it conflicts with the labour and personality theories of IP, solidifying the position of the fashion industry as an outlier to the IP world. They claim that in fashion, a lack of IP protection actually increases incentive to innovate, meaning it unexpectedly supports Bentham's utilitarian theory in an unusual way. Given that small designers have reported otherwise, this position needs to be questioned.

The Piracy Paradox focuses on the apparently 'beneficial' copying that happens between luxury designers and fast fashion companies. It is seen as beneficial because copying by high street brands acts as an advertisement for the original product, which creates a more desirable, elite brand that can charge higher prices. Because they charge high prices, the consumer market

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[25] Raustiala and Sprigman (n18) 1722.
[26] Yasmeen Frasso, 'Big Brands Stealing from Indie Creators' (*The Everyday Magazine*) Big Brands Stealing from Indie Creators — The Everyday last accessed 1 April 2026.
[27] Julie Zerbo, 'How come the high street can blatantly steal designs?' (*Dazed,* 21 July 2016) How come the high street can blatantly steal designs? | Dazed last accessed 1 April 2026.
[28] Raustiala and Sprigman (n18) 1699.
[29] Kal Raustiala and Christopher Sprigman, 'Faster Fashion: The Piracy Paradox and its Perils' (2021) 39 (2) Cardozo Arts & Entertainment Law Journal 535, 536 https://gretchen.law.nyu.edu/cgi/viewcontent.cgi?article=2103&context=fac-articles last accessed 1 April 2026.

does not overlap, and high street shoppers can shop runway-inspired trends at a lower cost.[30] This is the most common example of copying in fashion, but as will be explored in Part 3, I believe it fails to adequately acknowledge the copying of independent designers' work, which is not beneficial to them, making the Piracy Paradox paradoxical in itself. To say that copying is not harmful to originators is a dangerous generalisation.

1.4. Scope, limitations and research method

This article concentrates on the protection of designs, meaning the appearance of a product, and the issue of fast fashion companies copying from designers 'above' them (luxury brands) as well as 'below' them (independent designers) in the fashion pyramid. This article is focused on IP protections available in the UK; however, given that protection can operate at national, regional and international levels, there will be references made to, and case law included from other jurisdictions. Much of the literature on this topic comes from the US, where there is less design protection than in the UK – so this article will consider what the US can learn from the UK, or the other way around, considering the UK is still facing the same issues.[31] That being said, this article is not a comparative analysis – it uses a doctrinal research method, which involves the analysis of literature and legislation. Furthermore, this article focuses on protection provided by trade marks, copyright and design rights - although patents can be of use in the fashion industry, for example, to protect a new innovative fabric, the focus here is solely on copying of a design's appearance, which often happens by using cheaper materials and labour.[32]

1.5. Structure

Part Two details the IP protections currently available to fashion designs, and the theories that justify their existence, which in turn will explain why copying in the artistic fields as a whole should be discouraged. Part Three explores the theory of the Piracy Paradox, which is central to this discussion, claiming that the fashion industry is inherently different from other artistic fields and so must operate in a low-IP equilibrium which makes allowance for copying. This

[30] Hemphill and Suk (n21) 1153.
[31] Erika Myers, 'Justice in Fashion: Cheap Chic and the Intellectual Property Equilibrium in the United Kingdom and the United States' (2009) 37 AIPLA Q J 47, 63 https://heinonline.org/HOL/P?h=hein.journals/aiplaqj37&i=49 last accessed 1 April 2026.
[32] Wang (n23) 1017.

theory will be critiqued with the small-medium enterprises in mind, analysing whether copying in fashion increases or inhibits incentive to innovate – essentially, whether or not IP law in fashion is intentionally limited in order to boost the industry, albeit at the expense of SMEs' intellectual labour. Part Four will explore how the law favours each section of the hierarchy differently, with luxury brands being at the top, fast fashion in the middle, and independent designers relegated to the bottom, which resultingly leaves independent designers having no other option than to turn to non-legal methods of enforcement, namely in social media. Although social media may be one of the most useful tools for enforcement, it is also the biggest facilitator of the purchasing of infringing goods, as seen by the rise of the 'dupe' phenomenon. Finally, Part Five will look at whether the issue boils down to a failure of legislation or enforcement, and what reform is recommended in order to level the playing field between the top and bottom of the fashion industry pyramid.[33]

2. Current intellectual property protections for fashion designs

2.1. Theories of intellectual property law

It could be argued that the personality theory is a very fitting justification for the necessity of fashion protection. Derived from the philosophies of Hegel and Kant, the theory suggests that IP rights protect the creator's individual personality and the development of their identity through creative work, viewing creations as extensions of the creator's self.[34] At note 86, Wang writes that "intuitively, it seems more likely that independent designers would treat their process of creation as an exercise of personal expression", which is why the personality theory is so closely intertwined with this issue.[35] Moreover, Khagi writes that even big brands would view their designs "as intensely personal".[36]

This article centres on independent designers, who, despite their vulnerability within an industry dominated by fashion giants, are afforded comparatively limited protection. Accordingly, the analysis is informed by an empathetic understanding. The emotional impact

[33] Peter Doeringer and Sarah Crean, 'Can fast fashion save the US apparel industry?' (2006) 4 (3) Socio-Economic Review 353, 357 https://doi.org/10.1093/ser/mwl014 last accessed 1 April 2026.
[34] William Fisher, 'Theories of Intellectual Property', in Stephen Munzer (eds), *New Essays in the Legal and Political Theory of Property* (Cambridge University Press, 2001), 4.
[35] Wang (n23) 999.
[36] Irina Oberman Khagi, 'Who's Afraid of Forever 21?: Combatting Copycatting Through Extralegal Enforcement of Moral Rights in Fashion Designs' (2016) 27 (1) Fordham Intellectual Property, Media and Entertainment Law Journal, 67, 86 https://ir.lawnet.fordham.edu/cgi/viewcontent.cgi?article=1638&context=iplj last accessed 1 April 2026.

of design theft is heightened by the personal investment creators place in their work, which frequently reflects their identity, labour, and creative autonomy, rendering its unauthorised use especially upsetting. The personality theory successfully acknowledges this attachment as a legitimate basis for IP protection. However, personality theorists have come under fire for failing to address the issue of fetishism.[37] Radin distinguishes 'good object relations' and bad ones, the latter being where fetishism is involved.[38] If there is a "traditional understanding that a well-developed person must invest herself to some extent in external objects, there is no less a traditional understanding that one should not invest oneself in the wrong way or to too great an extent in external objects".[39] Khagi notes from interviews by Gwen Stefani and Michael Kors that there are some designers who may not feel that they have "invested their personhood in the designs at all".[40]

Therefore, the desire to monopolise designs could merely be seen as a "hunger for fifteen minutes (or more) of fame".[41] A stronger moral justification can be found in Locke's Labour Theory, which purports "that a person who labours upon resources that are either unowned or 'held in common' has a natural property right to the fruits of his or her efforts".[42] A fashion designer mixes their intellectual labour (creativity, skill, design work) with materials (fabric, ideas, trends), and so the resulting design can be seen as their property. The reward of an IP right prevents copyists from "becoming unjustly enriched by reaping where they have not sown," or rather, sewn.[43]

In terms of instrumental justifications of IP, the incentive theory derived from Bentham's utilitarian perspective is crucial to this discussion, given it is the justification with which the Piracy Paradox contends. IP rights encourage and reward innovation and creativity. Without protection, creators may not have the financial motivation to invest time and resources into developing new ideas because others could freely copy and profit from their work, and this would lead to the under-production of new works. The Piracy Paradox is built on the claim that "the standard theory of IP rights predicts that extensive copying will destroy the incentive for new innovation [yet] fashion firms continue to innovate at a rapid clip, precisely the opposite behaviour of that predicted by the standard theory".[44] Therefore, critics argue that the incentive

[37] Fisher (n34) 22.
[38] Margaret Jane Radin, 'Property and Personhood', (1982) 34 (5) Stanford Law Review 957, 968 https://doi.org/10.2307/1228541 last accessed 1 April 2026.
[39] ibid 961.
[40] Khagi (n36) 83.
[41] Fisher (n34) 22.
[42] ibid 2.
[43]Lionel Bently and others, *Intellectual Property Law* (6th edn, OUP 2022), 6.
[44] Raustiala and Sprigman (n18) 1689.

theory "remains fulfilled in the fashion industry" despite its low-IP equilibrium.[45] This can be seen as a more neo-liberal perspective, in that IP rights exist not because of a natural moral claim, but because they serve a functional, economic purpose which is not relevant to the thriving fashion industry, according to RS.

2.2. Design protection in the UK

Designs themselves may be subject to three types of protection: copyright, unregistered design rights, and registered design rights. Trade marks do not protect designs by virtue, but luxury brands have the upper hand in incorporating their mark into their designs, which acts as a protection. Trade marks can also be registered or unregistered, with unregistered marks receiving protection from the common law right of 'passing off', not available in civil jurisdictions. It is important to note that 'passing off' occurs when another product is attempting to pose as the original product, thereby confusing the public, but this "requires that the relevant public has prior familiarity with the claimant's brand".[46] Therefore, 'passing off' in the fashion industry will only protect well-known, luxury brands.

According to WIPO, most designers rely on IP rights that arise automatically, and these include copyright, UK and EU unregistered design rights and "good will in a trade name or get up", meaning unregistered trade marks.[47] Although the concept of copying is not unique to fashion, "fashion *is* an area where this behaviour is less discouraged and rather maintained by insufficient laws, lacking public awareness and financial barriers".[48] The following sections will detail the current design protections available in the UK, along with their successes and failures.

[45] Arianne V.J.T. Jimenez, 'A Sui Generis System of Protection for Exceptionally Original Fashion Designs' (2016) 36 (2) Loyola of Los Angeles Entertainment Law Review 101, 113 https://digitalcommons.lmu.edu/cgi/viewcontent.cgi?article=1599&context=elr last accessed 1 April 2026.
[46] Catherine W. Ng., 'The Law of Passing Off – Goodwill Beyond Goods' (2016) 47 (7) The International Review of Intellectual Property and Competition Law 817, 824 https://link.springer.com/content/pdf/10.1007/s40319-016-0510-9.pdf last accessed 1 April 2026.
[47] Macdonald (n2).
[48] Yasmeen Frasso, 'Big Brands Stealing from Indie Creators' (*The Everyday Magazine*) Big Brands Stealing from Indie Creators — The Everyday last accessed 1 April 2026.

2.3. Copyright

Original, fixated works are automatically protected by copyright, for the duration of the author's lifetime and seventy years after.[49] However, the Berne Convention (administered by WIPO) gives countries some discretion in determining how to protect applied art such as fashion.[50] For copyright protection to apply in the UK, a work must fall within one of the eight pre-existing categories outlined in Section 1 of the Copyright Designs and Patents Act (CDPA) 1988. Most logically, fashion should fall under the category of artistic craftsmanship,[51] but due to clothing's functional nature, copyright law deems it as a 'useful' article rather than an artistic one, which has limited the application of copyright in fashion. Copyright protects designs on clothing, but not the design as a whole, as demonstrated in the landmark US case of *Star Athletica*.[52] Section 4(1) of the CDPA 1998 states that artistic works would include graphic or pictorial elements on clothing. However, RS notes that practically, many designs are not separable in this way, which limits the use of copyright in fashion designs,[53] and "explains why fast-fashion retailers can blatantly copy others' designs without much legal consequence".[54] The US uses a 'separability test' to determine this,[55] and although the UK does not use a test, courts in both instances have to determine if a particular element of the garment qualifies as a protected artistic work by itself. For example, *Lambretta Clothing Co Ltd* concerned a 'target' symbol on a jacket, and the court found that while the garment itself was not protected, the graphic design printed on it was protected as a 'graphic work' under copyright law.[56] Fashion entails compiling elements to achieve a final design, meaning many garments will not feature a graphic element that can be separated. This has led other academics to suggest the entire garment should receive copyright protection, "not just individual pieces".[57]

Copyright is automatic, and the advantage of this is no application fees or waiting times, unlike with registered design rights or trade marks. However, this is also the system's downfall. A registration system provides clarity, in that documentation facilitates easier enforcement - this

[49] CDPA 1988, s12(2).
[50] Berne Convention for the International Protection of Literary and Artistic Works, Article 2(7)
[51] CDPA 1988, s4(1)(c)
[52] *Star Athletica, LLC v. Varsity Brands, Inc.*, 580 U.S. 405 (2017)
[53] Raustiala and Sprigman (n18) 1700.
[54] Keyon Lo, 'Stop glorifying fashion piracy: It is time to enact the Innovative Design Protection Act' [2021] (1) Chicago-Kent Journal of Intellectual Property 159, 181 https://scholarship.kentlaw.iit.edu/cgi/viewcontent.cgi?article=1315&context=ckjip last accessed 1 April 2026.
[55] Copyright Act of 1976, 17 USC s101
[56] *Lambretta Clothing Co Ltd v Teddy Smith (UK) Ltd* [2005] EWCA Civ 39
[57] Emily Palladinetti, 'When Imitation Isn't the Sincerest Form of Flattery: Combating Fast Fashion Design Piracy through Enhanced Copyright Protection' (2023) 15 Drexel L. Rev. 453, 501 Palladinetti (453-507) last accessed 1 April 2026.

could be seen as something the US gets right. In the UK, there is no way to register copyright, but in the US, it can be done voluntarily and is recommended to bring a lawsuit. Many creators "wish to have the facts of their copyright on the public record and have a certificate of registration", and there is the added benefit that "registered works may be eligible for statutory damages and attorney's fees in successful litigation".[58] Furthermore, "if registration occurs within five years of publication, it is considered *prima facie* evidence in a court of law".[59] This demonstrates how registered rights are easier to enforce, which is a weakness of an automatic system like copyright in the UK and EU.

Finally, copyright's applicability to fashion is limited further by the term of protection (the duration of the author's life and seventy years after), which is much longer than that of design rights and trade marks. The fashion cycle operates at high speed, and the concern raised by the Piracy Paradox is that full-dress protection creates a monopoly over designs that will inhibit the cycle from progressing. Fashion is cyclical, meaning that items made popular in the late 1990s are already back in fashion today, as seen by the rise of the 'Y2K' trend across the high street and social media platforms.[60] If these designs were given copyright protection in the 90s, the term of protection would still be active now. This would massively implicate cycle progression and reduce economic activity. Palladinetti states that "no one should control the life of a garment for over a century".[61] Writing from a US perspective, she goes on to propose that a twenty-year term would offer "designers the opportunity to cater to an entire generation of consumers that will purchase the garments protected by the copyrights held", whilst also ensuring that "designers can recoup the costs that went into designing and marketing their collections".[62] Interestingly, this would shape copyright law in the US into a similar regime offered by design rights in the UK and EU.

2.4. Design rights

Design rights are what separate UK and EU fashion protection most from that of the US and the rest of the world, meaning that "for Europeans, a natural solution to the lack of protection

[58] 'Copyright in General' (*copyright.gov*) https://www.copyright.gov/help/faq/faq-general.html last accessed 1 April 2026.
[59] ibid.
[60] Xiaochun Yang, 'Retro futurism: The resurgence of Y2K style in the fashion field' (2023) 167 International Conference on Comprehensive Art and Cultural Communication, 4 https://doi.org/10.1051/shsconf/202316702003 last accessed 1 April 2026.
[61] Palladinetti (n57) 504.
[62] Palladinetti (n57) 503.

for fashion items is to look for protection under design law".[63] These rights are generally considered to be the most useful in fashion.[64]

Design rights dramatically changed the protection of fashion in the UK, with registered design rights introduced in 1949,[65] and unregistered design rights (UDR) following in 1988.[66] In 2002, the EU introduced the European Union Community Design System, using UK law as a template.[67] Post Brexit, the Community Design System is no longer used by the UK, so UK designers must file separately to the EUIPO for Community Design protection within the EU, and EU designers must file separately to the UKIPO for UK design protection. For designers whose work reaches markets beyond the UK and EU, the Hague system offers a centralised alternative to filing separate national applications.[68] However, while it simplifies registration, it still shares many of the drawbacks associated with any registration, such as cost and delay, which can be impractical for designers operating within the short life cycles of fashion collections.

The advantage of UDR is that they apply automatically, for free, however they do not protect surface decoration, and they have a shorter term of protection compared to their registered counterpart.[69] They only protect "the shape or configuration (whether internal or external) of the whole or part of an article",[70] expiring "fifteen years from the end of the calendar year in which the design was first recorded in a design document or an article was first made to the design, whichever first occurred".[71] This automatic protection is useful "where protection without the burden of registration formalities is an advantage and the duration of protection is of lesser significance".[72] This makes UDR well-suited to the fast turnover of fashion designs. Moreover, UDR only protect against copying and do not grant exclusive use, which helps restrict monopolisation while affording protection.[73]

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[63] Joanna Buchalska, "Fashion Law: A New Approach." (2016) 7 QMLJ 13, 17. Fashion-Law-A-New-Approach.pdf last accessed 1 April 2026.
[64] Wickens (n17) 74.

[66] CDPA 1988
[67] Council Regulation (EC) No 6/2002 of 12 December 2001 on Community Designs [2002] OJ L3/1.
[68] Hague Agreement Concerning the International Registration of Industrial Designs (Geneva Act), adopted 2 July 1999, entered into force 1 April 2004, WIPO Doc No H/DC/4.
[69] Wickens (n17) 74.
[70] CDPA 1988, s213(2)
[71] CDPA 1988, s216(1)(a)
[72] Council Regulation (EC) No 6/2002 of 12 December 2001 on Community designs [2002] OJ L3/1
[73] Tedmond Wong, 'To Copy or Not to Copy, That is the Question: The Game Theory Approach to Protecting Fashion Designs' (2011) 160 University of Pennsylvania Law Review 1139, 1150-51 https://www.jstor.org/stable/41511301 last accessed 1 April 2026.

Registered design rights, on the other hand, protect the "appearance of the whole or a part of a product resulting from the features of, in particular, the lines, contours, colours, shape, texture or materials of the product or its ornamentation".[74] These rights last for "five years from the date of the registration" but this can be renewed every five years, for a maximum of twenty-five years. Unlike UDR, these grant an exclusive right of use.[75] In the UK, there is a twelve-month grace period where designers can disclose the design publicly and still apply for a UK-registered design within that period.[76] However, it has been noted that "this is often still not long enough to make an informed decision on its success and longevity".[77] The registration of designs is "prohibitively expensive",[78] given that a member of the UK Fashion and Textile Association was quoted £850,000 to protect just one collection.[79] Wickens notes that the cost of registering is not that high (£150 for up to 50 designs), but factoring in time to prepare applications and the volume of applications needed causes the price to skyrocket.[80] Even brands that can afford registration, such as Burberry, have commented, "while we do use the registered design system to protect longer life products such as fragrance bottles and packaging designs, surface patterns/logos … often we don't know whether a particular fashion design will have longevity within the year grace period".[81] This demonstrates the limited use of registered designs in fashion, which is evidenced by the number of registrations.

At the time of access (7 March 2025), under the 'garments' classification, there are 14,130 registered designs with the UKIPO, with only 1755 registered in the past year, and 21,364 lapsed designs.[82] RS "cite this sparse use as evidence that fashion designers are not interested in IP protection", but I agree with Myer's argument, in that this could be viewed as evidence that registered design rights are not as well-suited to the fashion industry as they are intended to be.[83] When first introduced, the EU regulation stated that the registered design right was

[74] Registered Design Act 1949, s1(2)
[75] Registered Designs Act 1949, s8(1-2)
[76] Registered Designs Act 1949, s1B.
[77] Wickens (n17) 75.
[78] ibid.
[79] UK Fashion & Textile Association, Response to the UK IPO 'Reviewing the designs framework: Call for views' (2022) https://assets.publishing.service.gov.uk/media/62cc3e5ed3bf7f3006989d46/J-Z-Designs-calls-for-views.zip last accessed 1 April 2026.
[80] Wickens (n17) 75.
[81] Burberry Ltd Response to the UK IPO 'Reviewing the designs framework: Call for views' (25 March 2022) https://assets.publishing.service.gov.uk/media/62cc1bcf8fa8f54e90dcc16c/A-I-Designs-Calls-for-views.zip last accessed 1 April 2026.
[82] 'Design View' (*tmdn.org)* www.tmdn.org/tmdsview-web/#/dsview/results?page=1&pageSize=20&criteria=W&offices=GB&territories=GB&fLocarnoClass=02.02 accessed 7 March 2025
[83] Myers (n31) 64.

intended for products with a long market life,[84] which does not apply to the speed of the fashion cycle, as suggested by Burberry.

RS also acknowledge that many of the registered designs are “pocket stitching on jeans”, or “pictorial works in the form of silk-screens or appliques”, and so “the function of the registration for all of these items is not to protect an original apparel design but to back-up the protection of a mark or pictorial work over which the owner already enjoys rights" from copyright and trade mark protection.[85] It is interesting that they say, ‘to back-up’, as if accepting that the current regime is unreliable. If the rights that the owner already enjoys were adequate, they would not feel the need to register the design also. It can be argued that a documented right provides more security, even if only superficially. Having a registered design simplifies enforcement, as it establishes a formal record of the design’s existence and ownership, reducing evidentiary burdens and aiding swift legal action. With UDR, the designer must collate their own “documentation of dates to prove infringement and [they] may have a more difficult time getting quick enforcement, crucial in a fast-moving industry like fashion”.[86] That being said, UDR are still regarded as most useful in fashion, particularly for independent designers. Interviews have found that these designers “lack knowledge of the rights available to them, and generally regard the current design rights as irrelevant to their firms”,[87] which shows how bigger brands can use registered design rights to their advantage because they have “the resources and opportunity to employ expert legal assistance”.[88] However, it has been shown that registered design rights are not frequently used by these brands because the length of protection is not necessary, given the fast turnover of trends they keep up with. They could be useful to independent designers who produce designs at a slower rate, if it were not for the cost, and the registration process “is confusing to the non-specialist users of the system which, in the fashion industry would be substantial if it was more user friendly”.[89]

[84] Council Regulation 6/2002, 16, 2002 O.J. (L3) (EC).
[85] Raustiala and Sprigman (n18) 1740.
[86] Myers (n31) 65.
[87] Alice Janssens & Mariangela Lavanga, ‘An Expensive, Confusing, and Ineffective Suit of Armor: Investigating Risks of Design Piracy and Perceptions of the Design Rights Available to Emerging Fashion Designers in the Digital Age’ (2020) 24 Fashion Theory 229, 252 https://doi.org/10.1080/1362704X.2018.1515159 last accessed 1 April 2026.
[88] Wickens (n17) 75.
[89] Burberry Ltd Response (n81)

2.5. Trademark

A trade mark is "particularly important to fashion labels, as it protects designers' most important asset; their brand".[90] Many individuals will consider a 'trademark' as synonymous with a 'logo', but they are much more than this. Following the 2019 amendment of the Trade Marks Act 1944, a trademark may "consist of words (including personal names), designs, letters, numerals, colours, sounds or the shape of goods or their packaging".[91] Packaging plays a significant role in a brand's identity. For example, Tiffany & Co trade marked the 'Tiffany Blue' of their packaging in 1998, and "in 2001, [it] was standardised as a custom colour created by Pantone exclusively for Tiffany and not publicly available".[92] The colour is used on packaging, branding and jewellery pieces, making it instantly recognisable to consumers, reinforcing brand value and customer loyalty.

A trade mark is desirable because it can be renewed indefinitely every ten years, unlike a registered design right, which can only be renewed for a maximum of twenty-five years,[93] however, they are harder to attain in fashion. Birkenstock had a registered Community Design right for its sole pattern, which expired. Upon trying to trademark the sole instead, the EUIPO and UKIPO held that the pattern lacks distinctiveness and is merely a surface pattern, meaning there is currently no registered protection in the EU or UK.[94]

Designers "may indirectly obtain protection for a design so long as the design incorporates the use of a protectable trademark".[95] This explains why monogram prints are used by nearly all luxury retailers - "you didn't think that all of those repeated logos were just aesthetic choices, did you?".[96] Rather than repeated logos, other luxury brands such as Burberry opt for 'less obvious' trademark integration with the 'Burberry Plaid', which is "a mark that simultaneously serves as the brand's identifier as well as a design element of many of their products … its use on a garment or accessory is a way that indirectly shields the otherwise unprotected design of

90 Lauren Howard, 'An Uningenious Paradox: Intellectual Property Protections for Fashion Designs.' (2008) 32 Colum. JL & Arts 101, 104 https://heinonline.org/HOL/P?h=hein.journals/cjla32&i=339 last accessed 1 April 2026.

91 Trade Marks Act 1944, s1

92 'Our Story - Tiffany Blue' (*Tiffany & Co. Newsroom,* 2020) Tiffany Blue - Tiffany last accessed 1 April 2026.

93 Registered Designs Act 1949, s8

94 Case C-26/17 P, Birkenstock Sales GmbH, ECLI:EU:C:2018:714; Birkenstock Sales GmbH's UK Trade Mark Registration (No.3070652), Re, 2019 WL 00427292.

95 Farella Braun, 'The Devil Wears Trademark: How the Fashion Industry Has Expanded Trademark Doctrine to its Detriment', (2014) 127 (3) Harvard Law Review 995, 1002 https://www.jstor.org/stable/23741386 last accessed 1 April 2026.

96 ibid.

that product from misappropriation".[97] Although it is not the logo, it is inseparable from the brand, and is an example of a 'quasidesign' trade mark, which are "patterns or shapes that walk the line between logos and designs, [they] are nominally trademarkable logos but practically non-trademarkable designs — and perhaps functionally both".[98]

Trade marks work in favour of luxury brands because clothing is a symbol of wealth. Sporting a heavily branded handbag or trainers is a method of signalling status, because the design is recognised by the public as premium. What many of these consumers fail to realise is they become a walking advertisement for the brand, which strengthens the power of the brand's trade mark. The importance of public recognition is seen at the beginning of the Trade Marks Act 1944: a trade mark "enables the registrar and other competent authorities and the public to determine the clear and precise subject matter of the protection afforded to the proprietor".[99] Therefore, the more that the public are exposed to a mark, the more recognisable it becomes, and the easier it becomes to spot a mark trying to 'pass off' as it. This does not work to the same effect for an unknown independent designer, nor a fast-fashion high street brand, even if they do attain a trade mark for their work – many consumers will not aspire to advertise a Primark monogram head to toe, the key factor is signalling status.

Potter notes that "generally, a brand's protected mark will be affixed discreetly, making trademark protection useless in regard to the design itself".[100] The critique implies that trade mark law disproportionately benefits established luxury brands whose logos or symbols are well-known and can be incorporated within the surface pattern. Most trade marks will only ever be affixed to a label on the inside of clothing, and in this instance, it serves no protection to the fashion design itself. Therefore, "the main threat posed by copyists is to innovation by smaller, less established designers whose relatively unfamiliar logos are rarely copied along with the underlying articles of apparel".[101] The aesthetic choices, such as silhouettes, stitching patterns and cuts, are often copied without their name or marks being reproduced. Where there is no mark being misappropriated, trade mark protection is irrelevant.

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[97] Whitney Potter, 'Intellectual Property's Fashion Faux Pas: A Critical Look at the Lack of Protection Afforded Apparel Design under the Current Legal Regime' (2011) 16 Intell Prop L Bull 69, 77 https://heinonline.org/HOL/P?h=hein.journals/iprop16&i=75 last accessed 1 April 2026.

[98] Braun (n95) 995.

[99] Trade Marks Act 1944, s1(a)

[100] Potter (n97) 77.

[101] Potter (n97) 80.

2.5.1. Passing off

Trademark infringement involves the use of a registered trademark without permission, but an 'unregistered trade mark' can still be protected under common law through a 'passing off' claim. A designer who uses a mark acquires 'goodwill' in association with that mark, which causes a customer to purchase from that brand rather than any other. This means the owner of a mark can sue another trader who uses it in such a way as to confuse the public into believing that his goods are those of the owner of the mark. Therefore, the main use of trade marks in fashion is to protect against the counterfeiting and passing off of luxury items.[102] Howard writes that "the lack of a registration requirement makes trademark accessible even to fledgling brands that may not have the resources to devote to the registration process", however, just because it is accessible does not mean it is effective.[103] As stated in *Inland Revenue Commissioners*, "goodwill is worth nothing unless it has power of attraction sufficient to bring customers home to the source from which it emanates".[104] Similar to registered trade marks, confusing the public "requires that the relevant public has prior familiarity with the claimant's brand", which is unlikely to be the case with a start-up designer.[105] Furthermore, a designer claiming trade mark protection "must be able to show that they had priority over the mark, that is to say that they had used the distinctive mark in commerce before the allegedly infringing party's use" and this is also "partly dependent on the volume of commerce for which the mark is employed".[106] This further highlights the limited applicability of trade marks to independent designers' work – registered or not.

3. The piracy paradox

3.1. Success of the piracy paradox theory

Despite my concerns about the impact on independent designers, which will become clear, the fundamentals of the Piracy Paradox are correct in relation to luxury and fast-fashion brands. The theory successfully acknowledges consumers' desire to stick with the trends.[107] Most consumers will participate in fashion trends to some degree, even if unknowingly. High street

[102] Jimenez (n45) 103.
[103] Howard (n90) 336.
[104] *Inland Revenue Commissioners v. Muller & Co's Margarine Ltd*, [1901] AC 217, 224.
[105] Catherine W. Ng. (n46) 823-4.
[106] Howard (n90) 104.
[107] Hemphill and Suk (n21) 1160.

retailers actively interpret and reproduce fashion trends, translating high-end designs into accessible styles for mass consumption. Therefore, in order to maintain their premium name and the satisfaction of their audience, runway designers constantly have to come up with new designs, not yet available to the masses, until it is inevitably copied and the cycle repeats. Nolan summarises the fashion cycle as: “trends get introduced on the fashion show catwalk, rise with trendsetters, peak when they have reached all consumers, decline when the market is oversaturated, and reach obsolescence when it is no longer fashionable”.[108] This creates the “opportunity to sell new goods [which] is profitable, and entails additional innovation” which makes it beneficial.[109] RS say it is “the absence of protection [which] speeds diffusion and induces more rapid obsolescence”.[110]

Copying increases the speed of creativity, and this is justified because big-name brands have the resources to keep up with it. What is not justified is when brands copy from independent designers who do not have the resources to compete, as Part 4 will demonstrate.[111] Replicas of luxury designs inadvertently advertise the original product and “help to stimulate the desire for the original product”,[112] but as noted in the discussion of trade marks, this does not work in the same way for a design where the origin is not known to the average consumer, which is the case with most independent designs. This demonstrates how the benefits of design copying are not universally shared, and how copying is demotivating for independent designers who are not reaping any advantages from it. The success of the Piracy Paradox comes to a halt once independent designers are considered.

3.2. How case law supports the piracy paradox theory

Limited IP protection and costly enforcement mean that some designers will accept defeat, allowing copying and the Piracy Paradox to flourish. Designers who can afford litigation will take their cases to court, as demonstrated by Christian Louboutin. Taking a case to court does

[108] Miranda Nolan, ‘How Intellectual Property Laws Allow For Fashion Dupes.’ (2023) SLU Law Journal Online HOW INTELLECTUAL PROPERTY LAWS ALLOW FOR FASHION DUPES last accessed 1 April 2026.
[109] Hemphill and Suk (n21) 1181.
[110] Raustiala and Sprigman (n18) 1722.
[111] Aya Eguchi, ‘Curtailing Copycat Couture: The Merits of the Innovative Design Protection and Piracy Prevention Act and a Licensing Scheme for the Fashion Industry’ (2011) 97 (1) Cornell Law Review, 131, 143-44 https://scholarship.law.cornell.edu/cgi/viewcontent.cgi?article=3228&context=clr last accessed 1 April 2026.
[112] David S. Wall and Joanna Large, ‘Jailhouse frocks: Locating the public interest in policing counterfeit luxury fashion goods’ (2010) 50 (6) The British Journal of Criminology 1094, 1112 https://www.jstor.org/stable/43610827 last accessed 1 April 2026.

not always result in the desired outcome for the complainant, and this shows how courts maintain fashion's 'low-IP equilibrium'.

Colour trade marks are commonly seen in luxury fashion, with one of the most famous examples being Christian Louboutin's red-soled shoes. This mark has been contested in court numerous times. The US District Court in 2012 held "that a single colour can never serve as a trademark in the fashion industry" following a claim of infringement by YSL's monochromic red heels.[113] At appeal, the Second Circuit judge found that the trade mark in question was the contrast between the red sole and the rest of the shoe, therefore YSL was not at fault. However, other courts may have decided this differently, given that the registered mark is in fact the red sole only, which was demonstrated when Zara came under fire for infringement in France.[114] The French court maintained that Louboutin's trade mark only applied in certain contexts (e.g. a red sole on high heels). It was ruled that Zara's version was sufficiently different and the court invalidated Louboutin's trade mark. This shows how the courts play a role in facilitating the Piracy Paradox, in that Zara made the luxury aesthetic accessible to the masses, and the limit of the trade mark allowed the trend to diffuse quickly through the market. Louboutin's exclusivity was challenged, and yet the original design became more recognisable through imitation.

The fact that different jurisdictions interpret the extent of the same trade mark differently shows that the Piracy Paradox overlooks the legal uncertainty designers face when trying to enforce their rights internationally. While the theory suggests that copying benefits the original creator by increasing their visibility, inconsistent protection suggests that without reliable and uniform enforcement, some designers could lose control over their brand identity, making the so-called 'benefits' of copying far less predictable or advantageous, even for high-end brands.

3.3. Critiques of the piracy paradox theory

One of the main proponents of RS's theory is the idea that the fashion industry cannot operate in the same way as other artistic fields, which "have used the orthodox theory of IP rights to demand increased legal protections".[115] Hemphill and Suk contend that "fashion is relevantly

[113] *Christian Louboutin S.A. v. Yves Saint Laurent America Inc.,* No. 11-3303 (2d Cir. 2012) 2.
[114] Ruth Faulkner, 'Zara wins court of appeal case against Christian Louboutin' (*Drapers*, 11 June 2012) Zara wins court of appeal case against Christian Louboutin last accessed 1 April 2026.
[115] Raustiala and Sprigman (n18)1717.

similar to other types of creative activity for the purpose of legal regulation",[116] and "more is needed" in order to make the claim RS make.[117] Interestingly, film and musical works have unique, tailored copyright frameworks in the UK, which further suggests IP regimes are not 'one size fits all'.[118]

Cohen writes that the lack of IP protection "is especially harmful to mid-level and independent designers who lose out on profit from their designs that are copied by big box fast-fashion copyists or better-known designers. This, in turn, reduces their incentive to create new designs", as supported by the utilitarian perspective.[119] A stolen design may encourage the original creator to come up with the next new thing, but if copying were prohibited, this would foster creativity in order to avoid infringement in the first place.[120] It would still allow for 'homage culture' or 'referencing' of other designs, while stopping the practice of outright copying. RS make the mistake of treating 'close copying' and 'shared trends' as "indistinguishable for their purposes, referring to both phenomena as 'copies'."[121] The importance of this distinction will be discussed further in due course.

3.3.1. The forgotten role of independent designers

RS adopt an idea from Doeringer, known as the 'fashion pyramid'.[122] At the top of this pyramid is high fashion, or 'haute couture', which caters to the runway and a small demographic of consumers who can shop at this price range. Below this are ready-to-wear designer items, which are a much larger business and can be further separated into 'prestige collections and lower-priced bridge collections'.[123] Below this is 'better fashion', which is an even larger category of moderately priced apparel found on the high street, in stores such as Zara and Mango. Below this, Doeringer includes fashion basics, which RS combine with basic commodities, at the very bottom of the pyramid. This is the lowest-priced apparel, found in supermarkets and 'specialty chains' such as Primark.[124] This model provides a succinct visual

[116] Scott Hemphill and Jeannie Suk, 'Remix and Cultural Production' (2009) 61 (5) Stanford Law Review 1227, 1232 https://www.jstor.org/stable/40379708 last accessed 1 April 2026.
[117] Hemphill and Suk (n21) 1180.
[118] CDPA 1988, s5A and 5B
[119] Arielle K. Cohen, 'Designer Collaborations as a Solution to the Fast-Fashion Copyright Dilemma', (2012) 11 (2) Chicago-Kent Journal of Intellectual Property 172, 182 https://scholarship.kentlaw.iit.edu/cgi/viewcontent.cgi?article=1113&context=ckjip last accessed 1 April 2026.
[120] Tina Martin, 'Fashion law needs custom tailored protection for designs' (2018) 48 U. Balt. L. Rev. 453, 475 https://scholarworks.law.ubalt.edu/cgi/viewcontent.cgi?article=2056&context=ublr last accessed 1 April 2026.
[121] Hemphill and Suk (n21) 1181.
[122] Doeringer and Crean (n33) 357.
[123] Raustiala and Sprigman (n18) 1693.
[124] Doeringer and Crean (n33) 357.

of the fashion hierarchy, but crucially, there is no mention of independent designers. This could be because they do not comfortably fit within the trajectory. Doeringer states that as we move up the pyramid, "designs and fabric become more differentiated, markets become smaller and more specialised, and demand is less and less sensitive to price",[125] meaning independent designers would be on par with haute couture. This suggests that the fashion pyramid is based on an outdated perspective of the industry.

In application to the fashion cycle, "traditionally, fashion brands follow [this] hierarchy, and the dominant theory is that fashion trends trickle down from top- to low-tier brands (…) however, in today's society, the advancement of technology and social media use have enabled rapid and large-scale information dissemination".[126] Therefore, when an independent design goes viral on social media, it can have as much influence on next season's trend forecast as a luxury design on the runway. Choi writes that previous studies have relied solely on this traditional theory "to understand the diffusion of fashion trends",[127] which means independent designers are left out of the discourse, along with the impacts that this model has on them.

Notably, RS do not leave out independent designers entirely - they assert that independent designers are not at any greater disadvantage than the brands above them. In a response to commentary on their first article, they allege that "the assertion that fashion's low-IP regime harms small designers lacks empirical support", since "even a cursory look at the fashion industry will reveal thousands of new and young designers competing for their place in the industry, seemingly undeterred by the prevalence of fashion copying – and, often, engaging in it."[128] This is a very surface-level observation. To their own detriment, the keyword they use here is 'competing'. The fashion industry is a dog-eat-dog world, and if you cannot beat them, you join them. New designers face no other choice than to accept and engage with the behaviours of those above them – it does not logically follow that they cannot be harmed by this practice. To argue that the issue does not exist simply because "new designers and companies continuously enter the industry" is a dangerous oversight.[129]

[125] ibid 357-8.
[126] Woojin Choi, Yuri Lee & Seyoon Jang, 'Diffusion of fashion trend information: a study on fashion image mining from various sources' (2024) 11 (30) International Journal of Interdisciplinary Research, Fashion and Textiles 1, 2 https://link.springer.com/content/pdf/10.1186/s40691-024-00394-8.pdf last accessed 1 April 2026.
[127] ibid.
[128] Kal Raustiala and Christoper Sprigman, 'The Piracy Paradox Revisited', (2009) 61 (5) Stanford Law Review 1201, 1221 https://www.jstor.org/stable/40379707 last accessed 1 April 2026.
[129] Jimenez (n45) 113.

3.3.2. Inspiration versus imitation

There is an important distinction between inspiration and imitation, which RS fail to make, and they "plead guilty" to this.[130] This is better termed by Hemphill and Suk as that of 'referencing' and 'close copying'. We have accepted that the Piracy Paradox successfully acknowledges the importance of the trend cycle, however "participation in a trend – by a consumer or a designer– does not necessarily or usually entail copying".[131] The 'zeitgeist theory' on trends emphasises "an individual's distinct desire to be in fashion" by taking inspiration from what is current, not necessarily imitating it.[132] 'Referencing' in fashion does not attempt to pass off as the original, but instead "marks awareness of the difference between the two", actually upholding the premium of the original whilst profiting off of the adaptation.[133] This practice has been incorrectly grouped with that of copying, feeding into the misinformed idea that the fashion industry survives on copying.

In arguing that there is no originality in fashion, Schwartz says, "ask the small designers where they got their inspiration. They pull their inspiration from others".[134] Similarly, in response to Hemphill and Suk, RS claim that "both [referencing and close copying] involve copying".[135] But as already highlighted, inspiration does not equate to imitation; interpretations of a previous design are entirely "different from copies in their goals and effects".[136] Although RS may find no difference in the power a close copy or reference has on the acceleration of the fashion cycle, they also contend that it is "mostly irrelevant as a legal matter".[137] I believe that this distinction is, in fact, fundamental to IP law. A close copy is infringing; a reference is not. Increased protection of fashion designs will eliminate close copies while allowing for references to continue, and the fashion cycle can still progress without threatening innovation, particularly from small designers.[138]

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[130] Raustiala and Sprigman (n128) 1217.
[131] Hemphill and Suk (n21) 1159.
[132] ibid 1160.
[133] ibid.
[134] Amy Kover, 'That Looks Familiar. Didn't I Design It?' (*New York Times*, 19 June 2005) That Looks Familiar. Didn't I Design It? - The New York Times last accessed 1 April 2026.
[135] Raustiala and Sprigman (n128) 1217.
[136] Hemphill and Suk (n21) 1160.
[137] Raustiala and Sprigman (n128) 1217.
[138] Hemphill and Suk (n116) 1227.

4. Injustice in the fashion industry

4.1. Privileges for luxury brands

It has been made apparent thus far that luxury brands have the upper hand when it comes to design protection and enforcement. Hemphill and Suk write in support of this: "the primary threat to innovation currently is not to the major fashion conglomerates, already well protected by the existing trademark … legal regime, brand investments, and the relatively small overlap between markets for the original and for the copy. The main threat posed by copyists is to innovation by smaller, less established, independent designers who are less protected along all of these dimensions".[139] The main reason for this is that fashion items are "positional goods", which are bought because they say something about the purchaser, and their value arises in a social context.[140] This means that positional goods are "only desirable when third people know the brand and recognise its social image. It then becomes prestigious".[141] This explains why well-known luxury brands have a privilege over a new independent designer.

In terms of the Piracy Paradox, once a positional good is available to the masses, meaning a luxury design has been copied for high street retailing, "desirability decreases rapidly".[142] However, the "small overlap between markets for the original and for the copy" means the luxury brand is not losing notable income from having their work stolen, and demand is increased from their loyal customers waiting for them to release the next, new prestigious item. The privilege of a premium social image is not one that independent designers have, as this requires public knowledge of the brand. This means that many consumers could unknowingly purchase a copy of an independent designer's work, including those who would have chosen to support the original creator if they had known.

4.2. Fast fashion giants

Fast fashion brands "benefit from capacities for mass-production, as well as familiarity as established and accessible household names", but they do not have a premium image to uphold, like luxury designers do, which they can use to their advantage in that their behaviour is not as

[139] Hemphill and Suk (n21) 1153.
[140] Raustiala and Sprigman (n18) 1719.
[141] Thomas Farkas, 'Does the United Kingdom need a general law against unfair competition? A fashion industry insight: Part 1', (2011) 33 (4) E.I.P.R. 227, 230 https://search.informit.org/doi/10.3316/agispt.20230420086773 last accessed 1 April 2026.
[142] ibid.

heavily scrutinised.[143] This also means that they can replicate an independent design without the price tag that the independent creator has to charge in order to barely break even, let alone make a profit.[144] This puts fast fashion brands in a position where they are getting the best of both worlds. They can copy from brands above them in the hierarchy, who often will not complain due to advertising benefits, but also from independent designers who do not have the resources to take legal action.

Because the fashion cycle operates at such speed, trend-focused consumers will often find the cheapest, low-quality items that "can be thrown away when the next trend comes along" – these are most commonly sourced from SHEIN.[145] Some argue that increased design protection will prohibit consumers from purchasing fashionable items inexpensively,[146] however, Howard rebuts this on two grounds.[147] The first being that a properly tailored system will allow designers to incorporate trends into their collections without knocking off others, drawing on the distinction between 'referencing' and 'close copies', and the second reason being that increased protection will force 'middle-of-the-pyramid' designers to innovate around it, "resulting in a greater amount of creativity in the market at a wider variety of prices".[148] While I agree with both of these reasons, the former is much stronger than the latter. This is due to the rise of fast-fashion houses using algorithms to interpret trends and create marketable products, which has reduced human creativity.[149]

SHEIN is a global online fashion and lifestyle retailer, founded in 2008 in China. Since 2016, SHEIN has built "a network of suppliers capable of producing requested items in as little as three days".[150] Using an "algorithmic web monitoring system, SHEIN intercepts the latest trends and translates them in real time into marketable products",[151] making SHEIN the go-to supplier for copies of the latest on-trend items. California-based knitwear designer, Bailey Prado, had forty-five of her crochet designs stolen by SHEIN.[152] She resorted to calling them

[143] Frasso (n48).
[144] ibid.
[145] Wickens (n17) 74.
[146] Design Law: Are Special Provisions Needed to Protect Unique Industries? Hearing on H.R. 2033 Before the H. Comm. on the Judiciary, Subcomm. on Courts, the Internet, and Intellectual Property, 110th Congress (2008) 33 CHRG-110hhrg40745.pdf last accessed 1 April 2026.
[147] Howard (n90) 123.
[148] ibid.
[149] Degli Esposti, P., Mortara, A., & Roberti, G. 'Unsustainable Fashion: SHEIN and the Fast Fashion Consumption Model', (2024) 14 (3) Italian Sociological Review 929, 932 Unsustainable Fashion: SHEIN and the Fast Fashion Consumption Model last accessed 1 April 2026.
[150] ibid.
[151] ibid.
[152] Heather Gosling, 'It's Daylight Robbery: Fast Fashion's Designer Crimes' (*Muse,* 16 February 2024) It's Daylight Robbery: Fast Fashion's Designer Crimes - Nouse last accessed 1 April 2026.

out in an Instagram post, which led to the removal of some of the listings, "but only the pieces that gained the most attention on social media, which is far from a real resolution".[153] A company spokesperson has said that SHEIN "takes all claims of infringement seriously", adding: "It is not our intent to infringe anyone's valid intellectual property and it is not our business model to do so",[154] and yet, this practice is what they thrive on.

A similar company is AliExpress. Some small enterprises have begun dropshipping stolen designs from AliExpress and selling them under their own name, marketing the products using the original designer's images.[155] This shows that not all SMEs are targets, some are the perpetrators. Unknowing consumers come across these small brands and believe they are supporting a small business by purchasing from them, but they are actually receiving a mass-produced replica of an independent designer's work. These resellers do not have a reputation to uphold, so they do not respond effectively to public callouts. Independent designer of 'KOKO BAY', posted on Instagram saying, "I'm genuinely confused how do these brands get away with it … it's even more frustrating when it's a small business and you message them, and they just ignore you and delete your comments".[156] Similarly, Collette Becket is the owner of 'Jet Black Clothing' and, as of May 2025, hand-sews every piece she sells. She posted an Instagram story stating, "if it's not big brands, it's smaller brands buying your knock offs on AliExpress and posing the images they stole off us as their own … even claiming to (have) designed the fabric themselves". She further proposed, "if the images look like they have been stolen from another brand, maybe don't buy them".[157] It is suggested that the solution to this issue relies on the consumer making informed decisions, but considering the weight this issue bears on independent designers, it follows that it should be resolved by the law. For independent designers, taking legal action against such large corporations requires a lot of time and, more crucially, financial resources that they do not possess.

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[153] ibid.

[154] Ellie Bramley, 'Details I made, they made – designers hit back at Shein's imitation game' (*The Guardian*, 2 September 2023) 'Details I made, they made' – designers hit back at Shein's imitation game | Retail industry | The Guardian last accessed 1 April 2026.

[155] Leticia Miranda, 'Small American Businesses Are Struggling Against A Flood Of Chinese Fakes' (*Buzzfeed News*, 4 April 2017) Small American Businesses Are Struggling Against A Flood Of Chinese Fakes last accessed 1 April 2026.

[156] Instagram Story to Followers (@helenxkb) (28 March 2025)

[157] Instagram Story to Followers (@jetblackclothing) (15 April 2025)

4.3. Marginalisation of Independent Designers

According to WIPO, "the biggest problem facing designers (both in the UK and globally) is that small design businesses have neither the time nor the financial resources to take legal action".[158] On top of this, we have seen that the trade mark protection that luxury designers rely so heavily on is not of any use to SMEs, which shows how they are disadvantaged by the legislation. Furthermore, "a young designer's ability to create … a brand is significantly hindered to the extent she is competing with low-priced knock offs",[159] and these designers "do not have the capital or technology to mass produce their own designs and compete with copyists".[160] It is evident that the financial barrier is the biggest challenge small designers face, and this impedes their ability to pursue enforcement as well as their ability to reproduce their own designs.

WIPO acknowledges that "IP infringement is on the increase, but for micro or small and medium-sized enterprises (SMEs) there is little chance of effective enforcement".[161] It could be argued that this is not an issue for the law to address, as financial difficulties are a fact of life for many, but Dids Macdonald, co-founder of ACID (Anti-Copying in Design), terms this as a 'David versus Goliath situation' whereby independent designers are systematically disadvantaged.[162] It has been suggested that pro bono lawyers could help ease the expense of litigation for independent designers. However, Amy Lehman, the director of Legal Services at Volunteer Lawyers in New York, states that volunteer attorneys may often have a conflict of interest, because they work for a big firm that may represent the infringing brand. Furthermore, it is not in the interest of pro bono lawyers to put themselves out of pocket for these cases: "no pro bono attorney is going to pay for those things…litigation is just out of reach…it's troubling. It's problematic".[163] This highlights the issues of the current, non-user-friendly system, which is certainly not beyond the scope of law reform to address, and this idea will be revisited in the final Part of this article.

Although design piracy is typically associated with fast fashion brands, luxury brands also copy from independent designers. Luxury brands tend to be more acknowledging of their own infringements when they occur, such as Chanel, which has been seen to previously issue apologies, add the original designer's name to the label, or remove the item from the shelves

[158] Macdonald (n2).
[159] Howard (n90) 119.
[160] Eguchi (n111) 143-44.
[161] Macdonald (n2).
[162] ibid.
[163] Wang (n23) 1027.

completely.[164] This is in order to protect their premium brand image, which fast fashion retailers do not possess. US-based retailer Nasty Gal's founder, Sophia Amoruso, responded to ripping off a bracelet design from independent designer Saylor Rose in an Instagram post stating: "Congrats, you've been knocked off. It's a rite of passage".[165] The design in this case was pulled from the website, only due to the social media traction it gained. Berlin-based designer Tuesday Bassen also tried calling out Zara over infringement of her design, but they rejected the claim, implying that 'she's too small a fish' to be taken seriously. Bassen stated, "they are trying to belittle and bully me".[166] This shows the dominance of big brands over independent designers, who rely on their legal muscle to force compliance. Independent designers are resorting to public shaming to overcome the power imbalance, but the success of this relies heavily on social media algorithms that push posts to be seen by the right audience and gain rapid views, which essentially boils down to luck.

4.4. The impacts of social media

4.4.1. Public shaming

Barriers to litigation, such as time and cost, often discourage independent designers from pursuing legal action. As a result, many turn to non-legal avenues - particularly in social media. This reliance on informal mechanisms highlights a broader failure in the enforcement of IP rights. Nevertheless, there are numerous stories where independent designers and even consumers have (somewhat) effectively called out infringing behaviour by both fast fashion retailers and luxury brands.

In the case of Bailey Prado mentioned in Part 4.2, SHEIN only removed the listings that gained the most social media attention, which shows how SHEIN was solely concerned with their public image, not their infringement. Rosenblatt states that shaming "operates through public perception (…). Since entities want to avoid the disapproval of others, they tend to avoid behaviour that would lead to public shaming".[167] The desire to avoid disapproval comes from

[164] Nicholas Tufnell, 'Inside the Tiny Scottish Knitwear Studio That Called Out Chanel for Copying' (*Business of Fashion*, 16 December 2015) Inside the Tiny Scottish Knitwear Studio That Called Out Chanel for Copying | BoF last accessed 1 April 2026.
[165] Zerbo (n27).
[166] ibid.
[167] Elizabeth L. Rosenblatt, 'Fear and Loathing: Shame, Shaming, and Intellectual Property', (2013) 63 (1) DePaul Law Review 1, 11 https://via.library.depaul.edu/law-review/vol63/iss1/2/ last accessed 1 April 2026.

a "fear [of] the economic impact caused by loss of reputation".[168] Given that litigation costs are inaccessible to most independent designers, shaming is the best way to level the playing field between 'Davids and Goliaths', and it is also much quicker than a lawsuit.[169] Adler and Fromer say that "individual customers now have the capacity to wage shaming campaigns that can bring a brand to its knees in a matter of hours (…) because public shaming is more attention-grabbing than court trials, it is no wonder that companies act quickly to repair the brand damage shaming can cause".[170] The fact that customers choose to engage in this call-out culture supports the moral positioning of this article: individuals feel empathy for the way small independent designers are being treated in the industry. Ironically, that is the greatest advantage independent designers have.

This being said, non-legal enforcement cannot be relied upon to fix the issue in the long term. Independent designer Kari Fry told Wang in a telephone interview, "I have had a couple of people take stuff down, but … if you leave them alone for a while, they'll usually just wait and then put it back up".[171] The only way to ensure a permanent result is via legal enforcement.

4.4.2. 'Dupe' or counterfeit?

Although social media has been seen to help with the issue of enforcing IP protections, the rise of 'dupes' presents a step backwards. 'Dupes' is a term coined by Gen Z, short for 'duplicates'. As the name suggests, dupes are affordable alternatives to high-end products that imitate their design or functionality, but are clearly sold under a different brand name to avoid direct consumer confusion and infringement.[172] As of early 2024, the 'dupe' hashtag on TikTok had nearly six billion views.[173] The dupe phenomenon began in the beauty industry, where consumers were looking for a cheaper alternative to a luxury product that claimed to perform similarly. Therefore, where copyright, design rights and trade marks concern the appearance of a product, there is typically no issue with the contents inside the packaging having a similar

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[168] Amy Adler & Jeanne C. Fromer, 'Taking Intellectual Property into Their Own Hands', (2019) 107 California Law Review 1455, 1515 https://gretchen.law.nyu.edu/cgi/viewcontent.cgi?article=1000&context=fac-articles last accessed 1 April 2026.
[169] ibid 1508-9.
[170] ibid 1515-16.
[171] Wang (n23) 1019.
[172] Carol Nyahasha, 'The difference between dupes and counterfeits: What consumers and IP Rights owners need to know' (*Kilburn & Strode*, 29 November 2024) The difference between dupes and counterfeits: What consumers and IP Rights owners need to know - Kilburn & Strode last accessed 1 April 2026.
[173] Amelia Hill, 'Counterfeit goes cool: high-end brands urged to embrace rise of #dupe' (*The Guardian*, 20 May 2024) Counterfeit goes cool: high-end brands urged to embrace rise of #dupe | Social media | The Guardian last accessed 1 April 2026.

formula to the original. However, the case of *L'Oreal v Bellure* could suggest otherwise.[174] Bellure manufactured 'smell-alike' perfumes of L'Oreal's, causing L'Oreal to claim that Bellure had infringed their mark according to s. 10 (3) of the Trade Mark Act 1994. Importantly, Bellure never claimed affiliation with L'Oreal, nor tried to pass off as L'Oreal products – the perfumes were sold under their own brand and trade mark, they just used L'Oreal for comparative purposes in terms of price and quality. The Court of Appeal of England and Wales addressed the implications of the European Court of Justice's (ECJ) earlier ruling in the same case and upheld that Bellure's use of comparison lists constituted trademark infringement by capitalising on the reputation of L'Oréal's trademarks without due cause, with Jacob LJ stating, "I do not agree with or welcome this conclusion – it amounts to a pointless monopoly. But my duty is to apply it".[175] Therefore, even in the absence of consumer confusion, taking unfair advantage of a trademark's reputation is prohibited. This case suggests that trade mark protection can extend beyond use of the trade mark itself, which puts dupes in a grey area of the law that needs clarifying.

Counterfeits, on the other hand, are products aiming to pass off as authentic and therefore do infringe on IP protections. The line between inspiration and imitation is becoming increasingly blurred, and this has led to the promotion of counterfeits on social media under the misleading label of 'dupes'. Potter writes that "it is only by misappropriating another's trademark that the copy crosses into the criminal territory of a counterfeit good. In other words, design piracy by creating [dupes] is simply counterfeiting without the label".[176] Simply put, "trademark law offers effective protection against counterfeits but not non-confusing knockoffs".[177] This is evident with fashion items, where 'dupes' cannot truly exist by definition. Makeup 'dupes' can exist without infringing on trade marks or the appearance of a product, but a fashion 'dupe' intends to replicate the appearance of another popular design, and in order to identify the original design in question, there must be a stark similarity which walks the line of 'passing off'. A recent survey by ACID indicates that 89 percent of product designers believe 'infringement is blatant and deliberate and certainly not inadvertent, as is sometimes suggested'.[178] Labelling items as 'dupes' creates a false sense of security that no infringement is taking place.

[174] *L'Oreal SA v Bellure NV* [2010] EWCA Civ 535
[175] *L'Oreal SA v Bellure NV* [2010] EWCA Civ 535 [49].
[176] Potter (n97) 77.
[177] Lo (n54) 174.
[178] Macdonald (n2).

Courts have also struggled to distinguish between counterfeits and dupes, as was seen in *Rosenthal*, where the defendants were accused of selling counterfeit Burberry and Coach handbags.[179] The issue before the courts was "when does a low-end, cheaply-made handbag merely look like a high-end, famous-name handbag, and when does it actually appropriate the famous-name trademark?"[180] In struggling to "maintain a convincing justification", what Justice Cooper did admit is that "the harms stemming from counterfeit goods are the same harms that stem from the availability of knock-offs", or rather, dupes.[181] Potter writes that in both instances, the harm is "almost purely economic" because it "bestows the fruits of the fashion designer's/trademark holder's labour upon a copier who, at very little cost, exploits the economic and creative resources expended by the originator", which is directly inspired by Locke's labour theory of IP.[182] Therefore, where a 'dupe' can be just as detrimental to an independent designer as a counterfeit is, it also follows that this distinction is irrelevant to the workings of the Piracy Paradox.

Both dupes and counterfeits benefit the fashion industry by speeding up the cycle, driving demand for something new. However, the line that separates a counterfeit from a 'dupe' is crucial to the operations of IP law. This relates to Hemphill and Suk's distinction, whereby a close copy is infringing, and a reference is not. 'Dupes' seemingly fit into the category of a close copy - the aim is to be as close of a copy as legally possible. Yet, in order to avoid infringement, there must be a degree of creativity involved, even if only small. Therefore, a dupe can be interpreted as a 'reference'. Because they offer a cheaper alternative to high-end products, the consumer market does not overlap, and luxury designers are not impacted. Nolan notes how "the measure of success for the industry focuses on the monetary gains for all— not just on independent designers and the individual impacts of [dupes] and counterfeits".[183] Therefore, although dupes are not beneficial when consumers do not know the origin of a design, it would be a step too far to prohibit dupes. Dupes "only copy the unprotectable parts of the original design".[184] This practice is legally sound and helps to speed up induced obsolescence, which benefits the industry economically.

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[179] *People of the State of New York v. Rosenthal*, No. 2002NY075570, 2003 WL 23962174, (N.Y. Crim. Ct. Mar. 4, 2003).
[180] ibid [1].
[181] Potter (n97) 77.
[182] ibid.
[183] Nolan (n108).
[184] ibid.

5. Need for reform

5.1. Failure of legislation or enforcement?

Before discussing suggestions for reform, it should be determined if the failure is rooted in the stringent and unclear legislation or the difficulty of pursuing enforcement. Arguing that independent designers are failed by the legislation could be interpreted as saying stronger IP rights are necessary, with 'stronger' meaning an exclusive right of use and global full-dress protection. Design rights are considered to set the UK and EU apart from, and ahead of, design protection in the US, with registered design rights granting the owner exclusive use.[185] However, "the level of copying seems to be approximately as high in the UK as in the US".[186] This could suggest that despite stronger IP protection and increased legislation in the UK, the pursuit of enforcement remains unchanged.

From this, it follows that despite the claims of the Piracy Paradox, design rights in the UK "seem to have led to more innovation in the UK cheap chic, as the chains have found ways to design around the legal protection".[187] However, RS contend that if "strong IP protection were a sine qua non of investment and innovation in fashion design, we would expect to see the European industry flourish and the U.S. industry stagnate".[188] On a similar note, Myers writes that "IP laws have had no apparent effect on the overall level of innovation by designer labels".[189] Whilst this seemingly supports RS's position, it should be noted that there is no empirical evidence in this claim. In Wang's article, she writes, "ultimately, whether Raustiala and Sprigman are correct—whether design copying has a positive effect on the overall rate of innovation in the fashion industry—is an empirical question that has yet to be resolved by the literature and I will not attempt to resolve it here".[190] This article also cannot resolve this question. Despite arguing that copying deters innovation from independent designers, and reports from a handful of designers that I have noted, there is no statistical evidence demonstrating a measurable decline in innovation, meaning the issue remains contested within the literature.

Therefore, drawing from everything discussed thus far, I am led to assert that copying is what encourages designer brands to innovate – because they earn their names by providing couture

[185] Myers (n31) 63.
[186] ibid 74.
[187] ibid.
[188] Raustiala and Sprigman (n18) 1743.
[189] Myers (n31) 74.
[190] Wang (n23) 996.

not yet available to the masses, whereas stronger protection encourages fast fashion brands to innovate in order to avoid crossing the line of infringement. This creates a problem for the legislation. To circle back to the utilitarian incentive theory, IP law aims to encourage the incentive to innovate. It seems as though there should be a ‘sweet spot’ found in legislation, which stops fast fashion brands from producing ‘close copies’, but allows them to produce ‘references’ which go far enough to drive demand for new luxury designs, and this goes back to what RS term as “politically stable”, in that copying is tolerated and even functional.[191] This further supports the claim on which this entire article rests, being that independent designers are the only group in jeopardy.

Even unregistered design rights, which should be the most accessible form of protection for independent designers, are flawed in that they can only be enforced once copying has occurred. If this copying has been undertaken by the likes of SHEIN or AliExpress, it is likely that thousands of these copies have already been manufactured before the original designer has even noticed, and these brands rely on the assumption that SMEs do not have the financial resources to pursue enforcement. No matter how much the legislation is altered or increased, it is all futile if it cannot be enforced. As has been frequently noted throughout this article, financial barriers cause many independent designers turn to non-legal enforcement in social media, which demonstrates the inefficacy of the current regime. In terms of the hierarchical power-imbalance, RS note that “fashion’s low-IP equilibrium does at least deprive large fashion firms of one anticompetitive tool that big firms operating in high-IP markets often use to grind down upstarts: lawyers.”[192] This is because more legislation will encourage more litigation. One option that could limit legal costs is a new, straightforward system that designers themselves can navigate, without relying on lawyers to decipher complex jargon and a “patchwork of different and overlapping rights”.[193] This will be demonstrated shortly in the discussion on sui generis legislation. Another option that could be implemented sooner than new legislation is commissioning. If copying is a given in the fashion industry, and necessary to promote innovation, then encouraging retailers to commission work from independent designers rather than steal it would create the best outcome for both parties. This could mean that designers will receive a reward for their intellectual labour, maintaining the incentive to innovate, and fast fashion houses will profit from it. The following section will explore this.

[191] Raustiala and Sprigman (n18) 1699.
[192] Raustiala and Sprigman (n128) 1221-22.
[193] Macdonald (n2).

5.2. The future of design protection

It is difficult to predict what the future of design protection will look like, but ACID (Anti Copying in Design Ltd) is committed to raising awareness of IP and encouraging respect for IP rights as part of corporate social responsibility, in the hope that progress can be made.[194] ACID represents over 1,000 companies, mainly micro-enterprises and SMEs from 25 different industry sectors. Co-founder, Dids Macdonald, believes the "David versus Goliath situation is compounded by low levels of IP awareness, making improved IP education and knowledge about IP rights an absolute must".[195] As aforementioned, emerging designers "lack knowledge of the rights available to them, and generally regard the current design rights as irrelevant to their firms".[196] Therefore, before attempting to tackle the issues presented by legislation and enforcement, a reasonable first step could be as simple as teaching independent designers about their rights. While this would be making progress, it is certainly only a 'first step'. Therefore, ACID also believes that a more 'hands-on approach' is needed, which can be seen by their "Commission it, Don't copy it" campaign, aiming to "encourage retail buying departments to support UK design by commissioning work directly from designers".[197] This campaign allows the designer to receive a royalty, allows the retailer to use its "purchasing power to produce the commissioned product cost-effectively while creating a unique UK design signature range", and consumers "get an excellent deal knowing they are buying an original design and supporting British designers".[198] Commissioning would provide an effective system that rewards independent designers for their intellectual labour without removing designs from the public domain entirely. Furthermore, this would avoid the challenge of rebuilding the current legislation entirely to fit the fashion industry.

On that note, it is worth mentioning that both the music and film industries have tailored protection frameworks which the fashion industry lacks. For example, music has multiple layers of copyright protection. The melody and lyrics are protected as a literary and musical work,[199] and the sound recording is protected as a recorded performance,[200] which is a separate right from the composition, and these can be attributed to different people. This tailored framework balances creative expression and commercial reality. It allows creators to own,

[194] ibid.
[195] ibid.
[196] Janssens and Lavanga (n87) 252.
[197] Macdonald (n2).
[198] ibid.
[199] CDPA 1988, s3
[200] CDPA 1988, s5A

license, and enforce their work through a finely tuned system. Fashion, by contrast, exists in a legal grey zone where many designs are not protected at all unless they meet high originality or registration standards, leaving them open to copying. Macdonald also calls for a "user-friendly IP framework" which could be found in a sui generis system, further in the future.[201]

5.2.1. A sui generis system

Where EU and UK design rights attempt to protect the appearance of a product as a whole, the global protections of copyright and trade marks require identifying separable elements, whether a logo, a colour or an appliqué. It has been noted in copyright discussions that many designs are not separable in this way,[202] but Jiminez notes that a global "full-dress copyright is unnecessary, impracticable, and harmful" because it "will likely increase litigation, chill creativity, and drive up costs".[203] Instead, she proposes a "middle ground … sui generis system of protection that only protects fashion designs … that are exceptionally original, and does so only against other articles that are substantially identical".[204] She defines 'exceptionally original' as "a fashion design that is, upon reduction to a fixed and tangible medium with sufficient specificity, the result of a designer's own creative endeavour; and its variation over prior designs for similar types of articles is the only one of its kind; can only be attributed to the designer; can be regarded as separate and different; is significant; and pertains to the article's appearance and not its function".[205]

This proposed system operates on a very high standard of infringement, meaning only a limited number of designs will receive protection.[206] Therefore, RS would approve of the maintenance of a low-IP equilibrium, which they claim is fundamental to the fashion cycle. Similarly, Jimenez claims the high standard will not diminish creativity since only a "small, select, and exceptional class of designs" will be brought outside of the public domain, allowing "designers to reference and adapt these exceptionally original designs without fear of infringement liability".[207] This will increase innovation by offering a reward for truly 'exceptionally original' work, which creates a benchmark for designers to strive towards, but also forces innovation in order to avoid copying.

[201] Macdonald (n2).
[202] Raustiala and Sprigman (n18) 1700.
[203] Jimenez (n45) 101 & 130.
[204] Jimenez (n45) 101.
[205] ibid 130-131.
[206] ibid 101.
[207] ibid 101 and 130.

On the other hand, Braun acknowledges that "critics of sui generis legislation may argue that the benefits of protection are ultimately outweighed by the cost of increased (and unnecessary) litigation".[208] This is because there is no use in any legislation that cannot be enforced, and even though a tailored regime is necessary for fashion, it does not eliminate the issue of enforcement costs. This being said, Braun concludes that "while bound to be imperfect, [sui generis legislation] may be the best way to balance the goals of artistic innovation, idea protection, and fair competition".[209]

5.3. Conclusion

Ultimately, this article is concerned with the inequality between independent, fast fashion, and luxury designers. Although limited, there is legislation in place which should effectively protect all original designs, particularly design rights, regardless of the fact that more protection is available for luxury designers (namely, trade marks). Independent designers are frequently disadvantaged, either by a lack of awareness of the unregistered rights available or by the prohibitive costs of securing registered protection. Even when they do possess knowledge of their rights, the expense and complexity of enforcement render those rights largely ineffective. Fast fashion companies are also able to navigate these protections strategically by walking the line between 'dupe' and 'counterfeit', or relying on the impracticalities of enforcement faced by independent designers.

Particular attention has been paid to the role of unregistered design rights and copyright in offering automatic, though often weaker, protection due to a lack of documentation. These mechanisms assume a level of legal literacy and knowledge that many emerging designers simply do not possess. Meanwhile, registered design rights and trade marks provide stronger, longer-term protection, but their cost and procedural demands make them inaccessible to many independent designers.

Moreover, this article has explored how luxury brands are better positioned not only to register and enforce their rights but also to shape the industry through their influence on the next trends that will reach the high street. This leaves independent designers disadvantaged by a lack of access to protection and enforcement. In light of these findings, this article suggests that a recalibration of the current system is necessary. Increased education around IP rights for new

[208] Braun (n95) 1016.
[209] ibid.

designers, a push for commissioning designs and potentially a sui generis system in the future could serve to create a more level playing field.

In conclusion, while IP law does provide a foundation for protecting originality in fashion, it does not yet offer equal protection for all designers. Without targeted reform and greater awareness initiatives, independent designers will continue to be vulnerable to appropriation, undermining both innovation and diversity within the industry. Future research should continue to interrogate these structural inequalities and seek solutions that recognise and support all designers, not just those with the means to assert their rights.

Environmental Law in Australia: How Indigenous Peoples are Disregarded

Ruby Simcock

1. Introduction

The mainstream concept of 'Environmental law' does not comprehend the economic and social inequalities experienced by Indigenous Peoples when subjected to climate change. Indigenous is usually used to describe the 'experiences shared by a group of people who have inhabited a country for thousands of years.'[1] They have a deep connection with the environment and are therefore greatly affected by climate change. Colonialism has threatened Indigenous communities for centuries and attitudes rooted in colonialism continue to harm communities today. Indigenous People are the traditional landowners however, they had their land stolen from them as land was deemed terra nullius, or 'nobody's land.' Environmental law excludes Indigenous communities. Language used within environmental law furthers this exclusion by refusing to acknowledge the culpability of colonialism in language loss, exacerbated by climate change. It also refuses to consider Indigenous understanding, by using Eurocentric language, ostracising Indigenous communities from environmental and climate discussions. Moreover, the prioritisation of economic development within Australia is amplifying climate change and the suffering of the Indigenous communities. Although attempts have been made at large scale climate change action seen in the Paris Agreement, failures to take meaningful measures in Australia still see Indigenous peoples being marginalised. Climate justice is spoken about within the Paris Agreement, but it makes little progress due to individual state sovereignty. Therefore, the mainstream concept of 'Environmental Law' fails to comprehend Indigenous suffering as a consequence of climate change and colonialism. This is mirrored in the gulf between climate law and climate justice.

2. Language

The language used within the mainstream concept of 'Environmental Law' does not encompass the level of harm felt by Indigenous communities when subjected to climate change.

[1] Chris Cunningham and Fiona Stanley, 'Indigenous by definition, experience, or world view,' (*thebmj*, 21st August 2003) https://www.bmj.com/content/327/7412/403.short last accessed 1 April 2026.

Eurocentric language employed neglects to imply the severity of climate change for Indigenous Peoples and ignores the decades of harm already faced. Language used implies environmental harm is a future issue however this is not the case for Indigenous communities, who have had to adapt to climate change effects for centuries. The physical effects of climate change also have further reaching impacts including the rapid decline in Indigenous languages.

The mainstream language used regarding environmental law does not encapsulate the centuries of suffering that Indigenous communities have already had to face as a result of climate change. It refuses to acknowledge the gravity of the crisis for Indigenous communities. 'The overall form and context of language use influences our environmental perceptions and actions,'[2] therefore the terms chosen are important. The use of the term "climate change" 'evokes no specific consequences whatsoever and can even suggest that the climate is changing of its own accord.'[3] It allows humans to create a separation from themselves and the climate, declining to take ownership for a problem that is as a result of human action and simultaneously inaction. This attempt at separation between the climate and humans is seen repeatedly throughout terms popularised. "Global warming" is again problematic because it neglects to convey the severity of the issue. 'It is inadequate to describe the complex repercussions of climate change.'[4] Moreover, even terms that display more urgency such as "climate crisis" or "climate emergency" erase connections between climate change and 'colonial violence that Indigenous communities have endured for centuries.'[5] None of the terms used within Western discussion encapsulate the continued threat of climate change for Indigenous communities. Furthermore, agreements in place such as the Paris Agreement, place goals for years in the future, presenting the illusion that immediate action does not need to be taken. However, for Indigenous Peoples this is not the reality. Plainly therefore, 'the pitfalls of colonial language are evident.'[6]

Furthermore, language used also ignores Indigenous communities' understanding, ultimately excluding them from discussions surrounding climate. In a study with Torres Strait islanders, it was found that they had no 'equivalent term for "climate change" in their own language.'[7] It also showed that terms to describe communities such as 'vulnerable' and 'resilient' were seen

[2] Julia C. Fine, Jessica Love-Nichols and Bernard C. Perley, 'Climate and language: an entangled crisis,' (2023) Vol152(3), Daedalus, 84, 86 https://www.jstor.org/stable/48739983 last accessed 1 April 2026.
[3] ibid 87.
[4] ibid.
[5] ibid.
[6] ibid.
[7] Melissa Nursey-Bray, 'Old ways for new days: Australian Indigenous peoples and climate change,' (2019) Vol24(5), The International Journal of Justice and Sustainability, 473, 479 https://doi.org/10.1080/13549839.2019.1590325 last accessed 1 April 2026.

to be unhelpful.[8] Although these terms are used frequently, they draw negative connotations towards the communities. Consistently describing Indigenous Peoples as 'resilient' is viewed as a way to avoid guilt and 'responsibility' when not 'supporting Indigenous-driven initiatives.'[9] Alternatively, it was seen to be equally as problematic to refer to Indigenous peoples as 'vulnerable', despite this being used 'extensively in… scientific literature.'[10] The notion that Indigenous peoples are 'vulnerable' removes their agency and autonomy.[11] The polarising use of these terms portrays Indigenous Peoples in a harmful way, in which policy makers can use the language in a way that benefits them, furthering colonial notions of disregarding Indigenous Peoples. It is important to consider how language will be interpreted by Indigenous groups as their understanding is different to that in the Western world.

Moreover, environmental law neglects to acknowledge how climate change and colonialism is directly responsible for the rapid decline in Indigenous language. Media reports on the 'loss' of languages state that languages are becoming 'extinct' at a rate of one every two weeks.[12] Languages are "lost" at a high rate due to forced migration as a result of rising sea levels amongst other results of climate change. When Indigenous Peoples are forced to migrate, the languages are unable to be passed on generation to generation and are eventually not spoken anymore. However, the language associated with this issue is taxing. Using terms such as "loss" denote a lack of accountability, it 'obscure[s] settler-colonisers deliberate destruction of Indigenous languages.'[13] Furthermore, the term 'extinction' to refer to these languages, often used to describe the extinction of animals, implies the false notion that these languages cannot return, as is the case with animals. However, 'a community may stop using its original language, but they can also start using it again.'[14] It has been argued that these 'extinction narratives are a form of oppression,'[15] as it puts the blame wrongly on indigenous communities 'engaging a strategy that' has been referred to as 'erasure of colonial agency.'[16]

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[8] Nursey-Bray (n7).
[9] ibid.
[10] ibid.
[11] ibid.
[12] United Nations Department of Public Information, 'The United Nations Permanent Forum on Indigenous Issues,' (The United Nations, April 2018)<https://www.un.org/development/desa/indigenouspeoples/wp-content/uploads/sites/19/2018/04/Indigenous-Languages.pdf> accessed 6th April 2025.
[13] Fine, Love-Nichols and Perley (n2) 88.
[14] Wesley Y. Leonard, 'Refusing "Endangered Languages" Narratives,' (2023) Vol152(3), Daedalus, 69, 78 https://www.jstor.org/stable/48739982 last accessed 1 April 2026.
[15] ibid 79.
[16] ibid 77.

Therefore, the huge impact that choices of language make on Indigenous Peoples is evident. The minimisation of the climate crisis directly leads to detrimental effects for Indigenous Peoples; it further removes them from decision making within environmental law despite their extensive knowledge.

3. Prioritising economic development

The concept of 'Environmental Law' does not comprehend how the Australian Government prioritise economic development at the expense of the climate and, consequently at the detriment of Indigenous Peoples.

Indigenous communities in the Northern Territory (NT) have been vocal in their apprehension about the Cotton Farming Industry. Water is free in the NT in a bid to increase development, therefore it is essentially a self-regulated industry. [17] Hence, it encourages the purchase of land in the NT to grow crops like cotton. Landowners frequently misuse permits, and the government have shown a reluctance to act upon these breaches stating they 'will not tell farmers what they can and cannot grow on their own land.'[18] When further pressured on why they are not prosecuting breaches, they voiced their support for the cotton industry, reinforcing their focus on economic development at the expense of Indigenous communities.

Indigenous communities rely on the water that is being irrigated for the cotton industry. Despite numerous attempts to oppose the cotton industry, the NT Government continues to issue large water licenses. Traditional owners have rights to hunt, fish, and can on a pastoral lease and they should be informed of major land use changes like the planting of commercial crops.[19] However in many cases they are not informed. This highlights a dismissal of Indigenous rights, indicating the government is economically developing at the detriment of Indigenous Peoples. Some Indigenous Peoples have had to resign from committees after being 'belittled' and 'ignored.'[20] This emphasises the importance of meaningful inclusion, it is not sufficient that they are just present for discussions.

Once more, this is seen with the management and ownership of the Murray Darling Basin (MDB). Again, Indigenous Peoples' true ownership of the river is overlooked. The Basin's

[17] ABC News In-depth, 'Exposing the territory handing out millions of dollars of water, for free,' (19th August 2024) https://www.youtube.com/watch?v=El0LEelDKKM last accessed 1 April 2026.
[18] ibid.
[19] ibid.
[20] ibid.

water market is worth around $16 billion and yet Indigenous groups own less than one percent of this, despite being the original owners. In 2018 the government promised Indigenous communities $40 million in order to buy back some of the river.[21] To this day, communities have received none of this money. It is evident from the improvements made at Toogimbie Station by the Nari Nari tribe that the environment would be better managed by Indigenous Peoples.[22] They were able to bring the land back from being desolate to a thriving ecosystem. This displays a continuous ignorance to Indigenous efforts. Indigenous communities have pled for decades 'to protect the land', but the government will not listen.[23] Therefore, it is clear that 'restoring Indigenous values for the environment would also enhance environmental justice.'[24] However, it is argued that utilising Indigenous Peoples' knowledge without returning to their land promotes the idea of 'universal ownership' of Indigenous knowledge.[25] Mirroring colonial attitudes, it suggests that settlers are 'owed' this knowledge. In a 1987 United Nations report, Indigenous communities were referred to as 'repositories of knowledge.'[26] This further illustrates that settlers believe they can extract knowledge from Indigenous communities. This is subsequently observed in a negotiation for reducing emissions from deforestation and forest degradation, despite being invited, Indigenous Peoples were 'effectively denied capacity to exercise agency.'[27] They were given no means to make a 'direct contribution' or ensure their views 'were reflected'.[28] Consequently, advancing the idea that Indigenous People are being included but not heard. Moreover, it illustrates that Indigenous knowledge is only used when it will benefit settlers. It reinforces an economic priority and dismissal of Indigenous voices.

Additionally, the word 'culture' is often used without a true understanding of what Indigenous culture is. As a result, Indigenous economic interests are overlooked. This is reflected in permissions granted to the Barkandji tribe; they were granted permission to use the river for 'cultural purposes', 'not for economic gain.'[29] Commonly, 'culture' refers to areas of significance however, it fails to acknowledge that many Indigenous practices can be viewed as

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[21] Kath Sullivan and Clint Jasper, 'First Nations call for increased water ownership of Murray-Darling river system,' (ABC News, 13th April 2021) https://www.abc.net.au/news/2021-04-13/first-nations-want-murray-darling-water-promise-upheld/100064684 last accessed 1 April 2026.
[22] ABC News, 'Traditional owners call for increased water rights in Murray-Darling Basin,' (27th May 2021) https://www.youtube.com/watch?v=KTWEiqhcF_o last accessed 1 April 2026.
[23] Monica Gratani, Stephen G. Sutton, James R. A. Butler, Erin Bohensky, and Simon Foale, 'Indigenous environmental values as human values,' (2016) Vol2(1), 7 https://doi.org/10.1080/23311886.2016.1185811 last accessed 1 April 2026.
[24] ibid 14.
[25] Fine, Love-Nichols and Perley (n2) 88.
[26] ibid.
[27] Nursey-Bray (n7) 474-5.
[28] ibid.
[29] ABC News (n22).

'economic, social and cultural.'[30] The failure to see that culture is intertwined with economic and social aspects of Indigenous lifestyle means that Indigenous values cannot be fully considered when making environmental decisions. The narrow interpretation is harmful for Indigenous communities because it '[relegates Indigenous] interests to a realm of negligible significance to the political economy of regional agricultural development and marginalised them within environmental research and action.'[31] This is evidenced in the discussion of the MDB plan, where the chairman pivoted the discussion from economic interests to the management of cultural heritage points for Indigenous People.[32] A focus on this slim reading of 'culture' minimises Indigenous communities on environmental issues and exacerbates economic gain for Government.

Although, it could be argued that the Australian Government is considering Indigenous communities in the MDB plan. It addresses groundwater; inspecting the water; adaptive management for climate change and much more.[33] The formal acknowledgement of the Indigenous connection to water is a positive step.[34] However, as discussed above, the meaning of cultural is not properly understood by those legislating and it leads to an oversight in economic interests. The MDB plan of 2012 also overlooked Indigenous communities' rights to own, manage and control water. 'Without precise policy objectives… [Indigenous Peoples] feel that their interests have been marginalised.'[35] It does not truly create any guarantee that the Government will look out for Indigenous interests.

The mainstream concept of Environmental law does not comprehend the severity of the detrimental impact the prioritising of economic development can have on the environment and therefore Indigenous communities. It is evident from how Indigenous voices have been ignored regarding the cotton industry and the Murray Darling Basin plan that the Australian Government does not grasp the risk that comes from mismanagement of the environment especially for Indigenous communities.

[30] Sue Jackson, 'Compartmentalising culture: The Articulation of Indigenous values in water resource management,' (2010) Vol37(1), Australian Geographer, 19, 26 https://doi.org/10.1080/00049180500511947 last accessed 1 April 2026.
[31] ibid 29.
[32] ibid 24.
[33] Murray–Darling Basin Authority, 'Key Elements of the Basin Plan,' (*Australia Government*, 3rd July 2024) https://www.mdba.gov.au/water-management/basin-plan/key-elements-basin-plan last accessed 1 April 2026.
[34] Annie Brown and Else Kennedy, 'Murray-Darling Basin Plan changes will formally acknowledge First Nations connection to water,' (*ABC News*, 1st December 2023) https://www.abc.net.au/news/2023-12-01/murray-darling-indigenous-water-rights-restoring-rivers-bill/103175452 last accessed 1 April 2026.
[35] ABC News (n22).

4. Paris Agreement and Australian compliance

Despite Australia signing and ratifying the Paris Agreement, there are concerns that targets will not be met, at great cost to Indigenous Peoples. Australia is already facing the effects of climate change at a much higher rate than anywhere else in the world.[36] Land areas in Australia have warmed by 1.4 degrees Celsius compared to a global average of 0.99 degrees Celsius and sea levels have also rose at a higher rate than the global average.[37] Therefore, Australia should be taking severe measures to ensure this does not worsen.

Impacts of climate change will be experienced across Australia however, many Indigenous communities 'will experience greater impacts because of pre-existing vulnerabilities and exposure.'[38] In referring to 'vulnerability', its harmful nature having been discussed above, it is expressing differences in 'wealth, education, disability and health status' that Indigenous Peoples may have which put them at greater risk of climate change.[39] Their risk is also exacerbated by the marginalisation they have faced historically due to colonialism.[40] It is argued that Australia's strategies in fulfilling their targets under the Paris Agreement have 'translated into little effort'.[41] This is surprising because Australia's 'economic development relies on sound management of water and land use,' therefore they have the most to gain from addressing climate change properly.[42] Not only will they struggle economically, Indigenous communities will suffer tremendously if major action is not taken to meet targets. It has been debated that the Coalition Government has led to Australia as being 'unwilling to advance ahead of other countries,' regarding climate change.[43] Indigenous Peoples identity as human beings connected to the land therefore it is paramount for Australia to be seen to make strides in climate change action.[44] Furthermore, for climate change action to be effective it 'must be grounded in the perspectives, knowledge and rights' of Indigenous Peoples.[45] However, the

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[36] Rosemary Lyster, 'The impacts of climate change on the human rights of First Nations Australians,' [1st December 2021], Precedent, 8 https://www4.austlii.edu.au/au/journals/PrecedentAULA/2021/63.html last accessed 1 April 2026.
[37] ibid.
[38] ibid.
[39] ibid.
[40] ibid.
[41] Maureen Papas, 'The 2030 Sustainable Development Agenda and the Paris Climate Agreement – taking urgent action to combat climate change: how is Australia likely to fare?' (2017) Vol20(1), Asia Pacific Journal of environmental law, 94, 105 https://doi.org/10.4337/apjel.2017.01.04 last accessed 1 April 2026.
[42] ibid.
[43] Papas (n41).
[44] Narelle Bedford, Tony McAvoy, and Lindsey Stevenson-Graf, 'First Nations peoples, climate change, human rights and legal rights,' (2021) Vol40(3), University of Queensland Law Journal, 371 https://journal.law.uq.edu.au/index.php/uqlj/article/view/6125/5015 last accessed 1 April 2026.
[45] ibid.

Government is neglecting to thoughtfully include Indigenous communities in meaningful discussions surrounding climate change and as a result, not only will Australia suffer but Indigenous communities will suffer greatly; food security will be affected, sea levels will rise, more intense cyclones will affect fishing sites and sites of cultural significance.[46]

Moreover, Australia is extremely reliant economically on fossil fuels and complicit in the burning of coal globally. Australia is the largest exporter of coal in the world, responsible for 39.5% of total coal exports.[47] As this coal is not being burned in Australia they do not have to declare this in their domestic National Greenhouse Gas inventory.[48] However, it is irrelevant that the coal is burned elsewhere, it is warned that 'every tonne of CO2 emissions adds to global warming.' [49] The exportation contributes to the imminent and ongoing threat faced by Indigenous Peoples in Australia. A case was brought to the Australian Federal Court stating that a duty to care was owed regarding a permit to extend a coal mine.[50] Despite the initial decision that a duty to care was owed, the Minister went ahead and approved the extension, dismissing the consequences. The scientific evidence was not disputed, even upon appeal it was stated the evidence was never in debate. This shows a clear ignorance by the Australian Government because within those facts it was clear that this extension could make it impossible for Australia to meet its targets set within the Paris Agreement. It highlights an apathetic response to climate change. Their omissions to take purposeful action is coupled with their deliberate measures to expedite climate change and further suffering for Indigenous communities.

However, *Sharma* illustrates that cases are making it to court and scientific evidence is being heard.[51] This shows an increased public awareness of the environment within Australia. It also 'represents a marked shift towards a duty for governments to care about climate harms.'[52] Since *Sharma* there have also been other cases that have brought to the courts that the government should be taking more thoughtful action regarding the environment.[53] Some cases are even

[46] Lyster (n36) 10.
[47] ibid.
[48] ibid.
[49] ibid.
[50] *Sharma v Minster for the Environment* [2021] FCA 560.
[51] *Sharma v Minster for the Environment* [2021] FCA 560.
[52] Jacqueline Peel and Rebekkah Markey Towler, 'A duty to Care: The Case of *Sharma v Minister Environment* [2021] FCA 560,' [2021] Vol33(3), Journal of Environmental Law, 727, 733 https://doi.org/10.1093/jel/eqab022 last accessed 1 April 2026.
[53] *Pabai Pabai and Guy Paul Kabai v Commonwealth of Australia* (2021) (VID622/2021); *Daniel Billy and others v Australia (Torres Strait Islanders Petition)* (2019) (CCPR/C/135/D/3624/2019).

being brought by Indigenous individuals/groups, illustrated by landmark actions such as *Pabai Pabai*,[54] marking a positive step towards recognition.

The Paris Agreement also clearly indicates the dichotomy between climate law and climate justice. The Paris Agreement focuses on setting targets to address climate change, it also attempts to ensure climate justice. It is the first international agreement to recognise climate justice which is an important acknowledgement. The preamble of the treaty, although not legally binding 'reflects the ethos of its proceeding provisions.'[55] It attempts to include acknowledgments of those at the most risk of climate change. However, some argue that 'climate justice faces the fundamental challenge of state sovereignty.'[56] It fails to include any 'legally binding requirement for adaptation in the nationally determined contributions.'[57] It only 'encourages adaptation using softer means.'[58] Therefore, despite ratifying the Paris Agreement, Australia is not legally bound to address climate justice issues such as proper inclusion of Indigenous individuals in decision making, or adaptation. As a result, the gulf between climate law and climate justice widens.

Indigenous communities have tried to speak up about mismanagement of the environment however they are being ignored. 'Australia's climate change policy is on course for 'disastrous' increases in temperature.'[59] Therefore, the targets made in the Paris Agreement are unlikely to be met and the repercussions for Indigenous Peoples will be drastic. The mainstream concept of 'environmental law' does not comprehend that targets are not satisfactory if proper measures are not being taken to meet them.

5. Conclusion

In conclusion, the mainstream concept of 'Environmental Law' does not portray the reality of how climate change is affecting marginalised groups such as Indigenous communities discussed here. The language used is Eurocentric and fails to acknowledge indigenous understanding, excluding them from discussions surrounding climate change and the environment. The language also neglects to reflect the serious impact colonialism has had on

[54] *Pabai Pabai and Guy Paul Kabai v Commonwealth of Australia* (2021) (VID622/2021).
[55] Lyster (n36) 9.
[56] Temitope Tunbi Onifade, 'Climate Justice under the Paris Agreement: framework and substance,' (2021) Vol15(3), Carbon and Climate Law Review, 233 https://doi.org/10.21552/cclr/2021/3/6 last accessed 1 April 2026.
[57] ibid 240.
[58] ibid.
[59] Papas (n41).

Indigenous groups, and how these colonial attitudes still influence how Indigenous Peoples are treated today. Their voices are minimised and dismissed despite their vast knowledge of the environment and its management. The government value economic development and gain above the environment, and as a direct result, Indigenous Peoples. As a result of this, Australia makes it highly unlikely that they will hit targets ratified under the Paris Agreement. The dismissal of Indigenous Peoples within environmental law widens the gulf between climate law and climate justice.

Algorithmic Discrimination and Societal Harm: Assessing the Capacity of International Human Rights Law in the Age of AI

Ruvimbo Mafuta

1. Introduction

The International Convention on the Rights of Persons with Disabilities (ICRPD) serves as a critical framework within international human rights law,[1] addressing discrimination and underscoring its relevance in the contemporary landscape of artificial intelligence (AI). As AI systems increasingly influence decision-making processes, they risk perpetuating structural inequalities through algorithmic bias,[2] creating societal harms that traditional human rights frameworks struggle to address.[3] Different articles within the ICRPD offer a critical lens for addressing AI-related harms by emphasising principles that align with the challenges posed by these technologies.

Despite its strengths, international human rights law faces significant challenges in addressing the systemic and intersectional harms caused by AI. These include gaps in enforceability, the lack of transparency of AI systems, and the global disparities in AI governance. Using theories of regulation, including public interest theory and institutionalist perspectives, this analysis evaluates the suitability of international human rights norms. It examines how well these norms capture and address the societal-level harms arising from AI deployment, focusing on the prohibition of discrimination.

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[1] United Nations Human Rights Office on the High Commission, 'International Convention on the Rights of Persons with Disabilities' (2006) https://www.ohchr.org/en/instruments-mechanisms/instruments/convention-rights-persons-disabilities last accessed 1 April 2026.
[2] Tetyana (Tanya) Krupiy, 'A Vulnerability Analysis: Theorising the Impact of Artificial Intelligence Decision-making processes on Individuals, Society and Human Diversity From a Social Justice Perspective' (2020), 2 https://doi.org/10.1016/j.clsr.2020.105429 last accessed 1 April 2026.
[3] Daragh Murray, 'Using Human Rights Law to Inform States' Decisions to Deploy AI: Symposium: How Will Artificial Intelligence Affect International Law? Using human rights Law to Inform States' Decision to Deploy AI' (2020), 158 https://doi.org/10.1017/aju.2020.30 last accessed 1 April 2026.

2. AI and discrimination at the societal level

AI's growing role in decision-making raises significant concerns about systemic discrimination. By replicating biases embedded in training data,[4] AI systems perpetuate structural harms that traditional legal frameworks struggle to address. The ICRPD mandates the elimination of discrimination, emphasising equal access and inclusion.[5] However, the actual impact of AI often diverges sharply from these ideals.

One mechanism through which discrimination occurs is algorithmic bias, where AI systems trained on historical data reinforce existing inequalities.[6] This bias is evident in predictive policing, where algorithms embed patterns of historical over-policing into future predictions disproportionately targeting racial minorities.[7] Ashwini K.P. notes, such tools amplify systemic harms,[8] contravening Article 2 of the ICRPD, which prohibits direct and indirect discrimination, including technological inequities.[9] The harms caused by predictive policing are compounded when viewed through an intersectional lens. Individuals who experience overlapping forms of marginalisation, such as racial minorities with disabilities, face intensified disadvantages. They are more likely to be targeted by biased systems while simultaneously encountering systemic barriers that hinder their ability to contest these discriminatory outcomes.[10] The ICRPD's emphasis on intersectionality highlights the urgent need for AI systems to be designed with an awareness of these layered identities, ensuring that they do not exacerbate existing vulnerabilities.

The consequences of these biases extend beyond policing. By reinforcing structural inequalities, AI systems undermine the protections guaranteed by the ICRPD, including equal

[4] Masisha Rahman, 'AI and Social: Navigating the Impact of Artificial Intelligence on Society's Equity and Inclusion (2024) https://ourfutureisscience.org/blog/ai-and-social-justice-navigating-the-impact-of-artificial-intelligence-on-societys-equity-and-inclusion last accessed 1 April 2026.
[5] International Convention on the Rights of Persons with Disabilities.
[6] Rahman (n4).
[7] United Nations Human Rights Office of the High Commission, 'Racism and AI: Bias From the Past Leads in the Future' (2024) https://www.ohchr.org/en/stories/2024/07/racism-and-ai-bias-past-leads-bias-future#:~:text=A%20clear%20example%20of%20how,on%20location%20and%20personal%20data last access 1 April 2026.
[8] ibid.
[9] International Convention on the Rights of Persons with Disabilities Article 2 'Definitions' (2006)
[10] Monique Mann & Tobias Matzner, 'Challenging Algorithmic Profiling: The Limits of Data Protection and Anti-Discrimination in Responding to Emergent Discrimination' (2019), 5 https://doi.org/10.1177/2053951719895805 last accessed 1 April 2026.

access to justice and societal participation.[11] The opaqueness of AI systems further entrenches these harms. Persons with disabilities may be unable to challenge or understand the discriminatory outcomes. This violates Article 9 of the ICRPD, which requires accessible systems that empower individuals to address barriers.[12] This lack of transparency not only diminishes accountability but also erodes trust in institutions meant to safeguard human rights.

Similarly in the employment sector, AI hiring tools disadvantage persons with disabilities by enforcing norms of productivity and communication that fail to account for diverse needs.[13] This reality stands in stark contrast to Article 27 of the ICRPD, which guarantees equal access to employment and calls for reasonable accommodations.[14] The Organisation for Economic Cooperation and Development (OECD) data from 2019 reveals that people with disabilities are 2.3 times more likely to face unemployment,[15] highlighting systemic barriers reinforced by biased AI tools. These disparities undermine the economic independence of individuals with disabilities and contribute to cycles of poverty and social marginalisation. Thereby, contravenes the ICRPD's mandate for equal participation in society. To effectively address these harms, it is crucial to implement robust regulatory oversight that aligns hiring technologies with inclusive employment. Implementing measures such as algorithm audits for bias, diverse training sets, and accessibility features in hiring processes can remedy algorithmic bias. However, the opaqueness of many AI systems complicates efforts,[16] exacerbating structural unemployment.

These examples illustrate how AI not only mirrors but also exacerbates social inequalities. As highlighted in the UN's discussions on digital equality, regulatory gaps and a lack of diverse perspectives in AI development perpetuate harms.[17] The ICRPD provides a valuable framework to address these issues but requires proactive measures to ensure AI systems promote equality. However, as current implementations show, the potential of the ICRPD to

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[11] International Convention on the Rights of Persons with Disabilities Article 13 'Access to Justice' and Article 29 'Participation in Political and Public Life' (2006).

[12] International Convention on the Rights of Persons with Disabilities Article 9 'Accessibility' (2006).

[13] Tetyana (Tanya) Krupiy, 'Meeting the Chimera: How the CEDAW Can Address Digital Discrimination' (2021), 37 https://eprints.ncl.ac.uk/fulltext.aspx?url=278922%2fE7599EE0-5B91-4185-8D20-8B6F4086774B.pdf&pub_id=278922&ts=639106671754685529 last accessed 1 April 2026.

[14] International Convention on the Rights of Persons with Disabilities Article 27 'Work and Employment' (2006)

[15] The Organisation for Economic Cooperation and Development (OECD), 'Using AI to Support People With Disability in the Labour Market: Opportunities and Challenges' (2023), 12 https://www.oecd.org/content/dam/oecd/en/publications/reports/2023/11/using-ai-to-support-people-with-disability-in-the-labour-market_e9463967/008b32b7-en.pdf last accessed 1 April 2026.

[16] Nathalie A. Smuha, 'Beyond the Individual: Governing AI's Societal Harm' (2021), 9 Beyond the individual: governing AI's societal harm | Internet Policy Review last accessed 1 April 2026.

[17] OECD 2023 (n15) 42.

address AI discrimination remains overlooked without enforceable mechanisms and collaboration between stakeholders.

3. Assessing the suitability of international human rights norms for ai harms

The systemic discrimination caused by AI raises critical questions about whether international human rights norms, particularly principles of equality and non-discrimination, are well-suited to address these harms. While the ICRPD provides a solid foundation for protecting marginalised groups, its application to AI reveals both strengths and significant gaps in addressing the societal level harms exacerbated by technological systems.

3.1. Strengths of international human rights norms

International human rights law is rooted in universal principles of equality and inclusion,[18] offering a moral and legal framework that aligns closely to the challenges posed by AI. The ICRPD's requirement for reasonable accommodation further underscores the need for inclusive AI systems,[19] such as ensuring hiring tools account for diverse employment patterns among persons with disabilities. The concept of reasonable accommodation is pivotal in the context of AI deployment.[20] It requires organisations to adapt their practices to meet the needs of persons with disabilities.[21] Thereby, fostering an inclusive environment. The World Economic Forum correctly argues that inclusivity in technological design is not merely a legal obligation but a moral imperative that acknowledges the diverse capabilities of users.[22] They suggest that

[18] International Convention on the Rights of Persons with Disabilities.
[19] International Convention on the Rights of Persons with Disabilities Explicitly mentioned in Article 2 'Definitions' but is referred in Article 5 'Equality and Non-Discrimination, Article 27 'Work and Employment' and Article 24 'Education' (2006).
[20] Tetyana (Tanya) Krupiy and Martin Scheinin, 'Disability Discrimination in the Digital Realm: How the ICRPD Applies to Artificial Intelligence Decision-Making Processes and Helps in Determining the State of International Human Rights Law' (2023), 21 https://doi.org/10.1093/hrlr/ngad019 last accessed 1 April 2026.
[21] Raquel Valle Escolano, 'Artificial Intelligence and Rights of People With Disabilities: The Power of Algorithms (2023), 34 https://pdfs.semanticscholar.org/6ec8/73840bab95e5bc7ea357c4c8c4254ba3396f.pdf last accessed 1 April 2026.
[22] World Economic Forum, 'Ethics by Design: An Organisational Approach to Responsible Use of Technology' (2020), 11 http://www3.weforum.org/docs/WEF_Ethics_by_Design_2020.pdf last accessed 1 April 2026.

organisations should proactively design AI systems with consideration for various user profiles to prevent discrimination and to enhance participation.[23]

The adaptability of human rights norms is another strength. Natacha Sangwa argues these norms can evolve to address emerging challenges, i.e., biases in AI systems.[24] By interpreting obligations dynamically, human rights norms can be extended to include technological discrimination, demanding proactive measures to prevent harm and ensure fairness. To further contextualise this adaptability, public interest theory provides a valuable lens. Public interest theory suggests that regulation should be designed to promote common good and protect the interests of society at large, especially against market failures and systemic injustices.[25] In the context of AI, this theory underscores the need for regulatory frameworks that prioritise human rights and social justice over purely economic considerations. By embracing public interest principles, human rights norms can be dynamically interpreted to address the specific harms AI technologies might infringe upon individual rights.

3.2. Limitations of international human rights norms

Despite the strengths of international human rights norms, significant challenges remain in effectively addressing the societal harms associated with AI deployment. One major limitation is the lack of enforceability of these norms.[26] Many AI systems are developed and operated by private companies that often fall outside the jurisdiction of traditional human rights enforcement mechanisms.[27] The absence of binding regulations means that private actors are not incentivised to align their technologies with principles of equality and non-discrimination. The influence of profit-driven motives can lead companies to prioritise efficiency over ethical considerations, resulting in AI systems that perpetuate existing biases rather than mitigating

[23] ibid 23.
[24] United Nations Women, 'Artificial Intelligence and Gender Equality' (2024) https://www.unwomen.org/en/news-stories/explainer/2024/05/artificial-intelligence-and-gender-equality
[25] Bronwen Morgan & Karen Yeung, *'An Introduction to Law and Regulation'* (2007) p. 17, Cambridge University Press
[26] Karen Yeung, Andrew Howes and Ganna Progrebna, 'AI Governance by Human Rights-Centred Design, Deliberation and Oversight: An End to Ethics Washing' (2019), 4 https://doi.org/10.1093/oxfordhb/9780190067397.013.5 last accessed 1 April 2026.
[27] Sakiko Fukuda-Parr, 'Emerging Consensus on 'Ethical AI': Human Rights Critique of Stakeholder Guidelines' (2021), 39-40 https://doi.org/10.1111/1758-5899.12965 last accessed 1 April 2026.

them.[28] This disconnect highlights the necessity for stronger regulatory frameworks that impose accountability on AI developers.

Another limitation of international human rights law is its traditional focus on individual harms. Many AI systems contribute to systemic and group-level discrimination, evident in issues such as the over-policing of racial minorities and the exclusion of persons with disabilities in the workforce.[29] These harms manifest indirectly and diffuse effects that are embedded within societal structures, making them challenging to address within a framework designed for identifiable violations. Noble and Roberts argue that the tech industry's reliance on meritocratic myths reinforces systemic biases and normalises exclusionary practices, effectively masking the structural inequalities that are embedded in AI systems.[30] This highlights a critical gap in human rights frameworks, which often lack the tools necessary to tackle the complexity of systemic discrimination in a rapidly evolving technological landscape.

The lack of transparency further complicates the applicability of international human rights norms. Many algorithms operate as "black boxes".[31] This opacity not only undermines procedural fairness but also hinders individuals' ability to challenge injustices effectively. Crawford and Paglen discuss the inherent biases in image recognition algorithms and other AI applications often go unchecked, as the complex processes behind these technologies are inaccessible to the very people they impact.[32] The legitimisation of bias not only undermines the universal protections promised by human rights law but also erodes trust in public institutions, as marginalised communities may feel further alienated from systems that are put in place to uphold their rights.

4. Reassessing international human rights norms in the age of artificial intelligence

The digital landscape has transformed traditional understandings of discrimination, complicating how human rights violations are defined and addressed. Article 5 of the ICRPD emphasises the right to equality and non-discrimination, establishing a foundation for

[28] ibid 36.
[29] Rahman (n4).
[30] Safiya Umoja & Sarah T. Roberts, 'Technological Elites, the Meritocracy, and Post-Racial Myths in Silicon Valley' (2019), 7 https://escholarship.org/content/qt7z3629nh/qt7z3629nh.pdf last accessed 1 April 2026.
[31] Trishan Panch, Heather Mattie and Rifat Atun, 'Artificial Intelligence and Algorithmic Bias: Implications for Health Systems' (2019), 2 https://doi.org/10.7189/jogh.09.020318 last accessed 1 April 2026.
[32] Kate Crawford and Trevor Paglen, 'Excavating AI: Politics of Images in Machine Learning Training Sets' (2020), 1114 https://link.springer.com/content/pdf/10.1007/s00146-021-01162-8.pdf last acessed 1 April 2026.

addressing systemic harms caused by AI.[33] By recognising discrimination as both an individual and structural issue, the ICRPD broadens the scope of human rights norms, making them relevant for addressing the diffuse, collective impacts of algorithmic bias. However, the deployment of AI technologies challenges these norms by introducing complexities that traditional human rights frameworks struggle to capture.

Tufekci correctly discusses how technology can create new forms of discrimination that do not easily fit within existing frameworks.[34] As AI continues to rise, it necessitates a re-evaluation of how discrimination is conceptualised within international human rights law. This dynamic nature of discrimination reveals a critical gap in current international human rights norms, which may not fully encompass the complexities of AI-driven harms. Moreover, the integration of AI in decision-making processes introduces a form of technological determinism, coined by Langdon Winner.[35] This perspective suggests that the reliance on AI systems can lead to outcomes perceived as inevitable and unchangeable, which ultimately undermines accountability.[36] Such a belief can reinforce the notion that biased outcomes are inherent to technology itself rather than the product of human design and societal structures. This highlights the need for human rights frameworks to address the underlying biases present in AI development and deployment, ensuring that technology serves to enhance equality rather than perpetuate discrimination.

The ICRPD's structural approach to equality offers a pathway for addressing these gaps. Its principles advocate for proactive measures, such as embedding accessibility and non-discrimination in the design and deployment of AI systems. Case in point, Article 5's focus on systemic equality supports the enforcement of algorithmic transparency and accountability measures,[37] such as regular audits and the inclusion of participatory governance models.[38] These measures align with the ICRPD's broader mandate to challenge societal-level barriers

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[33] International Convention on the Rights of Persons with Disabilities Article 5 'Equality and Non-Discrimination' (2006).

[34] Zeynep Tufekci, 'Algorithmic Harms Beyond Facebook and Google: Emergent Challenges of Computational Agency' (2015), 217 https://ctlj.colorado.edu/wp-content/uploads/2015/08/Tufekci-final.pdf last accessed 1 April 2026.

[35] Langdon Winner, 'Do Artifacts Have Politics?' (1980) https://www.jstor.org/stable/20024652 last accessed 1 April 2026.

[36] ibid.

[37] International Convention on the Rights of Persons with Disabilities Article 5 'Equality and Non-Discrimination' (2006)

[38] Vinodkumar Prabhakaran, Margaret Mitchell, Timit Gebru & Iason Gabriel, 'A Human Rights-Based Approach to Responsible AI' (2022), 4 https://doi.org/10.48550/arXiv.2210.02667 last accessed 1 April 2026.

that perpetuate discrimination, illustrating its potential to regulate AI technologies in ways that prioritise human rights.

However, the complexities of AI discrimination are further compounded by global disparities in how these technologies are deployed. The deployment of AI technologies is not uniform across the globe;[39] it varies significantly based on cultural, economic, and legal contexts. Donahoe and Metzger highlight the concept of digital sovereignty, which influences how AI is developed and regulated, asserting that different countries possess varying capabilities and frameworks for addressing AI-related harms.[40] Some nations may have robust legal frameworks and resources to implement ethical AI practices, others may lack the infrastructure necessary to ensure accountability and protection against discrimination. This disparity complicates the application of international human rights norms, which may not adequately capture the localised impacts of AI deployment. The implications of this variance are profound. AI systems may be deployed without adequate consideration for human rights, leading to unchecked discrimination and harm.[41]

Consequently, the effectiveness of human rights norms in addressing these issues can be significantly hindered by global inconsistencies in governance and regulation. This lack of uniformity raises critical questions about the universality of human rights frameworks in a rapidly evolving technological landscape. As Tufecki argues, the global nature of technology demands a more integrated approach to regulation,[42] ensuring that local contexts are considered while adhering to international standards. This leads to a broader reflection on how international human rights law can evolve to remain relevant amid such disparities. The challenge lies in balancing the need for localised responses to AI harm with the overarching principles of how international human rights norms should be applicable universally. Public interest theory remains a critical lens for understanding these challenges but must be adapted to address the complexities of global AI governance.

By aligning public interest theory with institutionalist approaches,[43] it becomes evident that the adaptability of international human rights law lies in its ability to integrate multi-stakeholder collaboration to address societal level harms caused by AI. While public interest theory

[39] Umoja and Roberts (n30).
[40] Eileen Donahoe and Megan MacDuffee Metzger, 'Artificial Intelligence and Human Rights' (2019), 123 https://doi.org/10.1353/jod.2019.0029 last accessed 1 April 2026.
[41] Murray (n3) 161.
[42] Tufekci (n34) 208.
[43] Morgan and Yeung (n25) 54.

emphasises the need to protect vulnerable populations, institutionalist principles provide a pathway for achieving this through coordinated efforts that reflect diverse local contexts. This interaction highlights that norms of international human rights law, when supported by inclusive and collaborative regulatory practices, can evolve to effectively capture and mitigate the complex, systemic harms arising from AI deployment, particularly those related to the prohibition of discrimination.

5. Conclusion

The deployment of AI in decision-making processes presents a profound challenge to international human rights law, particularly concerning the prohibition of discrimination. While these norms, exemplified by the ICRPD, provide a robust foundation for addressing systemic inequalities, their application to the societal-level harms caused by AI reveals both strengths and limitations. On one hand, the ICRPD's structural approach to equality and non-discrimination demonstrates its potential to address the dispersed and collective impacts of AI-driven harms. Articles 5, 9, and 27 of the ICRPD emphasise systemic reforms, accessibility, and inclusion, aligning with the need for transparency, accountability, and participatory governance in AI systems.[44] These principles illustrate how human rights law can adapt to regulate AI and mitigate structural discrimination.

On the other hand, significant gaps remain in the enforceability and practical applications of these norms. AI systems prove to operate in opaque, profit-driven environments that prioritise efficiency over fairness, and human rights law struggles to address the intersectional and systemic nature of AI-related harms. The global disparity further complicates the universal application of human rights principles, as technological development and regulatory capacities vary widely across jurisdictions. To effectively capture and address societal-level harms arising from AI, international human rights law must evolve. This requires a dynamic interpretation of existing norms, stronger enforcement mechanisms to regulate private actors, and multi-stakeholder collaboration that integrates local contexts with universal standards.

Ultimately, while the norms of international human rights law are well-suited in principle to addressing AI-related harms, their practical effectiveness depends on bridging the gaps

[44] International Convention on the Rights of Persons with Disabilities Articles 5, 9 and 27 (2006).

between aspiration and implementation. By building on frameworks such as the ICRPD, human rights law can rise to the challenge of protecting against discrimination in the age AI.

Gene-Editing and the Best Interest of the Child: A Normative Analysis of Legal and Ethical Frameworks

Ruvimbo Mafuta

1. Introduction

This paper explores the question: How can current legal frameworks ensure that gene-editing technologies serve the best interest of children? As scientific advances in gene-editing continue to accelerate, this question has become increasingly urgent. Notably, developments such as Clustered Regularly Interspaced Short Palindromic Repeats (CRISPR) have made the precise and efficient modification of human DNA technically possible, offering potential cures for a wide range of heritable diseases.[1] However, the application of these technologies to human reproduction, and by extension to unborn and future children, raises profound legal, ethical, and social challenges.

Gene-editing promises to transform treatment of genetic conditions by intervening at the genomic level. In childhood disorders such as sickle cell disease, CRISPR may offer a one-time corrective intervention. Yet, uncertainties remain, including off-target effects, long-term outcomes, and the ethical dilemma of altering without consent. These concerns force legal systems to confront difficult questions about parental authority, oversight, and the moral limits of biotechnology.

2. Legal complexities: defining the best interests of the child

A central difficulty in developing coherent legal responses to gene-editing lies in the ambiguity of what it means to act in a child's "best interests". This principle, long recognised in both international and domestic law, is not simple. While instruments such as Article 3 of the United Nations Convention on the Rights of the Child (UNCRC)[2] and Article 2 of the Oviedo Convention emphasise that a child's welfare must be the primary consideration in decisions

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[1] Nikhil Deep Kolanu, 'CRISPR-Cas9 Gene Editing: Curing Genetic Diseases by Inherited Epigentic Modifications' (2024) p.114. National Library of Medicine https://pmc.ncbi.nlm.nih.gov/articles/PMC10980556/#:~:text=One%20of%20the%20key%20advantages,and%20certain%20types%20of%20cancer. last accessed 13 April 2026.

[2] United Nations, 'The UN Convention on the Rights of the Child'. Article 3: Best Interests of the Child. https://www.unicef.org.uk/wp-content/uploads/2019/10/UNCRC_summary-1_1.pdf last accessed 13 April 2026.

affecting them[3], there is no universally accepted definition of what this entails in practice. This reflects the reality that decisions about children's welfare are sensitive to individual contexts and values. Parents may believe that using gene-editing to prevent hereditary diseases is in the best interests of their child, while clinicians may hesitate due to concerns about safety, reversibility, or long-term risk. Ethicists may weigh the child's future autonomy and psychological identity, while legal systems must mediate among these perspectives and translate them into enforceable norms.

It creates tensions within regulatory and clinical decision-making. For instance, Savulescu argues for the principle of "procreative beneficence", which suggests that parents have a moral obligation to select the child with the best chance at the best life[4]. This view supports the permissibility, and even the desirability, of using gene-editing technologies to eliminate disease-causing mutations.[5] However, others, such as bioethicist Holm, cautions that such arguments risk using children by framing them as products of optimisation, rather than as individuals with inherent dignity.[6]

From a legal perspective, English courts have generally been reluctant to adopt a strong reading of parental duty in this context.[7] Instead, the courts tend to affirm parental autonomy within the child's health and welfare, without mandating any positive obligation to use biotechnological enhancements.[8] This position was evident in *Re J (A Minor) (Wardship: Medical Treatment)* [1990] EWCA Civ, where the Court of Appeal considered withdrawing life-sustaining treatment from a severely brain damaged infant.[9] The court held that the child's best interests required a holistic assessment of the child's welfare, including dignity and quality of life considerations, rather than a presumption in favour of preserving life at all costs.[10] In this sense, *Re J* demonstrates that welfare determinations extend beyond medical optimisation,

[3] Council of Europe, 'Treaty No. 164: Convention on Human Rights and Biomedicine. Article 2: Primacy of the Human Being https://rm.coe.int/168007cf98 last accessed 13 April 2026.
[4] J Savulescu, 'Procreative Beneficence: Why We Should Select the Best Children' (2001) National Library of Medicine https://pubmed.ncbi.nlm.nih.gov/12058767/ last accessed 13 April 2026.
[5] Roberto Piergentili et al., 'CRISPR-Cas and Its Wide-Range Applications: From Genome Editing to Environmental Implications, Technical Limitations, Hazards and Bioethical Issues (2021) p.6 https://pmc.ncbi.nlm.nih.gov/articles/PMC8143109/ last accessed 13 April 2026.
[6] Søren Holm, 'Let Us Assume That Gene Editing is Safe - The Role of Safety Arguments in the Gene Editing Debate' (2019) https://doi.org/10.1017/s0963180118000439 ; See also, United Nations, 'The UN Convention on the Rights of the Child'. Article 3: Best Interests of the Child. https://www.unicef.org.uk/wp-content/uploads/2019/10/UNCRC_summary-1_1.pdf p.103 last accessed 13 April 2026.
[7] Martin Stanley, 'CRISPR and Gene Editing' https://regulation.org.uk/archive-gene_editing.html#:~:text=Although%20it%20is%20lawful%20in%20the%20UK,parliamentary%20process%2C%20before%20this%20could%20be%20permitted. last accessed 13 April 2026.
[8] Cressida Auckland and Imogen Goold, I 'Parental Rights, Best Interests and Significant Harms' (2019) p.5 – 7 https://doi.org/10.1017/S0008197319000382 last accessed 13 April 2026.
[9] Re J (A Minor) (Wardship: Medical Treatment) [1990] EWCA Civ J1019-6.
[10] ibid.

underscoring that the child's interests cannot be reduced to scientific possibility alone. These tensions underscore the need for clear, principled regulatory frameworks that can address the diverse interpretations of what serving a child's best interests actually involves.

2.1. Regulatory framework and criticism

A socio-legal approach is well suited to the subject because it allows for the simultaneous analysis of legal texts, institutional practices, and the normative values that underpin them. This is crucial in a field like gene-editing, where regulation does not operate in a legal vacuum but is heavily influenced by public ethics, scientific norms, and transnational frameworks. In the United Kingdom (UK), regulatory oversight of reproductive technologies is principally managed by the Human Fertilisation and Embryology Authority (HFEA), a statutory body established under the Human Fertilisation and Embryology Act 1990 (The 1990 Act). The HFEA plays a significant role in licensing and monitoring fertility clinics, authorising embryo research, and setting boundaries for emerging biotechnologies.[11] This framework currently prohibits the clinical use of germline gene-editing, but permits research on human embryos up to 14 days old, provided these embryos are not implanted.[12] This dual approach, permitting research under strict conditions while forbidding reproductive use, reflects a compromise between scientific progress and ethical caution. It allows for innovation while protecting future persons from untested and irreversible interventions.

Despite this strong institutional structure, the UK's legal framework is not immune to criticism. Some scholars have noted that the law is lagging behind technological capability, thus creating regulatory grey zones.[13] Others have pointed out that the distinction between somatic and germline interventions, while central to current law, may blur in practice as new methods emerge.[14] Somatic gene-editing targets non-reproductive cells in the body and affects only the individual being treated[15], whereas germline gene-editing involves changes to reproductive

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[11] Human Fertilisation & Embryology Authority, 'How We Regulate' https://www.hfea.gov.uk/about-us/how-we-regulate/ last accessed 13 April 2026.

[12] Human Fertilisation & Embryology Authority, 'The HFEA's Recommendation to Government on Extending the Time Limit on Embryo Research' (2017) https://www.hfea.gov.uk/about-us/news-and-press-releases/2024/the-hfea-s-recommendation-to-government-on-extending-the-time-limit-on-embryo-research/ last accessed 13 April 2026.

[13] Achim Rosemann et al., 'Heritable Genome Editing in a Global Context' (2019) p.38, Hastings Centre Report https://pmc.ncbi.nlm.nih.gov/articles/PMC6773219/pdf/HAST-49-30.pdf last accessed 13 April 2026.

[14] Matthias Braun and Peter Dabrock,'I bet you won't: The Science-Society Wager on Gene Editing Techniques' (2016) p.279, EMBO Reports https://doi.org/10.15252/embr.201541935 last accessed 13 April 2026.

[15] Mara Almeida & Robert Ranisch, 'Beyond Safety: Mapping the Ethical Debate on Heritable Genome Editing Interventions' (2022) p.2 https://www.nature.com/articles/s41599-022-01147-y.pdf last accessed 13 April 2026.

cells or embryos, resulting in heritable modification that are passed to future generations.[16] However, as new techniques emerge they challenge the boundaries between these categories i.e., editing early embryonic cells or stem cells capable of germline contribution.[17] Thus, regulators may find it increasingly difficult to maintain clear and enforceable separations.

Gene-editing technologies, when responsibly regulated, can offer transformative benefits to children affected by severe genetic conditions. Yet, it also recognises that such interventions pose significant risks, both to individual welfare and to broader societal values, if applied prematurely or without sufficient legal and ethical safeguards. Given the contested nature of the "best interests" principle, this paper critically examines whether current legal frameworks are equipped to govern gene-editing in a way that truly promotes child welfare. To achieve this, the paper focuses on the following key aims:

1) To critically assess whether the UK's HFEA, and selected international legal instruments effectively safeguard the best interests of the child in the context of emerging gene-editing technologies.
2) To analyse how legal doctrine, including statutory law and human rights principles, can be integrated with the bioethical concepts, specifically reproductive autonomy and the precautionary principle, to inform a child-centred approach to gene-editing.
3) To explore the practical implications of gene-editing regulation through a comparative case study analysis, contrasting the therapeutic application of somatic gene-editing for sickle cell disease with the controversial use of germline editing in the *He Jiankui* CRISPR twins case.

Ultimately, the paper seeks to offer a nuanced, rights-based framework for guiding the responsible development and use of gene-editing technologies in line with the best interests of the child.

3. Theoretical and methodological framework

The emergence of gene-editing technologies presents a profound ethical and legal dilemma: how can societies harness the therapeutic potential of these innovations while safeguarding the rights and welfare of future children? Central to this question is the challenge of reconciling

[16] ibid.
[17] Michael Morrison & Stevienna de Saille, 'CRISPR in Context: Towards a Socially Responsible Debate on Embryo Editing' (2019) p. 7 https://www.nature.com/articles/s41599-019-0319-5.pdf last accessed 13 April 2026.

rapid biotechnological advances with existing legal frameworks that were not designed to manage the complex, intergenerational, and often irreversible implications of genomic interventions.[18] As gene-editing transitions from laboratory research to clinical application, the need to re-evaluate how law serves the best interests of children becomes urgent. This is especially true given the potential long-term and unpredictable effects of germline interventions[19], which invoke the precautionary principle, a regulatory approach that favours rigorous oversight where scientific uncertainty and irreversible harm to future generations are at stake[20]. While some scholars view the precautionary principle as overly conservative, others argue it is a necessary legal safeguard to prevent irreversible harm in the name of progress.

3.1. Literature review and ethical standpoints

This literature review critically examines a range of legal and academic perspectives to assess whether and how existing frameworks are capable of meeting the challenge of gene-editing and protecting the best interests of the child. The first section explores ethical foundations, focusing on reproductive autonomy. While often viewed as a fundamental right, autonomy in the context of gene-editing raises questions about parental responsibility, the child's future freedom, and the extent to which reproductive decisions are truly free from coercive social influences. The second section addresses the precautionary principle, particularly the tension between individual choice and collective wellbeing. Drawing on historical examples of eugenics, it considers how current uses of gene-editing might reinforce exclusionary norms or marginalise disabled or minority communities, even under the guise of public health. The third section looks at how best to protect societal interests. Together, these discussions reveal that existing regulations provide only partial and uneven protection, with strong safeguards in some areas but far weaker attention is paid to equity, justice and intergenerational concerns. To truly serve the best interests of children, regulation must address this imbalance by engaging the full spectrum of ethical and legal questions.

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[18] Brooke Elizabeth Hrouda, '"Playing God?": An Examination of the Legality of CRISPR Germline Editing Technology Under the Current International Regulatory Scheme and the Universal Declaration on the Human Genome and Human Rights' (2016) p.232 - 240, Georgia Journal of International and Comparative Law https://digitalcommons.law.uga.edu/cgi/viewcontent.cgi?article=2379&context=gjicl last accessed 13 April 2026.

[19] A. Cecile J.W. Janssens, 'Designing Babies Through Gene Editing. Science or Science Fiction' (2016) p.1186 and 1187, Genetics in Medicine https://doi.org/10.1038/gim.2016.28 last accessed 13 April 2026.

[20] ibid.

3.1.1. Reproductive autonomy

Reproductive autonomy is often proclaimed as a cornerstone of liberal legal frameworks[21], yet its application in the context of gene-editing technologies is fraught with legal and ethical complexities, specifically when evaluated through the lens of the best interests of the child.

Savulescu's principle of procreative beneficence contends that parents are morally obligated to select children with the "best life prospects" through available biomedical technologies.[22] This appears compatible with the best interests standard.[23] Nevertheless, this formulation combines parental moral duties with a technocratic vision of the "good life", reducing complex decisions to genetic optimisation.[24] Harris advances this liberal stance even further, arguing that it is not merely permissible but often a moral duty to use technologies like gene-editing where they can prevent harm and promote human flourishing.[25] He maintains that leaving outcomes to the "genetic lottery" is morally inferior to deliberate intervention, since avoidable suffering should not be tolerated when science offers a remedy.[26]

In contrast, Baylis offers a cautionary counterpoint, urging us to recognise how sociocultural forces shape reproductive "choices". She argues that claims of autonomy become undermined when framed within systems of power that constrain real options.[27] Her analysis of mitochondrial replacement techniques illustrates this point. What appears as an expansion of reproductive freedom is often entangled in commercial and social pressures to pursue genetic parenthood at all costs.[28] For Baylis, then, autonomy in reproductive decision-making is only meaningful when individuals are genuinely free from coercion and from the weight of societal

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[21] Niklas Juth, 'Enhancement, Autonomy, and Authenticity' (2011) p.36 https://philpapers.org/rec/JUTEAA last accessed 13 April 2026.

[22] Savlescu J (n4).

[23] Council of Europe, 'Treaty No. 164: Convention on Human Rights and Biomedicine. Article 3: Equitable Access to Healthcare https://rm.coe.int/168007cf98 last accessed 13 April 2026.

[24] Paul Martin et al., 'Genome Editing: The Dynamics of Continuity, Convergence, and the Change in the Engineering of Life' (2019) p.220, New Genetics and Society, 2020 https://doi.org/10.1080/14636778.2020.1730166 last accessed 13 April 2026.

[25] John Harris, 'Why Human Gene Editing Must Not be Stopped' (2015) https://www.theguardian.com/science/2015/dec/02/why-human-gene-editing-must-not-be-stopped last accessed 13 April 2026.

[26] Harris (n25).

[27] Francoise Baylis, *Altered Inheritance: CRISPR and the ethics of Human Genome Editing* (Harvard University Press Cambridge, Massachusetts 2019); See also Donna Dickenson, 'Altered Inheritance: CRISPR and the Ethics of Human Genome Editing: By Francoise Baylis. Pp. 268. Cambridge, Massachusetts: Harvard University Press. 2019. £19.95. ISBN: 978-0-674-97671-9' The New Bioethics, *26*(1), 75–77 https://doi.org/10.1080/20502877.2020.1729578 last accessed 13 April 2026.

[28] Francoise Baylis, 'The Ethics of Creating Children With Three Genetic Parents' (2013) https://www.rbmojournal.com/action/showPdf?pii=S1472-6483%2813%2900132-6 last accessed 13 April 2026.

expectation of genetic "normality".[29] From a legal standpoint, this suggests a need for context-sensitive regulation that scrutinises not only the availability of gene-editing technologies, but the social scripts and pressures that influence their uptake.

Beyond this, the claim that reproductive autonomy includes the right to refuse intervention also deserves closer legal attention. If a state were to adopt a regulatory approach that relies heavily on procreative beneficence, parents who decline gene-editing could be viewed as negligent, raising troubling implications for parental rights. Habermas's concern that prenatal genetic programming can undermine the child's autonomy of their own life[30], foregrounds a legal dilemma: can the child's right to an open future co-exist with parental control over heritable genetic traits? Legal frameworks, then, must avoid privileging one interpretation of autonomy over another and instead ensure procedural safeguards that respect both the child's future autonomy and the parents' present autonomy, without subordinating one to another.[31]

Further, Sandel critiques enhancement as undermining the moral landscape of parenting by fostering an "ethics of control".[32] Here, the role of law is not merely to facilitate access, but to act as a deliberative tool, interrogating which kinds of reproductive liberties promote or inhibit the child's best interests in an increasingly technologized society. This reveals a deeper paradox that reproductive autonomy functions simultaneously as a shield for parental choice and as a potential sword against the child's future independence. Frameworks must tackle with whether autonomy exercised under systemic pressure is autonomy in any meaningful sense. By contrasting Savulescu and Harris' obligation to enhance with Baylis and Habermas' emphasis on freedom from coercion and the child's right to an open future, it becomes clear that law is required to mediate between conflicting accounts of autonomy. Without such mediation, autonomy risks collapsing into a legal fiction that legitimises genetic optimisation while obscuring the social realities that constrain real decision-making. Therefore, while current legal frameworks often protect reproductive autonomy, they must be recalibrated to distinguish between autonomy exercised under fair conditions and autonomy shaped by systemic coercion or unrealistic expectations. Only then can they credibly claim to safeguard the best interests of future children.

[29] ibid.
[30] Jürgen Habermas, *The Future of Human Nature* (Blackwell Publishing, Oxford 2003) p.29 https://monoskop.org/images/3/36/Habermas_Jürgen_The_Future_of_Human_Nature_2003.pdf
[31] Lisbeth Witthøfft Nielsen, 'The Concept of Nature and the Enhancement Technologies Debate' in Julian Savulescu, Ruud ter Meulen and Guy Kahane eds, *Enhancing Human Capacities* p.23, 25, 28 https://doi.org/10.1002/9781444393552.ch2 last accessed 13 April 2026.
[32] Michael Sandel, 'The Case Against Perfection' (The Atlantic, 2004) https://www.theatlantic.com/magazine/archive/2004/04/the-case-against-perfection/302927/ last accessed 13 April 2026.

3.1.2. The precautionary principle

The precautionary principle, especially if applied to germline editing presents a legal and ethical safeguard.[33] Yet its deployment is not without internal tension when examined in relation to children's best interests.

Prohibitions on germline modification, such as Article 13 of the Oviedo Convention[34], reflect a deep rooted fear of irreversible and intergenerational harms. On the surface, this seems to serve children's interests by preventing unknown risks. However, such blanket restrictions may paradoxically delay or deny access to potentially life-saving interventions, especially for genetic conditions with no current cure. For instance, Harris criticises the precautionary stance as morally paralysing, arguing that the real threat to the future child is failing to act when science offers hope.[35] This positions inaction as a legal failure, rather than a neutral stance, complicating the regulatory impulse to wait and see. On the other hand, Jasanoff at al. warn that gene-editing is not merely technical but also deeply political, implicating questions of moral responsibility, trust, and the limits of state authority.[36] This broader framing suggests that legal regulation must be anticipatory, not just reactive. The *He Jiankui* case, where Chinese law failed to prevent germline editing on embryos despite existing guidelines, illustrates the consequences of regulatory ambiguity.[37] A law that merely expresses disapproval, without transparency, does not protect children's interests.

The central dilemma then is whether precautionary reasoning prioritises present fears at the expense of future benefits. Harris' critique highlights that inaction can itself be a legal and ethical failure, particularly where curative interventions are indefinitely delayed.[38] By contrast, Jasanoff et al. reframe precaution as a matter of anticipatory governance, requiring law to manage uncertainty rather than suppress it.[39] A proportionality based approach, often seen in

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[33] Anu Shukla-Jones, Steffi Friedrichs & David E. Winickoff, 'OECD Science, Technology and Industry Working Paper: Gene Editing in an International Context: Scientific, Economic and Social Issues Across Sectors (2018), p.29 – 30 https://www.oecd.org/content/dam/oecd/en/publications/reports/2018/03/gene-editing-in-an-international-context_92f7c3dc/38a54acb-en.pdf last accessed 13 April 2026.
[34] Council of Europe, 'Treaty No. 164' (n3) Article 13.
[35] Harris (n25).
[36] Sheila Jasanoff, Krishanu Saha and J. Benjamin Hurlbut, 'CRISPR Democracy: Gene Editing and the Need for Inclusive Deliberation' Vol. XXXII, No. 1, Fall 2015 https://issues.org/crispr-democracy-gene-editing-inclusive-deliberation/ last accessed 13 April 2026.
[37] Britta C. van Beers, 'Rewriting the Human Genome, Rewriting Human Rights Law? Human Rights, Human Dignity, and Human Germline Modification in the CRISPR Era' (2020) p. 8, National Library of Medicine https://pmc.ncbi.nlm.nih.gov/articles/PMC8248990/ last accessed 13 April 2026.
[38] Harris (n25).
[39] Sheila Jasanoff, Krishanu Saha and J. Benjamin Hurlbut (n36).

EU law, could provide a more balanced path.[40] Fundamentally, regulators would be obliged to weigh the scale of risks against the severity of the condition in question. Such a model transforms precaution from a refusal into a dynamic framework that requires child welfare to be assessed against both the harms of action and the harms of inaction. In this way, precaution can operate not as a brake on innovation, but as structured commitment to child-centred safety under conditions of uncertainty.

Crucially, not all risks are physical or medical. Social harms such as commodification of children or the reinforcement of ableist norms, must also be integrated into precautionary reasoning.[41] The Nuffield Council on Bioethics proposes a framework in which germline editing is permissible only if it aligns with the welfare of the future person and upholds social justice.[42] This dual criterion shifts the legal burden from proving safety alone to justifying broader ethical legitimacy. Hence, legal frameworks that invoke the precautionary principle must avoid simplistic prohibitions. Instead, they must enable adaptive, participatory governance structures that include children's welfare not just as a rhetorical goal, but as an enforceable legal standard guiding research, clinical use, and public funding.

3.1.3. Societal interests

Gene-editing technologies do not exist in a vacuum. Their use and regulation is deeply entwined with societal norms, historical legacies, and collective aspirations, all of which influence what it means to act in a child's best interests. The legacy of positive eugenics, meaning preferred traits are selected, continues to shadow modern enhancement discourse.[43] Kevles and Gumer have documented how scientific rhetoric of genetic improvement masked deeply racialised, classist, and ableist agendas, such as the sterilisation of racialised people in 20th century America.[44] Gene-editing, even if well-intentioned, may revive such discourses

[40] Ana Nordberg et al., 'Cutting Edges and Weaving Threads in the Gene Editing Evolution: Reconciling Scientific Progress with Legal, Ethical, and Social Concerns' (2018) p.50, Journal of Law and the Biosciences https://doi.org/10.1093/jlb/lsx043 last accessed 13 April 2026.

[41] Nuffield Council on Bioethics, 'Genome Editing' (2016) p.100 https://cdn.nuffieldbioethics.org/wp-content/uploads/Genome-editing-an-ethical-review.pdf last accessed 13 April 2026.

[42] Nuffield Council on Bioethics 2016 (n42) 113.

[43] Robert A Wilson, 'Eugenics: Positive vs Negative' (2019) p. 1 https://philarchive.org/archive/WILEPV last accessed 13 April 2026.

[44] Andrew R. LaBarbera, 'Proceedings of the International Summit on Human Gene Editing: A Global Discussion – Washington, D.C., December 1-3 (2015) p.1123. https://doi.org/10.1007/s10815-016-0753-x ; see also Jennifer M Gumer, 'The Wisdom of Germline Editing: An Ethical Analysis of the Use of CRISPR-Cas9 to Edit Human Embryos' (2016) p.141, The New Bioethics, Vol. 25 No.2 https://doi.org/10.1080/20502877.2019.1606151 last accessed 13 April 2026.

under the guide of public health or efficiency. Instead frameworks must explicitly guard against the re-emergence of discriminatory practices that would undermine the very notion of acting in the child's best interests. Legal frameworks must thus go beyond procedural safeguards to actively reckon with the sociohistorical baggage of eugenics.

The history of coerced and forced sterilisation in the United States offers a stark warning. Alonso details that from the 20th century until the late 1970s, thousands of African American, Latin, and Native American women were sterilised, often without informed consent, under state-sanctioned or federally funded programmes.[45] The narratives of survivors such as the women of *Madrigal v Quilligan,* a federal class action lawsuit filed in 1978 by ten Mexican-American women against doctors at Los Angeles USC Medical Centre, illustrate these dynamics in stark terms.[46] The plaintiffs were sterilised immediately after childbirth without informed consent, many while under heavy medication, in active labour, or after being misled about the procedure's performance.[47] Language barriers, misinformation, and pressure from medical staff were central to their claims.[48] However, the court ruled in favour of the doctors, citing "misinformation" rather than coercion.[49] This history underscores the need for legal safeguards that actively confront structural bias and ensure that emerging technologies such as gene-editing are governed in ways that genuinely protect the rights and best interests of children.

Equally problematic is the application of negative eugenics, eliminating "undesirable" traits.[50] While framed as compassionate i.e., removing suffering, this risks constructing certain lives as inherently less valuable. Gumer challenges the assumption that disability parallels suffering, arguing that this sends a message to the disabled community "your kind is not wanted here".[51] When applied to gene-editing, such reasoning could legitimise interventions aimed at eradicating disability without addressing the social barriers. The social model of disability reframes this issue.[52] Regulation must prioritise dismantling discriminatory structures rather

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[45] Paola Alonso, 'Autonomy Revoked: The Forced Sterilisation of Women of Colour in 20th Century America' (n.d.) p. 1, 3 and 4 https://twu.edu/media/documents/history-government/Autonomy-Revoked--The-Forced-Sterilization-of-Women-of-Color-in-20th-Century-America.pdf last accessed 13 April 2026.

[46] Madrigal v. Quilligan, 639 F.2D 789 (9th Cir. 1981).

[47] Library of Congress, 'A Latinx Resource Guide: Civil Rights Cases and Events in the United States' https://guides.loc.gov/latinx-civil-rights/madrigal-v-quilligan

[48] Library of Congress, 'A Latinx Resource Guide' (n47); See also Madrigal v. Quilligan, 639 F.2D 789 (9th Cir. 1981).

[49] Library of Congress, 'A Latinx Resource Guide' (n47).

[50] Gumer (n44).

[51] ibid.

[52] Sarah Buder and Rose Perry, 'The Social Model of Disability Explained' Social creatures 2021 https://www.thesocialcreatures.org/thecreaturetimes/the-social-model-of-disability last accessed 13 April 2026.

than promoting genetic "correction". By embedding this perspective, legal frameworks can ensure that gene-editing is evaluated in relation to inclusion and justice, rather than exclusion and optimisation. A legal system that permits or incentivises the eradication of disability without engaging affected communities risks violating not only anti-discrimination norms but also the moral fabric of inclusive societies. This creates a fraught tension between autonomy and collective welfare.

Moreover, if gene-editing can reduce public healthcare burdens by eliminating genetic diseases, states may be tempted to subtly or overtly steer reproductive choices.[53] In responding to the child's best interests, the law must resist framing the child as a future burden or cost to be minimised, a framing historically used to justify reproductive control of marginalisation populations[54]. The history of sterilisation shows that "choice" can be hollow where structural coercion, misinformation, or economic pressure are present[55]. Legal mechanisms such as impact assessments on marginalised groups and constitutional protections against eugenic policies may help mediate between autonomy and the collective good in ways that genuinely centre the interests of children.[56] Moreover, just as sterilisation was historically justified as a means of preventing the transmission of "undesirable" traits, gene-editing could similarly be misused to promote a form of positive eugenics, raising the same dangers of coercion and exclusion in a new guise.

3.2. Methodology

Having established the ethical landscape on which gene-editing debates unfold, the next section sets out the methodological approach used to critically evaluate the legal and normative frameworks governing these technologies.

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[53] ibid 103-6.
[54] Buder and Perry (n52) 148.
[55] Madrigal v. Quilligan, 639 F.2D 789 (9th Cir. 1981).
[56] Silvio Funtowicz and Jerry Ravetz, 'Knowledge, Power, and Participation in the Post-Normal Age' Vol 237 Ecological Economics 2025 p.8 https://www.sciencedirect.com/science/article/pii/S0921800925001995 last accessed 13 April 2026.

3.2.1. Research design and rationale

This paper employs desk-based research, combining a comparative case study design with normative document analysis to explore how existing legal frameworks serve the best interests of children. This dual methodology enables both the evaluation of regulatory and ethical instruments and the contextualised comparison of two distinct case studies, CTX001 for sickle cell disease and the controversial germline editing done by He Jiankui.

3.2.2. Case study selection and justification

The comparative case study is well-suited to this topic, as it allows for the close examination of contrasting gene-editing scenarios in real-world contexts. The selected cases were chosen for their stark ethical and legal differences. CTX001 represents a somatic therapy that is overseen by robust clinical and regulatory processes and aims to treat serious genetic illness in living individuals. In contrast, the *He Jiankui* experiment involved germline editing on human embryos, resulting in the birth of genetically modified children, and was undertaken without any ethical oversight or legal authorisation. Together, these case studies provide a framework to interrogate how laws, institutions, and normative values either constrain or permit different applications of gene-editing, and how these relate to the child's welfare. In each case, three key dimensions are examined:

1) The legal authorisation processes and regulatory oversight mechanisms.
2) The presence or absence of child-centred protections such as informed consent, safety requirements, and the best interests test.
3) The ultimate consequences for child welfare and accountability.

These dimensions offer a practical lens through which legal frameworks can be evaluated for their efficacy and ethical coherence.

3.3. Normative document analysis

To supplement the case studies, the paper employs normative document analysis. This involves a close reading of key legal texts, bioethics reports, and policy documents to identify and evaluate how principles such as “the best interests of the child”, “autonomy”, “informed consent”, and “precaution” are defined and operationalised. The analysis focuses on both binding legal instruments and influential soft law documents. Key international instruments include the Oviedo Convention on Human Rights and Biomedicine, which articulate rights and protections for minors and future persons in biomedical contexts. At the domestic level, particular attention is paid to the HFEA, this includes licensing decisions, policy reports, and codes of practice which govern embryo research and reproductive technologies in the UK. The HFEA’s licensing model provides a transferable structure for evaluating how somatic interventions like CTX001 might be authorised in paediatric contexts. Additionally, the analysis draws on key reports from expert bodies such as the Nuffield Council on Bioethics, particularly the 2018 Report on genome editing and the 2023 Policy Brief on equity and access. These documents are selected not only for their normative authority but for their engagement with child-centred values and social justice concerns.

2.2.4 Data sources and analytical techniques

All relevant documents were reviewed through close reading and critical analysis. Careful attention is paid to provisions relating to the best interests of the child, direct benefit, informed consent, safety, and intergenerational impact. These core principles were identified and evaluated across a range of legal instruments, bioethics reports, and policy documents. Through comparative reading, patterns of convergence and divergence were noted between national and international frameworks, of how children’s welfare is addressed in different legal and ethical contexts. These insights were then applied to the case studies of CTX001 and *He Jiankui* to assess where legal norms are upheld, where they fall short in practice, and how they might be reformed to better safeguard the rights and interests of future children. Primary data for the case studies is drawn from publicly available sources. For CTX001, these include clinical trial documentation, regulatory filings, and scholarly analyses on safety, access, and ethics. For *He Jiankui,* the analysis draws from academic literature and international commentary from scholars and regulators. To ensure analytical rigour, each case is assessed not only against the standards set in law but also in terms of broader ethical principles concerning justice, autonomy, and child protection.

4. Case studies

4.1. Somatic editing and CTX001: a justified therapeutic intervention

CTX001, developed by CRISPR Therapeutics and Vertex Pharmaceuticals, is a somatic gene-editing therapy designed to modify hematopoietic stem cells to increase foetal haemoglobin levels, effectively curing sickle cell disease and transfusion dependant beta thalassaemia, two debilitating conditions.[57] Unlike germline interventions, CTX001 is performed on consenting individuals, typically adolescents or adults.[58] Thus, aligns more closely with established ethical frameworks around therapeutic treatment and informed consent.

This approach aligns with the regulatory standards, specifically those under the 1990 Act which, while primarily governing embryo research, establishes a precedent for a case by case licensing, independent oversight, and therapeutic justification.[59] These principles are transferrable to somatic gene-editing in children. Although CTX001 falls outside the HFEA's scope, its acceptability could be guided by similar mechanisms of authorisation and proportionality, particularly where the patient is minor. This is also consistent with Article 6(2) of the Oviedo Convention, which requires that interventions on persons unable to consent i.e., children, may only be carried out for their direct benefit, reaffirming the primacy of child welfare in medical decision-making.[60]

Sickle cell disease affects over 300,000 children annually, mostly in Sub-Saharan Africa[61], with the majority of cases concentrated in Sub-Saharan Africa, where malaria is endemic.[62] This geographic and epidemiological context complicates the biomedical narrative often told

[57] CRISPR Therapeutics, 'CRISPR Therapeutics and Vertex Announce FDA Fast track Designation for CTX001 for the Treatment of Beta Thalassemia' (n.d.) https://crisprtx.com/about-us/press-releases-and-presentations/crispr-therapeutics-and-vertex-announce-fda-fast-track-designation-for-ctx001-for-the-treatment-of-beta-thalassemia#:~:text=CTX001%20is%20an%20investigational%20ex,development%20costs%20and%20profits%20worldwide. last accessed 13 April 2026.

[58] Anna Dean, 'How CTX001 Therapy for Sickle Cell Disease Overcomes Many Challenges Associated with CRISPR Therapeutics' (2021) p. 10 https://bilt.online/wp-content/uploads/2021/08/HOWCTX1.pdf last accessed 13 April 2026.

[59] Human Fertilisation and Embryology Act 1990, section 3 https://www.legislation.gov.uk/ukpga/1990/37/section/3 last accessed 13 April 2026.

[60] Council of Europe, 'Treaty No. 164: Convention on Human Rights and Biomedicine Article 6(2) 'Where, accordingly to law, a minor does not have the capacity to consent to an intervention, the intervention may only be carried out with the authorisation of his or her representative or an authority or a person or body provided for by law' https://rm.coe.int/168007cf98

[61] Augustine M Muskoya et al., 'Prevalence of Sickle Cell Disease Among Anaemic Children Attending Mbeya Referral Hospital in Southern Tanzania' (2018) p. 142, The East African Health Research Journal https://pmc.ncbi.nlm.nih.gov/articles/PMC8279166/pdf/EAHRJ-2-2-142.pdf last accessed 13 April 2026.

[62] Thomas N Williams, 'Sickle Cell Disease in Sub-Saharan Africa' (2016) p.2 Europe PMC Funders Group https://pmc.ncbi.nlm.nih.gov/articles/PMC6858853/pdf/EMS84884.pdf last accessed 13 April 2026.

in Western discourse. Some scholars raise concerns that treating sickle cell disease might reduce malaria resistance conferred by the sickle cell trait (HbAS).[63] CTX001 is designed to treat homozygous individuals (HbSS), who do not benefit from malaria resistance and instead suffer debilitating and often fatal symptoms.[64] As such, withholding treatment in the name of population-level evolutionary advantage is ethically unsustainable.

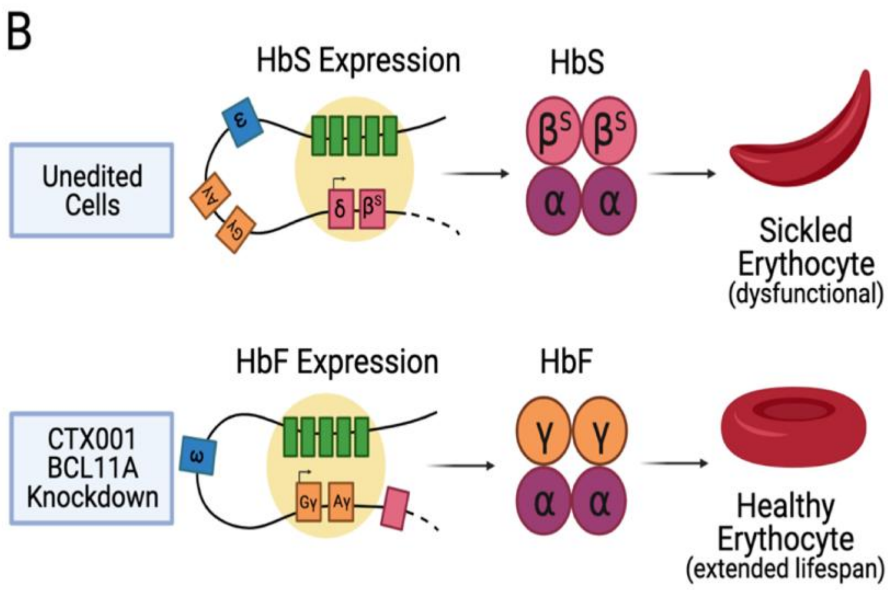

Figure 1: © Philippidis, CTX001 Therapy on Sickled Cells.[65]

Thus, this treatment has been widely praised as a medical breakthrough with significant benefits for affected children.[66] It reduces pain, mortality, and lifelong disability, thereby enhancing future autonomy by lifting constraints of genetic illness.[67] As such, it aligns with the principle of child welfare, particularly where somatic editing restores rather than defines identity. The emphasis on identity preservation is echoed in the Nuffield Council on Bioethics' 2018 Report on genome editing, which distinguished between interventions that "enable

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[63] Thomas N Williams et al., 'An Immune Basis for Malaria Protection by Sickle Cell Trait' (2005) p. 442, PLoS Medicine https://pmc.ncbi.nlm.nih.gov/articles/PMC1140945/pdf/pmed.0020128.pdf last accessed 13 April 2026.

[64] Human Fertilisation and Embryology Act 1990, section 3 p 4 and 8.

[65] Alex Philippidis, A 'Gene Therapy Created with CRISPR Shows Early Promise in Sickle-Cell Disease, Beta Thalassemia' (2020) https://www.insideprecisionmedicine.com/news-and-features/gene-therapy-created-with-crispr-shows-early-promise-in-sickle-cell-disease-beta-thalassemia/ last accessed 13 April 2026.

[66] ibid.

[67] Nuffield Council on Bioethics, 'Genome Editing and Human Reproduction' (2018) p.6 https://cdn.nuffieldbioethics.org/wp-content/uploads/Genome-editing-and-human-reproduction-report.pdf last accessed 13 April 2026.

children to live well"[68] and those that "impose social or parental values"[69] onto a child's genetic makeup. CTX001, by targeting a known disease rather than a social trait, avoids this ethical pitfall and instead strengthens a child's future capacity to exercise autonomy and agency, concepts that the Nuffield Council identifies as fundamental to evaluating the legitimacy of childhood interventions.

Baylis offers a compelling critique of somatic gene-editing from a justice perspective, arguing that publicly funded research into therapies like CTX001 often fails to return meaningful benefits to the communities most affected by the disease.[70] This observation is echoed by Cook-Deegan, who highlight how exclusive CRISPR patent licensing regimes restrict access and consolidate power in the hands of biotech firms.[71] However, while these critiques are valid, they risk undermining the ethical urgency of making therapies available. Instead of rejecting somatic interventions on the grounds of structural inequity, legal and regulatory frameworks should be reformed to correct that inequity, through open licensing, technology transfer, and global patent reform.

To this end, the Nuffield Council's 2023 Policy Briefing urges governments to take proactive steps in ensuring equitable access to genomic technologies, warning that without public interests in safeguards[72], life-saving treatments like CTX001 risk becoming tools of biomedical hierarchy. Legal structures such as the HFEA's conditional licensing regime, which only permit embryo testing when there is a "serious" medical condition[73], offers an administrative model of how ethically sensitive technologies can be deployed under enforceable access conditions. Extending this principle to somatic therapies would ensure that equity and innovation progress together, rather than at odds. Somatic interventions like CTX001 are not value-neutral simply because they are medically therapeutic. Scholars like Ruha Benjamin and Catherine Bliss have shown that gene-editing technologies carry embedded racial, economic, and historical biases.

[68] ibid.
[69] ibid 24 and 41.
[70] Baylis (n28).
[71] Robert Cook-Deegan, 'CRISPR Patents: Aspiring to Coherent Patent Policy' (2018) p.51 – 53, The American Journal on Bioethics https://doi.org/10.1080/15265161.2018.1533739 last accessed 13 April 2026.
[72] Nuffield Council on Bioethics, 'Ethics in Genomics Healthcare and Research: Building Connections and Sharing Best Practice' (2023) p. 1-2, 4 https://cdn.nuffieldbioethics.org/wp-content/uploads/FINAL-version-Genomics-workshop-summary-and-analysis.pdf last accessed 13 April 2026.
[73] David Archard, 'Future Perfect: Possible Children, Science and Ethics' Human Fertilisation & Embryology Authority 2021 https://www.hfea.gov.uk/about-us/30th-anniversary-expert-series/future-perfect-possible-children-science-and-ethics/ last accessed 13 April 2026.

Benjamin critiques what she terms the "New Jim Code", whereby innovations that appear progressive can reproduce racial hierarchies under the appearance of neutrality.[74] In the context of CTX001, this raises the concern that even a therapy targeted at sickle cell disease, could reinforce inequities if access is restricted or commercialised. Ruha similarly highlights how genomics research often encodes social assumptions about race and identity, warning that the scientific objectivity is frequently deployed to mask political or cultural agendas.[75] Both scholars therefore argue that justice in biotechnology requires active interrogation of whose interests are being served, and whose voices are excluded from governance.[76] CTX001 should not be viewed as a neutral medical fix, but rather as a potential site of restorative justice. A therapeutic intervention that relieves suffering, respects child autonomy, and addresses a historically neglected disease afflicting predominantly Black populations has moral weight not despite, but because of its sociopolitical implications. By embedding equity mechanisms into law, current frameworks can ensure that therapies like CTX001 can genuinely serve the best interests of children, rather than reinforcing biomedical therapies.

One of the key arguments advanced by advocates of somatic gene-editing is that, unlike germline editing, it poses no intergenerational risks.[77] This claim, while broadly accepted, deserves closer scrutiny. Baltimore et al. argue that somatic gene-editing can proceed within existing regulatory frameworks, provided that robust safety assessments and long-term monitoring are in place.[78] Yet, Porteus and Urnov acknowledge that off-target mutations, immunogenicity, and sustained DNA damage remain serious concerns in vivo.[79] These concerns should not be dismissed as mere technicalities, they highlight the necessity for a strong safety culture, one that is often challenged by commercial incentives in for-profit pharmaceutical models. Nonetheless, the risk profile of CTX001, when situated within a risk benefit analysis, aligns with Holm's claim that gene-editing interventions on children are justifiable when the net benefit clearly outweighs potential harm.[80] Given the severity and life limiting nature of sickle cell disease, the case of therapeutic intervention is ethically robust.

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[74] Ruha Benjamin, *Race After Technology: Abolitionist Tools for the New* (Polity 2019)
[75] ibid.
[76] Benjamin (n74)
[77] Teddy Ellison, 'Why Genetics is CRISPR Than It Used to be: Helping the Novice Understand Germ Line Modification and Its Serious Implications' (2017) p.599 Southern California Interdisciplinary Law Journal 595 https://gould.usc.edu/wp-content/uploads/legacy/why/students/orgs/ilj/assets/docs/26-3-Ellison.pdf last accessed 13 April 2026.
[78] David Baltimore et al., 'A Prudent Path Forward for Genomic Engineering and Germline Gene Modification' (2015) p.3 and 4 https://pmc.ncbi.nlm.nih.gov/articles/PMC4394183/pdf/nihms677725.pdf last accessed 13 April 2026.
[79] LaBarbera (n44) 1125.
[80] Holm (n6).

This aligns with the principle of child autonomy, not in the narrow sense of informed consent, which children cannot give, but in the broader sense of securing a future in which autonomy can be meaningfully exercised.[81] By removing the biological constraints imposed by sickle cell disease, CTX001 can expand a child's capacity for future flourishing. Importantly, this position is consistent with Article 3 of the Oviedo Convention, which mandates that any medical intervention must be carried out in accordance with relevant professional obligations and standards, reinforcing the need for robust regulatory oversight to prevent commercial or scientific overreach.[82] The legitimacy of CTX001, therefore, does not arise merely from its therapeutic promise but from its alignment with evolving legal norms that prioritise individual benefit, non-maleficence, and fairness in medical innovation.

4.2. Germline editing and the *He Jiankui* scandal: a normative boundary

In sharp contrast, the *He Jiankui* case demonstrates how gene-editing can be ethically and legally misused. He's editing occurred without meaningful ethical oversight, peer review, or clinical necessity.[83] In 2018, He announced that twin girls, Lulu and Nana, had been born with edited CCR5 genes.[84] These genes are designed to confer resistance to HIV.[85] This rogue gene-editing was condemned globally because He had forged ethics approval documents, misled participants about the risks, and proceeded without proper institutional authorisation.[86] The experiment was conducted in secret and involved eight couples, some of whom were HIV-positive.[87] What He did was unethical. Not only because it violated established scientific norms, but because it exposed future children to unknown, lifelong health risks for a benefit that was speculative and medically unnecessary.[88] By editing embryos to produce heritable

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[81] Archard (n73).
[82] Council of Europe, 'Treaty No. 164 Article 3.
[83] Qi Chen et al., 'Making Sense of it All: Ethical Reflections on the Conditions Surrounding the First Genome-Edited Babies' (2021) p. 3 https://pmc.ncbi.nlm.nih.gov/articles/PMC8340653/pdf/wellcomeopenres-5-18740.pdf last accessed 13 April 2026.
[84] Marcos Alonso and Julian Savulescu, 'He Jiankui's Gene-Editing Experiment and the Non-Identity Problem' (2020) p. 564, Wiley Bioethics https://pmc.ncbi.nlm.nih.gov/articles/PMC8524470/pdf/BIOE-35-563.pdf last accessed 13 April 2026.
[85] ibid 563.
[86] Henry Greely, 'CRISPR'd Babies: Human Germline Genome Editing in the 'He Jiankui Affair' (2019) p.118, Journal of Law and Biosciences https://pmc.ncbi.nlm.nih.gov/articles/PMC6813942/pdf/lsz010.pdf last accessed 13 April 2026.
[87] Alonso and Savulescu (n84) 563-4.
[88] Chen et al. (n83) 4.

changes, without robust safety data or consent from the future children affected, He disregarded the foundational ethical principles of non-maleficence, autonomy, and justice.[89]

Such conduct contravenes Article 13 of the Oviedo Convention, which expressly prohibits genetic interventions that introduce heritable modifications, except where aimed at prevention, diagnosis or therapy and only if the intervention does not aim to modify the genome of descendants.[90] As He Jiankui's edits were intended to be heritable but lacked medical necessity and therapeutic clarity. The act not only breached international ethical standards but also violated the principles underlying many national laws and soft law declarations. The Oviedo Convention remains the only legally binding international treaty addressing human rights in biomedicine, yet its effectiveness is limited by the fact that major scientific powers such as China and the United States are not signatories.[91] This illustrates a core governance challenge, the global divergence in regulatory frameworks allows actors to bypass restrictions by operating in less regulated jurisdictions. Thereby, jeopardising the rights and welfare of future children. Feeney et al. observe, such regulatory gaps create a "wild west" of genome editing, risking a form of bioethical tourism that undermines child protection across borders.[92]

Furthermore, Baylis notes that He's actions reflected the ethos of "fast science", where the technological imperative to act overrides deliberative ethical reasoning.[93] This raises serious concerns about the misuse of reproductive liberty. Holm critically examines how the mantra "only when it is safe" functions as a discursive cover-up, concealing deeper philosophical tensions between reproductive liberty and child welfare.[94] Even if He's intentions were therapeutic, Gumer argues that his actions were neither proportionate nor necessary, given the availability of preimplantation genetic diagnosis (PGD), which would have avoided the birth of children with genetic susceptibility to HIV without altering the germline.[95] The absence of a clear risk-benefit balance, coupled with the lack of societal consensus, made He's intervention premature but ethically indefensible. The 2015 International Summit on Human

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[89] Greely (n86) 159.
[90] Council of Europe, Treaty No. 164 Article 13.
[91] Council of Europe Portal, 'Chart of Signatures and Ratifications of Treaty 164' https://www.coe.int/en/web/conventions/full-List?module=signatures-by-treaty&treatynum=164 last accessed 15 April 2026.
[92] Oliver Feeney et al., 'Ethics, Patents and Genome Editing: A Critical Assessment of Three Options of Technology Governance' (2021) p.4, Frontiers in Political Science https://doi.org/10.3389/fpos.2021.731505 last accessed 15 April 2026.
[93] Françoise Baylis, 'Human Genome Editing: Our Future Belongs to All of Us' (2019) p.42 and 43, Issues in Science and Technology https://issues.org/wp-content/uploads/2019/04/Baylis-Human-Genome-Editing-SP19-ISSUES-42-44.pdf last accessed 15 April 2026.
[94] Holm (n6).
[95] Gumer (n44) 148.

Gene-Editing, hosted by the U.S. National Academies, the Royal Society, and the Chinese Academy of Sciences, concluded that germline editing would be "irresponsible to proceed with until safety and efficacy concerns are resolved and broad societal consensus is achieved".[96] The consensus from this summit reinforces the legal view that future children's welfare must take precedence over experimental impulses.[97] These concerns are not merely abstract. The Nuffield Council on Bioethics, while open to the future conditional use of germline gene-editing, stipulates that such interventions must meet stringent conditions.[98]

1) They must be in the best interests of the future person.[99]
2) They must have undergone robust public discourse.[100]
3) They must be subject to legally mandated oversight.[101]

None of these conditions were fulfilled in He's case. Instead the experiment violated the Council's emphasis on responsible governance, transparency and social consensus. Though this was a Chinese case, the same principles apply to any jurisdiction recognising child rights, informed consent, and ethical limits of experimentation. Child welfare, as articulated in documents such as the UNCRC, is not geographically contingent, it is a universal standard.[102] The principle that children must be protected from preventable harm and non-therapeutic experimentation transcends national borders, and it is this universality that makes this a crucial case study for international law and governance. While China has since updated its regulations to require central government approval for all gene-editing experiments involving human embryos[103], the case still exposes gaps in international legal enforcement, especially where national laws are rapidly outpaced by technological capabilities.

More recent proposals, including amendments to the TRIPS Agreement suggest using international patent law as a tool for enforcing ethical constraints i.e., banning the commercialisation of germline editing technologies for enhancement purposes.[104] Ethical licensing and government controlled patents could extend the reach of legal oversight beyond

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[96] LaBarbera (n44) 1123.
[97] ibid 1124.
[98] Nuffield Council on Bioethics, 'Genome Editing and Human Reproduction' (n67) p 2, 4 and 12.
[99] ibid 7.
[100] ibid 6.
[101] ibid 2 and 12.
[102] UNICEF, 'How We Protect Children's Rights' https://www.unicef.org.uk/what-we-do/un-convention-child-rights/ last accessed 15 April 2026.
[103] Chen (n83) 5 and 6.
[104] Feeney (n92) 2, 7 and 8.

national borders and into private industry[105], thus strengthening protections for future children. Moreover, the growing interests in stakeholder driven governance i.e., "stakeholder engagement, education and dialogue" (SEED) framework advocated by Howard et al. emphasis that law alone is insufficient.[106] Legal frameworks must work in tandem with inclusive, interdisciplinary and transnational dialogue that reflects the voices of children, parents, ethicists, scientists, and underrepresented populations.

As such, this scandal illustrates what can go wrong when scientific innovation outpaces governance, a risk that is not unique to China but is relevant to all jurisdictions lacking enforceable mechanisms for preventing unethical experimentation on future persons. This case continues to be referenced in policy discussions and academic literature because it reveals the fragility of existing legal frameworks when faced with high profile ethical violations. Without a coordinated international response, similar incidents could occur, especially in jurisdictions with weak oversight.[107] Thus, while He Jiankui acted within China, the case's implications are global. It demonstrates the urgent need for harmonised standards that prioritise the best interests of children, limit speculative germline interventions, and impose clear accountability. The *He Jiankui* case demonstrates that existing legal frameworks can safeguard the best interests of children only if they are enforceable, globally coordinated, and adaptable to rapid scientific change. Law must operate not only retrospectively i.e., punishing misconduct, but also prospectively meaning that there are clear thresholds for permissible innovation. These thresholds must be rooted in an uncompromising commitment to child welfare, requiring future policy to prioritise safety, justice, and autonomy over scientific novelty or commercial gain.[108]

4.3. CTX001 and He Jiankui: divergent approaches to child welfare in gene-editing

The case studies of CTX001 and *He Jiankui* reveal a stark contrast in how gene-editing technologies can either uphold or violate the best interests of children. Crucially, CTX001 operates within established ethical and legal standards that prioritise direct therapeutic benefit and individual welfare. Conversely, He Jiankui's germline intervention bypassed regulatory structures and exposed children to irreversible harm without necessity or consent.[109]

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[105] ibid 7.

[106] Heidi C Howard et al., 'One Small Edit for Humans, One Giant Edit for Humankind? Points and Questions to Consider for a Responsible Way Forward For Gene Editing on Humans' (2017) p.3, 8, 9 and 10 https://doi.org/10.1038/s41431-017-0024-z last accessed 15 April 2026.

[107] Feeney (n92) 7.

[108] Nuffield Council on Bioethics, 'Genome Editing and Human Reproduction' (n67) 5 and 7.

[109] Chen et al (n83) 3.

What distinguishes CTX001 is not only its clinical justification, but its compatibility with transferable legal standards.[110] While developed in embryo research, frameworks like the HFEA can be adopted to somatic interventions. This demonstrates that current legal frameworks, when combined with risk-benefit analysis and the principle of future autonomy, can guide responsible innovation. In contrast, the He Jiankui scandal underscores the limits of soft law and voluntary ethical norms.[111] Despite broad international consensus against germline editing, the absence of binding global regulation enabled unethical experimentation.[112] Thus, it calls for internationally enforceable standards, specifically around interventions that affect future generations.

Taken together, these cases affirm that gene-editing technologies can serve the best interests of children, but only when embedded within robust legal systems that enforce transparency, necessity, and justice. Where CTX001 shows how law can support ethical innovation, *He Jiankui* exposes the consequences of its absence. These case studies are significant because they are not theoretical or speculative. They are real-world applications of gene-editing with direct consequences for children, these urgent issues require immediate regulatory attention.

5. Findings

The normative foundations and case studies discussed in sections 2 and 3 reveal significant gaps in how current legal systems respond to emerging gene-editing technologies. This section presents key findings from this analysis, identifying where legal protections align, or fall short of securing the best interests of the child.

5.1. Divergent legal approaches to somatic and germline editing

A central finding of this paper is the different legal treatment of somatic versus germline gene-editing, both in UK and international law. In the UK, somatic gene-editing i.e., CTX001 for sickle cell disease operates within established medical and regulatory structures.[113] Somatic

[109] Dean (n58) 10.
[110] Council of Europe, 'Treaty No. 164' (n3) 10.
[111] Greely (n86) 128.
[112] ibid 172.
[113] Hope Anderson, 'CRISPR Clinical Trials: A 2024 Update' (2024) https://innovativegenomics.org/news/crispr-clinical-trials-2024/ last accessed 15 April 2026.

editing targets non-reproductive cells and affects only the individual treated[114], aligning with conventional therapeutic goals. As such, the use of somatic editing is generally uncontroversial and permissible under the Human Tissue Act 2004 and falls under existing clinical governance.[115] In contrast, germline editing, as illustrated by the *He Jiankui* case, represents a profound ethical and legal disagreement. Germline interventions involve the heritable alteration of embryos or gametes[116], raising questions of consent and intergenerational justice. In the UK, germline editing for reproductive purposes remains strictly prohibited. The 1990 Act permits gene-editing research on embryos up to 14 days old, provided these embryos are not implanted.[117]

Internationally, the Oviedo Convention prohibits modifications of the human genome that are heritable, stating that an intervention may only be undertaken for preventative, diagnostic or therapeutic purposes and only if its aim is not to introduce any modification in the genome of any descendants.[118] This convention, however, is not universally ratified. Thereby, undermining its global effectiveness. Qingxui Bu notes, this legislative asymmetry contributes to "regulatory havens" where controversial gene-editing may occur outside stringent oversight.[119] The legal isolation between somatic and germline editing is also becoming unstable. Advances in biotechnology now allow somatic cells to be reprogrammed into induced pluripotent stem cells, which can then be directed to become gametes.[120] This blurs the boundary between germline and somatic interventions. Braun and Dabrock argue that the traditional binary between somatic and germline editing is becoming unsustainable and that governance should focus on the goals, risks, and ethical implications of the intervention rather than its biological classification.[121]

This has significant implications for how the law can ensure gene-editing technologies serve the best interests of children. A regulatory system that is overly rigid may fail to account for emerging risks and benefits. Conversely, one that is too permissible risks enabling harm. Therefore, legal frameworks must implement an adaptive, risk sensitive model that integrates

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[114] Piergentili (n5) 6.
[115] Ilke Turkmendag, 'The Legal Framework For Genome Editing and the UK's Case Study' (2016) https://openacademy.eurordis.org/wp-content/uploads/2018/08/2.IT_.pdf last accessed 15 April 2026.
[116] ibid.
[117] Human Fertilisation and Embryology Act 1990, section 3.
[118] Council of Europe, 'Treaty No. 164' (n3) Article 13.
[119] Qingxiu Bu, 'Reassess the Law and Ethics of Heritable Genome Editing Interventions: Lessons for China and the World (2019) p.137, Issues in Law and Medicine https://pubmed.ncbi.nlm.nih.gov/33950602/ last accessed 15 April 2026.
[120] Braun and Dabrock (n14) 279.
[121] ibid.

scientific developments while remaining anchored in child-centric ethical principles. The current dichotomous structure risks becoming outdated and inadequate to manage biotechnologies in a way that upholds child welfare.

5.2. Inconsistencies and gaps in international legal governance

A second key finding is the marked inconsistency and fragmentation in international legal frameworks governing human gene-editing. Institutions such as the 2015 International Summit on Human Gene Editing have repeatedly emphasised the need for a global moratorium on heritable genome editing until a broad, inclusive international consensus is achieved[122]. These calls reflect concerns that germline modification represents a point of no return, with intergenerational consequences.[123]

Despite such warnings, the lack of globally binding legal instruments continues to obstruct the development of consistent safeguards. As previously mentioned, Article 13 of the Oviedo Convention bans heritable genome modifications, allowing only preventative, diagnostic, or therapeutic interventions. However, its effectiveness as a global standard is limited, as key states like the US and China have not ratified it. Consequently, international governance remains uneven, with widely varying ethical and legal thresholds for permissible research and clinical application. This regulatory nonconformity creates the risk of "regulatory havens", jurisdictions where oversight is minimal and enforcement is weak.

Therefore, Feeney et al. argue, such gaps enable ethically questionable practices to take place in countries with less restrictive laws[124]. Thus, potentially exposing future children to unproven and unsafe interventions. The OECD similarly cautions against the dangers of regulatory arbitrage and "ethics dumping", where high risk experimental procedures are relocated to states that lack strong ethical or legal protections.[125] From the standpoint of the best interests of the child, such inconsistencies pose profound challenges. Children born via gene-editing may face very different levels. This undermines the principle of equality and fairness enshrined in the UNCRC. States are obliged to provide children with the highest attainable standard of health[126] and to ensure their best interest are primary consideration in all actions affecting them.[127]

[122] LaBarbera (n44) 1126.
[123] ibid.
[124] Feeney (n92) 7.
[125] Anu Shukla-Jones, Steffi Friedrichs & David E. Winickoff (n33) p 17 and 28.
[126]United Nations, Convention on the Rights of Child, Article 24.
[127] ibid Article 3.

Baylis warns that such unevenness lets wealthy states benefit while poorer countries risk becoming testing grounds.[128] This not only raises issues of justice and exploitation but also amplifies the risks that future children, mainly those born in vulnerable regions, may bear the consequences of inadequately governed scientific progress. This concern is especially important in the context of sickle disease. Aforementioned, sickle cell disease disproportionately affects 66% of Sub-Saharan Africa.[129] However, the current focus of clinical trials and regulatory investment is heavily skewed toward wealth Western nations, where only a small fraction of the global sickle cell disease population live.[130] This match between disease burden and research investment raises a critical question, *whose children are being prioritised in the development of gene-editing therapies?* If international legal frameworks fail to address such disparities, children in the Global South may face a double disadvantage by disease prevalence and inaccessibility of treatment.[131] Ensuring that gene-editing serves the best interests of all children, not just those in resource rich countries, demands that international governance also addresses questions of access, equity, and global health justice.

To adequately protect child welfare, international legal frameworks must be reimagined as more than just influential guidelines. A coherent, enforceable global agreement is needed, one that is rooted in common ethical principles, the precautionary principle, and the rights of the child. This should include minimum standards for clinical trials, mandatory safety protocols, long-term monitoring obligations, and cross-border cooperation on enforcement. Without such a framework, the governance of gene-editing remains dependent on political will and national discretion, failing to provide the universal protection necessary for safeguarding the interests of future generations.

5.3. Ethical tensions: reproductive autonomy vs. child welfare

A third finding concerns the deep ethical tensions between reproductive autonomy and the best interests of the child. Savulescu's principle of "procreative beneficence" argues that parents

[128] Baylis (n27).
[129] World Health Organization, 'African Health Ministers Launch Drive to Curb Sickle Cell Disease Toll' (2022) https://www.afro.who.int/news/african-health-ministers-launch-drive-curb-sickle-cell-disease-toll last accessed 15 April 2026.
[130] CRISPR Therapeutics, 'CRISPR Therapeutics Submits First Clinical Trial Application for a CRISPR Gene-Edited Therapy, CTX001 in β-thalassemia' (n.d.) https://crisprtx.com/about-us/press-releases-and-presentations/crispr-therapeutics-submits-first-clinical-trial-application-for-a-crispr-gene-edited-therapy-ctx001-in-β-thalassemia-1 last accessed 15 April 2026.
[131] ibid.

have a moral obligation to select the child with the best life prospects, including through gene-editing.[132] This principle resonates with autonomy but is heavily criticised for promoting a form of genetic perfectionism that may instrumentalise children as outcomes of parental design rather than respecting their inherent dignity as moral subjects.

Baylis again provides an incisive critique of this logic. She challenges the notion that genome editing is about gene-editing rather than "people editing", arguing that future individuals are being shaped without consent.[133] The ethical problem, she notes, is not the lack of embryonic consent, which is conceptually incoherent, but real potential for adult persons to reject traits they did not choose, especially when such modifications carry unknown risks or social stigma.[134] This raises profound questions about autonomy, identity, and dignity. UK case law on parental discretion and child welfare also reveals a reluctance to impose strong duties of enhancement on parents.[135] Courts generally affirm parental autonomy unless decisions pose a risk a significant harm.[136] In the context of gene-editing, this creates a paradox. While parents may choose to avoid enhancement, they may also be permitted to proceed with experimental interventions that are insufficiently regulated. Auckland and Goold highlight this gap, arguing that current standards do not adequately safeguard children's rights against premature uses of emerging biotechnologies.[137]

Thereby, the law's reluctance to engage with speculative harms becomes problematic. If germline editing goes wrong, the child cannot seek compensation because their very existence is contingent on that decision, known as the "non-identity problem".[138] Yet, this should not nullify regulatory oversight. Holm notes, future individuals remain moral subjects of decisions made in the present.[139] Thus, legal frameworks should not concede to parental preference but embed safeguards that apply ethical standards to parental choice itself. To better serve the best interests of the child, the law should incorporate child welfare threshold into reproductive decision-making. This could include mandatory ethical review, clear risk-benefit ratios, and limits on parental discretion. These mechanisms could balance autonomy with accountability.

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[132] Martin (n24) 415, 419-25.
[133] Baylis (n27); Dickenson (n27).
[134] ibid.
[135]Auckland and Goold (n8).
[136] Re J (A Minor) (Wardship: Medical Treatment) [1990] EWCA Civ J1019-6.
[137] Auckland and Goold (n8).
[138] UNESCO, 'Report of International Bioethics Committee (IBC) on the Principle of Protecting Future Generations' (2021) p.25 https://unesdoc.unesco.org/ark:/48223/pf0000378723#:~:text=For%20the%20IBC%2C%20the%20underlying,prevention%20(such%20as%20new%20vaccines%2C last accessed 15 April 2026.
[139] Holm (n6) 103.

5.4.Socioeconomic inequities and access to technology

Gene-editing also raises urgent questions of distributive justice. Somatic therapies like CTX001, while promising, remain prohibitively expensive and are often funded through public-private partnerships.[140] Baylis argues that taxpayers effectively act as venture capitalists for somatic genome editing research yet reap little benefit in terms of accessibility or affordability.[141] This creates a disjunction between public investment and private profit.

Gene-editing's potential to serve the best interests of children is critically dependent on equitable access.[142] A technology that promises cures for genetic diseases but is affordable only to the global elite cannot be said to uphold the principle of justice. The problem is compounded in countries with limited healthcare infrastructure or inadequate regulatory oversight.[143] Without deliberate intervention, such technologies may reinforce rather than redress structural inequalities, leaving already disadvantaged children further behind. Efforts to broaden access must therefore be embedded in both domestic and international regulatory frameworks. These should include mechanisms to ensure equitable trials and fair distribution. If the ethical principle of justice is to have any operative meaning in gene-editing governance, access must be treated not as an immediate benefit but as a requirement for research and approval.

Even more concerning is the future prospect of heritable genome editing becoming a tool of social hierarchy. Gumer notes that if such technologies become normalised, they may entrench existing inequalities by enabling the wealthy to access genetic enhancements while others are left behind.[144] This echoes historical patterns of eugenics, where biological traits were used to justify discrimination. The Nuffield Council on Bioethics has warned that heritable genome editing must be evaluated through the lenses of "welfare of the future person"[145] and "social justice and solidarity".[146] It insists that any morally permissible use must not increase

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[140] Vertex, 'Vertex Pharmaceuticals and CRISPR Therapeutics Amen Collaboration for Development, Manufacturing and Commercialization of CTX001 In Sickle Cell Disease and Beta Thalassemia' (2021) https://investors.vrtx.com/news-releases/news-release-details/vertex-pharmaceuticals-and-crispr-therapeutics-amend last accessed 15 April 2026.
[141] Baylis (n27); Dickenson (n27).
[142] Vertex (n140) 39.
[143] CRISPR Therapeutics (n130); See also World Health Organization, 'African Health Ministers Launch Drive to Curb Sickle Cell Disease Toll' (2022) https://www.afro.who.int/news/african-health-ministers-launch-drive-curb-sickle-cell-disease-toll last accessed 15 April 2026.
[144] Gumer (n44) 150.
[145] Nuffield Council on Bioethics, 'Genome Editing and Human Reproduction' (67) 77.
[146] ibid 86.

disadvantage, discrimination, or division within society.[147] Embedding these values into statutory law would require regulatory bodies to consider social impact assessments in addition scientific reviews. The best interests of the child must therefore be interpreted as a relational principle, one that acknowledges how children's wellbeing is shaped not just by biology but by socioeconomic systems.[148]

5.5. Lack of empirical and democratic accountability

Finally, there is a notable lack of empirical rigour and democratic legitimacy in current governance models. Lacomussi's comparative analysis of the UK and US regulatory approaches reveals that while the UK via the Nuffield Council adopts a more socially embedded ethical framework, both jurisdictions fail to integrate robust public participation mechanisms[149]. Furthermore, the American National Academies of Sciences report advocates for comprehensive multigenerational follow ups in germline trials but lacks a strong democratic mandate to determine societal acceptability.[150]

Once more, Baylis critiques the elitist framing of ethical debates, where expert committees often exclude the voices of those most affected[151], including people with disabilities, women, and global South communities. Without inclusive deliberation, permissive norms risk evolving under the guise of inevitability.[152] Baltimore et al. recommend ongoing public forums and transparent research agendas as essential to rebuilding public trust and ensuring that gene-editing is used responsibly and equitably.[153] Such participation should not be treated as a procedural formality but as a substantive requirement. A meaningful public role in shaping the future of gene-editing, mainly one that includes youth, minority, and global perspectives. This will help ensure that the technologies are not only scientifically possible but also socially just and ethically grounded.

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[147] ibid.
[148] Beverley A Townsend, 'Human Genome Editing: How to Prevent Rogue Actors' (2020) p.2 BMC Medical Ethics https://doi.org/10.1186/s12910-020-00527-w last accessed 15 April 2026.
[149] Sofia Lacomussi, 'Regulating Genome Editing Technologies: A Comparison of Expert Recommendation in the U.K. and in the U.S. (2019) https://doi.org/10.1042/etls20180101 last accessed 15 April 2026.
[150] ibid.
[151] Baylis (n27); Dickenson (n27); See also, Baylis (n28).
[152] Roseanna Bourke et al., 'Understanding Ethical Drift in Professional Decision Making: Dilemma In Practice' (2021), p.1418, International Journal of Inclusive Education https://www.tandfonline.com/doi/full/10.1080/13603116.2021.1992679#abstract last accessed 15 April 2026.
[153] Baltimore (n78) 3.

6. Discussion

6.1. Reframing child welfare in gene-editing governance

The principle of the "best interests of the child", while foundational in international legal instruments i.e., Article 3 of the UNCRC,[154] remains underdeveloped in gene-editing. One of the key tensions exposed in this paper is the reliance on intuitive, often culturally situated, assumptions about what constitutes a good life for future children.[155] In the case of CTX001, therapeutic benefit is evident, and few would contest that alleviating the pain and mortality associated with sickle disease serves the child's best interests. However, the *He Jiankui* case reveals how appeals to benefit can be subjective without legitimacy. To move beyond narrow, medically farmed definitions of benefit, the concept of child welfare must be reconceptualised not only in terms of physical health outcomes, but also in terms of autonomy, relational identity, and intergenerational justice. While traditional bioethical models prioritise treatment efficacy and safety, they often marginalise or overlook how these interventions might affect the child's sense of identity of future self-conception. Again, the twins edited to be resistant to HIV by He Jiankui were subject to an experiment where consequences remain unknown.[156]
The Nuffield Council's proposal that genome editing be permissible only where it aligns with the welfare of the future person and promotes social solidarity provides a richer framework.[157] Yet, the absence of this framework in binding international law signals a missed opportunity to harmonise ethical reasoning with enforceable protection. This vacuum allows overly individualistic or state-driven interpretations of child welfare to dominate. Reframing the best interests standard through a multidimensional lens, encompassing legal, bioethical, and social criteria can reduce the normative ambiguity that currently plagues gene-editing regulation. This includes embracing pluralistic interpretations of "welfare" developed through democratic deliberation rather than technocratic imposition.[158] Furthermore, such a lens must account for sociocultural because what constitutes welfare in wealthy states may not translate in low-income regions.

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[154] United Nations, 'The UN Convention on the Rights of the Child' Article 3.
[155] Rosario Isasi, 'Human Gene Editing: Traversing Normative Systems' in Graeme Laurie et al. eds, *The Cambridge Handbook of Health Research Regulation*. Cambridge Law Handbooks. Cambridge University Press; 2021:337, Cambridge University Press https://www.cambridge.org/core/books/cambridge-handbook-of-health-research-regulation/human-gene-editing/E345BC04C1FCA74AE9D6427F4D62A92F last accessed 15 April 2025.
[156] Chen et al. (n83) 3.
[157] Nuffield Council on Bioethics, 'Genome Editing and Human Reproduction' (n67).
[158] UNESCO (n138).

Moreover, current ethical framings often reduce the best interests standard to a binary. Either a child benefits or suffers.[159] However, as Gumer and Baylis argues, gene-editing introduces complex harms and uncertain benefits requiring more than paternalistic judgement.[160] A future focused, child-centred standard would recognise that ethical justification does not end at the point of embryo creation or birth, but must be ongoing. This includes implementing long-term empirical monitoring to assess developmental, psychosocial, and health outcomes in children born of gene-editing interventions, as well as mechanisms for ethical redress should harms later emerge. As such, integrating rolling consent frameworks and longitudinal child welfare assessments into governance structures becomes a legal necessity rather than an ethical bonus.[161] These measures are not only protective, but also affirm the evolving capacities of the child, a core concept under Article 5 of the UNCRC which states "Governments must respect the rights and responsibilities of parents and carers to provide guidance and direction to their child as they grow up, so that they fully enjoy their rights. This must be done in a way that recognises the child's increasing capacity to make their own choices".[162] This signals a shift toward a participatory, rights-based model of child welfare governance that adapts with time, knowledge, and lived experience.

6.2. Rethinking legal divergence: the blur between somatic and germline editing

The findings identified a growing instability in the legal distinction between somatic and germline interventions. While the HFEA, continues to prohibit germline editing while permitting somatic therapies[163], developments increasingly expose the limitations of the binary. Although the distinction has provided a useful regulatory tool, it risks oversimplifying the nuanced ethical and biological realities of gene-editing interventions.

From a child welfare perspective, a risk-based framework is more appropriate.[164] A somatic therapy that results in unintended consequences for future generations, through off-target

[159] Santa Slokenberga et al., 'Governing, Protecting, and Regulating the Future of Genome Editing: The Significance of ELSPI Perspectives' (2022) p.330, European Journal of Health Law 29 https://doi.org/10.1163/15718093-bja10076 last accessed 15 April 2026.

[160] Baylis (n27).

[161] Nuffield Council on Bioethics, 'Genome Editing and Human Reproduction' (n67).

[162] United Nations, 'The UN Convention on the Rights of the Child' Article 5.

[163] UK Parliament, 'Written Evidence Submitted by the Centre for Genetics and Society (GNH0020) https://committees.parliament.uk/writtenevidence/81550/html/#:~:text=The%20HFEA%20should%20continue%20to,aim%20in%20almost%20all%20cases last accessed 15 April 2026.

[164] Adam Cribbs and Sumeth Perera, 'Science and Bioethics of CRISPR-Cas9 Gene Editing: An Analysis Towards Separating Facts From Fiction (2017) p.630 – 631, Yale Journal of Biology and Medicine 90 https://pubmed.ncbi.nlm.nih.gov/29259526/ last accessed 15 April 2026.

effects or unforeseen biological pathways[165], should not be regulated more leniently simply because it originated in a somatic context. Conversely, if a germline intervention demonstrates long-term safety and targets a severe, otherwise untreatable disease[166], it may be ethically justifiable under a rigorous precautionary framework. Braun and Dabrock's recommendation to focus regulation on purpose, effective, and risk rather than cellular origin provides a compelling alternative to the current legal structure.[167] This shift in focus is not merely symbolic. Regulation based on cell classification often fails to capture the implications of an intervention, effects on identity, autonomy, or long-term health outcomes. Legal systems must anticipate evolving knowledge and consequences. This could involve establishing adaptive licensing systems and ethical review protocols that regularly evaluate the broader impacts of interventions, regardless of their original classification.

Rigid legal binaries risk discouraging innovation. In reality, the ethical acceptability of an intervention often depends more on its societal context, governance structures, and implementation safeguards than on whether it targets germline or somatic cells. Reforming the somatic/germline distinction also challenges policymakers to more clearly define what constitutes therapeutic necessity, enhancement, or social preference. Without this clarity, parental or clinical discretion risks dominating the regulatory space, leading to inconsistent protections for children. A coherent, child focused regulatory system would adopt flexible, evidence based criteria that evolve technological understanding while remaining grounded in child welfare and human rights norms. Ultimately, a shift to a risk centred regulation would better align with precautionary ethical standards and ensure that innovation does not outpace protection.

6.3. Legal pluralism and the failure of global governance

The analysis reveals that international regulation of gene-editing remains a patchwork of soft law instruments and jurisdiction specific standards. The Oviedo Convention, while normatively robust, is limited by its Eurocentric signatories and lack of global ratification.

Feeney et al.'s call for enforceable ethical standards through international agreements, including trade or IP frameworks, is ambitious but reflects the urgency of the problem.[168] The

[165] Holm (n6) 103.
[166] ibid 102.
[167] Braun and Dabrock (n14) 279.
[168] Almeida and Ranishch (n15) 2, 7 and 8.

risk of bioethical tourism, particularly in lower income states where oversight may be weaker, threatens global child welfare norms.[169] A child-centred treaty, potentially modelled on the HFEA's licensing framework but adapted for transnational application could function to fill this gap. Such a treaty would need to integrate the UNCRC's substantive rights, including health[170] and protection from harmful medical experimentation[171], into enforceable biomedical governance. Global instruments must account for national variation in legal systems, healthcare infrastructure, and cultural values. A multi-tiered approach, establishing universal ethical standards while allowing for contextual adaptations, could foster legitimacy and compliance. This approach would be similar to "common but differentiated responsibilities"[172] in environmental law, applied here in gene-editing governance.

Importantly, any such treaty must also confront the socioeconomic asymmetries in research and treatment access. Sickle cell disease, as discussed, predominantly affects populations in Sub-Saharan Africa, yet clinical trials for somatic gene therapies are heavily concentrated in the Global North. Therefore, an international framework must include not only ethical criteria for permissible interventions but equitable guidelines for research funding, trial inclusion, and post-treatment care. Without addressing global structural justice, even the most sophisticated legal frameworks will fail to uphold the best interests of all children.

6.4. Reproductive liberty and the limits of parental choice

The discussion around reproductive autonomy, especially when grounded in Savulescu's principle of procreative beneficence[173], reveals the danger of unconstrained parental choice. While English courts generally defer to parental judgement unless there is significant harm, this threshold is ill equipped to manage the speculative risks and long-term identity implications posed by gene-editing.

Holm's framing of future children as "moral subjects" of current decisions is crucial.[174] Law must shift from a negative liberties model meaning it protects parental freedom from state interference to a positive rights model that actively secures the child's future autonomy and

[169] ibid 2 and 5.
[170] United Nations, 'The UN Convention on the Rights of the Child' Article 24.
[171] ibid Article 36 'Other Forms of Exploitation: "Governments must protect children from all other forms of exploitation, for example the exploitation of children for political activities, by media or for medical research."
[172] Ellen Hey, 'United Nations: The Principles of Common but Differentiated Responsibilities' https://legal.un.org/avl/pdf/ls/Hey_outline%20EL.pdf last accessed 15 April 2026.
[173] Savulescu (n4).
[174] Holm (n6) 103.

dignity.[175] The introduction of independent ethical review panels for gene-editing proposals, with child welfare mandate could safeguard decisions. These panels should include ethicists, paediatricians, disability rights advocates, and lay people to ensure pluralistic deliberation. Moreover, the current legal vacuum around enhancement instead of using gene-editing to treat disease.[176] As Gumer and Baylis note, even therapeutic interventions risk becoming normalised tools for parental preference when oversight is weak.[177] The best interests of the child must not be subordinated to aesthetic or aspirational visions of parenthood. Law must delineate the boundary between therapeutic benefit and enhancement, restricting the latter regardless of parental consent.

A further challenge lies in the evolving interpretation of harm. Courts and regulators must grapple with whether creating a child through risky or enhancement-based gene-editing constitutes a justiciable harm. The "non-identity problem" complicates accountability but should not preclude regulatory responsibility.[178] A precautionary harm framework, even in the absence of a clearly identifiable victim, allows for proactive protection without undermining reproductive freedom entirely.[179] Reproductive liberty, in this context, must be reframed as a right condition by duties to the future child, rather than a free floating privilege immune from regulatory scrutiny.[180]

6.5. Structural justice and participatory governance

This paper has challenged the assumption that equity and public trust can be addressed after scientific development. Baylis' observation that public funding supports private innovation without sufficient public return underscores a systemic failure.[181] Global equity is not merely a subsequent concern but precondition of ethical legitimacy.

Embedding equity into the research and regulatory process itself is necessary. Regulatory approvals could be contingent upon access plans, including price caps, tiered pricing for low-income countries, and open access licensing models. Moreover, global clinical trials should prioritise inclusion of affected populations, such as those in Sub-Saharan Africa in the case of

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[175] Tamar Ezer, 'A Positive Right to Protection for Children' (n.d.) p. 6-7 Yale Law School https://law.yale.edu/sites/default/files/documents/pdf/LawJournals/EZER.PDF last accessed 15 April 2026.
[176] Morrison and de Saille (n17) 3.
[177] Baylis (n27); Dickenson (n27); Baylis (n28); Gumer (n44).
[178] Holm (n6) 110, 139 and 335.
[179] European Union, 'Precautionary Principle' https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=LEGISSUM:precautionary_principle last accessed 15 April 2026.
[180] Holm (n6) 103.
[181] Baylis (n27); Dickenson (n27).

sickle cell disease, not only to generate safety data and meet obligations of justice.[182] The Nuffield Council's principle of solidarity offers a conceptual foundation here.[183] Technologies developed through collective investment should yield collective benefit. From a legal standpoint, this could justify the imposing public interest conditions on licensing, making access a statutory requirement.

Additionally, participatory governance must accompany structural reforms. Morrison and de Saille argue that public unease if often mischaracterised as ignorance, when in fact it reflects legitimate concerns about commodification, control and intergenerational responsibility[184]. Abandoning the deficit model of public engagement means valuing dissent and ensuring that dialogue informs policy [185] . Multistakeholder forums, especially including marginalised communities, must institutionalised[186]. Only then can it be ensured that governance of gene-editing reflects not just elite consensus, but democratic legitimacy rooted in shared ethical commitments. Finally, participation must not be superficial. It requires clear pathways for public influence on policy outcomes, transparent reporting on how input is used, and mechanisms to redress institutional bias. Participatory governance means sharing power in shaping biotechnology's ethical trajectory.

7. Conclusion

Gene-editing technologies represent one of the most profound scientific developments of the 21st century, offering the potential to cure severe genetic conditions and dramatically improve human health.[187] However, their application, specifically in the context of reproduction and future children, raises unprecedented legal and ethical challenges. This paper has argued that while gene-editing technologies hold significant promise, the ability of existing legal frameworks, both domestic and international, to ensure that they serve the best interests of the child is presently limited and uneven. Through comparative case study analysis, normative

[182] Edited Therapy, CTX001 in β-thalassemia' (n.d.) https://crisprtx.com/about-us/press-releases-and-presentations/crispr-therapeutics-submits-first-clinical-trial-application-for-a-crispr-gene-edited-therapy-ctx001-in-β-thalassemia-1 last accessed 15 April 2026.
[183] Nuffield Council on Bioethics, 'Genome Editing and Human Reproduction' (n67) 86.
[184] Morrison and de Saille (n17) 2.
[185] Andrew McGee, 'Using the Therapy and Enhancement Distinction in Law and Policy' Bioethics Volume 34, Issue 1 (2019) 70-1 https://doi.org/10.1111/bioe.12662 last accessed 15 April 2026.
[186] Eric Lander et al., 'Adopt A Moratorium on Heritable Genome Editing' (2019) https://www.nature.com/articles/d41586-019-00726-5 last accessed 15 April 2026.
[187] Rebecca Dimond et al., 'Editorial: Themed Issue: Understanding the Technical and Social Landscape of Gene Editing' (2021) p.363, New Genetics and Society https://doi.org/10.1080/14636778.2021.2004032 last accessed 15 April 2026.

legal examination, and engagement with key bioethical principles, this paper has demonstrated that meaningful governance must go beyond procedural safeguards and reflect a holistic commitment to justice, autonomy, and the evolving rights of future generations.

7.1. The fragility of current legal frameworks

Existing legal frameworks are highly fragmented and inconsistently applied across jurisdictions. The UK's HFEA offers a robust, if limited, model of national oversight, mainly in relation to embryo research and reproductive regulation. Yet, it remains confined by jurisdictional boundaries and cannot prevent unethical gene-editing practices elsewhere, as the He Jiankui scandal in Chine illustrated. Meanwhile, international frameworks, such as the Oviedo Convention lack enforceability and suffer from limited ratification, especially by major scientific powers like China and the United States. As result, legal enforcement remains patchy and often reactive, leaving significant gaps in the global protection of children's rights in the face of biotechnological advancement.

These limitations are particularly evident in the governance of germline editing. While somatic interventions like CTX001 for sickle cell disease operate under clearer clinical and regulatory standards[188], germline interventions challenge legal principles of consent, risk management, and intergenerational justice.[189] The binary legal distinction between somatic and germline editing, once a useful method, has become increasingly unstable as scientific developments blur the boundaries between the two. As argued throughout this paper, a shift toward a risk-based regulation is necessary, assessing interventions by impact on child welfare than cell classification.

7.2. Reproductive autonomy and ethical limits

The right to reproductive autonomy, while foundational in liberal democracies, must be balanced against the irreversible and intergenerational natural of gene-editing. Arguments such as Savulescu's "procreative beneficence" risk legitimising a utilitarian and individualistic vision of the child, framing them as optimised products rather than persons with inherent dignity and rights.[190] In contrast, critiques from Baylis, Gumer, and Holm illuminate how

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[188] Dean (n58) 10.
[189] Slokenberga, S et al. (n159) 339.
[190] Savulescu (n4)

reproductive choices are often shaped by social pressure, ableist norms, and power structures that may distort genuine autonomy.[191]

Therefore, this paper contends that reproductive liberty, while important, should not operate unchecked. It must be conditioned by legal threshold that reflect child welfare as a normative priority. This includes ensuring that reproductive decisions involving gene-editing are subject to independent ethical review, are proportionate to medical necessity, and avoid enhancement for non-therapeutic purposes. Furthermore, reproductive decision-making should be scrutinised not only at the point of clinical intervention and in light of broader social influences that may limit choice.

7.3. A child-centred interpretation of welfare

Central to this paper is the argument that existing legal articulations of "the best interests of the child" remain too vague, often reduced to biomedical notion of health or parental intuition[192]. CTX001 and *He Jiankui* case studies show welfare must encompass more than health. It must include future autonomy, identity, relational well-being, and long-term safety.

CTX001 as a treatment for sickle cell disease demonstrates how gene-editing can be ethically justified when used to alleviate suffering, restore autonomy, and support a child's flourishing without imposing identity-altering changes[193]. Conversely, the *He Jiankui* case reveals how claims of benefit can mask unethical experimentation that violates every principle of child welfare, non-maleficence, consent, justice, and dignity[194]. Law must toward a dynamic, evolving concept of child welfare. This would include longitudinal monitoring of children born from gene-editing interventions, ethical redress mechanism in cases of harm, and legal structures that respect the child's evolving capacities as articulated in Article 5 of the UNCRC[195]. It also requires embedding diverse perspectives from disabled communities, marginalised communities, and children themselves[196].

[191] Holm (n6); Baylis (n27); Gumer (n44).
[192] United Nations, 'The UN Convention on the Rights of the Child'; see also, Nuffield Council on Bioethics, 'Genome Editing and Human Reproduction' (n67).
[193] Dean (n58).
[194] Baltimore et al. (n78) 4.
[195] Council of Europe, 'Treaty No. 164' Article 5.
[196] Lander et al. (n186).

7.4. Structural justice and equitable access

Equally critical is the issue of justice. The current trajectory of gene-editing risks exacerbating global inequities [197]. While therapies like CTX001 offer transformative benefits, their development and distribution are largely concentrated in high income countries, despite the global burden of sickle cell disease falling disproportionately on low-income regions such as Sub-Saharan Africa.

This irregularity raises questions about distributive justice, *which children benefit from gene-editing, and which are left behind?* Legal and regulatory frameworks must therefore incorporate access and affordability as central criteria for approval. Public investment in gene-editing research must be matched by obligations to ensure public return[198], whether through equitable pricing, technology transfer, or patent reform. International instruments, such as TRIPS, could be leveraged to condition patent rights on adherence to ethical and access-based standard, as proposed by Feeney et al [199]. Moreover, the assumption that therapeutic interventions are automatically just is ethically ingenuous. Ruha Benjamin and Bliss argue biomedical technologies embed racial and economic exclusions[200]. As such, even seemingly benign intervention like CTX001 must be critically examined for their broader social impact. Governance structures must reflect this complexity and treat gene-editing not merely as a clinical innovation, but as a potential site of social repair or justice.

7.5. Toward democratic and global governance

Perhaps most importantly, this paper has shown that any effective legal response to gene-editing must be both democratic and global. Baylis highlights the danger of excluding public voices, especially those most affected[201]. Inclusive deliberation is not a procedural luxury but a requirement for legitimacy. Public engagement must be sustained, representative, and able to shape biotechnology norms.

At the international level, harmonised legal standards are urgently needed[202]. This includes a binding global treaty on human gene-editing that sets minimum standards for safety, consent, justice, and child welfare. Drawing on models like the HFEA and incorporating stakeholder

[197] Baylis (n27).
[198] Baylis (n27).
[199] Feeney et al. (n92) 2, 7 and 8.
[200] Benjamin (n74).
[201] Baylis (n27).
[202] Braun and Dabrock (n14) 134, 136-7.

driven governance frameworks like SEED, such an instrument should reflect pluralistic values while ensuring universal protections. Additionally, the precautionary principle must be reimagined not as a barrier to progress, but as a legal and ethical position of humility in the face of uncertainty. This does not mean freezing innovation but proceeding with oversight, dialogue, and commitment to future generations.

Gene-editing holds the potential to profoundly the lives of children affected by severe genetic disorders. However, as this paper has shown, this potential is matched by profound biological, social, and ethical risk. The law must not only keep pace with science but also provide a moral compass so innovation does not cost justice or dignity. The best interests of the child, if interpreted expansively and inclusively, can provide this compass. But this requires more than rhetorical commitments. It demands enforceable legal standards, cross-border cooperation, participatory governance, and an unrelenting focus on equity, accountability, and ethical integrity. Only then can gene-editing become a tool of care and justice for future generations