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Manchester Review of Law, Crime and Ethics

Preface from the Head of the School of Law

I would like to present, with great pleasure, the 9th edition of Manchester Review of Law, Crime and Ethics (MRLCE). As indicated in my preface to the previous issue, MRLCE has over the last eight years, become a voice for emerging thinkers with limitless geographical boundaries. The editors of the journal again, have in this volume, shown their determination to raise the standard of Manchester Review of Law Crime and Ethics to a veritable forum for socio legal intellectual exchanges. Once again, kudos to the editors for their hard work in making MRLCE what it is today.

This volume comes at a time when the world is facing one of its major if not the worse health crisis for a century. While the Covid19 pandemic took almost every country by surprise, governments around the world have gone at great length to introduce safety measures that have no doubt restricted and infringed into our liberty. Some citizens are therefore, questioning the extent of the lawfulness of some of the actions by governments to protect the population. It is therefore, no surprise that some of the articles in this volume are on human rights and public law amongst other subjects.

As a top Russell Group Law School that promotes interdisciplinary research, we are glad to have this volume covers a broad range of subjects including

environmental law, criminal law, torts law, criminology etc. The volume captures the essence of our intellectual agenda, i.e. employing law to respond to global challenges. The articles in this volume exemplify the analysis and exploration of complex socio legal questions of our time. They provide invaluable insights into some of the key legal issues that will underpin academic debates in decades to come. I will highly recommend this volume to anybody interested in contemporary intellectual debates.

Professor Yenkong Ngangjoh-Hodu,

October 2020

Preface from the Editor-in-Chief

I am exceptionally pleased to introduce Volume IX of the Manchester Review of Law, Crime and Ethics. After being a part of last year's editorial board, I am thankful to have been given the opportunity to continue to collaborate with brilliant minds and present some of the best work our law school has to offer.

We placed a great emphasis on choosing high-quality submissions, spanning a variety of legal and criminology topics, which we believed would be reflective of the strong intellectual capabilities of the law students of the University of Manchester.

Despite the challenges posed by this year, I am extremely grateful to, and proud of our authors and the entire editorial board for overcoming the delays and setbacks, to produce what I believe to be fantastic pieces of work.

I am grateful to all the academics who gave up their valuable time to review our papers and help them reach their full potential. I would also like to express my deepest gratitude to my Deputy-in-Chief, Charlet Chan - without your consistent hard work, readiness and support, this volume would not exist.

Lastly, I am delighted to hand over the title of Chief-in-Editor to Timothy Ke. The Review has come a long way from 2012, and I am confident that Timothy will

continue to uphold its excellent standard and take it to even higher levels of success.

I truly hope that you enjoy reading this volume and learning about legal issues that you might not have known existed – it has been a joy and honour to contribute to this edition.

Simpreet Kaur

October 2020

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Westphalia to Westminster: British Autonomy in the 'Postmodern' Era

Mitchell J. Taylor [1]

The concepts of autonomy and sovereignty have found themselves flung to the forefront of legal and political discourse on the contemporary global stage. As a sociological response to the eroding significance of national identity, seclusionary movements are gaining traction in the Western world. As states adjust to existing as smaller cogs in a much larger machine, questions remain: to what extent have these interdependent processes subverted individual state autonomy and has 21st century international cooperation destroyed the notion of unfettered sovereignty? This paper will attempt to address this directly through an analysis of the British nation-state, discussing the historical context of state autonomy and the traditional notion of Westphalian sovereignty before engaging with the substantive and abstract aspects of statehood through the writings of theorists such as, Stephen Haseler and Paul Hirst. Finally, this piece will employ Rod Rhodes' 'Differentiated Polity Model' along with some poignant critiques offered by David Marsh, David Richards, and Martin Smith through their 'Asymmetric Power Model' to offer an assessment of the symbolic nature of autonomy in the contemporary international system.

I. Introduction

The question of autonomy has dominated the political zeitgeist for the better part of a generation: "The emergence of a global economy…and of a new Western-led UN world role has placed the question of sovereignty into sharp focus."[2] Theorists such as Andrew Geddes, Stephen Haseler, and Paul Hirst have

[1] MA Security and International Law, University of Manchester, Department of Law.
[2] Stephen Haseler, 'Is the Nation-state Over? European Integration and the Issue of Sovereignty' (1992) 155 (1) World Affairs 23, 23.

suggested that the role of the nation-state is changing to adapt to a rapidly globalising world, and as such, the traditional nature of Westphalian autonomy enshrined within the 'Westminster Model' of centralised government is becoming redundant. Many trends have been cited as the cause of such a shift.

First, there are those, such as Joseph Camilleri and Jim Falk in *The End of Sovereignty,* who claim that the nation-state has become obsolete. Focusing their crosshairs on the fallibility of the conceptual nation, rather than the rapidly changing function of the state itself, Camilleri and Falk claim that the very notion of the nation-state is simply an idea, a story that citizens of the world use to shape and define their national identity, statehood and, in turn, their reality. Furthermore, the phenomenon of 'globalisation', driven by international polity organisations and global economic markets, is leading to a change in the function of national governments. Hirst argues that governments no longer function as all-encompassing governmental systems, but rather as conduits to legitimise both subnational and supranational polity infrastructure. Finally, as cited in Rod Rhodes' 'Differentiated Polity Model' and further collaborated by the works of Haseler, the transference of administrative control from Britain to the European Union (EU) has caused an erosion of power held by Westminster in favour of EU superiority. This devolution of power upwards, which is a staple point of Rhodes' 'hollowing-out of the state' thesis, has resulted in various EU organisations taking precedence over UK policy, signalling a loss of British autonomy. Rhodes believes that these processes of globalisation, Europeanisation and the so-called 'hollowing out' of the state have led to the ending of the era of modernity and the creation of the 'postmodern' state. Further to this, Haseler cites economic assimilation between the EU states and

the possibility of future military integration as an additional cause for concern.

This article will analyse these central themes of identity, nationality and statehood to determine to what extent these parallel processes affect nation-state autonomy through, *inter alia*, the arguments of the theorists named above on the erosion of traditional sovereignty in modern-day times. However, after engaging with the critiques offered in David Marsh, David Richards and Martin Smith's 'Asymmetric Power Model', along with observations of the current British political climate, it will be concluded that British autonomy lost to international organisations such as the EU is more symbolic than substantive, and as such, the British nation-state retains effective autonomy to a far greater degree than is suggested.

II. The Westphalian System

Autonomy can be defined as "the right or condition of self-government."[3] The modern concept of sovereignty was born with that of the nation-state, defined by the Peace of Westphalia of 1648.[4] The Peace of Westphalia was a series of peace treaties which ended the Thirty Years' War and the Eighty Years' War, establishing religious freedom across the previously long-warring European states. In what became known as 'Westphalian sovereignty', the Peace of Westphalia universalised the European concept of the nation-state: the right to exclusive governance over the state's territory and domestic

[3] Angus Stevenson, *Oxford Dictionary of English* (3rd Edition, Oxford University Press 2010).
[4] Andrew Geddes, *The European Union and British Politics* (Red Globe Press 2004) 38.

affairs.[5] This, in turn, has become commonly referred to by theorists as the starting point of modernity and establishment of the 'modern state.'[6] The Westphalian System paved the way for the Westminster Model to achieve its superiority as a model for democratic governance, shown through the shared principles and features of each model. With the Westphalian System built on exclusive territoriality – the indivisible right of each nation-state to occupy and govern its physical territory – it is discernible that the Westphalian System gave birth to the defining feature of British autonomy: parliamentary sovereignty.

Parliamentary sovereignty can be defined as the government's monopoly on domestic policy and the governing of the state.[7] If one were to adhere to the traditional Westminster Model of governance, the autonomous British state would be governed through a centralised national government with an infallible central executive through which all matters of policy are dictated.[8] Most importantly, the autonomous state as defined within the Westminster Model rejects contemporary movements towards international globalisation and domestic devolution, which Rhodes refers to as the 'hollowing-out' of the state. Due to this unilateral governance of the Westminster Model, the modern state is free from being overruled by any supranational governmental or non-governmental organisations.[9] Military wise, the

[5] ibid.
[6] Lumen, 'Nation-States and Sovereignty' (Lumen Learning) <https://courses.lumenlearning.com/boundless-worldhistory/chapter/nation-states-and-sovereignty/> accessed 13/03/20.
[7] Angus Stevenson, *Oxford Dictionary of English* (3rd edn, Oxford University Press 2010).
[8] Saïd Amir Arjomand, *Constitutionalism and Political Reconstruction* (Brill 2007).
[9] Robert Cooper, *Post Modern State and the New World Order* (2nd edn, Demos Publishing 2000).

autonomous state should be able to fund and manage its own army, navy and air forces, without fear of intervention from other states or international bodies. The Westminster Model of British governance is essentially "a zero-sum game with the Prime Minister dominating ministers and…central government dominating local government,"[10] embodying classical representative democracy. It is through this conceptualisation that one may find the 'soul' of Westphalian sovereignty: a hierarchical governance structure of 'trickle-down' politics[11] and a monopoly on national policy control, wrapped up in a territorial state with clearly defined borders and unilateral military administration, free from contemporary movements towards the internationalisation of military force or obligations under international law banning the use of force.

III. Does Nationality Exist: What is a Nation-State?

"The concept of a sovereign nation begins with the idea of a nation."[12] A nation-state can be described as any state in which the majority population relates to a mutual identity and common culture.[13] As discussed above, the concept of the nation-state as produced by the Westphalian System is based on exclusive authority over territory and domestic policy and the international agreement of mutual non-interference. Crucially, in the Westphalian international system it is the balance of power between these states that theoretically deters

[10] David Richards and Martin J Smith, *Governance and Public Policy in the UK* (Oxford University Press 2002) 4.
[11] Rod Rhodes, *Understanding Governance: Policy Networks, Governance, Reflexivity and Accountability* (Open University Press 1997) 6.
[12] Joseph Camilleri and Jim Falk, *The End of Sovereignty? The Politics of a Shrinking and Fragmenting World* (Edward Elgar Publishing Ltd 1992) 54.
[13] Antony C Pick, 'The Nation State: An Essay' (2011), 3 <http://www.thenationstate.co.uk/TheNationState.pdf> accessed 07/03/2020.

warfare and promotes peace. In contrast, there are those who would argue that the 'nation-state' is nothing more than an idea, "a metanarrative – a story through which vast numbers of people construct a picture of their world."[14] Camilleri and Falk hold a strong belief that "sovereign nations are inventions,"[15] and that the idea of a nation-state is a fictional concept created to foment the ideal of a "large, imagined community."[16] They reference two processes which have contributed to the creation of this social construct. First, "the idea of national community,"[17] which promotes the propagation of nationalistic ideologies and "evokes…a horizontal vision of the whole society."[18] Secondly, the "sense of a national history"[19] is cited to further deepen nationalistic rhetoric.[20]

While thought-provoking, the arguments posed by Camilleri and Falk could be considered somewhat quasi-philosophical, as opposed to substantively political or legal. While the 'state' refers to the tangible administrative organisation deployed by governmental bodies and can thus be observed and measured, the same cannot be said for the 'nation' which, as pointed out, may merely be a fabricated sociological notion that exists only in our cultural understanding of statehood. However, as the existence of nationalism is so widely accepted, to deny the existence of nationality would be to invalidate the importance of cultural assimilation within the modern state. Simultaneously, although Camilleri and Falk mention the idea of cultural regionalism, no actual alternatives to the imagined 'nationality' are presented

[14] Camilleri and Falk (n 12) 54.
[15] ibid.
[16] ibid.
[17] ibid 55.
[18] ibid.
[19] ibid.
[20] ibid.

within their works, leading us to question what outcome they would expect from a population which has accepted the superficial nature of their national identity. In short, even though "changes in the global market pose another powerful challenge to the concept of the national community,"[21] the perception of the nation-state has become such a formidable conceptualisation within the hearts and minds of citizens in the post-Westphalian global mentality that the idea cannot be dismissed as easily as Camilleri and Falk suggest. In any case, there are far more pertinent arguments to be drawn from the issue of autonomy, "for instance, there are those who argue that the British state has been 'hollowed-out', with powers moving 'up' to Brussels and other…international organisations."[22] Geddes considers this trend a "challenge [to] Westphalian sovereignty discourse."[23]

IV. British Sovereignty in Europe

The year 1973 saw Britain join the European Economic Community (EEC), which later became the EU.[24] Since that day, it has been argued by Rhodes and others that the autonomy of the British nation-state has increasingly been eroded away to become a 'hollowed-out' state. Theorists point to declining British autonomy and a rise in European confederalism to show that the British state is being replaced by a novel Europeanised

[21] ibid, 57.
[22] Geddes (n 4) 39.
[23] ibid.
[24] Matthew Elliot, 'Seven lessons from Britain's 1975 EEC referendum' (2015) The Telegraph. <http://www.telegraph.co.uk/news/newstopics/eureferendum/11652504/Seven-lessons-from-Britains-1975-EEC-referendum.html> accessed 07/03/2020.

model.[25] Numerous examples can be cited in support of this idea, observable across many European institutions, the most obvious being that EU law holds superiority over member states' domestic laws.[26] This is not in line with the traditional Westphalian model of an autonomous British state since applied limitations from the EU restrict the independence of the Westminster Parliament. Whilst some have hailed its authority as a welcome march toward progress, others have dismissed it as being involved beyond its competence in changing fundamental rights and attempting to remodel an established society.

In recent years, this has been the subject of much debate among the British public; those who approve the membership have praised its access to a 'single market' as economically favourable whilst those against the motion argue that Britain has compromised its autonomy. In response, in 2016, following a manifesto promise and a subsequent victory in the 2015 general election, then-Prime Minister David Cameron announced that the UK would hold a referendum in which the public would answer the following question: 'should the UK remain a member of the European Union?'. As town halls and lecture theatres filled with voters debating matters of autonomy and economy, the heart of the issue remained: considering all of Britain's upwards devolutions of power to European institutions, to what extent has it retained the right to its own self-governance?

A significant case which played a pivotal role in the understanding of British autonomy within EU institutions was

[25] Stuart McAnulla, *British Politics: A Critical Introduction* (Continuum International Publishing Group 2006).
[26] Case C–6/64 *Flaminio Costa v. ENEL* [1964] ECR 585, see also Rhodes (n 11).

Factortame [27]. This case was brought against the UK government by a company founded by Spanish fishermen (Factortame Ltd), who claimed that the UK's new policy requiring ships registered in the UK to have majority British ownership contradicted legislation guaranteeing equality of access to fishing waters for member states. In 1983, in response to concerns over the effect that equality of access would have on European fishing stocks, the EU created the Common Fisheries Policy, setting maximum fishing quotas for each member state's sea territory.

In 1985, Spain joined the EU, allowing Spanish fishermen to enter the UK fishing market by exploiting lax registration requirements set out in the Merchant Shipping Act 1894. The act stated that UK fishing vessels could only be owned by UK-nationals, but allowed UK companies to be registered as owners. Factortame, a UK company whose directors were all Spanish nationals, registered Spanish fishing vessels for use in UK waters. Most of their catches were landed in Spain and thus contributed to the Spanish economy; however, since the catches were made in UK waters, they were counted towards Britain's fishing quota. In response, Britain created a new Merchant Shipping Act with stricter regulations in 1988. Under the new regulations, a fishing vessel could only be registered if it had 'a genuine and substantial connection' with the UK. To discern this, three conditions had to be met:

(i) The vessel must be British-owned;
(ii) The vessel had to be managed and its operations had to be directed and controlled from the UK;

[27] Case C–221/89 *The Queen v Secretary of State for Transport, ex parte: Factortame Ltd and Others* [1991] ECR I-03905

(iii) Any charterer, manager or operator had to be a qualified person or company. A 'qualified person or company' was a person who was a British citizen resident and domiciled in the UK or a company which was incorporated in the UK and had its principal place of business there having at least 75% of its shares owned by, and at least 75% of its directors being, 'qualified persons.'

As none of Factortame's vessels met these requirements, they sought legal action against the reforms. The case quickly made its way through the English courts, the House of Lords, and eventually the European Court of Justice (ECJ). The ECJ found that the Merchant Shipping Act 1988 was not compatible with EU fishery policies and ruled in favour of Factortame. This was momentous for the understanding of the relationship between the UK and the EU, as it was the first case in which the ECJ ruled that UK law had to be disapplied, thus effectively overruling it. To many, this case proved that the UK forfeited autonomy when joining the EU, but this approach fails to consider that every EU member state is subjected to the same rules. By way of pooled sovereignty, Britain sacrificed no more autonomy than other member states when it acceded to the EU, the ECtHR, or any other trans-European legal or political body.

Although the Factortame case did indeed highlight the superiority of the EU over UK courts on issues which the EU enjoys competence over, this is simply examining one outcome of the power exchanges between the nation-state and the intergovernmental organisation. No EU member state can override EU law through its domestic courts, so this instance is neither unique to the UK nor unfairly skewed against it. When

one considers all outcomes of the transactions of power between the EU and its member states – the long-term maintenance of peace between European neighbours and, on the economic side, frictionless inter-EU trade and the international clout gained by trading externally as a union rather than individually – it becomes clear that the relationship between the UK and the EU is far more nuanced and intricate than the one-dimensional 'lost autonomy' argument would have one believe. One thing often missed in the arguments against EU membership is the overwhelming influence globalisation has had on the individual nation-state's ability to regress from post-modern processes, and the very functionality of autonomy itself.

V. Autonomy in a globalised world

Autonomy in a globalised world is a concept as difficult to define as it is to accurately assign to any single political actor. Although sometimes populations fail to see that "the modern state is a relatively recent phenomenon,"[28] there is truth to the claim "that 'sovereignty' in its modern form is a highly distinctive political claim."[29] Hirst believes that the rapid change in global governance has altered the role of the nation-state, suggesting that nation-states have "come to function less as all-purpose providers of governance and more as the authors and legitimators of an international 'quasi-polity.'"[30] Further, states will take on the role of ensuring accountability of regional, supranational governmental organisations and polity infrastructure. Essentially, nation-states serve the function of

[28] Paul Hirst, Grahame Thompson, and Simon Bromley, *Globalization in Question* (3rd edn, Polity Press 2009) 219.
[29] ibid.
[30] ibid 220.

"local authorities of the global system."[31] This perception of the emergence of a new functionality of sovereign states is compelling and thought-provoking and does not preclude the notion of individual state autonomy, as more radical theses do. However, "the idea of an exclusive and virtually self-sufficient 'national' culture" is indeed threatened.[32] Nevertheless, unlike Rhodes' claim that these processes are indicative of a shift into a new, postmodern political era, Hirst simply believes that the role of the nation-state is more fluid than static. As such, "the state may have less control over ideas, but it remains a controller of borders and the movement of people,"[33] which serves to legitimise the role of the nation-state even in this period of rapid political change. Hirst concludes that "despite the rhetoric of globalisation, the bulk of the world's population lives in closed worlds, trapped by the lottery of birth."[34]

In summary, characterising Hirst's views means simply acknowledging that "nation-states should no longer be seen as 'governing' powers, able to impose outcomes on all dimensions of [polity]…but as loci from which forms of governance can be proposed, legitimated and monitored."[35] Hirst's observations can be viewed through the lens of Camilleri and Falk's assertion that nationality does not exist, as a poignant reminder of the waning significance of nationalism in contemporary international affairs. While, as determined above, this argument offers little in way of practical applicability, it is easy to see why writers such as Camilleri, Falk, and Hirst have moved past viewing the 'nation' as a

[31] ibid 225.
[32] ibid 231.
[33] ibid 232.
[34] ibid.
[35] ibid 239.

tangible societal actor and now prefer to discuss such concepts through a purely metaphysical framework.

(i) Europeanisation and the 'hollowing-out' of the state

Europeanisation is commonly cited as a potential source of lost autonomy for Britain and forms a large role in Rhodes' 'Differentiated Polity Model': "whereas the Westminster Model implicitly suggests that the nature of power in the British political system is essentially top-down and elitist, the same is not true for the Differentiated Polity Model"[36]. At the heart of Rhodes' 'Differentiated Polity Model' is the notable omission of a unified and stable core from which governance flows. While Rhodes' model does not itself dictate a lack of autonomy, many of the same processes he cites as indicative of a move towards postmodernity through the 'hollowing-out' of the state upwards can also be used to reflect a loss of autonomy.

Most topical is the third trend in Rhodes' thesis; "the loss of functions by British government to European Union institutions."[37] Europeanisation has always been a hotly-contested topic when it comes to the debate of autonomy, with a whole generation of writers and theorists penning analysis of political interdependence and pooled sovereignty since the inception of the EEC. One such writer, Stephen Haseler, argues that the unprecedented supranationalism proposed by the Maastricht Treaty signalled a critical turning point in the international role of the nation-state. In particular, Haseler points to economic integration as indicative of a move away from the traditional nation-state, noting that "there is no greater

[36] Richards and Smith (n 10) 5.
[37] Rod Rhodes, 'The Hollowing Out of the State: The Changing Nature of the Public Service in Britain' (1994) 65 (2) Political Quarterly 138, 138.

attribute of 'national sovereignty' than national currency, [because] national identity is tied up with money."[38] In essence, Haseler contends that to "describe British economic policy as in any sense 'sovereign' is fanciful at best."[39] This clear delegation of authority over economic policy compliments Rhodes' 'hollowing-out' thesis and is a fair indicator of a loss of British autonomy.

Haseler cites two further causes for concern. First, he points to 'majority voting' as a major cause of lost sovereignty of the European nation-state: "qualified majority voting simply means that any of the member countries can be outvoted and cannot resort to the veto."[40] Concurrently, he expresses anxiety at the prospect of a combined European military force, stating that even though there is "considerable political distinction between military cooperation within Europe and military integration…we can already glimpse the birth of a European Army."[41]

Has Rhodes' 'hollowing-out of the state' upwards proven correct? Has the devolution of powers and authority to EU institutions resulted in a significant loss of British autonomy? The simple fact is that in 2016 the British public voted to leave the EU by a majority of 52%.[42] All of Rhodes' arguments of lost autonomy to EU organisations fail when confronted with this prosaic fact. The same blasé observations can be made of Haseler's claims.

[38] Haseler (n 2) 23.
[39] ibid 24.
[40] ibid 25.
[41] ibid.
[42] Thomas Sampson, 'Brexit: The Economics of International Disintegration' (Fall 2017) 31 (4) Journal of Economic Perspectives 163, 163.

At the time of writing, Haseler's concerns were valid and, in many ways, an excellent depiction of the threats to national sovereignty and autonomy that the EU posed. However, in the quarter-century since Haseler penned his concerns, Britain never entered into the European single currency through the Maastricht Convergence Criteria, nor did the EU come close to adopting a common military force. Britain retained its veto on all major policy changes and potential new members, and enjoyed nearly 10% of all the seats in the European Parliament (73 of 751) until the day of its departure from the union. In his thesis, Rhodes states that "to be blunt, Britain lost sovereignty when it joined the EU to a far greater extent than anticipated in 1972."[43] If academic bluntness is desirable, then it comes down to the humble observation that in 2016 the British public directly contradicted one of the fundamental tenets of Rhodes' Differentiated Polity Model – an event which no amount of intellectualisation will reverse. With a vital central point rendered redundant, Rhodes' entire thesis has been inexorably damaged and simply cannot stand the test of time.

Loss of autonomy through decentralisation, devolution or diplomacy is nothing more than a superficial farce that no academic framework can reliably build its foundations upon. This is due to the fact that these international power transactions do not lend themselves to quantitative study, only through qualitative assessment and abstract understanding may they be analysed. Because of this, this article can find only that Rhodes and Haseler are incorrect to assert that the EU has instigated a significant loss of autonomy for Britain. Perhaps this will change, and Rhodes' thesis will once again find relevance, but the current political climate suggests it will not

[43] Rhodes (n 11) 142.

be in the immediate future. To find a considerably higher degree of nuance and *perhaps* more longevity, one need look to no other than Marsh, Richards, and Smith and their competing framework, the 'Asymmetric Power Model'.

VI. Symbolic Autonomy: The Asymmetric Power Model

Marsh, Richards and Smith's 'Asymmetric Power Model' is a complex analysis of the flow of power within British politics. While in agreement with Rhodes on the fluidity of power in the political system, they argue that 'structured inequalities' exist within British politics that ensure that the state holds a disproportionate share of the authority in any power exchange it may engage in.[44] Marsh, Richards and Smith go on to argue that "the pattern of structural inequality, together with the British political tradition, contribute to the asymmetries of power which are perhaps the key feature of the British political system."[45] Similar inequalities observed on autonomy for the same principles that Marsh, Richards and Smith have applied to Rhodes' thesis can be used to show that autonomy is not a black-and-white concept, but a fluid phenomenon that is defined by its symbolic nature, rather than its practical application. Whilst it is not irrelevant to examine the effects of decentralisation on the autonomy of the British nation-state, a more complex approach can be offered to analyse the degree to which Britain retains control of its sacrificed autonomy. Once one looks at these exchanges of power through this more nuanced lens, the conclusion is simply that the 'hollowing-out' of the state through upwards devolution of powers assessed within this essay is purely symbolic and completely revocable.

[44] David Marsh, David Richards and Martin Smith, 'Unequal Plurality: Towards an Asymmetric Power Model of British Politics' (2003) 38 (3) Government and Opposition 306, 307.
[45] ibid 308.

While "the way in which national sovereignty is being eroded can help generate novel forms of nationalism,"[46] one may find it more useful to consider globalisation to be "transforming, rather than [destroying] nation-state sovereignty."[47] Effectively, it comes down to the notions of *de facto* (in fact) and *de jure* (in law)[48] autonomy. As Marsh, Richards, and Smith explain, "postmodernism emphasises that identity (in our case the identity of the state) is contingent, multiple, and constantly being renegotiated,"[49] and although it may be easier to label these processes as 'damaging' to state autonomy, in truth we are simply living in an age of rapid evolution of political power and authority. This conceptual fluidity of power eventually boils down to two questions, 'who decides' and 'who decides who decides.'[50] While 'who decides' may change, 'who decides who decides' remains an exclusive right of the nation-state, shown through the asymmetries of power in international relationships of interdependence as characterised within the 'Asymmetric Power Model'. It is through these observations that one may draw the conclusion that any autonomy lost by the British nation-state is virtuously symbolic, and while *de jure* autonomy

[46] John Baylis, Steve Smith and Patricia Owens, *The Globalisation of World Politics* (Oxford University Publishing 2010) 410.
[47] ibid.
[48] Some consider *de jure* to mean "by right", in contrast to *de facto* meaning "by fact". For example, some proponents of the establishment of a sovereign Palestinian state compare the *de facto* Palestinian territory, which has decreased since the 1967 Six-Day War, to a *de jure* territory based on the 1947 UN Partition Plan, which was adopted as Resolution 181 by the General Assembly and was accepted by the Jewish side but rejected by Arab leaders and governments. *De facto* territory includes only that which can be effectively controlled and protected from annexation by others, while *de jure* territory includes all territory which a state should have the right to claim. See Kenneth A Schultz 'What's in a Claim? De Jure versus De Facto Borders in Interstate Territorial Disputes' (2014) 58 (6) Journal of Conflict Resolution 1059.
[49] Marsh, Richards, and Smith (n 10) 29.
[50] Geddes (n 4) 38.

may wax and wane, *de facto* autonomy remains a static concept.

VII. Conclusion

To what extent does the British nation-state retain autonomy in the 21st century? The question itself poses an outdated conceptualisation of international politics and the answer is contingent upon one's interpretation of the relevant concepts and which framework one employs to assess autonomy. Camilleri and Falk contend that this question is arguing over a concept which does not exist – the 'nation-state', invalidated by the fact that 'nationality' is nothing but a 'metanarrative' which people use to shape their understanding of identity and self. Similarly, Hirst asserts that nation-states should no longer be viewed as autonomous actors with individual will, but instead as conduits through which governance flows from the international and subnational levels.

Conversely, theorists such as Rhodes and Haseler reject notions of metaphysicality of the nation-state and suggest that Britain has sacrificed autonomy through a variety of power exchanges employed over decades which equate to the 'hollowing-out' of the state. It is easy to be sceptical of these claims, as the lessons found in the 'Asymmetric Power Model' are valid when applied to the overarching issue of autonomy. As Camilleri and Falk argue "a simple but quite possibly highly misleading approach to the issue is to define this moment of late capitalism as 'postmodernity.'"[51] When taken with political objectivity, it is evident that the 'lost autonomy' Rhodes refers to in his thesis is nothing more than an

[51] Camilleri and Falk (n 12) 48.

unsubstantiated and symbolic exchange of sovereignty common in the popular internationalism of the 21st century.

From the theories and approaches analysed within this paper it is difficult to comprehend how one would be inclined to agree with Haseler and Rhodes when the insightful writings of Hirst and Camilleri and Falk engage with substantive nuance and do far more to encapsulate the abstract aspects of these international legal and political concepts. Rhodes' 'Differentiated Polity Model' addresses some concerns felt by those who mourn for the lost days of traditional secluded sovereign states, but this is rendered moot with the simple observation that the loss of autonomy suffered by the British nation-state is entirely voluntary. Thereby, these postmodern processes are better understood in the context of evolving power structures and sovereignty exchanges, rather than Rhodes', arguably, over simplistic view that all state functions not being directly exerted by the British central executive have been irreplaceably sacrificed. Richards and Smith's 'Asymmetric Power Model' is far more suited to assessing the flow of autonomy on the contemporary world stage. In the case of the British nation-state one must defer back to those two vital questions; 'who decides' and 'who decides who decides'. The executive control of British autonomy, even that which has been loaned to or pooled with others, remains with Westminster as it has since the Peace of Westphalia established the principles of the modern international system. This leaves one with no other conclusion to draw than that the British nation-state is as self-governing as it always has been, and any loss of autonomy cited by Rhodes or similar theorists is nought but superficial, cursory and symbolic. Because of this, the British nation-state can be said to retain its autonomy to the utmost possible sum, until such a time when the very decision-making

process which governs the flow of British autonomy is removed from Westminster.

The legal regulation of surrogacy in the UK: The need for change

Nancy Evans [52]

In its 13th Programme of Law Reform, the Law Commission announced that it would be commencing a consultation into the UK's legal regulation of surrogacy. The practice of surrogacy involves a woman (the surrogate) agreeing to gestate and give birth to a child for another person or people (the intending parents). Under UK law, the surrogate is the legal mother of the child until the intending parents obtain either an adoption order or a parental order. The government introduced parental orders in 1990 to deal with the unique circumstances of surrogacy arrangements wherein the surrogate-born child shares its genetic information with at least one of the intending parents. In order to obtain a parental order, intending parents must meet a number of requirements. These requirements include having the free and full agreement of the surrogate, bringing an application for a parental order within a specified period, and not paying the surrogate more than reasonable expenses. UK law also prohibits commercial surrogacy and only permits surrogacy agencies to operate on a non-profit basis.

In light of the Law Commission's consultation on surrogacy, this paper criticises three areas of surrogacy regulation that have proved to be particularly problematic in practice; the parenthood provisions, the parental order requirements, and the ban on commercial surrogacy. Whilst the paper does not advocate in favour of, or against any specific options for reform, it serves to highlight why the law is in desperate need of reform and, by extension, why the Law Commission's consultation should be welcomed.

I. Introduction

Three separate statutes and a vast body of case law govern the practice of surrogacy in the UK.[53] Under this legal framework,

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[53] Surrogacy Arrangements Act 1985 (as amended); Human Fertilisation and Embryology Act 1990 (as amended); Human and Fertilisation and Embryology Act 2008 (as amended).

neither the 'intending parents' nor the 'surrogate' can legally enforce their agreement in favour of either party.[54] The law recognises the birth mother (the surrogate) as the child's legal mother, leaving the intending mother without legal recognition in relation to the child.[55] The legal father may be the surrogate's husband if she is married.[56] If the surrogate is not married, the legal father will depend on the method and the time at which conception occurred.[57] If the intending parents want to be the child's legal parents, they must meet the criteria for a parental order, or they must adopt the child.[58] Commercial surrogacy is illegal in the UK, although the law excludes the surrogate and intending parents from committing any crime in relation to commercial surrogacy.[59] Instead, the payment of more than reasonable expenses to the surrogate has the potential to render void any parental order that the intending parents may seek.[60]

In May 2018, the Law Commission announced that it would review the legal regulation of surrogacy in response to public criticism that the law is 'not fit for purpose.'[61] Academic commentary is similarly critical, with some stating that 'the law governing surrogacy remains confused, incoherent, and poorly adapted to the specific realities of the practice of surrogacy.'[62] The Law Commission's initial consultation period ended in

[54] Surrogacy Arrangements Act 1985 (as amended), s 1A.
[55] Human Fertilisation and Embryology Act 1990 (as amended), s 27; Human Fertilisation and Embryology Act 2008 (as amended), s 33.
[56] Human Fertilisation and Embryology Act 1990 (as amended), s 28; Human Fertilisation and Embryology Act 2008 (as amended), s 35.
[57] Human Fertilisation and Embryology Act 1990 (as amended), s28; Human Fertilisation and Embryology Act 2008 (as amended), ss 36-38.
[58] Human Fertilisation and Embryology Act 2008 (as amended), s 54-54A.
[59] Surrogacy Arrangements Act 1985 (as amended), s 2 (2).
[60] Human Fertilisation and Embryology Act 2008 (as amended), s 54 (8).
[61] Law Commission <https://www.lawcom.gov.uk/project/surrogacy/> accessed 12/03/2019.
[62] Kirsty Horsey and Sally Sheldon, ''Still Hazy After all these Years': The Law Regulating Surrogacy' (2012) 20 Medical Law Review 67.

October 2019.[63] It is now working to produce a draft Bill to implement its proposed reforms and it expects the Bill to be finished in 2022.[64]

In order to highlight the need for law reform in light of the Law Commission's review, this analysis will focus on three areas of the legal regulation of surrogacy that have caused a number of problems in practice: the law on 'Parenthood'; the legal requirements for 'Parental Orders'; and the law's attempts to ban 'Commercial Surrogacy'.

The first section, 'Parenthood', will demonstrate that the assumptions underlying the laws on legal parentage are incoherent and conflict with demands from intending parents and surrogates alike. These assumptions are problematic because they lead to situations in which legal parentage lies with the surrogate, who does not wish to be the child's legal parent, and the intending parents are denied legal parenthood until they can gain a parental order, or adopt the child. Since intending parents (particularly intending mothers) are not considered the child's legal parents upon its birth, 'Parental Orders' are required. The second section will focus upon two parental order requirements that are out of touch with the modern realities of surrogacy practice and have been the subject of judicial scrutiny. The first is the requirement that intending parents apply for a parental order within a specific period of the child's life. The second is the reasonable payments requirement, which has the potential to bar any parental order if there have been more than reasonable payments made to the surrogate. The courts are in an awkward position since they have to circumvent the letter of the law to

[63] Law Commission <https://www.lawcom.gov.uk/project/surrogacy/> accessed 22/04/2020.
[64] ibid.

give effect to Parliament's intentions. This is particularly true in relation to 'Commercial Surrogacy' since the courts are retrospectively approving payments that far exceed what is reasonable in order to grant parental orders. Lastly, the final section will focus upon commercial surrogacy and demonstrate that the ban on commercial surrogacy is inhibiting good practice in the UK by preventing surrogacy agencies from becoming professional, well-regulated businesses. In turn, they are unable to offer high quality assistance to surrogates and intending parents, and instead can sometimes create more problems than they solve. This analysis will conclude that the current laws on surrogacy are outdated and do not adequately govern the modern realities of surrogacy practice.

Whilst this analysis will consider the benefits of legislative changes as a matter of course, advocating for or against any specific options for reform are beyond the scope of this paper. Furthermore, whilst there is a great degree of ethical debate concerning surrogacy, the focus of this analysis will be restricted to examining the practical problems that the current legal regulation of surrogacy has created. Finally, whilst adoption is another pathway to legal parenthood, this analysis will focus upon parental orders since they were custom-built to deal with the fact that the intending parents and surrogate-born child share a genetic bond.[65]

II. Parenthood

There are three models of legal parenthood: the birth model; the genetic model; and the intention model.[66] The birth model

[65] *Re A (Children)* [2015] EWHC 911 (Fam) [68].
[66] *In Re G (Children)* [2006] UKHL 43 [33]-[37]; Katarina Trimmings and Paul Beaumont, 'International Surrogacy Arrangements: An Urgent Need for Legal Regulation at the International Level' (2011) 7 (3) Journal of Private International Law 627, 630.

identifies the woman that gives birth to the child as the legal mother, regardless of genetics or intent. The UK entrenched its use of this model in the Human Fertilisation and Embryology Act 1990 (HFEA 1990).[67] The birth model means that the surrogate mother is legally responsible for a child that may not be hers genetically and one that she does not intend to keep. This section will address legal motherhood since the law will never recognise the intending mother as the legal mother of the child.[68] It will show that the UK's parenthood laws are illogical and inconsistent with demands from intending parents and surrogates. It will then demonstrate that legal parenthood provisions are problematic in modern practice, particularly in international surrogacy arrangements.

The birth model reflects the *mater semper certa est* principle. This phrase states that the 'mother is always certain' and reflects the historical approach to motherhood whereby, at the time of birth, it was possible to say with certainty that the woman giving birth was the child's biological mother.[69] Whilst this was true until the 20th century, it is no longer accurate in all cases.[70] Technological advances mean that women can gestate and give birth to children that they have not conceived.[71] Despite failing to reflect non-normative reproduction, the birth model may be preferred since it acknowledges that the child would never have been born without the birth mother.[72]

[67] Human Fertilisation and Embryology Act 1990 (as amended), s 27; Human Fertilisation and Embryology Act 2008 (as amended), s 33.
[68] ibid.
[69] Rita D'Alton-Harrison, 'Mater Semper Incertus Est: Who's Your Mummy?' (2014) 22 (3) Medical Law Review 357; Kirsty Horsey, 'Challenging presumptions: legal parenthood and surrogacy arrangements' (2010) 22 (4) Child and Family Law Quarterly 449, 469.
[70] ibid.
[71] Horsey, 'Challenging presumptions: legal parenthood and surrogacy arrangements' (n 69) 449.
[72] ibid 463.

However, the same principle applies to the genetic and/or intending mother; without her gametes and/or initiation of the process, the embryo that resulted in the child would not have existed.[73] In addition, advances in the field of ectogenesis mean that it may soon be possible to gestate a child without a woman physically giving birth to the child.[74] This could present additional challenges to the birth model since there will be no process of birth upon which to base motherhood. Given these advancements in the context of non-normative reproduction, there is no apparent basis for the law's prioritisation of birth aside from tradition.[75]

Furthermore, both the birth and genetic models encounter practical problems in relation to non-normative reproduction. On the one hand, the birth model protects gamete donors from legal responsibility for the child that their gametes create.[76] On the other hand, the birth model excludes intending genetic mothers from legal recognition as the surrogate-born child's mother. The genetic model carries similar problems. Basing legal motherhood upon a genetic link to the child would benefit intending mothers who are able to use their own gametes in the surrogacy process. However, the genetic model would disadvantage intending mothers whose gametes could not be used as they would share no genetic link with the child

[73] ibid 470.
[74] Elizabeth Chloe Romanis, 'Challenging the 'Born Alive' Threshold: Foetal Surgery, Artificial Wombs and the English Approach to Legal Personhood' (2020) 28 Medical Law Review 93, 117-118.
[75] Horsey, 'Challenging presumptions: legal parenthood and surrogacy arrangements' (n 69) 460; Katherine Wade, 'The regulation of surrogacy: a children's rights perspective' (2017) 29 (2) Child and Family Law Quarterly 113, 114.
[76] Horsey, 'Challenging presumptions: legal parenthood and surrogacy arrangements' (n 69) 467; Kirsty Horsey, 'Not withered on the vine: The need for surrogacy law reform' (2016) 4 (3) Journal of Medical Law and Ethics 181, 191.

and would not be the child's legal mother.[77] Instead, legal motherhood would lie with the gamete donor; this is problematic because women who donate their eggs do not intend to be the resulting child's legal mother.[78] By extension, this may then lead to a decrease in the number of donors, which would doubly disadvantage the intending mother, as she would be unable to use her own eggs and might be unable to find a willing egg donor.[79] Therefore, both the birth and genetic models are flawed in the context of non-normative reproduction.

The intention model provides a solution. Since gamete donors do not intend to have legal parenthood, they would be free from it.[80] In a surrogacy arrangement, the parties' intention that intending parents will have legal responsibility for the child would grant them legal parenthood from birth.[81] This already occurs in some American states that use pre-birth orders to determine legal parenthood before birth, based on the parties' intentions.[82] Thus, when compared to the intention model of legal parenthood, the birth model is inherently problematic in the context of non-normative reproduction.

In addition to being incoherent in non-normative reproduction, the birth model gives excessive protection to the

[77] Horsey, 'Challenging presumptions: legal parenthood and surrogacy arrangements' (n 69) 459; Horsey, 'Not withered on the vine: The need for surrogacy law reform' (n 76) 194.
[78] Horsey, 'Challenging presumptions: legal parenthood and surrogacy arrangements' (n 69) 466.
[79] Emily Jackson, 'UK Law and International Commercial Surrogacy: 'the very antithesis of sensible' (2016) 4 (3) Journal of Medical Law and Ethics 197, 214.
[80] Horsey, 'Challenging presumptions: legal parenthood and surrogacy arrangements' (n 69) 466-467.
[81] ibid 472.
[82] Melissa Elsworth and Natalie Gamble, 'Are contracts and pre-birth orders the way forward for UK surrogacy?' [2015] International Family Law 157, 161.

surrogate. Whilst it protects the surrogate's autonomy to change her mind,[83] the system can be abused. In *CD v. EF and AB*,[84] the surrogate refused to consent to the parental order that the intending parents sought.[85] She did so solely because she felt unsupported and unappreciated by the intending parents.[86] She expressed that she did not wish to be involved with the twin children, who had been living with the intending parents since the day after they were born, but she maintained that she did not consent to the parental order, thereby remaining the children's legal mother.[87] Since there is no mechanism for overriding a surrogate's refusal to consent (even when unreasonably withheld),[88] the judge could only make ancillary orders to protect the children's welfare.[89] Although this is a rare example,[90] it demonstrates that the legal entrenchment of the birth model is dangerous since the intending parents are at the mercy of the surrogate as the child's legal mother.[91] Conversely, under the intention model, the surrogate would not have had automatic legal parenthood of the child to begin with, meaning that she could not have abused her legal parenthood to spite the intending parents.

A challenge to the intention model might arise if a surrogate changed her mind and genuinely intended to keep the child once it was born. In such a situation, both parties would intend to be the legal parents of the child and it may be difficult

[83] Michael Freeman, 'Does Surrogacy Have A Future After Brazier?' (1999) 7 (1) Medical Law Review 1, 5.
[84] *CD v. EF and AB (by their Guardian)* [2016] EWHC 2643 (Fam).
[85] ibid [8].
[86] ibid [19], [26].
[87] ibid [2], [6], [9].
[88] Horsey, 'Not withered on the vine: The need for surrogacy law reform' (n 76) 194.
[89] *CD v. EF and AB* (n 84) [10].
[90] Elsworth and Gamble (n 82).
[91] Horsey, 'Challenging presumptions: legal parenthood and surrogacy arrangements' (n 69) 460, 466.

for the intention model to assign legal parenthood.[92] However, the intention model can make use of court-approved pre-birth registration in order to give effect to the intentions of the parties before the birth of the child. In many cases, the use of pre-birth registration greatly simplifies the process of the surrogacy arrangement because the intending parents obtain legal parenthood at birth and the surrogate is free from legal responsibility to the child.[93] However, this does not necessarily prevent the surrogate from changing her mind, although this is a rare occurrence.[94] In New Hampshire, surrogates are given a period of 72 hours following the child's birth (or up to a week in exceptional circumstances) to rescind their consent to the pre-birth order.[95] This illustrates that the intention model is flexible and can implement methods of balancing the competing interests between the surrogate and the intending parents, if the surrogate changes her mind. The flexibility of the intention model in balancing the interests of the parties under pre-birth registrations shows that the challenge presented by the surrogate changing her mind is not insurmountable.

Finally, the confusing legal regulation of parenthood in the UK has been one of the reasons posited for the increase in international surrogacy arrangements.[96] Statistics show that between 2008 and 2011 there was a 24% increase in the numbers of parental orders granted by the courts in respect of international surrogacy arrangements.[97] Whilst international

[92] ibid 469.
[93] Elsworth and Gamble (n 82).
[94] ibid.
[95] NH Rev Stat § 168-B:25 (2013); Stephen Snyder and Mary Patricia Byrn, 'The Use of Prebirth Parentage Orders in Surrogacy Proceedings' (2005) 39 (3) Family Law Quarterly 633, 651.
[96] Horsey, 'Not withered on the vine: The need for surrogacy law reform' (n 76) 191.
[97] Marilyn Crawshaw, Eric Blyth and Olga van den Akker, 'The changing profile of surrogacy in the UK – Implications for national and international policy and practice' (2012) 34 (3) Journal of Social Welfare & Family Law 267, 271.

surrogacy simplifies the initial stages of an arrangement, problems often arise post-birth because parenthood provisions differ internationally.[98] UK law regards the birth mother as the child's legal mother regardless of the laws in the surrogate's country.[99] In *X & Y*,[100] the intending parents travelled to Ukraine for a surrogacy arrangement.[101] Under Ukrainian law, the surrogate was free of all parental obligations once she handed the twins to the intending parents.[102] The intending parents were then able to register themselves as the legal parents in Ukraine.[103] However, although Ukraine recognised the intending parents as the legal parents, the UK recognised the surrogate and her husband as the legal parents.[104] This 'toxic mix of UK and foreign laws'[105] left the twins 'marooned stateless and parentless.'[106] The intending parents were unable to bring the twins to the UK until they took a DNA test to demonstrate to the immigration authorities that the children and the intending father shared a genetic link.[107] The Ukrainian and UK immigration authorities then permitted the family to leave Ukraine and enter the UK outside of the ordinary immigration rules.[108] The intending parents were subsequently able to obtain a parental order from the court, thereby becoming the child's legal parents.[109] Despite being resolved, *X & Y* highlights the

[98] Vasanti Jadva, 'Surrogates and intended parents in the UK' (2016) 4 (3) Journal of Medical Law and Ethics 215, 226.
[99] ibid.
[100] *Re X & Y (Foreign Surrogacy)* [2008] EWHC 3030 (Fam).
[101] ibid [4].
[102] ibid [8]-[9].
[103] ibid [8].
[104] ibid [5], [8].
[105] Margaret Brazier and Sacha Waxman, 'Reforming the law regulating surrogacy: extending the family' (2016) 4 (3) Journal of Medical Law and Ethics 159, 161.
[106] *Re X & Y (Foreign Surrogacy)* (n 100) [10].
[107] ibid [10].
[108] ibid.
[109] ibid [25].

fact that intending parents cannot escape the UK's parenthood presumptions by seeking surrogacy abroad. Instead, international surrogacy exacerbates the problems by potentially leaving the child's welfare 'gravely' at risk without legal parents.[110]

To conclude this section, the birth model is problematic since it fails to protect the surrogate-born child's best interests. There is no mechanism for pre-registration of the birth, meaning that any problems can only be resolved when the surrogate's position as the legal mother has been cemented following the birth of the child.[111] The courts are thus unable to override the surrogate's refusal to consent to a parental order, even if it is unreasonable in circumstances where she does not intend to have any contact with the child. This confusing legal regulation has led intending parents to pursue international surrogacy arrangements unaware that the courts will not consider them legal parents in the UK.[112] Consequently, the child is at risk of having no legal parents and no nationality. Overall, the UK's legal regulation of parenthood is confusing and outdated since it is based on archaic assumptions that are no longer true in the non-normative reproduction context.

III. Parental Orders

As the current law does not give intending parents automatic legal parenthood, Parliament has created 'parental orders.'[113] This workaround mechanism has the 'transformative effect'[114]

[110] ibid [24].
[111] Elsworth and Gamble (n 82) 158.
[112] Kirsty Horsey, 'Fraying at the Edges: UK Surrogacy Law in 2015' (2016) 24 (4) Medical Law Review 608, 621.
[113] Human Fertilisation and Embryology Act 1990, s 30; Human Fertilisation and Embryology Act 2008 (as amended), s 54.
[114] Horsey and Sheldon (n 62) 70.

of granting legal parenthood to the intending parents in a similar manner to adoption.[115] The courts grant parental orders based on a number of criteria contained within the Human Fertilisation and Embryology Act 2008 (HFEA 2008).[116] These criteria include the need for both of the intending parents to be over the age of 18 and in a non-prohibited enduring family relationship with one another, which includes: partners, civil partners, and spouses.[117] At least one intending parent must have a genetic link to the surrogate-born child and at least one intending parent must be domiciled in the UK, the Channel Islands or the Isle of Man.[118] The child's home must be with the intending parents at the time of the application and the surrogate and any other legal parent must give their consent to the intending parents' parental order.[119] The courts have experienced challenges with each of these requirements but not to the same extent as they have with the 'time limit' and the 'reasonable payment' requirement.[120] The problems created by these final two requirements have led to the courts circumventing the wording of the statutory requirements in order to protect the welfare of the child. This section will focus on the time limit and reasonable payment requirements because of the problems that they have created in practice.

(i) Time Limits

Before making a parental order, the court must ascertain that the surrogate and other legal parent agree to the order.[121]

[115] *A v. P (Surrogacy: Parental Order: Death of Applicant)* [2011] EWHC 1738 (Fam) [24].
[116] Human Fertilisation and Embryology Act 2008 (as amended), s 54.
[117] ibid s 54 sub-ss (2), (5).
[118] ibid s 54 sub-ss (1), (4).
[119] ibid s 54 sub-ss (4), (6).
[120] ibid s 54 sub-ss (3), (7), (8); Margaret Brazier and Emma Cave, *Medicine, Patients and the Law* (6th edn, Manchester University Press 2016) 391.
[121] Human Fertilisation and Embryology Act 2008 (as amended), s 54 (6).

However, if this agreement occurs within the first six weeks of the child's life, the HFEA 2008 will render it invalid.[122] So, even if the child lives with the intending parents from birth, the surrogate mother and other legal parent retain legal parenthood and are the only ones with the legal authority to make welfare decisions regarding the child for at least the first six weeks of its life.[123] Therefore, the intending parents are at the surrogate's mercy if, for example, the child needs urgent medical treatment.[124] Furthermore, although the six-week 'cooling off' period exists to protect the surrogate from making a hasty decision that she may later regret,[125] evidence suggests that the majority of surrogates do not experience psychological difficulties following birth.[126] In fact, surrogates rarely change their mind and instead would prefer to abdicate the legal responsibility of the child to the intending parents sooner than is currently possible.[127] Overall, the paternalistic six-week requirement is unnecessary in practice and simply creates additional stress for both the surrogate and the intending parents.

In addition to the six-week requirement, the HFEA 2008 states that intending parents 'must' apply for the parental order within the first six months of the child's life.[128] On a purely statutory basis, this would leave around twenty weeks

[122] ibid s 54 (7).
[123] Brazier and Waxman (n 105) 173; Horsey and Sheldon (n 62) 82-83; Horsey, 'Not withered on the vine: The need for surrogacy law reform' (n 76) 193.
[124] Brazier and Waxman (n 105) 173.
[125] *Re H (A Child)* [2017] EWCA 1798 (Civ) [12].
[126] Jadva (n 98) 219; Viveca Söderström-Anttila and others, 'Surrogacy: outcomes for surrogate mothers, children and the resulting families – a systematic review' (2016) 22 (2) Human Reproduction Update 260, 268, 273; Natalie Smith, 'Mapping out a future for the UK's law on surrogacy' (2016) 4 (3) Journal of Medical Law and Ethics 237, 239, 247-248.
[127] Jadva (n 98) 225; Elsworth and Gamble (n 82) 161; Smith (n 126) 240.
[128] Human Fertilisation and Embryology Act 2008 (as amended), s 54 (3).

for intending parents to apply for an order or else they would be at risk of the court refusing to grant one, an outcome which occurred in *JP v. LP*.[129] However, in *Re X* [130] the court essentially removed the 'unduly restrictive'[131]six-month limit by establishing that applying for a parental order outside of the six-month time limit will not lead to an automatic rejection.[132] The court emphasised that the importance of a parental order is such that Parliament cannot have intended 'one day's delay to be fatal,'[133] particularly given the fact that Parliament had not provided any justification for the provision when first enacted.[134] The courts have used this precedent in a number of subsequent cases.[135] *Re X* is undoubtedly beneficial in allowing intending parents to gain legal parenthood later in the child's life since they are sometimes unaware of the need for a parental order until long after the child's birth.[136] However, more profoundly, it renders the statutory provision meaningless and highlights the growing conflict between outdated statutory requirements and the demands of UK surrogacy practice, in reality.[137]

Overall, the time limit provisions are 'nonsensical' for all parties involved in a surrogacy arrangement.[138] Surrogates

[129] *JP v. LP, SP, CP (by the child's Guardian)* [2014] EWHC 595 (Fam) [28]-[31].
[130] *Re X (A Child) (Surrogacy: Time limit)* [2014] EWHC 3135 (Fam).
[131] Freeman (n 83) 18.
[132] *Re X (A Child) (Surrogacy: Time limit)* (n 130) [57], [62].
[133] ibid [55].
[134] ibid [16].
[135] *Re A (Children)* (n 65); *Re A* [2015] EWHC 2080 (Fam); *Re L (Children)* [2015] EWFC 90; *Re JB (A Child) (Surrogacy: Immigration)* [2016] EWHC 760 (Fam); *A v. C* [2016] EWFC 42; *LB v. SP* [2016] EWFC 77.
[136] Amel Alghrani and Danielle Griffiths, 'The regulation of surrogacy in the United Kingdom: the case for reform' (2017) 29 (2) Child and Family Law Quarterly 165, 177.
[137] Horsey, 'Fraying at the Edges: UK Surrogacy Law in 2015' (n 47) 610; Freeman (n 83) 18; Smith (n 126) 238.
[138] *Re X (A Child) (Surrogacy: Time limit)* (n 130) [55].

do not wish for prolonged legal responsibilities towards surrogate-born children but may end up retaining legal parenthood for a number of months, during which time they may need to authorise medical treatment or other interventions for the child even if the child does not live with them, or is related to them genetically.[139] Without a good excuse, intending parents risk their entire legal parenthood if they are unaware of the legal time limit requirements. Whilst the option to adopt would be open to them, the entire purpose of the parental order is to grant legal parenthood in the specific circumstances of a surrogacy arrangement wherein the child and (at least one of) the intending parents are genetically related.[140] Finally, the child's legal identity is uncertain until the intending parents can apply for the order, and the court grants it; in some cases, this uncertainty can last for a number of years.[141] The courts have experienced particular challenges with the time limit requirement since all decisions concerning a child must be made in the child's best interests, which often means that the court must grant the parental order regardless of the requirement.[142] Therefore, the time limit requirement is illogical and serves very little purpose in practice since it does not protect the child's best interests.

(ii) Reasonable Payments

In deciding whether to grant a parental order, the court must consider any payments that the intending parents have made to the surrogate.[143] If payments have been made, they must only

[139] Smith (n 126) 250.
[140] *Re A (Children)* (n 65) [68].
[141] ibid [45].
[142] Children Act 1989, s 1; Adoption and Children Act 2002, s 1; Human Fertilisation and Embryology (Parental Orders) Regulations 2010, SI 2010/985.
[143] Human Fertilisation and Embryology Act 2008 (as amended), s 54 (8).

be for 'expenses reasonably incurred.'[144] If this is not the case, the court can reject the application or authorise the payments retrospectively.[145] The payment of surrogates is an ethical issue that has sparked much debate; however, discussion of this ethical debate is not within the remit of this paper. Instead, this subsection will examine the courts' approach to the statutory reasonable payment requirement.

In practice, the court has never rejected a parental order application because of payments that intending parents have made to the surrogate.[146] This includes payments that have arisen from commercial surrogacy arrangements abroad even though the same arrangements and associated payments would be unlawful in the UK.[147] One of the main reasons that the court has never refused to authorise a payment is due to its obligations under the 2010 Parental Order Regulations.[148] Under these Regulations, the court is required to place the child's welfare as its 'paramount consideration' and apply the welfare checklist contained in the Adoption and Children Act 2002.[149] The courts have interpreted this to mean that they should make parental orders in the interests of the child's welfare, except in the 'clearest case of the abuse of public policy.'[150] Therefore, the 2010 Regulations have rendered the statutory reasonable payment provision incoherent with the

[144] ibid.
[145] ibid.
[146] Elsworth and Gamble (n 82) 158; Horsey, 'Fraying at the Edges: UK Surrogacy Law in 2015' (n 47) 612; Department of Health and Social Care, *Surrogacy: Review for Health Ministers of Current Arrangements for Payments and Regulation, Report of the Review Team* (Cm 4068, 1998) para 5.3.
[147] *Re L (Commercial Surrogacy)* [2010] EWHC 3146 (Fam).
[148] Human Fertilisation and Embryology (Parental Orders) Regulations 2010, SI 2010/985.
[149] Adoption and Children Act 2002, s 1.
[150] *Re L (Commercial Surrogacy)* (n 147) [10].

approach that the courts must now take.[151] Intending parents can now act in a manner that directly contradicts the statute whether they are aware of the provision or not, since their unreasonable payments will be retrospectively authorised by the courts so long as they do not abuse public policy.[152] Although the courts never chose to refuse a parental order due to unreasonable payments before the Regulations, the Regulations have essentially removed that choice, meaning that the courts will only be able to enforce the wording of the statute in extreme cases. Whilst this is beneficial for intending parents, because it removes a barrier to gaining a parental order, it proves that the law governing surrogacy is not fit for purpose since the courts cannot enforce the statutory provisions relating to it.

This section has demonstrated that the law governing parental orders for intending parents of surrogate-born children is ineffective. The courts are now actively ignoring both the time limit and reasonable expenses requirements because of their obligations to protect the child's best interests. Undoubtedly, this is of great benefit to surrogates, intending parents, and surrogate-born children alike. However, this is not to say that the law governing parental orders is suitable. Instead, it proves that the current statutory provisions relating to parental orders are incoherent and create confusion and conflict with court-based precedent and statutory updates. It would be beneficial for all parties if the Law Commission were to recommend updating the requirements for parental orders as part of its consultation, in order to reflect the modern realities of surrogacy practice.

[151] Alghrani and Griffiths (n 136) 186.
[152] Horsey, 'Fraying at the Edges: UK Surrogacy Law in 2015' (n 47) 611-612.

IV. Commercial Surrogacy

Under the Surrogacy Arrangements Act 1985 (SAA 1985), commercial surrogacy is illegal.[153] Whilst this is the general rule, the statute contains exceptions for intending parents and surrogates so that the child is not born subject to a 'taint of criminality.'[154] The SAA 1985 also provides limited pragmatic exceptions for non-profit surrogacy agencies to advertise and take part in surrogacy arrangements.[155] This section will demonstrate that the SAA 1985 has become incoherent in the modern world by examining the contrast between the terms of the SAA 1985 and current demands of surrogacy to show that the statute is merely offloading commercial surrogacy and its associated problems to other countries. Subsequently, it will also examine the issues that have arisen because of the restrictions on non-profit surrogacy agencies in the UK.

As mentioned in the first section of this analysis, the number of intending parents seeking international surrogacy arrangements is increasing.[156] In addition to the reasons already presented, another potential explanation for this increase is the fact that some countries allow commercial surrogacy.[157] Commercial surrogacy abroad primarily allows intending parents to avoid the UK's confusing legal regulation of the practice.[158] Furthermore, commercial surrogacy abroad is more widely available than altruistic surrogacy in the UK - in 2016, all non-profit surrogacy agencies in the UK stopped accepting

[153] Surrogacy Arrangements Act 1985 (as amended), ss 2-3.
[154] Department of Health & Social Security, *Report of the Committee of Inquiry into Human Fertilisation and Embryology* (Cmnd 9314, 1984) para 8.19; Surrogacy Arrangements Act 1985 (as amended), s 2 (2).
[155] Surrogacy Arrangements Act 1985 (as amended), s 2 sub-ss (2A)-(2C), s 3 (1A).
[156] Crawshaw, Blyth and van den Akker (n 97) 271.
[157] Brazier and Waxman (n 105) 162; Horsey, 'Fraying at the Edges: UK Surrogacy Law in 2015' (n 47) 608; Jackson (n 79) 202-203.
[158] Alghrani and Griffiths (n 136) 170.

new intending parents because they were experiencing a shortage of altruistic surrogates.[159] Despite this, only one agency, Childlessness Overcome Through Surrogacy (COTS), advocates for the law to allow commercial surrogacy arrangements in the UK.[160] The other two UK surrogacy agencies, Brilliant Beginnings and Surrogacy UK, claim that altruistic surrogacy is the best option because it encourages enduring and trusting relationships between the parties and forms a stable environment for the child.[161] However, these surrogacy agencies do not address why this should preclude commercial arrangements. The parties could form the same relationships in such arrangements and there is no evidence to suggest that commercial surrogacy is harmful to the children that are born because of it.[162] Instead, commercial surrogacy would simply enable the surrogate to be paid in recognition of her work in gestating and giving birth to a child that would otherwise not exist.[163]

Yet, far from merely promoting altruistic surrogacy, surrogacy agencies in the UK actively campaign against commercial surrogacy. The primary reason for this is their belief that permitting commercial surrogacy would restrict the availability of surrogacy to wealthy couples.[164] They have presented research data from surrogates themselves, 90% of whom agreed that they should not be paid for being a surrogate.[165] However, it is unlikely that surrogates registered

[159] Helen Prosser and Natalie Gamble, 'Modern surrogacy practice and the need for reform' (2016) 4 (3) Journal of Medical Law and Ethics 257, 259.
[160] Kim Cotton, 'The UK's antiquated laws on surrogacy: a personal and professional perspective' (2016) 4 (3) Journal of Medical Law and Ethics 229, 233.
[161] Smith (n 126) 242; Prosser and Gamble (n 159) 274.
[162] Wade (n 75) 113.
[163] Margaret Brazier, 'Regulating the Reproduction Business?' (1999) 7 (2) Medical Law Review 166, 182; Alghrani and Griffiths (n 136) 183; Cotton (n 160) 232.
[164] Smith (n 126) 242-243.
[165] ibid 243.

with any agency in the UK would be particularly supportive of commercial surrogacy since they have chosen to become a surrogate regardless of payment- money is explicitly not one of their motivating factors for becoming a surrogate. The statistic provided tells us nothing about how many women would become surrogates if commercial surrogacy was legal.

Instead, and contrary to concerns that commercial surrogacy would restrict access to only the wealthy, the fact that 90% of surrogates disagree that they should be paid suggests that they would choose not to become commercial surrogates, meaning that allowing both types of surrogacy in the UK would maximise the number of available surrogates.[166] Since 90% of current altruistic surrogates believe that they should not be paid, they would likely remain available as altruistic surrogates for those who could not afford commercial surrogacy arrangements. The commencement of commercial surrogacy could then open another pool of available surrogates, thereby creating a dual system in which altruistic and commercial surrogacy would co-exist to maximise the number of surrogates within the UK.[167] The potential for co-existence presents a solution to the UK's shortage of surrogates that would enable access to surrogacy for all. Thus, the surrogacy agencies' concerns that commercial surrogacy would restrict access to wealthy couples only contradicts the evidence that they provide, which suggests that altruistic surrogates would remain available despite the introduction of commercial surrogacy.

In the UK, surrogacy agencies can operate so long as they operate on a non-profit basis.[168] This reflects the attitudes

[166] ibid.
[167] Alghrani and Griffiths (n 136) 182-183.
[168] Surrogacy Arrangements Act 1985 (as amended), s 2 sub-ss (2A)-(2C), s 3 (1A).

of the Warnock committee, who believed that that the professionalisation of surrogacy was undesirable since it would lead to an increase in the numbers of surrogacy arrangements.[169] However, contrary to what the Warnock committee hoped, surrogacy practice has not 'withered on the vine.'[170] This means that the UK surrogacy agencies are each forced to manage a 'few dozen' cases per year whilst still operating on a non-profit basis.[171] This lack of professionalisation has caused problems in practice. In *Re G*,[172] COTS facilitated a surrogacy arrangement between intending parents who were Turkish nationals, and a UK surrogate.[173] However, COTS' misunderstanding of the relevant law meant that they did not advise the intending parents that they would be unable to obtain a parental order because they were not domiciled in the UK.[174] Furthermore, COTS failed to warn the intending parents or the surrogate that the courts might consider the surrogate's estranged husband to be the child's legal father.[175] Ultimately, the court managed to navigate a number of legal powers in order to facilitate the transfer of legal parenthood to the intending parents.[176]

Nevertheless, Mr Justice McFarlane was highly critical of COTS' involvement and the incorrect advice that they gave to the intending parents and the surrogate.[177] He noted that the staff at COTS were volunteers, none of whom were legally qualified.[178] Whilst accepting that they were 'well

[169] Brazier (n 163) 179.
[170] Department of Health and Social Care (n 146) para 2.23.
[171] Prosser and Gamble (n 159) 261-262.
[172] *Re G (Surrogacy: Foreign Domicile)* [2007] EWHC 2814 (Fam).
[173] ibid [8].
[174] ibid [15].
[175] ibid [30]-[37].
[176] ibid [41].
[177] ibid [17]-[29].
[178] ibid [21].

intentioned,'[179] he ultimately suggested that COTS was a group of 'well-meaning amateurs'[180] and questioned whether the facilitation of surrogacy arrangements should be left to such groups.[181] The case is now over a decade old and voluntary surrogacy agencies have undoubtedly become more experienced since *Re G*; five years after the case, COTS boasted success rates of 98%.[182] Regardless of experience, the case highlights the problems that can arise as a result of limiting the operation of surrogacy agencies to a non-profit basis. Without the chance to commercialise and professionalise, most surrogacy agencies will only ever be groups of well-meaning amateurs operating without regulation and potentially creating complex problems for surrogates, intending parents, and surrogate-born children alike. This is in direct contrast to other reproductive service providers who are regulated by the Human Fertilisation and Embryology Authority.[183]

Overall, although surrogacy agencies and surrogates deny that commercial surrogacy would be beneficial, the UK has reached a point of saturation whereby demand for surrogacy is outstripping supply. Concerns that allowing commercial surrogacy would restrict surrogacy access are unfounded because they ignore the potential for both systems to co-exist, which would increase surrogacy opportunities for everyone who desires them. Finally, the law's restriction on the operation of surrogacy agencies denies them the chance to professionalise, meaning that the agencies remain 'well-

[179] ibid [23].
[180] ibid [29].
[181] ibid.
[182] Amel Alghrani, 'Surrogacy: 'A cautionary Tale'' (2012) 20 (4) Medical Law Review 631, 639.
[183] Human Fertilisation and Embryology Act 1990 (as amended) ss 11-22.

meaning amateurs' with the potential to create additional problems in what is already a problematic area of law.

V. Conclusion

This analysis has assessed three aspects of the legal regulation of surrogacy in the UK in order to highlight the complexity of the law in light of the Law Commission's consultation on surrogacy. In each of these areas, it has shown that the legal regulation of surrogacy is problematic for the surrogate, the intending parents, the surrogate-born child, and the courts. This analysis has shown that use of the birth model means that the legal parenthood provisions are ill equipped to deal with technological advances, much of which is used in surrogacy practice. Furthermore, the courts do not recognise legal parenthood laws of other countries, thereby leaving the child in a legal limbo that cannot always be remedied by the courts' use of parental orders, since the parental order requirements themselves have created a number of problems in practice.

In respect of the six-week requirement, many surrogates have no desire to retain legal responsibility for the child once it has been born. Instead, in rare cases, the six-week minimum enables surrogates to abuse their position as the child's legal mother. This possibility leads to some intending parents seeking surrogacy in a country that uses pre-birth orders that do not compel the UK courts to recognise the intending parents' legal parenthood. In respect of the six-month requirement, the circumstances of some surrogacy arrangements have required the courts to interpret the statute purposively to such an extent that the provision is now irrelevant in practice.

Finally, the ban on commercial surrogacy is inhibiting the availability of surrogates in the UK to the extent that

demand is outstripping supply, leaving intending parents to seek surrogacy abroad, which comes with its own difficulties. The agencies themselves are unable to work effectively due to the ban on commercial surrogacy. They cannot advertise and cannot charge for their work, meaning that they are unable to professionalise and improve their services, which have already jeopardised at least one parental order. Their operation on the fringe of legality means that they are operating without regulation, which is incoherent when compared to other reproductive services. For all of these reasons, the Law Commission's consultation on surrogacy should be welcomed as a chance to finally create coherence within the legal regulation of surrogacy.

UK regulation on the ballast water management: What can be improved upon?

Weng Chi Cheah [184]

The shipping industry is arguably one of the most important industries contributing to the UK economy. This article will focus on the environmental risk posed by ballast water discharge, but particularly on the transferring of invasive alien species ("IAS"). This article will analyse the constraints of current regulations, including: why the *polluter pays principle* is unfeasible; the impact on ballast water regulation on the economy; the time-sensitive nature of this issue, and the limits on existing knowledge and technology. The current ballast water regulations include a wide range of international legislation and agreements, particularly the Ballast Water Management ("BWM") Convention by the International Maritime Organisation ("IMO"). The BWM Convention contains standards for ballast water treatment, namely Regulations D-1 and D-2. However, this command and control mechanism has posed several insufficiencies, including: non-compliance; difficulties with ascertaining the standards prescribed, and its cost to enforce. Nonetheless, it is undeniable that the BWM Convention will reduce the risk of unintentional IAS introduction. This article will go on to further compare and contrast the BWM Convention with the model adopted by the USA. Reforms proposed include: establishing an independent monitoring system by ratifying the BWM Convention in the UK; maintaining a proactive collaboration with the EU; incorporating environmental standards into regional trade, and implementing stricter standards on trade in response to the emergence of new economic trading patterns as a result of the UK leaving the EU. The article also further highlights the importance of self-regulation of the shipping industry itself to increase participation and compliance rate on ballast water management.

I. Overview of the shipping industry

There are four main industries within the maritime sector, namely the: shipping; ports; marine and maritime business services. This article will focus on the shipping industry, which is considered to be one of the most important industries

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contributing to the UK economy. In fact, almost 95% of all imports and exports of goods and services are transported using maritime shipping.[185] The shipping industry directly contributed almost £4.3 billion in 2015.[186] The gross value added pattern is said to be consistent with the impact caused by the Tonnage Tax 2000,[187] which was introduced to attract more low-taxed shipping businesses to relocate in the UK in order to stimulate the maritime sector.[188] This tax regime is estimated to have created 25,000 more jobs for the 2015 market, [189] with more than 50,000 jobs in total.[190] Additionally, the shipping industry has contributed £2.5 billion to the UK Exchequer,[191] forming 12.8% of the total tax revenues directly generated by the maritime sector.[192] Overall, the direct economic impact in turnover reached almost £14 billion, exceeding the period average of £13 billion in 2015.[193] The international sea faring forms the largest part (31%) of activity contributing to the marine sector with over £9 billion of business turnover in 2015.[194] Moreover, a quarter of the maritime legal firms, 35% of marine insurance premiums and 26% of shipbroking revenue in the world are all based in the UK.[195] There were almost 24,000 UK active seafarers in 2017,[196] with more than 3000

[185] 'Shipping' (Maritime UK) <https://www.maritinteuk.or about/our-sector/shipping/> accessed 1 December 2018.
[186] Centre for Economics and Business Research, 'The economic contribution of the UK shipping industry: A report for Maritime UK' (2017) 16.
[187] ibid.
[188] Watson Farley and Williams, 'UK Tonnage Tax: A Short Guide' (2008) 2.
[189] Centre for Economics and Business Research (n 186).
[190] Maritime UK, 'Annual Review' (2018) 15.
[191] Maritime UK (n 185).
[192] Centre for Economics and Business Research (n 186) 21.
[193] ibid.
[194] ibid.
[195] PwC, 'The UK's Global Maritime Professional Services: Contribution and Trends' (The City of London Corporation 2016) 7.
[196] Department for Transport and Maritime and Coastguard Agency, 'Seafarers in the UK Shipping Industry: 2017' (*GOV.UK*, 30 May 2018)

shipping companies[197] providing various shipping services from major ports[198] such as, Grimsby & Immingham, London, and Southampton.[199] However, the environmental impacts of the shipping industry are wide-ranging; they include: air and oil emissions; disruption of marine life; waste management from ships,[200] and the focus of this article, ballast water discharges.

Ballast water is taken onboard during the offload of goods to maintain the stability and manoeuvrability of an empty ship, it is then expelled when a new batch of cargo is loaded at a new destination, posing one of the greatest threats to the local marine ecosystem.[201] To provide a few broad examples, it was recorded that in 100,000m² of ballast water, which contains about 10,000 species,[202] 57% of the species collected were labelled as non-native.[203] Invasive alien species (IAS) are non-native organisms that are 'invasive' in nature due to their ability to spread, causing damage to biodiversity.[204] IAS

<https://www.gov.uk/government/statistics/seafarers-in-the-uk-shipping-industry-2017> accessed 1 December 2018.

[197] 'List of Shipping Companies in the UK' (*Altius Directory*) <http://www.altiusdirectory.com/Travel/list-of-shipping-companies-united-kingdom.html> accessed 2 December 2018.

[198] 'What Ports do You Ship to in the UK?' (*Shippo*) <https://www.shippo.co.uk/faqs/what-ports-do-you-ship-to-in-the-uk/> accessed 2 December 2018.

[199] Department for Transport, 'UK Port Freight Statistics: 2017' (2018) 5.

[200] 'Industry Issues' (*World Shipping Council*) <http://www.worldshipping.org/industry-issues/environment> accessed 2 December 2018.

[201] 'The International Day for Biological Diversity: Invasive Alien Species' (*Convention on Biological Diversity*, 22 May 2009) <https://www.cbd.int/idb/2009/> accessed 3 December 2018.

[202] 'Breaking down the ballast water problem' (*British Ecological Society*, 18 July 2014) <https://www.britishecologicalsociety.org/breaking-down-the-ballast-water-problem/> accessed 4 December 2018.

[203] F Williams and others, 'The Economic Cost of Invasive Non-native Species on Great Britain' (CAB International 2010) 118.

[204] 'Definition of terms' (Great Britain Non-native Species Secretariat) <http://www.nonnativespecies.org/index.cfm?pageid=64> accessed 3 May 2019.

will compete for food, causing disruption to local ecosystems, or even leading to the extinction of native species.[205] The damaging effects of ballast water has been evident through the spread of Chinese mitten crabs and red mysid shrimps in the UK, leading to the destruction of riverbanks and disruption to food webs. This article will focus on the environmental risk posed by ballast water discharge, particularly on the transferring of IAS through analysing the difficulties posed by the current regulations and by comparing the domestic framework to the US model. Accordingly, potential improvements for the UK framework will be discussed.

II. Difficulties in regulating

Generally, the *polluter pays principle* is used in environment policy by making the polluter bear the cost associated with the pollution. However, simply applying this principle is unfeasible in the context of regulating ballast water due to the difficulty in tracing and determining the polluter.[206] Whilst shipping remains to constitute 80% of the transportation of world trade,[207] it is important to appreciate the scale of the issue at hand. For example, in 2017, 248.3 million tonnes of goods

[205] 'What are Invasive Alien Species?' (*Convention on Biological Diversity*) <https://www.cbd.int/idb/2009/about/what/> accessed 3 December 2018; 'Invasive species 'spread around world in ships' ballast tanks'' (*The Telegraph*, 13 July 2009) <https://www.telegraph.co.uk/news/earth/wildlife/5815421/Invasive-species-spread-around-world-in-ships-ballast-tanks.html> accessed 5 December 2018; 'The top 5 destructive alien species in UK waters' (*Thomson*, 29 January 2016) <https://www.thomsonec.com/news/the-top-5-destructive-alien-species-in-uk-waters/> accessed 5 December 2018.

[206] Parliamentary Office of Science and Technology, 'Postnote: Invasive Non-native Species' (April 2008) 2.

[207] Jean-Paul Rodrigue, Claude Comtois and Brian Slack, *The Geography of Transport Systems* (1st edn, Routledge 2006) 206.

entered UK ports from international locations,[208] indicating that a significant volume of ballast water from either neighbouring States or across the globe was discharged in the UK waterways. Additionally, intake and discharge of ballast water will not only take place in ports, but during any point of the voyage depending on the sea and weather conditions. Therefore, not only is seawater in ports affected, but there is also an amplified risk that IAS may spread to coastal lines by ocean waves, currents and tides.[209]

Moreover, the regulation on ballast water would have an unquestionable impact on the economy. The costs associated with invasive species management includes risk analysis, research and prevention.[210] A huge sum of funds would be needed on prevention measures for the inspection of ships and containers at port of entry.[211] Funds would also be required for the construction of physical barriers to obstruct the spreading of IAS, as part of mitigation and damage control.[212] Apart from the management costs involved, impact on the economy includes opportunity costs such as, production losses and losses to other activities and sectors, for example, increased flooding and reduced earnings.[213] The total annual cost of IAS on the

[208] Department for Transport, 'Port freight annual statistics: 2017 final figures' (*GOV.UK*, 22 August 2018) <https://www.gov.uk/government/statistics/port-freight-statistics-2017-final-figures> accessed 3 December 2018.
[209] Rebecca M Thibault, 'Ballast Water Control: Issues & Recommendations for Protecting the United States' Shared Pacific Coastline' (2011) 10 Wash. U. Global Stud. L. Rev. 837.
[210] Laure Boissat, 'The hidden costs of invasive species' (*Geographical*, 9 April 2018) <http://geographical.co.uk/uk/uk/item/2682-the-hidden-costs-of-invasive-species> accessed 6 December 2018.
[211] George Marbuah, Ing-Marie Gren and Brendan McKie, 'Economics of Harmful Invasive Species: A Review' (2014) 6 Diversity 504.
[212] ibid.
[213] F Williams and others (n 203) 13.

shipping industry alone is estimated to be more than £32 million.[214]

Another obstacle is that most threatening alien species were introduced several decades ago where ballast water had been disposed by ships since the early 1900s,[215] but its population has only spawned recently. In other words, previously introduced IAS may also be a ticking time bomb, threatening biodiversity over the coming centuries. The establishment and dispersion rates differ over time due to a number of reasons such as, the type of species, or even climate changes.[216] Therefore, current problems with IAS does not effectively reflect current industry activities, but instead reflects the way industry activities were conducted in the past due to the 'time lags' between the introduction of IAS and its establishment as part of the ecosystem.[217] To further deteriorate the situation, international regulations generally require a longer period of time to be drafted, not to mention the time it takes to fully implement them. Hence, current regulations and policies merely pay off 'invasion debt' rather than tighten international trade that involves potential unintended invasive species.[218]

It is important to recognise that current knowledge and technology available is not sufficiently advanced for

[214] ibid 138.
[215] 'Ballast water' (*UK Marine Special Areas of Conservation*) <http://www.ukmarinesac.org.uk/activities/ports/ph6_2_4.htm> accessed 7 December 2018.
[216] Rüdiger Wittenberg and Matthew JW Cock, *A Toolkit of Best Prevention and Management Practices* (CABI 2001) 51.
[217] Franz Essl and others, 'Socioeconomic legacy yields an invasion debt' (2011) 108 PNAS 203.
[218] Mark Kinver, 'Invasive species have a 'delayed legacy', says report' (*BBC*, 21 December 2010) <https://www.bbc.co.uk/news/science-environment-12041943> accessed 10 December 2018.

'predictive modelling of ecological systems'.[219] As mentioned above, prevention and early intervention against IAS would be more cost-effective, as opposed to mitigating the effects once IAS is established. However, it is not possible to predict which specific alien species is likely to be invasive and damaging, and it is equally impossible to predict which species already exist in the ballast water.[220] Furthermore, climate change is only exacerbating the situation by allowing species, which are supposed to be inhibited by the climate, to survive and later become invasive – at the same time, increasing the ability of native species to resist the impact of IAS.[221]

III. Current UK regulations

The UK is bound by a wide range of international legislation and agreements including, but not limited to, the UN Convention on the Law of the Sea ("UNCLOS"), the International Convention on Biological Diversity, and the International Convention for the Prevention of Pollution from Ships ("MARPOL") 73/78, where they all have the common ground of protecting biodiversity from IAS.[222] The UNCLOS provides a global framework by calling member States together to 'prevent, reduce and control pollution of the marine environment including the intentional or accidental introduction of species, alien or new, to a particular part of the marine environment, which may cause significant and harmful changes thereto'.[223] Nonetheless, this article concentrates on

[219] Øyvind Endresen and others, 'Challenges in global ballast water management' (2004) 48 Marine Pollution Bulletin 619.
[220] Department for Environment, Food and Rural Affairs, 'The Invasive Non-native Species Framework Strategy for Great Britain' (2008) 40.
[221] Parliamentary Office of Science and Technology (n 206) 4.
[222] 'Non-native Species' (*Joint Nature Conservation Committee*) <http://jncc.defra.gov.uk/default.aspx?page=1532> accessed 12 December 2018.
[223] UN Convention of the Law of the Sea, art 196.

another framework, which is stipulated by the International Maritime Organisation ("IMO") and consists of specific regulations addressing the growing concern of IAS transfer. The IMO is an agency under the United Nations specialising in the shipping industry.[224] Recognising the need for a mutually agreed standardisation on ballast water, member States of the IMO established the International Convention for the Control and Management of Ships' Ballast Water and Sediments 2004 – also known as the Ballast Water Management ("BWM") Convention. This is to ensure that ballast water transfers, between member States, will take place according to the approved performance standards and evaluation procedures.[225] The BWM Convention contains an 'environmentally protective numeric standard'[226] for ballast water treatment. Vessels are obliged to treat their ballast water in accordance with standards laid down under Regulations D-1 and D-2, as well as tracking its intake, treatment and discharge in a Ballast Water Record Book.[227]

Regulation D-1 provides the requirements to be followed concerning ballast water exchange. Vessels are required to be at least 200 nautical metres away from the nearest land and at least 200 metres water deep in open seas in order to carry out ballast water exchange. This requirement is based on the assumption that the open sea conditions are

[224] 'Introduction to IMO' (*International Maritime* Organization) http://www.imo.org/en/About/Pages/Default.aspx> accessed 13 December 2018.
[225] 'Ballast Water Management' (*International Maritime Organization*) <http://www.imo.org/en/OurWork/Environment/BallastWaterManagement/Pages/Default.aspx> accessed 5 December 2018.
[226] 'Ballast water' (*World Shipping Council*) <http://www.worldshipping.org/industry-issues/environment/vessel-discharges/ballast-water> accessed 6 December 2018.
[227] Monty Smedley, 'Ballast water management convention ratified' (*ABPmer*, 12 October 2016) <http://www.abpmer.co.uk/buzz/ballast-water-management-convention-ratified/> accessed 13 December 2018.

unfavourable for coastal water organisms to survive[228] as a result of the changes in the water's chemistry, temperature and salinity.[229] On the other hand, Regulation D-2 concerns the microbial limits permitted in a specific volume of treated discharging ballast water. Shipowners will normally install an IMO-approved ballast water treatment system on-board the vessel, and from September 8th 2018, new vessels must comply with Regulation D-2. The BWM Convention has also set out an implementation schedule regarding the installation of IMO-approved ballast water treatment systems, under which all vessels will conform to the Regulation D-2 standard eventually.[230] This system must be approved by the Administration as stipulated under Regulation D-3, taking the guidelines provided for approval of ballast water management systems (G8) into account.

The BMW Convention approach reflects a command and control mechanism – a commonly used mechanism in regulatory frameworks. As discussed above, Regulation D-1 stipulates a specification standard by giving instructions on ballast water exchange, whereas Regulation D-2 acts as a quality standard through specifying the maximum concentration of organisms allowed in discharged ballast water. Certification is also granted under the Guidelines (G8) to vessels that are equipped with IMO-approved treatment systems. Hence, the command and control mechanism remains

[228] Niko Wijnolst and Tor Wergeland, *Shipping Innovation* (1st edn, Delft University Press 2009) 694.
[229] Bikram Singh, 'Everything You Wanted to Know About Ballast Water Exchange and Management Plan' (*Marine Insight*, 22 July 2016) <https://www.marineinsight.com/maritime-law/everything-you-wanted-to-know-about-ballast-water-exchange-and-management-plan/> accessed 10 December 2018.
[230] 'Ballast Water Management Convention Enters into Force' (*World Maritime News*, 11 September 2017) <https://worldmaritimenews.com/archives/229362/ballast-water-management-convention-enters-into-force/> accessed 12 December 2018.

to be the preferred tool of both the regulator and the industry, as it clearly sets out what is expected of them. Moreover, this mechanism prompts the industry to be innovative and creative in exploring alternatives to mandate treatment of discharged ballast water, as influenced by regulations set by IMO. It is seen as a triggering point for the shipping industry to influence the design of vessels fundamentally, for example, by limiting operational discharges or even eliminating ballast water entirely.

However, the command and control mechanisms have several insufficiencies. Firstly, vessels will not necessarily keep to the standards stipulated. For instance, most shipping from the UK involves short and shallow coastal routes from continental Europe, which does not fulfil the depth and distance criteria for ballast water exchange treatment. This means that most shipping from the UK are excluded from Regulation D-1.[231] Consequently, due to the overly-prescriptive nature of command and control, it inevitably opens up a lacuna of enforcement for vessels that stray within a grey area. This demonstrates that the command and control only changes industrial practice as opposed to behaviour, as parts of the industry are continuing to find loopholes to escape compliance liability.

Secondly, the industry faces practical challenges in proving that compartments of vessels, including the ballast tank and pipes, meet the D-2 requirement. The difficulty in ascertaining the presence of 'water pockets' formed in the compartments which trap the old ballast water, will mean that full exchange of ballast water is not possible. On top of that, intake of ballast water will inevitably cause sediments to settle

[231] F Williams and others (n 203) 137.

in the ballast tank which would create a haven for potentially threatening organisms to avoid being subjected under Regulation D-2. Thus, the ballast water exchange system can be said to be less effective in biological terms compared to ballast water treatment systems.[232]

Command and control mechanisms are also costly to enforce and administer. The state, or shipowners, do not gain any revenue from complying with the standard. On the contrary, they would have to invest millions to accommodate port authorities' testing of their systems, ballast water treatment systems, and even administration training to operate the systems. The shipowners may be compelled to overlook the importance of complying with the stipulated standards if they were to weigh it with the expenses required. Therefore, if the values which underpin the regulatory mechanism are not appreciated, the industry may subsequently treat obligations imposed as burdens, leading to further non-compliance with the standards set.

Regulations D-1 and D-2 are not necessarily to do with mandatory testing and sampling at every port – they merely lay down the standards required. The onus is on the BWM Convention signatories' decision to enact its own legislation on how they want to govern their waters, provided that the standards are met. Under Art. 8 of the BWM Convention, vessels that are found in violation of the regulations shall be subjected to the Flag State's – the State in which the vessel is registered to – jurisdiction. However, as of May 2020, the UK has yet to ratify the BWM Convention, and it is still in the process of drafting the domestic legislation.[233] In other words, though the UK, as a Member State of the IMO, is obliged to

[232] Niko Wijnolst and Tor Wergeland (n 228) 695.
[233]Maritime & Coastguard Agency, 'Ballast Water Management FAQ' (July 2018) 5.

comply with its Convention, the BWM Convention's position in the UK is currently much the same as a "toothless tiger", owing to its lack of legal repercussions. Hence, in the event where there are new species found in the ballast water and sediments, vessels could escape liability as they are not legally required to inform the Maritime and Coastguard Agency (MCA), who are responsible for the ballast water management.[234]

Moreover, vessels are merely 'strongly advised' and not legally required to comply with the old MCA Guidance 1998[235] on ballast water control and management. At this moment, there is neither monitoring of compliance in place nor is there any duty required for shipowners to report. Shipowners are not solely to blame as they do not see the reason to comply or invest in the expensive water treatment system, as no form of penalties are imposed if they are found offending the standard. Shipowners, as business figures, are aware that to offend would make more economic sense than complying, as backed by Becker's thesis.[236] The absence of a monitoring system would also result in a lack of credible information and data regarding compliance being available in the future. Therefore, it can be concluded that the 'enforcement' element in the command and control mechanism is absent and will not be put in place, unless and until the BWM Convention is fully ratified and implemented by the UK government.

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[234] 'Ballast water' (*Oil & Gas UK Environmental Legislation*) <https://oilandgasukenvironmentallegislation.co.uk/contents/topic_files/offshore/ballast_water.htm> accessed 20 December 2018.

[235] Maritime & Coastguard Agency, 'Guidelines for the Control and Management of Ships' Ballast Water to Minimize the Transfer of Harmful Aquatic Organisms and Pathogens' (August 1998).

[236] Gary S Becker, 'Crime and Punishment: An Economic Approach' (1968) 2 Journal of Political Economy 76, 169.

Thus, it is important for the UK to ratify the BWM Convention to reduce the risk of unintentional IAS introduction and safeguard aquatic biodiversity, as further echoed by the Environmental Audit Committee.[237] Moreover, it is viewed as the 'most environmentally protective standard' model that could be achieved using commercially available shipboard ballast water treatment technologies.[238] Ratifying the BWM Convention will also provide a global level playing field for international maritime trade by laying out clear and robust standards relating to the management of ballast water.[239] This will further benefit the UK economy in the long run by encouraging more international maritime business transactions, in the knowledge that the UK's waterway is up to par with international standards.

IV. Potential reform

In the following section, the United States ("US") will be used as a case study to explore ways in which the current UK regulations on ballast water could be improved. The US framework has always been viewed as a good model due to its comprehensive IAS strategies and ballast water legislation.[240] Though the US is not a signatory to the BWM Convention, it has two federal agencies responsible for the regulation of the ballast water in its territory, with standards similar to the BWM Convention Regulation D-2.[241] These agencies are the United

[237] Environmental Audit Committee, 'Invasive species' HC (2019) 88 [13]–[14].
[238] International Maritime Organization (n 225).
[239] 'New IMO rules introduced to fight invasive aquatic species' (*Port Technology*, 8 September 2017) <https://www.porttechnology.org/news/new_imo_rules_introduced_to_fight_invasive_aquatic_species> accessed 20 December 2018.
[240] Parliamentary Office of Science and Technology (n 206207) 4.
[241] Gerd Schneider and others, 'Ballast Water Management: Present and Future Challenges for Vessel Owners' (*KNect365*, 16 August 2018) <https://knect365.com/shipping/article/91fd950d-e07f-4edf-9599-

States Coast Guard ("USCG") and the US Environmental Protection Agency ("EPA").

The USCG published the 'Final Rule on Standards for Living Organisms in Ships' Ballast Water Discharged in US Waters'[242] in March 2012, with a discharge standard consistent with that imposed by the BWM Convention Regulation D-2. Similar to the BWM Convention, USCG also establishes an approval process for ballast water management systems. Currently there are only a limited number of treatment systems that have gained approval from USCG and been made available to the market. In fact, IMO-approved treatment systems will not necessarily obtain certification from USCG due to the 'more stringent' standards set.[243] For example, despite both USCG and IMO having the same limit on the number of organisms allowed in discharged ballast water, USCG further requires organisms to be dead rather than 'viable organisms'.[244] Hence, IMO-approved vessels will either have to apply as an 'Alternate Management System', with only 5 years validity, or apply for a separate USCG approval in order to continue their trading within the US territories.[245] Furthermore, the EPA issued its first Vessel General Permit (VGP) in 2008 to vessels which met the criteria under the 'National Pollutant Discharge

5ee4ce6c7066/ballast-water-management-present-and-future-challenges-for-vessel-owners> accessed 20 December 2018.

[242] Coast Guard, 'Standards for Living Organisms in Ships' Ballast Water Discharged in U.S. Waters; (*Federal Register*, 23 March 2012) <https://www.federalregister.gov/documents/2012/03/23/2012-6579/standards-for-living-organisms-in-ships-ballast-water-discharged-in-us-waters> accessed 2 January 2019.

[243] ibid.

[244] 'The Challenges' (*The North of England P&I Association Limited*) <http://www.nepia.com/insights/ballast-water-management/the-challenges/> accessed 2 January 2019.

[245] International Chamber of Shipping, 'Ballast Water Management Frequently Asked Questions (FAQs)' (16 January 2018) 8.

Elimination System', established under the Clean Water Act 1972.[246] This permit is a license to discharge a specific amount of pollutant, including ballast water, into the water under certain conditions.[247]

On the other hand, the fact that each state in the US has its own jurisdiction may lead to difficulties in compliance faced by international vessels if different ballast water treatment standards are enforced between ports. It is commercially undesirable for vessels, which engage in maritime activities across multiple states in a single voyage, to switch from one ballast water treatment system to another. Prior to USCG and EPA adoption of the IMO D-2 Regulation standard, most states that had different individual standards from the federal standard have now realigned their standards accordingly – with the exception of California, which continues to maintain a standard 1000 times higher than what the federal agency has set. Nonetheless, perceiving the constraints of current technology available in the industry, California has now enacted the Marine Invasive Species Act[248] which aims to implement a zero detectable living organisms final ballast water discharge standard by 1st January 2040.

The US model is another example of a command and control mechanism. However, the difference is that the US takes the regulation of ballast water into their own hands by developing it according to the industry's pace; hence, creating sufficient time for the industry to adapt to new regulation, thereby generating a greater compliance rate. Furthermore, by

[246] 33 U.S.C. 1251 et seq.
[247] 'About National Pollutant Discharge Elimination System (NPDES)' (*United States Environmental Protection* Agency) <https://www.epa.gov/npdes/about-npdes> accessed 3 January 2018.
[248] Assembly Bill No. 912, Chapter 443, 3.

incorporating the regulation into domestic law, it will allow enforcement to take place through monitoring the industry's compliance rate. A wide range of penalties are set out for different levels of offenders, from minor infringers all the way to severe offenders of non-compliance.[249] This punishment hierarchy, taking into account the severity of the offence committed, will act not only as rehabilitation to the offender but also deterrence to other shipowners. Moreover, the US Authorities will conduct sampling on ballast water to provide support to shipowners in complying with the VGP.[250] Thus, there will be certainty on the level of industry compliance due to consistent monitoring by the regulator. Additionally, the US Authorities will have a reliable database documenting compliance available for future study and research concerning IAS in ballast water.

With this in mind, the UK might wish to adopt a similar framework to the current US regulation on ballast water. Firstly, it is crucial for the UK to ratify the BWM Convention. The UK can then establish an independent monitoring system and conduct constant evaluation on the industry's compliance performance with the ballast water standards. Another reason for a monitoring system is that various factors, such as climate and seasonal change, may exacerbate circumstances by causing non-invasive species to become invasive. Hence, regular monitoring of standards will raise a red flag to the regulators on potential IAS in water, resulting in an effective pre-border intervention. If further unintended introduction of IAS could be reduced before coming within the border, the impact of established IAS on both marine biodiversity and the economy may be less extreme.

[249] UGCG Navigation and Vessel Inspection Circular (NVIC) 07-04 CH-1, Enclosure 4.
[250] Gerd Schneider and others (n 241).

If the UK wishes to minimise the effects of IAS, preventative measures should be prioritised, as it has proven to be more successful and cost-effective than attempting to control and eradicate IAS.[251]

The UK government should also maintain a proactive collaboration with the EU as it is crucial to establish an international port-monitoring network and database.[252] The UK government is advised to increase its engagement with the EU's work in revising the regulatory frameworks in order to 'generate a unified approach when tackling biosecurity issues'.[253] It is therefore essential for the UK to maintain a close relationship in this regard with the EU even post-Brexit to ensure continued information exchange and collaboration between countries; this is due to the simple fact that IAS does not respect borders. Furthermore, it is necessary to gain continued access to the list of IAS provided by the EU. This is because, unlike those created by the EU, there is no target species list for marine invasive species provided by the MCA.[254] Hence, it is essential to construct coordinated preventative plans and frameworks for early warnings addressing this global issue. For instance, partnering with the European Environment Agency ("EEA") will allow access to an early warning system to take action against newly-arrived IAS, and the Delivering Alien Invasive Species Inventories for Europe ("DAISIE") would help to provide expert information on IAS. Greater resources and database access will aid the

[251] Department for Environment, Food and Rural Affairs (n 220) 2.
[252] Øyvind Endresen and others (n 219) 621.
[253] 'Stopping the spread – an update on invasive species policy' (*British Ecological Society*, 17 April 2014) <https://www.britishecologicalsociety.org/stopping-the-spread-an-update-on-invasive-species-policy/> accessed 3 January 2018.
[254] British Ecological Society (n 202).

government in better prediction of IAS spread, hence minimising the 'time lag' issue raised earlier.

The UK could incorporate environmental standards into regional trade agreements. A good example can be illustrated by the Commission for Environmental Cooperation ("CEC"),[255] where the US, Mexico and Canada cooperate to promote effective enforcement of environmental law. The North American Agreement on Environmental Cooperation ("NAEEC"), complementing the North American Free Trade Agreement ("NAFTA"), promotes 'sustainable development based on cooperation and mutually supportive environmental and economic policies',[256] and at the same time safeguards the territory's environment. The UK could implement a similar scheme within the EU trade agreements to strengthen binding legal rules on States or private entities. The UK should also prevent conflicting EU regulations resulting in administrative confusion which could compromise the efficiency of world trade.[257]

The UK could also take this opportunity to implement stricter standards on trade and assert itself as a leader in marine biosecurity within the region. There is no doubt that new economic trading patterns will emerge once the UK leaves the EU. However, as Elaine King, Director of Wildlife and Countryside Link states, the opening doors to new trade post-

[255] 'International Cooperation: Commission for Environmental Cooperation (CEC)' (*United States Environmental Protection Agency*) <https://www.epa.gov/international-cooperation/commission-environmental-cooperation-cec> accessed 5 January 2019.
[256] North American Agreement of Environmental Cooperation 1993, art 1.
[257] Paul Gunton, 'Industry asks for a delay in the ratification of Ballast Water Management Convention' (*Riviera Maritime Media*, 12 May 2014) <https://www.rivieramm.com/opinion/industry-asks-for-a-delay-in-the-ratification-of-ballast-water-management-convention-38763> accessed 2 January 2019.

Brexit also opens the door to new nature invaders.[258] With that being said, there is also an increased risk of the introduction of new species from non-EU trading partners' countries. Nonetheless, the UK must not be tempted to compromise its biosecurity checks to obtain trade deals, not just due to integrity but also in the long term, prevention will always be more cost effective than eradication.

Another significant part of reform would come from within the shipping industry itself, as self-regulation will change the industry's behaviour at its core. The lack of due diligence within the industry[259] may lead to stagnation in the process of developing a desirable ballast water management framework as a one-sided effort from the government will not be sufficient. The fact that shipowners adopt the minimum level of compliance indicates a lack of awareness inside the industry on the dangers of IAS.[260] It is important for the industry to understand the risks resulting from IAS, and therefore actively join forces with the government in combating the effects. The industry's involvement is crucial as no one will understand the challenges and shortcomings of real-life applications of ballast water management systems better than the industry players themselves. In fact, it is up to the shipowners to engineer the whole business system 'to integrate expertise required to innovate and design ships' that fit their needs.[261] Therefore,

[258] Fiona Harvey, 'Call for post-Brexit trade deals to safeguard against invasive species' (The Guardian, 27 March 2018) <https://www.google.co.uk/amp/s/amp.theguardian.com/environment/2018/mar/27/call-for-post-brexit-trade-deals-to-safeguard-against-invasive-species> accessed 20 December 2018.

[259] 'Lack of Due Diligence on Ballast Water could Prove Expensive' (*The Maritime Executive*, 1 February 2018) <https://www.maritime-executive.com/corporate/lack-of-due-diligence-on-ballast-water-treatment-could-prove-expensive> accessed 29 December 2018.

[260] ibid.

[261] Niko Wijnolst and Tor Wegeland (n 228) 543.

more industry involvement is required in order to develop standards that fit the needs of both the shipowners and the standards of the government.

Finally, the International Standards Organisation ("ISO"), who has been involved in ballast water management for years, can be leveraged on to provide a link connecting 'IMO regulations and requirements and what industry really needs'.[262] For instance, the ISO 11711 deals with sampling and compliance of ballast water standards concerning IMO Regulation D-2. By bringing ship operators on the same page, this will solve the inadequacy of the efficacy of biodata and promote greater compliance. Trade associations should also come together to reflect their concerns and provide suggestions collectively to the government. Therefore, a government-industry agreement will be helpful in eliminating the lack of consensus among stakeholders in relation to what is expected from both the government and the industry. This will also cut down governmental costs by shifting the regulatory burden onto the industry.

V. Conclusion

This article has advanced arguments as to why the UK government should recognise the dangers and potential impacts associated with IAS on biodiversity and the economy, as well as arguing for the prioritisation of prevention and early intervention, as opposed to mitigation once IAS has been established. Currently, the lack of mandatory compliance under the MCA Guidance 1998 is insufficient to adequately enforce the BWM Convention, therefore this must be considered a priority by the government; indeed, accession of the BWM Convention in a timely manner would only help safeguard the

[262] *Ballast Water Treatment Technology* (Riviera Maritime Media 2018) 41.

UK waters from the threats of IAS. Once the BWM Convention is enacted into domestic law, an independent monitoring system is crucial to ensure shipowners' compliance. Moreover, this article emphasises the importance for the UK to maintain a close relationship with EEA and DAISIE post-Brexit for the continuance of information exchange and the alignment of tactics to control IAS. Finally, a greater awareness and understanding of IAS should be instilled in the shipping industry itself to allow for better cooperation with the government's initiative in preventing and eradicating IAS.

Ultimately, it is important that all stakeholders have the same goal – to protect the UK marine biodiversity from IAS.

The Defamation Act 2013: A matter of interpretation in the ongoing battle between free speech and the right to reputation

Hannah Claire Dykes [263]

The battle between free speech and right to reputation has been the subject of much contention within the English law of defamation, sparking legislative change via the implementation of the Defamation Act 2013. While the intention of its enactment was to achieve a fairer balance between the conflicting rights, there has been a lack of clarity surrounding many aspects of the Statute, and much has been left to judicial interpretation. This paper argues that, while many aspects of the Defamation Act 2013 do, on the face of things at least, enhance freedom of expression and achieve a greater balance between rights, several of the Act's provisions merely partially codify existing common law principles. Instead, it is only in tandem with the case law surrounding the statute that a fairer balance can be achieved.

I. Introduction

The Defamation Act 2013 was passed in an attempt to reform the 'chilling effect' of libel law[264] by allowing online commentators, journalists, and the public at large, to engage in legitimate debate and comment without a fear of undue legal repercussions.[265] It was previously believed by the Government and campaigners alike that the English law of defamation was far too claimant-friendly, having the effect of eroding freedom of expression and suppressing legitimate debate.[266] This can be

[263] LLB Candidate, University of Manchester, Department of Law.
[264] Free Speech is Not for Sale (*Libel Reform Campaign*, 2009) <http://www.libelreform.org/our-report> accessed 18 March 2019.
[265] Alastair Mullis, "Tilting at Windows: The Defamation Act 2013" [2014] 77 MLR 87, 87.
[266] (n 264).

supported by a statement made in the Coalition Agreement, following the 2010 General Election, which stated that 'there was a need to review libel law to protect legitimate free speech.'[267] The Act was indeed intended to "ensure a fair balance is struck between the right to freedom of expression and individuals' ability to protect their reputation."[268] Rather than drastically reforming the English law of defamation, however, this article argues that several of the Act's reforms amount to a partial codification of the common law.

This article's primary focus is on three specific reforms: the 'serious harm' requirement in part II;[269] the defence of public interest in part III;[270] and the defence of honest opinion in part IV,[271] concluding that such implementations leave the law very much open to interpretation by the courts. More room for flexible interpretation is achieved, which appears to allow courts to give due consideration to both freedom of expression and right to reputation. Any fairer balance between the two rights, however, has not been achieved by virtue of the Act alone.

Part V briefly addresses the "single publication"[272] rule and the defence of qualified privilege for publications in academic and scientific journals,[273] arguing that both reforms

[267] HM Government, *The Coalition: Our Programme for Government* (May 2010) <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/78977/coalition_programme_for_government.pdf > accessed 24 April 2020.
[268] Clive Coleman, Defamation Act 2013 aims to improve libel laws (*BBC News*, December 2013) <https://www.bbc.co.uk/news/uk-25551640> accessed 18 March 2019.
[269] Defamation Act 2013 (DA 2013), s 1(1).
[270] ibid s 4.
[271] ibid s 3.
[272] ibid s 8.
[273] ibid s 6.

are welcome in protecting freedom of expression, though perhaps could have been implemented more strongly to that effect.

II. The requirement of "Serious Harm"

An important result of the Defamation Act 2013 is the addition of a statutory threshold of harm which must be attained before actions in defamation can succeed. Under Section 1(1) of the Act, 'a statement is not defamatory unless its publication has caused or is likely to cause *serious harm* to the reputation of the claimant.'[274] In the case of bodies that trade for profit, the onus is even greater, with a more specific threshold of 'serious financial loss.'[275] This provision seems to 'raise the bar for bringing a claim,'[276] by placing a far greater onus upon the claimant to prove that the statement in question is, in fact, defamatory.

Moreover, the Section *prima facie* constitutes an abrogation from the commonly held principle that libel is actionable *per se*, thus weighing the scale more heavily towards freedom of expression. Nonetheless, one must consider the grandeur of this claim, particularly in relation to case law which existed prior to the implementation of the Act. Upon closer examination of the common law, it becomes evident that a threshold of seriousness had already been required for claims in defamation, suggesting that the Act has merely partially codified existing common law principles. In fact, the Explanatory Notes to the Act state that the requirement of

[274] (n 269). Emphasis added.
[275] ibid s 1(2)
[276] Explanatory Notes to the Defamation Act 2013 [11].

serious harm is intended to simply 'build on the consideration given by the courts in a series of cases, to the question of what is sufficient to establish that a statement is defamatory.'[277] Although the Explanatory Notes do subsequently express that the intent of the Act was to '[raise] the bar for bringing a claim,'[278] it is clear from the case law preceding the Act that the stepping stones to reform were laid out many years before the Act's implementation.

This can be seen in relation to *Thornton v Telegraph Media Group Ltd*,[279] a case decided three years prior to the Act's implementation, in which Justice Tugendhat established a 'threshold of seriousness' test applicable to defamatory statements.[280] To be defamatory, a statement must 'substantially'[281] cause harm to the defendant's reputation. In addition to this, the earlier case of *Jameel Yousef v Dow Jones & Co. Inc.*[282] had already introduced a procedural threshold requirement that damage must be more than minimal.[283] Therefore, a requirement had already been imposed upon the claimant to demonstrate, either by furnishing evidence or by establishing an inference, that substantial harm would result as a consequence of the defamatory statement. The statutory requirement of 'serious harm' indeed appears correspondent to that prescribed in earlier common law.

However, opponents to this argument may contend that the Act does, in fact, place a greater burden upon the claimant, thus augmenting freedom of expression, since Section 1(1)

[277] ibid.
[278] ibid.
[279] [2010] EWHC 1414 (QB).
[280] ibid [90-94].
[281] ibid [95].
[282] [2005] EWCA Civ 75.
[283] ibid [6].

makes reference to 'serious' and not simply 'substantial' harm. This was noted by Justice Warby in the High Court judgement of *Lachaux v Independent Print Ltd*[284] who held that Section 1 was 'clearly more demanding'[285] than the test established in *Thornton*, with the phrase 'likely to cause' being read as 'denoting more probable than not.'[286] This would seem to imply that the Defamation Act 2013 has enhanced the balance between freedom of expression and a right to reputation by imposing a more stringent requirement than the common law, rendering libel no longer actionable *per se*. This reads in accordance with Justice Bean's judgement in *Cooke v MGM Ltd*,[287] which emphasised in clear terms that serious harm involves a much higher threshold than that of substantial harm.[288] Moreover, it was recognised that evidence may be required to satisfy the requirement of serious harm,[289] marking a departure from the previously established common law principles.

Contrastingly, the Court of Appeal in *Lachaux*[290] reversed such an imputation, with Justice Davis having argued that such a radical departure from the principle that libel is actionable *per se* in tort was not within the intentions of Parliament.[291] According to Bennett,[292] the terms 'likely' and 'has a tendency to' have been used interchangeably and, as such, Section 1 'must be interpreted as imposing no more

[284] [2015] EWHC 620 (QB).
[285] ibid [29].
[286] ibid [34].
[287] [2014] EWHC 2831 (QB).
[288] ibid [37].
[289] ibid [38].
[290] [2017] EWCA Civ 1334.
[291] ibid [58].
[292] Thomas Bennett, 'Why so serious? Lachaux and the threshold of 'serious harm' in section 1 Defamation Act 2013' [2018] 10 Journal of Media Law 1, 10.

stringent a requirement than the common law previously imposed.' It indeed remains true that harm may be adduced by inference where a statement is 'so obviously likely to cause harm to a person's reputation.'[293] This is a view endorsed even after the Act's implementation. In *Tinkler v Ferguson*,[294] Lord Justice Longmore held that an inference of serious harm could be possible, albeit on the facts of the case no such inference was found. This appears to contradict the viewpoint that the Defamation Act 2013 has imposed a greater burden upon the claimant than that of common law, with claimants facing a battle no more arduous than that faced prior to the Act. When the Draft Bill preceding the 2013 Act was under discussion, it was indeed stated that Section 1 was merely intended to 'reflect the existing law…rather than a stricter meaning that makes it harder to bring a libel claim.'[295]

Lachaux was revisited by the Supreme Court in 2019,[296] and although the appeal was dismissed on the facts, the court interpreted Section 1(1) to not only have raised the threshold of seriousness beyond that established in *Thornton* and *Jameel*, but also required the harm to be 'determined by reference to the actual facts about its impact and not just to the meaning of the words.'[297] Herein lies the partial codification, and the modification to the common law threshold of harm. Lord Sumption delivering the unanimous judgement stated that:

> Section 1 necessarily means that a statement which would previously have been regarded as defamatory, because of its

[293] *Jameel* (n 279) [43].
[294] [2019] EWCA Civ 819 [28].
[295] Joint Committee on the Draft Defamation Bill, *First Report: Draft Defamation Bill* (2011-12, HL 203, HC 930-I) 27.
[296] [2019] UKSC 27.
[297] ibid [12].

> inherent tendency to cause some harm to reputation, is not to be so regarded unless it 'has caused or is likely to cause' harm which is 'serious.'[298]

The court went further, concluding that this must be determined by reference to 'the actual facts about its impact and not just the meaning of the words.'[299]

Some may argue that this effect of the Act has tangibly altered the English law of defamation and has, in turn, enhanced the protection of freedom of expression. If a statement's degree of harm is no longer dependent solely on the words themselves, defamation claims reliant on words alone will be more likely to fail. However, the impact of the Supreme Court's decision is not as radical as one might expect. Although an inference can now no longer be deduced based on words alone – something which indeed favours freedom of expression – the court also acknowledged that inferences of fact can be drawn from the circumstances surrounding the statement, such as the scale of the publication and the gravity of the statements made.[300]

As stated by Lord Sumption, the serious harm requirement cannot be seen as 'a revolution in the law of defamation, any more than the lower thresholds of seriousness introduced by the decisions in *Jameel* and *Thornton* effected such a revolution.'[301] In this respect, His Lordship's remarks can be read to support the argument that the Act has led to the partial codification of pre-existing common law principles. The Act in isolation has not enhanced the protection of freedom of

[298] ibid [14].
[299] ibid [12].
[300] ibid [21].
[301] ibid [14].

expression but, by partially codifying the common law, this has allowed for judicial interpretation in the definition of its terms. This is critical, as it permits the law to be flexible and adaptable, which should in turn allow for the consideration of both the right to reputation and freedom of expression.

Section 1(2) of the Act, on the other hand, can be seen to go much further in enhancing freedom of expression by making it considerably more difficult for bodies trading for profit to bring a successful claim. Under Section 1(2), a body which trades for profit is required to evidence that the claimant is likely to suffer 'serious financial loss.' This appears to be a radical change in the law, and one which seems to alter the viewpoint held in *Jameel*, in which a corporate body 'does not have to allege or prove special damage in order to establish a cause of action. Once the defamation is proven, damage is presumed.'[302]

The change of the law in this respect, and the requirement that the claimant must be likely to suffer 'serious financial loss,' appears to have been intended to make it more challenging for claimants who trade for profit to bring a successful claim. However, it is difficult to determine how successful this provision has been in achieving this, since there has been little scrutiny of Section 1(2) and its interpretation through case law since its enactment.

It should also be noted that the court in *Euroeco Fuels (Poland) Ltd & Ors v Szczecin And Swinoujscie Seaports Authority SA & Ors*[303] held that there was no reason why 'serious financial loss,' like 'serious harm,' could not be

[302] *Jameel* (n 279) [3].
[303] [2018] EWHC 1081 (QB).

inferred from the evidence surrounding the publication.[304] Even so, there have been few defamation claims brought by companies since the Act was passed, perhaps evidencing a lack of controversy surrounding the "serious financial loss" threshold. That being said, companies rarely brought claims in defamation even before the Act, particularly in the wake of the *McLibel*[305] case, which garnered a significant amount of hostile publicity due to the inequalities faced by the respondents in fighting a multinational corporation.[306] It is therefore difficult to conclude that Section 1(2) has radically changed the law.

While the inclusion of Section 1 has undoubtedly clarified the law in this area and protects legitimate debate in a greater capacity, it cannot be said that the implementation of the Act in isolation has caused this. It is evident that, in the years prior to the Act, steps had already been taken to establish a threshold of seriousness test. This no doubt paved the way to the eventual statutory inclusion of the "serious harm" requirement and greater protection of freedom of expression. Consequently, the Defamation Act 2013 cannot be wholly radical in this respect. Section 1(2) can be viewed as bringing a far greater apparent change to the law with the requirement that bodies trading for profit must be likely to suffer "serious financial loss." This is despite case law preceding the Act failing to establish a threshold of seriousness for companies bringing a claim, thus illustrating a much more significant change in the law. Nevertheless, it is difficult to conclusively establish how much impact this has had in practice, given the low numbers of claims in defamation made by companies.

[304] ibid [71].
[305] *McDonald's Corporation v Steel & Morris* [1997] EWHC QB 366.
[306] BBC, 'McLibel: Longest case in English history' (*BBC News*, February 2005) <http://news.bbc.co.uk/1/hi/uk/4266741.stm> accessed 19 July 2020.

It is clear from the arguments outlined above that although Section 1 and the "serious harm" requirement have helped to clarify the law, the Act itself has not been the sole component in ensuring a balance between free speech and one's right to a reputation. It is through a combination of both the statute and the case law surrounding it that change has ensued. What the Act has done is partially codify common law principles, leaving much to judicial interpretation. This allows the law to adapt with flexibility and will hopefully ensure that the rights to both reputation and expression are duly considered when future judgements are handed down by the courts.

III. The defence of public interest

Another key reform pursued by the Defamation Act 2013 has been the defence of 'public interest'[307] under Section 4. At its core, the defence has, the protection of responsible journalism, and allows a safeguard for those who publish material which they reasonably believe to be in the public interest. While *prima facie* this appears to be a welcome development of the law, which would no doubt enhance freedom of expression, it is argued that this is merely a codification of the common law and the now abolished[308] '*Reynolds* privilege.'[309] The Explanatory Notes of the Act confirm that the defence 'is based on the existing common law defence established in *Reynolds v Times Newspapers*, and is intended to reflect the principles in that case and subsequent case law.'[310]

The core objective of the statutory defence of public interest closely aligns with the judgement in *Flood v Times*

[307] DA 2013, s 4.
[308] ibid s 4(6).
[309] *Reynolds v Times Newspapers Ltd*. [2001] 2 AC 127 (HL).
[310] ibid [29].

Newspapers Ltd,[311] another case decided prior to the Act. Lord Brown described the central question of the common law defence as follows:

> could whoever published the defamation, given whatever they knew (and did not know) and whatever they had done (and had not done) to guard so far as possible against the publication of untrue defamatory material, properly have considered the publication in question to be in the public interest?[312]

The statutory defence can be applied regardless of whether the statement was one of fact or opinion,[313] something which favours freedom of expression greatly. However, it is important to note that, while a statutory action did not exist prior to 2013, the principles codified in the Act appear to achieve the same objective as the principles established in *Reynolds*.

Be that as it may, Section 4(2) of the Act appears to go further by clarifying that 'the court must have regard to all the circumstances of the case.'[314] Further to this, Hooper argues that the statutory defence is now far wider than that of the *Reynolds* privilege, and thus allows for greater flexibility, therefore leading to greater protection of freedom of expression in the media sphere.[315]

This is perhaps most evident in Section 4(4) of the Act. It states that, "in determining whether it was reasonable for the

[311] [2012] UKSC 11.
[312] ibid [113].
[313] DA 2013, s 4(5).
[314] ibid s 7(2).
[315] David Hooper and others, 'The New Defamation Act 2013: What Difference Will It Really Make?' (*Media Law Resource Centre*) <http://www.medialaw.org/component/k2/item/1815> accessed 19 March 2019.

defendant to believe that publishing the statement complained of was in the public interest, the court must make such allowance for editorial judgement as it considers appropriate."[316] This seems to address previous criticisms of the *Reynolds* privilege, seen to have a detrimental effect on the reporting of legitimate matters of public interest and eroding freedom of expression. Subsection 4 appears to enhance freedom of expression by making an allowance for editorial judgement in the determination of whether the statement was within the public interest.

Despite this, it is submitted that such a principle is simply a codification of the judgement in *Flood*[317] in which Lord Mance stated that 'while the court must have the last word in setting the boundaries of what can properly be regarded as acceptable journalism, within those boundaries the judgement of a responsible journalist and an editor merits respect.'[318] This statement no doubt strengthens freedom of expression in favour of the media, but such an expansion of protection cannot solely be attributed to the implementation of the Act.

This viewpoint is supported by *Economou v De Freitas*,[319] the first case in which the defence of public interest under Section 4 of the Defamation Act was used. In this case, Justice Warby argued that the defendant's conduct fell far short of the abolished *Reynolds* privilege,[320] and yet the defence still succeeded. It was argued that the defendant could be held to this lower standard because he was not a journalist. This seems to suggest that Section 4 of the Defamation Act has protected

[316] (n 313) s 4(4).
[317] *Flood* (n 311).
[318] ibid [137].
[319] [2016] EWHC 1853 (QB).
[320] ibid [139].

free speech more strongly than the *Reynolds* privilege, making the English law of defamation less favourable to claimants.

The decision in this case was taken to the Court of Appeal,[321] which reached the same conclusion in holding that the defence, under Section 4, could be applied to the case. While the appeal was made on the grounds that Justice Warby had erred when considering all the circumstances of the case, the appeal was subsequently dismissed. This might evidence an enhanced protection of expression resulting from the Act. However, the impetus for this change has not stemmed from the Act in isolation. Instead, judicial interpretation of both the Act itself and the surrounding case law has played a central role in protecting freedom of expression.

Moreover, the case went further in establishing that such a defence was not restricted solely to cases involving the mainstream media, but could also be used as a defence for contributors, who could be held to a lower standard than that of a journalist.[322] Similarly, in *Doyle v Smith*,[323] the High Court confirmed that the public interest defence could be invoked by bloggers and amateur journalists online. This represents a significant shift towards the protection of freedom of expression, particularly considering the growing importance online activities play in the dissemination of information in the modern age.

In *Economou*, Lady Justice Sharp further highlighted the importance of the defence and its impact on freedom of expression in her Court of Appeal judgement, stating that the

[321] *Economou v De Freitas* [2018] EWCA Civ 2591.
[322] ibid [104].
[323] [2018] EWHC 2935 (QB) HC.

importance of freedom of expression to a functioning democracy:

> concerns the freedom to receive information as well as to impart it … The importance of the right in this arena is what led to the recognition of the *Reynolds* defence, and to the subsequent enactment of the public interest defence.[324]

However, although the judgement indicates that Section 4 did not explicitly give reference to the list of ten non-exhaustive factors relevant to determining "responsible journalism" identified in *Reynolds*, Lady Justice Sharp alludes to the way in which the matters identified in the *Reynolds* factors can, and will, remain relevant to the outcome of a public interest defence.[325] *Reynolds* indeed enjoys continued relevance to the interpretation of Section 4. In truth, the basis of a public interest defence existed in *Reynolds* as a common law principle long before the Defamation Act 2013 was enacted.

It remains true that much has been left to judicial interpretation, and the partial codification of the defence has, in fact, done little to clarify or enhance pre-existing protections. Instead, the Defamation Act 2013 should be seen as a supplement to the existing case law, which had already made significant progress in altering the balance between freedom of expression and the right to reputation.

[324] ibid [110].
[325] ibid.

IV. The defence of honest opinion

Perhaps one of the most significant reforms of the Defamation Act 2013, and one which no doubt culminates in a greater protection of freedom of expression, is the new statutory defence of 'honest opinion.'[326] The statutory defence replaces the now abolished common law defence of 'fair comment.'[327] It has four elements, applying to a (i) statement of opinion, which (ii) indicates the basis of such opinion and (iii) which an honest person could have held (iv) on the basis of any fact, or asserted fact, at the time prior to publication. This must be in the absence of malice.[328] Such a defence clearly indicates an intention to enhance freedom of expression. '[A] critic need not be mealy-mouthed in denouncing what he disagrees with ... [but rather is] entitled to dip his pen in gall for the purposes of legitimate criticism.'[329]

It may be argued that this statutory provision, like the others implemented by the Act, is merely a codification of the existing common law. The defence, under Section 3, simply builds upon the judgement expressed in *Joseph v Spiller*[330] and, as stated in the Explanatory Notes to the Act, 'broadly reflects the current law, while simplifying and clarifying certain elements.'[331] One may also suggest that the defence of fair comment has always been seen as one of the fundamental ways in which freedom of expression has been guaranteed and, as such, only marginal change has ensued as a result of the Act's implementation. As stated by Lord Justice Bingham (as he then

[326] DA 2013, s 3.
[327] ibid s 3(8).
[328] ibid.
[329] *Tse Wai Chun Paul v Albert Cheng* [2001] EMLR 777 [20].
[330] [2009] EWCA Civ 1075.
[331] At [19].

was) in *Brent Walker Group v Time Out*,[332] the defence of fair comment has always been an 'essential element of free speech.'[333] This can be supported by the decision in *Butt v Secretary of State for the Home Department*,[334] in which Justice Nicol alluded to the way in which much of Section 3 merely codified the pre-existing defence of fair comment. His Lordship also made clear the way in which the principles previously established at common law, would continue to be applicable to the Section 3 defence.[335]

Nevertheless, there is a clear point of difference between the statutory defence to the old defence of fair comment. While the common law defence referred to the need that the comment be on a matter of 'public interest,'[336] Section 3 contains no such provision. An obvious consequence of the Act's omission of this substantive requirement is an easier defence to establish. Further to the point, Section 3 protects not only assertions of fact, but also honestly held opinions. Prior to the Defamation Act 2013, the common law defence required that the defendant must have known of the facts which led to the comment being made. However, under the statutory provision it is enough that 'an honest person could have held the opinion on the basis of any fact that existed at the time the statement complained of was published';[337] this appears to have 'radically alter[ed] the nature of the defence.'[338]

[332] [1991] 2 QB 33.
[333] ibid [44].
[334] [2017] EWHC 2619 (QB).
[335] ibid [16].
[336] *Joseph* (n 330) [64].
[337] DA 2013, s 3(4).
[338] *Joseph* (n 330).

The decision reached in *Butt*[339] was put on appeal.[340] Although the appeal was dismissed, the court also highlighted the long-standing principle that inferential statements of fact constitute comment, which could be protected under Section 3.[341] It emphasised that even if a statement can be objectively proven true, this does not prevent it from being protected under Section 3.[342] Instead, the statement must be considered in 'its immediate and wider context,'[343] and in this instance it was an evaluative judgement. This clearly evidences an enhanced protection of freedom of speech by giving the defence a far wider scope.

Whether such immense protection will exist in the sphere of social media is yet to be seen and, as stated by Mullis, 'the utility of the honest comment defence to social media commentators is significantly less than might otherwise have been the case.'[344] On the whole, however, the statutory defence of honest opinion has supplemented the principles established at common law and quite clearly heralded a stronger protection of freedom of speech.

V. Other provisions

In addition to the key reforms outlined above, under Section 8 of the Act a 'single publication' rule has been introduced.[345] This has arguably modified the law quite notably in favour of defendants, by preventing infinite liability for online

[339] *Butt* (n 334).
[340] [2019] EWCA Civ 933.
[341] ibid [51].
[342] ibid [37].
[343] ibid [47].
[344] Mullis (n 265).
[345] DA 2013, s 8.

publications. Under the Limitation Act 1980,[346] the time limit for bringing a claim in defamation is one year from the date of publication. This meant that, prior to the Defamation Act 2013, every publication of the defamatory statement gave rise to a separate cause of action. This was particularly problematic for online publications, with each access of material potentially giving rise to a new claim. Under Section 8, however, any cause of action is to be treated as having accrued at the date of the first publication.[347] This abolishes the indefinite liability claimants could have relied upon, thereby protecting freedom of expression to a greater extent.

However, under Section 8(4), the single publication rule does not apply to subsequent publications if the manner of that publication is materially different to that of the original. Factors the court may have regard to in determining this include the level of prominence and the extent of the subsequent publication. This means that if a statement was initially posted somewhere where it garnered very little attention but was then posted at the top of the same webpage for instance, the second publication could be deemed materially different, potentially allowing claimants to circumvent the rule. Section 8's protection of freedom of expression may not be as effective as first thought, although the inclusion of this rule clearly increases the difficulty of bringing an action. Nonetheless, if the content is changed in its meaning or in its context, it is highly likely that this will trigger a new limitation period,[348] and at this instance it could be argued that the single publication rule falls short in protecting defendants' exercise of free expression.

[346] Limitation Act 1980, s 4A.
[347] DA 2013, s 8(3).
[348] LA1980, (n 346).

Moreover, the court's discretion to extend the limitation period under the Limitation Act 1980[349] is retained,[350] and it seems that the "single publication" rule is only applicable if the same publisher subsequently republished the material; notably, it does not apply to third parties. Consequently, it could be argued that, although it is most definitely a welcome change in the law, the single publication rule does not go far enough in protecting defendants and freedom of expression more generally.

Another welcome change wrought by the implementation of the Defamation Act 2013 has been contained in Section 6, which provides qualified privilege to those publishing in scientific and academic journals. This defence was introduced as a means to prevent the stifling of legitimate and beneficial academic debate.

To be eligible for this defence, the statement must be related to an academic or scientific matter,[351] which has been the subject of an independent review by a journal editor or experts on the subject to establish its academic merit.[352]

This defence can be defeated, however, if it can be shown that the statement was made with malice.[353] This has definitely proven to be a welcome defence and one which was no doubt inspired by the case of *British Chiropractic Association v Singh.*[354] In this case, a writer who specialised in

[349] ibid s 32A.
[350] ibid s 8(6)(a).
[351] DA 2013, s 6(2).
[352] ibid s 6(3).
[353] ibid.
[354] [2010] EWCA Civ 35.

science writing was sued because it was argued that he had accused the claimant of promoting 'bogus treatments,'[355] and while the basis of this case was the defence of fair comment, it served as an impetus for the inclusion of a defence which protected those who published opinions in an academic journal. This can most evidently be seen in Lord Judge's stance[356] on the matter and his agreement with the notion that plaintiffs 'cannot, by simply filing suit and crying "character assassination!," silence those who hold divergent views no matter how adverse those views may be to plaintiffs' interests,' as expressed also by Judge Easterbrook in the US libel case of *Underwager v Salter*.[357]

Furthermore, Lord Judge highlighted the way that freedom of speech was stifled prior to the Defamation Act 2013 by suppressing 'public debate which might otherwise have assisted potential patients to make informed choices about the possible use of chiropractic.'[358] Therefore, the inclusion of a defence for those who comment in peer-reviewed scientific or academic journals, under Section 6 of the Defamation Act 2013, clearly enhances the protection of freedom of speech in this arena. It may be argued, however, that the statutory defence has not gone far enough – it is confined only to peer-reviewed academic and scientific journals and excludes academic debate more widely. However, it must be said that the absence of any cases on this matter at present may appear to indicate the success of Section 6 in protecting free speech in this field.

[355] ibid [1].
[356] ibid [34].
[357] 22 F.3d 730 (7th Cir. 1994).
[358] *Singh* (n 354) [11].

VI. Conclusion

While the Defamation Act 2013 has clearly sought to create a fairer balance of rights, the Act itself has simply built upon the existing principles established at common law. The serious harm requirement does little to clarify what may be defined as "serious harm" and appears to be incidental to the common law requirements which had already been established. It is difficult to say whether the Act alone has placed a greater burden upon claimants wishing to bring a claim in defamation. The Court of Appeal in *Lachaux* understood that the Act had not placed a greater burden upon claimants, and that Section 1(1) was not a radical modification of the law.

While the Supreme Court decision concluded that serious harm could not be adduced from words alone, a decision which does place a slightly greater burden upon the claimant, Lord Sumption shared the viewpoint that the Defamation Act 2013 was not in fact a radical alteration of the law but instead represented a partial codification of existing common law principles. Section 1 of the Act in isolation has only partially codified common law principles; it is apparent that the inherent meaning of "serious harm" has been decided and clarified by the common law, and not simply by statute alone.

Furthermore, the defence of public interest similarly appears to codify existing law. While the defence no doubt enhances the protection of freedom of expression, such an enhancement cannot be solely attributed to the implementation of the Act. Therefore, it is doubtful that the Act itself has radically altered the balance between the two conflicting rights. The defence of honest opinion seems to be the one provision of the Act which seems to have most drastically altered the

balance – in particular the abolition of the requirement that the opinion must be one of "public interest."

Another welcome change has been the introduction of the "single publication" rule in Section 8, but again, although a statutory footing has been helpful in protecting freedom of expression, the rule alone has arguably not gone far enough. Much is left to the discretion of the courts, and it is difficult to conclude that Section 8 has been a helpful addition to the fullest.

Similarly, while the inclusion of a defence which protects those who comment in peer-reviewed academic and scientific journals has been welcomed and has paved the way for greater protection of free speech in this area, it could have arguably been bolder in doing so.

As stated by Mihaita, 'the Utopian Idea that an Act could create a real balance on paper is unhealthy and impossible,'[359] and this is exemplified by the way in which the Act has been largely left open to interpretation. While the Act does much in the way of codifying the existing law, a real balance of power cannot be achieved without the existence of case law and, as such, to say the Act itself has achieved a greater balance between expression and reputation would be false. Instead, recent clarifications surrounding the Act have gone further in helping to achieve this balance.

[359]Anamaria-Mitina Mihaita, 'Defamation Act 2013: Free Speech or Reputation?' (*North East Law Talk*, 25 June 2013) <https://blogs.ncl.ac.uk/nelr/2013/06/25/defamation-act-2013-free-speech-or-reputation/> accessed 20 March 2020.

Chasing the Ideal: Anabolic and androgenic steroid use amongst male adolescents in the UK

Paul Anthony Wardle [360]

There is no doubt that recent years have witnessed a rise in the number of people using image and performance enhancing drugs (IPEDs). Once reserved for competitive athletes, IPED use has 'transcended the elite sporting arena and is now predominantly found among non-elite, recreational gym-goers'. Such use is especially notable amongst adolescent males, who are turning to the use of these substances in a bid to obtain the 'ideal physique'. Still, notwithstanding the continued increase in use—and the myriad of associated physiological and psychological harms—research surrounding IPED use amongst non-competitive male adolescents is scarce and there remains a distinctive gap in literature with respect to this group. In an attempt to draw attention to this often neglected group of users, this paper sets out to use an adaptation of Rhode's 'risk environment' as a conceptual framework to explore the intersectionality that exists between recent societal changes (including gender capital, neoliberalism, and consumerism), the effects of these changes on the underlying motives behind use, and the resultant implications on intervention efforts. Opting to look at those young men who abuse these substances merely for aesthetic reasons will allow for more targeted intervention practices, which in turn will maximise both harm reduction and prevention. Further, by highlighting recent societal changes as having contributed toward an increasing number of adolescent males striving for enhanced physiques, it is shown that the underlying motives behind IPED use are far more complex than the current literature suggests.

I. Introduction

It has been well documented, albeit with some degree of ambiguity, that the popularity of image and performance enhancing drugs (IPEDs) in the UK has grown exponentially in

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the past three decades.[361] What was once largely confined to competitive athletes has now 'transcended the elite sporting arena and is now predominantly found among non-elite, recreational gym-goers.'[362] Moreover, recent years have witnessed a particular rise in the number of adolescents using IPEDs, especially anabolic and androgenic steroids (AAS). More and more, young men are turning to the use of these substances in a bid to obtain the 'ideal physique'.[363] Still, despite this increased occurrence, the research surrounding IPED use amongst adolescents remains scarce. As a result, whilst it is acknowledged that there is a growing body of literature surrounding IPED use more generally, there remains a distinct gap with respect to prevalence and motivations behind AAS use amongst non-competitive male adolescents.

In an attempt to address this gap and enhance the existing knowledge surrounding AAS use amongst this group, this article sets out to explore the intersectionality that exists between recent societal changes, the effect of these changes on the underlying motives behind use, and the resultant implications on intervention. It does this over three key sections: background, theoretical framework, and discussion.

[361] See below (n 362).

[362] Mike Salinas, William Floodgate and Rob Ralphs, 'Polydrug use and polydrug markets amongst image and performance enhancing drug users: Implications for harm reduction interventions and drug policy' (2019) 67 International Journal of Drug Policy 43. See further Jim McVeigh, Geoff Bates and Martin Chandler, 'Steroids and Image Enhancing Drugs: 2014 National Survey Results' (National IPED Survey, CPH 2015) 2; Gisella Santos and Ross Coobmer, 'The risk environment of anabolic–androgenic steroid users in the UK: Examining motivations, practices and accounts of use' (2017) 40 International Journal of Drug Policy 35, 1.

[363] It is acknowledged that the same is true for young women (and a great portion of society more generally); however, due to the implications on targeted intervention, a discussion of these groups is left for another forum.

Firstly, in providing a background to AAS use, it is shown that the shift toward AAS use being predominantly found among "recreational gym-goers" has been accompanied by a shift that has resulted in primary motives for use being grounded in an internalised drive for muscularity and leanness (i.e. aesthetics as opposed to performance). Additionally, within this section, the key harms associated with AAS use during adolescence are outlined, highlighting AAS use amongst this group as being a public health issue (despite seemingly low frequency rates).

Secondly, a theoretical framework is provided in which the key concepts and theories drawn upon in the discussion are outlined and defined. This includes an outline of Rhode's 'risk environment'[364] as a conceptual framework, alongside a brief exploration of gender capital, neoliberalism and consumerism—all of which are used within the following discussion.

Finally, there is a discussion that aims to explore and analyse the intersectionality between recent societal changes and their influence on user motives. By highlighting recent societal changes as having contributed toward an increasing number of adolescent males striving for enhanced physiques, it is shown that the underlying motives behind AAS use are far more complex than the current literature suggests. Then, having considered the complexities of these underlying motives, an attempt is made to provide a framework on which future, evidence-based targeted intervention efforts can be made with respect to this group of users.

[364] Tim Rhodes, 'The 'risk environment': a framework for understanding and reducing drug-related harms' (2002) 13 International Journal of Drug Policy 85.

Before continuing, it is necessary to clarify the scope of this article. The term 'IPED 'encompasses a wide range of substances taken to enhance one's physical performance and alter one's appearance.[365] These can be licit, which include a range of over-the-counter supplements,[366] or illicit, such as AASs, peptides, hormones, melatonin II and human growth hormone (HGH).[367] For the purposes of this article, discussion is limited to the use of AASs.[368] Furthermore, consideration is given exclusively to non-competitive male adolescents, that is, young men aged 14 to 19 whose primary motivations are grounded in aesthetics as opposed to performance or athleticism. The purpose of this is twofold. Firstly, AAS users are not a homogenous group. Motives, practices and intervention requirements all change throughout one's lifespan. As such, limiting focus to this specific group of users will allow for a more in-depth understanding of motives and prevalence in what is otherwise a largely neglected group. While rates may be low, they are not negligible. Secondly, considering the heterogeneity of users, opting to look at those young men who abuse these substances merely for aesthetic reasons will allow for more targeted intervention practices, which in turn will maximise both harm reduction and prevention.

[365] G. Antonopoulos and A. Hall, ''Gain with no pain': Anabolic-androgenic steroids trafficking in the UK' (2016) 13 European Journal of Criminology 696; Geoff Bates and Jim McVeigh, 'Image and Performance Enhancing Drugs: 2015 National Survey Results' (National IPED INFO Survey, CPH 2016); Emma Begley, Jim McVeigh, Vivian Hope, 'Image and Performance Enhancing Drugs: 2016 National Survey Results' (National IPED INFO Survey, PHI 2017). N.b. Additionally, some IPEDs are used to increase cognitive ability, such as methylphenidate.

[366] For example, protein, creatine monohydrate, amino acids, vitamins.

[367] N.b. AASs are categorised as Class C substances under the Misuse of Drugs Act 1971, being legal to possess for personal use but illegal to buy, sell, transfer or distribute.

[368] Any reference to steroids hereinafter refers to anabolic and androgenic steroids ('AAS'). This is not to be confused with corticosteroids, the anti-inflammatory medicine that reproduce hormones normally produced by the adrenal glands.

II. Background

The misuse of AASs can be traced back as early as the 1950s when bodybuilders, such as Larry Scott, used early forms of these substances in a bid to gain levels of muscularity and leanness otherwise unobtainable naturally.[369] The use of these substances did not enter the spotlight, however, until the 1956 Olympics when Russian athletes reportedly took testosterone in order to gain a competitive advantage over their competition.[370] Following this, the late 1980s saw AAS use 'transcend the elite sporting arena' [371] and enter into the general population.[372] As a result, the 1990s witnessed a significant increase in the popularity of these substances amongst recreational users; what was once largely confined to the realm of competitive sports was now being used by non-competitive groups in the UK [373] in a bid to enhance their physiques.[374]

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[369] This is in reference to AAS and not other IPEDs, which can be traced back much further. See E. Freeman, D. Bloom and E. McGuire, 'A brief history of testosterone' (2001) 165 Journal of Urology 371; M. Altschule and K. Tillotson, 'The use of testosterone in the treatment of depressions' [1948] New England Journal of Medicine 1036.

[370] N. Wade, 'Anabolic Steroids: Doctors Denounce Them, but Athletes Aren't Listening. Science' (1972) 176 Science 1399 as cited in Government, *'Steroids and Other Appearance and Performance Enhancing Drugs (APEDs): What is the history of anabolic steroid use?'* (National Institution of Drug Abuse, no date) <https://www.drugabuse.gov/publications/research-reports/steroids-other-appearance-performance-enhancing-drugs-apeds/what-history-anabolic-steroid-use> ~~accessed 09 May 2019~~.

[371] See (n 362).

[372] Buckley and others, 'Estimated prevalence of anabolic steroid use among male high school seniors' (1988) 23 Journal of the American Medical Association 3441 as cited in Government, *'Steroids and Other Appearance and Performance Enhancing Drugs (APEDs): What is the history of anabolic steroid use?'* (n 370).

[373] P. Korkia and G. Stimson, 'Indications of Prevalence, Practice and Effects of Anabolic Steroid Use in Great Britain' (1997) 18 International Journal of Sports Medicine 557, 557.

[374] D. Sagoe and others, 'The global epidemiology of anabolic-androgenic steroid users: A descriptive metasynthesis' (2014) 24 Substance Abuse Treatment Prevention and Policy 10, 12 in Jim McVeigh and Emma Begley, 'Anabolic steroids in the UK:

Moreover, reports as early as 1989 highlight the popularity of AASs amongst adolescents aged 14 to 19 [375] – an issue that health care specialist Sven Nilsson referred to, even then, as 'a big problem for society.'[376]

Since the 1990s AAS use has only continued to increase,[377] with current estimates from the Crime Survey for England and Wales (CSEW) showing use as increasing from 194,000 in 2005/06 to 356,000 in 2015/16.[378] What is more, CSEW also highlights an increase in use amongst 16 to 24-year-olds over this same period, with current prevalence rates estimated to be between 0.3% and 0.4% (equating to around 19,000 users).[379] Comparatively, qualitative research in this area highlights prevalence as being significantly higher, with Cafri *et al*.[380] reporting total usage of adolescent males to be 9.8% (with a mean age of 14.64), and research conducted by

an increasing issue for public health' (2017) 24 Drugs: Education, Prevention and Policy 278, 278. See further S. Nilsson, 'Androgenic anabolic steroid use among male adolescents in Falkenberg' (1995) 48 European Journal of Clinical Pharmacology 9, 9.

[375] See further R. Windsor and D. Dumitru, 'Prevalence of anabolic steroid use by male and female adolescents' (1989) Medicine & Science in Sports & Exercise 494; S. Tanner and others, 'Anabolic steroid use by adolescents: prevalence, motives, and knowledge of risks' (1995) 5 Clinical Journal of Sport Medicine 108.

[376] Nilsson (n 374) 9.

[377] Antonopoulos and Hall (n 364); 2016 IPED Survey (n 364); 2017 IPED Survey (n 364); Sagoe and others (n 373) as cited in McVeigh and Begley (n 373).

[378] Home Office, 'Drug Misuse: Findings from the 2016/17 Crime Survey for England and Wales' (Home Office, National Statistics 2017); 2016 IPED Survey (n 365) Salinas and others (n 362).

[379] CSEW 2017 (n 378). See further Home Office, 'Drug Misuse: Findings from the 2017/18 Crime Survey for England and Wales' (Home Office, National Statistics 2018).

[380] G. Cafri and others, 'Pursuit of muscularity in adolescent boys: Relations among biopsychosocial variables and clinical outcomes' (2006) 35 Journal of Clinical Child and Adolescent Psychology 283 as cited in Jarred Martin and Kaymarlin Govender, '"Making Muscle Junkies": Investigating Traditional Masculine Ideology, Body Image Discrepancy, and the Pursuit of Muscularity in Adolescent Males' (2011) 10 International Journal of Men's Health 220.

Martin and Govender [381] highlighting a prevalence of a staggering 15%.[382] On this, the 2016 IPED Survey reports the most common age for the onset of AAS use in this group to be between 20 and 24 years old,[383] although it was noted that up to 19% of respondents started taking oral AASs ≤ 19 years, with 13% admitting they injected AASs ≤ 19 years.[384] Worryingly, a number of respondents claimed the onset of AAS use to be as early as 14 years old, as supported by Cafri, and Martin and Govender.[385]

It is important to note that the reliability of CSEW as a mechanism for estimating the frequency of AAS use has been questioned,[386] with a consensus that it typically underestimates the actual number of users.[387] This is due to a number of factors surrounding issues with stigma, accessibility and willingness to participate in these studies. For example, although the questionnaire is confidential, it remains debatable as to whether people are open about their drug use.[388] There have also been criticisms raised with respect to methodological issues surrounding these reports (e.g. the reliance on self-reporting).[389] Still, data extrapolated from needle and syringe programmes (NSPs), described as a more accurate predictor,

[381] Martin and Govender (n 380).
[382] Worringly, the same study found that 48% of adolescent males of school-going age use supplements, diet-aids, and legal drugs to gain muscularity, reduce fat, and improve appearance.
[383] 2016 IPED Survey (n 365).
[384] 2016 IPED Survey (n 365) Appendix 3.
[385] 2016 IPED Survey (n 365) 7.
[386] 2016 IPED Survey (n 365) as cited in Salinas (n 362).
[387] The reported degree of prevalence within the data extrapolated from NPSs, Global Drug Surveys, and estimates provided by gym-owners and managers all situate prevalence at a significantly higher rate than that which is reported in CSEW.
[388] User Guide to Drug Misuse: Findings from the Crime Survey for England & Wales July 2013 as cited in Home Office, 'Drug Misuse: Findings from the 2013/14 Crime Survey for England and Wales' (Home Office, National Statistics 2014) 2.
[389] ibid.

reaffirms that AAS use is growing overall, and highlights it doing so at a much higher rate.[390] Therefore, notwithstanding the difficulties in ascertaining precise numbers, it can reasonably be concluded that the use of these substances has continued to increase steadily year on year.[391] As a result, despite the seemingly low degree of prevalence (especially when compared with the popularity of recreational drugs amongst this group),[392] when one considers the harms associated with AAS use it is clear that this is still an area that warrants attention.

In line with this argument, it is worth briefly outlining the key harms associated with AAS use. In doing so, three key issues can be highlighted: the range of physiological harms associated with AAS use (especially at such a young age); the potential psychological harms arising from said use (e.g. dependence); and the increased likelihood of high-risk behaviours (e.g. polypharmacy and needle sharing). In addressing each, it is important to note that the lack of engagement by AAS users with primary health care services and an over-reliance on 'folk pharmacology'[393] continues to exacerbate these harms.

[390] NPSs have reported a 2000% increase in needle exchange attendance from 1991-2006. Note, however, that the low level of engagement by users with NSPs and treatment services means that this too has difficulties in accurately ascertaining prevalence rates. For example, a number of individuals who visit NPSs also collect needles for their friends or associates (17%), rendering such headcounts skewed. See further 2015 IPED Survey (n 362) 10.

[391] N.b. It is acknowledged that there are exceptions to this statement, such as the reported (slight) decrease in use last year. Here, I refer to the overall prevalence rates. See further Global Drug Surveys; 2015 IPED Survey (n 362); 2016 IPED Survey (n 365); 2017 IPED Survey (n 365).

[392] Key finding from CSEW 2017/18 show younger people as being more likely to take drugs than older people, citing the level of any drug use in the last year among 16 to 19 year olds as 16.9%. See further Home Office (n 379).

[393] Briefly, 'folk pharmacology' is a term that can be ascribed to the practice of users opting to acquire information disseminated through the fitness community by coaches,

Firstly, there is a myriad of physiological harms associated with AAS use. While a comprehensive review of these harms is left for another forum,[394] it is worth noting that AAS use carries with it significant risks. These can range from acute harms, which typically subside with the cessation of use (e.g. mood disturbances), to chronic conditions that are significantly more detrimental (e.g. cardiovascular damage and liver damage).[395] Further research is required before it can definitively be said that early-onset use exacerbates these harms; however, current literature does highlight AAS use as being associated with increased morbidity and mortality rates in individuals under 30.[396]

Secondly, there are the psychological harms associated with AAS use. Typically, the psychological effects arising from AAS use include irritability, aggression, egocentrism and

personal trainers, gym managers and other users, as opposed to doctors and other primary health care professionals. See further. E. Southgate and M. Hopwood, 'The role of folk pharmacology and lay experts in harm reduction' (2001) 12 International Journal of Drug Policy 321; B. Maycock and P. Howat, 'Social capital: Implications from an investigation of illegal anabolic steroid networks' (2007) 22 Health Education Research 854.

[394] See McVeigh and Begley (n 374); G. Kanayama and others 'Anabolic androgenic steroid dependence: an emerging disorder. Addiction' (2009) 104 Addiction 1966; J. Pope and others, 'The lifetime prevalence of anabolic-androgenic steroid use and dependence in Americans: current estimates' (2004) 23 American Journal of Addiction 371; G. Kanayama and H. Pope, 'Illicit use of androgens and other hormones: Recent advances' (2012) 19 Current Opinion in Endocrinology, Diabetes and Obesity 211.

[395] H. Pope and G. Kanayama, 'Treatment of anabolic-androgenic steroid related disorders' (2015) in H. Pope and others, 'Adverse health consequences of performance-enhancing drugs: An endocrine society scientific statement' (2013) 35 Endocrine Reviews 341. See further R. Zahnow and others, 'Adverse Effects, Health Service Engagement, and Service Satisfaction Among Anabolic Androgenic Steroid Users' (2017) 44 Contemporary Drug Problems 69, 70; Government, 'Research report series: Anabolic steroid abuse' (National Institute on Drug Abuse, 2000 Publication No. 00-3721).

[396] W de Ronde, 'Preventing anabolic steroid abuse: A long way to go' [2019] Journal of International Medicine 349; Government, Research Report (n 395).

extreme mood swings.[397] A growing body of research is now demonstrating a clear link between AAS use and adverse mental health,[398] including increasing rates of depression, anxiety and even suicide.[399] This may be attributed to the fact that adolescents are more susceptible to the negative effects of steroids because of their vulnerability to hormonal changes (especially during the stage of puberty); however, more research is needed before any conclusions can be drawn. An interesting observation with respect to these harms comes by way of the causality dilemma: is it, in fact, AAS use that has led to increasing rates of depression and anxiety or has the increasing rates of depression and anxiety led to an increased consumption of these substances? [400]

Finally, there is the increased likelihood of high-risk behaviours. While it has been highlighted that it is becoming increasingly difficult to identify a specific typology of user,[401] the research in this area has shown AAS users to be more likely to engage in certain high-risk behaviours. Such behaviours typically include polypharmacy (i.e. the concurrent use of multiple medications or substances by one individual),[402]

[397] Sarita Gober, Paul McCabe and Malky Klein, 'Adolescents and Steroids: What Principals Should Know' (2006) 7 Principle Leadership 11.
[398] See for example Lindqvust and others (2013) and Pope and others (2005) as cited in Zahnow (n 395) 70.
[399] Zahnow (n 395) 70; Gober and others (n 397).
[400] This question is a central strand of this paper, in that it is argued that recent societal changes are exacerbating mental health diagnoses (by way of body image disorders and the like), which is resulting in an increase in AAS use.
[401] This is especially true for adolescents because of the notable lack of research surrounding this group (although efforts have been made). See further Zahnow and others, 'Identifying a typology of men who use anabolic androgenic steroids (AAS)' (2018) 55 International Journal of Drug Policy 105; A. Christiansen and others, 'Outline of a typology of men's use of anabolic androgenic steroids in fitness and strength training environments' (2017) 24 Drugs Education Prevention and Policy 295.
[402] See further M. Duerden, T. Avery and R. Payne, 'Polypharmacy and medicines optimisation: Making it safe and sound' (The King's Fund, 2013)

needle sharing, driving while under the influence, and increased levels of unprotected sexual activity.[403] When one turns to the harms associated with these behaviours, it is clear that adolescents are in a particularly vulnerable position. By way of an example, it has been widely recognised that users often take AASs alongside various other recreational substances, including cannabis, cocaine and amphetamines.[404] In addition to the concurrent use of recreational drugs, a high percentage of users (49%) [405] also 'stack' steroids while on a cycle.[406] As a result, considering the prevalence of psychoactive substances amongst this group, this concurrent use of drugs means that the physiological harms associated with AAS use, outlined above, are compounded.

Accordingly, while the numbers may appear low, it is clear that they are not negligible. The increasing usage of AAS amongst this group, alongside the aforementioned reluctance to

<https://www.kingsfund.org.uk/sites/default/files/field/field_publication_file/polypharmacy-and-medicines-optimisation-kingsfund-nov13.pdf> accessed 9 May 2019.

[403] Miller and others (2005) as cited in Gober and others (n 397).

[404] According to the 2016-2017 IPED National Survey, the number of participants who had reported using one or more psychoactive substances in the preceding year was almost half (47%). See further Sagoe and others (n 374); 2015 IPED Survey (n 362); 2016 IPED Survey (n 365).

[405] R. Peters and others, 'Patterns and correlates of anabolic-androgenic steroid use' (Technical Report No 48, Sydney National Drug and Alcohol Research Centre, 1997) 49 as cited in Sagoe and others (n 374).

[406] 'Stacking' is the term given to the process of pairing different PIEDs together during one 'cycle'. 'Cycle' refers to the period of time in which one takes AASs (e.g. 12 weeks), typically followed by a period of time where the user then comes off steroids. N.b. It is this author's opinion that 'stacking' is likely to be less common in this group. This is due to a number of reasons primarily surrounding anecdotal knowledge, the role of folk pharmacology, and the method of supply. For example, research has highlighted that dealers often refuse to provide certain substances to users they feel are inexperienced (see, for example Salinas (n 362)). This, alongside a general consensus that users should start on lower doses, means that while poly-drug use of AASs with recreational drugs (or even other types of IPEDs, such as melatonin II or fat burners) is likely, it is hypothesised that 'stacking is likely to be less common.

engage with primary health care services and reliance on 'folk pharmacology', means this is a public health issue. In line with this, there is a clear need for further research into the motivations behind this AAS use that considers the heterogeneity of this group, as doing so will allow for a more informed framework on which intervention efforts can be built.

Further to the above, it is crucial to consider the motivations of this group. It has been well established that the motivations behind AAS use are becoming increasingly diverse.[407] Increasing muscle and strength; losing fat; sexual enhancement; tanning enhancement; sporting and occupational performance; and injury prevention/recovery have all been cited as reasons behind steroid use. For the purposes of this discussion, attention is being given exclusively to male adolescents who do not compete in sports, or at least where performance is not their primary motivation for use. Therefore, those motivations surrounding athleticism and occupational performance can safely be discarded in order to further the discussion at hand.[408] Once completed, it becomes clear that the motivations that remain (except for sexual enhancement) [409] all centre around changing one's appearance. For example, recent reports show that respondents typically cite 'gaining muscle and strength' (62%) or 'losing fat' (49%) as their primary motives, with secondary motives also including 'coping with

[407] See for example Cohen, Collins, Darkes, & Gwartney (2007); Kimergård & McVeigh (2014); Sagoe and others (2015); Zahnow and others (2018) as cited in Salinas (n 362).

[408] Although users may have co-current motivations, those who use AASs for aesthetic purposes do not place as much importance on athleticism or performance (at least not for 0-2 years, after which evidence has shown motives shift to performance becoming increasingly important). Considering the age range of focus here, and the occupations at risk (e.g. police, armed forces, security), occupational motives can also be safely discarded.

[409] Which is only 'extremely important' for a small amount of users (8.4%). See further 2016 IPED Survey (n 365).

depression/anxiety' and 'increasing confidence' (13%).[410] In line with this, the 2016 IPED survey highlighted the most commonly reported motives behind IPED use as 'aesthetic reasons' (56%), followed closely by 'non-competitive bodybuilding' (45%) [411]—although it is this author's opinion that these are one and the same.[412] Therefore, superficially, it appears that primary motivations for AAS use can be said to have 'remained largely unchanged from the exploratory research of the 1990s'[413] during which a total of 386 AAS users in the North West of England stated that their primary motives were to 'improve bodybuilding' and 'increase muscle'[414] (highlighting motivations, even then, as being grounded in an internalised drive for muscularity and leanness to obtain an 'ideal body').

With the above in mind, the question remains: why? Why has there been this shift toward motivations grounded in aesthetics? Why is there this internalised drive for muscularity and leanness? Why do Western nations venerate the mesomorphic build? And why are more and more young men turning to these harmful, illicit substances in a bid to obtain the ideal body? On this point, it is argued that research in this field has stagnated, with many studies proving to be generalised and

[410] 2015 IPED Survey (n 362); 2016 IPED Survey (n 365). N.b. There are questions to be raised as to whether these reasons are a result of negative body-image as a byproduct of the concepts discussed below. Meaning that although cited as separate reasons, this 'improved confidence' may come by way of an improved physique, making one feel more conformed with societal expectations.
[411] 2016 IPED Survey (n 365) 10.
[412] That is, if one is not enhancing their musculature and leanness for competition, it can safely be assumed that they are 'recreational bodybuilders'—in which case, this is primarily for 'aesthetic reasons'.
[413] P. Lenehan and others, 'A study of anabolic steroid use in the North West of England' (1996) 1 Journal of Performance Enhancing Drugs 57 as cited in 2015 IPED Survey (n 362).
[414] ibid.

banal. It is accepted that there is a growing body of research in this field more generally; however, to the best of the author's knowledge, there are currently no studies which aim to explore the reasons behind these superficial motives.[415] Accordingly, while it is acknowledged that previous research has gone a long way in developing a framework on which future efforts can be built, more needs to be done.

III. Theoretical Framework

It is important to outline the primary theories and arguments that are to be drawn upon in the following section. By using an adaptation of 'risk environment'[416] as a conceptual framework, the following section aims to examine the intersectionality that exists between recent societal changes, the effect of these changes on the underlying motives behind use, and the resultant implications on intervention.

Coinciding with the public health movement of the 1980s and 1990s, the end of the twentieth century witnessed the emergence of risk, or actuarialism, as a dominant framework across a breadth of disciplines.[417] Described by Giddens as 'a society increasingly preoccupied with the future (and also with

[415] There is a growing body research that highlights a positive link between AAS use and negative body image psychopathologies (eg muscle dysmorphia) and mental health (e.g. depression and anxiety, as mentioned above); however, it is important to note that much of this research originates from a psychology, sociology, or medicine background.
[416] Rhodes (n 364).
[417] For example, the notion of 'risk society' can be traced back to the early 1990's, when Ulrich Beck defined it as 'a systematic way of dealing with hazards and insecurities induced and introduced by modernisation itself'. See further Ulrich Beck, *Risk Society, Towards a New Modernity* (1st edn, Sage 1992) 260.

safety),' [418] a risk society can be more basically defined as a society that organises its functions in a manner that takes a calculated response to risk. Since its conception, this heightened emphasis on risk and its management has been more fully explored (in a predominantly sociological and penological context) by several academics.[419] By drawing on the work of O'Malley,[420] for example, it can be seen that 'risk society' is to be understood not as a matter of individualistic pathologies but as a set of risks predictable and manageable in aggregate terms.[421]

In keeping with this view, the concept of "risk environment" can be seen as particularly relevant for the discussion at hand. Attempting to build on the earlier works of Beck, Giddens, Rose and O'Malley,[422] this concept diverts attention from "risk" more generally toward understanding and reducing drug-related harms.[423] Originally put forward by Rhodes regarding HIV infection as a result of drug injection, this concept moves away from individualistic modes of behaviour change in favour of more ecological approaches,

[418] Anthony Giddens and Christopher Pierson, *Conversations with Anthony Giddens: Making Sense of Modernity* (1st edn, Stanford University Press 1998) 209.
[419] For example, discussion on a 'risk society' can be traced back to the early works of Beck (n 417) and Giddens (n 418), seen above.
[420] See for example Pat O'Malley, 'Risk, power and crime prevention' (1992) 21 Economy and Society 252; Pat O'Malley, *Risk, Uncertainty and Government* (1st edn, Taylor and Francis 2004); Pat O'Malley, *Crime and Risk* (1st edn, Sage 2010).
[421] Pat O'Malley, 'Risk and Responsibility' (1996) in A. Barry and others, *Foucault and Political Reason: Liberalism, Neo-Liberalism and the Rationalities of Government* (1st edn, UCL Press 1996) 189. See further N. Reichman, 'Managing crime risks: Toward an insurance-based model of social control' (1986) 8 Research in Law and Social Control 151.
[422] See further Ulrich Beck, *Risk Society, Towards a New Modernity* (1st edn, Sage 1992); Anthony Giddens and Christopher Pierson, *Conversations with Anthony Giddens: Making Sense of Modernity* (1st edn, Stanford University Press 1998); O'Malley (n 420).
[423] Rhodes (n 364).

encouraging exploration of the social situations and places in which drug-related harm is produced and reduced. Accordingly, this approach not only assists in identifying and explaining the conditions that give rise to harm, but also goes on to assist in predicting (and therefore preventing) them.[424] With this in mind, this article uses this framework to analyse the micro- and meso-level influences on user motives, and shows that the underlying reasons go beyond those proposed in the literature: "if the primary determinants of harm are economic and social, then the remedies must also be economic and social."[425]

Turning to the influences on user motives, it is important that AAS use is acknowledged as being part of a broader societal milieu.[426] In doing so, AAS use can be recognised as a heterogeneous phenomenon that consists of numerous interconnected factors that are shaped and influenced by societal shifts at both the micro- and meso-level. Increasing use of highly-visual social media (HVSM), and its associated fandom; gender capital; instant gratification; and increasing rates of negative mental health diagnoses all situate AAS use within the structural and cultural conditions of neoliberalism, consumerism and normative ideals of the male body. So defined, it becomes clear that these societal changes at the micro-level (e.g. increased use of HVSM and an ever-changing mediascape) have dynamically impacted upon AAS users at the meso-level (by influencing motivations, experiences and patterns of use).[427]

[424] ibid.
[425] M. Marmot, 'Improvement of social environment to improve health [1998] Lancet 57 as cited in Rhodes (n 415).
[426] P. Kraska, C. Bussard and J. Brent, 'Trafficking in bodily perfection: Examining the late-modern steroid marketplace and its criminilization' (2010) 27 Justice Quarterly 159 as cited in Santos and Coomber (n 362) 35-36.
[427] Santos and Coomber (n 362) 41.

It should be acknowledged that it is accepted that body image concerns, as a manifestation of such things as hegemonic masculinity and neoliberalism, have long been an issue for young men. The argument advanced below merely aims to highlight the growing body of research that shows the aforementioned changes as having exacerbated these issues greatly, which in turn has led to an increased use of AAS use within this group. Furthermore, it is essential to point out that the theories drawn upon in this article are not intended to stand independently, but instead operate as a collective 'toolkit' of concepts that allows for a better understanding of the complexities of user motives. On this point, for heuristic purposes, it is necessary to provide a working definition of each of the theories mentioned above.

Gender capital, as put forward by Bridges in his seminal work on the masculinities of male bodybuilders, [428] refers to the 'knowledge, resources and aspects of identity available – within a given context – that permit access to regime-specific gendered identities.' [429] Acting as a hybrid concept that builds on the conceptualisation of hegemonic masculinity and cultural capital, gender capital can be more basically defined as the methods utilised in an attempt to claim, and sustain, a dominant position in a social hierarchy (this is true of both inter-group and intra-group hierarchies).[430] Grounded in Gramsci's theory of hegemony,[431] hegemonic masculinity and cultural capital both operate as strategies for analysing the systems of valuation that are present in

[428] Tristan Bridges, 'Gender Capital and Male Bodybuilders' (2009) 15 Body & Society 83.
[429] ibid.
[430] That is, male against female, and male against male hierarchies.
[431] For a review of Gramsci's early work on hegemony, see Thomas Bates, 'Gramsci and the Theory of Hegemony' (1975) 36 Journal of the History of Ideas 351.

contemporary society.[432] More broadly, cultural capital refers to 'the resources (e.g. knowledge, body image, tastes) that individuals employ to gain status in certain contexts.' [433] Similarly, while it has been accepted that hegemonic masculinity is used differently in disparate fields,[434] a core tenet of the concept lies in the social and symbolic value it places on cultural dynamics that legitimise the patriarchal structures it aims to explain. So defined, this article uses the notion of 'body capital',[435] encapsulated within Bridges' theory of gender capital, to show that these normative ideals of the male body are increasingly being viewed as an important source of 'capital 'within contemporary society.[436]

With the above in mind, it is worth outlining the concepts of neoliberalism and consumerism. There is no doubt that the concept of neoliberalism has become widespread. Once largely confined to the realms of political and academic debate, recent years have witnessed increasing reference to this concept within the public sphere. Still, the concept remains largely undefined, with many attempts only resulting in further obfuscation.[437] While rehearsal of the definitional ambiguities

[432] See for example P. Bourdieu, *Distinction* (1st edn, Harvard University Press 1984); R. Connell, *Gender and Power* (1st edn, Stanford University Press 1987); R. Connell, *Masculinities* (1st edn, University of California Press 1995) as cited in Bridges (n 428).
[433] Bridges (n 428).
[434] R. Connell, 'Hegemonic Masculinity: Rethinking the concept' (2005) 19 Gender and Society 829; Bridges (n 428).
[435] On earlier works surrounding the notion of 'physical' or 'bodily' capital, see C. Shilling, The Body and Social Theory (1st edn, Sage 1993); L. Wacquant, 'Pugs at Work: Bodily Capital and Bodily Labour among Professional Boxers' (1995) 1 Body & Society 65.
[436] That is, the 'specific repertoires of knowledge, tastes, dispositions and objects of desire that individuals within particular social spaces perceive and employ for status accumulation'. See Bourdieu (n 432) 113.
[437] On the matter of definitional ambiguities, this author tends to agree with O'Malley, in that 'it is not a matter in which I want to spill much ink on'. See O'Malley (n 421) 76.

surrounding this concept is left for another forum, it is worth noting that a significant factor behind this obscurity likely lies in the fact that (as a system of 'political economic practices')[438] neoliberalism is made up of several inter-related 'dimensions'.[439] In an attempt to navigate these dimensions, the work of Seddon is particularly useful.[440] Seddon, drawing upon an 'eclectic and diverse body of scholarship',[441] puts forward a framework that defines these dimensions and frames them within the context of contemporary drug use. In reviewing this framework, two points are raised that are relevant to the discussion at hand. Firstly, neoliberalism can be viewed more broadly as a way of defining human behaviour through the use of capitalism and the 'free market'. Secondly, typically described as the rise of a 'consumer society', there has been a clear shift towards an emphasis on consumption.[442] So defined, it becomes clear that competition and consumerism are central tenets of the concept of neoliberalism. Using this ideology, this article uses the concept of neoliberalism (and 'consumer society 'as a by-product thereof) as a lens to view the intersectionality between the underlying motives of AAS use and the aforementioned shift in societal trends. Consequently, it becomes apparent that these concepts serve to function as the instruments that propagate normative ideals of the male body and influence the underlying motives behind AAS use.

[438] See D. Harvey, *A Brief History of Neoliberalism* (1st edn, OUP 2007).
[439] Toby Seddon, *A History of Drugs: Drugs and Freedom in the Liberal Age* (1st edn, Routledge 2010)
[440] ibid 78-80.
[441] ibid 79.
[442] Seddon (n 439).

IV. Discussion

> A body is a piece of consequential equipment, and its owner is always putting it on the line. Of course, he can bring other capital goods into many of his moments too, but his body is the only one he can never leave behind. [443]

The male body is an integral part of social construction; it is the 'symbolic tool' [444] that allows a person to claim, and sustain, a form of patriarchal dividend in an ever-evolving social hierarchy. It is clear that muscularity has become a significant indicator of masculinity for the modern man,[445] with society venerating the mesomorphic build.[446] Moreover, a changing mediascape, developing advertising methods, and the increased use of HVSM have all served to propagate the masculinities that are central to these normative ideals of the male body. With this in mind, it is apparent that young men are under increasing pressure to have a muscular and lean physique that conforms to societal expectations of the ideal body. Considering this, it is not surprising that studies are reporting higher levels of body dissatisfaction amongst young men as a result of their inability to meet this expectation.[447] For example, Chris, who started using AASs aged 17, gives the following testimony:

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[443] Erving Goffman, *Interaction ritual: essays on face-to-face interaction* (1st edn, Aldine 1967).

[444] See Connell (n 432); Connell (n 434).

[445] M. Fabris and others, 'Attachment style and risk of muscle dysmorphia in a sample of male bodybuilders' (2018) 19 Psychology of Men & Masculinity 273 as cited in Catherine Bégin, Olivier Turcotte and Christopher Rodrigue, 'Psychosocial factors underlying symptoms of muscle dysmorphia in a non- T clinical sample of men' (2019) 272 Psychiatry Research 319.

[446] Muscular, lean, and well-built with a high metabolism and responsive muscle cells. Typically characterised by broad shoulders and a tapered waist.

[447] Bégin and others (n 85) 319; Charlotte Greenway and Clare Price, 'A qualitative study of the motivations for anabolic-androgenic steroid use: The role of muscle

> "You look in the mirror and it just doesn't seem like anything is happening ... [Before] I didn't really think about it ... happy with myself, and then ... I just wanted more and more ... like oh I'll do this now [steroids] and it'll make me a lot bigger ... everybody else wants to be big don't they, and be bigger than each other." [448]

Such internalisation of the muscular ideal has had significant detrimental effects on the psychopathology of adolescents, regarding body image.[449] A growing body of research is highlighting AAS use as being robustly associated with negative body image (and body image disorders), framing negative body image as a primary risk factor for AAS use amongst this group.[450] The study by Cafri *et al*[451] is one which records the desire for increased muscularity being positively linked to higher rates of AAS use amongst young men. More recently, this link is supported by Jampel *et al*[452] who argue that adolescents' perceptions of themselves as underweight or

dysmorphia and self-esteem in long-term users' (2018) 6 Performance Enhancement and Health 12, 13.

[448] Marc Harris, Michael Dunn, and Tina Alwyn, 'A qualitative exploration of the motivations underlying anabolic-androgenic steroid use from adolescence into adulthood' (2016) 4 Health Psychology Report 315, 318.

[449] This is true of male and female adolescents, although the focus here is on the former.

[450] See further Field and others (2014); Van den Berg and others (2007); Cafri and others (2006); Kanayama and others (2006); Riciardelli and McCabe (2004) as cited in Stuart Murray and others, 'Anabolic steroid use and body image psychopathology in men: Delineating between appearance- versus performance-driven motivations' (2016) 165 Drug and Alcohol Dependance 198.

[451] G. Cafri and others, 'Pursuit of muscularity in adolescent boys: relations among biopsychosocial variables and clinical outcomes' (2006) 35 Journal of Clinical Child & Adolescent Psychology 283 as cited in Murray and others (n 450).

[452] J. Jampel and others, 'Self-perceived weight and anabolic steroids misuse among US adolescent boys' (2016) 58 Journal of Adolescent Health 397 as cited in Murray and others (n 450).

overweight are associated with an increased risk of AAS use, reaffirming the primary motives behind AAS use as grounded in an internalised drive for muscularity and leanness. Accordingly, consistent with sociocultural theories that frame this internalisation as a primary driver behind AAS use,[453] it can be seen that AAS users who experience physical appearance concerns are particularly susceptible to a "core nexus of psychopathology involving body image, dieting and exercise." [454]

A key example of a body image psychopathology associated with this pathological pursuit of muscularity comes by way of muscle dysmorphia (MD). Originally put forward by Pope *et al* [455] as 'reverse anorexia',[456] MD is generally characterised by 'an intensely distressing preoccupation that one is of insufficient muscularity (although appear[ing] normal or muscular).'[457] Typically, this results in behaviours such as excessive weight lifting, rigid dieting and, as seen above, an

[453] Donald McCreary and others, 'A Review of Body Image Influences on Men's Fitness Goals and Supplement Use' (2007) 1 American Journal of Men's Health 307; Mike Parent and Bonnie Moradi, 'An abbreviated tool for assessing conformity to masculine norms: Psychometric properties of the Conformity to Masculine Norms Inventory' (2011) 12 Psychology of Men & Masculinity 339.

[454] Murray and others (n 90) 199; Scott Griffiths and others, 'Physical appearance concerns are uniquely associated with the severity of steroid dependence and depression in anabolic–androgenic steroid users' (2018) 37 Drug and Alcohol Review 664.

[455] Pope and others (1993) as cited in Dave Smith and others, 'Muscle Dysmorphia and Anabolic- Androgenic Steroid Use' in Matthew Hall, Sarah Grogan and Brendan Gough, Chemically Modified Bodies: The Use of Diverse Substances for Appearance Enhancement (1st edn, Palgrave 2016).

[456] Being explained as the male version of the disorder anorexia nervosa. See further Pope and others (1993) and Murray and others (2010) as cited in Smith and others (n 455).

[457] ibid.

increased likelihood of AAS use.[458] Recognised in the Diagnostic and Statistical Manual [459] as a sub-type of body dysmorphia disorder (BDD), current estimates place the prevalence of MD at approximately 10% of the 'lifting community'.[460] However, similar to reports of AASs, this figure is likely to significantly under-represent actual use. For example, while there have been no attempts to quantify the prevalence of MD in adolescents in respect of AAS use (to the best of this author's knowledge), it is known that younger AAS users are more likely to suffer from physical appearance anxiety and related body image psychopathologies than their older counterparts.[461] Moreover, it is well accepted that young men minimise their body dissatisfaction and remain closed off about their anxieties and insecurities,[462] meaning any research undertaken on this group is likely to be susceptible to methodological inaccuracies. Consequently, it is highly probable that figures are likely to be significantly higher than that which have been reported.

An interesting point arises here with respect to the 'causality dilemma' concerning these body image pathologies: are these body image disorders part of the wider symptomology

[458] Bégin and others (n 445) 319. See further Lebur Rohman, 'The Relationship Between Anabolic Androgenic Steroids and Muscle Dysmorphia: A Review' (2009) 17 Journal of Treatment and Prevention 187.
[459] American Psychiatric Association, Diagnostic and Statistical Manual of Mental Disorders (5th edn, Arlington 2013).
[460] 'Muscle Dysmorphia & Body Image in Men' (*Body Dysmorphia Disorder Foundation*, no date) <https://bddfoundation.org/muscle-dysmorphia-body-image-in-men/> accessed 15 May 2019; A. Ahmad, N. Rotherham and D. Talwar 'Muscle dysmorphia: One in 10 men in gyms believed to have 'bigorexia'' (*BBC Newsbeat*, 2015) <http://www.bbc.co.uk/newsbeat/article/34307044/muscle-dysmorphia-one-in-10-men-in-gyms-believed-to-have-bigorexia> accessed 15 May 2019.
[461] Murray and others (n 450); Greenway and Price (n 447) 14.
[462] See for example Glen Jankowski and others, 'Young men's minimisation of their body dissatisfaction' (2018) 33 Psychology and Health 1343.

associated with AAS use (i.e. consequences of AAS use) or are they, in fact, the causal effect? Generally, research on this question remains quite divided. Research conducted as recently as 2016 by Harris, Dunn and Alwyn [463] led to the conclusion that 'rather than muscle dysmorphia … causing AAS use, it functions to perpetuate its usage, whilst also being a consequence of bodybuilding and usage itself, thus also portraying a circular maintenance pattern of addictive behaviour.' In contrast, the work of Greenway and Price [464] highlighted that 'for half of the men interviewed … MD symptoms were present before AAS [use] and were explicitly related to self-esteem, body dissatisfaction and social acceptance.'[465] In this sense, it appears that AAS use may be a symptom of MD rather than a causal factor.[466] Considering that psychological research has shown evidence of internalised body ideals in children as young as 5 years old,[467] there is clearly a need to identify and differentiate between these users, as doing so will have significant implications on interventions.

Having highlighted a positive link between AAS use and negative body image (and BDDs), it is important to explore the reasons behind this normative ideal of the male body. On this, it would appear that the increased use of HVSM has contributed toward this pathological need for the 'ideal body'.

[463] Harris and others (n 448).
[464] Greenway and Price (n 447).
[465] This is further supported by the work of Olivardia, Pope, and Hudson in 2000 when it was reported that for 73% of the participants MD preceded AAS use.
[466] Greenway and Price (n 447).
[467] For example, when faced with numerous choices of varying body types, children repeatedly opted for the mesomorphic build. See Timothy Baghurst, Scott Griffiths, and Stuart Murray, 'Boys and Girls Prefer Hyper-Muscular Male Action Figures over Normally-Muscular Action Figures: Evidence that Children have Internalized the Muscular Male Body Ideal' (2018) 20 North American Journal of Psychology 159. See further M. Labre, 'Adolescent Boys and Muscular Body Ideal' in Hall and others (n 455).

Accordingly, this author uses this increase in HVSM as an evidential lens through which to view the underlying motives behind AAS use in an attempt to explore their intersectionality with wider societal influences.

Social media is now an integral part of adolescents' lifestyles. Almost ubiquitous, 95% of teenagers report having access to social media, with 45% reporting they are online on a 'near-constant basis'.[468] One interesting observation concerning this use is the shift toward 'highly visual', image-centric platforms such as Instagram, Snapchat and YouTube. Until recently, Facebook dominated the social media landscape, however, the past three years have witnessed a clear shift toward these image-centric platforms whereby users share a vast amount of visual content in the form of images and videos. It is this increased use of HVSM that has led to a large body of research highlighting an associated increase in rates of adverse mental health (e.g. depression and anxiety) and negative body image psychopathologies (e.g. MD and BDDs) amongst young men aged between 14 and 24.[469] On this point, this article identifies four key ways in which the increased use

[468] Victoria Rideout and Michael Robb, 'Social Media, Social Life: Teens reveal their experiences' (Report, Common Sense 2018) <https://www.commonsensemedia.org/sites/default/files/uploads/research/2018_cs_socialmediasociallife_fullreport-final-release_2_lowres.pdf> accessed 19 May 2019; Monica Anderson and Jingjing Jiang, 'Teens, Social Media & Technology 2018' (Report, PEW Research Centre 31 May 2018) <https://www.pewinternet.org/2018/05/31/teens-social-media-technology-2018/'> accessed 19 May 2019; Felix Richter, 'Teens' Social Media Usage Is Drastically Increasing' (Statista, 9 October 2018) <https://www.statista.com/chart/15720/frequency-of-teenagers-social-media-use/> accessed 19 May 2019.

[469] See D. Marengo and others, 'Highly-visual social media and internalizing symptoms in adolescence: The mediating role of body image concerns' (2018) 82 Computers in Human Behavior 63; Scott Griffiths, 'The Contribution of Social Media to Body Dissatisfaction, Eating Disorder Symptoms, and Anabolic Steroid Use Among Sexual Minority Men' (2018) 21 Cyberpsychology, Behavior and Social Networking 149.

of HVSM has contributed toward this internalised drive for the ideal body: intra-/inter-sexual competition, increased levels of fandom, an increasing need for instant gratification, and changing marketing strategies as a result of a rise in the 'consumer society'.

Firstly, there is the inherent internalised competition that arises from social media use.[470] Drawing on 'tropes of the visual cultures of contemporary consumer capitalism', young men can be seen sharing images of themselves on these social media platforms in a bid to promote the most 'successful version of themselves, with success being signified through the achievement of a muscular body'.[471] It was in addressing this phenomenon that Simpson coined the term 'spornosexual' (a portmanteau of sportsman and porn star).[472] Describing the body as a 'hot commodity', Simpson identified the fact that young men are sharing, and comparing, this 'commodity' (their bodies) in the 'online marketplace' of social media.[473] On this point, it should be noted that over a quarter (27%) of teenagers recently admitted checking social media on an hourly basis.[474] Therefore, such regular exposure to these platforms places users in situations where they are led to compare their appearance with that of others on a 'near-constant basis'. Given that these images are typically those which involve a portrayal

[470] See Marc Harris, Michael Dunn and Tina Alwyn, 'Intrasexual competition as a potential influence on anabolic-androgenic steroid use initiation' (2017) Journal of Psychology 1.
[471] Jamie Hakim, 'Fit is the new rich': Male embodiment in the age of austerity' (2016) 61 Journal of Politics and Culture 84 as cited in Santos and Coomer (n 362).
[472] Characterised as a young man who attempts to fashion a spectacularly muscular body in order to share images of it on social networking sites. See Mark Simpson, 'The metrosexual is dead. Long live the "spornosexual"' (Telegraph, 10 June 2014<www.telegraph.co.uk/men/fashion-and-style/10881682/The- metrosexual-is-dead.-Long-live-the-spornosexual.html> accessed 20 May 2019; Hakim (n 471).
[473] ibid.
[474] Rideout and Robb (n 468); Anderson and Jiang (n 468); Richter (n 468).

of one's 'best self' (by exhibiting one's idolised body or other 'capitals')[475] it is not surprising that teenagers often perceive a deficit between their own body image and the internalised ideal propagated through social media that leads to increased levels of body dissatisfaction.

Interestingly, this notion of 'body capital' and competition is supported by the concepts of gender capital and neoliberalism. For example, a vast amount of evidence suggests that the increase in the number of men fashioning the 'ideal body' and posting images of themselves on social media can be traced back to approximately 2008, a time described as 'the immediate pre-history of the intensification of neoliberalism that goes by the name of 'austerity''.[476] On this, Hakim labels this era as one of 'continued neoliberal austerity', whereby 'many have begun to delay a strategy of value-creation historically associated with less privileged groups—namely, bodywork.'[477] Whether this signifies an era where 'fit is the new rich', remains debatable. It is this author's opinion that to ascribe AAS use to any one factor would be to unnecessarily narrow academic focus. It does, however, signify an increase in the number of young men who are fashioning their physiques in an attempt to both conform to societal expectations and gain 'bodily capital' in a bid to claim a dominant position within the social hierarchy.

Secondly, there is the increase in fandom associated with the use of HVSM. Briefly, fandom, as a manifestation of participatory culture, refers to 'communities built around a

[475] These could be other manifestations of bodily capital (eg a tan and whitened teeth) or materialistic capital (eg car, phone or clothes).
[476] Hakim (n 471).
[477] ibid 86.

shared enjoyment of an aspect of popular culture.'[478] Traced back to the early work of Jenkins [479] and Jenson [480] in the early 1990s, an example of the strength of fandom in the (recreational) bodybuilding community comes by way of the late Aziz 'Zyzz' Shavershian.[481] A self-confessed 'extreme ectomorph', Shavershian rose to fame after he drastically transformed his body (through the use of AASs) and developed the online persona of 'Zyzz', posting numerous videos on his YouTube account in respect of bodybuilding and many other topics. Deified for his persona, Zyzz created an online community of thousands [482] that still exists to this day (despite Shavershian passing away in 2011). For example, Zyzz's most-watched video (Zyzz: The Legacy) has over 12 million views; a remastered version released around the anniversary of his death in 2016 has over 1.5 million views.[483] This is but one example of someone revered for their physique.

One only has to turn to a HVSM platform for a few minutes to realise fandom is now firmly embedded in the social media landscape; moreover, with the ascendance of these platforms, there has been a marked increase in fandom

[478]Anonymous, 'Fandom and Participatory Culture' (Grinnell College, no date) <https://haenfler.sites.grinnell.edu/subcultural-theory-and-theorists/fandom-and-participatory-culture/> 17 May 2019.

[479] Henry Jenkins, *Textual Poachers: Television Fans and Participatory Culture* (1st edn, Routledge 1992).

[480] Joli Jenson, 'Fandom as Pathology' in Lisa Lewis, *The Adorning Audience: Fan Culture and Popular Media* (1st edn, Routledge 1992).

[481] See further M. Underwood, 'Exploring the social lives of image and performance enhancing drugs: An online ethnography of the Zyzz fandom of recreational bodybuilders' (2017) 39 International Journal of Drugs Policy 78.

[482] A precise number is difficult to obtain. Looking at past video views, subscribers and online forums, it is likely to be in the tens of thousands.

[483] Youtube, 'Zyzz - The Legacy' (Youtube, 22 March 2012) <https://www.youtube.com/watch?v=AdBoybKnzZw> accessed 16 May 2019; Youtube, 'Zyzz - The Legacy (Remastered 2016)' (Youtube, 5 August 2016) <https://www.youtube.com/watch?v=dh5f79ZfKTk > accessed 16 May 2019.

surrounding those with perceived 'capital' (bodily or otherwise). With the growth of this fandom comes a parallel increase in associated harms—especially as these images are often carefully edited to ensure they portray the subject in the best possible light. Additionally, many of these 'idols' claim to be 'natural' when, in fact, they are using AASs. As a result, revered and deified for their perceived success, fandom surrounding these 'instafamous'[484] celebrities reinforce normative ideals of the body, encourages internalised competition and increases the perceived deficit between one's own capital and that of societal expectations. In light of this, it is worth noting that adolescents are more susceptible to the external influences resulting from fandom. More prone to idolatry, fandom amongst this group is often endorsed as 'normal adolescent behaviour'.[485] Considering the harms associated with this phenomenon, it is paramount that it be understood and appreciated for its implications on the underlying motives behind AAS use. If adolescents are more prone to idolatry, and this idolatry can exacerbate the negative symptoms associated with HVSM use, it is highly probable that it will also impact on AAS use.

Thirdly is the increasing need for instant gratification. Grounded in the psychological model of the 'pleasure principle', instant gratification refers to the 'desire of experiencing pleasure or fulfilment without delay or

[484] The word 'celebrity' is diversifying. More and more young men and women are looking to social media platforms in search of their idols. 'Instafamous' (a portmanteau of Instagram and famous) is a term given to social media influencers who have risen to high levels of fame or success through their online endeavours.

[485] Pilar Lacasa, 'Teenagers, Fandom, Identity' (2017) 3 Persona Studies 51; Joel Tiller, 'Why Teenagers Obsess Over Pop Stars' (Blog Post, Child Mind Institution 5 May 2011) < https://childmind.org/blog/teenagers-obsess-pop-stars/> accessed 19 May 2019.

deferment'.[486] To say that we live in an era of instant gratification is an understatement. More and more, society is growing accustomed to the instant gratification afforded by technological advances, with social media being a prime example of this. Operating as a reactive form of communication, social media feeds society's 'desire of fulfilment without delay' by allowing users to share images and videos of themselves in an attempt to receive feedback from their followers. Each day there are over 500 million active users on Instagram, over 100 million images and videos shared, and over 4.2 billion 'likes'.[487] This process of sharing content in a bid to receive 'likes' not only reaffirms 'the visual cultures of contemporary consumer capitalism' in a manner that frames these 'likes' as a form of cultural capital, but also highlights how the nature of the process fits in with society's need for instant gratification. Moreover, while there appears to be a lack of literature on the matter, it is reasonably arguable that this desire for instant gratification extends to the desire of obtaining the 'ideal physique'. An example of how social media has fuelled this desire comes by way of the above described 'instafamous' influencers using, and abusing, their positions on social media to sell (legal) supplements and promises of quick body transformations (e.g. 'lose 7lbs in 7 days'). Capitalising on the increasing fandom cultures forming around these idols, and affirming the notion of 'likes' and 'followers' operating as

[486] R. Baumeister and B. Bushman, *Social Psychology and Human Nature* (2nd edn, Wadsworth 2010) 49; Neil Patel, 'The Psychology of Instant Gratification and How It Will Revolutionize Your Marketing Approach' (Article, Entrepreneur 24 June 2014) <https://www.entrepreneur.com/article/235088> accessed 18 May 2019.

[487]Salman Aslam, 'Instagram by the Numbers: Stats, Demographics & Fun Facts' (Statistics Report, Omnicore 6 January 2019) <https://www.omnicoreagency.com/instagram-statistics/> accessed 19 May 2019; Todd Clarke, '22+ Instagram Stats That Marketers Can't Ignore This Year' (Blog, Hootsuite 5 March 2019) <https://blog.hootsuite.com/instagram-statistics/> accessed 19 May 2019.

a form of cultural capital, individuals with a significant following are now promoting supplements and training regimes (with no scientific backing) that hold promises of drastic, instant changes. This is, at least in part, attributable to changing market strategies (as a result of the rise of a 'consumer society'). It also shows how this 'desire for fulfilment without delay' is fed by social media on numerous pathological levels. With this being the case, it requires no stretch of the imagination to envisage a situation where an adolescent, fuelled by a pathological need to obtain a physique that conforms to societal expectations, turns to AAS use as a result of the factors outlined above.

Finally, following on from the above, there is the rise of consumerism. The modern consumer is not 'an isolated individual making purchases in a vacuum' but rather a participant in the contemporary phenomenon that has been labelled as a consumer society.[488] In its most simple form, this phenomenon refers to the ideology that these participants, holding consumerist values, always want to consume more and to a large extent, often find fulfilment and satisfaction through this consumption (i.e. the purchase of new consumer goods).[489] In consideration of this, it is this author's opinion that this rise of a 'consumer society' has indirectly influenced and affected AAS use as a result of a shift in marketing methods and drug supplies. Capitalising on this consumerist culture, digital marketing companies are now utilising social media to leverage sales in increasingly diverse ways. For example, research into consumer behaviour has shown that:

[488] Neva Goodwin and others, 'Consumption and the Consumer Society' (Digested Chapter, Global Development and Environment Institute 2008) < http://www.ase.tufts.edu/gdae/education_materials/modules/Consumption_and_the_Consumer_Society.pdf> accessed 16 May 2019.
[489] ibid.

> A neutral or even negative social media post with high engagement will impact sales more than a positive post that draws no likes, comments or shares … [and] this is true even among customers who say their purchase decisions are not swayed by what they read on social media. [490]

Revisiting the aforementioned practice of influencers leveraging their positions to promote and sell products on behalf of these companies, it quickly becomes apparent that the shift in marketing strategies on these platforms has been designed to draw on the desire for instant gratification, capitalise on the 'fandom cultures' created within these platforms, and propagate these normative ideals of the male body by associating products with influencers who hold a large degree of cultural capital (bodily or otherwise). Briefly, another example of consumerism indirectly affecting AAS prevalence comes by way of drug supplies. While a comprehensive discussion on this topic is beyond the scope of this paper, it is worth noting that the rise of consumerism, technological advances and the desire for instant gratification have all resulted in AASs being supplied in a number of innovative ways. An example of this is the increasing use of the internet to source AASs. Having been identified as 'a key aspect for facilitating AAS use by providing ready access to supply[491]… information [492]… and community' [493], a recent review that set

[490]Kevin Manne, 'How social media impacts consumer spending' (Article, Science Daily 19 November 2016) <https://www.sciencedaily.com/releases/2016/11/161119091917.htm> accessed 17 May 2019.

[491] F. Cordaro, S. Lombardo and M. Cosentino, 'Selling androgenic anabolic steroids by the pound: Identification and analysis of popular websites on the Internet' (2011) 21 Scandinavian Journal of Medicine & Science in Sports 247.

[492] J. Andreasson and T. Johansson, 'Online doping. The new self-help culture of ethnopharmacology' (2015) 19 Sport in Society 957.

[493] ibid.

out to track internet interest in AAS searches on Google observed two trends. Firstly, searches for AASs have increased in line with prevalence rates. Secondly, there appears to be a 'seasonal interest' in AAS use (increasing in summer months),[494] which arguably supports the notion of AAS use being situated in 'health and beauty consumerism'.[495] This has clear implications for the younger demographic as it is unlikely that these users will have access to the resources and supply networks of their older counterparts — meaning they have to resort to online supply (which has a host of issues in itself).[496]

In light of the above, it is worth considering the implications of these environmental influences on intervention efforts. The literature on intervention efforts surrounding non-competitive male adolescents indicates that this is an area which has suffered from a lack of academic attention. While it is acknowledged that there is a growing body of literature that focuses on the aetiology, epidemiology and harms associated with AAS use, it appears that little attention has been given to how we can influence and encourage behaviour change within this group.[497] Having highlighted the importance of targeted age-appropriate interventions that consider the heterogeneous nature of this group, this is a cause for concern. Additionally,

[494] R. Brennan, J. Wells and M. Van Hout, 'The injecting use of image and performance-enhancing drugs (IPED) in the general population: A systematic review' (2016) 25 Health and Social Care in the Community 1459 as cited in Joseph Teck and Mark McCann, 'Tracking internet interest in anabolic-androgenic steroids using Google Trends' (2018) 51 International Journal of Drug Policy 52.

[495] ibid.

[496] Such as the source of the AASs, the authenticity of the products, etc. It is accepted that these concerns appear in traditional supply networks too, but less likely to be the case to the same extent given the 'community' nature of users and fact they help each other out.

[497] Geoff Bates and others. 'A systematic review investigating the behaviour change strategies in interventions to prevent misuse of anabolic steroids' [2017] Journal of Health Psychology 1.

there are two more ways in which the research in this area appears inadequate. Firstly, what little research that has been done in respect of intervention efforts for adolescent AAS users seems to suffer from an academic disposition to fixate on adolescent athletes (i.e. those who participate in sport). This means evidence of evaluations outside of the sporting domain is 'severely lacking',[498] which is particularly troublesome when considering that the variability in motives means that much of the conclusions drawn from these efforts may not apply to non-competitive adolescent users. Secondly, systematic reviews in this area have identified a distinct lack of continuity in the makeup of these evaluations, with there appearing to be no evidence that interventions attempt to 'build on' the success (or lack thereof) of the efforts that preceded them.[499] Consequently, 'efforts largely consist of a series of "one off" interventions that vary greatly in focus', with 'no clear messages emerging on what approaches are likely to be effective or ineffective.'[500]

Nevertheless, a review of the literature does highlight certain commonalities in those efforts deemed to be successful that may help in building an effective evidence-based intervention framework for non-competitive male adolescent AAS users in the UK. In line with the heterogeneous nature of this group, it appears that those interventions which take a more multifunctional approach boast the highest success rates.[501] The more successful intervention efforts typically include behavioural change therapies (e.g. establishing norms regarding others' perceptions of AAS use);[502] protective factors

[498] ibid.
[499] ibid.
[500] ibid.
[501] ibid.
[502] ibid.

(e.g. focusing on ethics and values, harms, body image and social norms);[503] and education (e.g. healthy alternatives and information on correct training, nutrition regimes and supplement use): 'programs that raise awareness of the risks, decrease social anxiety, and increase self-esteem and positive self-body image have yielded [more] positive results.' [504] Two interventions commonly cited as being successful (for reducing IPED use) are ATHENA and ATLAS.[505] Breaking these programmes down into their constituent parts, it can be seen that both programmes utilise a range of efforts that both target the psycho-social issues surrounding AAS use (e.g. negative body image psychopathologies) and aim to promote healthy alternatives to achieving increased muscularity and leanness. In line with this need to take a multi-functional approach, this author considers the following components as being key to any effective, evidence-based framework on which future intervention efforts can be built.

Firstly, intervention efforts must consider the heterogeneous nature of this group.[506] This starts by differentiating between those users with aesthetic-based motives from those with performance-based motives. While a discussion of those users with performance-based motives has been left for another forum, it is important to note that the variability of motives behind AAS use has significant

[503] ibid.
[504] Gober and others (n 397).
[505] D. Elliot and others, 'Preventing disordered eating and body-shaping drug use for female student athletes (ATHENA)' (2004) 76 Journal of School Health 67; Lin Goldberg and others, 'Effects of a Multidimensional Anabolic Steroid Prevention Study' (1996) 19 Journal of the American Medical Association 1555. N.b. It is acknowledged that these programmes have come under scrutiny for their effectiveness. However, by breaking the programmes down and analysing their efficiencies and deficiencies, it is possible to construct a more solid intervention framework for future efforts.
[506] Santos and Coomer (n 362).

implications on proposed intervention programmes, i.e. users with aesthetics-based motives may be less likely to respond to a performance-based prevention model. Accordingly, it is vital to delineate the appropriate intervention requirements for each.

Secondly, considering that the underlying motives of this group (non-competitive male adolescents) appear to be grounded in negative body image concerns and an internalised drive for muscularity and leanness, it is paramount that efforts aim to address these concerns by way of body image acceptance interventions. In this sense, it may be appropriate to view these young men as 'cultural victims'[507] of contemporary society. In doing so, AAS use amongst this group can be viewed as the public health issue it has been shown to be, and efforts can be made to change the perceptions surrounding these users.[508] Such efforts should focus on changing the normative ideals of the male body pathologically engrained in these users' perceptions (propagated by a changing mediascape and increased use of HVSM)[509] and understanding their tendency to minimise their body dissatisfaction, as doing so will give this group of users a channel through which they can openly discuss their body image concerns.[510] In encouraging critical awareness of the idealised images presented on social media, as well as of the potential impact that exposure to these kinds of images can have on adolescents' body image,

[507] For a discussion on treating users (more generally) as 'cultural victims', see Helen Keane, 'Diagnosing the male steroid user: drug use, body image and disordered masculinity' (2005) 9 Health 189.

[508] Which in turn will lead to better engagement, reduced harms, and higher desistance rates.

[509] Jessica Alleva and others, 'A meta-analytic review of stand-alone interventions to improve body image' (2015) 10 PLoS One 1; A. Bailey and others, 'Mapping the evidence for the prevention and treatment of eating disorders in young people' (2014) 2 Journal of Eating Disorders 5.

[510] Jankowski and others (n 462).

intervention efforts can begin to restructure the masculinities within this group and focus on raising self-esteem.[511]

Thirdly, efforts should include a combination of education and skills-based training that focuses on alternative ways in which one can achieve increased muscularity and leanness. This could be accomplished by including education through information provisions (e.g. developing a healthy, balanced nutrition and supplementation regime) and incorporating skills-based training on effective (and correct) methods for weight lifting and resistance training (e.g. developing an appropriate training programme). Supported by the research in this area, previous efforts that have included these components and have taken a multi-functional approach have typically boasted increased success rates.[512] It is acknowledged that criticisms may be raised against this proposal in respect of the gateway hypothesis,[513] however, it is this author's opinion that this is easily rebutted. Much of the research done into the gateway hypothesis typically draws on over-simplified correlations between increased (legal) supplement use and increased long-term AAS use. In doing so, it makes clear errors in citing supplement use as a causal effect for increased life-time risk of AAS use. For example, one paper highlights that those who supplement their training with

[511] Marengo and others (n 469); Underwood (n 481).

[512] Bates and others (n 497). See further Elliot and others (n 505); Goldberg and others (n 505).

[513] See for example Ian Boardley, 'The Gateway Hypothesis of IPED Use: Current Knowledge and Future Research' (Blog, Human Enhancement Drugs 4 July 2016) <https://humanenhancementdrugs.com/2016/07/04/blog-4-the-gateway-hypothesis-of-iped-use-current-knowledge-and-future-research/> accessed 19 May 2019; Tom Hildebrandt and others, 'Fitness supplements as a gateway substance for anabolic-androgenic steroid use' (2012) 26 Journal of the Society of Psychologists in Addictive Behaviors 955; T. Karazsia, J. Crowther and R. Galioto, 'Undergraduate men's use of performance- and appearance-enhancing substances: An examination of the gateway hypothesis' (2013) 14 Psychology of Men & Masculinity 129.

numerous (legal) performance enhancing drugs and advanced techniques of training or recovery are at higher risk of life-time AAS use.[514] This can be seen as an over-generalised, reductionist approach that fails to consider the wider influences on AAS use.

Briefly, in concluding this discussion of interventions, it is important to note how these components may come together to form effective interventions that focus on prevention and harm-reduction of AAS use amongst this group of users. To that end, this author identifies three potential methods of delivery on which future efforts can be built: better education for those in positions to recognise the symptomology of AAS use (e.g. teachers, sports professionals, gym managers); balanced, non-judgemental education in schools; and increased online presence for accessible information.

In respect of the first of these, it is argued that a simple yet efficient starting point could be something as straightforward as better education for those in a position to recognise the symptomology associated with AAS use. This could include educating teachers, coaches, gym managers and parents as to the environmental influences that increase the risk of these users turning to AASs. By encouraging those on the front line to be proactive in identifying these risks, efforts can be made in attempting to prevent use. One example of this

[514] With respect, however, this is a banal statement. It appears to be inherently obvious that those who used these supplements and 'advanced techniques' are at a higher risk of use. The reason for this is twofold. Firstly, individuals who do so are clearly more invested in their physique. Considering the aforementioned shift toward AAS motives being grounded in aesthetics, it is not surprising that those who have these body image concerns and 'drive for muscularity' are more likely to turn to AASs in their life-time. Secondly, there are also environmental influences to be considered. However, a discussion of the nature of these environments (gyms, occupations etc) is left for another forum.

would be gym managers and personal trainers taking the time to properly induct and supervise younger members in order to ensure they have the requisite knowledge, support and skills to pursue their goals (e.g. fat loss or increased strength and muscularity).[515]

Another manner in which intervention efforts could be delivered is through implementing balanced, non-judgemental programmes in schools that focus on preventing adolescents from using AASs and creating an atmosphere of openness (with respect to societal norms, body image concerns, and the like).[516] By implementing classroom-based interventions that encompass the aforementioned (evidence-based) components of previous intervention efforts, schools could focus on restructuring the masculinities of this group (i.e. address the issues surrounding the normative ideals of the male body) and encourage an open discussion of the body image concerns that arise from these masculinities (and, in turn, lead to AAS use).

Finally, in an attempt to innovate intervention methods, future efforts should attempt to use the internet (particularly online forums and social media) as a platform through which to connect to young AAS users. It has been well established that as a group, despite a clear desire for information, AAS users have a low level of engagement with health care professionals and services.[517] As a result, users often turn to

[515] It is acknowledged that this places gym managers and personal trainers in a paradoxical position, as individuals in these positions are often those who supply AASs. However, research has shown that suppliers are often reluctant (and even refuse) to supply AASs to less experienced, novice users. Accordingly, it is reasonably assumed that the same can be said with respect to adolescent users.
[516] Gober and others (n 397).
[517] Zahnow and others (n 395); H. Pope and others, 'Anabolic steroid users' attitudes toward physicians' (2004) 99 Addiction 1189; 2015 IPED Survey (n 362); 2016 IPED Survey (n 365).

online forums as a way to seek and share information and experiences regarding AAS use (including information on harm reduction), with forum members often 'show[ing] concern for both their own and others' [AAS] use and, where they lack information, will recommend seeking information from medical professionals.'[518] Accordingly, given the growth of social media (and the internet more broadly) establishing a 'health service presence' on these platforms could prove to be a useful strategy for engaging with this group of AAS users and providing them with harm reduction advice.[519] This could prove to be an especially useful strategy considering that younger AAS users are much more likely to be reserved with regards to seeking advice from health care services.[520] In light of this, however, it is important to point out that these proposals are not offered up as a permanent fix, but as a solid foundation on which intervention efforts can continue to develop.

V. Conclusion

In an attempt to draw attention to a commonly neglected group of AAS users (non-competitive male adolescents), this paper set out to use "risk environment" as a conceptual framework to explore the intersectionality that exists between recent societal changes, the effect of these changes on the underlying motives behind use, and the resultant implications on intervention efforts. In doing so, five key conclusions have been drawn.

[518] Boden Tighe, 'Information sought, information shared: exploring performance and image enhancing drug user-facilitated harm reduction information in online forums' (2017) 14 Harm Reduction Journal 48. N.b. An interesting observation on these forums is the high credence given to anecdotal evidence, often being used in conjunction with scientific literature in an attempt to support opinions/claims.
[519] ibid.
[520] This is due to the fact that they are more likely to be concerned with the perceived stigma and embarrassment that may arise from visiting these services.

Firstly, notwithstanding the seemingly low prevalence rates amongst this group, the harms associated with AAS use (especially at such a young age) frame it as a public health issue that warrants immediate attention. Secondly, at a surface level, motivations behind AAS use appear to have remained largely unchanged from the 1990s—being primarily grounded in aesthetic reasons (e.g. increased muscularity and leanness). On this, it has also been shown that to gain a comprehensive understanding of the underlying motives behind AAS use amongst this group, there is a clear need to go beyond these superficial motives and address the "why" behind this pathological need for the "perfect physique". Thirdly, it has been shown that the motives behind AAS use lie beyond those proposed in previous literature. It is accepted that there is a growing body of literature in this area that seeks to address these underlying motives, however, many of these seem to suffer from the same narrowed focus as previous studies. In order to appreciate the significance of wider societal influences and their implications on intervention efforts, research needs to take a more nuanced approach that considers how wider societal trends influence AAS use. On this point, risk environment is particularly useful as a conceptual framework with which to view this intersectionality. Fourthly, this group of users clearly show heterogeneity in their motives, patterns and beliefs — all of which must be considered in order to build, develop and deliver intervention efforts that are grounded in theory.

With this in mind, the above discussion is not intended as a solution, but as rhetoric that clarifies some of the complexities surrounding intervention efforts for this group — that is, to map rather than prescribe. Finally, a review of the available literature leads to the conclusion that this is an area that has suffered greatly as a result of a lack of academic

research (with respect to male adolescents outside of the sporting domain). As such, there is a clear need for further empirical research that analyses both the motivations behind AAS use for non-competitive male adolescents and how said knowledge can aid in the development of effective, evidence-based intervention programmes. It is worth noting, however, that future efforts should enable the reader to identify how and why the interventions were designed and which mediating variables were targeted; doing so will give a clear view on why interventions have been effective or ineffective, and will better inform all succeeding efforts.[521]

[521] Bates and others (n 497).

Lessons from Darfur: The Sociological Drivers Behind Mass Violence

Josh Sromek [522]

This article explores the socio-ecological drivers that led to the Darfuri genocide in the early 2000s which oversaw the death of over four-hundred and fifty thousand African natives and the displacement of two million more. The aim of this article is to demonstrate, through the application of sociological and criminological theory, a distinct processual map taking effect across the macro-, meso- and micro-levels of analysis that facilitated this particular theatre of mass violence.

The practical importance of this article therefore rests in its demonstration of the way in which sociological and criminological theory can be utilised to further the understanding of genocidal behaviour in a modern-day context, as the study of genocide has remained elusive from the scope of criminological study in particular.

In light of a severe lack of combined criminological and sociological approach in this area, this article concludes that Darfur is a particularly instructive case study when such approach is adopted, and sheds light on the pre-requisite conditioning for genocide.

I. Introduction

The intra-state conflict in Darfur, a region located in North-eastern Africa, occurred following the desertification of the Arid Sahel zone of the Sahara in the mid-1980s, whereby the consequential increase in competition for arable land within Sudan exacerbated tensions among the Sudanese population. Shortly after, an Arabisation campaign launched at institutional

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level, following a military coup led by Omar al-Bashir, resulted in the marginalisation of the Black African population in the west.[523]

A social constructivism, namely 'Arabs versus Black Africans', was devised and prompted by the state as an ideological weapon to mobilise landless travelling groups.[524] These men were recruited into illegitimate paramilitary structures [525] as a limb of the state to carry out the mass death, rape and displacement of the indigenous population of Black Africans across the region of Darfur. A review of UN World Health Organisation data has led journalists to conclude that over four-hundred and fifty thousand people have died as a result of the genocide, as of April 2006.[526] Another two-million Africans were consequently displaced.[527]

It is here that a paradoxical phenomenon lies. Whilst modernity oversees the progression of democracy, freedom and community, it is profound to think that it equally bears witness to the committal of primeval acts of destruction that defy reason. Such atrocities can therefore prove difficult to comprehend and particularly difficult to explain. Whilst there can be no simple explanation, it is argued that answers lie in the interplay between ecological, political and social drivers that filter through macro-, meso- and micro-levels of analysis. In adopting the Darfuri conflict as a case study, this article will

[523] Joachim Savelsberg, *Crime and Human Rights* (Sage Publications 2010) 57.
[524] John Hagan & Wenona Rymond-Richmond, *Darfur and the Crime of Genocide* (Cambridge University Press 2009) 163.
[525] ibid 190.
[526] Eric Reeves, 'How Many Dead in Darfur?' (The Guardian 2007).
[527]John Hagan and Wenona Rymond-Richmond, 'The Death and Rape of Darfur' (2005) Criminology 43(3) 525-561, 552.

demonstrate the way in which the relationship between these levels exposes a distinct processual map that can and does lead to genocidal outcomes. Where criminology has often failed to concern itself with genocide, (aside from a handful of notable exceptions), this article will argue that the Darfur conflict is instructive as a contemporary theatre of mass violence. Its study from a combined criminological and sociological perspective can be used to further understand and identify the prerequisite conditioning for genocidal outcomes in the modern era. Indeed, genocide remains a poorly understood phenomenon from a criminological viewpoint, despite a proliferation of genocidal behaviour in the 20th century. Accordingly, this article will find that criminology adds particular value to understanding the Darfuri genocide and its causes. To further academic enrichment and practical implications, findings, as explored in the following discussion, that collectively help to explain the Darfuri genocide must be developed and tested across differentiating theatres of mass violence.

II. Macro-level Variables

This discussion will firstly engage with the eco-political dynamics at play at macro-level and work down towards their outcomes at meso- and micro-level respectively, to demonstrate a sociologically predicted pathway to genocidal behaviour.

Academic commentary has argued that whilst there can be no doubt that there existed diverse social and cultural causes, the Darfur conflict was born as a result of an ecological

crisis, that occurred at least in part, from climate change.[528] It is contended here that it was the ecological dynamics at play in Darfur that permitted the Sudanese Government to implement a racially fuelled ideology. Therefore, it was these two interlocking variables that predominantly catalysed the genocidal process in Darfur.

The Darfuri conflict has a strikingly unique character as a contemporary genocide due to its inherent link with global warming as a macro-level actor. It has been rightly contended that dramatic changes to the climate can lead to an increasing scarcity of resources.[529] Indeed, the subsequent scarcity of arable land within Sudan, following the desertification of the Arid Sahel zone of the Sahara, had meant that the number of landless Arabs within Sudan, desperate for grazing land for their herds, had markedly grown. Despite the fact that the Sudanese regime was democratically void, highlighted by its rise to power through a military coup,[530] the state's effective exploitation of the desertification of the Sahara provided the government with a powerful tool to artificially generate institutional legitimacy and support. Arab groups directly experiencing the adverse effects of climate change on resource accessibility were increasingly susceptible to the ideological constructions fed down through political discourse.

[528] Lyal Sunga, 'Does Climate Change Kill People in Darfur?' (2011) Journal of Human Rights and Environment 2(1), 64-85, 70.
[529] Craig Anderson and Matt Delisi, 'Implications of Global Climate Change for Violence and Developing Countries', in J P Forgas, A W Kruglanski, and K D Williams, *The Psychology of Social Conflict and Aggression*, (New York Psychology Press 2011) 249-265, 259.
[530] Agnes van Ardenne der Hoven and Salih Mohamed, *Explaining Darfur: Lectures on the Ongoing Genocide,* (Vossiuspers UvA 2006).

Academics have offered that the state-level creation of belief systems that sought to exclude a victim group from the perpetrators' 'universe of moral obligation' was commonplace in the development of twentieth century genocides.[531] Building upon the concept that outgroups can serve as a 'lightning rod' for collective frustration[532], a process of state-led alienation in Darfur fuelled an extremist racial ideology to both isolate and target Black African tribes residing in West Sudan. Thus, such adversely affected groups of landless Arabs were ideologically indoctrinated to push Black African Tribes outside the contours of their moral boundaries[533]. The 'universe of moral obligation' is a term that is used to describe the way in which perpetrators to mass violence form solidarity in their aim, which overrides any obligations such group may have had with the victimised counterparts. Indeed, Green and Ward have profoundly stated that where victims of mass violence are wholly excluded from the universe of obligations, killing is of no more consequence than swatting a fly.[534]

Correspondingly, a vision of access to resources and land was offered to the Arab population, which could be achieved at the sacrificial expense of the Black African population. Such a sacrifice was effectively justified in the service of this vision.[535] In this respect, increased resource

[531] Penny Green and Tony Ward, *State Crime: Government, Violence and Corruption* (Pluto Press 2004) 184.
[532] Donald Dutton, Ehor Boyanowsky and Micheal Bond, 'Extreme Mass Homicide: From Military Massacre to Genocide' (2005) Aggression and Violent Behaviour 10(4), 437-473,456
[533] Helen Fein, *Accounting for Genocide: National Responses and Jewish Victimisation During the Holocaust* (New York Free Press 1979)
[534] Green and Ward, (n 531), 181.
[535] Dutton, Boyanowsky and Bond (n 532), 456.

competition had combined with the Sudanese Government's extreme Arab Islamic policies[536] to exacerbate the 'Arab versus Black African' construction, devised at state-level as an ideological vehicle. As demonstrated here, it is argued that desperation enhances the ability of leaders to generate compliance within genocidal commands.[537]

Anderson and Delisi suggest that although it may be too simplistic to attribute the conflicts in Africa during the latter 20th century and the start of the 21st century to climate change, the role played by the economic hardships wrought through resource shortage cannot be ignored.[538] It is therefore arguable that the effects of climate change on the accessibility of land and sustainable resources may prove to be a new root cause of pressure in years to come as the effects of global warming begin to expansively affect African and Middle-Eastern countries.

At macro-level, the Darfuri genocide is particularly informative of the way in which climate change may perpetuate and catalyse pre-requisite conditions of mass violence in areas where arable land is increasingly scarce; similar sociological patterns deriving from such predictors are likely to surface across space as the 21st century progresses. Sunga has thus suggested that in the context of armed conflict, competition over accessibility to resources, a tension aggravated by climate change, ought to be accounted for as part of the wider macro-dynamic.[539] This is to be welcomed as a constructive proposal to enlighten contemporary criminological study with regard to

[536] Savelsberg (n 1), 61.
[537] Dutton, Boyanowsky and Bond (n 532), 454.
[538] Anderson and Delisi (n 529), 259.
[539] Sunga (n 528), 70.

emerging theatres of mass violence. In respect of policy and preventative action, it should be noted that Rafter advocates for a *genocidal propensity* to measure the likelihood of genocides occurring in the future.[540] As a pro-active tool used in this way to inform international prevention strategies, such a mechanism should be equally welcomed. Aligned with Sunga's aforenamed advancement, it is offered here that *ecological emanations of pressure* or *increased resource competition* must be added to the propensity measure to effectively account for ecologically driven prerequisites taking shape. To this end, it is imperative that the green criminology movement is provided with the requisite funding necessary to further explore the ecological dynamics taking effect across theatres of mass violence. Green criminology describes the analysis of environmental or ecological harms from a criminological perspective, focusing on the interplay between criminogenic behaviour and ecosystems. One compelling advancement in this strand of criminology has been recent efforts to examine the relationship between genocide and ecocide.

Arguably, this field of criminology is still in its infancy, with the term being officially introduced in the early 1990's. However, its importance to a contemporary understanding of criminological behaviours must not be underestimated. Green criminology offers a clear way in which the discussion surrounding atrocity mitigation can be enriched, by offering newfound perspectives and theories on the causative factors to mass violence, particularly in the case of developing countries. It is here whereby concepts such as the

[540] Nicole Rafter, *The Crime of All Crimes: Towards a Criminology of genocide* (NYU Press 2016) 56.

propensity measure, as proposed by Rafter, could be developed further into more sophisticated and practically significant tools.

III. Meso-level Variables

This discussion will now focus on meso-level sociology, namely, group structures and the way in which they developed and operated in Darfur. Significance lies with this mid-level variable as it is the 'organisational context that largely determines the nature of the participation of perpetrators'[541]. Furthermore, Alvarez offers that the production of a genocidal result is 'dependent on a variety of different institutions turning abstract initiatives into reality'.[542] The subsequent discussion will therefore focus primarily on the recruitment of the Arab militia by the Sudanese regime and the collectivised racial intent developed at group level, respectively.

In Darfur, the military coup of the Sudanese Government fostered racial and ethnic divisions by mobilising Arab militias in the south for nearly twenty years. Gradually, militia activity shifted to the west of Sudan as increasingly desperate and landless black African groups were recruited into paramilitary structures.[543] These militia groups, collectively known as the so-called Janjaweed, served as an extension of the official Sudanese state military force. Such groups were largely responsible for the violence across Darfur, which was justified as a means to tackle the perceived problems posed by black African Tribes. Van Ardenne contends that under the leadership of Musa Hilal, a prolific individual political actor,

[541] Alexander Alvarez, *Genocidal Crimes* (Routledge Taylor & Francis Group 2010) 75.
[542] ibid 75.
[543] Hagan and Rymond-Richmond, *Darfur and the Crime of Genocide* (n 524), 163.

the Sudanese state had effectively passed control of the use of force and violence to the parallel paramilitary structure. Whilst he states that it was at this point that the Janjaweed had 'officially become part of the machinery of government,'[544] it is likely that the state handed monopoly to the unofficial Janjaweed militia groups to both carry out the violence and disguise state involvement. Generally speaking, genocidally inclined political powers typically have an interest in concealing their connections to mass violence.[545] As such, paramilitary groups preferentially offer the state plausible deniability of their involvement. Whilst the Janjaweed were recruited as a paramilitary limb of the Sudanese regime, their nature as an unofficial group structure was likely desirable.

Indeed, deniability of state involvement through the use of a paramilitary proxy is often engaged as a governmental strategy in the context of ethnic cleansing. In the case of the Bosnian war, Arkan's Tigers, a brutal state-backed paramilitary group structure, allowed the Serbian government to deny any direct involvement in the fighting. The government had insisted that Serbian citizens who participated in the violence were all volunteers.[546] The use of such proxies can have far-reaching legal ramifications. In the 2005 UN commission of inquiry in Darfur, the commission concluded that 'the government had not pursued a policy of genocide,'[547] although curiously, it did find that some individual actors may have acted with genocidal

[544] van Ardenne and Mohamed (n 530).
[545] Alvarez (n 541), 85.
[546] Marija Ristic, 'The Role of Serb Fighters in Putin's Ukraine and Syria Campaigns' (Business Ukraine 2016)
[547] 2005 *Report of the International Commission of Inquiry on Darfur to the United Nations Secretary General*, Geneva, 1-176, 4.

intent.[548] The lack of evidence of a collective intention to commit genocide *beyond reasonable doubt* is arguably contributed to the state's effective distortion of direct links to paramilitary groups, who predominantly carried out the mass violence. It is often the case that illegitimate military structures are financially backed and equipped by that political power,[549] and as such, these meso-variable patterns similar across space and time may point to the way in which future atrocities are conducted by genocidally inclined and corrupt establishments. Critically, as a means to expedite state scrutiny and genocidal prevention, international accountability structures should investigate the way in which state military budgets are allocated as a means to seek out state corruption. If direct links between the administration and paramilitary structures could be effectively established via financial traces, this may be a means by which political actors can be brought to the International Criminal Court (ICC) on account of conspiracy to commit intra-state violence.

As the second meso-level variable, a process of reframing is transmitted through individual actors from state level to trigger collective moral disengagement. This process is achieved by placing new ideological perspectives in group identities and in turn, developing new narratives.[550] The 'political entrepreneurs' of the Sudanese Government, namely state figures such as Musa Hilal, were employed to utilise

[548] Matthew Happold, Darfur, the Security Council and the International Criminal Court', (2006) International & Comparative Law Quarterly, 55(1), 226-236.
[549] Alvarez (n 541), 85.
[550] Rafter (n 540), 81.

ideological tools to collectively frame and mobilise groups.[551] Seemingly, when actively propagated by political figures, expressions of violent racism can acquire a collective organisational force that can lead to genocidal victimisation.[552] This useful analogy showcases the way in which the regime's 'Arabisation' and implementation of an ideological framework is directly transmitted into group processes to form collectivised racial intent.

In terms of ideological conditioning, Savelsberg offers that processes of reframing 'are especially effective if they define the root of the problem and its solution collectively, the antagonists as "us versus them", and a problem caused by "them" that can be challenged by "us."'[553] This is arguably why ethnic mobilisation proved to be effective in the context of Dafuri. Granted by the unique ecological developments in Sudan, the Sudanese regime was afforded the ability to present a simplistic answer (the removal of African tribes) to complex socio-economic problems (the increasing scarcity of land and resources).

Again, broad similarities are attributable to other theatres of mass violence. Ethnic mobilisation was also prominent in the Rwandan genocide where underlying socio-economic conditions advanced the use of brute force in the efforts to solve complex issues.[554] A discernible consistency in various genocidal ideologies is therefore the production of a

[551] John Hagan & Wenona Rymond-Richmond, 'The Collective Dynamics of Racial Dehumanisation and Genocidal Victimisation in Darfur' (2008) American Sociological Review 73, 875-901, 878.
[552] Hagan and Rymond-Richmond, *Darfur and the Crime of Genocide* (n 524), 169.
[553] Savelsberg (n 1), 60.
[554] van Ardenne and Mohamed (n 530).

seemingly straightforward solution to socio-economic hardship; this has consequently fed into group dynamics through the political discourse. It is proposed that without an alternative solution, marginalised individuals are polarised and ideologically indoctrinated by the state. Bromwich highlights that a core issue in Sudan stems from the 'Sudanese aspiration to be removed from the US list of state sponsors of terrorism, a prerequisite for financial access and achieving wider rapprochement from the west.'[555] As a matter of policy in a supra-macro context, genocidal states must be brought under the protection of international humanitarian initiatives as a communitarian measure of control. Only then can adverse complexities of socio-economic circumstances be addressed, and mass violence prevented. Without such pro-active enterprise to bring states into the western collective, radical ideologies are allowed to exclusively manifest and fuel group action. It is at this point whereby a process of collectivised dehumanisation begins to manifest, as predicted by the Janjaweed group dynamics. Dehumanisation can be described as a 'mechanism that imposes degrading attributes on both individuals and entire groups for purposes of group destruction'[556] and is used to 'reframe' the target group to subhuman levels. Criminology identifies this component of the processual map as a collective *moral disengagement* of the victimised group.

[555] Brendan Bromwich, 'Power Contested Institutions and Land: Repoliticising Analysis of Natural Resources and Conflict in Darfur', (2018) Journal of Eastern African Studies, 12:1, 1-21, 4.
[556] Hagan and Rymond-Richmond, 'The Collective Dynamics of Racial Dehumanisation and Genocidal Victimisation in Darfur' (n 551), 877.

Hagan and Rymond-Richmond's *collective action theory* posits that socially constructed racial groups created through state-led ideology are subsequently provided with a lexis of motives and neutralisation. This, in turn, facilitates frenzied group action. The subsequent racialised intent that follows is produced through the collective and individual use of racial epithets at meso- and micro-level, respectively.[557]

Hagan and Rymond-Richmond suggest that placing the African tribes outside of the sphere of obligation had left such groups subject to targeted genocidal victimisation. Racial epithets such as 'kill the blacks' were commonly used to strip black Darfuri groups of their membership in Sudanese society, of which they argue is a 'defining feature of genocide.'[558] Conceptually endorsing *collective action theory*, academic commentary has contended that the 'Arab and African' social construction, the premise of the 'us versus them' construct, was to some extent, realised on the ground.[559] This is evidenced as accounts of Janjaweed militias calling Fur or Masalit victims of rape and murder 'slaves' or 'blacks'[560] has been documented. The extensive use of racial epithets used by the Janjaweed militia was therefore manifested through collectivised racial intent formed at group level, which was transmitted via specific political actors used by the state. Furthermore, Jones identifies how anthropologists have analysed the way in which violence is ritualised within cultures; 'when collectively performed, it

[557] Hagan and Rymond-Richmond, *Darfur and the Crime of Genocide* (n 524).
[558] Hagan and Rymond-Richmond, 'The Collective Dynamics of Racial Dehumanisation and Genocidal Victimisation in Darfur' (n 551) 877.
[559] Lutz Oette, 'Saviours and Survivors: Darfur, Politics and the War on Terror' Publication Review (2010) Journal of African Law 54(2), 313-318.
[560] ibid.

serves to enhance community and solidarity'.[561] Here, the 'us versus them' construct served to collectively 'reframe' the Black African outgroup. This process is attained through a development of collective neutralisation, which is subsequently filtered through to individual perpetration. At meso-level, the use of racial slurs employed reinforces the 'group identity' that Jones describes to qualify the Janjaweed's psychological guilt of committing mass murder and, in turn, produce a collective moral disengagement.

IV. Micro-level Variables

At micro-level, this discussion will explore techniques of neutralisation and dehumanisation.

Skyes and Matza's *techniques of neutralisation* [562] asserts that offenders employ one or more of five psychological methods to effectively remove normative obstacles, thus enabling them to engage in illegitimate activity. Sociologists Ribeaud & Eisner take this further and importantly highlight that dehumanising the victim serves as one of four key mechanisms that forms a cluster of cognitive processes serving to overcome dissonance between individual moral standards and behavioural transgressions.[563] Alvarez demonstrates the way in which *techniques of neutralisation* can be readily applied to a context of mass violence, namely the Holocaust, as

[561] Adam Jones, *Genocide; A Comprehensive Introduction* (2nd edn, Routledge 2011) 435.
[562] Gresham Sykes and David Matza, 'Techniques of Neutralisation: A Theory of Delinquency', (1957) American Sociological Review 22(6), 664-670.
[563] Denis Ribeaud and Manuel Eisner, 'Are Moral Disengagement, Neutralisation Techniques, and Self-Serving Cognitive Distortions the Same? Developing a Unified Scale of Moral Neutralisation of Aggression' (2010) International Journal of Conflict and Violence 4(2), 298-315, 311.

a psychological explanation for perpetration.[564] Moral neutralisation allows internalised moral rules to be temporarily discarded and appear irrelevant in specific situations. This process is predominantly facilitated through dehumanisation as an ideological tool to subordinate the victimised group. It is therefore these two processes that work in tandem at micro-level to facilitate perpetration in situations of genocide.

In the context of Darfur, the Arab Janjaweed ultimately desired 'arable' land, not necessarily to kill and rape Black African Tribes. Whilst Klusemann rightfully suggests that one method by which individuals accommodate themselves to genocidal participation is explained by the neutralisation theory,[565] it is clear that this is more expansive in its scope as a motivated phenomenon, 'serving both individual and intergroup functions.'[566] In light of the preceding discussion, it is proposed that techniques of neutralisation and dehumanisation were engaged at an individual level to ameliorate the psychological guilt of perpetrators. These techniques were used to justify the brutal ethnic cleansing in Darfur. This, of course, was predicted and fed by group dynamics. Hagan & Rymond-Richmond's victimisation survey [567] conducted within the Darfuri refugee camps of Chad is a particularly influential contribution to criminological study in

[564] Alexander Alvarez, 'Adjusting the Genocide: The Techniques of Neutralisation and the Holocaust' (1997) Social Science History, 21(2), 138-178.
[565] Stefan Klusemann, 'Massacres as Process: A Micro-sociological Theory of Internal Patterns of Mass Atrocities', (2012) European Journal of Criminology 9, 468-480, 115.
[566] Nick Haslam, 'Dehumanisation: An Integrative Review', (2006) Personality and Social Psychology Review 10(3), 252-264, 255.
[567] John Hagan and Wenona Rymond-Richmond, 'Racial Targeting of Sexual Violence in Darfur', (2008) American Journal of Public Health 99, 1386-1392.

this respect. The study represents significant and far-reaching implications by revealing how techniques of neutralisation are played out on the ground in theatres of mass violence. The data collected has subsequently been used to support Hagan and Rymond-Richmond's *collective action theory*.

Crucially, the victimisation survey indicates that an average of more than one, and as many as two persons were reported to have been sexually victimised when half or more of the respondents from a village reported hearing racial epithets during attacks by a combination of government and Janjaweed forces.[568] The use of a degrading and dehumanising lexis such as, 'this is the last day for blacks' or 'kill all the slaves,'[569] used in the collective and individual expressions of Janjaweed and official military perpetrators appeared to have increased the severity and extent of genocidal victimisation.[570] In line with Hagan and Rymond-Richmond's model, academic contribution has posited that 'the use of racial hatred appears to mobilise attackers and ignites a fury that encourages acts of murder and rape - a common trend in genocides.[571]

The implications of this may be far reaching for state retribution. Through their quantitative study, Hagan and Rymond-Richmond conclude that the evidence of racial slurs used immediately before the carrying out of the systematic rape and killing of Black African Villagers clearly demonstrates a collective and individual racial intent to kill the African Darfuri people. Compellingly, they suggest that there may be grounds

[568] ibid, 1390.
[569] Hagan and Rymond-Richmond, *Darfur and the Crime of Genocide* (n 524), 172.
[570] Hagan and Rymond-Richmond, 'The Collective Dynamics of Racial Dehumanisation and Genocidal Victimisation in Darfur' (n 551), 895.
[571] Savelsberg, (n 1), 58.

for the ICC to prosecute the Sudanese Government officials based on joint criminal enterprise.[572] According to the UN's definition of genocide, there must be an 'intent to destroy, in whole or in part, a national, ethnical, racial or religious group.'[573] This evidence-based standard of proof could be satisfied through the establishment of collectivised intent. Arguably, it evidences the Sudanese Government and Janjaweed militias' criminal engagement in aiding and abetting atrocity perpetration.'[574] Strikingly, the state's ability to deny its contribution had meant that neither the EU, the UN Commission of Inquiry in 2005, nor the Office of the Prosecutor of the ICC 2007 found the Darfuri conflict to be a genocide.[575] It was not until 2008 that an application was filed to call Sudanese President al-Bashir to the ICC on account of crimes of genocide,[576] despite the fact that international crimes against humanity taking place in the west of Sudan had commenced in early 2003.

Certainly, the purpose of Hagan and Rymond-Richmond's work was to encourage intervention and prosecution in a Darfur-specific context.[577] Whilst undoubtedly an outstanding contribution to the criminology of genocide, Pruitt contends that the *collective action theory* is narrow and

[572] Hagan and Rymond-Richmond, 'The Collective Dynamics of Racial Dehumanisation and Genocidal Victimisation in Darfur' (n 551), 895.
[573] UN Genocide Convention 1951.
[574] Yusuf Aksar, 'The UN security Council and the Enforcement of Individual Criminal Responsibility: The Darfur Case' (2006) African Journal of International and Comparative Law, 104-119.
[575] Hagan and Rymond-Richmond, *Darfur and the Crime of Genocide* (n 524), 190.
[576] ibid (n 524), 190.
[577] Bruce Hoffman, 'Mobilizing Criminology: The Boundaries of Criminological Science and the Politics of Genocide' (2009) Theoretical Criminology, 13(4), 481-485.

perhaps too specific to the Darfuri conflict.[578] As a theory that is applied to only one instance of genocide, it is necessary to expand its theoretical ambit across space and time to test its broader applicability. Buttonbach has warned of the dangers of confining genocides to narrow categories, where a new application of theoretical thought would be more appropriate.[579] In this instance, this can only be achieved where the *collective action theory* can be built upon and/or critiqued, and used to bear a new understanding of collectivised genocidal intent entirely. The most limiting feature of Hagan and Rymond-Richmond's theory is its sole concentration on *racially* motivated intent. Indeed, Pruitt offers that Hagan and Rymond-Richmond use qualitative analysis to suggest that genocide is based on race and encouraged by the government.[580] Perhaps the most common-sense approach to enriching criminological and sociological understanding of genocide is to test this model in instances of genocide fuelled by non-racially motivated ideologies. Certainly, the UN definition of genocide, although narrowly defined and criticised to that end, is expansive enough to include ethnicity, national origin and religion. It is proposed that the *collective action theory* is expanded and tested to instances of these protected categories as a further crucial academic step.

[578] William Pruitt 'Toward a Modified Collective Action Theory of Genocide: A qualitative Analysis' (2011) The College of Criminal Justice, 1-201, 84.
[579] Henry Buttonbach, 'Towards a Theory of Genocide? Not Yet! A Caveat' (2004) Journal of Genocide Research, 6(2), 149-150.
[580] William Pruitt, (n 577) 42.

V. Conclusion

This discussion has attempted to demonstrate a causative map that flows from state level, down to individual action that ultimately led to the mass murder, rape and displacement of the black African population in Darfur. This has been explained and developed by a combined sociological and criminological approach.

The impacts of the restructured socio-ecological landscape have represented significant implications for the Sudanese population. The scarcity of arable land was capitalised on by the extremist Sudanese regime who intentionally implemented a racialised ideology. As *collective action theory* posits, the racial 'Arabisation' was adopted by the Islamic regime to create a socially constructed 'us versus them' divide and removed Black African Tribes outside of the universe of obligation. This was then transmitted to mobilised group structures (used by the state as a proxy for violence) via numerous political actors, whereby a lexicon of degrading and dehumanising language was employed amongst Janjaweed and official military forces as part of a process of *reframing* and *moral disengagement*. This collective group intent expedited individual *techniques of neutralisation* that was namely achieved through the elevated use of racial epithets as part of a process of dehumanisation.

Currently, there is little criminological study covering this particular phenomenon, much to the detriment of understanding the mechanics of mass violence in the 21st century. However, the adoption of a combined criminological and sociological lens can be particularly instructive and is best suited as an approach with regards to understanding the nature

and development of contemporary mass atrocities. Through such an approach, lessons with particular relevance to modernity can be learned from this specific theatre of mass violence:

In relation to macro-level actors, a causal link can be identified between Sudan's increasingly adverse socio-economic landscape and the pathway to a genocidally inclined state. Therefore, Darfur as an ecologically derived conflict may well serve as a warning for the development of atrocities to come, in light of the very real prospects of global warming. As years pass by, the forever shifting ecological landscape continues to perpetuate the shortage of human resources. The projection that there will be a 5-8% increase in the proportion of Africa that is arid and semi-arid by 2080 is a cause for much concern.[581] This will inevitably increase scarcity and competition for desirable land in volatile areas, where extreme power vacuums and state instability is commonplace. It is therefore of fundamental importance that criminology is increasingly developed in the study of genocide to advance understanding of the conditions for genocidal behaviours in ecologically adverse areas of the world. As discussed previously, green criminology offers further recourse in this respect.

With regards to meso- and micro- level variables, whilst individuals commit genocide, the state partakes a critical role.[582] Indeed, Hagan and Rymond-Richmond's *collective action theory* of genocide represents the most instructive and

[581] Andrew Githeko, 'Intergovernmental Panel on Climate Change' (IPCC) (2007), Cambridge University Press, 435-467, 435.
[582] William Pruitt (n 577), 43.

far-reaching model for contemporary mass violence thus far, in an area where criminological perspective is severely lacking. Whilst a useful starting point, this model is limited to a Darfur-specific context. More must be done to enrich the discussion. It is therefore crucial that further action is taken to populate this area with criminology and sociology so as to appropriately evaluate mass atrocities, encourage theoretical critique, and better our understanding. Doing so will have a profound impact on the way in which humanity chooses to respond to contemporary genocides.

Has freedom of expression been unduly restricted in Europe regarding religious matters?

Richard Kelly [583]

This article seeks to answer whether freedom of expression has been unjustifiably restricted in Europe through a focus on the timeline following the *Charlie Hebdo* attack. It will concentrate on expression with regards to religious matters and examine if states and the European courts have, since the attack, through legislation and case law, unduly restricted it. The article answers in the affirmative: when authoring policies on the degree of protection "expression" warrants, states have indeed unduly restricted it, quite often in the name of national security. Consequently, the current precedents in case law protecting religious feelings fail to pay due heed to the rights of democratic citizens to legitimate free expression. Furthermore, it will be demonstrated that the ease of dissemination of content online raises the risks of widespread harm. This has led states to attempt to remedy this issue, often to an unsatisfactory effect. It is suggested that the current regulations require amendments to reflect the modern world, which would protect both free expression and society's members at large.

I. Introduction

The events of the infamous *Charlie Hebdo* attack in Paris were orchestrated, it seems, to attack a particular locale that was critical of religion. As a vengeful response to material some would describe as blasphemous, the attacks exacerbated an ongoing debate regarding the degree to which freedom of expression should be protected. States' responses to the attacks, both through legislation and jurisprudence, warrant detailed

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examination. At its crux, this article advocates that freedom of expression relating to religion has been unduly restricted since the *Charlie Hebdo* attack and aims to identify instances of such restrictions, especially in the name of national security. Although there have been subsequent attacks, the *Charlie Hebdo* shooting will serve as a starting point due to the widespread support for both the murdered cartoonists and freedom of expression, captured by the slogan "Je suis Charlie."[584] In light of international support for freedom of expression, it is suitable to examine states' response to the attack as an indicator of increased governmental protection of expression. The primary matters of free expression addressed in this article are extremism, terrorism and religious symbols.

Section II addresses the legal framework of freedom of expression, including how it is protected in Europe and internationally, allowing the remainder of the article to exist in proper context. It will describe the circumstances under which freedom of expression can be restricted and attempt to define "hate speech." Section III provides a brief overview of the legal framework of religion supplemented with a short description of what may be considered "blasphemy". Section IV examines how states have reacted to the *Charlie Hebdo* attacks through legislation they have passed in the attempts to eradicate extremism and terrorism. Section V considers historic and recent European jurisprudence with a view to illustrating how the Court has balanced the freedoms of expression against religion. The question is posed and answered whether offence suffered by religious individuals should be material when restricting expression. This section concludes that while the

[584] Simone Chambers, 'Free Speech and Civility in Pluralist Societies' in Edward M. Iacobucci and Stephen J. Toope (eds), *After the Paris Attacks: Responses in Canada, Europe, and Around the Globe* (University of Toronto Press 2015) 13.

European Court of Human Rights (hereafter the "Court") often has national security in mind, public morals and other rights should not be side-lined. Finally, Section VI analyses the impact of the Internet in terms of communication. It investigates the ease of online dissemination of harmful content and the problems this can cause, both in terms of offence, and national security. European states' attempts to curb harmful dissemination involve measures such as requesting Internet intermediaries to strengthen regulation. However, it is a legitimate query whether Internet intermediaries ought to bear liability for certain online content, especially when Internet publications seldom occur only once. Ultimately, current measures combatting damaging content must be strengthened to a fortitude sufficient to regulate modern Internet dissemination.

II. The Legal Framework of Freedom of Expression

The exercise of freedom of expression can be seen as a benchmark for how tolerant a region is and the extent to which society freely functions within it. It is a key right and is protected in both international and regional systems by Article 19 of the International Covenant on Civil and Political Rights (hereafter "ICCPR")[585] and generally holds its place as a cornerstone of any democratic society.[586] Despite this, it is known as a "qualified right," meaning that there is no absolute right to freedom of expression, and in some states it may be restricted.

[585] International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171 (ICCPR), art 19.
[586] Rhona K.M. Smith, *International Human Rights Law* (OUP 2018) 310.

The right to freedom of expression in Europe has a special status and has been described by the Court as one of the basic conditions for the progress of democratic societies and for the development of each individual.[587] Article 10 of the European Convention on Human Rights (ECHR) (hereafter the "Convention") enshrines freedom of expression, which includes the "freedom to hold opinions and to receive and impart information and ideas without interference by public authority."[588]

The qualified nature of this right as shown in Article 10(2) allows restrictions "prescribed by law and necessary in a democratic society" to be justified with regards to matters of national security, amongst others.[589] The restrictions must also serve a legitimate aim. According to the Court, "necessary in a democratic society" means that there must be a pressing social need for the restriction, with the interference being proportionate to the legitimate aim pursued.[590] It is well established that the Court gives states a "margin of appreciation" in applying Article 10 and any restrictions placed upon it,[591] and accordingly there has been some variation in how states have dealt with freedom of expression. However, this does not give states free rein and the Court retains the final say on whether there has been any breach of Article 10. The margin of appreciation doctrine varies not just with the type of expression, but also according to the interest the state invokes for the limitation. Limitations on grounds of national security, for example, have been treated more deferentially by the

[587] *Handyside v the United Kingdom*, Application No. 5493/72 (ECtHR, 07 December 1976) [49].
[588] Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights, as amended) (ECHR), art 10(1).
[589] ECHR, art 10(2).
[590] *Handyside v the United Kingdom* (n 587) [49].
[591] *Handyside v the United Kingdom* (n 587) [48].

Court.[592] The margin of appreciation is wider in cases which may offend an individual's personal convictions or religion.[593] It is generally recognised that the Court has split freedom of expression into three categories: political, artistic and commercial. Political speech is viewed as the most highly prized with the narrowest margin of appreciation with commercial expression being the reverse of this.[594]

Article 19 of the ICCPR also allows for restrictions which are prescribed by law and necessary for the rights and reputation of other individuals, as well as for the protection of national security, public order, public health and public morals.[595]

Restrictions may also be placed where speech crosses a threshold and becomes "hateful" speech. It is therefore necessary to examine what constitutes hate speech and how it is restricted. In the absence of a universal definition, the UN has defined hate speech as: "any kind of communication in speech, writing or behaviour, that attacks or uses pejorative or discriminatory language with reference to a person or a group on the basis of who they are, in other words, based on their religion, ethnicity, nationality, race, colour, descent, gender or other identity factor."[596] Hate speech may also be prohibited

[592] Ian Leigh, 'Damned if they do, Damned if they don't: the European Court of Human Rights and the Protection of Religion from Attack' (2011) 17(1) Res Publica 55.
[593] Monica Lugato, 'The Margin of Appreciation and Freedom of Religion: Between Treaty Interpretation and Subsidiarity' (2017) 52(1) Journal of Catholic Legal Studies, art 5.
[594] Leigh (n 592).
[595] ICCPR, art 19.
[596] Antonio Guterres, 'United Nations Strategy and Plan of Action on Hate Speech' (*UN*, May 2019) <https://www.un.org/en/genocideprevention/documents/UN%20Strategy%20and%20Plan%20of%20Action%20on%20Hate%20Speech%2018%20June%20SYNOPSIS.pdf> accessed 26 July 2019.

under international human rights law by Article 4 of the International Covenant on the Elimination of All Forms of Racial Discrimination (hereafter "ICERD"),[597] and Articles 19 and 20 of the ICCPR.

Whether speech crosses the threshold and becomes hate speech, this must be determined on a case-by-case basis. The Court will have regard to a number of factors, such as the political or social backdrop against which it was made, and if it called or incited any violence or intolerance.[598] The Court will also examine the aim pursued by the applicant and the context in which it was disseminated, including the status and role in society of the applicant(s) and person(s) targeted by the remarks at issue, and the potential impact of the remarks.[599]

On the contrary, there are some occasions where expression does not warrant even *prima facie* protection under Article 10.[600] Article 17 of the Convention provides that no party may use Convention rights to seek the destruction of the very rights guaranteed in the Convention. In essence, no right may be relied upon where it will infringe on another, such as the restriction of religious rights in favour of expression.

[597] International Convention on the Elimination of All Forms of Racial Discrimination (adopted 21 December 1965, entered into force 04 January 1969) 660 UNTS 195, art 4.
[598] Aernout Nieuwenhuis, 'A positive obligation under the ECHR to ban hate speech?' [2019] Public Law 326.
[599] Anne Weber, *Manual on Hate Speech* (Council of Europe 2009) 33.
[600] Toby Mendel, 'Freedom of Expression: A Guide to the Interpretation and Meaning of Article 10 of the European Convention on Human Rights' (Council of Europe, 2012) <https://rm.coe.int/16806f5bb3> accessed 30 August 2019.

III. The Legal Framework of Religion

Peter Jones is correct in saying that freedom of expression, when it comes to religious matters, really concerns two different things. The first is freedom to express a certain belief or religion, and the second is the freedom to express a certain view about a religion, which may include a neutral or negative opinion.[601] The first is substantially connected to questions of national security: how extreme expressions of religion have manifested in practices such as Islamic terrorism and how states have reacted to this.

There are many high-profile examples of the second, with the cartoon controversy and ensuing attacks surrounding *Charlie Hebdo* being just one. Some might see criticism of religion as a form of blasphemy, which has been a longstanding controversial topic in Europe. Blasphemy can be defined as a perceived insult or disparagement against beliefs and practices associated with religion, including disparagement of gods or other religious figures.[602] Although these attacks and issues are perceived as fundamental to the religion of Islam, the potential for offence and for tensions to rise as a result is not limited to this religion. This raises questions about the relationship between freedom of expression and religion generally and where the limit of tolerance is and ought to be.[603] The European Court of Human Rights' task of balancing freedom of expression against freedom of religion is inevitable, yet the

[601] Peter Jones, 'Introduction: Religion and Freedom of Expression' (2011) 17(1) Res Publica 1.
[602] Paul Sturges, 'Limits to freedom of expression? The problem of blasphemy' (2015) 41(2) IFLA 112.
[603] Ilias Bantekas, *International Human Rights Law and Practice* (Cambridge University Press 2016) 394.

Court must proceed cautiously in cases where there is a danger of offence being caused and tensions stirred.

Internationally, freedom of religion is protected under Article 18(1) of the ICCPR, which confirms the freedom to manifest a belief or religion of choice, while Article 18(3) confirms that limitations may be applied which are prescribed by law and necessary to protect public safety, order, health, morals or fundamental rights and freedoms. Similarly, it is protected under Article 9(1) of the ECHR, which states:

"[e]veryone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief and freedom, either alone or in community with others and in public or private, to manifest his religion or belief, in worship, teaching practice and observance."

IV. Reactions of States following the *Charlie Hebdo* attack

(i) Brief Outline of Charlie Hebdo attacks

On 07 January 2015, two brothers, Cherif and Said Kouachi, forced their way into the offices of the satirical newspaper, *Charlie Hebdo*, in Paris, killing twelve people including some of the cartoonists.[604] Another assailant attacked a grocery store, taking several people hostage and killing four. All three attackers were killed by anti-terrorism police in a raid on 09 January 2015.[605] Due to their deaths, they have not expressly stated the motive for the attack, though they appear to have taken particular offence at publication of cartoons of the

[604] Mohammad Fadel, 'A Tale of Two Massacres: *Charlie Hebdo* and Utoya Island' in Edward M. Iacobucci and Stephen J Toope (eds), *After the Paris Attacks: Responses in Canada, Europe, and around the Globe* (University of Toronto Press 2015) 30.
[605] ibid.

prophet Mohammed. Internationally, this attack was regarded as an infringement of the principle of freedom of expression itself.[606]

(ii) Counter-extremism, terrorism strategies, and legislation

One of the major impacts of the attacks can be seen in the policies of some European states, who have developed approaches on countering terrorism, preventing violent extremism (PVE) and countering violent extremism (CVE). PVE approaches tend to prevent radicalisation from happening, while CVE approaches have a greater focus on attempting to rehabilitate radicalised individuals.[607] In some countries, such as France, some of these policies were already in place prior to 2015. At present, there is no universally agreed definition of terrorism or violent extremism, yet the terms seem to be used interchangeably in many instances. There are several differing governmental definitions with the common theme of "violence [being] used to achieve a certain ideological goal, which can include religion."[608]

The United Nations Educational, Scientific and Cultural Organisation (UNESCO) suggested that violent extremism "refers to the beliefs and actions of people who support or use violence to achieve ideological, religious or political goals."[609] Lack of clarity and a unified notion of what

[606] ibid.
[607] Shireen Quodosi, 'PVE vs CVE- What's the Difference?' (*Clarion Project*, 18 December 2018)
<https://clarionproject.org/pve-vs-cve//> accessed 18 April 2020.
[608] William L. Waugh, Jr., 'The Values in Violence: Organizational and Political Objectives of Terrorist Groups' [1983] Conflict Quarterly (Summer) 5.
[609] United Nations Educational, Scientific and Cultural Organization, 'Preventing violent extremism through education: A guide for policy-makers' (2017)

exactly constitutes extremism or terrorism run the risk of excessively imposing restrictions on freedom of expression.[610] For example, the Human Rights Council Resolution 30/15[611] contains a very wide definition of violent extremism activities. It states that these are activities which "aim to threaten the enjoyment of human rights and [sic] fundamental freedoms, and democracy, and threaten the territorial integrity and security of States, and destabilize legitimately constituted government." This definition might be considered dangerously vague and thus wider in ambit than intended. Though the aim is to prevent terrorism, it may cast a shadow over free speech, as it could potentially be read to include expression that does not call for violence but simply expresses approval or disapproval of extremist groups.

The PVE and CVE approaches are very closely linked to national security measures that states have adopted,[612] which appear to be aimed at preventing the type of religiously fuelled attacks as seen in Paris. The growth of such strategies demonstrates a political resolve to address violent extremism and attacks resulting from them. The UK, Belgium and France have all introduced counter-terrorism measures in recent years – this extends beyond democracies in the West. Russia, for example, has adopted a strategy to counter extremism since 2014.[613] Some states may also have been influenced by the UN Security Council Resolution 2178[614] which requires states to

<https://reliefweb.int/sites/reliefweb.int/files/resources/247764e-2.pdf> accessed 24 August 2019.

[610] Sejal Parmar, 'Freedom of Expression narratives after the *Charlie Hebdo* attacks' (2018) 18(2) Human Rights Law Review 267.

[611] UNGA Human Rights Council Res 30/15 (02 October 2015) A/HRC/RES/30/15.

[612] Parmar (n 610).

[613] ibid.

[614] UNSC Res 2178 (24 September 2014) UN Doc S/RES/2178.

"enhance efforts to counter this kind of violent extremism."[615] Efforts to counter violent extremism could be seen as proportional and necessary in a democratic society to protect the public. However, the Resolution lists "preventing radicalisation" as an "essential element" of CVE, without any requirement that the radical behaviour is violent or intended to be violent in nature.[616] This may increase suppression of peaceful religious devotion and discourse[617] instead of achieving the aim of preventing violence. To grasp how these strategies have the potential to unduly restrict freedom of expression, it is beneficial to examine some of the most notable examples.

The UK announced the enactment of an "extremism bill" in July 2015, which was aimed at combatting all forms of extremism and included proposals for banning orders to outlaw extremist organisations. It would have also provided organisations, such as OFCOM, with powers to censor extremist content. However, the overall proposals proved controversial and the Bill did not pass through Parliament and failed to materialise.[618] Despite this, the Counter-Terrorism and Border Security Act 2019 was granted royal assent in February 2019. The Rt Hon Ben Wallace MP stated that the purpose of the Act was to ensure the UK had the powers needed to "tackle the evolving threat posed to the UK by terrorism and hostile state activity, in order to keep the public safe and to protect our

[615] ibid.
[616] Rebecca Louis and Eran Shor, 'Nation-Level Counterterrorist Legislation, 1945-2017' in Eran Shor and Stephen Hoadley (eds), *International Human Rights and Counter-Terrorism* (Springer Singapore 2019).
[617] ibid.
[618] Parliament UK, 'Counter-extremism policy: an overview' (*Parliament UK*, 23 June 2017) <https://researchbriefings.parliament.uk/ResearchBriefing/Summary/CBP-7238> accessed 20 August 2019.

national security."[619] Though the Act does not specifically state that it is attempting to restrict a specific religion, there was concern in the UK that new legislation was needed to face the threat of International terrorism.[620] The head of counter-terrorism policing, Neil Basu, revealed in the beginning of 2019 that eighteen plots to cause mass murder in Britain had been thwarted since March 2017, of which, fourteen originated from Islamist organisations and four related to right-wing terrorists. This was seemingly an attempt to show that the UK's efforts to combat terrorism were not focused on any particular religion.[621]

The Counter-Terrorism and Border Security Act 2019 has faced much criticism over the fact that it does not adequately protect freedom of expression. Section 1 confirms it is an offence for an individual to express an opinion or belief that is supportive of a proscribed organisation, and is reckless as to whether the person to whom the expression is directed at will be encouraged to support a proscribed organisation. Firstly, it must be highlighted that the government decides the content on the list of proscribed organisations. Furthermore, the clause is not only vague as to what amounts to "support," but there seems to be abundant potential for freedom of expression

[619] Home Office, 'Counter-Terrorism and Birder Security Act 2019 Overarching Fact Sheet' (UK Government, 06 June 2018) <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/778175/2019-02>12_Overarching_Fact_Sheet_RA.pdf> accessed 20 August 2019.

[620] Jamie Grierson, 'British nationals to be banned from parts of Syria under new law' *The Guardian* (London, 20 May 2019) <https://www.theguardian.com/politics/2019/may/20/british-nationals-to-be-banned-from-parts-of-syria-under-new-law> accessed 02 September 2019.

[621] Jamie Grierson and Vikram Dodd, 'Prevent strategy on radicalisation faces independent review' *The Guardian* (London, 22 January 2019) https://www.theguardian.com/uk-news/2019/jan/22/prevent-strategy-on-radicalisation-faces-independent-review accessed 02 August 2019.

to be suppressed. Merely raising the question of why an organisation was included in the government's list might be considered support, even though it may be a legitimate enquiry. It is feared that the government may take any questioning as proof that a person supports an organisation and all its activities, whether it be extremist in nature or not.[622]

Other clauses which raise alarm are clause 2, which criminalises publication of media containing clothing or an item which raises reasonable suspicion that the person is a supporter of a terrorist organisation, and clause 3, which makes it an offence to view or access information online that could be useful to a person committing an act of terrorism. Both clauses may be an undue restriction on freedom of expression and do not seem necessary in a democratic society. Clause 2, for example, might foreseeably criminalise the publication of an article researching various terrorist organizations. Likewise, clause 3's ambit appears wide enough to catch merely personal research to understand terrorism out of concern, for instance, that a friend or family member may be radicalised. While the UK's intention was clearly to protect national security in enacting this Bill, its considerably ambiguous contents bode ill for freedom of expression. In the years to come, whether freedom of expression is unduly restricted as a result of the Counter-Terrorism and Border Security Act 2019 will be a worthy legal development to follow.

In France, more than 50 people were charged with the offence of glorification of terrorism shortly after the *Charlie*

[622] Index on Censorship, 'Freedom of expression and the Counter-Terrorism and Border Security Act' (*Index*, 12 February 2019) <https://www.indexoncensorship.org/2019/02/freedom-of-expression-and-the-counter-terrorism-and-border-security-act/> accessed 04 August 2019.

Hebdo attacks.[623] The sudden intervention by the authorities appears to be a crackdown on free speech in the name of free speech – views perceived to support terrorism were silenced in order to protect views disparaging terrorism.[624] The political discourse seemed to have been to treat this as France's own 9/11, with both security and ideological pressure being placed on the French Muslim community.[625] A controversial and notorious comedian, Dieudonne, was found guilty by the French courts of condoning terrorism after he posted on Facebook, "I feel like Charlie Coulibaly," days after the attacks. It is not exactly clear what Dieudonne meant by this, however, the post contained the "Je suis Charlie" slogan that had become viral online at the time, alongside the name of one of the terrorist attackers.[626] Four UN experts on UNESCO World Press Freedom Day in May 2015 stated that criminal responsibility for "expressions relating to terrorism should be limited to those who incite others to terrorism."[627] Despite how many may view Dieudonne for his controversial beliefs, convicting people based on vague terms such as showing "support" for a terrorist organisation or for "glorification" of terrorism seems disproportionate when it is not a direct incitement.

[623] Jacob Mchangama, 'Freedom of Expression and National Security' (2016) 53(4) Society 363 <https://search.proquest.com/docview/1799811115/fulltextPDF/395D70597CA04829PQ/1?accountid=12253> accessed 05 August 2019.
[624] Sturges (n 602).
[625] Fadel (n 604) 35.
[626] BBC, 'Comic Dieudonne given jail sentence for anti-Semitism' (*BBC News*, 25 November 2015) <https://www.bbc.co.uk/news/world-europe-34921071> accessed 05 August 2019.
[627] Article 19, 'Special Rapporteurs Warn Against Restrictions on Freedom of Speech in Conflicts' (*Article 19*, 04 May 2015) <https://www.article19.org/resources/special-rapporteurs-warn-restrictions-freedom-speech-conflicts/> accessed 05 August 2019.

The French authorities, undoubtedly fearful over the severity of the 2015 attacks, including the November 2015 incidents in Paris, declared a state of emergency which lasted until November 2017. The state of emergency granted sweeping powers to authorities such as the mandate to search any premises without judicial oversight.[628] It must be noted that this state of emergency was declared in response to acts of violence in the name of radical Islam and, in the case of the Paris attacks, people belonging to the Islamic terrorist organisation ISIS.[629] A popularising view that Islam as a religion was radical appeared to have been emerging, and even petty acts of violence were signs of radicalisation which could threaten national security. The emergency powers granted to the authorities were enacted to combat some of the threat that Islam was deemed to pose.[630] Only six days following the November attacks in Paris, the state of emergency was extended, a process that would be repeated frequently thereafter. This is worrying evidence that national security concerns can so often trump human rights concerns in times of national emergency.[631] When states behave in this way, it can pave the way for new legislation which can normalise potential restrictions on free expression, of which France is an example.

Following the end of the state of emergency, France announced a counterterrorism law[632] designed to provide police

[628] Marco Perolini, 'France's permanent state of emergency' (*Amnesty*, 26 September 2017) <https://www.amnesty.org/en/latest/news/2017/09/a-permanent-state-of-emergency-in-france/> accessed 26 August 2019.
[629] Stephanie Hennette Vauchez, 'The state of emergency in France: days without end?' 14(4) European Constitutional Law Review 700.
[630] ibid.
[631] ibid.
[632] Renforçant la sécurité intérieure et la lutte contre le terrorisme 2017.

with more tools to fight violent extremism.[633] This imposed many restrictions on certain members of society, for instance, authorities were empowered to shut down a mosque or other place of worship if the preachers were found to have promoted radical ideas.[634] The fact that this could be done without the approval of a judge alarmed Human Rights defenders. Indeed, Benedicte Jeannerod, the French director of Human Rights Watch, remarked that the "normalisation of emergency powers crosses a new line."[635] The lack of judicial oversight introduces the potential for state abuses and restrictions on freedom of expression. If the state feels a religious group is too closely linked with "radical" ideals, they may fast track a shutdown of their religious place of worship in contravention of Convention rights. Similarly, France's counterterrorism law suffers from the same issue as the UK Counter-Terrorism and Border Security Act 2019: ambiguity.

Radical ideas and theories could potentially include legitimate debate over extremism, leading to an unnecessary shutdown of a place of worship, impacting freedom of expression and religion alike. It is uncertain whether these counterterrorism laws are even fit for purpose to protect national security long-term if those of the Islam religion feel marginalised and oppressed as a result. Following a visit to France, the Special Rapporteur Ni Aolain commented that it was "concerning that the French Muslim community have been

[633] Samuel Osborne, 'France declares end to state of emergency almost two years after Paris terror attacks' *The Independent* (London, 31 October 2017) <https://www.independent.co.uk/news/world/europe/france-state-of-emergency-end-terror-attacks-paris-isis-terrorism-alerts-warning-risk-reduced-a8029311.html> accessed 21 August 2019.
[634] Jean-Paul Pelissier, 'France adopts tough new anti-terror law' (*RFI*, 04 October 2017) <http://en.rfi.fr/france/20171004-france-adopts-tough-new-anti-terror-law> accessed 21 August 2018.
[635] ibid.

the community primarily subject to exceptional measures both during the state of emergency and the new law in tandem with other counter-terrorism measures."[636]

Elsewhere, the Belgian government enacted a raft of counter-terrorism laws, undoubtedly in response to the *Charlie Hebdo* and November Paris attacks, but also to the coordinated attacks on 22 March 2016 in Brussels Airport and a metro station, to which ISIS had claimed responsibility.[637] Belgium sought amendments to existing regulations which would have had the potential to severely curtail freedom of expression, broadening the scope of incrimination of public incitement to commit, directly or indirectly, a terrorist attack. It would have removed the assessment on a case-by-case basis of the risk of an offence being committed. Even discussing terrorism in a broad sense, with no risk of an offence being committed will expose an individual to a real risk of criminal liability.[638] Thankfully, this amendment was found to be unconstitutional,[639] a ruling which is difficult to disagree with as without it, the grave consequence of criminal liability would effectively attach to potentially harmless discourse on terrorism.

[636] UN Human Rights, 'France: UN expert says new terrorism laws may undermine fundamental rights and freedoms' (*United Nations Human Rights Office of the High Commissioner*, 23 May 2018) <https://www.ohchr.org/en/NewsEvents/Pages/DisplayNews.aspx?NewsID=23130&LangID=E> accessed 21 August 2019.

[637] Human Rights Watch, 'Grounds for Concern: Belgium's Counterterror Responses to the Paris and Brussels Attacks' (*Human Rights Watch*, 03 November 2016) <https://www.hrw.org/report/2016/11/03/grounds-concern/belgiums-counterterror-responses-paris-and-brussels-attacks> accessed 22 August 2019.

[638] David Morelli, 'Fight Against Terrorism Cannot Justify Restricting Free Speech, Belgian Court Rules' (*Liberties*, 23 March 2018) <https://www.liberties.eu/en/news/ldh-victory-free-speech-constitutional-court/14562> accessed 22 August 2019.

[639] ibid.

What can be seen from these counter-extremism strategies is that they suffer from overly broad and vague definitions in their attempt to curb terrorism. Many of the strategies and legislation enacted with the aim of rapidly preserving national security seem to have been poorly drafted and grave effects on freedom of expression have ensued. These strategies and legislation could mainly affect expression in favour of a religious group or ideology, although it could also include speech in opposition, such as calling for violence against religious groups. Terminology such as "support" or "glorification" of terrorism as seen in French and UK law is an attempt to address an issue through terms that are undefined; therefore, their potential to injure freedom of expression hardly comes as a surprise.

V. Jurisprudence: Examining religion and free expression

(i) The dynamic of religion and freedom of expression

In a world where pluralistic societies abound, it is important that a balance is achieved between competing ideologies. If religious hate speech was advocated in all forms and allowed without restrictions, this could create conditions where discrimination, hostility and potentially violence may thrive.[640] Such conditions imperil individuals' freedom to safely practise their own religion in a democratic society. Conversely, if prohibitions on expressions against religion are overly wide, this creates obvious concerns for freedom of expression.

[640] Carolyn Evans, 'Religion and Freedom of Expression' in John Witte and Christian Green (eds), *Religion and Human Rights: An Introduction* (OUP 2011) <https://www.oxfordscholarship.com/view/10.1093/acprof:osobl/9780199733453.001.0001/acprof-9780199733453-chapter-11> accessed 31 August 2019.

As has been stated, two main areas where religion and freedom of expression clash is the freedom to express a certain belief or religion and the freedom to express a certain view about a religion. Most of the legislation and regulations adopted by States deals with the former, whereas jurisprudence has examined both areas.

(ii) Historic judgments on protection of religious feelings and freedom of expression

To understand how case law has judged the balance between freedom of expression and protection of religious feelings pre-*Charlie Hebdo*, three important cases should be considered.

The most notorious of cases dealing with the relationship between freedom of expression and protection of religious feelings is *Otto-Preminger-Institut v Austria*.[641] The case concerned a satirical religious film which showed God as a "senile … idiot" and Christ as a "cretin" amongst other images. It was considered disparaging to religious doctrines in Austria and seized by authorities. The question before the Court was whether seizure of the film amounted to a violation of Article 10 of the Convention.[642] The Court stressed that the right to freedom of expression is not absolute and in the context of religious beliefs, there is a duty to avoid expressions which are gratuitously offensive to others, infringing on their rights, and do not contribute to any kind of public debate.[643] The Court

[641] *Otto-Preminger-Institut v Austria* Application No. 13470/87 (ECtHR, 20 September 1994).
[642] Simon Stokes, 'Blasphemy and Freedom of Expression under the European Convention on Human Rights: Two Recent Cases' (1996) 7(2) Entertainment Law Review 85.
[643] *Otto-Preminger-Institut v Austria* (n 641) [49].

highlighted the need to keep religious peace [644] and confirmed that due to the lack of consensus in Europe on the significance of religion, a certain margin of appreciation must be afforded to the member state, which had not been exceeded in this case.[645]

A subsequent case, *Wingrove v United Kingdom*,[646] concerned a film which depicted the wounded body of Christ in an erotic scene with a nun. The applicant, Mr Wingrove, appealed against a decision to refuse a classification certificate for the film by the British Board of Film Classification as it was decided that the film could be perceived as blasphemous. The Court acknowledged that the film had been refused certification in order to "protect the right of citizens not to be offended in their religious feelings."[647] The Court agreed that the refusal to grant a distribution certificate was intended to provide protection on matters regarded as important to their religion and therefore it was not satisfied of a violation of Article 10.[648]

Finally, the case of *I.A v Turkey*[649] concerned an applicant who was convicted for publishing an allegedly blasphemous book, contending that his conviction violated his freedom of expression.[650] The book contained statements such as, "Muhammad did not forbid sexual relations with a dead person or live animal."[651] The Court confirmed that the right to

[644] ibid [52].
[645] ibid [50].
[646] *Wingrove v The United Kingdom* Application No. 17419/90 (EctHR 25 November 1996).
[647] ibid [45].
[648] ibid [61].
[649] *I.A v Turkey* Application No. 42571/98 (EctHR 13 September 2005).
[650] Madhav Khosla, 'Proportionality: An Assault on Human Rights?: A Reply' (2010) 8 (2) International Journal of Constitutional Law 298.
[651] *I.A v Turkey* (n 649) [30].

freedom of expression applies not just to favourably received information but also to expressions that can "offend, shock or disturb."[652] However, the Court reiterated the requirement established in *Otto-Preminger*, that there is a duty under Article 10 to avoid gratuitously offensive expressions in the context of religious beliefs.[653] The Court found that the statements were not only ones that offended or shocked but that they were a blatant attack against the Prophet and/or Islam.[654] Therefore, the Court considered that the measures taken to protect Muslims against the offensive statements were sufficient as they met a "pressing social need."[655]

As can be seen from these three cases, despite there being a general rule that freedom of expression protects expressions that shock, offend or disturb, an exemption appears to have been created by the Court when it comes to protecting the religious feelings of others.[656] This determination not to offend religious sentimentalities even extends to statements made against religious figures, as evident from the *IA v Turkey* case.

(iii) Religious feelings and freedom of expression: recent developments

In the past few years there have been several cases which have examined the relationship between religion and freedom of

[652] ibid [23].
[653] ibid [24].
[654] ibid [29].
[655] ibid [30].
[656] Niraj Nathwani, 'Religious Cartoons and Human Rights - A Critical Legal Analysis of the Case Law of the European Court of Human Rights on the Protection of Religious Feelings and its Implications in the Danish Affair Concerning Cartoons of the Prophet Muhammad' (2008) 4 European Human Rights Law Review 488.

expression. One such case was *Sekmadienis v Lithuania*,[657] where religious figures depicting Jesus and the Virgin Mary were pictured in commercial advertising. The advertisements contained slogans/messages such as "Jesus, what trousers!" and "Dear Mary, what a dress!" Complaints were made to the State Consumer Rights Protection Authority (SCRPA), who consulted a commission advertising regulator for their opinion. They considered that the advertisement could be humiliating and could "really offend religious people."[658] After further consideration, the SCRPA fined the company responsible for the advertisements.

The Court was mindful of national law prohibiting advertising which violated public morals yet was of the view that "not every use of religious symbols in advertising would violate public morals."[659] The Court also questioned whether it was foreseeable for the company to anticipate that national law would apply in this scenario, as it was amended during the case to prohibit advertisement expressing "contempt for religious symbols."[660] It was recognised that the restriction was for a legitimate aim both to protect public morals and the right of religious people not to be insulted on grounds of belief.[661] Whilst recognising the state's margin of appreciation, it was highlighted that there is a duty to avoid expression in regard to objects of veneration that are gratuitously offensive to others and profane. The Court, however, found that the religious

[657] *Sekmadienis Ltd v Lithuania* Application No. 69317/14 (ECtHR, 30 January 2018).
[658] Nicolas Bauer, 'How to Reconcile Freedom Of Expression And Religious Freedom' (2018) European Centre for Law & Justice <https://eclj.org/free-speech/echr/comment-concilier-les-liberts-dexpression-et-de-religion-> accessed 15 August 2019.
[659] *Sekmadienis* (n 657) [67].
[660] ibid.
[661] ibid [69].

advertisements were not gratuitously offensive and did not appear to incite religious hatred.[662]

It was also found that the national authorities had failed to adequately explain why the advertisements were contrary to public morals and the authorities' explanations for why it was offensive were "declarative and vague."[663] The national authorities had argued that the advertisements would be found offensive by the majority of the Lithuanian population, who were of the Christian religion. In response, the Court stated that, even if the majority would have been offended, it would be incompatible under the Convention if "the exercise of Convention rights by a minority group were made conditional on its being accepted by the majority."[664]

This case demonstrates the complexity and variety of issues the Court has, on occasion, had to balance when examining issues regarding freedom of expression and religion. It also demonstrates the Court's willingness to restrict freedom of expression on the ground of protecting public morals. It does provide useful guidance and iterates that when attempting to restrict expression on the grounds of public morals, the authorities must avoid ambiguity and explain exactly why a restriction is required.[665] The Court in this instance was clear that freedom of expression should be protected with regards to religious imagery unless it is gratuitously offensive or inciting hatred. Even if the majority happens to be so offended, it will not be sufficient to justify a restriction on expression. This

[662] ibid [77].
[663] ibid [79].
[664] ibid [82].
[665] Ingrida Milkaite, 'Sekmadienis Ltd v Lithuania: Can Religious Figures Be Featured in Commercial Advertising?' (Strasbourg Observers, 13 March 2018) <https://strasbourgobservers.com/2018/03/13/sekmadienis-ltd-v-lithuania-can-religious-figures-be-featured-in-commercial-advertising/> accessed 16 August 2018.

seems a reasonable standpoint for the Court to take and it is welcoming that they did not allow the restriction solely because it might offend a particular religious group. However, the decision in this case must be contrasted with a later ruling by the Court.

The recent case of *E.S. v Austria* [666] highlights an area of difficulty courts have faced in balancing the right to freedom of expression against freedom and protection of religion. In this case, a woman was convicted based on one of her statements during seminars that the Prophet Muhammad was a paedophile, as he had allegedly married a six-year-old girl and had intercourse with her when she was slightly older. The Court found that the comments made were primarily intended to disparage Islam and so could be deemed illegal in order to protect the liberty of Muslims to practise their religion.[667] Although the Court did not explicitly state that the ruling was to protect national security, it can be inferred that this may have been a secondary intention as the Court felt that a balance needed to be struck between freedom of expression and a right "to have religious peace preserved in Austrian society."[668] The Court found that the applicant's conviction was based on Article 188 of the Criminal Code,[669] aimed at preventing disorder by safeguarding religious peace.

This is not the first time the Court has ruled that free speech can be curbed to protect the religious feelings of others

[666] *E.S. v Austria* Application no. 38450/12 (ECtHR, 25 October 2018).
[667] Humanists UK, 'European Court of Human Rights rules that Austria can keep its blasphemy law' (*Humanists UK*, 29 October 2018) <https://humanism.org.uk/2018/10/29/european-court-of-human-rights-rules-that-austria-can-keep-its-blasphemy-law/> accessed 05 August 2019.
[668] *E.S. v Austria* (n 666) [57].
[669] Criminal Code of the Republic of Austria (1974, Amended 2019), art 188.

when there is potential for offence,[670] yet the case was still considered controversial. Milanovic is of the view that the presiding case applies the previous reasoning in *Otto-Preminger-Institut* "wholly uncritically, while even going beyond them in policing offensive speech."[671] While the Court did acknowledge the need for religious believers to accept the denial of their religion by others, [672] it also stated that non-believers cannot make statements which hurt or offend believers. This contradiction appears almost to be an endorsement of a type of blasphemy law.[673] Yeginsu and Williams accurately observe that it did not uphold an Austrian blasphemy law, nor did it find that defaming a religious figure would automatically result in a restriction on freedom of expression. However, what it did generate was an indirect abdication of responsibility to properly address the question of free expression against religious ideals.[674] This is because the Court deferred to the Austrian Court's judgment, given the wide margin of appreciation granted to them.[675]

It seems questionable for the Court to focus on ruling only to protect "religious beliefs," especially in light of the numerous different beliefs one might hold. Political views can be attacked without facing repercussion in most states, so why

[670] *Otto-Preminger-Institut v Austria* (n 641).
[671] Marko Milanovic, 'Legitimizing Blasphemy Laws Through the Backdoor: The European Court's Judgment in E.S. v Austria' (2018) EJIL: *Talk* <https://www.ejiltalk.org/legitimizing-blasphemy-laws-through-the-backdoor-the-european-courts-judgment-in-e-s-v-austria/> accessed 10 August 2019.
[672] *E.S. v Austria* (n 666) [42].
[673] Sofia Galani, 'Freedom of expression and feelings of believers' (2019) 1 European Human Rights Law Review 93.
[674] Can Yeginsu and John Williams, 'Criminalizing Speech to Protect Religious Peace? The ECtHR Ruling in E.S. v. Austria' (*Just Security*, 28 November 2018) <https://www.justsecurity.org/61642/criminalizing-speech-protect-religious-peace-ecthr-ruling-e-s-v-austria/> accessed 23 August 2019.
[675] *E.S. v Austria* (n 666) [44].

should religious views differ? Although the freedom to religion is granted under Article 9 of the Convention, the right not to "have one's feelings hurt" is not included in the provision. Neither do the laws on hate speech protect this at the regional or international level. It is also questionable whether a wide margin of appreciation is still necessary in this area. There has been a growing repeal of blasphemy laws in recent years, with a recent example being Ireland in 2018.[676] Hence, if there is a mounting consensus on this issue, some may argue that the Court could have taken a bolder stance by refusing to grant such a wide margin of appreciation to Austria[677] and taking a firmer hand themselves. However, this would raise questions whether it should be the role of the Court to intervene in lieu of states themselves, especially considering widespread concern and polarising stances towards blasphemy in countries where blasphemy is still protected. Additionally, some reasoning for the restriction on expression can be described as illogical. The Court maintained that the applicant's criticism was capable of arousing "justified indignation" and was not intended to contribute to a public debate but simply to demonstrate that Muhammad was not a worthy subject of worship.[678] What remains unclear is how the Court was able to fully ascertain that the intention of the applicant was to attack Muhammad, especially when their intention was not explicitly stated to the audience.

Although the applicant did cite a source to support her statement, namely the Al-Bukhari Hadith collection,[679] the

[676] Emma Graham-Harrison, 'Ireland votes to oust 'medieval' blasphemy law' The *Guardian* (London, 27 October 2018) <https://www.theguardian.com/world/2018/oct/27/ireland-votes-to-oust-blasphemy-ban-from-constitution> accessed 23 August 2018.
[677] Yeginsu and Williams (n 674).
[678] *E.S. v Austria* (n 666) [52].
[679] ibid [13].

Court qualified the applicant's statements as "value judgments," which are non-neutral statements lacking a factual basis. Therefore, it remains unclear the precise scope of factual evidence the Court was expecting and what would have been considered neutral by the Court. Though the Court's intention was to prevent any public indignation due to religious offence suffered, this seems an undue restriction on the expression of the applicant and a worrying precedent akin to a blasphemy law. In regards to the Court placing such weight on the fact that Muhammad's marriage with Aisha lasted past her coming of age, the Court's stance appears to be that as long as a marriage continues when the child is past eighteen years old, the situation may no longer be seen as paedophilia.[680] This is an intensely controversial position to take and should not have been relied upon by the Court in its reasoning. Indeed, there are many who would find this reasoning alone gratuitously offensive.[681]

The Court seems to have placed too much emphasis here on defending the right not to be offended when it comes to religious ideals. Certainly, in a democratic society there should be a mutual respect and willingness not to intentionally harm individuals of different groups and religions, therefore the banning of certain utterances may be necessary.[682] However, some limitation to this principle is necessary, and the line drawn in the *E.S. v Austria* case does not justify the restriction on free expression being necessary in a democratic society. The comment made by the applicant appears to have been more of an observation of a historical religious figure based upon a

[680] Graeme Wood, 'In Europe, Speech Is an Alienable Right' (*The Atlantic*, 27 October 2018) <https://www.theatlantic.com/ideas/archive/2018/10/its-not-free-speech-criticize-muhammad-echr-ruled/574174/> accessed 23 August 2018.
[681] ibid.
[682] Nieuwenhuis (n 598).

historical source.[683] It appears the Court, perhaps mindful of a possible conflict involving followers of Islam, opted for the "easy" solution in deferring to Austria's margin of appreciation and restricting freedom of expression. If this is the case, it is perhaps understandable why some academics argue that the Court has undervalued freedom of expression and should "admit their cowardice."[684] Indeed, the stance of Puppinck is one that seems substantially fair, as he points out that the Court's judgment is one that muzzles criticism of Islam in the name of "living together" and values the objectives of "mutual tolerance" and "peaceful co-existence" above freedom of expression. Puppinck is of the view that only expressions which are gratuitously offensive or likely to incite violence should be restricted.[685] A final consideration between these two cases is whether the legislature and the judiciary are suited to be the final arbiters on the degree of offence religious groups suffer, as religious beliefs differ drastically from one another – in a way which the state may not fully understand. As a result of these two cases, one final thought to consider involves the notion of whether the judiciary and legislation should account for the fact that followers of different religions may be more, or less offended at the same comments made against their religion.

In *Mariya Alekhina and Others v Russia*,[686] members of the Russian punk musical band, "Pussy Riot," attempted to

[683] Steve Peers, 'Freedom to insult? Balancing freedom of expression with religious tolerance in ECHR case law' (EU Law Analysis, 27 October 2017) <http://eulawanalysis.blogspot.com/2018/10/freedom-to-insult-balancing-freedom-of.html> accessed 13 August 2019.
[684] Wood (n 680).
[685] FigaroVox, Interview with Gregor Puppinck, Director of the European Centre for Law and Justice, ECLJ (26 October 2018).
[686] *Mariya Alekhina and Others v Russia* Application No. 38004/12 (ECtHR, 17 July 2018).

play one of its songs titled "Punk Prayer – Virgin Mary, Drive Putin Away," from the altar of Moscow's Christ the Saviour Cathedral. No service was taking place, but an audience was inside the cathedral at the time. The performance lasted but a minute before they were escorted out and a video of the performance was later uploaded to their website and YouTube. When questioned, members of the Cathedral staff confirmed that their "religious feelings" had been offended because of the performance and the band was arrested on the offence of "hooliganism motivated by religious hatred."[687] Despite arguments from the band that their performance was politically and not religiously motivated, the Supreme Court of Russia ruled that their actions had amounted to religious hatred or enmity and upheld the District Court's ruling that a custodial sentence was required. In relation to the video of the performance, the District Court held that it was extremist in nature and banned access to it. "Pussy Riot" brought the case to the Court, complaining about their detention and conviction, alleging that those measures had been excessive in relation to their conduct.

The Court acknowledged that the band's performance amounted to a form of artistic and political expression protected by Article 10 of the Convention.[688] It found that the actions against the band did amount to an interference with their freedom of expression, which raised the question of whether those actions were prescribed by law, in pursuit of a legitimate aim and necessary in a democratic society. Having determined that it was not immediately necessary to reach a

[687] Columbia University, 'Mariya Alekhina and Others v Russia' (Global Freedom of Expression Columbia University) <https://globalfreedomofexpression.columbia.edu/cases/mariya-alekhina-others-v-russia/> accessed 13 August 2019.
[688] *Alekhina* (n 686) [206].

conclusion of whether the actions were prescribed by law,[689] the Court declared itself satisfied of the pursuit of a legitimate aim, namely, "protecting the rights of others."[690] In determining whether the restriction was necessary in a democratic society, the Court seemed to adopt a context-specific approach when examining the band's performance. Although it acknowledged potential offences, the Court could not discern any analysis in the domestic court's judgment which would label the band's conduct as incitement of violence or religious hatred.[691] The Court found that interference was not necessary in a democratic society.

Following the same line of reasoning, the Court deemed outright banning of the performance's video recordings unnecessary, stating that there is little scope for restrictions on political speech or on matters of public interest. In particular, in the absence of incitement of terrorist actions or violence, either by expressing hatred towards identified persons or otherwise, there should be no restrictions.[692] The Court was not persuaded that the videos were "extremist,"[693] and the ban did not meet a "pressing social need."[694] It is apparent that the Court did not place great emphasis on the content of the performance, or the suitability of an "extremist" classification, but rather focused upon the context in which the performance occurred. Meanwhile, Igor Ponkin, a member of the Public Council at the Ministry of Interior for Russia is of the view that the restriction of freedom of expression in the "Pussy Riot" case was justified. He highlights that Article 10

[689] ibid [209].
[690] ibid [210].
[691] ibid [215].
[692] Ibid [260].
[693] Ibid [264].
[694] Ibid [268].

of the Convention should not protect conduct that includes invading religious places of worship and that Christians should have the right to worship without hostile or violent protest taking place in the Church.[695]

It is disappointing that the Court did not undertake a closer examination of the actual context of the performance to assess more reliably the existence of incitement of violence or religious hatred. Still, it is difficult to disagree with the Court's reasoning that there was insufficient evidence to show incitement, violence or religious hatred, and that the restrictions were not necessary in a democratic society. A more astute examination of the performance's content would not likely reveal more than simple political motivations for conceiving and performing the song. The performance did not clearly appear directed towards inciting hatred against Christianity nor its followers. As the Court acknowledged, it may offend some, but this should not be sufficient to limit free expression to the degree of a custodial sentence, therefore the restrictions were disproportionate.

A review of these recent cases has shown that the Court is quite willing to defer to the judgment of national authorities in situations of religious expression and allow a wide margin of appreciation. It is difficult to understand the divergence of approaches the Court has taken in the *E.S. v. Austria* and *Sekmadienis* cases, especially when the advertising in *Sekmadienis* was publicly available and the applicant's statements in *E.S. v Austria* were made during seminars. It is

[695] Igor Ponkin, 'Opinion on the Judgment of the European Court of Human Rights of 17 July 2018 in the case of *Mariya Alekhina and Others v Russia*' (International conference, Strasbourg, 13 December 2018) <http://media.aclj.org/pdf/Opinion-on-the-case-of-Mariya-Alekhina-and-Others-v.-Russia,-Ponkin.pdf> accessed 13 August 2019.

therefore reasonable that the Court may be more willing to restrict religious expression in *Sekmadienis*, in light of the wider public reach.

Although the judgments of *Sekmadienis* and *Mariya Alekhina* are valuable in the scheme of protecting freedom of expression, the Court in *E.S. v Austria* has imposed excessive constraints on freedom of expression because of the religious offence they believed would occur, and to safeguard peace. If this is the position the Court takes going forward, there may be future instances of unjust decisions handed down.

(iv) Comparison of religion and freedom of expressions cases: is it right to limit expression over religious offence?

The judgment in *E.S. v Austria* is questionable for following the same doubtful logic in *Otto-Preminger-Institut*: that the Courts are best placed to determine when religious followers feel offence,[696] as well as deeming publications as "gratuitously" offensive, thereby undermining Article 10 Convention rights. According to the Court in *Otto-Preminger-Institut*, comments made to insult, which are not seen as promoting any manner of public debate could be seen as gratuitously offensive,[697] despite the fact that "gratuitously offensive" speech is a difficult term to define. As Leigh points out, "gratuitously offensive speech is a vague category that is unpredictable in its application."[698] A startling thought: the

[696] Stajan Smet, 'E.S. v. Austria: Freedom of Expression versus Religious Feelings, the sequel' (*Strasbourg Observers*, 07 November 2018) <https://strasbourgobservers.com/2018/11/07/e-s-v-austria-freedom-of-expression-versus-religious-feelings-the-sequel/> accessed 24 August 2019.
[697] Erica Howard, 'Gratuitously Offensive Speech and the Political Debate' (2016) 6 European Human Rights Law Review 636.
[698] Leigh (n 592).

phrase, "gratuitously offensive," may be so vague and yet decisive all the same, that critical decisions on freedom of expression turn on a guessing game. There is clearly an inability to measure offence. Kiska is of the opinion that, in essence, whichever group "shouts the loudest" is able to decide what speech should be criminalised – this damages certainty and the rule of law.[699]

The imprecision of the term "gratuitously offensive," has stark potential to result in more cases of freedom of expression being unduly restricted in the future. Much would depend on the context in which the statements are made. For example, statements criticising a religion or belief, or even statements that ridicule, should not be outright impermissible, even if some individuals were to find them offensive and there were concerns over national security. However, it is reasonable to disallow offensive comments which amount to hate speech, especially if those comments were to call for violence against religious groups. Hate speech law is sometimes presented as a subcategory of blasphemy law, having a common objective to censor speech which may offend others. However, this is not in fact the core purpose of hate speech laws. Instead, they are meant, by mechanism of eliminating the spread of objective falsehoods, to prevent violence against societal groups or effective exclusion from society altogether.[700] To achieve a society where freedoms of belief and religion are given the esteem they are due is also to accept, in that society, offensive remarks against virtually every belief. These two rights are

[699] Roger Kiska, '*E.S. v Austria* and its implications for Article 10 Jurisprudence' (International conference, Strasbourg, 13 December 2018) <https://archive.christianconcern.com/media/roger-kiska-discusses-challenges-to-freedom-of-religion> accessed 19 August 2019.

[700] Richard Moon, 'Religion and Hate Speech' (*The Immanent Frame*, 18 January 2019) <https://tif.ssrc.org/2019/01/18/religion-and-hate-speech/> accessed 25 August 2019.

inseparable and to "suppress one of those rights is to suppress the other."[701]

Indeed, Barendt is of the view that a right to receive and express only inoffensive opinions would be "hardly worth having."[702] If it is acceptable to limit expression over religious offence, where is the line to be drawn? Is Scientology insultable, for example, but not other beliefs or religions? The popular TV show Doctor Who received a complaint from the group Christian Voice following an aired episode, "Voyage of the Damned," which appeared to depict the Doctor as Jesus Christ.[703] This seemed to have offended the religious sensibilities of this group, yet it is questionable to suggest that the episode should have been pulled in case any offence was caused.

Dobrin highlights another problem with restricting free speech when it comes to religion, such that the beliefs of one religion may malign another religion or belief. For instance, the Sunnis and Shias of the Islam religion have been violent towards each other in defending the "true faith."[704] Tsakyrakis raises an excellent point in addressing the *Otto-Preminger* case, that the problem relates more to the attempt itself to balance free expression with religious feelings. He believes the issue is less about the substance of the restriction imposed and more

[701] Peter Jones, 'Free to offend and to be offended' *The Scotsman* (Edinburgh, 13 January 2015) <https://www.scotsman.com/news/opinion/peter-jones-free-to-offend-and-to-be-offended-1-3659020> accessed 25 August 2018.
[702] Eric Barendt, 'Religious Hatred Laws: Protecting Groups or Belief?' (2011) 18(1) Res Publica 41.
[703] The Metro, 'Doctor Who hit by religious outcry' (*The Metro*, 21 December 2007). <https://metro.co.uk/2007/12/21/doctor-who-hit-by-religious-outcry-213334/> accessed 25 August 2019.
[704] Arthur Dobrin, 'Insulting Another's Religion and free speech' (*Psychology Today*, 21 September 2012) <https://www.psychologytoday.com/gb/blog/am-i-right/201209/insulting-anothers-religion-and-free-speech> accessed 25 August 2019.

about its very imposition, for the purpose of protecting "religious feelings." He states that "by deferring all the crucial judgments to the final stage, the balancing approach clouds the real problem and provides crude resources to resolve it."[705]

Crucially, restriction of expression over concerns on religious offence may harm religious believers, especially those belonging to a minority in a state. Some scholars believe that minority views which do not align with popular viewpoints are often perceived as offensive or shocking.[706] Even so, it is crucial that minority viewpoints are protected, as it may be regarded as a blanket statement to classify *all* or even most minority views as objectively offensive. If offensive or shocking expressions are restricted, minorities may find it more difficult to express themselves where their values do not conform with general society.[707]

A "bird's eye" examination of the Court's overall approach reveals that freedom of expression regarding religious matters have not been unduly restricted at all in some cases. Where excessive restriction has undoubtedly occurred, however, has been in situations where a religious individual takes offence. Arguably, in favouring the upkeep of religious peace, the Court ruled that expressions which are gratuitously offensive and not contributing to public debate are not protected under Article 10 of the Convention. Despite recent case law such as *Sekmedienis* being an instance where the Court has protected free expression to an extent; *E.S. v Austria* reaffirms the longstanding position laid down in *Otto-Preminger-Institut,* that gratuitously offensive speech relating

[705] Stavros Tsakyrakis,'Proportionality: An Assault on human rights?' (2009) 7(3) International Journal of Constitutional Law 468.
[706] For example, see Nathwani (n 656).
[707] ibid.

to religion is not within the scope of protection. Restricting expression by reason of offence caused is, as discussed, an immoderate suppression of free speech in the name of religion.

VI. Online content

(i) The emergence of the Internet

When considering whether freedom of expression has been restricted, it is important to consider the role of the Internet, which has added a "global dimension" to the availability and dissemination of propaganda and speech advocating religious hatred.[708] Any attempt to regulate communication on the Internet is made extremely difficult owing to the instantaneous availability of its content worldwide.[709]

The creation and expansion of the Internet over the past 15 years has led to a dramatic increase in the ability to share thoughts and ideas to millions of individuals at once. In terms of communication, it is quite possibly the most impactful technological leap since the invention of the printing press in the fifteenth century and one that permeates through every-day living.[710] It allows access to virtually limitless amounts of information from the comfort of one's home and presents no modest change from the more traditional forms of media such as the traditional press and broadcasting. What books were to previous generations, the Internet is to this generation. This is illustrated by data obtained by Internet World Stats with over 57% of people worldwide currently connected to the Internet,

[708] Daniel Moeckli, *International Human Rights Law*, (OUP 2014) 230.
[709] Eric Barendt, *Freedom of Speech* (OUP 2009) 451.
[710] James A. Dewar, 'The Information Age and the Printing Press: Looking Backward to See Ahead' (*Rand)* <https://www.rand.org/pubs/papers/P8014/index2.html> accessed 15 August 2019.

compared to around 25% just ten years ago.[711] Its importance was recognised in the case of *Times Newspaper v UK:*[712]

"In light of its accessibility and its capacity to store and communicate vast amounts of information, the Internet plays an important role in enhancing the public's access to news and facilitating the dissemination of information generally."[713]

(ii) Ease of Dissemination and consequent problems

At the forefront of increased dissemination are social media companies, the most prominent including Facebook, Twitter, YouTube and Instagram. In this context, these companies have become "inadvertent assistants" to hostile actors by providing a "ready-to-use facilitator environment to their information flow."[714] The appeal driving the success of social media is instant, effortless connection to people across the globe, with thought flowing effectively in real time in the form of personal posts, video clips, news articles and more.[715] Speech vilifying a religious group, calling for violence and threatening national security may be shared over these platforms and within minutes be seen by thousands of people. This obviously broadens the scope of offence that may be suffered and increases the danger posed by such posts. David Anderson, the former independent terrorism reviewer in the UK, highlighted that the accessibility

[711] Internet World Stats, 'Internet Growth Statistics' <https://www.internetworldstats.com/emarketing.htm> accessed 27 August 2019.
[712] *Times Newspapers Ltd (Nos 1 and 2) v The United Kingdom,* Application No. 3002/03 and 23676/03 (ECtHR, 10 March 2009).
[713] ibid [27].
[714] Tsvetelina van Benthem, 'Social media actors in the fight against terrorism: technology and its impact on human rights' (2018) 7(2) Cambridge International Law Journal 284.
[715] Sanna Leisti, 'Digital Era and Social Media Shaping the World' in Pekka Hallberg and Janne Virkkunen (eds), *Freedom of Speech and Information in Global Perspective* (Palgrave Macmillan 2017) 235.

and amount of extremist propaganda has escalated, attributing to the increased number of attacks occurring in recent years.[716] The ease of dissemination of this type of speech raises the question of whether new regulations are needed for the modern world, where it is more difficult to regulate speech.

(iii) Attempts to regulate online content: intermediaries under pressure

"Internet intermediaries" can refer to a wide range of service providers which can "bring together or facilitate transactions between third parties on the Internet."[717] They may provide services to third parties and host or transmit data – among the most recognisable intermediaries would be search engines or social media companies such as Google and Facebook respectively.

Some social media companies frame their vision on the principle of freedom of expression. For example, Twitter proclaim one of their main values to be their belief in free expression, and that "every voice has the power to affect the world.[718] Despite this, they have faced growing state pressure to tackle harmful content. The EU's E-Commerce Directive (ECD),[719] in place since 2000, provides intermediaries with

[716] David Anderson Q.C. 'The Terrorism Acts in 2014' (17 September 2015) <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/461404/6_1256_EL_The_Terrorism_Act_Report_2015_FINAL_16_0915_WEB.pdf> accessed 30 August 2019.

[717] Organisation for Economic Co-operation and Development, 'The Economic and Social Role of Intermediaries' (OECD, April 2010) <https://www.oecd.org/internet/ieconomy/44949023.pdf> accessed 19 August 2019.

[718] Twitter, 'Twitter- Our Values' <https://about.twitter.com/en_gb/values.html> accessed 22 August 2019.

[719] Council Directive 2000/31/EC of the European Parliament and of the Council of 08 June 2000 on certain legal aspects of information society services, in particular

some safety from liability. If intermediaries are acting as mere conduits or are merely caching, transmitting, or storing information, they will not be held liable for the content that is transmitted, provided that they do not modify the information, along with various other provisions. However, if they become aware of illegal content and fail to remove this, immunity from liability may be lost.[720] What emerges, for Benthem, is a picture of a legal framework which operates on two levels: the first being that intermediaries are bound by the domestic legislation of the state, and secondly, companies must observe their own terms of service to act as human rights adjudicators.[721]

Liability for user generated content was considered in the case of *Delfi AS v Estonia*,[722] where an Internet news company was held liable for offensive comments posted by its readers which threatened violence. The Court found that the government of Estonia had acted correctly in holding the news company liable and that they had proposed justified and proportionate restrictions on the users' freedom of expression. The case was brought by Delfi AS, the owner of a major Internet portal in Estonia. Comments could be posted on Delfi AS's news articles online by Internet users, which were uploaded automatically and not edited by the applicant company. The company's system for dealing with hateful comments included a "notify and take down" system, under which readers were allowed to notify an editor of an inappropriate comment, which could then be promptly deleted.[723] The news portal had removed the comments, though

electronic commerce, in the Internal Market (Directive on Electronic Commerce) OJ L178/0001.

[720] ibid [46].

[721] Benthem (n 714).

[722] *Delfi AS v Estonia*, Application No. 64569/09, (ECtHR, 16 June 2015).

[723] Mart Susi, '*Delfi AS v Estonia'* (2017) 108(2) American Journal of International Law 295.

this was only after being notified several weeks later by the other party.

The Court noted that the company exercised a substantial amount of control over the published comments.[724] However, it was stressed that the judgment did not concern social media platforms where the platform operator did not contribute any real content. Liability seems to be a question of degree, with companies holding greater control over content more likely to attract legal obligation.

Due to the mounting pressure on technology companies to act in countering illegal hate speech online, Facebook, YouTube and others agreed in 2016 with the European Commission's Code of Conduct on countering illegal hate speech online.[725] The technology companies agreed to restrict the promotion of incitement of violence and hateful conduct.[726] It was agreed that posts flagged by users would be reviewed and any found to be illegal would be taken down within 24 hours.[727] This was in spite of Facebook previously querying whether 24 hours was a realistic timeframe, as many posts required careful analysis and legal assessment.[728] Six

[724] *Delfi* (n 722) [145].
[725] European Commission, 'The EU Code of conduct on countering illegal hate speech online' (European Commission, 30 June 2016), <https://ec.europa.eu/info/policies/justice-and-fundamental-rights/combatting-discrimination/racism-and-xenophobia/countering-illegal-hate-speech-online_en> accessed 20 August 2019.
[726] ibid.
[727] Zachary Laub, 'Hate Speech on Social Media: Global comparisons' (*Council on Foreign Relations*, 07 June 2019) <https://www.cfr.org/backgrounder/hate-speech-social-media-global-comparisons> accessed 23 August 2019.
[728] The Guardian, 'France online hate speech law to force social media sites to act quickly' *The Guardian* (Paris, 09 July 2019) <https://www.theguardian.com/world/2019/jul/09/france-online-hate-speech-law-social-media> accessed 28 August 2019.

months later, those same companies announced an intention to create a shared database to allow for easier review of banned extremist content.[729] In addition, Twitter had been securing its own terms of service and agreed to update its hate speech rules in relation to religion. This would ban posts that liken religious groups to "rats," "viruses" or "maggots," among other terms.[730]

Following numerous terrorist attacks in 2017, British Prime Minister, Theresa May and French President, Emmanuel Macron confirmed plans to fine Internet companies for failing to remove extremist content from their websites.[731] Following the egregious attacks on the mosques in Christchurch, New Zealand on 15 March 2019, certain media outlets and social media platforms fell under criticism for having permitted livestreaming of the shootings. Fifty individuals were killed in the attacks, and the original video was viewed thousands of times before eventually being removed.[732] Justice Minister of the UK, Andrew Little, said at the time that current laws did not sufficiently regulate "the evil and hateful things that we're seeing online."[733] In response to the attack two weeks later, Facebook responded by confirming they had received feedback

[729] Casey Newton, 'Facebook, Microsoft, Twitter, and Youtube are creating a database of 'terrorist content' *The Verge* (New York, 05 December 2016) <https://www.theverge.com/2016/12/5/13849570/facebook-microsoft-twitter-google-terrorist-content-database> accessed 01 September 2019.
[730] BBC, 'Twitter bans religious insults calling groups rats or maggots' (*BBC News*, 09 July 2019) <https://www.bbc.co.uk/news/technology-48922546> accessed 28 August 2019.
[731] Amanda Paulson and Eva Botkin-Kowacki, 'In terror fight, tech companies caught between US and European ideals' (*The Christian Science Monitor*, 23 June 2017) <https://www.csmonitor.com/Technology/2017/0623/In-terror-fight-tech-companies-caught-between-US-and-European-ideals> accessed 01 September 2019.
[732] BBC, 'Facebook to consider live video restrictions after NZ attacks' (*BBC News*, 30 March 2019) <https://www.bbc.co.uk/news/technology-47758455> accessed 26 August 2019.
[733] ibid.

suggesting they needed to do more to regulate content, which Facebook agreed with.[734]

Former Security Minister for the UK, Ben Wallace, had previously accused Internet companies of being "ruthless profiteers" by failing to assist security services in stamping out extremism online.[735] It is therefore clear that the UK government, at least, believes intermediaries should be liable in these situations.

Dissemination has become a major concern among European states and countermeasures have been plentiful.[736] For example, in 2017 Germany passed the Network Enforcement Act,[737] exposing social media companies to heavy fines on failures to remove what is defined as hate speech.[738] Section 3(2) of the Act requires social media companies to remove or block access to content that is unlawful, within 24 hours of receiving a complaint. Time-based conditions for companies to fulfil have faced criticism from scholars, as speed inevitably sacrifices thoughtful deliberation. Thus, the limited timeframe could promote removal as a default response for companies to avoid facing hefty fines.[739] Possibly due to the Network Enforcement Act's stringent efforts to combat hate speech, it is sometimes referred to as "hate speech law."[740] In

[734] ibid.
[735] Natasha Lomas, 'UK eyeing 'extremism' tax on social media giants' (*Tech Crunch*, 02 January 2018) <https://techcrunch.com/2018/01/02/uk-eyeing-extremism-tax-on-social-media-giants/> accessed 22 August 2019.
[736] Parmar (n 610).
[737] Network Enforcement Act 2017.
[738] ibid, s.4.
[739] Danielle Keats Citron, 'Extremist Speech, Compelled Conformity, and Censorship Creep' (2018) 93 Notre Dame Law Review 1035.
[740] Wenguang Yu, 'Internet Intermediaries' Liability for Online Illegal Hate Speech' (2018) 13(3) Frontiers of Law in China 342.

addition, the worldwide nature of shared information and lack of national barriers raises the question of whether intermediaries should be liable for user generated content online that offends religious sensibilities or threatens national security. Intermediaries cannot be classified as content authors for simply transmitting content and facilitating Internet connection.

France, possibly inspired by Germany's Network Act, has recently passed its own draft bill to fight online hate speech. The text requires online networks to delete messages that are considered "obviously hateful" within 24 hours or risk fines of up to £1.12m.[741] However, this has faced criticism for being too vague in some of its terms. The bill covers an offence of "apology of voluntary interference with life," which has been used to attach liability to jests made in bad taste about the terrorist attacks of 11 September 2001.[742] There have been calls in recent years within Europe for intermediary liability to be expanded. To increase regulation over harmful content, the UK has proposed a new "duty of care" for social media companies[743] – any failure to comply would result in fines or blocked services.[744] There have also been discussions over imposing a time limit on intermediaries to delete extremist

[741] The Guardian, 'France online hate speech law to force social media sites to act quickly' *The Guardian* (Paris, 09 July 2019) <https://www.theguardian.com/world/2019/jul/09/france-online-hate-speech-law-social-media> accessed 20 August 2019.
[742] Article 19, 'France Analysis of draft hate speech bill' (*Article 19*, 03 July 2019) <https://www.article19.org/resources/france-analysis-of-draft-hate-speech-bill/> accessed 22 August 2019.
[743] Home Office, 'Online Harms White Paper' (UK Government, 26 June 2019) ch 3 <https://www.gov.uk/government/consultations/online-harms-white-paper/online-harms-white-paper> accessed 26 August 2019.
[744] BBC, Reality Check team, 'Social media: How can governments regulate it?' (*BBC News*, 08 April 2019) <https://www.bbc.co.uk/news/technology-47135058> accessed 22 August 2019.

content on their sites in one hour, with failure to do so risking a fine.[745]

Shortly following the Christchurch attacks, the UK released the Online Harms White Paper[746] which placed far greater responsibility for online content on platform providers. A central aim of the legislation is clearly to combat violence, including terrorism motivated both for and against religion. Indeed, the Joint Ministerial foreword reads as follows: "the internet [sic] can be used to spread terrorist and other illegal or harmful content, undermine civil discourse, and abuse or bully other people. Online harms are widespread…"[747] The proposed legislation seems to have been introduced to place a greater burden on the largest platforms such as Google and Facebook.[748] The White Paper appears to take quite an expansive view on which parties attract liability, namely, companies which "provide services or tools that enable or facilitate users to share or discover user-generated content or interact with each other online."[749]

However, numerous concerns preside over the White Paper's impact on freedom of expression. Firstly, the phrase "online harms" is overly imprecise. Broadly understood, mischievous liability may result in legitimate discussion on religion. The White Paper proposes that a regulator oversees company conduct and issue fines if companies do not comply with their "duty of care," while companies remain liable for

[745] BBC, 'Social media faces EU fine if terror lingers for an hour' (*BBC News*, 20 August 2018) <https://www.bbc.co.uk/news/technology-45247169> accessed 22 August 2019.
[746] Home Office (n 743).
[747] ibid.
[748] Alicia Mendonca-Richards, 'Tackling online abuse: a look at the online harms White Paper' (2019) 25(5) Computer and Telecommunications Law Review 135.
[749] Online Harms White Paper [4.3].

properly illegal content on their services and platforms. A more extreme option would be to introduce ISP blocking, which would result in Internet users becoming barred from accessing certain websites.[750] This would only be introduced in the most extreme instances, presumably for repeat offenders, to combat the risk of censorship accusation. This may entail the possibility that companies are compelled to utilize artificial intelligence (hereafter "AI") algorithms to identify and eliminate harmful content.

Indeed, many intermediaries, such as Google and YouTube, have already been utilising AI. The sheer amount of data that is uploaded on the Internet every day makes it virtually impossible to monitor harmful content without AI use.[751] It is certainly questionable whether AI is fit for purpose to differentiate between harmful content affecting national security and purely historical references or permissible satire.[752] The aim of protecting national security and blocking circulation of terrorist content through the use of AI may have a counter-productive effect—much content raising awareness of international atrocities may be outright removed. An extreme example is the automatic removal of videos documenting the atrocities committed in Syria from YouTube

[750] Gian Volpicelli, 'All that's wrong with the UK's crusade against online harms' (*Wired*, 09 April 2019) <https://www.wired.co.uk/article/online-harms-white-paper-uk-analysis> accessed 23 August 2018

[751] Benthem (n 714).

[752] Index on Censorship, 'Index on Censorship submission to Online Harms White Paper consultation' (*Index on Censorship*, 19 June 2019) <https://www.indexoncensorship.org/wp-content/uploads/2019/07/Online-Harms-Consultation-Response-Index-on-Censorship.pdf> accessed 23 August 2018.

through AI,[753] thus demonstrating the importance of having some form of human review policy over online content.[754]

By punishing those who are willing to discuss and stand against actual hate speech or speech inciting violence, these companies are facilitating the aims of those whom they are really attempting to punish.[755] When states defer responsibility to private companies for restricting and removing content, there may be an unfortunate lack of oversight.

Undue restriction of expression continues to exist as private companies seek to comply with state requests in a manner evasive of sanctions. This was highlighted as an issue by Human Rights experts including David Kaye, the Special Rapporteur on the Promotion and Protection of the Right to Freedom of Opinion and Expression.[756] Disproportionate liability could lead platform operators to excessively block legitimate and useful content. This is not to say that all pressure coming from European legal regulation is overall detrimental. For example, the tightening of intermediaries' policies could prevent susceptible individuals from viewing religious extremism videos online which might otherwise provide

[753] Malachy Browne, 'YouTube Removes Videos Showing Atrocities in Syria' *New York Times* (New York, 22 August 2017) <https://www.nytimes.com/2017/08/22/world/middleeast/syria-youtube-videos-isis.html> accessed 28 August 2019.

[754] Stuart Macdonald and others, 'Regulating terrorist content on social media: automation and the rule of law' (2019) 15(2) International Journal of Law in Context 183.

[755] Index on Censorship, 'Content bans won't just eliminate "bad" speech online' (*Index on Censorship*, 06 June 2019) <https://www.indexoncensorship.org/2019/06/content-bans-wont-just-eliminate-bad-speech-online/> accessed 23 August 2019.

[756] Letter from David Kaye and others to the United Nations Human Rights Council (07 December 2018).

impetus for them to join terrorist organisations.[757] These principles could inadvertently prevent potential terrorist attacks from happening in the future. However, this must be balanced against the very real potential of companies' terms of service being interpreted too harshly. Indeed, some of the proposals have merit if there are adjustments – German and French laws illustrate a potentially suitable approach of fining companies for non-compliance.[758] This strategy may prove constructive, provided the 24-hour time limit for companies to investigate content is relaxed to accord with empirical needs.

(iv) Should intermediaries be liable?

The most notable argument against imposing liability on intermediaries for dissemination is a pragmatic one. Intermediaries, as a counsel of prudence, may block content which does not necessarily cross harmfulness thresholds. Permissible satire or legitimate debate may be erased without proper scrutiny.

If, however, there is no intermediary liability, there may be no forceful incentive to remove harmful expression or terrorist content. Abundant harm is a natural consequence of widespread dissemination of such content to millions, jeopardizing state security. Since the development of the Internet has created such a "revolution in the infrastructure of free expression,"[759] it can be argued that new regulations are needed to control the spread of harmful content. Wenguang argues for a system of intermediary liability that is legitimate, proportional and transparent, where national and international

[757] Citron (n 739).
[758] Network Enforcement Act 2017 (Germany); Loi Avia du 13 mai 2020 (France).
[759] Jack M. Balkin, 'Old-School/New-School Speech Regulation' (2014) 127 Harvard Law Review 2996.

laws serve as "procedural requirements."[760] However, Mendonca-Richards believes that although there is a risk to freedom of expression with increasing Internet companies' liability, she considers it unlikely that companies will adopt an overly cautious approach in order to minimise liability.[761] If clear and comprehensible requirements are placed on intermediary liability, this certainly seems like an acceptable way to regulate – though the regulating laws must not themselves unduly restrict freedom of expression.

The recent wave of domestic legislation highlighted above demonstrates the growing trend of states pressuring Internet intermediaries to swiftly remove content,[762] which has the potential adverse effect of infringing on peoples' freedom of expression. There is no clear answer amongst scholars on how best to regulate online dissemination of speech and which party should be made accountable, yet there are clearly issues for the current trend of further intermediary liability.

(v) Potential methods of reform

A justifiable defence for intermediaries has been the difference between themselves, as platforms which distribute content, and users who author harmful information. However, it must be accepted that a sizeable component of modern life now takes place online. The 2018 Report of the Special Rapporteur on the Promotion and Protection of the Right to Freedom of Opinion and Expression states that "[i]nternet companies have become central platforms for discussion and debate, information access,

[760] Yu (n 740).
[761] Mendonca-Richards (n 748).
[762] Benthem (n 714).

commerce and human development."[763] This implies a position of control over the lives and rights of others,[764] and therefore it is argued that this should come with a burden of responsibility through greater liability than that currently imputed.

Mendonca-Richards maintains that the previous regulations from the 1990s are outdated and had created several exemptions for Internet companies in order to facilitate their growth. She believes that the landscape has now changed, and new legislation is needed in order to address the dissemination of false information and abusive material targeted at individuals.[765] Certainly, one may argue that sufficient tools such as advanced filtering technology already exist, allowing Internet companies to eliminate harmful content more effectively.[766] Benthem proposes a separate international human rights obligation for social media actors, which would allow them to disobey national regulations which unduly threaten free expression. She believes intermediaries should be able to place some constraints on the measures sought by governmental authorities and this could be sought through either customary international law or the application of already existing obligations by virtue of the "vertical corporate position of power."[767]

Some scholars believe that imposing liability on intermediaries for online content requires foremost, a clear

[763] UNCHR, 'Report of the Special Rapporteur on the Promotion and Protection of the Right to Freedom of Opinion and Expression' (18 June- 6 July 2018) 6 April 2018 UN Doc A/HRC/38/35 [9].
[764] Benthem (n 714).
[765] Mendonca-Richards (n 748).
[766] Carsten Ullrich, 'Standards for Duty of Care? Debating Intermediary Liability from a Sectoral Perspective' (2017) 8 Journal of Intellectual Property, Information Technology and E-Commerce Law 111.
[767] Benthem (n 714).

definition of such terms. As already emphasised, no such agreed-upon definition of hate speech exists and may vary state by state according to religious climates. For a concept as malleable as hate speech, it should be considered very important to set an outer boundary that is grounded on not only national law, but also human rights standards.[768] Improvements in regulating the way in which harmful content is disseminated online could reasonably be made. Benthem's proposal for an international human rights obligation could potentially function in practice, but it would be difficult for states to avoid semantic difficulties given the difficulty of defining "harmful content" and "hate speech." To overcome these difficulties, Internet companies may consider involving human rights groups in their efforts to define hate speech and extremist materials. A multi-stakeholder group could be established, including various civil liberties, calling upon human rights experts to help companies define the undefinable. The results of these efforts could be shared to nation states to foster understanding of the limits of content removal from certain websites under differing terms of service. States may then abstain from punishing intermediaries for legitimate expression.[769]

Certainly, it is easy to see that disproportionate fines and onerous temporal requirements for content removal could injure freedom of expression by encouraging the removal of legitimate content. A possible solution might be to introduce a neutral international watchdog for online content, possibly through an organisation such as the UN. This would enable review of the practices of major companies to ensure that protected content is not removed. Citron also proposes that tech

[768] Yu (n 740).
[769] Citron (n 739).

companies produce "Transparency Reports," which would provide detailed information on state efforts to censor hate speech and extremist content online, possibly through a request for removal.[770] This would aid in providing a level of accountability by states to prevent arbitrary requests for censorship of content. It would also be prudent within these reports for Internet companies to provide their own data which would detail the frequency at which content is removed or blocked and the reasons for this.

In summary, potential action to shed violations of freedom of expression could take the form of precisely defining terms at national and international levels in collaboration with human rights groups, as well as increasing the time period for Internet companies to investigate content complaints.

VI. Conclusion

This article has investigated whether freedom of expression has been unduly restricted, utilising religion as an anchoring point. As discussed, some states have enacted counterterrorism or anti-extremism legislation attempting in large part to prevent religious ideology-fuelled attacks, as seen in the *Charlie Hebdo* attacks. Within these measures, real threats to freedom of expression may be perceived, such as those shown in several clauses of the Counter-Terrorism and Border Security Act 2019. A portion of these restrictions do not seem necessary in a democratic society, as they threaten simple debate or discussion over religious matters. Furthermore, caution must be taken by states henceforth to ensure Article 10 Convention rights are given due regard. Through an analysis of recent jurisprudence, the Court has clearly attempted to balance

[770] ibid.

freedom of expression and religion, albeit inconsistently. The recent *A.S. v Austria* case has demonstrated a disregard for freedom of expression in order to favour the protection of religious feelings and peace. This is a worrying trend. It relies on defining offence, which is no simple task and will only lead to inconsistent decisions, which poses further difficulties for freedom of expression and rule of law.

Moving forward, an attempt would be welcomed to reverse the decision made in *A.S v. Austria* to balance freedom of expression more appropriately. Greater ease of dissemination online spawns greater prevalence of hateful and harmful speech which should undoubtedly be controlled. The evidence suggests that states in the past few years are attempting to regulate this and, though some of the ideas have merit, further reform is clearly required. Social media companies have been placed under intense pressure from states to counter dissemination of content online and this may, as a natural consequence, side-line Article 10 of the Convention in favour of the staunch evasion of corporate liability. The introduction of an international watchdog for online content would ease some fears over the potential erosion of freedom of expression, yet it remains to be seen whether there is a real desire, internationally, for the implementation of such an auditor. Where the precarious expression-religion balance will tip in the coming years will be a legal saga worthy of attentive scrutiny.

The Tos and Fros of Democratic Fabric: How effective is Parliament as executive watchdog?

Timothy Ke [771]

The preliminary steps to securing legitimate democratic governance in the United Kingdom are two-fold. An executive government must not only become sworn into office by democratic election but must maintain the legitimacy of that office by duly complying with Her Majesty's Parliament's measures of scrutiny. In the United Kingdom, scrutiny exhibits a high degree of fragility, dulled by evasive political rhetoric and party-political attitudes within the legislature itself. This article highlights the importance of proper scrutiny of the executive government. It assesses the extent to which Parliament has trumped political challenges to the force of its scrutiny, examining three major contemporary methods of scrutiny: ministerial questioning; parliamentary debates, and the operation of select committees. It is asserted that public engagement with parliamentary matters greatly strengthens the quality of scrutiny, and that measures relatively free from political tide are forums for all constituencies' voices to be fully and unequivocally heard. *Has politics blunted Parliament's fangs as watchdog?*

I. Introduction

Among the trinkets distinguishing democracy from autocracy, is transparency—a government with a true eye to allowing a nation's people and their parliament to see right through it. But democracy bears its own faction of challenges to parliamentary scrutiny. Governments which must be sworn in by citizens' election naturally concern themselves with self-preservation.

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Poole may indeed be justified in asserting that an exceptionally powerful executive merits an exceptional level of scrutiny.[772] An 'arena legislature'[773] such as Her Majesty's Parliament, possessing no independent law-making ability, must take pains to facilitate the Government's transparency in the face of political challenges.

In this article, the tension between governance and scrutiny will be assessed with three areas of focus. Firstly, it will be contended that despite opposing considerations, scrutiny absolutely has its place in the constitution. Secondly, it will be asserted that it is Parliament, not the executive, which rightly holds the constitutional right to scrutiny. Thirdly, three major contemporary scrutiny mechanisms, namely ministerial questioning, parliamentary debates, and select committees will be assessed for areas of strength and reform.

II. The importance of scrutiny—inalienable?

Parliamentary scrutiny of the executive, whether harsh or soft, is inalienable from the constitution. Truly, Montesquieu's separation of powers supports Parliamentary scrutiny in outlining the tyranny of one body holding unregulated power from multiple branches of government.[774] The United Kingdom's executive overlap with Parliament is - for

[772] Thomas Poole, 'The Constitution and Foreign Affairs' (2016) 69 Current Legal Problems 143, 171.

[773] Nelson Polsby, 'Legislatures', in Greenstein and Polsby (eds), *Handbook of Political Science, Volume 5: Governmental Institutions and Processes* (Reading, MA 1975) 277.

[774] Charles de Secondat, Baron de Montesquieu in Anne Cohler, Basia Miller, Harold Stone (eds), *The Spirit of Laws* (originally published 1749, New York: Cambridge University Press 1989) 216.

proponents of the 'Parliamentary decline thesis'[775] in the twentieth century - problematic. Their concern is that a 'gulf' exists between 'substance and form,'[776] that despite a widespread appreciation of varying degrees of the executive usurping Parliament's democratic *carte blanche*, Parliament is incapable of providing adequate scrutiny in response. Is this "gulf" a necessary one?

Sceptics of the 'Parliamentary decline thesis' would respond affirmatively: perhaps Parliament was never intended to subject government to intense levels of scrutiny.[777] Criticism of scrutiny popularly relies on the notion of unreasonable restriction, and it must be conceded that excessive legislative scrutiny, of which the United States is an illustration, potentially divides the state's ideology into multiple distinct agendas, generating at its worst, governmental seizure. This has caused, among other serious mistakes, the death of a Native American man in the States.[778] Locke asserts that a democratically legitimate government has a right to govern without unreasonable interference.[779] In this light, the executive has "won over" the right to govern; it does so from a democratic place. These arguments, it is submitted, are incapable of outright denying the importance of scrutiny; they can be said only to criticise *excessive* scrutiny.

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[775] Matthew Flinders & Alexandra Kelso, 'Mind the Gap: Political Analysis, Public Expectations, and the Parliamentary Decline Thesis' (2011) 13 British Journal of Politics and International Relations 249, 254.

[776] Poole (n 772) 160.

[777] Mark Elliot & Robert Thomas, *Public Law* (OUP 2017) 407.

[778] Javier Garcia Oliva & Helen Hall, 'People Are Dying, Cold and Hungry: What Happens When Government Stops - Religion, Law and The Constitution' (*Religion, law and the constitution*, 2019).

[779] John Locke, *Two Treatises on Government* (Awnsham Churchill, 1689) 374. Also supported in Jeremy Waldron, *Law and Disagreement* (OUP, 1999) 296.

If the executive's right to govern is accepted, then Parliament can also be said in rebuttal to *provide* Locke's "democratic legitimacy" and thereby *strengthen*, not undermine its rule. Due respect ought to be given to a politician refusing to force draft legislation through the ranks of the legislature, and preferring to persuade rather than to coerce, to vote than to veto. Scrutiny then, 'is not the enemy of effective and strong government, but its primary condition.'[780] This strengthens the notion that public power must first be placed 'under [scrutiny's] threat,'[781] satisfying the democratic philosophy that legitimate governance can never run separate from the interests of the state. It is not a stretch to accept that a constitution 'adapted … to the people for whom [it] is framed'[782] respects that governance be subject to reasonable review. Scrutiny is thereby embedded as a constitutional standard and the root of executive legitimacy.

III. Scrutiny is Parliament's role alone—a niche for a niche

Why then, if scrutiny is essential, does Parliament scrutinise the executive and not *vice versa*? The answer seems uncontroversial: a governing body, under the separation of powers, cannot then assess and critique the legitimacy of this governance. Parliament's inherent debility is its unsuitability for administration. King suggests that the executive occupies a niche in governing which Parliament cannot replace.[783] In a

[780] Bernard Crick, *The Reform of Parliament* (London 1969) 259.

[781] Philip Pettit, *Republicanism: A Theory of Freedom and Government* (OUP, 2000) 188.

[782] Charles-Louis de Montesquieu, *The Spirit of Laws* (Originally published 1914, Cosimo 2007) 6.

[783] Anthony King, *The British Constitution* (first published 1953, OUP 2007) 332.

similar vein, Mill calls Parliament 'radically unfit' to govern.[784] A representative parliamentary assembly, for Mill, has a niche of its own in the constitution 'to watch and control the government.'[785]

In practice, the powers of scrutiny most comfortably reside with Parliament, playing an 'important constitutional role by monitoring government implementation of [policy]' where Ministers may act independent of legislative approval as prerogative enables.[786] Ministers must respect *Parliament's will*, undertaking a constitutional duty under the Ministerial Code to be accountable to Parliament which has proven readily accepted by select committees.[787] The *will of Parliament* reflects, by utmost fiduciary representation, the will of the nation.[788] It thereby more comfortably holds the keys to scrutiny.

IV. Mechanisms of scrutiny

(i) Ministerial questioning

The first primary scrutiny mechanism, ministerial questioning, is severely undermined by the executive's culture of self-preservation. On respected authority, Erskine May asserts that 'the purpose of a question is to obtain information or press for

[784] John Stuart Mill, *On Liberty and other essays* (OUP 1991) 282.
[785] ibid.
[786] Ian Loveland, *Constitutional Law, Administrative Law, and Human Rights* (OUP 2013) 143.
[787] Cabinet Office, 'Ministerial Code' (London 2015) [1.2b]. Approved in House of Commons Public Administration Select Committee, *Smaller Government: What do Ministers do?* (HC 530 2010-11) vol I 15-6.
[788] John Stuart Mill, *Considerations on Representative Government* (New York Henry Holt and Company 1873) 112.

action.'[789] This aligns with the Whig party's view, a party which staunchly advocated for Parliament's supremacy and the duty of every Minister to be accountable to it. The Whiggish argument is democratic; it holds that Parliament ought to be heard and answered transparently because its 'determinations are the result of the joint experience and wisdom of a whole nation.'[790] The Whig party's defence of transparent, effective questioning has indirectly bled into the modern Ministerial Code itself, which expresses similar sentiments.[791] This conflicts with a 'Peelite' approach which is, as Barendt notes, more heavily implemented.[792] It is submitted that: the 'Peelite' argument that 'backbenchers … by definition [know] less than Ministers'[793] cannot justify dispensing of difficult questions with excuses for governmental mistakes. Nor can it license '[engaging] in self-congratulation' instead of allowing meaningful criticism.[794] These practices seem more meritocratic than constitutional.

Occasionally, ministerial error is sanctioned with effective disapproval in Parliament, such as April 1995's hospital closures by Virginia Bottomley and the questioning of Theresa May over the government's mistake in sinking the *General Belgrano*. Both cases, however, seemed to rely on public humiliation. Likewise, oral questions take advantage of publicity in sanctioning governmental errors.[795] It appears that

[789] Erskine May, *Parliamentary Practice* (LexisNexis 2011) 344.

[790] The words of a Whig author in Thomas Rymer, *Of the Antiquity, Power & Decay of Parliaments* (London 1714) 8.

[791] Cabinet Office (n 787).

[792] Eric Barendt, *An Introduction to Constitutional Law* (Oxford 1998) 116.

[793] Douglas Hurd, *Robert Peel: A Biography* (London 2007) 226.

[794] Loveland (n 786) 145.

[795] Elliot & Thomas (n 777) 29.

'the remedies are political,'[796] and the authority is not derived from Parliament alone - MPs pose questions 'not in the hope of changing policy, but to highlight issues to the general public.'[797] The government represented by Bottomley had a majority in the commons of barely a dozen.[798] Parliament's successful scrutiny in these cases appear anomalous. Private novice questions, though allotted more time than usual, with 30-40% of questions tabled by the opposition frontbench alone, [799] will likely offer little more effect in policing a self-preserving executive. Written questions, albeit though offering ministerial transparency, are limited by cost and may be answered evasively.[800] MP criticism of written answers may be accepted by the government, though there is no corresponding guarantee of remedial action. In this way, scrutiny is undermined as the executive strives—staunchly—to dampen criticism and remain in power.

(ii) Parliamentary debate

The second primary scrutiny mechanism is parliamentary debate, made more effective by stimulating public criticism of the executive. The Backbench Business Committee in 2010 has enabled MPs to decide Parliament's debating agenda, which is applauded throughout Parliament.[801] Though debates are

[796] Graham Gee, 'What is a Political Constitution?' (2010) 30 Oxford J Legal Studies 278.
[797] ibid 429.
[798] Loveland (n 786) 146.
[799] ibid.
[800] Elliot & Thomas (n 777) 431.
[801] House of Commons Procedure Committee, *Review of the Backbench Business Committee* (HC 168 2012–13).

criticised for being overly 'adversarial' and 'party-political,'[802] the accessibility of debates to the public may surely be a substantial strength. Norton suggests that "there is little evidence" of debate effectiveness because they are 'partisan.'[803]

However, overt and oftentimes controversial operation achieves an ancillary purpose—stimulating public opinion. Defence of constituency interests is a 'hallmark of backbench behaviour,'[804] treated benevolently by whips which allows public interest, reflected in Parliament, to pierce the armour of the executive. Emergency debates deal with intensely controversial topics and are likewise useful as a source of governmental embarrassment.[805] Even where public opinion does not entirely reach - such as adjournment debates - MPs are empowered to act for their constituents in more nuanced issues. Public opinion, then, seems *the great equaliser* in strengthening scrutiny against the executive through parliamentary debates. It is the lifeblood of the executive government, and like a sturdy whip, is indispensable in keeping Ministers accountable.

(iii) Select committees

Select committees may be influenced by party-politics, though ultimately remain free to lead Parliament in scrutiny. For Brazier and Fox, select committees are the greatest source of parliamentary scrutiny.[806] Indeed, forty percent of their

[802] Loveland (n 786) 143.

[803] Philip Norton, *Parliament in British Politics* (Basingstoke 2005) 131.

[804] Loveland (n 786) 145.

[805] ibid 144.

[806] Alex Brazier & Ruth Fox, 'Reviewing Select Committee Tasks and Modes of Operation' (2011) 64 Parliamentary Affairs 354, 367.

recommendations are accepted by government.[807] Though doubt is cast on the coercive powers of select committees (SCs),[808] Parliament itself has welcomed the incorporation of SCs into 'the thinking of [M]inisters and public bodies.'[809] Select committees' operation is comparatively unrestrained by dependence on the 'goodwill of ministers,'[810] capable of independent inquisition in societal issues of its choosing.

Scrutiny in House of Lords SCs, though less organised, non-departmental and subservient to the Commons, nonetheless provide valuable checks on executive procedure. In the Brexit controversy, the Delegated Powers and Reform Committee warned the executive against misuse of 'The Great Repeal Bill' to bypass proper parliamentary scrutiny.[811] The *Legal World News* receives this as a contemporary victory.[812]

However, parliamentary coercions of Ministerial appearances easily fail due to the executive command of MP voting, which enables non-attendance.[813] As Brazier and Fox suggest, 'the commitment of [SC] members is critical' to its success.[814] A SC member's chair is—eternally—a backbencher's post and abandonable for higher office. Politics may be inherently inalienable from Parliament committees to this degree. Contrastingly, the prestigious Public Accounts Committee (PAC) strikes a fascinating balance by retaining

[807] Gee (n 796) 146.

[808] Richard Gordon & Amy Street, *Select Committees and Coercive Powers – Clarity or Confusion?* (London 2012).

[809] House of Commons Liaison Committee, *Legacy Report* (HC 954 2014-15) 38.

[810] ibid 145.

[811] House of Lords Delegated Powers and Regulatory Reform Committee, *European Union Withdrawal Bill* (HL Paper 73 2017-19) 15.

[812] Jan Miller, 'Peers Offer Some Cheer to Brexiteers' *Legal World News* (2019).

[813] Loveland (n 786) 152.

[814] Brazier & Fox (n 806) 365.

access to Ministers via ministerial responsibility whilst leaving its political impartiality relatively intact through partnership with the extra-parliamentary National Audit Office (NAO). 88% of the PAC's recommendations from 2010 to 2015, supplemented with specialised NAO expertise, were accepted;[815] a reminder that select committees are a forum of parliamentary freedom. Reform will no doubt be met with executive defiance; nonetheless, further development of select committees is likely highly desirable.

V. Conclusion

Parliamentary scrutiny entrenches its place in the constitutional fabric for being a precondition of executive legitimacy. The executive government achieves only *prima facie* legitimacy in virtue of democratic election. Should the executive claim the right to govern *qua*-executive, the legislature necessarily undertakes the altogether difficult role of ensuring the executive stays on the right side of governmental legitimacy. In questioning Ministers, executive self-preservation vies with its duty of accountability. In parliamentary debates, the role of public criticism in strengthening scrutiny reflects the government's constitutional duty to serve the state. Finally, the constitution itself enables select committees to command governmental accountability, whilst free to strive for parliamentary freedom, and through this—meaningful scrutiny.

[815] 'History - Public Accounts Committee' (*UK Parliament*, 2019) <https://www.parliament.uk/business/committees/committees-a-z/commons-select/public-accounts-committee/history-of-committee/> accessed 7 February 2019.