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Preface from the Head of The University of Manchester Law School

The Manchester Review of Law, Crime and Ethics (MRLCE) is now in its 10th edition. It is my great pleasure to be writing this preface for a journal that has been thriving thanks to its talented editors. This Volume comes at a time when students are opportune again to follow lectures face-to-face and engage in lively academic debate. I am therefore glad to witness renewed energy invested in the edition by its contributors and the editors. The articles are well-thought through and lucidly written. As always, I am sure the readership of the MRLCE will continue to grow.

I mentioned this in my preface of the 9th edition. However, it is important to reiterate it here again as the contributions in this edition are good reflections of the study of Law in Manchester. Indeed, as a top Russell Group Law School that promotes interdisciplinary research, we are glad to have this Volume cover a broad range of subjects including competition law, criminal law, torts law, criminology, etc. The Volume captures the essence of our intellectual agenda, i.e., employing law in response 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

Head of The University of Manchester Law School

September 2021

Preface from the Editor-in-Chief

As Baroness Hale of Richmond[1] has put it, having taught Law for eighteen years at our University of Manchester: "[t]he great joy of university teaching, of course, is that the teachers learn as much from (some of) their students as the students learn from their teachers."[2] To write so warmly of students' potential—for a figure in the Law who has served on the Bench in Britain's highest court for the better part of two decades as a familiar and formidable voice upon the world stage of the common law—is nothing short of impressive humility. But Baroness Hale's words are also reflective, I trust, of a profound truth. That grandeur occasionally veils itself is indisputable. For who, amongst the audience of a lecture delivered by Baroness Hale at our Law School in 1968, was "this tiny slip of a girl, with elfin face and ginger hair, still only 17 years old, and from the start asking the most penetrating and challenging questions?"[3] That modest figure was Professor Margaret Brazier in her youth, a pioneering figure in the Law School for nearly fifty years whose work and leadership has doubtless produced many of the sea changes shaping the University of today.

The portrait of the Law School one can drum up nowadays, of course, differs in certain aspects from that of yesteryear. Not least of all, Professor Brazier had woven her lattices as a Manchester student at a time when "extracting first class marks from the Manchester examiners was like pulling teeth without an anaesthetic."[4] Fortunate we are nowadays that this state of affairs has abated (though not, as some students might vehemently protest, comprehensively). But the School's

[1] Formerly Lady Hale, President of the Supreme Court of the United Kingdom until Her Ladyship's recent retirement last year.
[2] Foreword by Baroness Hale of Richmond in Catherine Stanton and others (eds), *Pioneering Healthcare Law: Essays in Honour of Margaret Brazier* (Routledge 2015) xix.
[3] ibid.
[4] ibid.

fundamental tastes have remained unaltered. Whilst we are situated at the heart of the Journal's decennial issue, I must take this rare opportunity to reflect upon how surely an encouraging narrative of student-hood such as that presented by Baroness Hale has seeped into the tendrils of this publication. The Journal, which had originally been conceived by student hands, has remained so; it has, along the way, become a forum of legal, criminological, and ethical sparring of an exceptional calibre. To the diligence of our Law School's student community, it is a testament. Of their talent in undertaking serious scholarship, it is a manifestation. It is all within these pages.

Joe Tomlinson, Editor-in-Chief of Volume III of the *Manchester Review of Law, Crime and Ethics* and now Senior Lecturer in Public Law at York Law School, highlighted a wonderful passage from an article by Professor David Kennedy of Harvard Law School. It deserves recollection. For their millennial issue, the editorial board of the *New York University Journal of International Law and Politics* requested that Professor Kennedy should author an article very forward in its vision, one that ventures a portrait of what would "consume [his] legal career and shape the parameters of international law in the new millennium."[5] In response to their call, the Professor humbly wrote:

> I imagine the editors experience themselves, at least on some days, to be quite firmly within the established field, the board of a well-respected journal, having the courage to reach out, encourage the new and the young.[6]

Furthermore:

> I have gotten a lot by picking up on the threads of [students'] interests … There is something odd in a student editorial board asking people half again to twice their age what issues we think will become relevant in our

[5] David Kennedy, 'When Renewal Repeats: Thinking Against the Box' (2000) 32 New York University Journal of International Law and Politics 335, 335.
[6] ibid 336.

> careers—as if we were just starting out and they were situated too far along to be able to see that far forward.[7]

There is, without a doubt, a marked craving for 'renewal' that sprawls far beyond the borders of the international law discipline, and that deeply humble and marvellous notion captured by Professor Kennedy equally extends past those bounds—that students may be among the most forceful stewards of any imminent 'renewal.' They are situated, as Professor Kennedy has suggested, in the transitory space betwixt possibility and experience. Both phenomena surrender themselves to the student's possession as that space matures. The raw white of a blank canvass complements the myriad hues of experience in the field, whereas either on its own may fail to engender the truest form of that intensely coveted innovation and renewal. This juxtaposition between present and future paints the student's journey in tones of a wonderful ambiguity—it adds a depth to their identity as one sensitively and invariably amenable to both victory and loss. It is a source of encouragement that, even in strife, students are (or will become) capable of greatness of an industry-leading calibre, and it adds a certain weight and preciousness to their existing accomplishments in that simultaneously they are capable of failure. "How strong the night lies as light aeriates the dark and atomic dreams multiply from a graphene heart."[8]

In the fullness of time, what a privilege it is for the Editorial Board of our Journal to deliver to you the tenth Volume. The multiplicity of all those whose efforts culminated in the successful publication of this Volume exceeds what I am able to address in this short note. My gratitude is owed to all of them. One of the highest joys of an endeavour such as this Journal is the settling of debts of gratitude when almost all is said and done, the ornamental ribbons on this Volume prepared to be fastened,

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[7] ibid.

[8] From *Inspire and Be Inspired*, a poem composed by Lemn Sissay MBE on the occasion of his appointment as Chancellor of The University of Manchester.

and the (Deputy) Editor-in-Chief is reflecting (perhaps too fondly) upon its pages. But I must give special thanks to a few towering figures here. First, this project would not have been possible without the steady support of the Deputy Editor-in-Chief, Zhen Qi (Quintus) Wong. Quintus emerged unscathed having been barraged with my ceaseless streams of assignments, leaving his valuable mark on the Review with more deftness than I was entitled to demand. He is an individual of tireless temperament whose assistance I was fortunate to have. Second, I thank all the talented Editors on this year's Board for their scrupulous efforts in making excellent articles exceptional, particularly when the hours they spent giving this Volume form were necessarily subtracted from the valuable time available for their studies. Third, we have nothing but gratitude for the academics at the University who spared no time and effort in providing thorough reviews of all articles published in this Journal.

Fourth, I am sincerely grateful to Gerard McDermott QC and Elinor Watts for generously authoring an article in private international law for this Volume of the Review. It has been a true pleasure to work with them and it is a privilege to share their work with you. I trust you will enjoy reading their piece as much as I did.

Finally, I wish to extend gratitude to my predecessor as Editor-in-Chief, Simpreet Kaur, for appointing me to this seat in which I have learned much and which I do not for a moment take for granted. It is with no less delight and confidence that I pass this torch to Thomas Carter, whose extraordinary performance on the Editorial Board for this Volume is no doubt the precursor of the publication of a most impressive Volume XI.

My own time here on the Review and at the University has been truly valuable. It has been an honour and a privilege to have had any part in contributing to this edition of the Review. Time and time again my peers, as students, impress upon me the

notion that grandeur veils itself—it is evident in their capacity to remain grounded tempted by the unrealistic highs of success and to resolutely mitigate against failure, to navigate the jostling and precarious waters of an exceptionally difficult two years amidst an upwards struggle for professional achievement, and to plant their feet upon the shores of this law review platform which celebrates their tenacity.

Timothy Ke
Editor-in-Chief

September 2021

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Memories Should Remind Us of Judicial Discretion

Mukuma Kawesha[†]

What if, every time judges exercise discretion, they could only consider either morality, precedent, or consequence? Is it even possible to practically isolate these aspects of decision-making? This article aims to explore what exactly judges are doing when exercising judicial discretion in complex cases. Discussion does not adhere to any given jurisprudential school of thought. The article is instead heavily influenced by commonalities of how everyday problems are solved and how the nature of decision-making is often ascribed retrospectively. Different jurists have elucidated incomplete conceptions of the process of judicial discretion. The author believes that vagueness and varied terminology amongst commentators has exaggerated the divide between the various schools of thought. Thus, this work pieces together these elements to depict a (more) complete picture of judicial discretion that is similar to our perceptions of memories. Ultimately, judicial discretion in hard cases is a fluid exercise that is tied to aspirations, current context, and past experiences. This becomes apparent when the blinders of seeking certainty or presupposing morality are removed.

I. Introduction

It is an instinctive desire to limit flexibility in judicial interpretation and construction of law. This arises from the sense that predictability makes it easier to align people's conduct with legal expectations. However, the infinite possibilities of human interactions—and ergo conflicts—cannot be covered by finite legislative enactments and case law precedent. Recognising this highlights that judicial discretion is necessary to attain justifiable judgements where this disparity between interactions and the law exists. The subsequent commentary will illustrate the nature of

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law as encompassing standards informed and supported by social facts and utility. It is within this context that judicial discretion commences its operation. Additionally, discussion will outline what amounts to a 'hard case,' with emphasis placed on their anomalous character being the gateway to permitting fluid discretion. Fundamentally, judicial discretion in hard cases has a broad (but not unrestrained) scope. The exercise of discretion is an endeavour seeing judges both create and discover law.

Arguments can be presented as to why certain cases should not be brought before the law at all. Notwithstanding, ensuing discussion is grounded in judicial discretion in an adjudicative light. Furthermore, the below sections focus on the 'Hart-Dworkin Debate' as it features highly persuasive assertions. Assessing every aspect of these jurists' accounts and disagreements is beyond this article's focus, yet the Hartian and Dworkinian points that are particularly compelling are the notions that:

- the scope for judicial discretion is no different in hard cases;
- there is, or should be, a presupposition of morality in law; and
- there should be resistance to a formulation of judicial discretion that permits judges to make and interpret the law.

II. The Essence of Hard Cases

'Hard cases' involve disputes which judges cannot solve via straightforward application of established law. As a consequence, judges must exercise their discretion in order to make sound decisions and arrive at suitable conclusions. Difficulty in these cases often arise from the following factors:

- the law being completely silent on the relevant matter;

- application of the law leading to absurd results (see *Tennessee Valley Authority v Hill*[9]);
- where applying existing law would result in discordance of underlying legal principles (see *Riggs v Palmer*[10] and *McLoughlin v O'Brien*[11]); or
- the applicable existing law may be regarded by adjudicators as a rule that should be overruled.

It is crucial to note that judges are limited to these slivers of situations when the rules are ineffective or non-existent. They neither have an omnipotent power to create law as they please, nor a discretion as robust as legislators.

Having established what amounts to a hard case, analysis can now shift to considering what judicial discretion in hard cases can and should entail. The views held by subscribers to naturalism and consequentialism are briefly addressed, but the main focus will be on the works of Hart and Dworkin.

III. The Different Formulations of Judicial Discretion

(i) Fuller, Devlin and MacCormick: Natural Law Meets Consequence

Naturalists regard law as a moral enterprise. Dissimilarities do, however, exist between the various proponents of natural law. For instance, Fuller's aspirational morality is drastically different to Devlin's religious-based 'Christian morals' conception.[12] Nonetheless, naturalists generally postulate that judicial discretion rests in judges making decisions on a morally evaluative basis. It is accepted that hard cases may have a moral conflict at their core, but not every problematic case will be underlined by a moral issue.

[9] 437 US 153 (1978); Scott Shapiro, 'The "Hart-Dworkin" Debate: A Short Guide for the Perplexed' in Arthur Ripstein (ed), *Ronald Dworkin* (Cambridge University Press 2007) 31.
[10] (1889) 115 NY 506.
[11] [1983] 1 AC 410.
[12] Lon Fuller, *The Morality of Law* (Revised edn, Yale University Press 1969) 104; Patrick Devlin, The Enforcement of Morals (OUP 1973) 25.

Moreover, not all conflicts can be resolved through moral evaluation. There are cases steeped in pragmatism and consequence, in which the outcomes are neither bound by, nor concerned with, moral considerations. The literature of Neil MacCormick is useful to illustrate this point. In recommending consequentialism, MacCormick utilises *Reavis v Clan Line Steamers*.[13] In that case it was the fear of resulting 'multiplicity of litigations' that was the *practical* determining factor.[14] Overall, it is feasible that there will be hard cases within which morality will be an important consideration. That being said, subsequent sections reveal that this is a quality that Hart, Dworkin, and the author's depiction can easily—no less, more persuasively—encapsulate. Further, despite its role in showing the pragmatic layer to judicial discretion, the consequentialist stance is inherently precarious. The reason for this is that it requires predictions about the societal impact of legal judgments to be made. Thus, consequentialism can also be set aside.

(ii) Hart: Contradiction, Contemporaneous Positing, and Could-Bes

Hart proposes that law is made up of posited rules and is grounded in social facts. Hart justifies this assertion by reference to different categories of rules. Firstly, there are primary rules, which impose obligations. Secondly, secondary rules, which confer power.[15] For Hart, the key secondary rule is the Rule of Recognition, which outlines that the validity of any rule is based on an empirical understanding of what 'officials' recognise as law.[16] For our purposes, another secondary rule—the Rule of Adjudication—is also of particular importance. Whilst the Rule of Adjudication is often cast as a subordinate secondary rule, it unveils Hart's conception of judicial discretion. This rule confers

[13] (1925) SC 725.
[14] Neil MacCormick, *Legal Reasoning and Legal Theory* (Clarendon Press 1978) 141.
[15] HLA Hart, *The Concept of Law* (2nd edn, OUP 1994) 81.
[16] ibid passim.

power on the judiciary, namely the power to determine whether a primary obligation has been broken.[17] Hart recognises that the 'open texture' of language results in the possibility of rules having a range of meanings. Therefore, how rules are to be understood must be deciphered.[18] This establishes space for a strong judicial discretion where judges can make and apply law,[19] and where posited rules are indeterminate or incomplete. From a Hartian perspective, the law and judicial discretion are only circumscribed by 'substantive constraints'—but crucially, only restrained by morality if prescribed by the legal system.[20]

Although Hart's conceptions of law and of judicial discretion separately seem logical, when addressed in tandem they appear contradictory. On the one hand, Hart makes a claim that law is posited and binding via convention (i.e., the Rule of Recognition). On the other, judicial discretion appears to be a legal requirement to resolve problems arising from the inherent 'open texture' of language. Yet, a judge, in resolving a dispute where there is a gap in posited rules, cannot readily be regarded as taking part in an exercise in law as Hart has conceived it. This is because there is nothing posited to be extensively interacted with. Hart could argue that judges are positing law in a manner contemporaneous with their adjudication, but this would be fatal to positivism. A positing-as-you-go argument seemingly undermines the premise which the Rule of Recognition depends on. Positivism, through the Rule of Recognition and emphasis on sources, underlines that the law is something that is observed or recognised by officials in charge of the legal system. Thus if the law were being posited whilst judges exercised their discretion, Hart would be suggesting that validity of the rules brought about in the exercise of discretion pre-dated any empirical assessment which could be made of what officials recognise. Therefore, there

[17] ibid 96–7.
[18] ibid 129.
[19] ibid 274–75.
[20] ibid 273.

must be some element(s) of law that are valid without positing and empirical observation.

Overall, Hart's depiction of law has a universality that other jurists lack, as their conceptions of law tend to apply only to the Anglo-American context. The abstraction of his propositions on further examination is a shortcoming. Hartians typically stave off jurisprudential disagreements by asserting that virtually anything could form part of the law, or that they refer to terms like 'rules' in a broader sense than their critics. Hart's exposition, in its attempt at general applicability (and shielding-off criticism), distorts the nature of law and judicial discretion. This results in a rendering that is littered with could-bes, but which is scarce and unconvincing as to what law, and judicial discretion, actually are.

(iii) Dworkin: There is a Thin Line Between Creation and Discovery

For Dworkin, law encompasses rules and principles which rest on both social and moral facts. Rules are 'all-or-nothing' standards which are conclusive and do not conflict.[21] If rules were to conflict then one must be invalid(ated).[22] Principles, on the other hand, can conflict and have dimension, which means they can be weighed against each other.[23] Principles also provide justificatory support to potential judgements, since they are a standard followed due to their associations with justice, fairness and morality.[24] According to Dworkin, judges cannot make law; they can only discover it. This is the case because the Dworkinian view holds that law can never be incomplete—it is simply that judges must work to discern and valuate the relevant legal principle(s).[25]

[21] Ronald Dworkin, 'The Model of Rules I', reprinted in Ronald Dworkin, *Taking Rights Seriously* (Harvard University Press 1977) 24.
[22] ibid.
[23] ibid 25–7.
[24] ibid.
[25] ibid.

Dworkin is thereby arguing that an infinite pool of principles already exists in law, since they are the grounds of law that the rules rest on.[26] Crucially, Dworkin's conception regards 'law as integrity.'[27] This bears with it the sense that law coheres vertically and horizontally. Vertical coherence holds that 'history matters' to the extent that it is relevant in the present context and uncovers justifications for past decisions. Horizontal coherence is more significant and requires consistency amongst standards presently enforced.[28] Dworkin utilises chain novels and Hercules to illustrate judicial discretion in operation. In this analogy, judges are like the novelists; they aim to add to the previous chapter, and labour towards fulfilling the best interpretation for the next part, eventually working towards a *single best novel*.[29]

In general, Dworkin constructs a version of judicial discretion that affords judges limited power. Dworkinian judicial discretion is so weak that it could be questioned whether it even involves choice at all. However, Dworkin's arguments are useful because their reference to the role of legal principles reveals a quality in law which positivists admit to largely overlooking.[30] Dworkin rightly recognises that judges excavate implicit principles or sometimes weigh up explicit ones.[31] Nonetheless, it cannot be ignored that judges take more innovative steps when exercising discretion. A modest example of judicial innovation is *Donoghue v Stevenson*,[32] in which a *new* principle (the 'neighbour principle') was made by judges.[33] Is such innovative principle-making not outside the judicial remit Dworkinians expound?

Even whilst adhering to a Dworkinian conception of the law as containing principles and rules, Dworkin's underestimation

[26] Shapiro (n 9) 23.
[27] Ronald Dworkin, *Law's Empire* (Harvard University Press 1986) passim.
[28] ibid 227.
[29] ibid 230–31.
[30] E.g. Hart (n 15) 259.
[31] *Riggs* (n 10); Dworkin (n 21) 23; *McLoughlin* (n 11); Dworkin (n 27) passim.
[32] [1932] AC 562.
[33] ibid 580 (Lord Atkin).

of creativity in judicial discretion is problematic. One arrives at this conclusion when recognising that in practical terms it would not be definitely stated whether any specific principle was created or discovered. Dworkin insists that principles are unequivocally discovered. However, it is argued that classifying principles as discovered or created is irrelevant because their value rests in their substance, and not their description. Following Dworkin himself, the importance of principles is in their dimension and ability to effectively transpose societal ideals into the law.[34] Correctly viewing principles as such facilitates two essential functions of law. Firstly, it allows judgements to adhere to social facts because judges would be creating or interpreting law in a manner that is reflective of their society's standards. Secondly, it gives the law utility by demonstrating that the principles—due to their ability to be weighed up—can lead to resolution. Principles would be able to achieve this regardless of how they arose. Therefore, it ceases to be relevant whether they stemmed from reading between the lines of precedent and/or statute, or from the mind of a judge.

As previously stated, Dworkin limits judicial discretion to a discovery exercise within a law constituted by valid rules and morally sound principles. Limiting judicial discretion in this manner merely achieves presupposition of moral grounding. It does not guarantee morally acceptable judgements, it only warrants that discretion has the semblance and semantics of morality. Asserting any moral quality to law can only exist from deliberately seeking this. Maintaining any specific ideal in law is an active endeavour that will not be automated by a generalised assumption about law. Hart shows this by highlighting cases where it is evident that judges (and lawyers) are convinced that they are making reference to pre-existing law, when quite clearly there is no binding existing law.[35] Dworkin has asserted this use

[34] Dworkin (n 21) 25–7.
[35] Hart (n 15) 273–74.

of language by judges to favour his views.[36] However, this actually shows that supposed prerequisite ideals can always feature in articulation but are not automatically involved in reality. In insisting that morality is a prerequisite element of judicial discretion, Dworkin runs the risk of falsely embedding a presupposition of righteousness in the exercise of discretion. This association of the law with morality could create a cloak that skews evaluation (and perception) of legal systems. Following Dworkinian views, if laws are necessarily moral, then all legal systems innately rest on morally sound premises.

Having addressed the views of different scholars, there are a number of valuable elements to law and judicial discretion that have been unearthed. These elements can now be stitched together to create a more comprehensive argument.

IV. A More Concrete Picture of Judicial Discretion

(i) Between Foundations to Everywhere and Foundations to Nowhere

Curiously, the nature of law and the scope for judicial discretion in hard cases rest between Hartian and Dworkinian iterations. As seen above, there lies a degree of accuracy in each of the jurists' depictions, yet their stances conflict on multiple levels. Admittedly, semantics exaggerate the divergence between them, as illustrated by the fact that Hart and Dworkin use 'rules' at varied degrees of fluidity. Equivocation aside, their perceptions of law are still limited. Hart has laid down foundations so broad that almost everything (not just law) could sit atop them. Conversely, Dworkin has embellished his foundations, revealing a conception of judicial discretion so constrained that it leads nowhere.

[36] Dworkin (n 21) 81.

Combining the views of Hart and Dworkin, it can be deciphered that law is a series of standards that differ between eras and jurisdiction. But these standards will typically encompass some rules, precedent, and legal principles amongst other norms that are *not yet* posited or explicitly known. Legal principles in particular are crucial to facilitating judicial discretion. The nature of legal principles proposed by the author accepts the Dworkinian point that principles have dimension. Notwithstanding, the argued basis of principles is a crucial difference. Firstly, legal principles are not necessarily moral, since their validity stems from their ability to make sense within the social facts of a regime and their utility. Utility is not to be understood in the utilitarian sense of maximising good (this may be a system's preference), but in the more rudimentary sense of an ability to point towards an outcome in disputes. It would be inaccurate to regard judges as embarking on a creative endeavour when they merely fish out principles that are implicit within precedent or posited rules; this would be equivalent to asserting that Marie Curie invented radium. Instead, it is apparent that judges are merely unveiling these principles. Despite this, the *Donoghue v Stevenson*[37] case showed that judges can, in the exercise of their discretion, generate principles. Thence, in exercising judicial discretion in hard cases, judges are also able to act in a more revolutionary sense and create law.

This subsection has begun to set out the broad ambit for judicial discretion. There are two aspects that are left to be put forward—firstly, illustrating why law and judicial discretion are not necessarily moral; lastly, analogy will be drawn to memories to hopefully tie discussion together neatly.

[37] *Donoghue* (n 32).

(ii) Morality, Amorality, and Immorality in Law

The quintessential elements of judicial discretion explain why rather liberal room should be left for its application. Judicial discretion has flexibility, contemporaneity with the issue at hand, and an understanding of present societal development. Precedent, statutes, and already articulated principles will typically lack or struggle to maintain these qualities. The reason for this is that these areas of law were constructed at a previous point in time. It is this lack of myopia, coupled with an ability to be specific, that enables judicial discretion to produce fair and just outcomes. Limiting the room for judicial discretion stifles the scope for ingenuity. Accordingly, this could preclude the fair, moral, and just outcomes that Dworkin and naturalists propose.

Moving further into the place of morality in law, it must be accepted that morality is not an inherent characteristic of law. Indeed it can be accepted that morality holds a level of subjectivity, and therefore that there could be a hypothetical construction of morality which could house every legal system–past or present–within it. Even if one imaginatively overstretched 'moral' depictions that are able to house Apartheid South Africa or Nazi Germany within them, it still must be found that morality is not a prerequisite for law. Indeed, it is difficult to see why a system could not exist based on social facts which were indifferent to morality, or even deliberately immoral. In an amoral legal system, principles could be scalable simply based on the time that they were outlined:

- So, the first is one;
- The next is two;
- The first principle with a greater value than the second principle, and so on and so forth.

Here a numerical equation would be the basis of judicial discretion. This is admittedly limited in terms of scalability, but would nevertheless permit judges to create and interpret

principles. Thus, morality's relevance only exists when it is a part of the *specific* society over which the law governs. Undeniably, most societies may have some morality falling under their social facts, yet where this is the case, morality will only be valuable to the extent of its usefulness in resolving a specific dispute. This is highlighted in *Henningsen v Bloomfield Motors*,[38] where judges felt bound simply by virtue of the moral content of principles.[39] In the end, it may well be the case that the reason morality features so heavily in the exercise of judicial discretion is that a moral argument happens to be an *extremely useful* means of justifying decisions.

(iii) Judicial Discretion and the Malleability of Memory

Judicial discretion has often been described by jurists through all-inclusive isomorphic illustrations. Hart utilises umpires in baseball to demonstrate how discretion is not unrestrained;[40] Dworkin has used chain novels and the 'iudex' to show that hard cases are resolved by an "application of standards other than rules."[41] In accordance with this tendency, *memories* are the author's tool of choice. This tool is rudimentarily influenced by Dworkinian propositions in *Law's Empire*.[42]

Both judicial discretion and memories are spoken of as encompassing previously encountered absolutes. This untangles why people find themselves consumed by the idea that law, like memory, must stem almost entirely from the past, or what already existed. Furthermore, memories are often strengthened, triggered, and employed when the present has some resemblance to the past. Memory is extremely influential in scoping people's focus, and for better or worse, influences how imaginatively

[38] (1960) 32 NJ 358, 161 A2d 69.
[39] Dworkin (n 21) 16–7.
[40] Hart (n 15) 40–2, 63, 80.
[41] Ronald Dworkin, 'Judicial Discretion' (1963) 60 The Journal of Philosophy 624, 634.
[42] Dworkin (n 27) 25.

similar issues are approached. For judges, established law sets these perimeters. Yet, even when limited to thinking within the box, people would not merely repeat earlier actions if dissimilarities arose or if in hindsight it was felt that their actions were unsuccessful. Although frequently unrecognised, like judicial discretion, memories often attach present beliefs, aspirations and subsequently introduced information onto perceptions of the past.[43] Unbeknownst to any given individual, this tripartite (backward, present, and forward-looking) picture can persist in that person's psyche as *an accurate depiction of the past alone*.[44] Judicial discretion also sits in this limbo. It pervades (and considers) a malleable amalgamation of where the law was, where it is, and where it is going. In this form, judicial discretion has the ability to:

- refrain from being bound by what was there before, so as to allow legal innovation;
- be permitted rather wide room in hard cases because it benefits from an ability to be specific and adjust to societal conditions in real time (legislatures lack this); and
- conclusively, has no necessary moral prerequisite. This is due to the notion that aspirations, present issues, and historical development of legal systems need not be morally persuaded (individually or collectively). After all, it is the set of factors emblematic of a jurisdiction's character that binds and constrains.

V. Conclusion

Human, and by consequence, legal problems, can take on virtually endless forms. Past legislation, case law and principles cannot

[43] Elizabeth Loftus, 'The Malleability of Human Memory: Information introduced after we view an incident can transform memory' (1979) 67 American Scientist 312.
[44] Karim Nader and others, 'The Dynamic Nature of Memory' in Christina Alberni (ed), *Memory Reconsolidation* (Academic Press 2013).

always solve these issues. Expounding this authenticates that the room for judicial discretion in hard cases is wide, but not unlimited. This conclusion is reached on account of the exercise of discretion needing to align with standards governed by social facts and utility that constitute law. This is the only conception that can be taken in order to accommodate the reality of operating outside of adjudicative normality, whilst still interlacing the peculiarities of any given legal system.

Domestic Legal Status of EU Law: In Search of Intellectual Clarity

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This article seeks to explore whether EU law or domestic law provides the theoretical foundation for the domestic effect of directly effective EU law. To that end, an evaluation of the domestic status of EU law, as well as its relationship with parliamentary sovereignty, is attempted. From a review of relevant case law, this article concludes that although there may be conflicting views as to which constitutional actor (i.e. Parliament or the courts) initiated the change which accommodated EU supremacy, it is a settled view that the relationship between EU supremacy and parliamentary sovereignty was determined by domestic constitutional law. *Prima facie*, the Supreme Court's decision in *Miller* may appear to deviate from that settled view, for the majority held that EU law was "an independent and overriding source of domestic law." However, a more elaborate analysis reveals that the source-of-law argument in the majority judgment is consistent with established jurisprudence and upholds parliamentary sovereignty as the ultimate rule of recognition.

I. Introduction

The United Kingdom ('UK') formally withdrew from the European Union ('EU') on 31 January 2020 and completed the Brexit implementation/transition period on 31 December 2020, thereby ending the UK's 47-year-long membership of the bloc. Although EU law has ceased to have effect in the UK and has been replaced by a new breed of domestic law, viz. retained EU law,[45] it is nonetheless worth reflecting upon how EU law drastically reshaped the domestic legal landscape. Amongst other

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[45] European Union (Withdrawal) Act 2018 ('EUWA 2018'), ss 2–7.

things, such reflection carries with it important lessons regarding the nature of the UK Constitution.

This article seeks to explore whether EU law or domestic law provides the theoretical foundation for the domestic effect of directly effective EU law.[46] To answer that question, a series of pertinent cases, culminating in *R (Miller) v Secretary of State for Exiting the European Union*[47] (*'Miller'*), are examined. By way of conclusion, it is submitted that despite an appearance of a lack of intellectual clarity in these cases, it is common ground that EU supremacy was given effect by, and operated within, the domestic constitutional order.

To support that conclusion, the article is structured as follows. First, the principles of EU supremacy and parliamentary sovereignty are elucidated and their tension—channelled into the domestic legal system through the European Communities Act 1972 ('ECA')—is highlighted. Secondly, the *Factortame*[48] line of case law is examined. It is argued that these cases are capable of being understood by reference either to the 'construction view' or the 'revolution view.'[49] The scope for different interpretations seemingly results in a lack of intellectual clarity. However, a common theme is discernible, i.e. that the relationship between EU supremacy and parliamentary sovereignty was a matter for domestic law. Thirdly, a line of jurisprudence concerning constitutional statutes is discussed. The status of the ECA as a constitutional statute diversifies the UK constitutional landscape; but a conclusion, consistent with previous cases, can be drawn that EU law was afforded primacy by domestic constitutional law. Lastly, the Supreme Court's judgment in *Miller* is appraised. *Prima facie*, the source-of-law argument in the majority judgment is

[46] The disjunctive 'or' is used advisedly because, as will be illustrated below, the doctrines of EU supremacy and parliamentary sovereignty are mutually exclusive.
[47] [2017] UKSC 5, [2018] AC 61.
[48] This article focuses on *R v Secretary of State for Transport, ex p Factortame Ltd (No 1)* [1990] 2 AC 85 (*'Factortame (No 1)'*) and *R v Secretary of State for Transport, ex p Factortame Ltd (No 2)* [1991] 1 AC 603 (*'Factortame (No 2)'*).
[49] HWR Wade, 'Sovereignty—Revolution or Evolution?' (1996) 112 LQR 568.

illogical and departs from the settled view of the domestic status of EU law. However, a detailed analysis demonstrates that the Supreme Court's decision in *Miller* does, in fact, fall in line with established jurisprudence.

II. Tension between EU Supremacy and Parliamentary Sovereignty

EU supremacy is conceptually incompatible with parliamentary sovereignty. The principle of supremacy holds that directly effective EU law prevails over conflicting domestic law.[50] Meanwhile, parliamentary sovereignty, as conceived by such classic constitutionalists such as Dicey, dictates Parliament can "make or unmake any law whatever" and that enactments by Parliament are the highest form of law which cannot be "override[n] or set aside" by courts.[51] For the sake of clarity, Dicey's proposition of parliamentary sovereignty needs to be finessed. The fact that Parliament can make or unmake any law does not preclude the legislative capacity of other entities (say, the EU legislatures); the point is rather that Acts of Parliament enjoy the highest legal status. It follows that any other forms of laws—including directly effective EU law, which purports to take priority over Acts of Parliament—will not be enforced by the courts in case of conflict with statutes.[52]

The doctrinal incompatibility is clearly encapsulated in the theoretical justifications for EU supremacy. There is, on one

[50] See Case 26/62 *NV Algemene Transport- en Expeditie Onderneming van Gend en Loos v Nederlandse Administratie der Belastingen* [1963] ECR 1; Case 6/64 *Costa v Ente Nazionale per l'Energia Elettrica (ENEL)* [1964] ECR 585.

[51] See AV Dicey, *Introduction to the Study of the Law of the Constitution* (3rd edn, Macmillan 1889) 38. Although the original text reads "no person or body is recognised by the law of England as having a right to override or set aside the legislation of Parliament," Dicey subsequently defines a law as "any rule which will be enforced by the Courts" and so, it is respectfully submitted, the other person or body is an implicit reference to the courts.

[52] ibid 38.

hand, the Union-centric principle of sincere cooperation.[53] On the other, Member States view supremacy through the lens of conferral.[54] The doctrinal and theoretical positions notwithstanding, the conflict would not have materialised by virtue of dualism (viz. that international and domestic laws operate on different planes).[55] However, there was a real tension.

The ECA realised the tension between EU supremacy and parliamentary sovereignty by channelling directly effective EU law into domestic law. Section 2(1) of the ECA 1972 guaranteed direct effect for directly effective EU law in the UK, whilst section 2(4) stipulated that domestic legislation, past or future, would be construed and would take effect subject to section 2. The combined effects were to subordinate domestic law to directly effective EU law.[56] Furthermore, under s 3(1) of the 1972 Act, questions regarding the meaning and effect of EU law were to be determined "in accordance with the principles laid down by and any relevant decision of the European Court," including the doctrine of EU supremacy itself and pertinent jurisprudence. EU supremacy was therefore introduced into the domestic legal realm. Importantly, the reception prompts a question apposite to the following discussions: namely whether EU law, qua EU law, took precedence over national law, or whether the application of EU supremacy depended on the ECA and the UK's constitutional arrangements.

III. The Construction View versus the Revolution View

The initial judicial response to the inception of EU supremacy in domestic law was that the ECA served as a construction aid to

[53] Consolidated Version of the Treaty on European Union [2012] OJ C326/13 ('TEU'), art 4(3).
[54] ibid art 5(1)–(2).
[55] *Miller* (n 47) [55].
[56] See below for examples of how the provisions were dealt with and interpreted by courts in case law and by academics in relevant literature.

Parliament's intention and that Parliament remained sovereign. According to the "plain words" of s 2(4) of the ECA, which states that 'any enactment passed or to be passed … shall be construed and have effect subject to the foregoing provisions of [section 2],'[57] all legislation inconsistent with EU law would be ineffective and this amounted to a suspension of the doctrine of implied repeal.[58] An example is the case *Macarthys Ltd v Smith*,[59] where s 8 of the Sex Discrimination Act 1975 (amending s 1 of the Equal Pay Act 1970) came into conflict with what is now Art 157 of the Treaty on the Functioning of the European Union. In that case, Lord Denning MR fashioned the harmonious construction approach, whereby Parliament's intention when enacting subsequent statutes was generally presumed to uphold EU law, barring an express or specific contrary intention.[60] Therefore, Lord Denning MR envisaged two exceptions to the s 2(4) rule: one is express repeal of the ECA and the UK's withdrawal from the EU;[61] the other is where Parliament acted inconsistently with EU law and expressed such an intent clearly in a statute.[62]

The House of Lords adopted a similar approach in the *Factortame* litigation. The *Factortame* litigation concerned a conflict

[57] Galvin Phillipson, 'EU Law as an Agent of National Constitutional Change: *Miller v Secretary of State for Exiting the European Union*' (2017) 36 Yearbook of European Law 46, 91; cf Mark Elliott, 'Sovereignty, Primacy and the Common Law Constitution: What Has EU Membership Taught Us?' in Mark Elliott and others (eds), *The UK Constitution after Miller: Brexit and Beyond* (Hart Publishing 2018) 234, who argues that the exemption from implied repeal cannot *a priori* be assumed from the text.

[58] Implied repeal means that provisions in a later statute prevail over conflicting provisions in an earlier one. See, e.g., *Ellen Street Estates Ltd v Minister of Health* [1934] 1 KB 590.

[59] [1979] ICR 785.

[60] ibid 789 (Lord Denning MR). For convenience, both exceptions will be referred to as express repeal in the remainder of this article.

[61] Anthony W Bradley, 'The Sovereignty of Parliament—Form or Substance?' in Jeffrey L Jowell and Dawn Oliver (eds), *The Changing Constitution* (6th edn, OUP 2007) 47. See also the EUWA 2018, s 1.

[62] An arguable example is the European Union Referendum Act 2015 ('EURA 2015'), s 2, whose 15-year rule vis-à-vis the franchise was claimed to be incompatible with EU rights of free movement. See also *Schindler v Chancellor of the Duchy of Lancaster* [2016] EWCA Civ 469, [2017] QB 226, where the Court of Appeal held that the EURA 2015, s 2 did not fall within the scope of EU law.

between free movement rights under EU law and the Merchant Shipping Act 1988. To resolve that conflict, Lord Bridge held in *Factortame (No 1)* that s 2(4) of the ECA "has precisely the same effects as if a section were incorporated in" subsequent statutes—and the hypothetical section effectively stipulated that the statutory provisions were "without prejudice" to directly effective EU law.[63] The ECA thus served as an interpretive tool through which EU supremacy was conveyed into domestic law. On this construction view, parliamentary sovereignty remained in the driving seat, because Parliament was taken, for the duration of the UK's EU membership, to voluntarily accept EU supremacy;[64] but it could repeal the ECA expressly. Although implied repeal was inapplicable to EU law, this was only a modification of parliamentary sovereignty as per Parliament's intention. However, the effect of the ECA was open to an alternative interpretation.

Wade regards the ECA and the *Factortame* litigation as revolutionary. Despite Lord Bridge's reliance on the construction argument in *Factortame (No 1)*, Wade views the hypothetical section as a substantive restraint upon later Parliaments. This is because the intention of refraining from legislating in a way contradicting EU law was imposed by the Parliament of 1972 upon that of 1988.[65] Since the orthodox view of parliamentary sovereignty does not admit of Parliament binding its successors, parliamentary sovereignty was revolutionised by the ECA and EU supremacy.[66] By the same token, Lord Bridge's reference in *Factortame (No 2)* to the voluntary acceptance of EU supremacy by Parliament does not fit well with the traditional view of

[63] *Factortame (No 1)* (n 48) 140 (Lord Bridge).
[64] *Factortame (No 2)* (n 48) 659 (Lord Bridge): "[W]hatever limitation of its sovereignty Parliament accepted when it enacted the [ECA] 1972 was entirely voluntary. Under the terms of the Act of 1972 it has always been clear that it was the duty of a [UK] court, when delivering final judgment, to override any rule of national law found to be in conflict with any directly enforceable rule of [EU] law."
[65] Wade (n 49) 570.
[66] HWR Wade, 'The Basis of Legal Sovereignty' (1955) 13 CLJ 172, 190; ibid 574.

parliamentary sovereignty.[67] It is also noteworthy that the revolution presented by Wade was a judicial (as opposed to parliamentary) one, as the "ultimate legal principle" (i.e. parliamentary sovereignty) is a political fact which "lies in the keeping of the courts" and is "unchangeable by Parliament."[68]

However, Wade's analysis is objectionable. For one, the revolution view is qualified insofar as the ECA was merely an Act of Parliament, susceptible to express repeal. Parliament therefore held the ultimate brake on the domestic functioning of EU law. Ekins goes further, contending that Parliament's "legal freedom to legislate as it sees fit has not been surrendered or expired."[69] The reason is that Parliament had exercised its legal freedom courteously and consciously "in view of the severe practical limitations (diplomatic, economic) that arise from the integration of the UK into … the EU."[70] Ekins also objects to Wade's notion of a judicial revolution, since the fact that parliamentary sovereignty is not statutory does not automatically render the doctrine common-law based and in the keeping of the courts.[71] Indeed, it is counterintuitive that a political fact should fall within the remit of the judiciary, rather than the political branches of government—i.e. the legislature and the executive. Whilst a reply to Ekins' second objection merits more elaboration than is allowed in this short piece, his first criticism can be answered as follows. The practical limitations on Parliament's legislative freedom were not only diplomatic/economic, but also legal—because statutory provisions contrary to EU law would attract liabilities under EU law. To argue that the ECA did not constitute a legal restraint runs counter to the multifaceted nature of the UK Constitution.[72]

[67] Wade (n 49) 572–73.
[68] Wade (n 66) 189; Wade (n 49) 574.
[69] Richard Ekins, 'Legislative Freedom in the United Kingdom' (2017) 133 LQR 582, 590.
[70] ibid.
[71] ibid 601–03.
[72] David Feldman, 'None, One or Several? Perspectives on the UK Constitution(s)' (2005) 64 CLJ 329, 345–46.

To summarise, seminal cases concerning the conflict between EU and domestic law (and hence EU supremacy and parliamentary sovereignty), notably *Factortame*, are explicable by reference to either the construction view or the revolution view. This results in a lack of intellectual clarity. Be that as it may, a common theme is discernible and underlies both views: that parliamentary sovereignty was no longer as absolute as the traditional Diceyan conception. This is because, until the ECA was expressly repealed, EU law overrode conflicting domestic law.[73] On the construction view, this process was achieved by Parliament, and on the revolution view, by the common law. Notwithstanding, it is clear that both Parliament and the courts are actors within the UK constitutional order. It therefore seems that the tension between EU and UK law was resolved as a matter of domestic law. However, before a final conclusion is reached, a further judicial development needs to be grappled with.

IV. The ECA as a Constitutional Statute?

The characterisation of the ECA as a constitutional statute complicated the debate concerning the domestic status of EU law. The notion of constitutional statutes was first developed in *Thoburn v Sunderland CC*[74] ('*Thoburn*'), concerning a conflict between the ECA and the Weights and Measures Act 1985 (and hence *Thoburn* is also known as the 'metric martyrs' case). There, Laws LJ opined that there should be "a hierarchy of Acts of Parliament," comprising ordinary and constitutional statutes—the latter not being subject to implied repeal.[75] Laws LJ laid down two alternative criteria for a constitutional statute:

> In my opinion a constitutional statute is one which (a) conditions the legal relationship between citizen and state

[73] Nicholas W Barber, 'The Afterlife of Parliamentary Sovereignty' (2011) 9 International Journal of Constitutional Law 144, 153.
[74] [2002] EWHC 195 (Admin), [2003] QB 151.
[75] ibid [62] (Laws LJ).

> in some general, overarching manner, or (b) enlarges or diminishes the scope of what we would now regard as fundamental constitutional rights.[76]

Since the ECA incorporated the whole corpus of EU rights into domestic law and afforded overriding effect to EU law, the ECA was accordingly a constitutional statute.[77]

Laws LJ's view is ground-breaking as it abrogates the Diceyan homogeneity of statutes.[78] Insofar as the traditional conception of parliamentary sovereignty was altered, Laws LJ's view is of a piece with the common theme underlying the construction and the revolution views (as illustrated above). Moreover, Laws LJ seemed to be inclined towards the revolution view. His Lordship insisted that Parliament "cannot stipulate against implied repeal any more than it can stipulate against express repeal," because "[b]eing sovereign, it cannot abandon its sovereignty."[79] Instead, the traditional doctrine of parliamentary sovereignty was modified by the common law.[80] In reality, however, Laws LJ disagreed with the revolution view, since Parliament could expressly repeal the ECA and the suspension of implied repeal was "hardly revolutionary."[81] It is difficult to discern any substantive difference between Wade's and Laws LJ's views. Their disagreement obscures, rather than reveals, the true status of EU law in domestic law. A better expression is, as per Allan, that the change brought by the courts following the influx of EU law was part of the evolving common law and "reflects new conceptions of the political community" of the time.[82] It thus

[76] ibid.
[77] ibid [69] (Laws LJ).
[78] Mark Elliott, 'Constitutional Legislation, European Union Law and the Nature of the United Kingdom's Contemporary Constitution' (2014) 10 ECLR 379, 381. See also Dicey (n 51) 136.
[79] *Thoburn* (n 74) [59] (Laws LJ).
[80] ibid [59]–[60] (Laws LJ).
[81] John Laws, 'Law and democracy' [1995] PL 72, 89. See also *Thoburn* (n 74) [59] (Laws LJ).
[82] TRS Allan, *Law, Liberty, and Justice: The Legal Foundations of British Constitutionalism* (Clarendon Press 1993), 280. See also John Bell, 'Sources of Law' (2018) 77 CLJ 40, 62.

becomes clear that the elevated status of EU law was judicially made and depended on the domestic constitutional order of the UK.[83]

In *R (Buckinghamshire CC) v Secretary of State for Transport*[84] ('*HS2*'), Lord Neuberger and Lord Mance gave some (if limited) support to Laws LJ's dicta.[85] Unlike in *Thoburn*, however, the conflict in *HS2* was between "two constitutional instruments," namely the Bill of Rights 1689 and the ECA.[86] Their Lordships suggested a more nuanced notion of hierarchy than the binary one envisaged by Laws LJ:[87]

> [T]here may be fundamental principles, whether contained in other constitutional instruments or recognised at common law, of which Parliament when it enacted the [ECA] 1972 did not either contemplate or authorise the abrogation.[88]

This *obiter* statement is significant in two different respects. On one hand, this nuanced approach is a further breakaway from the Diceyan teachings and illustrates the evolution of the common-law constitution. On the other, however, the reference to Parliament's 'contemplation' and 'authorisation' suggests that parliamentary intention is relevant to the relationship between constitutional instruments and that the concept of constitutional statutes is not, contrary to Laws LJ's assertion, a purely common-law creature.[89]

Despite the subtle difference between *Thoburn* and *HS2*, a shared feature can be deduced. Whether the constitutional status of the ECA was purely by force of the common law or involved parliamentary intention, the domestic expression of EU

[83] *Thoburn* (n 74) [69] (Laws LJ).
[84] [2014] UKSC 3, [2014] 1 WLR 324.
[85] ibid [207]–[208] (Lord Neuberger and Lord Mance).
[86] ibid.
[87] Elliott (n 78) 387–89.
[88] *HS2* (n 84) [207] (Lord Neuberger and Lord Mance).
[89] Elliott (n 57) 238. See also Phillipson (n 57) 90–1.

supremacy was determined by UK constitutional law. As Lord Reed rightly remarked:

> If there is a conflict between a constitutional principle … and EU law, that conflict has to be resolved by our courts as an issue arising under the constitutional law of the [UK].[90]

In that sense, *HS2* effected a further qualification for EU supremacy—namely constitutional principles/instruments of more fundamentality than the ECA. This limitation, together with express repeal, attested to the fact that EU supremacy was circumscribed by UK constitutional law. This observation is in tune with the common theme underlying the earlier cases and academic literature: whilst the traditional conception of parliamentary sovereignty was altered in response to the domestic inception of EU supremacy, the supremacy principle operated within the confines of the domestic constitutional framework. The domestic status of EU law is, thus far, clear. It is, however, unfortunate that the Supreme Court's decision in *Miller* (as discussed below) gave at least an appearance of a contrary position.

V. The *Miller* Case: EU Law as a Source of Law

(i) Preliminary Observations

For clarity, the factual background is outlined and the ambit of discussion within this section clarified. In the aftermath of the 2016 EU referendum and a majority vote for Leave, the UK Government wished to exercise its prerogative to initiate the EU withdrawal process under Art 50 TEU. Gina Miller challenged the Government's proposed use of prerogative power and argued that an Act of Parliament was needed to trigger the Art 50

[90] *HS2* (n 84) [79] (Lord Reed).

process. The Divisional Court[91] unanimously found in favour of Mrs Miller, and so did the Supreme Court by a majority of 8-3. For present purposes, the Supreme Court's decision, particularly its source-of-law argument, is of the most interest. As a result, the Divisional Court's judgment, which rested on the rights argument and frustration argument,[92] will not be discussed. Nor will the Supreme Court's judgment pertaining to the same arguments.[93] Consequently, this section should not be read as challenging the correctness of the *Miller* decisions generally. Indeed, Mrs Miller's case would have arguably been successful on the basis of the rights and frustrations arguments alone.[94]

(ii) Majority Judgment: An Apparent Paradox

The Supreme Court's judgment in *Miller* ostensibly introduced confusion about the domestic status of EU law and seemed discordant with previous case law. The essence of the source-of-law argument can be found in the following statement by the majority:

> In our view, then, although the 1972 Act gives effect to EU law, it is not itself the originating source of that law. It is … the 'conduit pipe' by which EU law is introduced into UK domestic law. So long as the 1972 Act remains in force, its effect is to constitute EU law as an independent and overriding source of domestic law.[95]

[91] *Miller* [2016] EWHC 2768 (Admin), [2017] 1 All ER 158.
[92] Nicholas W Barber and others, 'Reflections on *Miller*' [2017] UK Supreme Court Yearbook 212, 225.
[93] ibid 226.
[94] Phillipson (n 57) 56.
[95] *Miller* (n 47) [65], citing John Finnis, 'Brexit and the Balance of Our Constitution' (Policy Exchange, London, 2 December 2016) 21–2 <http://judicialpowerproject.org.uk/wp-content/uploads/2016/12/Finnis-2016-Brexit-and-the-Balance-of-Our-Constitution2.pdf> accessed 28 April 2021.

There are two material components, namely 'overriding' and 'independent,' which merit careful examination in turn.

First, the overriding effect of EU law will be discussed. Whilst acknowledging the possibility of express repeal ("the primacy of EU law … did not prevent it from being repealed by domestic legislation"), the majority of the Supreme Court affirmed the suspension of implied repeal ("EU law cannot be implicitly displaced by the mere enactment of legislation which is inconsistent with it").[96] As a corollary of the suspension of implied repeal, the majority judgment further confirmed the "constitutional character" of the ECA.[97] In these respects, *Miller* is consistent with previous jurisprudence and uncontroversial. However, the Supreme Court majority, in stating "[t]he primacy of EU law means" EU law could not be impliedly repealed,[98] seemingly indicated that EU law, qua EU law, overrode domestic law.[99] On this reading, *Miller* would signal a dramatic departure from the established view (as demonstrated above) that the relationship between EU supremacy and parliamentary sovereignty should be a matter for domestic law. This novel position is seemingly reinforced by the majority's assertion that EU law was an independent source of domestic law—to which the discussions now turn.

Secondly, the majority's contention that EU law was an independent source of domestic law seems defiant of logic and perplexing. The assertion of the independent domestic status of EU law is curious, because the domestic effect of EU law depended on the ECA in the UK's dualist system. Indeed, the *Miller* majority admitted that "[i]n one sense … the 1972 Act is the source of EU law."[100] However, the *Miller* majority then

[96] ibid [66].
[97] ibid [67].
[98] ibid [66].
[99] John Laws, 'The *Miller* Case and Constitutional Statutes' in Mark Elliott and others (eds), *The UK Constitution after Miller: Brexit and Beyond* (Hart Publishing 2018) 208.
[100] *Miller* (n 47) [61].

confusingly stated that "in a more fundamental sense and … a more realistic sense, … the EU institutions … are the relevant source."[101] The ECA was thus regarded by the majority as a mere "conduit pipe."[102] These statements are paradoxical. If EU law had truly been an independent source of domestic law, the rule of recognition (i.e. the political fact described by Wade, according to which the validity of law is determined)[103] would necessarily have been altered.[104] However, the Supreme Court justices unanimously rejected that proposition.[105] The upshot is that the majority's position vis-à-vis the source-of-law argument seems self-contradictory and the two senses they posited are hard to reconcile with each other.

However, reconciliation might be attempted in two ways.[106] One approach is to treat the *Miller* majority's two senses as "sequential phenomena": that EU law depended temporarily on the ECA to enter the domestic legal system but, once here, had overriding effect qua EU law.[107] However, this approach amounts to an alteration of the rule of recognition, which the Supreme Court rejected. The other way of resolving the paradox is to regard the ECA as "the formal basis for EU law in the UK" and law-making in Brussels as "the substantive reality."[108] Viewed thus, the two senses are empirical observations of little legal significance.[109] Perhaps Laws is right that the debate as to the different senses is barren and distracting.[110] As such, the majority in the Supreme Court might be forgiven for their linguistic

[101] ibid.
[102] ibid [65].
[103] Wade (n 49) 574. See also HLA Hart, *The Concept of Law* (3rd edn, OUP 2012) 100–10.
[104] Mark Elliott, 'The Supreme Court's Judgment in *Miller*: In Search of Constitutional Principle' (2017) 76 CLJ 257, 270.
[105] *Miller* (n 47) [60], [177] and [224]–[226].
[106] Elliott (n 104) 272.
[107] ibid; Elliott (n 57) 231.
[108] Paul Craig, '*Miller*, EU Law and the UK' in Mark Elliott and others (eds), *The UK Constitution after Miller: Brexit and Beyond* (Hart Publishing 2018) 116. See also Elliott (n 104) 272–73.
[109] Elliott (n 104) 272–73.
[110] Laws (n 99) 210, 215.

looseness, given the constitutional implications of Brexit and the repeal of the ECA.[111] However, insofar as the language adopted by the majority of the Supreme Court sends incoherent messages about the relationship between EU supremacy and parliamentary sovereignty, *Miller* is perplexing.

(iii) Minority Judgment: The Better View?

The majority judgment can be contrasted with a more logically appealing dissent by Lord Reed. The main thrust of Lord Reed's reasoning is that EU law was not an independent source of domestic law and that the rule of recognition had not changed:

> The UK's entry into the EU did not, however, alter the rule of recognition, and neither would its withdrawal. That is because EU law is not a source of law of the relevant kind: that is to say, a source of law whose validity is not dependent on some other, more fundamental, source of law, but depends on the ultimate rule of recognition.[112]

Thus, Lord Reed's opinion avoided the awkward 'senses' in the majority judgment and seems more logical. Furthermore, Lord Reed's dissent is consistent with previous case law, to the extent that the "limited primacy" was given to EU law by domestic law, specifically Parliament.[113]

However, the fact that Lord Reed's analysis appears logically more sound does not necessarily mean it is a better view. For one thing, Lord Reed probably failed to have due regard to the "dynamic process" via which EU law became directly

[111] *Miller* (n 47) [81]–[82]. See also Timothy Endicott, 'Lord Reed's Dissent in Gina Miller's Case and the Principles of our Constitution' [2017] UK Supreme Court Yearbook 259, 267.
[112] *Miller* (n 47) [224] (Lord Reed).
[113] ibid [225]–[226] (Lord Reed).

effective in the UK and took precedence over domestic law.[114] More importantly, Lord Reed's objection to the majority's reasoning, i.e. that EU law was not a source of law of "the relevant kind," is perhaps misplaced. As illustrated above, the majority judgment, despite its ostensible illogicality, is better understood as referring to a loose sense of sources of law—viz. "the incorporation of a new set of rules and rule-making institutions into the system."[115] The majority in the Supreme Court did not therefore posit EU law as a source of law in the narrow sense, which Lord Reed found relevant and objectionable.[116] The upshot is that Lord Reed's criticisms of the majority's judgment are not well-founded.

(iv) Rule of Recognition

The preceding discussions about *Miller* are premised on the proposition that the rule of recognition was not altered by the domestic inception of EU law via the ECA. However, a more subtle analysis of the concept of the rule of recognition itself is needed. The aim is to determine whether there is an inherent tension—as suggested by Elliott—between the assertion that EU law was an independent source of domestic law and the proposition that the rule of recognition was not changed.[117]

In fact, the rule of recognition did change due to the addition of a new source of law, but the ultimate/supreme rule of recognition remained unaltered.[118] First, it is important to appreciate that the rule of recognition is not a single rule.[119] Rather, the Hartian notion refers to a set of rules, including rules

[114] ibid [60], [90].
[115] Barber and others (n 92) 227.
[116] ibid 232.
[117] Allison L Young, 'R *(Miller) v Secretary of State for Exiting the European Union*: Thriller or Vanilla?' (2017) 42 EL Rev 280, 290.
[118] ibid 290–92; Phillipson (n 57) 70–2.
[119] Bell (n 82) 63.

which identify and govern the sources of law and which determine the hierarchy between those sources.[120] Second (and more importantly), parliamentary sovereignty is the "ultimate rule of recognition" or "supreme criterion of validity," which overrides other sub-rules within the rule of recognition.[121] It follows that although the rule of recognition was altered by the addition of an overriding and independent source of law (i.e. EU law), the ultimate rule of recognition (that is, parliamentary sovereignty) did not change.[122] Hence, the paradox of the majority judgment described by Elliott is precluded. Indeed, this is likely what the Supreme Court majority intended to express by holding the "fundamental rule of recognition" had not been varied.[123] Thus, the Supreme Court's decision in *Miller* is consistent with the settled view about the domestic status of EU law. However, it is also undeniable that the source-of-law argument is not easy to comprehend and may be an unnecessary distraction.[124]

VI. Conclusion

In conclusion, the supremacy of EU law over domestic law, when it applied in the UK legal system, was given effect and limited by the constitutional arrangements of the UK; within the UK constitutional order, parliamentary sovereignty is the supreme rule of recognition.

This conclusion is deduced from a review of pertinent case law. Firstly, in respect of the *Factortame* line of case law, there

[120] Phillipson (n 57) 71.
[121] Young (n 117) 290, citing Hart (n 103) 107; Phillipson (n 57) 71, citing Neil MacCormick, *Questioning Sovereignty* (OUP 1999) 83.
[122] Young (n 117) 290–92; Phillipson (n 57) 71–2. See also Hasan Dindjer, 'Sources of Law and Fundamental Constitutional Change' (UKCLA, 27 January 2017) <https///ukconstitutionallaw.org/2017/01/27/hasan-dindjer-sources-of-law-and-fundamental-constitutional-change/> accessed 27 April 2021.
[123] *Miller* (n 47) [60]; Phillipson (n 57) 71.
[124] Dindjer (n 122); Barber and other (n 92) 230.

is *prima facie* profound disagreement between the construction view and revolution view, which results in a lack of intellectual clarity. However, that divergence of views concerns the constitutional roles of Parliament and the courts. On a better perspective, it is common ground that the relationship between EU and domestic law was determined by the latter. Similarly, at first sight, the novel notion of the ECA as a constitutional statute developed in *Thoburn* and *HS2* further unsettles the UK constitutional order. However, it is settled that EU law and its supremacy operated within the domestic constitutional framework. Lastly, the source-of-law argument in the Supreme Court's *Miller* judgment seems to deviate from this settled position. In holding that EU law was simultaneously an independent source of law and dependent on the ECA, the majority judgment suffers an apparent paradox. However, a more detailed analysis of the Supreme Court's decision in *Miller* reveals its consistency with the settled view: viz. that EU law as a source of law was part of the UK constitutional order and subject to the ultimate rule of recognition—that is to say, parliamentary sovereignty.

Ending the "War on Drug Users": Abandoning the Criminal Justice Approach to Drug Use in the UK in Favour of a Public Health Model

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The UK adopts a prohibitionist approach to drugs, seemingly built upon the notion that drugs are harmful. The legislation seeks to reduce drug use and drug-related crime under the guise of reducing harm to society. In practice, however, the legislation fails to meet these aims, and the prohibition of drugs drives further adversity for both drug users and communities. This article will explore several damaging consequences of prohibition, which are often conflated with consequences of drug use: (i) the criminalisation and stigmatisation of drug users obstructs their reintegration into society, (ii) the policing of drugs leads to impure substances and perilous drug-taking practices, and (iii) the illicit drug market drives systemic crime and violence as participants have no recourse to the law. It will be suggested that the UK's current drug policy brings more harm than good. Harm reduction would be better facilitated by embracing a public-health approach to drug use. This should include decriminalisation of drugs, harm-based education and drug regulation, and increased support for drug users.

I. Introduction

The UK currently operates a criminal justice approach to drugs. According to Shiner, this approach is premised upon the principle of harmfulness: drugs are prohibited because they are harmful, and people need protection from harm.[125] However, the law fails

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[125] Michael Shiner, 'Drugs, Law and the Regulation of Harm' in Rhidian Hughes, Rachel Lart and Paul Higate (eds), *Drugs: Policy and Politics* (1st edn, Open University Press 2006) 61.

to meet its aims of reducing drug use and crime, and it is also counterproductive as various hardships are driven by prohibition itself. The criminalisation and stigmatisation of drug users hinder their opportunities for recovery and reintegration into society. Increased health risks arise from the use of unregulated drugs and unsafe drug-taking practices driven by the policing of drugs. Furthermore, the illicit drug market induces systemic violence, as individuals have no recourse to legitimate law enforcement.

This article will explore the UK's criminal justice approach to drugs and the flaws in this approach. It will be demonstrated that the criminal justice approach to drugs causes more damage for drug users and communities than it prevents. As Buchanan and Young summarise, the "war on drugs" constitutes a "war on drug users."[126] It will be argued that the UK should abandon its prohibitionist approach to drugs. A public health approach—focusing on harm reduction and the decriminalisation and regulation of drugs—would better facilitate reduced harm for users and the wider population, which should be the principal focus of drugs policy.

II. The Criminal Justice Approach

The prohibitionist approach to drugs in the UK is achieved primarily through the Misuse of Drugs Act 1971 (MDA 1971). This Act seeks to prevent the misuse of 'controlled' drugs, listed in Schedule 2 of the Act, by prohibiting the possession, supply, manufacture, import, and export of these substances.[127] According to their purported harmfulness, the Act categorises drugs into three classes (Class A, B or C), with the most harmful drugs designated Class A.[128] However, this system has been

[126] Julian Buchanan and Lee Young, 'The War on Drugs – A War on Drug Users' (2000) 7(4) Drugs: Education, Prevention & Policy 409, 409.

[127] Misuse of Drugs Act 1971, ss 3–6.

[128] ibid Sch 2.

criticised. MacDonald and Das argue that drugs are classified based on "little or no scientific evidence" regarding their apparent harmfulness and that the classes, therefore, "have no real meaning in terms of damage to health."[129]

The MDA 1971 is accompanied by the Psychoactive Substances Act 2016 (PSA 2016), which imposes a blanket ban on the production, distribution, sale and supply of psychoactive substances.[130] The 2016 Act has received similar criticism, with Stevens *et al* noting that the blanket ban approach fails to account for particular substances' specific harmfulness.[131] Burgess argues that, in drafting the Bill, the Government sought to satisfy voters with a traditionalist outlook on drugs[132] and therefore ignored recommendations to account for individual differences between substances.[133] Thus, widespread dissatisfaction with the existing legislation is apparent, due to its seemingly unprincipled and unfair basis.

A principal aim of the legislation is to deter drug use. However, various studies suggest that this aim has not been met. Monaghan comments that, since the implementation of the MDA 1971, "the levels of drug use have continued to rise: the opposite outcome of its intended goals."[134] For instance, illicit drug-taking amongst young people in Britain "began to rise at the end of the 1980s and continued to do so until the millennium," according to

[129] Rhona MacDonald and Aditi Das, 'UK Classification of Drugs of Abuse: An Un-Evidence-Based Mess' (2006) 368 The Lancet 559, 560.

[130] Psychoactive Substances Act 2016, ss 4–9.

[131] Alex Stevens and others, 'Legally Flawed, Scientifically Problematic, Potentially Harmful: The UK Psychoactive Substance Bill' (2015) 26(12) Intl J Drug Policy 1167, 1168.

[132] Nicholas Burgess, 'The Lost Symbol: A Semiotic Analysis of the Psychoactive Substances Act 2016' (2017) 7 Aberdeen Student L Rev 109, 119.

[133] All-Party Parliamentary Group for Drug Policy Reform, 'Towards a Safer Drug Policy: Challenges and Opportunities Arising From 'Legal Highs' (All-Party Parliamentary Group for Drug Policy Reform 2013) 25.

[134] Mark Monaghan, 'The Evidence Base in UK Drug Policy: The New Rules of Engagement' (2008) 36(1) Policy & Politics 145, 146.

Aldridge *et al*'[135] International comparisons further reinforce the weak deterrent effect of the legislation. Shiner observes that despite having "one of the harshest drugs regimes in Europe, [the UK] also has one of the highest levels of youthful drug use."[136] The Runciman Report similarly found no evidence to suggest the UK has benefitted from this comparably harsh approach.[137] Perhaps more importantly, research also indicates that legal concerns are not the primary motivation for abstinence from drug use. Fears of legal consequences were uninfluential in university students' decisions to abstain from drug use, according to Rosenberg *et al*'s study.[138] The 1998 Youth Lifestyles Survey also found that young adults were influenced more by considerations of harm than illegality. Thirty-six to seventy-eight per cent of respondents (with variation depending on the type of drug) cited harm as their primary motivation for non-use of drugs, compared to only thirty to fifty-two per cent of respondents who cited illegality as their primary motivation.[139] It follows that illegality is not the primary deterrent to drug use for many young people.

A further rationale for the prohibitionist approach to drugs is the notion that drug use encourages criminal activity, and accordingly prohibiting drugs will reduce crime. Hough *et al*'s research affirms that individuals may commit acquisitive crimes to fund their drug use or offend due to the disinhibiting effects

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[135] Judith Aldridge, Fiona Measham and Lisa Williams, *Illegal Leisure Revisited: Changing Patterns of Alcohol and Drug Use in Adolescents and Young Adults* (Routledge 2011) 4.

[136] Michael Shiner, 'Out of Harm's Way? Illicit Drug Use, Medicalization and the Law' (2003) 43(4) Brit J Criminol 772, 778.

[137] Police Foundation, *Drugs and the Law: A Report of the Independent Inquiry into the Misuse of Drugs Act 1971* (Police Foundation 2000) (Runciman Report) 3.

[138] Harold Rosenberg, Chelsea Baylen, Shanna Murray, Kristina Phillips, Marie S Tisak, Amelia Versland and Erica Pristas, 'Attributions for Abstinence from Illicit Drugs by University Students' (2008) 15(4) Drugs: Education, Prevention & Policy 365, 375.

[139] Nina Stratford and Wendy Roth, *The Youth Lifestyles Survey 1998: Technical Report* (National Centre for Social Research 1999); Michael Shiner (n 136) 772, 789.

of drugs.[140] This purports to offer a compelling basis for the prohibitionist approach to drugs. Moreover, Seddon recognises that the association between drugs and crime has been a "defining feature" of drugs-related discourse in the UK since the 1980s,[141] when political concerns grew in line with the rising numbers of drug-using offenders, from 24,000 in 1986 to 95,000 in 1996.[142]

However, the drug-crime link is complex. Although a minority of problematic drug users finance their drug use through acquisitive crime, Hough *et al* acknowledge that most of these individuals were offenders *before* their drug use became a problem.[143] They conclude that there is "no persuasive research" of any causal relationship between drug use and crime for "the vast majority of illicit drug users."[144] A more accurate explanation is that drug use and offending often have a shared common cause, rooted in "limited social and economic resources, and limited exposure to legitimate 'life opportunities.'"[145] Hence, prohibiting drugs will not necessarily reduce offending; the wider social issues which drive both drug use and offending will persist, which the UK's current legal framework fails to account for. Rather than criminalising drug use, evidence suggests that drug treatment can

[140] Mike Hough, Tim McSweeney and Paul J Turnbull, 'Drugs and Crime: What Are the Links? Evidence to the Home Affairs Committee Inquiry into Drug Policy' (DrugScope 2001).

[141] Toby Seddon, 'Drugs, Crime and Social Exclusion: Social Context and Social Theory in British Drugs-Crime Research' (2006) 46(4) Brit J Criminol 680, 680.

[142] John Martin Corkery, *Statistics of Drug Seizures and Offenders Dealt With, United Kingdom, 1996: Area Tables* (Home Office Research, Development and Statistics Directorate 1998); BMA Board of Science, *Drugs of Dependence: The Role of Medical Professionals* (British Medical Association 2013) 92.

[143] Mike Hough, Tim McSweeney and Paul J Turnbull, 'Drugs and Crime: Exploring the Links' in Mark Simpson, Tracy Shildrick and Robert MacDonald (eds), *Drugs in Britain: Supply, Consumption and Control* (Palgrave Macmillan 2007) 106–07.

[144] ibid 106.

[145] ibid 104.

reduce both drug use and offending.[146] For example, courts can sentence offenders to a community order with a Drug Rehabilitation Requirement, which provides access to a treatment programme intended to support the offender through recovery from substance misuse and reduce their drug-related offending. Gossop *et al* found that drug misusers' criminal convictions reduced by twenty-four per cent in one year following their admission to drug treatment.[147] The utility of a criminal justice approach to drugs in reducing crime is therefore tenuous, and an alternative health-led approach would likely be more effective.

It is evident that the UK's current approach to drugs policy is inefficient. As noted above, the law is not founded upon scientific evidence of the relative harmfulness of drugs, thus suffering from arbitrariness. The law's deterrent effect is weak, given the continued high prevalence of drug use and the low priority of legal concerns in motivations for abstinence. The justification for prohibition based on the drugs-crime link is also flawed, and drug treatment would be more effective at reducing both drug use and offending. The crucial conclusion is that the UK's existing drugs policy fails to achieve its aims. Through highlighting several additional detriments driven by criminalisation, it will be argued that the fundamental problem is not the inadequacy of the existing legislation; rather, the use of illicit drugs should not be a matter of criminal justice at all.

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[146] UK Drug Policy Commission, *Reducing Drug Use, Reducing Reoffending* (UKDPC 2008) 11; Rosanna O'Connor, 'How Alcohol and Drug Treatment Helps to Reduce Crime' (*Public Health Matters*, 2 November 2017) <https://publichealthmatters.blog.gov.uk/2017/11/02/how-alcohol-and-drug-treatment-helps-to-reduce-crime/> accessed 25 January 2020.

[147] Michael Gossop, Katia Trakada, Duncan Stewart and John Witton, 'Levels of Conviction Following Drug Treatment – Linking Data from the National Treatment Outcome Research Study and the Offenders Index' ((Home Office Research Findings 275, Home Office Research, Development and Statistics Directorate 2006).

III. Harms Caused by Criminalisation

It is widely recognised—in, for example, the Runciman Report—that the UK's prohibitionist drug laws inflict widespread criminalisation upon large numbers of otherwise law-abiding citizens.[148] Criminalisation also subjects drug users to further adversity. The Royal Society for Public Health (RSPH) acknowledges that criminal records can seriously hinder drug users' life opportunities; they may "lose their current job, and face numerous barriers to moving on including access to colleges and universities, training, employment, housing, personal finance and travel."[149] Eastwood also notes that having a criminal record may prevent drug users from entering certain professions, such as health or law, and this "wasted potential" has high economic costs and drives offenders' social exclusion.[150]

This is particularly concerning in light of the unequal enforcement of drug policies vis-à-vis Black, Asian, and minority ethnic (BAME) communities. A 2018 report by Release found ethnic disparities in stop and search, prosecution, conviction and sentencing for drug offences.[151] For instance, black individuals were prosecuted for drug offences at more than eight times the rate of white individuals in 2017.[152] Institutional racism continues to permeate police forces and the broader criminal justice system, two decades on from the Stephen Lawrence Inquiry.[153] Thus, the harms driven by the criminalisation of drugs have a more marked

[148] Police Foundation (n 137) 7; Paul Smith, 'Drugs, Morality and the Law' (2002) 19(3) J Applied Philosophy 233, 242.

[149] Royal Society for Public Health, 'Taking a New Line on Drugs' (RSPH 2016) 33.

[150] Niamh Eastwood, 'Drugs – It's Time for Better Laws' (*Release*, 18 July 2013) <https://www.release.org.uk/blog/drugs-its-time-better-laws> accessed 29 December 2019.

[151] Michael Shiner and others, 'The Colour of Injustice: 'Race', Drugs and Law Enforcement in England and Wales' (StopWatch, Release and LSE's International Drug Policy Unit 2018) 44.

[152] ibid.

[153] Home Office, *The Stephen Lawrence Inquiry* (Cm 4262, 1999).

impact on BAME communities, as BAME individuals are disproportionately targeted throughout the process of drug law enforcement.

Criminalisation is also severely counterproductive, given that unemployment and low educational achievement are often driving forces for problematic drug use. Seddon notes that the rise of the "British drug problem" in the 1980s coincided with wider social issues, including the economic recession and high unemployment rates.[154] Buchanan and Young's research similarly found that of 200 problematic drug users interviewed in Merseyside, fifty-two per cent had no qualifications, and one in seven had never been able to secure a job post-substance misuse.[155] Furthermore, a 2008 Green Paper recognised the importance of paid work in facilitating dependent drug users' recovery.[156] Hence, criminalising drug use and impeding drug users' employment or educational aspirations means that users are more likely to engage in further drug use due to their limited opportunities, as Mann argues.[157] This circular process is futile in achieving rehabilitation, hampering users' recovery and reintegration within the community.

Furthermore, Austen notes that "the ethos of prohibition … proliferates stigma and discrimination" against drug users.[158] Meehan adds that the war on drugs "contributes widespread acceptability to policies that portray drugs, and those

[154] Toby Seddon (n 141) 684.

[155] Julian Buchanan and Lee Young (n 126).

[156] Department for Work and Pensions, *No One Written Off: Reforming Welfare to Reward Responsibility* (Cm 7363, 2008) 46; Chris Grover and Ian Paylor, 'No One Written Off? Welfare, Work and Problem Drug Use' (2010) 17(4) Drugs: Education, Prevention and Policy 315, 316.

[157] John Mann, *The Real Deal: Drugs Policy That Works* (Fabian Society 2006) 28.

[158] Liz Austen, 'Police and Crime Commissioners: Emerging "Drug Policy Actors"? (2016) 15(1) Safer Communities 4, 5.

who use drugs, as an enemy."[159] This can be significantly damaging to drug users. Paylor *et al* note that stigmatisation may lead to "an erosion of drug users' support networks," as family and friends may distance themselves from the user.[160] Drug users are, therefore, marginalised and socially excluded. Stigma is also detrimental to drug users' health, as it deters users from seeking help. According to the RSPH, only one in ten drug users are confident that they are capable of receiving help without judgment or stigma if needed.[161] Thus, along with criminal records hampering recovery, the stigmatisation of drug users also often traps them in "a cycle of chronic drug relapse," as Buchanan and Young conclude.[162] Drug use, evidently, should not be a matter of criminal justice.

The prohibitionist approach to drugs also exacerbates health-related concerns for drug users. A key consequence of prohibition is that illicit drugs have no "regulated quality control."[163] Trade is displaced to criminal markets, with purchasers having no certainty about the purity of the substance they are consuming. Therefore, drug users face increased risks of serious injury or death, as drugs may be more potent than expected. This is evident in the criminalisation of psychoactive substances, including synthetic cannabinoid receptor agonists (SCRAs), also known as 'Spice.' SCRAs were formerly legal and sold in headshops in branded packaging, indicating the ingredients and likely strength and effect of the substance.

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[159] Claire Meehan, "'Junkies, Wasters and Thieves": School-Based Drug Education and the Stigmatisation of People Who Use Drugs' (2017) 15(1) J Critical Education Policy Studies 85, 91.

[160] Ian Paylor, Fiona Measham and Alison Wilson, *Social Work and Drug Use* (McGraw-Hill Education 2012) 37.

[161] Royal Society for Public Health (n 149) 35.

[162] Julian Buchanan and Lee Young (n 126).

[163] Chris Crowther-Dowey, 'The Police and Drugs' in Mark Simpson, Tracy Shildrick and Robert MacDonald (eds), *Drugs in Britain: Supply, Consumption and Control* (Palgrave Macmillan 2007) 108.

However, when the Psychoactive Substances Bill proposed to criminalise the production and sale of psychoactive substances, critics warned that trade would be displaced to "illegal dealers whose sales practices may increase harms."[164] Ralphs *et al* also predicted that the Act would push trade of SCRAs to illegal street-level markets and that "a shift from headshops to street level dealing will almost certainly lead to poorer quality deals."[165] Moreover, they argued that it is "highly likely that street-level products are being cut with unknown ingredients that may cause further harm" in bids to increase profit margins for dealers and to ensure user addiction.[166]

These concerns materialised when the Act was implemented. Ralphs *et al* noted that, when the Act came into force, "both users and frontline staff working with the homeless community reported clear signs of a flourishing street-level market for synthetic cannabinoids."[167] The Home Office's review of the Act in 2018 also described "a large-scale shift away from retailers as a result of the PSA, with street dealers becoming the main source of [new psychoactive substances], particularly for synthetic cannabinoids."[168]

Furthermore, the review acknowledged that SCRAs "are no longer being sold in branded packets," depriving users of any information as to the contents of their purchase.[169] This coincides with an increase in potency of psychoactive substances since the Act's introduction, with synthetic cannabinoids being an area of

[164] Alex Stevens and others (n 131) 1169.

[165] Rob Ralphs, Paul Gray and Anna Norton, 'New Psychoactive Substance Use in Manchester: Prevalence, Nature, Challenges and Responses' (Manchester Metropolitan University 2017) 46.

[166] ibid.

[167] ibid 47.

[168] Home Office, *Review of the Psychoactive Substances Act 2016* (The Stationery Office 2018) 5.

[169] ibid 52.

particular concern.[170] In Manchester, samples were found which were "up to 700 times stronger than what had previously been sold in head shops."[171] Thus, criminalising SCRAs directly compounded the harms to its users. It can be suggested that if a public health approach to psychoactive substances had been adopted—for example, regulation of SCRAs to ensure a safer product and increased support to its users—many of the injurious consequences now associated with its use would not have arisen.

Health risks also arise from unsafe drug administration, which transpire because of users' attempts to avoid being caught and punished by law enforcement. Kerr *et al* note that the police's enforcement of drug laws "can prompt changes in injection behaviour that exacerbate risk for adverse health outcomes."[172] They cite Aitken *et al*'s findings that a police crackdown in a street heroin market in Australia led to increased risk-taking behaviour from users in attempts to avoid being caught by the police.[173] This included sharing dirty needles, thus risking the transmission of diseases and injecting more rapidly, thus risking severe consequences of imprecision.[174] Kerr *et al* also cite Dovey *et al*'s findings[175] that drug users "seek out locations, such as alley doorways, that provide increased privacy and camouflage during injection."[176] More seclusion translates to less opportunity for bystanders to assist if the user overdoses, and therefore a greater

[170] ibid.

[171] HM Inspectorate of Probation and the Care Quality Commission, *New Psychoactive Substances: The Response by Probation and Substance Misuse Services in the Community in England* (HM Inspectorate of Probation 2017) 29.

[172] Thomas Kerr, Will Small and Evan Wood, 'The Public Health and Social Impacts of Drug Market Enforcement: A Review of the Evidence' (2005) 16(4) Intl J Drug Policy 210, 211.

[173] Campbell Aitken, David Moore, Peter Higgs, Jenny Kelsall and Michael Kerger, 'The Impact of a Police Crackdown on a Street Drug Scene: Evidence from the Street' (2002) 13(3) Intl J Drug Policy 193.

[174] ibid 200.

[175] Kim Dovey, John Fitzgerald and Youngju Choi, 'Safety Becomes Danger: Dilemmas of Drug-Use in Public Space' (2001) 7(4) Health & Place 319.

[176] Thomas Kerr, Will Small and Evan Wood (n 172) 212.

risk of severe illness or death.[177] Such unsafe practices would not likely persist if drugs were not illegal and users did not fear punishment.

Finally, although the criminal justice approach to drugs aims to reduce crime, the illicit drug market itself drives systemic crime and violence. Because drugs are illegal, participants in the market have no recourse to the law when others "break agreements or threaten market share"; instead, individuals often resort to violence to deter and punish those responsible.[178] Violence may follow—for example, territorial disputes or robberies of drug dealers.[179] Violence within the illicit drug trade is not overwhelming; Pearson and Hobbs note that it is often overstated and that avoidance of violence is generally prioritised.[180] Nonetheless, this form of crime persists owing to the illegality of drugs. Had the sale of drugs been legal, trade could be regulated through legitimate markets, and participants could rely on traditional law enforcement to resolve disputes–an inherently safer process for the parties involved.

To summarise, the disadvantages of the prohibition of drugs undoubtedly outweigh the perceived justifications for this approach. The criminalisation and stigmatisation of drug users negatively impact their future opportunities and support networks, driving them further into drug use. The lack of regulation for drugs means that the substances consumed are often overly potent and dangerous, and the policing of drugs drives unsafe drug-taking practices—both of which are detrimental to drug users' health and can be fatal. Finally, systemic violence within the illicit drug trade threatens individuals' well-

[177] Kim Dovey, John Fitzgerald and Youngju Choi (n 175) 328.

[178] Peter Reuter and Alex Stevens, *An Analysis of UK Drug Policy* (UKDPC 2007) 42.

[179] Paul J. Goldstein, 'The Drugs/Violence Nexus: A Tripartite Conceptual Framework' (1985) 15(4) J Drug Issues 493, 497.

[180] Geoffrey Pearson and Dick Hobbs, *Middle Market Drug Distribution* (Home Office Research Study 227, Home Office Research, Development and Statistics Directorate, 2001) viii-ix.

being and lives. As well as putting a strain on the NHS, police and criminal justice system, these issues are detrimental to drug users' health and well-being. Accordingly, the UK should abandon the criminal justice approach to drug use and adopt a policy that prioritises drug-related harm reduction: a public health model.

IV. Public Health

A public health approach to drug use could reduce drug-related harm for both users and the wider community. To an extent, harm reduction is already incorporated into UK drugs policy. Harm reduction initiatives emerged in the mid-1980s in response to the heroin epidemic and the fears of transmitting infectious diseases through the sharing of injecting equipment. One example of harm reduction in practice is needle exchange services, whereby individuals who inject drugs can safely dispose of their used equipment and get new injecting equipment. Stimson notes that needle exchanges attracted large numbers of drug users and reduced the sharing of needles significantly.[181] By positioning the risk of infectious disease as a more significant threat to public health than drug use, these practices successfully reduced harm (namely, the spread of disease) to drug users and the general public.

Harm reduction is also implemented in some local police forces. In Durham Constabulary, the Checkpoint scheme diverts individuals found in possession of small quantities of illicit drugs away from the criminal justice system and instead to a local offender management programme. This programme targets offenders' underlying reasons for offending and assesses their needs to provide health-based interventions.[182] There is

[181] Gerry V Stimson, 'Harm Reduction in Action: Putting Theory into Practice' (1998) 9(6) Intl J Drug Policy 401, 405.

[182] 'Checkpoint' (*Durham Constabulary*) <https://www.durham.police.uk/Information-and-advice/Pages/Checkpoint.aspx> accessed 27 January 2020.

widespread support, including from Hughes and Anthony, for policies and practices which target "the social forces that enable drugs and crime to exist."[183] By addressing offenders' broader personal issues—such as mental health issues and homelessness—Checkpoint achieves this precise goal. This has proven successful in preventing reoffending: only four per cent of those diverted to the scheme reoffended within 18 months, compared with a nineteen per cent reoffending rate over 12 months for individuals who go through the regular criminal justice system.[184] Thus, unlike the existing criminal justice approach to drugs, Checkpoint addresses the shared common causes for drug use and offending and is more effective in reducing drug users' reoffending.

Checkpoint has also benefitted Durham's police force. Each non-arrest saves an average of 12 hours of police time, conserving an estimated £160,000 annually.[185] This benefits the wider public as it enables resources to be re-allocated elsewhere, whether for alternative policing strategies (such as targeting suppliers and importers of drugs) or health-based drug interventions. Furthermore, Open Society Foundations argue that harm-reduction-based policing benefits the police's perceived trust and legitimacy in the communities they serve.[186] Thus, existing harm reduction practices in UK drugs policy effectively promote the well-being of drug users and reduce

[183] Rhidian Hughes and Nerys Anthony, 'Drugs, Crime and Criminal Justice' in Rhidian Hughes, Rachel Lart and Paul Higate (eds), *Drugs: Policy and Politics* (1st edn, Open University Press 2006) 88.

[184] Martin Powell, 'Decriminalisation of People Who Use Drugs: Reducing Harm, Improving Health, Helping the Vulnerable and Releasing Resources' (Transform 2018) 2.

[185] Mattha Busby, "'You Can't Arrest Your Way Out of Record Drug-Related Deaths," Say Police' (*The Guardian*, 24 April 2019) <https://www.theguardian.com/society/2019/apr/24/cant-arrest-your-way-out-record-drug-related-deaths-say-police> accessed 31 December 2019.

[186] Marc Krupanski, 'Police & Harm Reduction' (Open Society Foundations 2018) 6.

reoffending, and they also benefit the communities in terms of its police force's resources and reputation.

UK policymakers should build upon these practices and adopt a more comprehensive public health approach to drug use in order to target all areas of drug-related harm. A crucial feature of such an approach would be the 'decriminalisation' of illicit drugs. As Meacher and Clegg explain, decriminalisation in this context would entail the removal of criminal sanctions for the personal possession or use of drugs, but the production and supply of drugs would remain illegal.[187] Thus, individuals found in the personal possession of drugs would no longer face the adverse consequences of criminalisation, discussed above. A national approach comparable to Durham's Checkpoint scheme would be favourable.

Decriminalisation would also bring an abundance of other benefits. As drug criminalisation significantly drives the stigma against drug users, decriminalisation would likely soften that stigma. Decriminalisation would also benefit drug users' health; the RSPH notes that the criminal status of drug use often deters people from seeking treatment, so decriminalising drugs would encourage users to seek help free from judgment.[188] Furthermore, as with Durham Constabulary's adoption of the Checkpoint scheme, police resources could be allocated elsewhere to benefit society. Thus, following the "quiet revolution" of drug decriminalisation worldwide, the UK should acknowledge the merits of decriminalisation and proceed with this pathway.[189]

Nonetheless, decriminalisation is not the sole focus of a public health approach. The RSPH proposes a more holistic

[187] Molly Meacher and Nick Clegg, 'How Changes to Drug Prohibition Could Be Good for the UK—An Essay by Molly Meacher and Nick Clegg' (2016) 355 Brit Med J 1, 2.
[188] Royal Society for Public Health (n 149).
[189] Niamh Eastwood, Edward Fox and Ari Rosmarin, *A Quiet Revolution: Drug Decriminalisation Across the Globe* (2nd edn, Release 2016).

public health-led model. Along with decriminalisation, they recommend the implementation of evidence-based drugs education for young people.[190] This is a rational strategy in light of the research discussed above, which affirms that concerns around harmfulness to health are a stronger deterrent to drug use than illegality. Evidence-based education is, therefore, more likely to encourage safer drug usage and reduced harm, or abstinence from drug use entirely. The RSPH also recognises the importance of supporting individuals in recovering from drug use.[191] They propose training the wider public health workforce to support drug users and signpost them towards treatment services.[192] These suggestions are grounded on scientific evidence regarding the harmfulness of drugs. In reducing drug-related harm, they focus on what drug users and the wider population genuinely need—unlike the UK's existing prohibitionist approach. The RSPH, therefore, offers a compelling alternative to the criminal justice approach, and it would be more effective at reducing harm and supporting drug users' recovery and reintegration into society.

Transform also recognises the merits of a public health approach, and it incorporates this into its suggestions for regulation. It recommends regulating drugs—including their production, availability, suppliers and purchasers—according to each drug's relative harmfulness.[193] For instance, the highest risk drugs should be available only on a medical prescription, whereas lower-risk drugs could be sold and consumed in licensed premises, comparable to the sale of cannabis in Dutch coffee shops Like the RSPH, Transform's suggestions are premised upon evidence-based considerations of the harms of drug use. Their recommendations are, therefore, equally credible. Regulation would also ensure safer products and drug

[190] Royal Society for Public Health (n 149) 25–32.

[191] ibid 35.

[192] ibid.

[193] Stephen Rolles, *After the War on Drugs: Blueprint for Regulation* (Transform 2009).

administration; therefore the current harms arising from the use of impure substances and unsafe practices would be significantly reduced.

Despite the merits of a public health approach to drug use, it is essential to explore its potential problems. One concern is that decriminalisation may lead to an increase in drug users and, therefore, drug-related problems. McKeganey speculates that any "liberalisation" of the UK's drugs policy would have this effect.[194] However, international evidence does not support this concern. Hughes and Stevens' analysis of Portugal's drugs policy highlights that the decriminalisation of all illicit drugs in Portugal in 2001 led to reductions in problematic drug use, as well as drug-related harms and burdens on the criminal justice system.[195] Additionally, a 2016 report from Release regarding decriminalisation policies worldwide found that the harshness of a country's drug enforcement-policies, in relation to the possession of drugs, seems to have little correlation with the levels of drug use in that country.[196] In the Netherlands, for example, studies have concluded that the *de facto* decriminalisation of cannabis in 1976 has not resulted in increased usage of cannabis.[197] On this basis, arguments that decriminalisation would lead to increased and problematic use of drugs are unconvincing. Such theories are speculative, whilst international evidence suggests outcomes to the contrary.

Another potential problem with decriminalising drugs and prioritising public health could be the adverse reaction this

[194] Neil McKeganey, 'The Challenge to UK Drug Policy' (2007) 14(6) Drugs: Education, Prevention and Policy 559, 568.

[195] Caitlin Elizabeth Hughes and Alex Stevens, 'What Can We Learn From the Portuguese Decriminalization of Illicit Drugs?' (2010) 50(6) Brit J Criminol 999; Stephen Rolles, 'An Alternative to the War on Drugs' (2010) 341 Brit Med J 127, 127.

[196] Niamh Eastwood, Edward Fox and Ari Rosmarin (n 189) 38.

[197] Beau Kilmer, 'Do Cannabis Possession Laws Influence Cannabis Use?' in Inge Spruit (ed), *Cannabis 2002 Report: Technical Report of the International Scientific Conference* (Belgian Ministry of Public Health 2002) 105.

may generate from the wider public. In 2002, Luty and Grewal's survey of the UK public's attitudes towards drug dependence found that respondents held significantly negative views towards drug addicts. Ninety-four per cent of respondents regarded drug addicts as untrustworthy, and sixty-two per cent believed that the law is too soft on drug addicts.[198] The 2002 Home Affairs Committee Inquiry into Drug Policy also concluded that decriminalising drugs "would send the wrong message."[199]

However, more recently, the UK public's attitudes towards drugs have proven more liberal. A 2019 report from the Conservative Drug Policy Reform Group found that fifty-three per cent of respondents thought drug use is best seen as a health issue, and the focus should be on reducing harm, compared to only thirty-one per cent who thought drug use is best seen as a criminal activity.[200] With 1690 respondents and a nationally representative sample, compared to only 505 respondents in Luty's and Grewal's 2002 study, the findings offer a good illustration of the wider public's views.[201] Thus, the justification for maintaining a criminal justice approach based on public attitudes is outdated. Given that a substantial proportion of the UK electorate now agree that drug use is best seen as a health issue, the argument for a public health approach to drugs has never been stronger and should be capitalised on.

Overall, the case for a public health approach to drug use is compelling, and the arguments against this approach are weak. The UK should build upon its existing harm reduction practices and recognise that drug use is a matter of public health. Decriminalisation should be a central feature of a public health

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[198] Jason Luty and Pardeep Grewal, 'A Survey of the British Public's Attitudes Towards Drug Dependence' (2002) 7 J Substance Use 93, 94.

[199] Select Committee on Home Affairs, *The Government's Drugs Policy: Is It Working?* (HC 2001-2002, 318-I) para 74.

[200] Conservative Drug Policy Reform Group, 'Public Attitudes to Drugs in the UK' (CDPRG 2019) 5.

[201] ibid.

approach, facilitating more nuanced evidence-based regulation. The models proposed by the RSPH and Transform are credible and compelling suggestions, and they offer strong starting points to consider the precise type of public health model to be adopted. As Rolles notes, justifications for prohibition are often grounded in faulty logic, as the detrimental impacts of prohibition are often conflated with the impacts of drug use.[202] For instance, Seddon highlights that the health issues associated with long-term heroin use arise from using impure heroin and infected injecting equipment rather than heroin use itself, and these are consequences of prohibition rather than drug use.[203] A public health approach to drugs would rightly seek to mitigate against, and eradicate, the harms of both drug use and drug-prohibition. This would be welcomed.

V. Conclusion

The 'war on drugs' approach to UK drugs policy has intensified the harms associated with drug use[204] and has been responsible for the "neglect of the public health dimension."[205] After fifty years of a punitive drugs policy that criminalises one of the most vulnerable groups in our society, the UK should embrace a public health approach to drug use and prioritise harm reduction for drug users as well as the wider public. The existing legislation fails to meet its aims of reducing drug use and drug-related crime. The criminal justice approach to drugs also drives further detriment for drug users, including those discussed here (e.g. stigmatisation and unsafe drug-taking practices) and extending beyond. A public health approach could accommodate the reduction of drug-

[202] Stephen Rolles (n 195).

[203] Toby Seddon, 'The Hardest Drug? Trends in Heroin Use in Britain' in Mark Simpson, Tracy Shildrick and Robert MacDonald (eds), *Drugs in Britain: Supply, Consumption and Control* (Palgrave Macmillan 2007) 73.

[204] Conservative Drug Policy Reform Group (n 200) 3.

[205] Judith Aldridge, Fiona Measham and Lisa Williams (n 135) 215.

related harms as well as foster health-led treatment and interventions for drug users and addicted individuals.

Adopting a public health model for drugs policy is not a radical approach. Rather, as Transform highlight, "the prohibitionist model is the radical approach, in that it is based exclusively on moral judgment against drug use and drug users and not on an evidence-based approach to reducing drug-related harms."[206] It is time for the UK to abandon this value-judgment and instead identify the use of illicit drugs as a public health issue. A holistic public health approach to drugs policy would be welcomed, including the decriminalisation of drugs, harm-based education and regulation of drugs, and increased support for drug users. Change is overdue, albeit it is unlikely given the current political administration. The Government's 2017 Drug Strategy confirmed that they have "no intention of decriminalising drugs."[207] Nonetheless, there is an All-Party Parliamentary Group for Drug Policy Reform, which may hold some promise for change in this direction in the future.

[206] Stephen Rolles (n 193) xiii.

[207] HM Government, *2017 Drug Strategy* (July 2017) 16 <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/628148/Drug_strategy_2017.PDF> accessed 23 June 2021.

A Comprehensive History and Critical Analysis of Optography: Can it Qualify as a Science in Light of Modern Scientific and Forensic Standards?

Anja Lampesberger[†]

The Victorian (pseudo)science of 'optography' was thought to be a scientific method of affixing the last image an eye had perceived to the retina permanently, which can be subject to forensic analysis after death. The ultimate objective of 'optography' will be analysed to determine whether it has the properties to qualify as a valid science as per today's standards. In pursuit of a definitive conclusion, primary sources on the development and general history of optography will be examined, paying particular attention to scientific practices, ethics, and success rates. Further, optography in Victorian works of fiction will be analysed, comparing these portrayals to scientific work and examining their impact on society and legislation. The results will show that optography is indeed a science—but was a short-lived phenomenon, mainly due to its issues relating to credibility and lack thereof. It would not therefore be likely to survive under modern scientific standards and scrutiny. Despite this, the cultural and societal impacts have been substantial, with accounts on the subject in fiction soaring and superstitions rising, some of which prevail to this day.

I. Introduction

What was the last thing a person saw before they died? This is a question that has filled humanity with fascination and terror for at least hundreds of years, a question which, if answerable, could aid in solving many of humanity's mysteries, and answer the attending age-old question of '*who done it?*' What if there indeed was a method whereby scientists could extract this precise information from a body? The answer is: there is, or at the very least, so

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thought Victorian scientists immersed in the study of optography. Optography is the science of extracting the last image to which a living being was exposed from their retina. Nowadays, it is often classified as a Victorian *pseudoscience*, and it is claimed that little truth supports the conclusions which were made by Victorian scientists regarding the efficiency and accuracy of the procedure. This, however, is an inaccurate representation of the work and advancements achieved in this realm, especially in the late 19th century. The question has now become: *could optography ever be evolved to such an extent that it becomes a functional forensic science?*

Little scientific research exists on the subject of optography. This is partly due to its short-lived history and application, and its ostensible lack of impact on modern science and technology. Nevertheless, this paper will provide a comprehensive history of optography, using both historical sources and modern analyses along with experiments of the science. There will be further focus on its impact on 19th and 20th century policework and the impact it has had on fiction at the time as well as decades later. This knowledge will aid in understanding the complex issues relating to optography and elaborate on the nuanced differences between a pseudoscience and a science not applicable in forensic contexts.

II. Etymology

As per its dictionary definition, an optogram is "an image of an external object fixed on the retina by the photochemical action of light on the rhodopsin."[208] This is achieved by the science of optography, defined as:

> The production of an optogram on the retina by the photochemical action of light on the visual purple; the fixation of an image in the eye. The object so

[208] Merriam-Webster Medical Dictonary, 'Optogram' <https://www.merriam-webster.com/medical/optogram> accessed 6 January 2020.

> photographed shows white on a purple or red background.[209]

Both definitions capture the scientific approach developed in the 19th century, applied to both human bodies and animal carcasses. However, the first documented mention of an optographic image dates back to the early 17th century. Jesuit priest and scientist[210] Christoph Scheiner[211] observed a "faint and all too fleeting image"[212] during optometrical research on the retina of a dissected frog.[213] This is the earliest traceable mention of optography and, whilst being mentioned in fiction, the scientific approach was left undiscussed until it resurfaced in the early 19th century. It is claimed that this re-found interest is strongly linked to the birth of photography in the 1840s, when the eye was likened to a lens[214] by artists and scientists alike.[215] Further influence seems to have come from German physiologist Hermann von Helmholtz's invention of the ophthalmoscope, a medical instrument which enables view of the retina from outside the eye.[216]

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[209] Webster Dictionary, 'Optography' (1913) <http://www.webster-dictionary.org/definition/optography> accessed 6 January 2020.

[210] A physicist, optometrist, and astronomer, as well as the inventor of the pantograph and the optometer. He is seen as the co-discoverer of sunspots alongside Galileo Galilei, Thomas Harriot, and Johann Fabricius.

[211] Anton von Braunmuhl, *Christoph Scheiner als Mathematiker, Physiker und Astronom* (first published 1891, Bamberg: Buchner 2008).

[212] Ogden Tanner, Diana Hirsh and Martin Mann, *Photography as a Tool: Life Library of Photography* (1st edn, Time-Life Books 1970) 43.

[213] ibid.

[214] To which a permanent image could be affixed by light imprints.

[215] Derek Ogbourne, *Encyclopedia of Optography: The Shutter of Death* (Muswell Press 2008).

[216] Douglas J Lanska, 'Optograms and Criminology: Science, News Reporting, and Fanciful Novels' (2013) 205 Progress in Brain Research 55–84.

III. Scientific Developments

Franz Christian Boll was the first to discover and later study the effect of light on retinal pigments, now known as rhodopsin,[217] in 1876.[218] He observed that retinal pigments bleach under light and regenerate in the dark, suggesting a connection between this phenomenon and the process of vision.[219] The majority of his research was conducted on frogs, and in 1877 he found that it was light which caused the discolouration of the retinal pigment upon conducting the following experiment:

> I partially closed the shutters, so that only a relatively narrow stripe [sic] of sunlight entered the room. Into this I placed the eye of a curarized, dark-adapted frog. Examination of the retina after 10 minutes showed it to be divided by a clearly delineated colorless stripe into two red halves.[220]

Subsequently, he began to question the stability of this retinal image by considering the viability of preservation for an extensive period of time after death. Boll discovered that, had the retinas been examined in the dark, the retinal pigment was visible for as long as 24 hours after death in frogs and cartilaginous fishes, and for up to 12 hours in mammals.[221] However, Boll likewise appreciated that exposure of the retinas to even minimal amounts of visible light caused the image to decay in a matter of seconds. This unfortunate vulnerability towards visible light rendered microscopic and indeed most forms of research virtually

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[217] He originally referred to it as *Purpurrot* [purple-red] and later as *Sehrot* [visual red] before Wilhelm Kühne coined the terms *Sehpurpur* [visual purple] and rhodopsin, which is the term conventionally used today.

[218] Franz C Boll, 'Zur Anatomie und Physiologie der Retina' (1876) Monatsberichte der Königlichen Preussischen Akademie der Wissenschaften zu Berlin 783–87.

[219] Franz C Boll, 'Zur Physiologie des Sehens und der Farbenempfindung' (1877) Monatsberichte der Königlich preussischen Akademie der Wissenschaften zu Berlin 2–12, 72–4.

[220] Franz C Boll, 'On the Anatomy and Physiology of the Retina' (1977) 17(11–12) Vision Research 1249, 1255.

[221] Boll (n 219).

impossible. Cognisant that the need for a method of stabilisation was yet greater, Boll suggested a photochemical approach upon recognising that:

> if visual red is a chemical compound and if erythropsin[222] really exists and is not merely a pretty name, then it must be possible to separate it from the substance of the rods and perhaps to dissolve it or somehow isolate it.[223]

Boll was never able to conclude his research, having passed away prematurely from tuberculosis in 1879 at the age of 30.[224]

Wilhelm Kühne, who succeeded Hermann von Helmholtz as Professor of Physiology at the Ruprecht Karl University of Heidelberg, worked on similar subjects commencing in 1877. His research both confirmed and extended Boll's core findings.[225] However, controversy arose regarding Kühne's research during Boll's lifetime, with multiple sources accusing him of usurping Boll's work. Despite this, Kühne was not discouraged from pursuing his research further.[226] His conclusions concurred with those of Boll, namely that retinal pigments persist after death unless it is exposed to sufficient quantities of light:

> An experiment taught me immediately that even a frog retina which has been torn away from the pigment epithelium retains its color for hours in a room that is as

[222] A visual pigment, which he believed to function by a light-induced transformation not dissimilar to the oxygen-induced transformation of haemoglobin.
[223] Boll (n 220) 1257.
[224] Lanska (n 216).
[225] August Ewald and Wilhelm Kühne, 'Über künstliche Bildung des Sehpurpurs' (1877) 15 Centralblatt für die medicinischen Wissenschaften 753–54.
[226] Arthur Gamgee, 'On Photo-Chemical Processes in the Retina' (1877) 15 Nature 477–78. See also Ruth Hubbard, Preface to the English Translation of Boll's 'On the Anatomy and Physiology of the Retina' and Kühne's 'Chemical Processes in the Retina' (1977) 17 Vision Research 1247.

> dimly lit as possible… but loses it immediately in broad daylight.[227]

After conducting further research on rhodopsin itself, Kühne began comparing vision to a repetitive photographic process, conceiving of the eye as a biological camera.[228] Soon, he found visible images "bleached" onto the retina, much similar to the negative of a photograph. The first successful image retrieved was that of a flame he extracted from the retina of a frog which had gazed at a candle for fourteen consecutive hours. Conducting further experiments on frogs and rabbits, he discovered that similar retinal images resulted after exposing their retinas to a bright window for a number of minutes. Kühne is the first to refer to such images as "optograms," coining both this term and the term "optography."[229] He himself admitted that his first optograms required extraordinarily specialised conditions in order to retrieve an image. Nonetheless, Kühne revelled in his success, which led him to suggest that optography be both credible and practicable despite its imperfections.[230]

IV. The Emergence of Controversy

Naturally, Khüne's aforementioned statements, accompanied by his research, fuelled a vast amount of speculation amongst the general public regarding optography's potential applications. In particular, optography's apparent utility extended to forensics to determine the last image seen by a murder victim and hence, the most likely guilty party. Despite initially vehemently dismissing these suggestions, Kühne continued his research in this area. His

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[227] Wilhelm Kühne, 'Chemical Processes in the Retina' (1879) 17 Vision Research 1269, 1283.

[228] Wilhelm Kühne, 'Über den Sehpurpur' (1877) 1 Untersuchungen aus dem Physiologischen Institute der Universität Heidelberg 15–103.

[229] Wilhelm Kühne, *Chemische Vorgänge in der Netzhaut* (Ludimar Hermann ed, Teil 1, Handbuch der Sinnesorgane 1879) 3.

[230] Wilhelm Kühne, *On the Photochemistry of the Retina and on Visual Purple* (Michael Foster ed and tr, first published 1878, London: Macmillan and Co. 2009).

main goal was to 'affix' the image onto the retina for extended periods of time in order to increase visibility and usability of the image in various contexts. Eventually, a method of stabilising optograms for an increased period of time was discovered, using a process he likened to 'the fixing of a photographic plate.' [231]

Contrary to success in research, his public statements on the topic remained pessimistic, having stated repeatedly that any retinal image could fade spontaneously due to the natural metabolic process continuing even *post mortem*.[232] Kühne recognised that, in order to "disentangle in the optogram the numerous after-images which in daily life are so completely woven together,"[233] careful arrangements were required. However, even then, there was no guarantee of success.

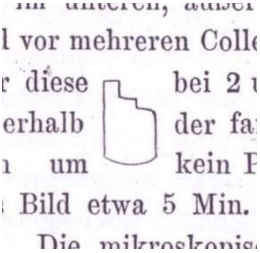
At this point, he began to contradict previous statements and views on optography. He publicly stated that optograms are easily achieved, even during a subject's lifetime: "[i]n spite of regeneration of the [visual] purple during life as after death, optograms are possible even during life."[234] He further dismissed earlier accounts concerning the brief timeframe to grasp optograms before they fade or disappear under light, now contending:

> I am not prepared to say that eyes which have remained in the head an hour or more after decapitation will no longer give satisfactory optograms; indeed, the limit for obtaining a good image seems to be in rabbits from about sixty to ninety minutes, while the eyes of oxen seem to be useless after one hour.[235]

Merely two years following these statements, Kühne embarked on what is arguably his most famous scientific

[231] ibid. See also Lanska (n 216).
[232] ibid.
[233] ibid 86.
[234] ibid 86–7.
[235] ibid 92.

experiment. On 16th November 1880, he agreed to view the retinas of a criminal after a state execution in the Landesstrafanstalt Bruchsal [Bruchsal Prison] near Karlsruhe. The man to be executed was Erhard Gustav Reif, who had murdered his two young children by drowning them after the death of his wife.[236] Immediately following Reif's execution by guillotine, Kühne extracted Reif's retinas[237] and examined them in a dimly lit room. Within 10 minutes, he accomplished the retrieval of the only reported human optogram and presented it to several colleagues who were present during the procedure.[238]


l vor mehreren Colle
r diese bei 2
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1 um kein F
Bild etwa 5 Min.
Die mikroskopis

Figure 1. Drawing of the human optogram retrieved from Erhard Gustav Reif.[239]

> The … tiny picture was 2 by 3-4 mm in length; because the rod cells were everywhere preserved within the colorless area, it was not a Pseudo-optogram. On this cloudy autumn morning the figure remained visible for about 5 min.[240]

The shape of the object seen in this optogram has been widely discussed and analysed throughout history, with various accounts

[236] Ogbourne (n 215).
[237] It is specified in the records that the right eye was reserved for other purposes, however the specifics of what these purposes were or entailed could not be found in any of the records accessed during the research of this article.
[238] George Wald, 'Eye and Camera' (1950) 183(2) Scientific American 32–41.
[239] Wilhelm Kühne, 'Museum of Optography' (1881) <http://www.museumofoptography.net/The_Human_optogram_files/Reifnew.jpg> accessed 7 January 2020.
[240] Wilhelm Kühne, 'Beobachtungen zur Anatomie und Physiologie der Retina' (1881) 4 Untersuchungen des Physiologischen Instituts der Universität Heidelberg 280.

identifying it as the blade of the guillotine or the steps leading to it. Whilst these could be accurate theoretical interpretations of the drawing, they are hindered from being recognised as factually accurate by the fact that Erhard Gustaf Reif was reportedly blindfolded before he was sent to the guillotine. Despite knowing what was going to happen, he could not have laid eyes upon it. Consequently, there could not have been an optogram of the guillotine imprinted onto his retina. Nonetheless, it is also important to note the varied accounts of Reif's exact point of blindfold. Some sources insist on him being blindfolded from the moment he came out from his cell,[241] while others report that he was only blindfolded moments before the blade fell.[242]

V. Societal Impact

Despite the controversy surrounding what is believed to be the only human optogram, the use of human optograms in fiction is widespread. Perhaps the first use of optography in fiction can be found in Auguste Villiers de l'Isle-Adam's short story, *Claire Lenoir*, originally published in 1867.[243] In his novel, optography is referenced twice, albeit in decidedly different ways. The first mention occurs as the narrator picks up a newspaper, reading an article published by the *L'Académie des Sciences de Paris*:

> It can be asserted that the animals destined to our nourishment … conserve in their eyes, after the butcher's death stroke, the impression of the objects they have seen before they die. It is a photograph … among which one

[241] Ali Hossaini, 'Vision of the Gods: An Inquiry Into the Meaning of Photography' (2003) 2(3) Logos Journal.
[242] The College of Optometrists, 'Optography and Optograms' <https://www.college-optometrists.org/the-college/museum/online-exhibitions/virtual-eye-and-vision-gallery/optography-and-optograms.html> accessed 7 January 2020.
[243] Auguste Villiers de l'Isle-Adam, *Claire Lenoir* (Arthur Symons tr, Jean-Marie Mathias Philippe edn, Revue des Lettres et des Arts 1925).

> almost always distinguishes that of the man who has slaughtered them.[244]

The novel's second instance of optography occurs towards its end. The narrator visits an old friend's widow, who had taken to the bed a year prior, and in her dying eyes sees an impossible image: her husband, now appearing vampiristic, taking revenge on the man with whom she committed infidelity, severing the man's head and readying himself to toss the decapitated head off a cliff.[245] Evidently, two vastly different depictions of optography are used by Villiers predominantly as foreshadowing and metaphorical devices.

Villiers was not alone in using this new method in fiction. Many authors followed, including Jules Verne[246] and Rudyard Kipling.[247] Their use of optography, albeit no more realistic than Villiers' work, was more consistent and coherent within their fictional worlds. Perhaps the most accurate depiction can be found in Kipling's short story, *At the End of the Passage*. Kipling never reveals to the reader what is portrayed by the optograms, the story's character destroying the images immediately after seeing them. The character makes known to his companions (and the reader) merely that: "[i]t was impossible, of course. You needn't look, Mottram. I've torn up the films. There was nothing there. It was impossible."[248] Hereby it is implied that the horror was too great to ever be spoken of or seen. Verne, by contrast, vastly overrepresented the accuracy of the science in his novel *Les Frères Kip* [The Kip Brothers].[249] In Verne's novel, with the help of an optogram, the exact facial features of the true culprits could

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[244] ibid 42.
[245] ibid.
[246] Jules Verne, *Les Frères Kip* (first published 1902, Stanford Luce tr, Wesleyan University Press 2007). See also James Joyce, *Ulysses* (first published 1922, Wordsworth Classics, London 2010).
[247] Rudyard Kipling, *At The End of the Passage* (Life's Handicap: Being Stories of Mine Own People, New York: Doran & Co. 1931) 244–69.
[248] ibid.
[249] Verne (n 246).

be seen and thus the main characters in the book could be exonerated.[250]

In the late 19th century, popular belief in the capabilities of optography was widespread through its use in fiction as well as the rapid advancements in the field of photography in the real world. It became so prevalent in society that even police forces were not exempt from it. Some police departments began to take close-up photographs of a victim's eyes in the hopes of identifying the culprit.[251] Scotland Yard brought in so-called "forensic photographers"[252] in the 1888 'Jack the Ripper' cases in Whitehall, London, to take pictures of the victims' retinas in order to determine the murderer's identity.[253] According to all extant reports, these efforts were fruitless, as stated here by Stewart-Gordon during the investigation of Annie Chapman's death:

> In an attempt to be scientific, the police pried open Annie Chapman's dead eyes and photographed them, in the hope that the retinas had retained an image of the last thing she saw. But no images were found.[254]

Even at the point where optography was being actively used in police investigations, opinions on what exactly an optogram was and how and when it occurred varied significantly. This was made obvious by the following statement regarding the same case:

> Later, the curious ritual of photographing the victim's eyes had been carried out. There was a theory that was to last well into the first quarter of the twentieth century that in

[250] ibid.
[251] Arthur B. Evans, 'Optograms and Fiction: Photo in a Dead Man's Eye' (1993) 20(3) Science Fiction Studies 341–61.
[252] Jo Chipperfield, 'Bullet-Holes for Eyes: The Lingering Image Of Horror in a 1920s Murder' (Leanne Franklin and Ravenel Richardson eds, The Many Forms of Fear, Horror and Terror, Oxfordshire: Inter-Disciplinary Press 2009) 186, 188.
[253] ibid. See also Walter Dew, 'I Caught Crippen' (Memoirs of Ex-Chief Inspector Walter Dew, C.I.D of Scotland Yard, London and Glasgow: Blackie & Son 1938) 38–9.
[254] James Stewart-Gordon, 'The Enduring Mystery of Jack the Ripper' (June edn, *The Reader's Digest*) 119, 121.

> cases of violent death the last images were fixed permanently to the retina of the eye. A photograph taken when the eye had been drawn a little way out of the socket could thus, it was believed, identify the killer.[255]

It is important to note that even in this critical assessment of police work, the factual element seems to be unclear. The statement that "in cases of violent death the last images were fixed permanently to the retina of the eye"[256] implies that should one die from natural or non-violent causes, no such last image could be found on the retina. This, however, goes against the scientific background of this area as Kühne clearly stated that an optogram could be created at any point during a person's lifetime.[257]

Regardless, the sole fact that tests were being carried out seemed unnerving to some murderers. Accordingly, the removal of victims' eyes as preventative action against the finding of their image within them also became more prevalent during this time. An exemplary case is the murder of Constable P.C. Gutteridge in Essex in 1927.[258] The Constable was on patrol when he was shot in the left side of the head twice, as well as once in each eye, all from a distance of about ten inches. It was believed by some that the shots through the eyes were carried out due to optography-related superstition.[259] In 1955, there was a similar case in Brussels where a woman was sentenced to three years in prison for conspiracy to murder, because she had "sewn the head-cape which was to prevent the victim from seeing her assassin and conserving his image on the retina of her eyes..."[260]

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[255] Terence Sharkey, *Jack the Ripper: 100 Years of Investigation* (New York: Dorset Press 1987) 83–4.
[256] ibid 83.
[257] Wilhelm Kühne, Chemische Vorgänge in der Netzhaut (L Hermann ed, Teil 1, Handbuch der Sinnesorgane 1879) 3.
[258] The Gutteridge Case (1983) 56(4) The Police Journal 330–33.
[259] Richard Harrison, *Scotland Yard* (Chicago/New York: Ziff-Davis Publishing Co. 1949).
[260] Jacques-Henry Bornecque, *Villiers de l'Isle-Adam: Créateur et Visionnair* (Paris: Nizet 1974) 62.

Evidently, the image in the dead man's eye became a superstitious belief held far past the height of optography, which in some cultures is still held to this day. An example appears to be Russian culture,[261] wherein the belief has proven capable of becoming manifest in destructive ways, as demonstrated by a New York article about the Russian Mafia:

> "In one instance, the wife of a man who had crossed rival gangsters was stabbed to death. Then, in keeping with an ancient Russian custom, the killer gouged out her eyes in the belief that his image would be recorded in them."[262]

Although superstitions surrounding optography have manifested in societies across Eurasia,[263] there is no evidence that practices such as those discussed in this section were particularly widespread. The evidence presented here, however, should not be disregarded as it highlights the impact of optography as a potential forensic method vis-à-vis murder and investigation. The fact that most did not have in-depth knowledge of the process or what should be expected as the outcome did not seem to have much effect on the opportunities and threats perceived through it.

[261] Along with support from the article from *The Reader's Digest* cited immediately below, this is asserted by force of consultation with many of the author's Russian peers regarding this particular superstition. They have all confirmed that it is something widely believed to this day in Russian culture. See too Jo Chipperfield, "Bullet-Holes for Eyes': The Lingering Image of Horror in a 1920s Murder' in Leanne Franklin and Ravenel Richardson (eds), *The Many Forms of Fear, Horror and Terror* (Brill 2020) 195ff.

[262] Nathan M Adams, 'Menace of the Russian Mafia' (August edn, *The Reader's Digest* 1992) 34–5.

[263] ibid; Douglas J Lanska, 'Optograms and criminology: science, news reporting, and fanciful novels' (2013) 205 Prog Brain Res 55, 56–7 and 74–6.

VI. Optography as a Pseudoscience?

Nowadays, in many popular science articles or TV shows, optography is categorised as a pseudoscience.[264] This is by reason of its very limited utility in crime investigations owing to time constraints and vulnerability towards light exposure. The majority of scientists would ostensibly agree that optography cannot be used in a forensic context, which was stated as early as 1881. American physician Dr W. C. Ayres was working on perfecting optography in Kühne's laboratory, conducting over one thousand experiments in the process. Eventually, he concluded that "optography would never prove to be of practical utility in forensic investigations."[265]

After the murder of Joseph Bowne Elwell in 1920, the medical examiner, Dr Charles Norris, was publicly criticised in an editorial of *The New York Times* for failing to photograph Elwell's eyes, thereby missing the opportunity to identify the murderer.[266] Norris replied to the accusations writing:

> You will see that this experiment is a very crude one for practical purposes and it does not indicate at all that the retina of the eye may be employed to photograph the features of a murderer.[267]

The term pseudoscience is never actually mentioned in historical records, posing the question: has optography been

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[264] E.g. Wikipedia, 'Optography' (2020) <https://en.wikipedia.org/wiki/Optography> accessed 7 January 2020. See also SciShow, 'Victorian Pseudosciences: Solving Murders with Eyeballs' (2016) <https://www.youtube.com/watch?v=aCxuVpte8X4> accessed 5 January 2020.

[265] Lanska (n 216) 73. See also 'Permanent Pictures on the Retina' (1881) 11 Medical Times 479 and Henry D Noyes, *A Treatise on the Diseases of the Eye* (William Wood & Co. 1881) 954.

[266] 'HOW PARIS WOULD TREAT ELWELL CASE; Information It Took New York Two Weeks to Get Would Have Been Ready in 24 Hours. EYE'S RETINA AS WITNESS Disputed Testimony Settled by Confrontation - How Crime Would Have Been Reconstructed' *The New York Times* (27 June 1920) 9. See also Lanska (n 216).

[267] Charles Norris, 'IMAGES ON THE RETINA; Dr. Norris Tells of Experiments, but Denies Any Fault on His Part' *The New York Times* (1 July 1920) 9.

mislabelled? The dictionary definition of a pseudoscience reads as follows:

> a system of theories, assumptions, and methods erroneously regarded as scientific.[268]

The defining difference between a pseudoscience and a science manifests in that the former constitutes "methods erroneously regarded as scientific."[269] With regards to optography, this is not entirely the case. There has been a definitive scientific process that has been proven to work for numerous physicists.[270] However, as aforementioned, it has also been stated that optography is not fit to be classed as a forensic science, nor to be used as a forensic method during the investigation of a crime. Not only is this due to practical reasons, but also owes to the hypothetical transition of the "science" from mere animal experimentation to human testing being hindered by the imperative boundary of ethics. The main ethical issue which presents itself is the fact that in order to gather an optogram and verify its usability in a forensic context, the subject would have to die. While there are ethical concerns in every study involving human subjects, the purposeful killing of people to verify a forensic theory would not be acceptable in any case and, in fact, reminds one of the practices of Aktion T4 carried out by Nazi doctors in WWII. [271] While subjects may generally consent to use of their body for scientific purposes after their natural death, just as donors of cadavers do in medical education today, this would not be possible in this particular instance, as examiners would (i) require exact knowledge of the final image the person saw (for the purpose of verifying the findings of the examination against the

[268] Merriam-Webster Medical Dictionary, 'Pseudoscience' (2020) <https://www.merriam-webster.com/dictionary/pseudoscience> accessed 5 January 2020.
[269] ibid.
[270] Boll (n 219). See also Kühne (n 240) 280–83 and George E Blackham, 'The Deliverances of the Retina' (1882) 21 Buffalo Medical and Surgical Journal 529–37.
[271] Melvyn Conroy, *Nazi Eugenics: precursors, policy, aftermath* (Stuttgart: Ibidem-Verlag 2017). See also Christof Beyer, 'Gottfried Ewald und die „Aktion T4" in Göttingen' (2013) 84 *Nervenarzt* 1049.

true last image seen by the subject) and (ii) the retinas must be examined immediately after death and before exposure to any other sources of visible light.

Furthermore, one must bear in mind the fact that optography is a science developed in the Victorian era. Medical and scientific procedures have advanced and evolved significantly since then and it is questionable whether the practices applied in optography would align with modern scientific standards. In today's scientific context, optography would not be practicable due to the precise and timely conditions which would need to be achieved in order to retrieve an image, but also because the methods that are known have only sparsely been documented or referenced in fiction. As such, optography can never be advanced realistically to a level at which it becomes feasible to use in a forensic context.

VII. Conclusion

On being cognisant of these findings and taking into account many aspects of optography and its complex history, dubbing it as a pseudoscience is factually incorrect. The inability to apply a science to a specific context does not invalidate the science and the scientific process in itself. Therefore, dismissing the entire field of study and advancements it has achieved as well as extending to other subjects would not only be foolish but erroneous.

Despite the science of optography being first developed in the 19th century, the belief in the "fleeting image seen in someone's eye"[272] is centuries old and clearly deeply rooted in many beliefs and cultures. The hopes of scientists to make truth of this belief seems to have briefly arisen during periods of scientific advancement, but equally quickly dismissed. However,

[272] Tanner, Hirsh and Mann (n 212) 43.

within these periods, it has been proven that this age-old belief manages to be rooted in truth, even if there is no practical way to utilise this knowledge. Nonetheless, it has brought great advances in adjoining fields of science and further influenced the worlds of fiction and modern culture to this day.

Practice over Principle: Why the Unwritten, Monarchical and Religious Nature of the United Kingdom's Constitution Should Remain Untouched

Tom Horobin Evans[†]

The constitution of the United Kingdom is unique in its unwritten, shapeless and antiquated form and in its preservation of monarchism and state religion. This article makes the essential claim that the (i) unwritten, (ii) monarchical, and (iii) religious elements of the United Kingdom's constitution are, despite often being termed drawbacks, unproblematic. This topic is of importance following the increasing pressure to reform the United Kingdom's constitution in ways which solve few Public Law issues, and risk weakening the strength and adaptability of the political and legal framework of the country. By addressing each of the three aforementioned constitutional elements individually, the value of maintaining the present constitution as it stands can be seen—leading to the conclusion that these antiquities are thoroughly worthy of preservation, despite their awkwardness. Although the state of our constitution is a common topic of legal literature, a full defence of it is unusual. Nevertheless, the findings of these examinations give the implication that, whilst it is not without flaws, stripping our constitution of what makes it unique is not the fix-all that many legal scholars believe.

I. Introduction

It is difficult to argue that the United Kingdom's (UK's) constitution stands in anything other than stark contrast to constitutions found throughout much of the world, as shown through its combination of unique characteristics. Firstly, its peculiarity is highlighted in its uncodified nature, whereas codified

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constitutions had become "almost universal" towards the end of the 20th century.[273] Secondly, in relation to its monarchism, the UK operates a legislative process requiring 'royal assent,' despite only seven of the twenty-eight European Union member states retaining any form of monarchy.[274] Lastly, the UK's constitution possesses a notable religious element, regardless of the fact that a (albeit slim) majority of countries no longer have any state or preferred religion.[275] Naturally, this might suggest that the UK constitution suffers from some degree of antiquity and, to the extent that it does, it is discordant with international constitutional developments on the whole. However, regardless of the potentially anachronistic nature of our constitution in the modern world, the UK remains near the bottom and most stable end of the Fragile State Index (149th of 178 states measured),[276] which measures the stability of a state through economic, social and political indicators. This stability, largely derived from the UK's economic sustainability and democratic legitimacy, suggests that the argument in favour of constitutional change is somewhat unfounded. Nevertheless, from this defence of the UK's current position it does not follow that all grievances with its constitution should be dismissed, or that any amendment would be unbeneficial.

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[273] Linda Colley, 'Scottish independence: Time for a UK constitution' *Prospect Magazine* (London, 24 April 2014) <https://www.prospectmagazine.co.uk/magazine/time-for-a-uk-constitution> accessed 15 November 2019.

[274] Morgane Labbé, 'Do European Monarchies Still Have Any Purpose?' *The New Federalist* (Brussels, 3 January 2018) <https://www.thenewfederalist.eu/do-european-monarchies-still-have-any-purpose> accessed 15 November 2019.

[275] Harriet Sherwood, 'More than 20% of countries have official state religions – survey' *The Guardian* (London, 3 October 2017) <https://www.theguardian.com/world/2017/oct/03/more-than-20-percent-countries-have-official-state-religions-pew-survey> accessed 15 November 2019.

[276] Fragile States Index, 'Global Data (2020)' (*Fragile States Index*, 2019) <https://fragilestatesindex.org/data/> accessed 2 February 2020.

II. 'Unwritten' constitution

To describe the UK's constitution as 'unwritten' is somewhat inaccurate. Much of the UK's constitutional laws and arrangements are, in fact, written in statute, but are not codified into a single constitutional document.[277] This continuous uncodified state is arguably its most unique and defining feature, and likely its most hotly debated. The lack of a codified constitution inherently signifies that there is no constitutionally entrenched legislation, and whilst entrenchment (generally) could be the topic of its own article, for the purposes of this article it is taken that there is limited constitutional entrenchment in the UK, and that all statutes are similarly capable of repeal.[278] Notably, this contrasts with states such as the USA, where such fundamental legal principles are "extraordinarily difficult"[279] to revoke. There is both positives and negatives to the limited entrenchment of legislation within the UK constitution.

One arguable strength of the constitution is adaptability. Legal change based on modern social attitudes does not need to be weighed against outdated or old law. For example, abortion, under certain circumstances, was simply and directly legalised under the Abortion Act 1967. This can be contrasted with the American approach—namely the achievement of legalisation

[277] Vernon Bogdanor, The New British Constitution (Hart Publishing 2009) 8–9.

[278] The case of *Thoburn v Sunderland City Council* [2002] EWHC 195 does outline a *limited* hierarchy of entrenchment, establishing a method of identifying 'constitutional statutes' (legislation of great constitutional importance, e.g., Scotland Act 1998), and, importantly, that they could only be repealed expressly by parliament, *not* through implied repeal. However, this still does not constitute the stricter limits on constitutional changes often seen in written constitutions (e.g., supermajority in the USA)—all legislation is still capable of repeal by simple majority.

[279] Richard Albert and Bertil E Oder (eds), *An Unamendable Constitution? Unamendability in Constitutional Democracies* (Springer 2018) 11.

through lengthy Supreme Court litigation in cases such as *Roe v. Wade*.[280]

Thinking more negatively, it is often argued that this leaves the UK dangerously susceptible to populism. Young argues that "the relative lack of consolidation in the UK constitution may give rise to cause for concern as to the extent to which populism may harm democracy."[281] In other words, the lack of clear mechanisms to entrench legislation means that, theoretically, legislation which defines democratic principles (such as human rights) is capable of being repealed by a simple majority in the event that a regressive populist government obtains the requisite number of seats. In reality, however, there are limits to such threats. In the *Jackson*[282] case, Lord Steyn posed a scenario (albeit *obiter*) where judges "may have to consider whether this is a constitutional fundamental which even a sovereign Parliament … cannot abolish."[283] Although it remains unknown whether such an exercise would ever arise in practice, some members of the judiciary have inferred that they have a right to protect unwritten principles of fairness, which could defeat the will of a largely populist parliament. Additionally, the unwritten constitutional principles that many criticise as unstable appear to have been largely effective in practice: the UK has not had a significant, successful violent revolution since the English Civil War of the 17th century. In *A v United Kingdom,*[284] Lord Hoffman argued that "In many important respects England is the same nation as it was at the time of… the Glorious Revolution."[285] If the UK's last

[280] *Roe v. Wade*, 410 US 113 (1973).

[281] Alison Young, 'Populism and the UK constitution' (2018) 71(1) Current Legal Problems 17, 34.

[282] R *(Jackson and others) v Attorney General* [2005] 2 WLR 866.

[283] ibid [102].

[284] *A v United Kingdom* (2009) 49 EHRR 29.

[285] ibid [91].

major constitutional change was four centuries ago, that implies that, at least, it is a relatively stable state. One of the primary reasons that the UK has never adopted a codified constitution *is* its stability; despite political revolution, arguably the "severe rupture" in societal stability which often gives rise to codification has not occurred.[286] And importantly, it must be remembered that a codified constitution does not provide unassailable protection against populism and dictatorship. For example, the Weimar Republic's codified constitution was written in a way which allowed for the eventual formation of the Third Reich.[287]

Through these examples, it is apparent that the strength of a constitution in protecting its people does not necessarily correlate with the codification of such constitutional principles. Therefore, and notwithstanding the obvious concerns surrounding the UK's reliance on unconsolidated law and unwritten principles, it remains unconvincing that a shift towards a codified constitution would engender a constitutional strengthening, or that unwritten constitutions are not suitable for the 21st century.

III. Monarchy

As a constitutional monarchy, the UK has a representative democratic parliament, and yet, it still vests power in an unelected, hereditary monarch. This can be criticised for contradicting key principles contained within the UK's uncodified constitution.

[286] Mark Elliot and Robert Thomas, *Public Law* (Oxford University Press 2017) 77.

[287] Ronald Car, 'A reply to Sujit Choudhry's 'Resisting democratic backsliding': Weimar legacy and self-enforcing constitutions in post-WWII left-wing constitutional theory' (2019) 8 Global Constitutionalism 391.

'Republic,' the UK's largest republican advocacy group, believes that the "[h]ereditary public office goes against every democratic principle."[288] In their online manifesto, they further provide that "there's nothing to stop them [the monarchy] abusing their privilege" and that a "monarchy gives vast arbitrary power to the government."[289] These three points exemplify many republican criticisms of the monarchy in relation to the UK's constitution. Essentially, these arguments advocate the opinion that constitutional principles, such as parliamentary supremacy and democracy, are undermined by the power that is attributed to the monarchy in monarchical constitutions. It is difficult to argue against the proposition that the continued existence of a monarchy within a representative democracy is somewhat contradictory—after all, those holding political power should be voted for in formal elections,[290] and monarchs simply are not. However, seven out of ten members of the UK public still support the monarchy,[291] and historically, the UK has never fallen below majority support for the continued existence of the monarchy. In a looser sense of the definition of democracy—"a system in which the people have a decisive say over how and by whom they are governed"[292]—it can be argued that the public has, in fact, had a decisive say in whether the monarchy should be upheld, through polling. The results of these polls indicate that there is no desire to become a republic state. On this view, the monarchy is not an affront to the basic principles of democracy.

[288] Republic, 'What We Want' (*Republic*) <https://www.republic.org.uk/what_we_want> accessed 2 February 2020.

[289] ibid.

[290] Elliot and Thomas (n 286) 174.

[291] Matthew Smith, 'Who are the monarchists?' (*YouGov*, 18 May 2018) <https://yougov.co.uk/topics/politics/articles-reports/2018/05/18/who-are-monarchists> accessed 15 November 2019.

[292] Elliot and Thomas (n 286) 168.

The other main point of criticism is that monarchical power is uncontrolled and damaging to parliamentary supremacy. This criticism is less convincing. Although the monarchy holds considerable power in theory, certain constitutional principles significantly curtail its *de facto* authority, and in the opinion of Wade, this has been so since the 17th century's Glorious Revolution—i.e., the informal exchange of power from monarch to Parliament.[293] The considerable pressures of these constitutional principles mean that, in actuality, the monarchy's power and influence are modest indeed, and that these principles are the lodestones preventing monarchs from "abusing their privilege."[294] Finally, it is worth noting that even where the powers that have been devolved to the government via the monarchy are wrongfully exerted, the courts have demonstrated a willingness to limit royal prerogative in recent cases such as *Miller/Cherry*,[295] by ruling that the prorogation of parliament was null. As a result, it is clear that on a purely ideological level the arguments for amending the monarchy out of the UK's current constitution are somewhat convincing. However, it appears that in actual reality the limited powers held by the monarchy indicate no real need to do so.

IV. Religious nature

Religion, and the Anglican church particularly, remain clearly present in several elements of the UK's constitution, also representing a foundational influence in other areas of the constitution. Critics of this presence, such as 'Humanists UK,'

[293] HWR Wade, 'The Basis of Legal Sovereignty' (1955) 13(2) CLJ 172.

[294] Republic (n 288).

[295] R (on the application of *Miller and Cherry*) v *Prime Minister* and *Advocate General for Scotland* [2019] UKSC 41, [2019] 3 WLR 589.

typically see the twenty-six 'Lords Spiritual' (Anglican bishops awarded judicial power) in the House of Lords as a "present example of discrimination" and "religious privilege,"[296] often calling for the total removal of Lords Spiritual altogether.

Despite this criticism, the tangible impact of this 'discrimination' and 'privilege' on statute and case law simply does not exist. Article 9 of the Human Rights Act 1998 created the statutory rights to freedom of religion, freedom to change religion, freedom to worship, to teach religion and so on.[297] Additionally, case law such as Glasgow City Council v McNab[298]—a decision which ruled that a Catholic school could not demand that a Catholic fill a specified role—showed the application of other statutory law (in McNab's case, the Employment Equality Regulations 2003[299]) in protecting religious rights. Although these cases rarely reach higher courts,[300] meaning they lack precedential weight, they are still clear examples of how religious minorities, and their beliefs, are protected in the UK. Given this, there is little evidence to suggest that the presence of Lords Spiritual has caused any significant discrimination against atheists and religious minorities, or provided privilege to Anglicans, as is often suggested.

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[296] Humanists UK, 'Bishops in the House of Lords', (*Humanists UK*, 2019) <https://humanism.org.uk/campaigns/secularism/constitutional-reform/bishops-in-the-lords/> accessed 15 November 2019.

[297] Human Rights Act 1998, sch 1, pt 1, s 9.

[298] *Glasgow City Council v McNab* [2007] UKEAT, [2007] 1 WLUK 248.

[299] Employment Equality (Religion or Belief) Regulations 2003, SI 2003/1660, regs 7(2)–(3).

[300] David Perfect, 'Religion or belief: is the law working?' (*Equality and Human Rights Commission*, December 2016) <https://www.equalityhumanrights.com/sites/default/files/religion-or-belief-report-december-2016.pdf> accessed 15 November 2019.

It is conceded that a move to incorporate religious figures from minority religions (in line with the 2011 recommendations from the Royal Commission on the Reform of the House of Lords) would make religious minorities "more representative" of the UK public,[301] however, there appears to be little practical need for this to occur. Even if the surface elements of religion in our constitution, such as Lords Spiritual, were amended away in line with an increasingly secular public, it remains that many argue our legal system is underpinned by "the Christian principles of justice and fairness."[302] Consequently, simple 'amendment' would not be able to totally erase the underlying religious influences that impact almost every element of our constitution. In practice, a full abolition of religious influence would require complete reform with conscious secularism. Even the Magna Carta, a widely venerated charter of medieval English law, which Lord Denning identified as "the foundation of the freedom of the individual against the arbitrary authority of the despot,"[303] was drafted by the Archbishop of Canterbury and was therefore partially concerned with protection of church rights.

Accordingly, there is little reason to amend the UK's constitution towards secularism. The lack of impact that religious elements of the constitution appear to have on the UK's system, and the disproportionate impracticality of achieving this task due to Christianity's deep roots, highlight the lack of a pressing need to attempt such amendment.

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[301] Cabinet Office, *Royal Commission on the Reform of the House of Lord*s (Cm 4534, 2000) 14.

[302] Jon Kelly, 'Eight arguments about whether the UK is a Christian country' (*BBC,* 23 April 2014) <https://www.bbc.co.uk/news/magazine-27111146> accessed 15 November 2019.

[303] Simon Lee, 'Lord Denning, Magna Carta and Magnanimity' (2015) 27 Denning Law Journal 106.

V. Conclusion

Superficially, the current UK constitution appears anachronistic and self-contradictory, and to some extent it is. However, as illustrated throughout, on closer examination there appears to be very little actual need to amend away its uncodified nature, monarchical presence, and religious elements. The issues that these elements could engender have been largely curtailed through a combination of constitutional principles, cumulative legislation and progressive case law. As a result, and in sharp contrast to the proposition that the UK's constitution is unsuitable for the 21st century, it is argued that the uncodified nature of the UK constitution has allowed it to be fluid, and to adapt to the 21st century, whilst maintaining the antiquities that make it unique.

Public Criminology: Theoretically Informed External Mission Against Discipline-fuelled Internal Struggle, in the Context of Criminological Need for Reconciliation

Vlad-George Zaha[†]

The mission of public criminology has long represented a point of contention amongst scholars arguing on various sides of the philosophical, criminological, and public spectra. Many questions arise. What exactly constitutes public involvement? Within which philosophical dimensions should public engagement reside? How should public work materialise? And can a theoretically sound and empirically viable form of public scholarship exist within such a diversly divided criminological field? Conceived upon an interventionist conceptualisation of public criminology, this article employs the missions of empowerment, social justice, and human rights, where public criminologists distinguish between the powerful and the powerless, directing their intellectual and professional resources towards the benefit of the latter. Specifically, this article adopts elements from the labelling theory of crime and critical race theory to evaluate the practicality of the proposed public criminology model. Conversely, although particular application methods are discussed for each theoretical paradigm, the article argues that despite individual theoretical advancements, creating a coherent and sustainable 'public criminology' amidst criminology's internal crisis is only minimally achievable. Finally, this article conceptualises diplomatic reconciliation amongst criminological perspectives as one solution towards mitigating the counterproductive effects of duelling factions. Although the introduction of such remedial framework remains a matter for prospective analysis, it is through public scholarship that criminology must re-engage in its purpose: addressing public concerns.

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I. Introduction

The criminological universe is formed by a plethora of constantly expanding schools of thought, drawn from the philosophical spectre: different scholars with often conflicting philosophies employ various methods in order to make sense of all the aspects concerning the 'crime event.' Loader and Sparks have argued that "the more criminology has grown […] the more it has fractured into self-referential specialisms that have lost their essential connection with the public concerns that they ostensibly address, and which provide criminology with its *raison d'être*."[304] In this connection, this critical piece adopts a public interventionist approach on the conceptualisation and operationalisation of a theoretically informed public criminology, appraising the extent to which the proposed form of public criminology is achievable. Firstly, it is argued that public criminology ought to encompass theoretical frameworks which advocate for direct criminological engagement with disadvantaged groups. Secondly, and conversely, due to significant difficulties in managing the pluralistic nature of criminological discourse, such a form of theoretically informed public criminology is only achievable to a minimal extent. As shall be discussed, the solution to this impasse ought to be pursued through diplomatic reconciliation of the warring intellectual factions that form the criminological universe.

To substantiate this thesis, Hamilton's organisational framework[305] will be adopted in defining and distinguishing between 'public criminology' and 'policy criminology,' as itself adapted from Burawoy.[306] The article then argues for a

[304] Ian Loader and Richard Sparks, "'What are we gonna do now?" Revisiting the public roles of criminology' (2008) 72(1) Criminal Justice Matters 18, 19.
[305] Claire Hamilton, 'Towards a Pedagogy of Public Criminology' (2013) 5(2) Enhancing Learning in the Social Sciences 20, 21–2.
[306] Michael Burawoy, 'For public sociology' (2005) 70(1) American Sociological Review 4, 16.

conceptualisation upon Carrabine's[307] characteristics of public criminology, particularly focusing on empowerment, human rights, and social justice as criminological missions. Subsequently, these criminological perspectives are situated within the labeling theory and critical race theory, which are used for the empirical application of afore-presented criminological aims, towards constructing a theoretically informed public criminology. However, whilst advocating for '*a*' type of public criminology, one must acknowledge the flexible, often convergent, forms of criminological approaches,[308] and hence, the analysis bears the multifaceted texture of criminological debate closely in mind. Lastly, a critique inspired by Turner[309] highlights how criminology's internal crisis, fulled by competing intellectual schools of thought, advances the unlikely achievability of such theoretically informed public criminology within the current spheres of the broader discipline. Significant reconciliatory efforts within the duelling schools of thought are necessary in order to achieve the public interventionist potential of criminology.

II. Conceptualising Public Criminology

It is imperative to distinguish between the two approaches which advance criminological knowledge beyond the academic realm: 'policy criminology' and 'public criminology.'[310]

Policy criminology, also called 'administrative criminology,' represents the criminological work undertaken to addresss governmental issues, often in close proximity with the

[307] Eamonn Carrabine, Maggy Lee and Nigel South, 'Social Wrongs and Human Rights in Late Modern Britain: Social Exclusion, Crime Control, and Prospects for a Public Criminology' (2000) 27(2) Social Justice 193, 206.

[308] Pat Carlen, 'Against Evangelism in Academic Criminology: for Criminology as a Scientific Art' in Mary Bosworth and Carolyn Hoyle (eds), *What is Criminology?* (OUP 2011) 97.

[309] Emily Turner, 'Beyond "Facts" and "Values": Rethinking Some Recent Debates about the Public Role of Criminology' (2013) 53(1) British Journal of Criminology 149, 160.

[310] Christopher Uggen and Michelle Inderbitzin, 'Public criminologies' (2010) 9(4) Criminology & Public Policy 725, 726.

political and administrative sectors.[311] Despite emprical evidence that it exerts influence upon 'public' policy and practice, such as Clarke's notorious situational crime prevention,[312] policy criminology is vastly discredited as a narrowly focused, easily manipulated, and atheoretical approach used to fit the simplistic governmental approach to managing the crime phenomena,[313] whilst disregarding broader societal factors (e.g. poverty, race, opportunities, consequences of criminal justice system intervention).[314] Policy criminology also reinforces the socio-political *status quo* between the powerful and the powerless, the privileged and the opressed, determining governmental action to systematically overlook disadvantaged groups, creating class, race-and-gender-based injustice.[315]

Public criminology, on the other hand, materialises as the 'conscience' of policy criminology, where the former involves a moral and critical scrutiny of the latter.[316] According to Burawoy's[317] sociological interpretation, the public approach will move beyond the servility of the policy/administrative framework, bypass political influence, and engage directly with communities, thereby resembling or constituting social activism. Hence, this article hereafter adopts the following definition of public criminology:

> [Public criminology means] working for the ordinary public rather than for narrow political interests and emphasizing social justice and human rights. An empowerment-orientated public criminology prioritizes

311 Roger Matthews, *Realist Criminology* (Palgrave Macmillan 2014) 72, 80.
312 Pat Mayhew, 'In defence of administrative criminology' (2016) 5(7) Crime Science 1, 3.
313 Phil Scraton, *Power, Conflict and Criminalisation* (Routledge 2007) 10, 13.
314 Travis Hirschi, 'Review: Administrative Criminology' (1993) 22(3) Contemporary Sociology 348, 349; Tim Hope, 'Official Criminology and the New Crime Sciences' in Bosworth and Hoyle (eds) (n 308).
315 Reece Walters, 'Government Manipulation of Criminological Knowledge and Policies of Deceit' in Will McMahon (ed) *Critical Thinking about the Uses of Research, Evidence Based Policy Series* (Centre for Crime and Justice Studies Report 2008) 14, 16.
316 Hamilton (n 305) 21.
317 Burawoy (n 306) 16.

> the interests of the public person/s (individuals/communities) over interest groups that disempower people and cause and create conditions resulting in crime or other social injuries.[318]

That aside, one must acknowledge the diverse perspectives of criminological discourse that adopt a more functionalist approach to public work. There are reasonable arguments against the compartmentalisation of 'public/policy' criminology, contending that administrative work (e.g. the development of street policing strategies) itself *is* public criminology in service of society.[319] Nevertheless, for the purposes of this article, the previously defined scope of public criminology will be adopted and defended, that is, the empowerment of ordinary people instead of politicians and the building of communities rather than policy.[320]

III. Operationalising Public Criminology: The Labeling Theory of Crime

The first theoretical approach in support of the public interventionist criminological model is the 'labeling theory' of crime, which is a revisionist adaptation of the criminological discourse.[321] The labeling theory challenges prevailing assumptions of criminality by shifting attention away from reductionist accounts of crime, towards the social construction and reaction to crime, whilst accounting for the media and the State.[322] One of the key assumptions of the labeling theory is that 'crime' is socially constructed, and 'criminals' are those who have been socially labelled as such, be it through state-proven means

[318] Carrabine, Lee, and South (n 307) 193, 206.
[319] Paul Rock, 'The public faces of public criminology' (2014) 14(4) Criminology & Criminal Justice 412, 414-21
[320] Simon Winlow and Steve Hall, *Rethinking Social Exclusion* (Sage 2013) 167.
[321] Ross L Matsueda, 'The Natural History of Labeling Theory' in: David Phillip Farrington and Joseph Murray (eds) *Labeling Theory* (Transaction Publishers 2014) 40.
[322] ibid 14, 15.

(e.g. court sentencing) or merely through public perception based on perceived course of events (e.g. police arrest). What is regarded as crime changes over time, further subject to the different cultural and geographic boundaries to reflect societal norms; labels are then attributed accordingly.[323] According to the labeling theory, the mass media's thorough involvement in the process of defining and understanding criminality affords it a disproportionate degree of influence, as the majority of people are substantially fed information on 'crime' through the news-media.[324] In deciding which events are news-worthy and by providing powerful interpretations in broadcast and print, "the news media distort the 'true' picture of crime and criminal justice" in ways that are detrimental to society.[325] 'Moral panics' represent one phenomenon caused or aggravated by media: that is, where certain groups come to be labeled as threats to society following hyper-mediatisation of synthetically constructed stories and stereotypes.[326]

A notable example of 'moral panic' stems from the Brexit debate: intensive discourse saw some news-media and politicians harness racial intolerance and xenophobia to impute distorted labels to certain groups, such as that of "criminal[s]" to foreigners.[327] Similarly, politicians may try to capitalise on societal attitudes to justify harsh criminal justice policies to the detriment of labeled groups (e.g. foreigners) and of society at large.[328] As Uggen and Inderbitzin eloquently put it, one course of action for public criminologists involves narrowing the "gap between public

[323] Howard Saul Becker, *Outsiders* (revised edn, Free Press 1973) 9.
[324] Yvonne Jewkes, *Media and Crime* (Sage 2015) 3.
[325] Chris Greer and Eugene McLaughlin, 'News Power, Crime and Media Justice' in Alison Liebling, Shadd Maruna, and Lesley McAra (eds), *The Oxford Handbook of Criminology* (7th edn, OUP 2017) 260.
[326] Stanley Cohen, *Folk Devils and Moral Panics: The Creation of the Mods and Rocker* (MacGibbon and Kee 1972) 5.
[327] Jon Burnett, 'Racial violence and the Brexit state' (2017) 58(4) Race & Class 85, 96.
[328] Will Jennings, Stephen Farrall, Emily Gray, and Colin Hay, 'Penal Populism and the Public Thermostat: Crime, Public Punitiveness, and Public Policy' (2016) 30(3) Governance 463, 465.

perceptions and the best available scientific evidence."[329] It is within public criminologists' remit to oppose distorted facts and to advance factual criminological knowledge,[330] thus avoiding moral panics.[331] Consider, for example, the previously-mentioned moral panic dimension of the Brexit debate. Evidence does suggest that the occurrence of terrorist acts increases with immigration; however, that increase owes only to "homegrown, right-wing terrorism" perpetrated by fascist or quasi-fascist individuals or groups, and cannot to be attributed to migrants or foreigners.[332]

Public criminologists informed by the labeling theory can highlight the counter-productive outcomes of state intervention on labeled 'offenders' and the wider repercusions on society. Indeed, individuals labeled as criminals or potential criminals, especially if identified as such by criminal justice institutions, experience social exclusion and may ultimately undertake membership of a deviant group, symptomatic of an internalisation of their 'offender' label.[333] Studies of imprisonment further illustrate the labelling effect on individuals, positing that short-term prison sentences inadvertently create 'hardened' criminals and damage wider society. Such phenomena occurs through the joint action of coming to self-identify as an

[329] Uggen and Inderbitzin (n 310) 726.
[330] Elliot Currie, 'Against marginality: Arguments for a public criminology' (2007) 11(2) Theoretical Criminology 175, 188.
[331] Chris Greer and Robert Reiner, 'Labelling, Media, Crime and Justice' in Gerben Bruinsma and David Weisburd (eds), *The Encyclopaedia of Criminology and Criminal Justice* (Springer 2013) 2822.
[332] Richard R McAlexander, 'How are Immigration and Terrorism Related? An Analysis of Right - and Left-Wing Terrorism in Western Europe' (2019) 5(1) Journal of Global Security Studies 179, 193.
[333] Jon Gunnar Bernburg, 'Labeling Theory' in Marv Krohn, Nicole Hendrix, Gina Penly Hall and Alan Lizotte (eds) *Handbook of Crime and Deviance* (Springer Nature Switzerland 2019) 6.

offender, whilst the societal collective consciousness defines and recognises the 'offender' label.[334]

Whilst these criminological insights can simply be disseminated and digested via news distribution,[335] there is also a more radical framework of 'News-Making Criminology' that calls for an in-depth analysis of news media frameworks and adaptation of criminological dialogue to match journalistic demands, reaching the general public.[336] Such methods of informing the public are accomplishable, at least on a situational level (e.g. identifying local/relevant criminological stories and disseminating them to a micro/meso-level audience).[337] A theoretically informed public criminology would thus both aid the disadvantaged group (by shielding them from unjustified labeling), and empower wider society by fostering awareness of the counterproductive and counterintuitive processes of nurturing crime through punishment. It is only at this point that the criminological discourse provides due impetus to challenge the *status quo*.[338]

IV. Operationalising Public Criminology: Critical Race Theory

The proposed model of public criminology requires more than merely addressing informational discrepancies. The critical race theory is another foundation upon which distinct, disadvantaged groups can be empowered and social justice can be achieved.

[334] Francis Cullen and Cheryl Lero Jonson, 'Labeling Theory and Correctional Rehabilitation: Beyond Unanticipated Consequences' in Farrington and Murray (eds) (n 321) 80.
[335] Martina Feilzer, 'The Importance of Telling a Good Story: An Experiment in Public Criminology' (2009) 48 The Howard Journal 472, 475–78.
[336] Gregg Barak, 'Newsmaking Criminology: Reflections on the Media, Intellectuals and Crime' (1988) 5 Justice Quarterly 565, 578–80.
[337] Gregg Barak 'Doing Newsmaking Criminology from within the Academy' (2007) 11 Theoretical Criminology 191, 193–94.
[338] Currie (n 330) 188.

Within the criminal justice system, young black males are over-represented at each stage of the investigative and criminal proceedings processes: they far more likely to be stopped and searched, arrested, given harsh sentences and imprisoned, than white males.[339] Additionally, minority ethnics are more likely to be victims of 'common' crime than majority ethnics, in addition to racial discrimination by state institutions.[340] Institutional racism, which indicates the police's failure to provide fair services irrespective of skin colour or ethinic origin,[341] continues to persist in the criminal justice system.[342] These issues are exacerbated by socio-economic inequality as black communities in the West are more likely to be unemployed or employed in low paying jobs,[343] to live in deprived areas that are more heavily policed,[344] and to be labeled as deviant, aggravating social exclusion.[345]

In light of minority ethnic communities being systematically disadvantaged, critical race theory is a suitable option to inform public criminology by adopting a social justice-oriented approach in favour of marginalised groups.[346] This criminologically adapted, theoretical paradigm aims to analyse and counteract aspects of racism, with a specific focus on deconstructing racialisation—the process through which criminal

[339] Noah Uhrig, *Black, Asian and Minority Ethnic disproportionality in the Criminal Justice System in England and Wales, London* (Ministry of Justice Report 2016) 9.
[340] Coretta Phillips and Benjamin Bowling, 'Ethnicities, racism, crime, and criminal justice' in Liebling, Maruna, and McAra (eds) (n 325) 195.
[341] William Macpherson, The Stephen Lawrence Inquiry (Home Office Command Paper 4262-I, 1999) 45.
[342] Mark Ellison, *The Stephen Lawrence Independent Review: Possible corruption and the role of undercover policing in the Stephen Lawrence case Summary of Findings* (House of Commons Papers 1094, 2014) 4.
[343] Adam Corlett, *Diverse Outcomes: living standards by ethnicity* (Resolution Foundation Briefing 2017) 3.
[344] Jonathan Jackson, Ben Bradford, Betsy Stanko and Katrin Hohl, *Just Authority? Trust in the police in England and Wales* (Routledge 2013) 130.
[345] Jon Gunnar Bernburg, Marvin D Krohn and Craig J Rivera, 'Official labeling, criminal embeddedness, and subsequent delinquency: A longitudinal test of labeling theory' (2006) 43 Journal of Research in Crime and Delinquency 67, 78.
[346] Richard Delgado and Jean Stefancic, *Critical Race Theory: An Introduction* (New York University Press 2001) 1.

justice mechanisms construct racial dimensions of certain acts and attribute them to minority ethnic groups.[347] Examples include 'mugging' as a racially manufactured crime, politically and socially-embedded to be attributed to young black males,[348] racialised punishment as harsher and more frequent criminal justice system interventions, and racial victimisation through police under-protection and over-policing.[349] Richie[350] provides an integrated model for public criminology wherein social justice is empirically initiated through critical race theory. This approach means redressing the ill-effects of injustice and creating opportunities, whilst prioritising theory, research and interventions on those most impacted by disadvantage and discrimination. Phillips, Earle, Parmar, and Smith[351] build on this point, arguing that criminologists must encourage reform of inherently racist State-administered systems by expanding on internal criminological thought whilst contributing to social movements and organisations.

A 'voice of colour' can be given force by public criminologists through methods such as legal 'counter-storytelling' or joining NGOs in order to empower marginalised and oppressed groups and achieve social justice.[352] A successful example is StopWatch, a civic, human rights-oriented coalition formed by academics to advocate for racial justice. The organisation has produced a series of impactful analyses

[347] John Scott, Andrew Fa'avale and Beverly Yuen Thompson, 'What can southern criminology contribute to a post-race agenda? (2018) 13(2) Asian Journal of Criminology 155, 156–58.

[348] Stuart Hall, Charles Critcher, Tony Jefferson, John Clarke and Brian Roberts, *Policing the Crisis: Mugging, the State, and Law and Order* (MacMillan 1978) 51.

[349] Sarah X Pemberton, 'Criminal Justice as State Racism: Race-Making, State Violence, and Imprisonment in the USA, and England and Wales' (2015) New Political Science 37(3) 321, 331–40.

[350] Beth E Richie, 'Criminology and Social Justice: Expanding the Intellectual Commitment' in Bosworth and Hoyle (eds) (n 308) 212.

[351] Coretta Phillips, Rod Earle, Apla Parmar and Daniel Smith, 'Dear British criminology: Where has all the race and racism gone? (2019) 24(3) Theoretical Criminology 1, 12–3.

[352] Richard Delgado, Jean Stefancic, 'Critical Race Theory and Criminal Justice' (2007) Humanity & Society 31(2-3) 133, 139.

pinpointing systemic discrimination and has positively impacted these communities through its campaigns.[353] Thus, critical race theory fits within the proposed model of theoretically informed public criminology alongside labeling theory, highlighting empowerment, human rights, and social justice as core values. Feminist criminological scholarship also advocates for justice by drawing attention to women's issues and empowering women. The Black Feminist Theory[354] is particularly apposite to the present discussion which addresses discrimination experienced by minority ethnic women, as well as the Feminist Pathways Theory, which advocates for expansion of criminological research and intervention for women more generally.[355]

V. Criminological Dissensions and Solutions

Although the nature of implementation of the theoretical perspectives presented above has been briefly explored at the end of each section, their individual effectiveness will not be contested. This article seeks to analyse the overall achievability of the proposed public criminology model within the the wider discipline and the socio-political environment. The empowerment-oriented, borderline radical approach this public criminology takes has the unfortunate effect of fuelling criminology's internal crisis: namely, that diverse approaches attempting to rationalise social and political environments cannot reach a consensus.[356] This is especially damaging where criminology is perceived by the political, public, and academic

[353] Michael Shiner, Zoe Carre, Rebekah Delsol and Niamh Eastwood, *The Colour of Injustice: 'Race', drugs and law enforcement in England and Wales* (The International Drug Policy Unit Report 2018) 1.

[354] Patricia Hill Collins, *Black Feminist Thought: Knowledge, Consciousness, and the Politics of Empowerment* (2nd edn, Routledge 2000) 6, 8.

[355] Amanda Burgess-Proctor, 'Pathways of Victimization and Resistance: Toward a Feminist Theory of Battered Women's Help-Seeking' (2011) Justice Quarterly 29(3) 309, 310.

[356] Massimo Pavarini, 'Is Criminology Worth Saving?' in David Nelken (eds), *The Futures of Criminology* (Sage 1994) 43, 62.

world as traversing a 'post-adolescent' period where the rapid development of knowledge and critical thought produces excessive disagreement and conflict, lacking the consensus/reconciliation necessary for the public to meaningfully benefit from, and engage in, the topics of debate.[357] Examples range from contesting criminological production and possession of "truth"[358] to duelling philosophies, to the complete rejection of criminological intervention within a state-dominated environment (e.g. the prison-abolitionist school of thought).[359]

However, it must be noted that some scholars have made crucial contributions which shifted at least part of the criminological universe from periods of turmoil towards moments of reconciliation. Jock Young, one of the most influential criminological minds, is a pertinent example—his influence upon scholars of various orientations was strongly characterised by cooperation and integrated theoretical advancements, marking reconciliatory achievements amongst some critical, radical, feminist, labelist and left theorists *inter alia*.[360] That said, such forms of influential study have mostly resided and resulted in a new criminological scholarship, namely 'left realism,' which *eo ipso* remains at odds with a significant amount of the already-existing and newly-forming criminological schools of thought. Relevant examples include radical critiques and powerful attacks against left-wing realism,[361] as well as dissension stemming from differences in fundamental philosophical concepts within right-wing realist

[357] Matthews (n 311) 26.
[358] Vincenzo Ruggiero, 'How Public is Criminology?' (2012) Crime Media Culture 8(2) 151, 154–55.
[359] Viviane Saleh-Hanna, 'Penal Abolitionist Theories and Ideologies' in Viviane Saleh-Hanna (eds), *Colonial Systems of Control: Criminal Justice in Nigeria* (University of Ottawa Press 2008) 417.
[360] Walter S DeKeseredy, 'Remembering Jock Young: Some Sociological and Personal Reflections' (2015) 23(1) Critical Criminology 155, 156–58.
[361] Thomas O'Reilly-Fleming, 'Left realism as theoretical retreatism or paradigm shift: Toward post-critical criminology' in Thomas O'Reilly Fleming (eds), *Post-Critical Criminology* (Toronto Prentice Hall 1996) 410.

scholarship.[362] Where high levels of dissent preside (as with much of the criminological landscape), reconciliation between intellectual perspectives must transcend not only the barriers of *similar* schools of thought, but also the barriers of *conflicting* ones.[363]

These conflicting approaches become relevant as public and political audiences are highly sensible to discourse struggles within the discipline. Politicians may well reinforce their own perspective,[364] whilst the public may equally well reject criminological intervention due to lack of coherence or credibility.[365] On a wider scale, this tallies with Cohen's powerful critique: if criminology is not capable of identifying with itself or of finding its bearings, it will also be unable to identify with any social actor or intervene upon any social scene.[366] For the proposed model of theoretically informed public criminology, the outcome is thus only marginally achievable as contasting with its interventionist scope, in which case "criminology's public role will remain inadequate and interminable, permitting only limited knowledge to exercise an unjustified dominance over others."[367] Put bluntly, it is not the interventionist practices/values developed in the previous paragraphs, but rather criminology's inability to integrate different perspectives, that makes this form of public criminology minimally achievable, at least within the criminological discipline.

One solution is proposed by Turner,[368] who argues that public criminology should develop a conceptualisation of the

[362] Mayhew (n 312) 2.
[363] Turner (n 309) 164.
[364] Lesley McAra, 'Can Criminologists Change the World? Critical Reflections on the Politics, Performance and Effects of Criminal Justice' (2017) 57(4) British Journal of Criminology 767.
[365] Lynn Chancer and Eugene McLaughlin, 'Public criminologies: Diverse perspectives on academia and policy' (2007) 11 Theoretical Criminology 155, 161; Jock Young, *Criminological Imagination* (Polity 2011).
[366] Stanley Cohen, *Against Criminology* (Transaction Publishers 1988).
[367] Turner (n 309) 160.
[368] ibid 162.

social scientist inspired by diplomatic reconciliation, thus constructing a more nuanced and integrative approach to public intervention. Turner summarises the argument within Loader and Sparks' development of the theory of 'democratic under-labouring': criminological knowledge should be reconciled in a diplomatic manner, understanding diverse areas of action, and shuttling "between camps in the service of productive coexistence."[369] Criminologists adhering to this theory will thus operate in an environment where criminological discourse can provide suitable responses for diverse audiences, enabling pursuit of the values of empowerment, social justice, and human rights embodied within this theoretically informed public criminology. However, the extent to which this is achievable is inconsistently developed in Loader and Sparks' piece, and most importantly, the exact procedure for implementation and transformation is not sufficiently expanded upon in Turner's work, in addition to the problems presented by unclear terminology.[370] These are essential aspects given the highly divisive nature of the criminological universe, [371] and are aspects in respect of which re-alignment ought to be pursued with caution.

VI. Conclusion

This article has conceptualised public criminology within a public interventionist framework of empowerment, social justice, and human rights, initiating it through the labeling and critical race theories to construct a theoretically informed public criminology. Whilst advancements in achieving the proposed aims and values have been presented for each theory, it is the wider discipline of criminology and subsequent struggles which

[369] Ian Loader and Richard Sparks, *Public Criminology?* (Routledge 2011) 144.
[370] Jacqueline Tombs, 'A Symposium of Reviews of Public Criminology?: Which Public? Whose Criminology?' (2011) 51(4) The British Journal of Criminology 707, 709.
[371] David Wilson 'Counterblast: The Public Criminologist and the Democratic Under-labourer' (2013) 52(5) The Howard Journal of Crime and Justice 543, 544.

constrain the realisation of the proposed concept of public criminology to be minimally achievable, at least within the current state of the industry. In its rapid expansion of theories, programmes, modes of action, and curriculum, criminology must—if it is to address the "public concerns [that] provide [it] with its *raison d'être*"[372]—find grounds for reuniting its duelling factions.

[372] Loader and Sparks (n 304) 19.

Electronic Monitoring as an Electronic Panopticon: A Foucauldian Perspective

Michelle Corallo[†]

The recent increase in electronic monitoring as a substitute for prison sentences despite its unproven efficacy raises questions regarding its scope in society as a punitive method. The topic of constant surveillance through electronic monitoring is best understood by adopting a Foucauldian framework whilst drawing appropriate parallels with Bentham's panopticon. However, the Foucauldian principles provide an incomplete account of the guiding principles underpinning surveillance, and alternate doctrines and reasonings will be explored to fill its gaps. Specifically, it is argued that electronic monitoring is the natural advancement of the panopticon and carries three critical functions. First, it maintains Foucault's disciplinary society by taking advantage of the power-body knowledge in order to normalise and control offenders and the broader public. Second, it functions as a cultural artefact, symbolic of contemporary technologically innovative societies. Third, from a strict Marxist perspective, electronic monitoring is preferred because, compared to prison sentences, it is more cost-effective, and thus more suitable for general society.

I. Introduction

In the last twenty years, the United Kingdom witnessed a dramatic growth in the use of electronic monitoring (EM), which has been increasingly adopted in various jurisdictions as an alternative to prison sentences.[373] In essence, EM remotely tracks the movements of an offender via a GPS, usually installed on an irremovable ankle bracelet. By corollary, the offender is

[†] B.A. (Hons), University of Manchester School of Social Sciences.

[373] E.g. National Audit Office, 'The new generation electronic monitoring programme' (July 2017) <https://www.nao.org.uk/wp-content/uploads/2017/07/The-new-generation-electronic-monitoring-programme.pdf> accessed 8 February 2021 (United Kingdom); Correctional Service Canada, 'Electronic Monitoring of Offenders' (CD 566-11, 2016) <https://www.csc-scc.gc.ca/acts-and-regulations/566-11-cd-eng.shtml> accessed 12 July 2021 (Canada).

encouraged to respect curfews, off-limit areas, and mandatory meetings as failure to comply results in court procedures or custody.[374]

This article assesses whether EM is the start of a new electronic prison, and is thus preferable as a better surveillance method that reflects cultural sensibilities and mentalities whilst maintaining the class structure.[375] Foucault's work has been chosen as the centrepiece of analysis as "every issue of surveillance and society is a Foucault issue."[376] Foucault's disciplinary power and panopticism will be addressed, arguing that EM is nothing more than an advanced and "electronic" panopticon designed to normalise and control.[377] Furthermore, the article will consider alternative explanations of Foucault's intellectual bases, arguing that EM is additionally a cultural artefact. Lastly, discussion turns to an insight on power that can indeed be gleaned from Marxist thought which shifts the purpose of EM and, once again, serves as a critique of Foucault for neglecting social structure and labour.

II. Power-knowledge-body and panopticism

A proper understanding of Foucault's basic principles is essential before proceeding with the core issues of this article. The underlying theme of his findings most pertinent for the purposes of this piece is the interplay between power, knowledge and the body. At the heart of this relationship, Foucault depicts the body, which is a tool to determine the power relations, as a thing to be "mastered" and trained to become "docile."[378] Power can be

[374] ibid.
[375] Norbert Elias and Jephcott Edmund, *The Civilising Process* (Blackwell, 1978).
[376] David Wood, 'Foucault and Panopticism Revisited' (2003) 1(3) Surveillance & Society 234, 234.
[377] David Lyon, 'Bentham's Panopticon: From Moral Architecture to Electronic Surveillance' (1991) 98(3) Queen's Quarterly 596, 608.
[378] David Garland, *Punishment and Modern Society: A Study in Social Theory* (first published 1990, University of Chicago Press 2012) 137.

understood as a form "of domination and subordination," an omnipresent part of socialisation which signifies influence and control.[379] Power is a "mode of action" that influences another's behaviour and thinking.[380] The Foucauldian power is fluid: it does not belong to any group. In fact, its movements are dictated and modified by knowledge. Knowledge refers to the understanding of a body and its characteristics, and accordingly, it allows the exercise of power. Once knowledge is obtained, power can reach the body, the target of control. Power and knowledge are mutually dependent; there cannot be power without knowledge nor knowledge without power. As a matter of fact, the general concept of discipline as a sanction for wrongdoing is a system of power exercised for the purpose of controlling the behaviour of society.[381] For Foucault, the power-knowledge-body triangle is at the "basis of society" and governs all aspects of life, including discipline[382] and is thus essential to explain the increase of EM.

Foucault postulates that knowledge is shaped by historical changes, and hence it also transforms how disciplinary power is displayed by the State.[383] His 19th century historical analysis of the modern punitive system suggests that, as the public grew increasingly aware of the State's power, the need for corporal (physical) punishment as a display of authority gradually ceased. Moreover, physical penalties inflicted to the body were suboptimal in light of more suitable forms of punishment as the focus of punishment is shifted to correction and normalisation instead. Society now disciplines the 'soul,' which can be understood as crucial aspects of an individual's internal cognition, in order to alter, train, and standardise the mind.[384] This process of normalisation helps the State maintain disciplinary power over

[379] ibid 137.
[380] Michel Foucault, 'The Subject and Power' (1982) 8(4) Critical Inquiry 777, 790.
[381] Michel Foucault, *Discipline and Punish: The Birth of the Prison* (first published 1975, Penguin 1977).
[382] Garland (n 378) 138.
[383] ibid.
[384] Foucault (n 381).

society.[385] Normalisation is achieved through a specific mechanism where the individual is monitored, his conduct recorded and subsequently compared to the preferred standards of behaviour.[386] Foucault suggests that the knowledge acquired feeds the power-knowledge relationship. The body, disciplined, will have no alternative but to conform.[387] According to Foucault, this historical route allowed the prison to emerge as a preferred method of discipline.[388]

Foucault applied Bentham's panopticon as a mechanism for the operation of disciplinary power in order to further explore the relationship between surveillance and discipline in a practical fashion. Bentham designed the panopticon (or inspection house)—an architectural structure promoting surveillance.[389] The word "panopticon" has Greek origins and efficiently captures the fundamental characteristic of the panopticon—namely, "all-seeing."[390] Its design provides for a central control tower from which an individual is able to continuously monitor every inmate in the cells.[391] The inmates are "clearly visible" to the central building "which they [the inmates] cannot see."[392] The incessant subjection to surveillance, and the exercise of power-knowledge, coerce the of self-control. In the panopticon prison, the coercion is comparatively gentle and subtle; it is not physical, but it directly affects the soul' in a manner consistent with Foucault's historical insight. Hence, the panopticon epitomises the power-knowledge relationship and the "new disciplines of modern social control."[393] The panopticon represents an extensive part of Foucault's work, who defines it as an extraordinary "machine"

[385] Garland (n 378).
[386] ibid.
[387] Foucault (n 381).
[388] ibid.
[389] Jeremy Bentham, *Panopticon; Or, The Inspection House* (T. Payne 1791).
[390] Lyon (n 377) 597.
[391] Bentham (n 389).
[392] Garland (n 378) 146.
[393] Lyon (n 377) 597.

and a "laboratory" to "correct individuals."[394] On his model, schools, workplaces and other common institutions themselves mirror the design and regime of the panopticon and strive to discipline "docile bodies."[395] These organisations contribute to the "disciplinary society" which, Foucault carefully underlines, is not inherently educated, but, instead, disciplines bodies (citizens) through the surveillance of "panopticon machine[s]" in various forms.[396]

III. Electronic monitoring as an electronic panopticon

Foucault predicted that the panopticon was just the start of the modern, automated era of surveillance.[397] The panopticon is, indeed, "a key spatial figure" in the contemporary electronic monitoring of offenders.[398] As of March 2019, more than ten thousand offenders are subjected to EM, the remote GPS tracking enforced through an ankle bracelet. For almost half of them, EM has been imposed as a court sentence.[399] Despite these numbers, EM has significant consequences for offenders and their family members and/or cohabitees who themselves suffer the inconveniences of living with an offender subject to EM.[400] Research has shown that cohabitees of individuals under EM are often forced to diminish their social life as well as covering roles of "co-punishers" by ensuring the enforcement of curfews or other EM related conditions.[401] Moreover, EM's effect on

394 Foucault (n 381) 202–04.
395 ibid.
396 ibid; Garland (n 378) 146.
397 Lyon (n 377).
398 Wood (n 376) 235.
399 Ministry of Justice, 'Electronic monitoring caseload' (2019) <https://data.justice.gov.uk/contracts/electronic-monitoring> accessed 8 February 2021.
400 Delphine Vanhaelemeesch and Tom Vander Beken, 'Between convict and ward: the experiences of people living with offenders subject to electronic monitoring' (2014) 62 Crime, Law and Social Change 389, 409.
401 ibid 400.

recidivism has not been proven, questioning its efficacy as a substitute for incarceration.[402] However, EM is so consistent with the power-knowledge relation and the panopticon's disciplinary power to such an extent that many referred to EM as the "electronic panopticon."[403] Then, is EM simply the natural technological evolution of the panopticon, as perceived by Foucault? Through EM, the offender is subjected to constant monitoring. Although he/she is uncertain of being monitored in that very moment, the offender decides to conform because of a possibility of being observed.[404] At base, the more extensive the monitoring an offender is subject to, the more knowledge is acquired, allowing for greater exercise of power on the body. And in a cyclical manner, power enables the collection of more knowledge and increases its control upon the body. The propensity to prefer EM, instead of the prison sentence, and the former's rather widespread use, can be problematic due to its shortcomings.

Foucault believed that the prison is a failure.[405] In his frameworks, prisons do not correct offenders, nor do they deter them from offending, and he alluded to recidivism as evidence.[406] However, it has "certain very precise functions"[407] which constitute a "covert form of success."[408] Apart from being a long-lived phenomenon within virtually all cultures, the prison creates a category of delinquents.[409] This is used as a political manoeuvre in order to distinguish "crime from politics" and incite members of the working class against delinquent members of their class.[410] By establishing a notorious class of delinquents, the prison guarantees that offenders are supervised by the authorities and

[402] ibid 400.
[403] Lyon (n 377) 608.
[404] Wood (n 376) 236–38.
[405] Foucault (n 381).
[406] ibid.
[407] ibid 271.
[408] Garland (n 378) 149.
[409] ibid 149–50.
[410] ibid 150.

that the other members of the working class are controlled owing to a fear of becoming 'delinquents' themselves.[411] Hence, it may be inappropriate to compare EM to the prison in terms of offender rehabilitation, correction, or deterrence without considering the wider social scope both serve. To Foucault, the real focus is the extent to which punitive systems can control the powerless and render their bodies docile.

Applying this logic to EM, it is obvious why it would be preferred over prison sentences. First, it bypasses certain undesired side-effects of incarceration, such as overcrowding.[412] Second, it accomplishes the objective of punishing the soul, that is, to coerce subjects into conforming, but in a gentler, yet no less effective way. As formerly mentioned, EM works as an electronic panopticon. It induces inmates to conform owing to the fear of being observed. The body is subjected to minimal physical oppression from an invisible and automatic power.[413] Statements from individuals subjected to EM reveal that "it is psychologically wearing" and more tedious "than the world of prison," and that EM has the same level of restraint as prison "in terms of self discipline" but with less physical coercion.[414] As a matter of fact, despite still being forcibly confined to his habitation, the individual *willingly* decides to comply to his obligations. Any such voluntary obedience seems to be a result of constant technological surveillance. With reference to Foucault's historical analysis, the diminishing of physical coercion can be explained by the loss of the need for the State to overtly display power and authority.[415] This is true now more than ever. As technology advances, society becomes increasingly aware of the State's presence by means of EM, a novel form of surveillance.[416] Finally,

[411] ibid 150.
[412] Vanhaelemeesch and Vander Beken (n 402).
[413] Lyon (n 377).
[414] Richard G. Fox, 'Dr Schwitzgebel's Machine Revisited: Electronic Monitoring of Offenders' (1987) 20(3) Australian & New Zealand Journal of Criminology 131, 142.
[415] Foucault (n 381).
[416] Lyon (n 377).

EM achieves the same "covert form of success" as that of the prison.[417] Subjecting an individual to EM inspires a similar degree of societal stigma as a prison sentence, since EM is, like the prison, visibly associated with criminal activity. This mechanism helps maintain and reinforce the delinquent class created by the prison whilst simultaneously controlling the working class.[418]

IV. Electronic monitoring as a surveillance artefact

Although Foucault's ideas might seem to serve as a strong account of EM as an alternative to prison sentences, Garland critiques his approach. Garland, like several other critics of Foucault, remarks that power cannot be the only rationale behind punishment.[419] Understanding historical changes in the nature and delivery of punishment is a multifaceted task which requires a consideration of culture.[420] A cultural examination of punishment, according to Garland, should be taken alongside any theory and it should always account for sensibilities and mentalities.[421] The panopticon, which sits at the heart of Foucault's surveillance thesis, is, in fact, a hybrid between "the penal and the popular culture."[422] Indeed, Bentham himself acknowledges that his design resembles a popular trinket of cultural architecture, the Rotunda.[423] Moreover, Foucault failed to account for the fact that Bentham favoured physical punishment such as "gagging [and] manual violence" to deal with resistance to conformity.[424] This is inconsistent with Foucault's disciplinary society that instead rejects physical punishment. Thus, Foucault

[417] Garland (n 378) 149.
[418] ibid 149.
[419] David Garland, 'Foucault's *Discipline and Punish* - An Exposition and Critique' (1986) 11(4) American Bar Foundation Research Journal 847, 877.
[420] ibid; Garland (n 378) 148–49.
[421] Garland (n 378).
[422] Philip Smith, *Punishment and Culture* (University of Chicago Press 2008).
[423] John Bowring (ed), *The Works of Jeremy Bentham* (William Tait 1843).
[424] ibid.

view of Bentham's panopticon, which is not only the epitome of power-knowledge but also a grand display of cultural influence, could benefit from a cultural perspective providing an additional facet to the analysis. At this point, it is imperative to understand that Garland does not reject Foucault's power and control. Instead, he stresses that cultural forces must be considered as a *necessary and additional layer* of dominant theories of punishment. Hence, Foucault's theory alone could not fully account for the increase of EM as a sentence.

Similarly, Monahan[425] applies a cultural analysis to the topic of surveillance. Contemporary societies have become increasingly accepting of technological surveillance. For instance, because we approve and embrace systems like customer loyalty cards, although they track our shopping habits, they are now part of our culture.[426] Thus, as we have come to welcome, or at least to accept the existence of, technology and surveillance, EM cannot solely be conceived as an instrument of power and control. Instead, it can also be studied as a "surveillance artefact," expressing society's sensibilities and mentalities.[427] Further, punishment and culture benefit from a symbiotic relationship where they influence, shape, and determine each other's boundaries.[428]

V. Electronic monitoring as product of capitalism

Through a careful analysis of EM, it must be emphasised that power still heavily contributes to our understanding of EM as an electronic panopticon despite the introduction of cultural forces. Scholars have added several interpretations to the way power shapes punitive systems, often challenging their colleagues' work.

[425] Torin Monahan, 'Surveillance as cultural practice' (2011) 52(4) The Sociological Quarterly 495, 495.
[426] ibid.
[427] ibid 499.
[428] Garland (n 378).

Academics adopting the Marxist perspective see punishment as the instrument of a political economy, which is based on the distribution of classes and labour. Unlike Foucault, Marxist approaches view power as static and not obtained through knowledge. Instead, it is determined by the ownership of modes of production and is exclusive to the ruling class.[429] Hence, punitive methods follow the pattern of labour demand in society to serve the needs of the powerful, who control the working class and the flow of labour.[430] From this different analysis of power, Marxist academics see surveillance as a "necessary component" of a contemporary capitalist civilisation.[431] Perhaps, the increase, and introduction, of EM is simply a reflection of what suits our contemporary ruling class best. After all, EM is a cheaper punishment, saving the State more than £70 a day per capita[432] while still allowing the working class to be constantly controlled. Simultaneously, it allows individuals to continue participating in the production of labour, as they are not in prison, serving society. Although it is reminiscent of Foucault's power to control, the Marxist perspective critically adds a layer of reasoning pertaining to economic power and class structure to supplement Foucault's explanation of EM. It highlights the necessity to go beyond Foucauldian 'power' and investigate what other factors could explain the preference of EM over prison sentences.

VI. Conclusion

This article has discussed the emergence of EM as an alternative to prison by exploring how other theories can build additional layers to the Foucauldian perspective. EM appears to be an electronic panopticon, which draws from the power-knowledge

[429] ibid.
[430] Dario Melossi and others, *Punishment and Social Structure* (first published 1939, Transaction Publishers 2003).
[431] Christian Fuchs, 'Political economy and surveillance theory' (2012) 39(5) Critical Sociology 671, 684.
[432] National Audit Office (n 373).

principle in order to control and monitor offenders. As an alternative to prison, it efficiently punishes the soul while applying little to no physical coercion. Instead, it is the individual himself who decides to conform in fear of being observed. In this way, EM maintains Foucault's disciplinary society, controlling the working class and preserving the utility of the 'delinquent class' label. In other words, EM is the natural technological evolution of the prison.

Moreover, as Garland remarks, cultural forces heavily influence punitive systems. Thus, EM further reflects our adaptation to new technological means of surveillance, which society has come to embrace or accept. Just as the panopticon was a cultural artefact (albeit neglected in that regard by Foucault), EM represents a progression of culture and is, in fact, a surveillance artefact of contemporary society.

Additionally, EM enjoys an economic advantage. As Marxist scholars suggest, power can also be conceived in terms of ownership of labour and, in a capitalistic society, belongs to the ruling class. Therefore, the choice of EM as an alternative to prison sentences is, perhaps, due to its financial benefits rather than its efficiency in the criminal justice system.

In summary, the increase of EM as an alternative to prison sentences can be explained through three lenses which, together, convey a fuller picture. EM is a more sophisticated surveillance technique that is more advantageous to society and that is becoming ingrained in such as a cultural artefact and, thus, might be preferred to prison sentences. However, this article is just the start of a longer, more knowledgeable discourse on EM, punishment, and society. Future writings should, perhaps, focus on understanding the demographic of individuals subjected to EM to investigate other socioeconomic factors that might result in EM's gradual increase in appeal to law-makers and law-enforcement.

Medical Gatekeeping and Access to Abortion: Opening the Floodgate or Embracing Patient Autonomy?

Yunjiao Liu[†]

Under section 1(1)(a) of the Abortion Act 1967, abortion is permissible within 24 weeks of gestation if the continuance of pregnancy could cause greater harm to the woman or her family than terminating the pregnancy. However, the satisfaction of these requirements is to be determined by two registered medical practitioners acting in good faith. This requirement has faced much contention from legal academics and practitioners and serves as the focal point of this article. This article will begin by delving into the underlying rationales behind medical gatekeeping, highlighting the outdated and inaccurate perception of the women who seek abortions, which are often underpinned by gender stereotypes. This will be followed by an examination concerning the implications of the current law, including the power imbalance caused by medical gatekeeping and its effect on the doctor-patient relationship. Lastly, the article will conclude by evaluating and refuting the concerns surrounding the potential 'opening of the floodgate,' explaining why such fear is inherently fallacious and misplaced. Together, this article seeks to highlight why access to abortions should not be gatekept. Instead, the pregnant woman is in the best position to make abortion decisions for herself.

I. Introduction

Whilst the law allows abortion to take place under certain circumstances in the United Kingdom, access to abortion is still not an automatic legal right. Instead, abortions may only be undertaken if the approval of two registered medical practitioners has been obtained. This legal requirement serves a 'gate-keeping' function that is in dire need of reform. The article will start by

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deconstructing the rationales behind doctors' gatekeeping powers, which is underpinned by a limited and outdated gender perception that is inappropriate in contemporary society. The adverse implications of medical paternalism will also be explored, including its effect on the patient-practitioner relationship, and by extension, the quality of medical care provided. The last section of this article will assess the 'abortion on demand' counterargument often used to justify the current overly paternalistic framework, and the fallacious nature surrounding this assertion. The article will not engage in the pro-life or pro-choice debate, as the English jurisdiction already permits abortion. Instead, this article contends that the gate-keeping role given to clinicians surrounding abortion decisions is a relic that has no place in modern society. Women are instead best placed to make abortion decisions for themselves.

II. History of Abortion Legislation and the Current Law

The procuring of a miscarriage by the mother or any third-party is a criminal offence under Section 58 and Section 59 of the Offences Against the Person Act 1867, which remains in force at the time of writing. Additionally, under the Infant Life Preservation Act 1929, it is a felony to cause the death of a child through a wilful act before they have an existence independent of their mother, unless it is to preserve the mother's life. *R v Bourne*[433] reflects this, wherein Macnaghten J affirmed the lawfulness of abortions under the condition that the pregnancy places the mother's physical or mental health in jeopardy.[434] Following this, the Abortion Act 1967 was introduced with the aim of bringing uniformity and clarity to the law. Whilst abortion is still a criminal offence under the aforementioned statutes, the 1967 Act confers legal authority to terminate a pregnancy that would otherwise be

[433] [1938] 3 All ER 615.

[434] Margaret Brazier and Emma Cave, *Medicine, Patients and the Law* (6th edn, Manchester University Press 2016) 311.

unlawful. Under the Abortion Act 1967, abortion is deemed lawful if the woman's circumstances satisfy at least one of the four grounds of the Act. Notably, s 1(1)(a) permits abortion before the 24th week of gestation if the harm to the woman's physical or mental health, existing children or family, is greater than terminating the pregnancy.[435] However, the satisfaction of these requirements is to be determined by two registered medical practitioners acting in good faith.[436]

III. Deconstructing the Rationales Behind Current Laws

(i) The Woman

To evaluate whether doctors should continue as the 'gatekeepers' of abortion decisions, one must understand the origin of this prescription of power. In this case, the historical context of the Abortion Act 1967 is especially important as it provides an explanation of the rationales behind modern abortion laws. Indeed, it is within the antiquated narrative of women being considered 'immature,' 'vulnerable' and 'desperate,'[437] or in some way 'plunging into despair.'[438] For example, during parliamentary debates, Lord Silkin often portrayed women who seek abortion as either ill, facing imprisonment or inadequate to care for a family.[439] In these contexts, women who sought abortions were viewed through the lens of blame, labelled as "immoral" or "foolish" and having their current situation attributed to their personal inadequacies.[440] MP David Steel, who introduced the Bill for the Abortion Act 1967, also emphasised facilitating the access

[435] Abortion Act 1967, s 1(1)(a).
[436] ibid.
[437] Mary Boyle, *Re-thinking Abortion: Psychology, Gender, Power, and the Law* (Routledge 1997) 71.
[438] Sally Sheldon, *Beyond Control: Medical Power and Abortion Law* (Pluto Press 1997) 38–41.
[439] Sally Sheldon, 'A Missed Opportunity to Reform an Outdated Law' 2009 4(1) Clinical Ethics 3.
[440] Emily Jackson 'Abortion, Autonomy and Prenatal Diagnosis' Social & Legal Studies (2000) 9(4) 467, 487.

of women to the medical profession.[441] As the objective was to tackle backstreet abortions and to encourage women to seek out doctors instead,[442] it is unsurprising that the clinician would gatekeep abortion decisions, as the women seeking abortion were believed to be unfit to make such decisions.[443] This view underlies how abortion decisions were perceived and forms the foundations of the Abortion Act 1967.

However, this is problematic in the modern world where gender equality and women's rights are fundamental principles underpinning our society,[444] which the state of the current law does little to accommodate. One particular concern is what Jackson calls a "condition of legality."[445] In other words, because lawful abortions were granted under the premise that women are vulnerable, inadequate, and require the guidance of doctors, it became a requirement for women to portray themselves as such in order to gain access to an abortion. This is heavily reflected in the current law, where s 1(1)(a) requires the woman to establish the condition of falling victim to either physical or psychological harm if abortion(s) are not granted.[446] Improvement to one's quality of life is somewhat irrelevant as compared to whether or not detriment will be caused; the focus is on protecting rather than empowering women to make an autonomous choice. As a result, some women are required to exaggerate their vulnerability to the extent of presenting their circumstances in a negative light.[447] Their perceived immaturity and inadequacy cement the

[441] Sally Sheldon, 'The Letter and Spirit of the Abortion Act' in British Pregnancy Advisory Service, *Britain's Abortion Law: What it says, and why* [sic] (British Pregnancy Advisory Service 2013) 15 <http://www.reproductivereview.org/images/uploads/Britains_abortion_law.pdf> accessed 15 August 2021.
[442] ibid 16.
[443] Sheldon (n 439) 3.
[444] Jo Bridgeman, 'A Woman's Right to Choose?' in Ellie Lee (ed), *Abortion Law and Politics Today* (Macmillan Press Ltd 1988) 89.
[445] Emily Jackson, *Regulating Reproduction: Law, Technology and Autonomy* (Hart Publishing 2001) 75.
[446] Abortion Act 1967, s 1(1)(a).
[447] Jackson (n 445) 81.

notion of their incompetence as decision-makers,[448] and medical gatekeeping is therefore required.

The present framework is clearly concerning as it facilitates an inaccurate and stereotypical view of women that rests on an "outdated framework"[449] originating from the 1960s. In contemporary society, almost one third of the female population will seek abortion at least once in their lifetime.[450] Abortion is now a common and socially acceptable procedure with little medical risk, and the women who were previously viewed as inadequate because they diverged from the traditionally held views are no longer an anomaly; they are just "ordinary women" from all social classes.[451] The normalisation of abortion and reduced medical risks associated with the procedure significantly undermines the need for 'protection.' Henceforth, the archaic reasoning behind the denial of women's decision-making powers has no place in modern society. Instead, these factual inaccuracies and inherent discrimination "fossilise[] the values & assumptions of the era."[452]

(ii) Social versus Medical Decision

Another rationale behind doctors' decision-making powers is that abortion has always been construed as a 'medical decision.' Although it does not accurately reflect the true nature of modern abortion decisions, the reliance on medical practitioners' professional judgment is so deeply embedded in the public mindset that anything otherwise is seen as preposterous and

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[448] ibid.

[449] Sally Sheldon 'It's time to ditch the two-doctors rule' (*Spiked*, 20 October 2008) <https://www.spiked-online.com/2008/10/20/its-time-to-ditch-the-two-doctors-rule/> accessed 27 March 2020.

[450] Royal College of Obstetricians and Gynaecologists, *The Care of Women Requesting Induced Abortion Evidence-based Clinical Guideline Number 7* (RCOG Press 2011).

[451] Sheldon (n 439) 4.

[452] Sally Sheldon, 'The Decriminalisation of Abortion: An Argument for Modernisation' (2015) 36(2) Oxford Journal of Legal Studies 334.

unacceptable. This notion is frequently reinforced in Parliamentary debates, where abortion decisions were framed as "medical decisions," and involves the "right of the doctors."[453]

However, the past status quo in this regard is unreflective of modern life. Approximately 98% of abortions in recent times were carried out under s 1(1)(a) of the Abortion Act 1967, also known as the social ground.[454] To examine whether this requirement is satisfied, the factors taken into consideration are often not medical in nature, but instead rely heavily on an abundance of social factors that are both complex and confidential. For example, the woman's social circumstances, financial state, familial ties, support network, and foreseeable environment are all of relevance,[455] as well as the woman's ethnicity and culture which touch upon issues such as sex-based abortions.[456] These are social decisions specific to the woman's individual circumstance, and accordingly, it is dubious to argue that a doctor's clinical training and medical expertise is adequate to enable a comprehensive weighing of these various social implications.[457] Doing so is an attempt to 'medicalise'[458] abortion laws, which simply does not reflect the realities of the current situation.

[453] Boyle (n 437) 71.
[454] Department of Health and Social Care, 'Abortion Statistics for England and Wales' (2020) 4.7 <https://www.gov.uk/government/statistics/abortion-statistics-for-england-and-wales-2020/abortion-statistics-england-and-wales-2020> accessed 16 August 2021.
[455] Jackson (n 445) 75. See also Jonathan Herring, *Medical Law and Ethics* (6th edn, Oxford University Press 2016) 309.
[456] Brazier and Cave (n 434) 313.
[457] Jackson (n 445) 71.
[458] ibid 75.

IV. Implications and Concerns Surrounding the Current Law

(i) Doctors' Powers

Having explored the current legal position of the woman, the level of power and degree of discretion granted to doctors will be explored to further highlight the power imbalance between the two parties. Firstly, the ambiguous nature of the statute combined with a reluctance for judicial interference results in a worrisome system where doctors operate on questionable discretion when applying the criteria. This is concerning because not only are women denied the decision-making power, but they are also pitted against a system with an "unjustifiable" degree of power.[459]

For example, the statute governing the circumstances in which abortions should be granted was intentionally left vague,[460] with limited details on the relevant factors to taken into consideration when deciding one's eligibility for accessing abortions. s 1(2) of the Abortion Act 1967 states that "account may be taken of the pregnant woman's actual or reasonably foreseeable environment." Taken ostensibly, this suggests that whilst practitioners can take these environmental factors into consideration, it is not legally imperative for them to do so.[461]

Academics have identified the Abortion Act as a deliberate act to prevent the erosion of doctors' powers,[462] and to ensure women do not feel 'entitled' to abortion.[463] The only limitation in the statute is that the doctor must not act in bad faith,[464] yet there has only been one case where this was found, a

[459] ibid 86.
[460] ibid 77.
[461] Dorothy Flower, 'Certifying Abortions: The Signing of HSA 1 Forms' in British Pregnancy Advisory Service (n 441) 23.
[462] Jackson (n 445) 78.
[463] ibid 82.
[464] Abortion Act 1967, s 1(1).

case where the evidence was undeniably obvious.[465] In the case *R v Smith,*[466] the doctor was found to have acted in 'bad faith' after exhibiting clear unscrupulous behaviour, such as neglecting to conduct any medical tests, internal examination, and attempting to conceal evidence and mislead the Court.[467] In contrast, in *Regina v Dixon*,[468] a gynaecologist who carried out an abortion on a woman who was naive about her own pregnancy was held to have acted within the law.[469] As George Baker noted in the high court decision *Patron v BPAS*:

> Not only would it be a bold and brave judge who would seek to interfere with the discretion of doctors acting under the [Abortion] Act, but I think he would really be a foolish judge who would attempt to do any such thing …[470]

As a result, a situation eventuates where the "doctor's own opinion defines the scope of his own statutory defence."[471] The decision on the applicability of the criteria is based on the doctor's opinion formed from the facts, not whether it exists in fact[472] Further, the lack of legal restrictions exacerbates the extent of abuse, revealing just how much power doctors have in abortion decisions. Considering the potentially illegitimate reasons behind doctors' decision—making powers, the level of discretion afforded to the doctor alongside the court's reluctance to interfere highlights one of the many concerns surrounding doctor's current gate-keeping role in abortion decisions.

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[465] Abigail Ward, 'If a Woman's Personhood Is Truly Respected by the Law, Then She Must Also Be the Ultimate Source of Both the Decision to Abort and the Meaning Given to that Decision. A Discussion with Reference to UK Abortion Law' (2016) 3 Bristol Law Review 113, 116.
[466] R *v Smith* [1974] 1 All ER 376.
[467] Sheldon (n 439) 18.
[468] Boyle (n 437) 62.
[469] ibid.
[470] *Paton v BPAS* [1978] 2 All ER 987, 992.
[471] Jackson (n 445) 78.
[472] ibid.

(ii) Medical Paternalism

Another prominent issue within the current system is its implications on the Doctor-Patient relationship. As previously mentioned, by acting as gatekeepers, doctors are given a concerning degree of power and discretion. This undermines the Doctor-Patient relationship,[473] and leaves room for an abuse of power through an assertion of personal beliefs onto the patient which results in both medical and social issues.

The current law gives doctors the "dual role as impartial counsellor and as the ultimate authority over abortion decision-making."[474] Its concerning nature is exemplified in the difficulty of establishing trust when the doctor is the ultimate decision-maker, and women might have to approach the consultation with the aim of persuasion, such that the practitioner is convinced that they are in a 'worse light' as previously mentioned.[475] This also hinders women from disclosing important details in order to accommodate the required narrative, which could compromise the quality of service they receive. The private nature of abortion requests makes it difficult to identify exactly how many women have concealed important information, or instances where doctors have exceeded their power, especially given the aforementioned breadth of discretion and lack of judicial interference.[476]

In fact, there have been instances of such power being abused or improperly executed, which have led to serious consequences. For example, there have been cases where doctors

[473] ibid 81.
[474] ibid.
[475] ibid.
[476] ibid 79.

were found to either impose their own beliefs on the woman,[477]or deliberately delay the process through methods such as conscientious objections.[478] Consequently, some women were denied access to abortion for exceeding the 24-week timeframe. Additionally, there has been evidence showing a growing number of doctors using their discretion to refuse authorisation of abortions after about 16 weeks.[479] As demonstrated in *Saxby v Morgan*[480] a doctor refused an abortion on the basis of the procedure being too advanced, when in reality the woman in question was only 18 to19 weeks pregnant. These examples reveal the concerning implications that could result from an abuse of power.

Furthermore, in situations where decisions were wrongly made by doctors, challenging a doctor's decision requires a strong degree of knowledge, social awareness, and confidence. As a result, rather than challenging the validity of a doctor's refusal to grant abortion, women often misinterpret the decision and attribute the outcome to their own ineligibility.[481] Jackson identifies that ethnic minorities in certain societies or poorly educated women are most heavily impacted, which could result in social disparity. These women sometimes lack the awareness or confidence to challenge a doctor's decision,[482] as doing so would require a thorough understanding of one's health condition and legal standing. These knowledges are not readily accessible and are heavily influenced by the socio-economic background of an individual.

[477] Sally Sheldon, 'British Abortion Law: Speaking from the Past to Govern the Future.' (2016) 79(2) Modern Law Review 283, 290. See also Dilys Cossey, 'Abortion and Conscientious Objection' (Birth Control Trust, 1982) 9.
[478] ibid. See also S J MacIntyre, *Single and Pregnant* (Croom Helm, 1979) 75–6, 283. These are available to practitioners unless their participation is necessary to save the life or prevent grave permanent injury to the patient.
[479] Jackson (n 445) 80.
[480] *Saxby v Morgan* [1997] 8 Med LR 293. See also Jackson (n 445) 86.
[481] Jackson (n 445) 86.
[482] ibid.

This highlights the adverse implications medical gatekeeping could have on the doctor-patient relationship. The nature of abortion decisions is inherently an intricate one that relies heavily on the practitioner's good faith and mutual trust. This gatekeeping power would have severe consequences on both an individual and societal level if abused.

(iii) Who is the beneficiary?

As previously established, the introduction of the current Abortion Act was intended to prevent back-street abortions and general harm to women.[483] However, the nature of abortion decisions means doctors will not always be able to act in the best interest of the woman.

The relationship between the patient and practitioner is an intricate one that has been subjected to scrutiny both amongst the legal and academic world.[484] Whilst most of the contention revolves around the balance between patient autonomy and doctor paternalism, even the most conservative group in favour of doctor paternalism would agree that the overriding justification for medical paternalism is patient well-being.[485] However, academics such as Wyatt have identified that doctors owe some form of professional or moral duty of care to the foetus.[486]

This is evidenced by the extensive development in foetal and neonatal procedures, and the foetus' potential ability to bring legal actions against the practitioner for medical negligence if they reach postnatal life.[487]As a result, the unique circumstance of abortion means doctors will not always be able to act in the

[483] Sheldon (n 452) 334.
[484] Brazier and Cave (n 434) 85.
[485] John Wyatt 'Medical Paternalism and the Fetus' (2001) 27 (suppl 2) Journal of Medical Ethics ii15.
[486] ibid ii18.
[487] ibid ii16.

woman's best interest at times, such as by imposing compulsory detention or treatment if it is believed a mother's actions might harm the foetus.[488]

Moreover, the doctor's decision-making power appears to have the potential to benefit only the foetus. English law allows the woman to refuse an abortion recommended by her doctor, even if carrying on the pregnancy could potentially endanger her life.[489] In this light, it appears that the gatekeeping only prevents excessive abortions, rather than acting as an objective guide on whether abortion is the best course of action. The term 'doctor-paternalism' does not even accurately reflect the current power dynamic between the doctor and patient, as doctor-paternalism would imply doctors overriding the patient's autonomy to do what they believe is in the patients' best interests. For this reason, it undermines the objective of 'protecting' the women, which, as discussed above, is one of the key principles used to rationalise medical gatekeeping. By giving the decision-making powers to the doctors, it allows doctor paternalism to prevail, but even more concerning is that in this case, the 'doctor knows best' belief is not wholly accurate as the doctor might not always know (or do) what is best for the woman.

(iv) Practitioner's perspective

It is also crucial to examine this gatekeeping role from the doctor's perspective. Per above, abortion remains a criminal offence under the current law.[490] Unlike a negligence-based tort liability, doctors are faced with heightened criminal sanctions and the possibility of incarcerations. Although Courts are generally reluctant to interfere, abortion decisions still have serious consequences if the criteria is found to be incorrectly applied or

[488] ibid ii19.
[489] Jackson (n 445) 80.
[490] Offences Against the Person Act 1867.

decided. In other words, doctors risk being held accountable for denying access to abortion in valid cases or granting abortions when the criteria is not met. With campaigners and MPs pushing for doctors to face prosecution for mistakes such as incorrect execution of paperwork required under the Act, some doctors have voiced their concerns surrounding its impact on their job performance and the quality of service they provide.[491]

Many practitioners have also expressed fear of acting unlawfully, which alongside the adverse impact of the negative stigma surrounding abortions, could deter young doctors from undertaking abortion cases in the first place.[492] Some doctors described the gatekeeping as 'bizarre' and instead advocated for an 'informed-consent' operation used for other medical procedures, where women have the implications of such decisions explained to them thereby enabling their informed consent.[493] Such an operation would offer the medical guidance needed, but allows the patient to retain their own autonomy.

From this, it appears that regardless of the level of judicial interference, the current law puts all parties at an unfair and risky position. A lack of interference and safeguards puts the women in vulnerable positions, yet an overly scrutinised system with a heightened risk of criminal allegations and sanctions could also instil a level of fear in doctors which could again compromise the quality of service offered.

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[491] British Pregnancy Advisory Service, 'Doctors believe UK's 'outdated' abortion law restricts their ability to provide the best care for women, new study finds' (13 September 2018) <https://www.bpas.org/about-our-charity/press-office/press-releases/doctors-believe-uk-s-outdated-abortion-law-restricts-their-ability-to-provide-the-best-care-for-women-new-study-finds/> accessed 06 February 2021.

[492] ibid.

[493] Ellie Lee, Jan Macvarish and Sally Sheldon, 'Doctors who provide abortion: their values and professional identity' (*Parenting Culture Studies*, February 2017) <https://blogs.kent.ac.uk/parentingculturestudies/files/2012/06/Prelim-Findings-Final-Feb-2017.pdf> accessed 03 August 2021.

V. Opening the Floodgates

One common argument against abolishing doctors' gatekeeping role is the fear of 'opening the floodgate.' The increase in the numbers of abortions carried out annually has caused many to speculate that the law has allowed an 'abortion on demand' system.

The 'statistical argument' is often used to support this claim. It argues that statistically speaking, abortions are always safer than carrying a pregnancy to full term when comparing the number of medical accidents between abortion and childbirth.[494] Moreover, a woman's physical or mental wellbeing will most likely be adversely impacted if they are denied access to abortion when they are actively seeking one.[495] Consequently, women would always be granted abortion under 24-week gestation whereby the criteria under s 1(1)(a) of the Abortion Act offers little restriction.

Academics such as Keown have expressed concerns for a lack of safeguard against access to abortion which contrary to what the Abortion Act has intended, could result in an 'abortion on request' system.[496] This concern has somewhat been alleviated by the reassurance that abortion remains a right subject to approval by two medical practitioners. Whilst doctors must consult with the woman and take her decision into consideration, the lawfulness of the abortion rests with the doctor. The removal of doctor's gatekeeping could further fuel the concerns surrounding an increase in abortion cases.

However, for this argument to stand, one must first accept the premise that there are 'trivial' or 'specious'[497] reasons for abortion, and hence 'gatekeepers' are needed as there will be

[494] Sheldon (n 441) 10.
[495] Jackson (n 445) 79.
[496] John Keown, Abortion, Doctors and the Law: Some Aspects of the Legal Regulation of Abortion in England from 1803 to 1982 (Cambridge University Press, 1988) 128.
[497] Boyle (n 437) 64.

instances where an abortion is not appropriate. This, in reality, is extremely difficult to establish, as abortion decisions are not only medical decisions, but also involve the interplay of many previously discussed social factors. As a result, a concerning reality emerges: doctors are not in the best position to gate-keep or to decide what is 'trivial.' What a particular doctor deems as 'trivial' might have serious implications for the woman's life. Consequently, the 'abortion on demand' argument is inherently fallacious, as there is no way for others to judge whether an abortion decision is 'inappropriate.'

Therefore, using medical gatekeeping as a way to prevent the abortion floodgate from opening would result in two outcomes, both of which are undesirable. Firstly, it deems the gatekeeping role redundant, as women would always be granted abortion if the doctor takes into consideration the women's wishes alongside the statistical risk assessment showing pregnancy's risk compared with abortions. Accordingly, it is nothing but an inconvenient legal process birthed from outdated gender stereotypes. Alternatively, it deems the gatekeeping role inappropriate, as any instances where the doctor actually exercises their discretion and denies the abortion request would directly conflict with the women's wishes, who in reality, have a much better understanding of their situation the implications of pregnancy than any practitioner.

VI. Conclusion

In conclusion, the rationales behind doctors' 'gate-keeping' are underpinned by an archaic perception of gender stereotypes that has no place in contemporary society. Furthermore, the decision-making powers given to the doctors rely too heavily on clinician discretion, this combined with the Court's reluctance to interfere results in an overly paternalistic legal framework that puts both the women and the doctor at risk. This is especially concerning as

the doctor cannot always act in the woman's best interest, thus eroding the 'protection' element behind medical paternalism. Additionally, any potential consequences of 'opening the floodgate' are weakened by heavy reliance on the premises of a 'trivial' reason for abortion. However, there is little evidence suggesting doctor's gatekeeping is appropriate for such decisions. Taking these factors into consideration, medical gatekeeping regarding abortion decisions should be abolished and the ultimate decision-making powers should be given to the woman.

The Doctor's Dilemma: Deciphering the Legal and Ethical Principles in the Acts and Omissions Doctrine

Wei Zi (Jinnie) Lau[†]

The law forbids an act that leads to killing yet permits the death of a patient by way of an omission. Active euthanasia is perceived as a criminal offence but passive euthanasia, in certain circumstances, may be deemed as lawful. The landmark case of *Airedale NHS Trust v Bland* established the legal distinction between act and omission as the foundation for blameworthiness and subsequently paved the precedent of what constitutes an omission. This distinction is inextricably linked with criminal law principles of 'intention' and 'causation.' As courts grapple with the continued reliance on the acts and omissions doctrine, questions remain: are the principles that underpin the distinction legally problematic? Have they been manipulated or distorted by the courts to engineer particular results? Is the distinction between killing or letting die morally dubious? This article attempts to address these questions through an analysis of the legal and moral issues associated with the acts/omissions distinction and argues that such a distinction, in the context of active and passive euthanasia, produces inadequacies and inconsistencies within the legal framework. It will discuss the significance of *Bland* before engaging with legal issues and ethical arguments proposed by philosophers like James Rachels and Joseph Fletcher. Finally, it will explore why, despite identified inadequacies, the law continues to rightly uphold the AOD distinction to exculpate medical professionals in killing/letting die scenarios.

I. Introduction

The acts and omissions doctrine ('AOD') is used as a foundation to differentiate actively killing from passively allowing a person to die, where the law regards the former as more culpable than the

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latter in certain circumstances.[498] This piece will orbit around James Rachel's quote in 'Active and Passive Euthanasia':

> [T]he process of being 'allowed to die' can be relatively slow and painful, whereas being given a lethal injection is relatively quick and painless … The doctrine that says that a baby may be allowed to dehydrate and wither, but may not be given a lethal injection that would end its life without suffering, seems so patently cruel as to require no further refutation.[499]

Fundamentally, the law's classification of the withdrawal of life-prolonging medical treatment as an *omission* rather than an *action* has attracted varying legal and ethical issues. To begin, the perceived difference between 'killing' and 'letting die' is conceptually unclear and vastly based on the tendency to exercise a value judgement where less moral responsibility is ascribed to a doctor omitting to act compared to a doctor's positive action. Such notions are explored by theorists such as Walton and McCall Smith.[500]

The concepts of 'intention' and 'causation' serve as legal and legitimacy-based tools for distinguishing behaviour in imputing liability to the doctor. Within the AOD, intention is deemed *present* where the doctor *acts*, but *absent* when the doctor *omits to act*. Intention is also crucial in the moral assessment within

[498] As a narrow exception to this general principle, liability for an omission or failure to act can arise *where the defendant is under a legal duty to act*. A duty may arise (for instance) from a statute, contract, or special relationship (e.g. familial, spousal, or co-habitation), where the defendant creates a dangerous situation, or where he/she is under an obligation to create medical care. The duty to act is discharged where the defendant takes reasonable steps. For purposes of this article, discussions will be based on the distinction made between an act and an omission in medical treatment as decided in the landmark case of *Airedale NHS Trust v Bland* [1993] AC 789 (HL).

[499] James Rachels, 'Active and Passive Euthanasia' (1975) 292(2) New England Journal of Medicine 78, 79.

[500] Douglas N Walton, *On Defining Death: An Analytic Study of The Concept of Death In Philosophy and Medical Ethics* (McGill-Queen's University Press 1979); Alexander McCall Smith, 'Euthanasia: The Strengths of the Middle Ground' (1999) 7 Medical Law Review 194.

the AOD. Similarly, for 'causation,' it is argued by Brock and Beauchamp that an act *causes* the patient's death, whereas an omission simply *permits* the patient's underlying health condition to do so.[501] Regardless, these principles are legally problematic and morally dubious, as discussed by philosophers like James Rachels, John Finnis, John Keown and Joseph Fletcher.[502] Yet despite theoretical difficulties, courts continue with their tendency to absolve medical professionals from criminal liability in relying fundamentally upon the causation-permission distinction. In fact, it is argued by Keown that the AOD could be upheld owing to practical and policy concerns or considerations.[503]

This article seeks to uphold James Rachel's quoted sentiment by critically examining the satisfactoriness of the legal distinction between acts/omissions and exploring whether the two concepts can be distinguished morally. It will do so employing a three-fold analysis. First, it will outline the position of the law in a conceptualisation of the relevant principles, particularly highlighting the significance of *Airedale NHS Trust v Bland (Bland)*.[504] Second, it will scrutinise the legal and moral arguments associated with the AOD within the scope of the criminal law principles of 'intention' and 'causation,' and investigate whether the application of such principles are legitimate in justifying the distinction. Third, in order to decipher the true basis for the AOD, the piece will examine grounds for why, in spite of criticisms, the doctrine continues to be relied upon by judges in relevant cases. It is not within the scope of this piece to discuss particularised ethical issues such as sanctity of life,

[501] Tom L Beauchamp, 'A Reply to Rachels on Active and Passive Euthanasia' in Tom L Beauchamp and LeRoy Walters (eds), *Contemporary Issues in Bioethics* (Wadsworth Publishing company 1985); Dan W Brock, *Life and Death* (Cambridge University Press 1993).
[502] See John Finnis, 'Bland: Crossing The Rubicon?' (1993) 109 Law Quarterly Review 329, John Keown, *Euthanasia, Ethics and Public Policy* (Cambridge University Press 2002); Joseph Fletcher, 'Ethics and Euthanasia' in Robert H Williams, *To Live and To Die; When, Why, and How* (Springer-Verlag 1973) 121.
[503] Keown (n 502) 85–90.
[504] [1993] AC 789 (HL), [1993] 1 All ER 821 (HL).

autonomy, and quality of life, as the focus will be drawn towards critically analysing the legal principles that underpin the distinction between acts/omissions. This paper will conclude that the AOD is not satisfactory in maintaining the distinction between active and passive euthanasia.

II. Understanding how the AOD is conceptualised in law

To gain a clear understanding of the AOD, one must first address the fundamental concepts. Most criminal offences require a positive act, yet there are occasions in which those who fail to act may face criminal prosecution.[505] Under such circumstances, liability for omissions arises when there is a duty of care ('DoC'). In common law, doctor-patient relationships are among the established legal categories automatically giving rise to a DoC.[506]

Currently, the law *prohibits* an act that leads to killing (e.g. "lethal injection") but *permits* the death of a patient by way of omission, such as withholding or withdrawing treatment (e.g. "allowing the baby to dehydrate and wither"[507]). Somewhat paradoxically, this demonstrates that active euthanasia is seen as a criminal offence, yet in certain circumstances, such as where there is no longer a duty to continue treatment, passive euthanasia may be deemed lawful.

The landmark case of *Bland* ultimately confirmed that the foundation of culpability is the legal distinction between acts and omissions. It also set a precedent for what constitutes an omission in the eyes of the law. The victim, Bland, suffered from severe brain damage during the Hillsborough football ground disaster in 1989 resulting in a persistent vegetative state ('PVS'). Subsequently, with the concurrence of the patient's family, as well as consultant and independent physicians, the authority

[505] Jonathan Herring, *Medical Law and Ethics* (Oxford University Press 2018) 502.
[506] *Montgomery v Lanarkshire Health Board* [2015] UKSC 11.
[507] Rachels (n 499).

responsible for Bland's hospital sought a court declaration which enabled his doctors to lawfully discontinue all life-sustaining treatment, including the removal of a feeding tube which provided him with nutrition and hydration.[508] However, withdrawal could potentially satisfy the *actus reus* (guilty act) element of the criminal offence of murder. It hence became crucial for the courts to label the doctors' conduct as an omission instead of an act.

The courts classified artificial nutrition and hydration as medical treatments and categorised the withdrawal of such treatments as an omission.[509] However, as doctors owe a DoC to their patients, the breach of such duty by removing treatment could still give rise to a murder allegation despite the appearance of an omission rather than act. To avoid this, the House of Lords held that the pre-existing duty would *expire* when it became apparent that it was no longer in Bland's best interest to continue the treatment.[510] As such, it is not sufficient to have death occurring by way of omission to avoid liability, there must also be an absence or cessation of the *duty* to act.

The decision to withdraw treatment was contingent upon Bland's best interests. Doctors are under a (now statutory) duty to consider the patient's best interests and can thereby act lawfully while removing life support.[511] As the treatment was deemed "futile,"[512] no criminal liability was incurred. This principle of best interests paved the way for other cases[513] and the recent case of *An NHS Trust v Y*[514] reduced the role of the courts in treatment withdrawal. If it was unanimously decided between the family and

[508] Jo Samanta and Ash Samanta, *Medical Law* (Macmillian Law Publishers 2015) 417–18.
[509] *Bland* (n 504) [840].
[510] ibid.
[511] *Bland* (n 504) [868]. Note that the requirement to act in the best interests of a patient without capacity is set out in the Mental Capacity Act 2005, ss 1(5) and 4.
[512] *Bland* (n 504) [869]
[513] Such as: *W v M and Others* [2011] EWHC 2443 (Fam); *United Lincolnshire Hospitals NHS Trust v N* [2014] EWCOP 16.
[514] [2018] UKSC 46, [2019] AC 978.

medical staff that continuation of treatment was *not* in the best interest of the patient, then there is no need to seek a court declaration for withdrawal.[515]

Although *Bland* serves as a strong precedent for the AOD, it simultaneously "exposes the fragility of distinctions"[516] made between active and passive euthanasia. Particularly in *Bland,* the finding was not that the tube removal or switching off of a ventilator *is* an omission because the doctor abstains from doing anything. Instead, it was found that it "*should be classified*" as an omission."[517] This is because despite the involvement of positive acts, what is being done to the patients is essentially to omit feeding or ventilation. Such finding has faced much criticism in academic literature and has contrived in Lord Mustill an "acute unease"[518] when applying this distinction. It has even been described "as a cloak for avoiding the moral issues,"[519] leaving the law "confused and contradictory."[520] In fact, it was in Lord Mustill's opinion that the victim did not have interests of any kind. According to medical evidence, Bland had no awareness, nor could he suffer pain or pleasure. Yet regardless of his state, the majority of the court in *Bland* intimated that when a patient has lost all capacity for consciousness, the only way to determine his best interests is to impose an objective opinion by reference to broader notions of what is deemed good or bad.[521] Ultimately, the landmark case of *Bland* confirmed the legal distinction between acts and omissions as the basis of culpability and held

[515] ibid.
[516] Margaret Brazier and Emma Cave, *Medicine, Patients and the Law* (Manchester University Press 2016) 573.
[517] Andrew Mcgee, 'Ending the life of the act/omission dispute: causation in withholding and withdrawing life-sustaining measures' (2011) 31(3) Legal Studies 467, 486.
[518] *Bland* (n 504) [887].
[519] Andrew Ashworth, *Principles of Criminal Law* (Oxford University Press 2003) 113.
[520] Richard Huxtable, *Euthanasia, Ethics and the Law: From Conflict to Compromise?* (Taylor & Francis 2007) 117.
[521] *Bland* (n 504) [851].

that treatment withdrawal is not culpable provided it is in the patient's best interest.

The next section will scrutinise the merits of the AOD by first examining the relationship between killing/letting die with acts/omissions to outline the justifications commonly used to formulate a perceived difference between the two concepts.

III. Connecting the dots between killing/letting die and acts/omissions

As Herring notes, many healthcare professionals seem to share the "common sense" intuition that there is a significant distinction between acts and omissions.[522] In spite of potential theoretical difficulties as explored above, McCall Smith suggests that the distinction provides a basis for which a majority of people think and act.[523] This could be due to individuals' stronger inhibitions "against active wrongdoing than against wrongfully omitting."[524]

As such, there is a tendency to exercise a value judgement in distinguishing killing from letting die. Using individual moral judgement as a basis, the task then becomes a bare examination of the conduct in question, which is then attributed to a category of killing or letting die.[525] Based on our impressionistic judgements of what is acceptable and justified, this theory potentially explains the perceived (albeit perhaps imprecise) difference that we seem to rely on when faced with a scenario where killing/letting die is involved.

[522] Herring (n 505) 538.
[523] Alexander McCall Smith, 'Euthanasia: The Strengths of the Middle Ground' (1999) 7 Medical Law Review 194.
[524] Glanville Williams, 'Criminal Omissions – The Conventional View' (1991) 107 Law Quarterly Review 86, 88.
[525] ibid.

The "trolley problem"[526] is a classic philosophical thought experiment which illuminates the landscape of disparity between the perception of acts and omissions. The moral dilemma the trolley problem presents is to decide whether a bystander should allow a runaway trolley to kill five people or interfere by changing the tracks, redirecting the trolley so that only one person is killed. Questions arise as to which decision can be held more morally culpable than the other: a positive act that leads to killing (intervention resulting in the death of one person), or an omission that leads to letting die (non-intervention which allows the trolley to kill five people)? Notably, some commentators view the redirection of the trolley as morally impermissible merely because it involves a positive act, even if non-intervention would result in more deaths by a factor of five.[527]

Likewise, it is possible that we associate less moral responsibility with a doctor omitting to act because a positive action, such as the "injection of a lethal dose… [implies] a deliberate interruption of the course of nature."[528] In fact, Walton continues to argue that allowing nature to take its course (i.e. an omission), despite an implied sanction or approval, does not carry as strong an attribution to intention or deliberate agency as compared to a positive act.[529] Consequently, there is a strong case that our common perception of the moral distinction is based on how "active" the agent is—the more active, the more morally responsible.

Regardless, the AOD cannot be used to categorically label active euthanasia as morally unacceptable and passive euthanasia as morally acceptable, due to its "vagueness, obscurity,

[526] Thomson Judith Jarvis, 'Killing, Letting Die, and the Trolley Problem' (1976) 59(2) The Monist 204.
[527] Jesse Marczyk and Michael J Marks, 'Does It Matter Who Pulls the Switch? Perceptions of Intentions in the Trolley Dilemma' (2014) 35(4) Evolution and Human Behavior 272.
[528] Walton (n 500) 96.
[529] ibid.

elusiveness and inadequacy."[530] There is no sharp distinction between the two concepts and the same event is often explicable as either an action or an omission, contingent on the perspective of the observer. For instance, treatment withdrawal can be precieved as an act as it involves the *action* of removing a feeding tube or switching off a ventilator. Conversely, it can also be seen as an omission as what is essentially done is to *omit* feeding or ventilation. Unless another foundation can be established, the doctrine, when associated with letting die, must still be evaluated against other moral standards.

This would involve the discussion of two crucial criminal law principles—intention and causation. Although the subject matter of this work is intrinsically medical, both concepts essentially regulate the establishment of blameworthiness and liability in treatment withdrawal cases where doctors are involved.

It is worthwhile to regard both principles from a moral perspective. Consider whether there is a distinction in morality between actively placing a person in a position where they will drown and letting that person drown in idly standing by. Rachels illustrates this through the story of Smith and Jones by arguing that there is *no* moral difference between what is done.[531] Here, Smith, to gain inheritance, pushes his young cousin underwater where Jones, for the same reason, watches his cousin drown in the bath while doing nothing to save him. The question posed is whether the *intention* in drowning was any different from letting drown and equally, whether it could be said that Jones *did not* play a *causal* part in the death of his young cousin.[532] The significance here is that both Smith and Jones had the intention that the victim should die. As there is no difference in intention, Rachels argues that there is no moral difference between what they have done—

[530] Glenys Williams, 'Acts and Omissions in Treatment Withdrawal: Conceptual Problems and Policy Decisions' (2008) 39 Cambrian L Rev 75, 94.
[531] Rachels (n 499) 79.
[532] Glenys Williams, *Intention and Causation in Medical Non-Killing* (Routledge-Cavendish 2007) 66.

whether Smith actively pushes his cousin or whether Jones omits to save him.[533]

Hence, it can be seen that in order to attribute liability or distinguish behaviour, 'intention' and 'causation' materialise as the "legitimate and legal bases" that underpin the differentiation between killing and letting die.[534] The following section will analyse whether such bases form satisfactory justifications for the AOD or whether instead, they have given rise to legally problematic and morally dubious issues.

IV. Manipulation of 'intention' to save medical practitioners

In certain circumstances, it is argued that because a doctor "acts" in a positive manner causing death, he has the requisite intention to kill. In contrast, if he has only omitted to act, then the intention to kill will be considered absent and thus the doctor has only allowed or permitted the patient to die from his underlying illness or injury.[535] Legally, the AOD acknowledges this distinction in intention—where one can intend to kill by positive action, the same intent will be considered *lacking* in letting die.[536]

The *mens rea* (guilty mind) element of murder is "malice aforethought," which encompasses the criminal intention, in contrast to the *actus reus*, which represents an illegal act. *Mens rea* can be satisfied through *direct intention* to commit a crime, or *oblique intention* through foresight of virtual certainty.[537] Put simply, even if the crime is not the defendant's primary intention, if they could clearly foresee the virtual certainty of it taking place, they still bear the guilty intention. For example, a person who, having overslept, must break legal speed limits to reach their place of employment

[533] Rachels (n 499).
[534] Williams (n 532).
[535] Rachels (n 499).
[536] ibid.
[537] ibid 9.

without being late, does not have the direct intention to commit a crime. Rather, their direct (primary) intention is to reach work on time, while their oblique intention to commit crime comes from their pre-established understanding that in order to achieve this, laws concerning maximum speed limits must be broken. In context, this indicates that a doctor could be held guilty for murder when he decides to withdraw life-sustaining treatment as he must have foreseen the virtual certainty of how his omission will lead to the patient's death.[538]

However, the court in *Bland* lawfully permitted a doctor to withdraw treatment from a PVS patient even when the intention was to end his life.[539] This demonstrates that although the doctor may have foreseen the patient's death, this was not unconditionally indicative of intention as doctors are under a duty and required by law to act in the patient's best interest. This is their first and foremost concern and thus their minds will not be "preoccupied with intention."[540] In *Re A (Children)*,[541] it was said that the extended meaning of intention (i.e. foresight) was "not appropriate"[542] and instead the term should be given its "natural ordinary meaning" (i.e. purpose).[543] This narrow and tailored definition of intention is one of the many examples which illustrate how courts manipulate 'intention' to achieve a result that allows medical practitioners to escape liability. [544]

A doctor's priority is the patient's best interests.[545] To ascertain the best interests of an incapacitated person, a non-exhaustive checklist of factors from Section 4 of the Mental Capacity Act 2005 ('MCA') and the Code of Practice within the

[538] ibid.
[539] *Bland* (n 504) [876].
[540] Williams (n 524) 31.
[541] *Re A (Children) (Conjoined Twins: Surgical Separation)* [2000] 4 All ER 961 (CA).
[542] ibid [1050] (Brooke LJ).
[543] Alan Noorie, *Crime, Reason and History: A Critical Introduction to Criminal Law* (Butterworths 2001) 58.
[544] Another example would be *Gillick v West Norfolk and Wisbech AHA* [1986] AC 112 (HL).
[545] *Bland* (n 504).

MCA is referred to.[546] The MCA does not impose a test of substituted judgement, but instead encourages the decision-maker to "ascertain the patient's wishes, feelings and values" and to consider the patient's interest holistically through "social" and "psychological" factors."[547] Accordingly, it seems "inappropriate and contradictory" to impute the criminal intent of a murderer to a doctor associated with end-of-life decisions.[548] Moreover, Ashworth notes that judges have shifted between "narrower and broader meanings of intention" to distinguish between "worthy" and "unworthy" motives.[549] Resultingly, intention, used as an indicator for addressing culpability within the AOD is unsatisfactory and insufficient to deal with issues within the medical domain.

From a moral perspective, Rachels asks what the purpose of treatment withdrawal would be if it is not "the intentional termination of the [patient's] life …" and in fact, it should be "exactly that" or else "there would be no point to it."[550] Other commentators such as Finnis and Keown offer similar insights. Finnis contends that withdrawing nutrition and hydration from individuals who do not face imminent death seems to demonstrate an intention to bring about death.[551] To Keown, the AOD altogether fails to address the key question of whether the doctor intended to produce death; if that is the case, then it is morally wrong.[552] If these propositions are accepted, they lead to the conclusion that similarly to killing, letting die can be intentional and intended and that it is just as possible, by

[546] See the Mental Capacity Act 2005 and Mental Capacity Act Code of Practice 2007.
[547] *James v Aintree University Hospitals NHS Foundation Trust* [2013] UKSC 67 [592] (Lord Pannick).
[548] William Wilson and K J M Smith, 'The Doctors' Dilemma: Necessity and the Legality of Medical Intervention' (1995) 1 Medical Law International 387, 389.
[549] Andrew Ashworth, 'Criminal liability in medical context: The treatment of good intentions' in Andrew P Simester and A T H Smith, *Harm and Culpability* (Clarendon 1996).
[550] *Montgomery* (n 506) 79–80.
[551] Finnis (n 502).
[552] Keown (n 502).

intentionally letting die, for one to "kill" another.[553] Fundamentally, it is a flawed argument to say that one *kills* when one *acts*, whereas one *lets die* when one *omits to act*, as an individual can kill by standing still and also let die by moving. Intention, as a basis for the AOD, is inadequate and unsatisfactory for ignoring the axiomatic proposition that an 'omission' (including letting another die) can be intended with no less clarity than a positive act to bring about that individual's death in similar circumstances.

Next, it is commonly perceived that an act causes the patient's death, whereas an omission simply permits the patient's underlying disease or health condition to cause death without the moral actor's involvement. In fact, despite a multitude of possible 'but for' causes, there is a tendency for the law to pinpoint a single cause, in respect of which judges often utilise inconsistent principles to determine legal causation. The following section will investigate the causal elements within acts/omissions, with a specific focus on intervening acts, and consider whether the elements can be distinguished on moral and legal grounds to justify the AOD.

V. Warping the causative relationship between the doctor and patient

To uphold the AOD, some have argued that omissions cannot cause a result as logically, without a cause, there cannot be an effect. Beauchamp argues that action and omission play a differing causal role as only through active conduct can an individual cause consequences, whilst through omitting to undertake positive conduct the individual cannot.[554] Furthermore, Brock contends that "killing" involves a causal process which itself brings about a person's death as a consequence whereas "letting die" merely *allows* a casual process

[553] Williams (n 524) 67.
[554] Beauchamp (n 501) 443, 444.

to bring about a consequence of death.[555] In other words, proponents of the AOD claim that it is the *patient's illness* that causes death and hence withdrawing treatment merely enables the illness to progress to its natural conclusion. We will explore the validity of this notion through a legal perspective.

Causation is typically divided into two categories: factual (or 'but for') causation and legal causation. A factual cause is made out if the event or consequence would not have occurred *but for* the actor's act or unlawful omission.[556] For instance, applying the 'but for' test to the context of omissions, it is found that omissions often feature as a necessary condition for given outcomes: 'but for the doctor's failure to provide treatment, the patient would not have died.'[557]

However, the test is overbroad as there can be a multitude of 'but for' causes.[558] Therefore, the law utilises the test for legal causation as a tool to ascertain whether the conduct of the accused is a cause that has either 'contributed significantly' or has been the 'substantive cause' of the prohibited consequence.[559] Ultimately the assessment is a value-laden one of whether the conduct *should* be a sufficient cause in law so as to attract liability.

The operation of causation in criminal law requires judges to identify one single cause of death out of many possible causes. However, issues of causation can arise when an event occurs and breaks the causal chain between the original event and the consequence, known as the *novus actus interveniens* ('new act intervening').[560] In *Bland,* injuries sustained by Bland arose from a

[555] Brock (n 501) 189.
[556] Williams (n 530).
[557] Marc Stauch, 'Causal Authorship and The Equality Principle: A Defence of The Acts/Omissions Distinction in Euthanasia' (2000) 26 Journal of Medical Ethics 237.
[558] For instance, in the *Bland* case, who is to say that the initial negligence causing the Hillsborough football ground disaster (and not the euthanasia) is not the 'but for' cause of Bland's death, as it is certainly the 'but for' cause of his persistent vegetative state?
[559] Herring (n 505) 502.
[560] As discussed by Goff LJ at *R v Pagett* (1983) 76 Cr App R 279, [1983] Crim LR 393 [280].

general disaster and could not be attributed to an individual perpetrator.[561] Yet, treatment withdrawal could still be characterised as an intervening event as it interfered with the natural progression of Bland's illness. In fact, PVS is not a terminal illness and patients could still live for at least another 10 years by following a life-sustaining regime of nutrition and hydration.[562] Undeniably, this suggests that Bland would have died a largely natural death if artificial nutrition and hydration had not been withdrawn. Thus, it can be said that the doctor's conduct played *a* causal role in death, albeit it was not *the* cause or sufficient for culpability.[563] Yet, none of the judges explicitly referenced the *novus actus interveniens* doctrine or in fact any causal aspects within the case. Instead, they chose to follow the presumption of causation and held that the negation of the duty to treat was sufficient to justify withdrawal of treatment. This illustrates that judges have not drawn from the same principles consistently to justify their perception of a legal cause in medical cases, and the lack of consistency has allowed judges to impose standards which make it most unlikely for doctors to suffer liability as the legal cause of their patients' deaths.

Morally speaking, Fletcher comments on how "naïve and superficial" it is to suppose that because nothing is done "positively to hasten the patient's death, we have thereby avoided complicity in his death."[564] This demonstrates the inappropriateness of justifying the acts/omissions distinction using the causation presumption as omissions clearly have a causal impact. Additionally, Kuhse states that an agent can be equally "responsible for a consequence [they] refrain from preventing" as they would be for a "consequence [they] bring about by a deliberate action." According to her concept of "refraining" from preventing death, then the doctor's omission

[561] McGee (n 517).
[562] Brock (n 501) 83.
[563] Williams (n 524) 111.
[564] Fletcher (n 502).

can be considered as the "morally significant cause of the patient's death."[565] This resonates with Frey's theory of "control responsibility," which essentially outlines that doctors are as casually responsible for an omission as they are for an act, as they hold full autonomy and responsibility in their decisions to proceed in whatever way.[566] Under the context of acts/omissions, the decision to withdraw treatment by omitting to act is ultimately the doctor's (acting in the best interests of the patient) and thus the consequence of death did not arise from "a mistake, an accident, ignorance, negligence or recklessness"—it was a "chosen death."[567] Henceforth, he should be as "casually responsible" for an omission as he is for an act. This implies that because the agent exercises choice and control in making the omission, then a doctor, in choosing to withdraw treatment will logically be the moral cause for the omission's consequences.

Evidently, there is a causative relationship between the doctor's omission and the patient's death. Yet in spite of this, judges seem to have "manipulated" principles of causation, such as the concept of intervening acts to limit the range of circumstances in which a doctor is held liable.[568] This clearly captures the inadequacy of the AOD as judges seem to have a disproportionate tendency to identify the patient's underlying illness, rather than the doctor's removal of treatment, as the substantial cause of death. This element of judicial manipulation to safeguard medical practitioners will be further explored in the final section.

Ultimately, despite intention and causation being the main indicators utilised to distinguish behaviour and ascribe liability within the AOD, the above analysis has shown how

[565] Helga Kuhse, *The Sanctity of Life Doctrine in Medicine: A Critique* (Clarendon Press 1987) 60.
[566] Raymond Frey, 'Intention, Foresight, and Killing' in Tom L Beauchamp (ed), *Intending Death: The Ethics of Assisted Suicide and Euthanasia* (Prentice Hall 1996).
[567] ibid.
[568] Beauchamp (n 554) 111.

drawing the distinction between acts and omissions on the basis of intention and causation is near-impossible due to the subjective and contingent nature of both. It has been discussed that an omission is also capable of being intentional, having intended consequences and can be a cause of the ultimate harm. Yet, the law continues to rely on this vague and unreliable distinction between positive acts and neutral omissions. Resultingly, the final section will question whether practical and political factors contribute to an alternative justification that can uphold the satisfactoriness of the AOD.

VI. A universal adherence to absolve medical professionals from criminal liability?

In the judgement of *Bland,* Lord Mustill famously described the law as both "morally and intellectually misshapen," but nevertheless, the "law is there" and must be taken "as it stands."[569] Despite the associated legal and philosophical issues regarding the distinction's inadequacy, there is still continued reliance on the AOD today.

First, the element of fairness outlined in the principle of fair labelling demands "offenders to be labelled and punished in proportion to their wrongdoing" and ensures that punishment is given to the person perceived "to be the blameworthy wrongdoer."[570] This was clearly illustrated in the discussion of *novus actus* cases, where judges clearly had to "stretch" causation and intention principles by manipulating their definitions.[571] The requirement of legal causation is necessary to limit the consequences for which persons are found responsible, yet this ultimately depends on the need to find a blameworthy cause. As

[569] *Bland* (n 504) [821], [885].
[570] Andrew Ashworth and Jeremy Horder, *Principles of Criminal Law* (5th edn, Oxford University Press 2005), 88–9.
[571] Keown (n 502) 92.

such, judges impose standards which make it unlikely for doctors to be held criminally liable for the patient's death by negating the wrongfulness of the act. The AOD is used to this extent as a mechanism to justify judicial practices which allow doctors to avoid liability. As such, the removal of life-sustaining treatment will be seen as legally acceptable in certain circumstances by default—there will simply be no question of any wrongdoing arising for doctors, notwithstanding that the conduct falls within the definition of the offence. But ultimately, by extinguishing the perception of doctors being blameworthy, the AOD upholds the principle of fair labelling by saving medical professionals from being held criminally responsible for performing their duties in good faith on the horns of difficult ethical dilemmas.

Furthermore, courts may resort to the AOD construction to exculpate medical professionals in scenarios where laypersons would otherwise be found liable.[572] This was illustrated in *Bland,* where Lord Goff highlighted that the "doctor's conduct is to be differentiated from … an interloper" as the interloper's act will be deemed to be an "active" interference whereas the doctor's is merely that of "allowing his patient to die of his pre-existing condition."[573] This suggests that the identity of the person will be considered when categorising treatment withdrawal using AOD. Particularly, it seems to imply that it is the doctor's unique status and role within society that protects them from liability.[574]

Doctors are often involved in making choices that lead to serious consequences for their patients—including death. Clearly, they engage in activities that not only carry immense responsibility but involve decisions which are often forbidden to be made by the rest of the society.[575] Categorising treatment withdrawal as an omission not only gives the impression that

[572] Noorie (n 543)
[573] *Bland* (n 504) [866].
[574] Keown (n 502) 86.
[575] Keown (n 502) 87.

withdrawing treatment is ethically acceptable, but also aligns with one's expectations when the doctor's causal connection to the patient's death and liability is questioned. Our intuition rejects the idea that doctors commit criminal offences within the scope of good faith practice and thus generates the tendency for us to "exculpate doctors and place blame" on either the underlying illness or intervenor that produced the victim's condition.[576] Evidently, as the AOD assumes no causal link between omissions/letting die and the patient's death, it provides a strong basis for such intuitions to manifest.

Finally, the law is often an instrument for public policy. It can be used as a tool to facilitate acceptance and understanding of decisions that would "otherwise meet unwarranted resistance."[577] Effectively, upholding the AOD generates the perception that it is acceptable for doctors to withdraw treatment by categorising their conduct as omission/letting die, thereby "reassur[ing] patients, doctors and the public" that patients are not being "killed."[578] Additionally, endorsing the AOD is also "psychologically comforting" for doctors as it allows them to perceive their conduct as disconnected from the patient's death and eliminates fear of prosecution, which could interfere with their practice.[579] Therefore, despite an unclear and vague distinction, it is nevertheless effective in allowing people to understand and accept the implementation of decisions in withdrawing treatment.

[576] Antony Duff, *Intention, Agency and Criminal Liability* (Basil Blackwell Ltd 1990) 41–2.
[577] President's Commission for the Study of Ethical Problems in Medical and Behavioural Research, *Deciding to Forego Life Sustaining Treatment: Ethical, Medical and Legal Issues in Treatment Decisions* (US Government Printing Office 1983).
[578] Keown (n 502) 90.
[579] Joanne Lynn, *By No Extraordinary Means: The Choice to Forego Life-Sustaining Food and Water* (Indiana University Press 1989) 57.

VII. Conclusion

The AOD is an established mechanism used to distinguish actively killing from passively allowing a person to die. This article's discussion began in the landmark decision of *Bland,* where it was established that a doctor's pre-existing DoC to its patient *expires* when it is no longer in the patient's best interest to continue treatment. Without clearly addressing the fundamental criminal concepts of intention and causation, the courts categorised the withdrawal of artificial treatment as an omission rather than an act. Ultimately, regardless of the distinction's doubtful validity, the precedent in finding culpability in act/omission cases was established.

The moral and legal grounds for such distinction was then examined through the legitimacy-based intellectual tools of intention and causation. Proponents of the AOD argue that acts are deemed to have the *intention* to cause the death of the patient, whereas in omissions, the intention to kill is considered *absent* and would be regarded as allowing or permitting the patient to die of a pre-existing illness, accordingly lacking a causal element. However, through analysing the moral propositions from Rachels, Finnis and Keown, it is evidently a flawed argument to assert that letting die cannot be intentional. Similarly, by considering intervening acts and contentions asserted by Fletcher, Kuhse and Frey, omissions can still carry a causal impact. As such, the legal distinction is inadequate, where the courts manipulate and apply inconsistent principles of intention and causation to maintain the distinction and to engineer particular results.

But regardless of the law's vagueness and inadequacy regarding the AOD, it was argued that practical and policy related motives uphold the distinction's continued employment. Although the mechanism may be inadequate, the consideration of principles like fair labelling, exculpation of medical professionals and public policy has resulted in the categorisation

of treatment withdrawal as a matter of permissible omission or letting die.

Despite being a legally problematic and morally dubious distinction, the AOD rests unchallenged in the current law as it could very well be the optimal resolution for medical cases in formulating a compelling conception that is acceptable for medical professionals, the public and the courts.

Ill or Illegal? How the Mental Health Act 2007 Criminalises Psychopathy

Tobias Collins[†]

In 2007, detention powers under the Mental Health Act 1983 increased following drastic reform, including the adoption of a broader definition of mental disorder with the removal of any treatability requirement. This article considers the changes in relation to the statutory concept of psychopathy, questions the motives behind the expanded scope of the 1983 Act and analyses the legislation in light of human rights considerations and recent reform proposals. This article first discusses the term 'psychopath' and its ambiguity as a medical and legal term. It is subsequently contended that the moral panic as a result of the 1996 Michael Stone murders politically spurred the 2007 amendments to protect public safety at the expense of the mentally ill. Upon a comparative analysis against the ECHR jurisprudence and the recent Wessely Review and White Paper, it is revealed that the 2007 amendments are better described as quasi-criminal rather than a healthcare reform, designed to warehouse problematic individuals rather than to treat the sick. Hence, the Strasbourg Court's decision in *Rooman v Belgium* and the 2021 White Paper are welcome, as they may provide valuable safeguards for those liable to be detained under the 2007 amendments with no prospect of treatment.

I. Introduction

In 2007, Parliament brought forward a significant amendment to the definition of "mental disorder" under the Mental Health Act ('MHA') 1983. The new definition—that "mental disorder means any disorder or disability of the mind"[580]—is made significantly more general than any previous definitions and dramatically broadened the scope of the 1983 Act. Of particular concern is the

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[580] Mental Health Act 1983 (as amended), s 1(2).

omission of numerous, more specific definitions contained in previous MHAs, including the 'psychopathic disorder' first defined in the MHA 1959.[581] This article submits that the new, broader definition was motivated by a political desire to detain those with 'psychopathic' personality disorders rather than an effort to improve mental health treatment, and seeks to explore the tension between politicians and professionals[582] and underlying human rights concerns[583] arising from the novel definition.

An examination of the concept of 'psychopathic disorder' is merited. Whilst the vague definition is cause for concern, Parliament was offered little guidance from relevant professionals whilst attempting to define the disorder.[584] Secondly, the notable impacts of the 1996 murders of Lin and Megan Russell by Michael Stone should not be overlooked for, as will be discussed below, the moral panic created as a result became the perfect avenue for politically motivated amendments to the MHA 1983. Thence, a prioritisation of public safety over treating the mentally ill is observed. Thirdly, the resulting tension this has created between politicians and healthcare professionals is explored, and it is argued that the amendments are quasi-criminal in that the framework is aimed towards detaining people rather than treating them. Fourthly, the 2007 amendments are comparatively examined against the backdrop of new case law of the European Court of Human Rights ('ECtHR') and more recent reform proposals; it is argued that the ECtHR jurisprudence and recently proposed reform may provide valuable safeguards for those liable be detained under powers

[581] Mental Health Act 1959, s 4(4).
[582] Jeremy Lawrence, 'Pure Madness: How Fear Drives the Mental Health System' (Kings Fund Lecture, London, June 2002).
[583] Lady Hale, 'Is it time for yet another Mental Health Act?' (Lecture at the Royal College of Psychiatrists Annual Conference, Birmingham, 24 June 2018).
[584] Herschel Prins, 'Psychopathic Disorder—Concept or Chimera' (2002) 8 International Journal of Mental Health and Capacity Law 247, 247–48.

conferred by the 2007 amendments with no prospect of treatment.

II. 'Psychopath'

In his famous piece, *I Think They Call Them Psychopaths*,[585] Herschel Prins proposes a thought experiment whereby a hypothetical conference of professionals seeks to define psychopathy. He concludes that there would be "as many definitions as experts present,"[586] and argues that the myriad of psychiatrists, lawyers, and philosophers would fail to reach a consensus.[587] Returning to this experiment 25 years later, Prins concludes that whilst advances in neurobiology and genetics may have provided another, more scientific, medicalised perspective as to what constitutes a psychopath, the confusion regarding the concept remained.[588]

Unhelpfully, the terminology "dissocial personality disorder" in the ICD-10 does not shed light on a specific definition, but rather describes a broader disorder than just psychopathy, encompassing other personalities such as amorality or sociopathy.[589] It is therefore questionable whether 'psychopath' is a medical term at all.[590] In contrast, the term "psychopathic disorder" was introduced into the UK legislation via the MHA 1959,[591] whilst potentially owing its origins to the

[585] Herschel Prins, 'I Think They Call Them Psychopaths' (1977) 28 Prison Service Journal 8.
[586] ibid.
[587] ibid 8–9.
[588] Prins (n 584) 248.
[589] World Health Organization, 'The ICD-10 Classification of Mental and Behavioural Disorders: Clinical Descriptions and Diagnostic Guidelines' (Geneva, 1992) <https://www.who.int/classifications/icd/en/bluebook.pdf> accessed 1 November 2019, 159.
[590] Kate Moss and Herschel Prins, 'Severe (Psychopathic) Personality Disorder: A Review' (2006) 46 Medicine, Science and the Law 190, 191.
[591] Mental Health Act 1959, s 4(4).

Mental Deficiency Act 1913[592] rather than psychiatry. As such, 'psychopath' is perhaps better viewed as a legal term.

If this is the case, the removal of its definition from section 1(2)[593] becomes an even greater cause for concern. To argue that 'psychopath' is a purely legal term appears *prima facie* reductionist, and is not supported by legal, medical, or sociological literature.[594] Instead, Prins, having observed the disagreement between different professionals as to what the term means, is correct in his analysis that 'psychopath' as a term does not solely belong to healthcare or law, but to both.[595] It is perhaps worth stating that under the MHA 1983, "psychopathic disorder" was defined as one which results in abnormal aggression or seriously irresponsible behaviour;[596] but that the ICD-10 encompasses a far wider range of similar behaviours in its "asocial personality disorder," of which at least three disorders are required to be considered to fall within its scope.[597]

Therefore, despite failing to define psychopathy like previous MHAs, the decision to adopt such a broad definition for mental disorder in the 2007 amendment is arguably pragmatic. The amendment avoids the term 'psychopath,' whose meaning professionals do not agree on, whilst creating a definition broad enough to encompass mental disorder in its entirety.[598]

However, this was clearly not the view of Parliament in the past, as the unamended 1983 Act provided both a broad definition and a host of more specific ones.[599] Furthermore, other

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[592] Mental Deficiency Act 1913, s 1(d), which provides: "Moral imbeciles; that is to say, persons who from an early age display some permanent mental defect coupled with strong vicious or criminal propensities on which punishment has had little or no deterrent effect."
[593] Mental Health Act 1983 (as amended), s 1(2).
[594] Prins (n 584) 247–48.
[595] ibid.
[596] Mental Health Act 1983, s 1(2).
[597] World Health Organisation (n 589) 158–59.
[598] Health Committee, *Post-legislative scrutiny of the Mental Health Act 2007* (HC 2013-14, 584-I) para 6.
[599] Mental Health Act 1983 (as enacted), s 1(2).

legal systems have been able to encompass both the need for specificity and general applicability when creating definitions. For example, the Norwegian model defines "psychotic" as "a condition that meets the criteria in the current diagnostic manuals."[600] However, as noted by Glover-Thomas, the effects of broader criteria is that it gives professionals more discretion to classify an individual as such whilst being unencumbered by numerous criteria or a strict legal framework.[601] It is on this basis that this article submits that the amendment was motivated by a desire to make psychiatrists "jailers,"[602] equipped with the power to detain psychopaths, such as Michael Stone, before they are able to actually commit criminal offences.

III. Moral Panic and Politics

In 1996, Michael Stone was prosecuted for the murder of Lin Russell and one of her daughters.[603] The incident attained notoriety due to its brutality, before eventually sparking what Cohen describes as a moral panic, whereby media focus causes the public to exhibit disproportionate levels of concern over a perceived threat.[604] For this reason, psychopaths became the perceived threat as Michael Stone had previously been detained under section 3 of the MHA 1983.[605] Despite his long criminal history, Stone's treating hospital was forced to discharge him as his personality disorder was deemed untreatable.[606] Widespread

[600] Lov om straff (straffeloven) (LOV-2005-05-20-28). For an English translation, see the Penal Code <https:// lovdata.no/dokument/NLE/lov/2005-05-20-28> accessed 1 November 2019.
[601] Nicola Glover-Thomas, 'The Age of Risk: Risk Perception and Determination Following the Mental Health Act 2007' (2011) 19 Medical Law Review 581, 584.
[602] Lawrence (n 582) 14.
[603] Robert Francis, 'The Michael Stone Inquiry—A Reflection' (2014) 1 International Journal of Mental Health and Capacity Law 41.
[604] Stanley Cohen, *Folk Devils and Moral Panics* (Routledge 2011) 1.
[605] Francis (n 603) 41–2.
[606] ibid.

outrage ensued once the public became aware to which a government inquiry followed.[607]

Although susceptibility to treatment within the MHA 1959 definition of psychopathic disorder[608] had already been omitted before the Stone incident,[609] the 1983 Act still included a requirement for treatment that was likely to alleviate or prevent a deterioration of the disorder before an individual could be detained.[610] However, after Stone, this last bastion of the treatability requirement was removed and was replaced with a much vaguer requirement for "appropriate medical treatment."[611] Accordingly, the outrage from the public had put the final nail in the coffin of the treatability requirement for psychopathic disorders. As a result, the new 2007 definition has given the state far greater power to detain those who are statutorily considered psychopathic, a strong prioritisation of public security at the detriment of the rights of individuals with personality disorders to be free from arbitrary detention.[612]

IV. Politics versus Healthcare

The idea of healthcare reform being driven by concerns for public safety rather than for the mentally ill is not without controversy. Politicians themselves recognised undisputable difficulties whilst scrutinising the draft Mental Health Bill: Lord Carlile of Berriew questioned the emphasis placed on the Michael Stone case,[613] whilst Lord Patel argued against the perceived need for legislative change in light of more pressing problems such as underfunding,

[607] South East Coast Strategic Health Authority and others, *Report of the Independent Inquiry into the Care and Treatment of Michael Stone* (South East Coast Strategic Health Authority 2006).
[608] Mental Health Act 1959 s 4(4).
[609] Mental Health Act 1984 (as enacted), s 1(2).
[610] Mental Health Act 1983 (as enacted), s 3(2)(b).
[611] Mental Health Act 1983 (as amended), s 3(2)(d).
[612] Glover-Thomas (n 601) 585.
[613] HL Deb 12 June 2006, vol 683, col 95.

unpleasant in-patient environments, and untrained staff.[614] The view that legislative change was of lesser importance than increased resources was reflected in the Stone inquiry itself, which was particularly critical of the lack of beds in medium secure units[615] and cited greater access to resources for both hospital staff and Mr Stone as factors which could have prevented the murders, rather than the state's inability to detain untreatable patients.[616] Furthermore, in addition to his diagnosis with a personality disorder in 1996,[617] Michael Stone had been diagnosed with schizophrenia only two years prior,[618] had spent much of his childhood in institutional care,[619] and had a history of drug use.[620] These factors taken collectively would blur Stone's underlying cause of committing murder: was it psychopathy, or perhaps, a more multi-faceted issue?[621]

Due to the distorted view of psychopathy widely held amongst society, it is not likely coincidental that Stone's personality disorder became the sole or at least prime focus of public and legislative interest.[622] For example, one study by Daoud *et al* found that the public generally agreed with the statement that "psychopaths are usually violent and aggressive."[623] A more alarming study by Lyon and Ogloff revealed that similar views are shared by mental health professionals themselves,[624] pointing at an expert witness who

[614] HL Deb 28 November 2006, vol 687, cols 686–87.
[615] South East Coast Strategic Health Authority and others (n 607) 338.
[616] ibid 348.
[617] Francis (n 603) 45.
[618] South East Coast Strategic Health Authority and others (n 607) para 10.12.
[619] ibid paras 1.1–1.3.
[620] ibid paras 9.1–9.3.
[621] Francis (n 603).
[622] Berg and others, 'Misconceptions regarding psychopathic personality: Implications for clinical practice and research' (2013) 3 Neuropsychiatry 63.
[623] Daoud and others, "'How to spot a Psychopath": Lay theories of Psychopathy' (2009) 44 Social Psychiatry and Psychiatric Epidemiology 464.
[624] DR Lyon and JRP Ogloff, 'Legal and ethical issues in psychopathy assessment' In Carl B Gacono (ed), *The Clinical and Forensic Assessment of Psychopathy: A Practitioner's Guide* (Taylor and Francis 2000) 139.

regularly testified that psychopaths are 100% likely to reoffend.[625] However, a literature review by Berg *et al* found that although psychopathy does increase the risk of violent behaviour, this risk tends to be modest in nature.[626]

Despite Lyon and Ogloff's findings, the move to weaponize the MHA as a tool to detain psychopaths puts politicians at odds with psychiatrists, who vehemently opposed the National Director for Mental Health in England and Wales's assessment that public protection does form a part of the psychiatrists role.[627] Instead, the President of the Royal College of Psychiatrists argues that the job of a psychiatrist is to help people, not detain them; concluding that the new legislation has made psychiatrists agents of the state who modify unwanted behaviour on a political agenda.[628] This assessment was shared by some in Parliament, with the chair of the MHA commission arguing the Act was "close to laying the foundation for social engineering."[629]

However, in response, the government argued that individuals with personality disorders had been victims of a "diagnosis of exclusion."[630] The previous definitions of disorder, which required a manifestation of abnormally aggressive behaviour and susceptibility to treatment,[631] had prevented people from accessing the medical attention needed.[632] Therefore, by removing these criteria from the definition of mental disorder, the government argues that the broader definition enables individuals with personality disorders to access medical attention

[625] ibid 168.
[626] Berg and others (n 622) 63.
[627] Lawrence (n 582) 15.
[628] ibid.
[629] ibid 14.
[630] National Institute for Mental Health in England, 'Personality Disorder: No longer a diagnosis of Exclusion' (NHS, London, 23 January 2003) <http://personalitydisorder.org.uk/wp-content/uploads/2015/04/PD-No-longer-a-diagnosis-of-exclusion.pdf> accessed 1 November 2019.
[631] Mental Health Act 1959, s 4(4).
[632] HL Deb 10 January 2007, vol 688, col 299.

which was previously unattainable.[633] This alternative view, which presents the amended legislation as a protection of rights to receive medical treatment,[634] is potentially supported by the government funding research into treating personality disorders,[635] as such research may seem to evidence a genuine desire from the government to treat individuals rather than simply contain them. Moreover, the view that psychopathy is untreatable is now far less held than it was previously[636] with some pilot studies showing success after intensive inpatient treatment.[637]

However, the government's motives behind legislative change remain somewhat suspect.[638] For one thing, the practical result yielded by the removal of the treatability requirements from the definition of mental disorder has been to give the state the power to detain individuals who may not be treatable.[639] Furthermore, despite being framed as a healthcare reform, half of the White Paper which formed the basis of the MHA 2007 amendments outlined the need to detain those deemed dangerous,[640] and the research that the government funded into treating personality disorder focussed on patients at Ashworth high security hospital.[641] As such, the amendments may be better described as quasi-criminal rather than healthcare-related. They are used to detain, rather than treat, individuals, whilst any

[633] ibid.
[634] National Institute for Mental Health in England (n 630).
[635] Department of Health and Social Care, *Report of the Committee of Inquiry into the Personality Disorder Unity, Ashworth Special Hospital* (Cm 4194, 1999).
[636] Martyn Pickersgill, 'How personality became treatable: The mutual constitution of clinical knowledge and mental health law' (2012) 43 Social Studies of Science 30.
[637] Grimes and others, 'Treatment of Psychopathy: A review and brief introduction to the mental model approach for psychopathy' (2010) 28 Behavioral Science and the Law 235.
[638] Glover-Thomas (n 601).
[639] ibid.
[640] Department of Health and Social Care, *Reforming the Mental Health Act—Part I* (White Paper, Cm 5016, 2000).
[641] Department of Health and Social Care (n 635). Ashworth hospital is a high-security psychiatric hospital where patients require detention due to their violent propensities.

treatment individuals may receive can be forced[642] and is often experimental.[643]

V. Human Rights Concerns

As the 2007 amendments removed several criteria which greatly limited the State's power to detain individuals, it is important to examine the probable human rights implications arising from such amendments and consider the (potential?) reforms in light of the UK's international obligations.

In the case of *Winterwerp*,[644] the ECtHR set out three criteria that render a detention legal. First, it must be reliably shown by medical experts that the person is of unsound mind; second, that the relevant mental disorder is of a kind and degree warranting compulsory confinement; and finally that there is persistence of such a disorder to justify continuing detention.[645] Despite the court accepting that the definitions of disorders may evolve over time to match modern medical understanding,[646] the *Winterwerp* criteria clearly require a very high threshold of mental disorder for detention to be sanctioned. In contrast, the definition provided by the amended MHA 1983 sets out a comparatively lower bar, conceivably setting the threshold as low as mild paraphilias. This is a grave concern, as such a low bar could enable detention of those with mental disorders in circumstances that would be considered arbitrary, resulting in a violation of the right to liberty as protected by Article 5 of the European Convention on Human Rights ('ECHR').

However, falling under the scope of s 1(2) of the MHA 1983 does not necessarily mean a person is eligible for detention.

642 Mental Health Act 1983 (as amended), s 63.
643 Pickersgill (n 636).
644 *Winterwerp v Netherlands* (1979-80) 2 EHRR 387.
645 ibid para 39.
646 ibid.

For one, further criteria more aligned with *Winterwerp* are set out elsewhere in the Act.[647] This is most apparent in section 3, where a requirement for the disorder to be of a sufficient nature and degree is set out,[648] ensuring that people are not detained for treatment unless their disorder warrants such an approach. Moreover, the significant costs involved in detention[649] and prevalence of mental health issues amongst the population[650] means it is unlikely that the aim of broadening the Act's scope was to detain those with mild issues. This is evidenced by the creation of a new administrative category of "Dangerous and Severe Personality Disordered" for the MHA 1983 powers of detention to be focussed on.[651]

It may then be thought that if the *Winterwerp* criteria are met, indefinite detention of those with mental disorders irrespective of a lack of treatability may be compatible with Article 5 ECHR. Demonstrably, a 1999 consultation paper suggested extending powers of indeterminate confinement in either special units or hospitals to those who fall under the "Dangerous and Severe Personality Disordered" category.[652] A similar system was already in place in Holland's Ter Beschikking Stelling system;[653] and such a scheme had been previously proposed, most notably by the Fallon Report into Ashworth Hospital.[654] In a similar vein (and perhaps unfortunately), the ECtHR in *Hutchinson-Reid v*

[647] Mental Health Act 1983 (as amended), ss 2–3.
[648] Mental Health Act 1983 (as amended), s 3(2)(a).
[649] Health Committee (n 598) para 21.
[650] NHS Digital, *Mental Health and Wellbeing in England: Adult Psychiatric Morbidity Survey 2014* (NHS Digital 2016) <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/556596/apms-2014-full-rpt.pdf> accessed 1 November 2019.
[651] Moss and Prins (n 590).
[652] Pickersgill (n 636) 35.
[653] ibid 36.
[654] Department of Health and Social Care (n 635).

UK[655] found that a person could be detained without violating the convention if it was necessary for public protection.[656]

Yet, in a significant victory for the rights of persons with mental disorders, it is unlikely that such a decision could be made today. The ECtHR has since ruled, in the case of *Rooman v Belgium*,[657] that the need to protect the public cannot supersede the need to treat the patient.[658] The ECtHR attempted to ensure some form of individualised treatment in place for people with mental disorders,[659] for otherwise detentions could be considered arbitrary under Article 5 ECHR.[660] This has raised concerns over the approach taken by the UK courts when dealing with individuals with psychopathic disorders, as it was previously ruled that a simple "milieu" approach can be considered an appropriate treatment.[661] Clearly, this would not uphold an individual's right to individualised treatment,[662] whilst the ruling in *Rooman* also casts doubt over whether detaining those who are potentially untreatable is compatible with human rights principles.[663]

One additional point of interest is that any detention on the grounds of a person's mental disorder runs contrary to Article 14 of the United Nations Convention on the Rights of Persons with Disabilities ('UNCRPD').[664] Article 14 UNCRPD expressly states that detention on grounds of disability is prohibited for any purpose, which as such would presumably include public safety.

[655] *Hutchinson Reid v UK* App no 50272/99 (ECtHR, 20 February 2003).
[656] ibid para 53.
[657] *Rooman v Belgium* App no 18052/11 (ECtHR, 31 January 2019).
[658] ibid para 210.
[659] ibid para 209.
[660] ibid para 203.
[661] *MD v Nottinghamshire Healthcare Trust* [2010] UKUT 59 [26].
[662] *Rooman* (n 657) para 209.
[663] ibid para 203.
[664] Convention on the Rights of Persons with Disabilities (adopted 13 December 2006, opened for signature 30 March 2007, entered into force 3 May 2008) 2515 UNTS 3 (CRPD), art 14.

Unfortunately for those detained under the MHA, Article 14 UNCRPD is accepted but ignored by the ECtHR.[665]

VII. Hope for Reform

Ten years after the 2007 amendments, the UK government announced an Independent Review of the Mental Health Act.[666] The Review was targeted specifically to consider rising detention rates, particularly amongst ethnic minorities, and how practice can be improved.[667] The 154 recommendations have been largely accepted by the government in its 2021 White Paper, which adopts four key principles to consider when treating a person who has been detained under the 1983 Act: choice and autonomy, least restriction, therapeutic benefit, and the person as an individual.[668] Most pertinent for the purposes of this paper are two proposed changes and the significantly higher standards for detention they would provide under the 1983 Act.

First, the White Paper acknowledges the current deficiency in only requiring "appropriate medical treatment" to be available upon detention. Indeed, there is no express requirement for any benefit patients should derive from the treatment.[669] This is of particular concern because, as demonstrated by cases such as *MD*,[670] it is the lack of a treatability requirement that goes to the heart of the 1983 Act's ability to simply warehouse individuals, rather than providing them treatment—an issue acknowledged by the Government.[671] In response, the Government proposes to add to section 3 of the

[665] *Rooman* (n 657) para 205.
[666] Simon Wessely, *Modernising the Mental Health Act: Increasing choice, reducing compulsion* (UK Government 2018) (Wessely Report).
[667] Department of Health and Social Care, *Reforming the Mental Health Act* (White Paper, Cm 355, 2021).
[668] ibid 10.
[669] ibid 24.
[670] *MD* (n 661).
[671] ibid.

1983 Act the additional requirements that the treatment cannot be provided without detention, and that the purpose of treatment is to bring about a therapeutic benefit.[672]

The Government's proposal arguably does not go far enough to safeguard those with personality disorders. The additional requirements do not re-introduce the need for treatment to be likely to alleviate their symptoms, only that the purpose must be to bring about a therapeutic benefit. However, requiring that the treatment is for the purpose of therapeutic benefit is not the same as a requiring the treatment to actually bring about any such benefit, and as such the risk of being warehoused and subjected to well-meaning yet ultimately ineffective treatment continues to persist. This was potentially acknowledged by Sir Simon in his foreword to the Review, wherein he set out the goal of ensuring that "more" people are made better by the imposition on their liberty,[673] possibly accepting that "more" is not "all."

Second, the government seeks to raise the threshold required to detain. Specifically, the threshold is to be raised from "for the interests of the patient's own safety or with a view to the protection of other persons" to that of a "substantial likelihood of significant harm to the individual or to another"—to be applied whenever a person is detained under any section of the 1983 Act.[674] This is clearly a much higher threshold, going far beyond even the protection offered by the *Winterwerp* criteria, and as such is likely to significantly reduce the class of people susceptible to detention. Unfortunately, however, this wording seems to resemble more closely the dangerous offender provisions than any other piece of health legislation,[675] seemingly

[672] ibid.
[673] Wessely (n 666) 6.
[674] Department of Health and Social Care (n 667) 25.
[675] Sentencing Act 2020, s 308(1).

still encompassing a degree of public protection as opposed to legitimate concerns about treating the mentally disordered.

VIII. Conclusion

It is submitted that the new definition of mental disorder provided by the 2007 amendments is indicative of an attempt to manage those with disorders instead of an attempt to identify them and provide treatment. This perceived need to control those with personality disorders was based on a warped view of those with asocial personality disorders, very possibly influenced by a moral panic and depictions by the media. To that end, the new definition provided by s 1(2) of the 1983 Act has arguably shifted the role of psychiatrists to that of "jailers." By removing any mention of treatability included in the definition provided by s 4(4) of the 1959 Act, the new definition has provided the State with greater power to detain and forcibly treat a wider group of people, in a move more motivated by keeping "problematic" individuals locked away than actually treating the mentally ill.

Fortunately, reform appears to be imminent. The White Paper response to the Wessely recommendations and the European case of *Rooman* have potentially provided much-needed safeguards against the 2007 reforms, offering more protection for individuals against being detained for the purpose of containment alone and meaning those detained in the future are more likely to be helped than warehoused. However, the effectiveness of these reforms in practice remains to be seen, and as such it is perhaps presumptuous to overstate their significance as safeguards against powers of detention until this has been proven in the courts.

Just Obsolescence: Is Just War Theory Still Relevant in the 21st Century?

M. J. Taylor[†]

Just War Theory, in one form or another, has served as the bridge between the absolutist moral philosophies of realism and pacifism for much of human history. Just war thought aims to balance the dual principles of security and morality by determining when, how, and why it is ethically permissible to engage in warfare. The theory finds its roots in ancient civilisations yet has seen significant development in the 21st century, including the introduction of an entirely new facet: *jus post bellum* (justice after war). But is this too little too late? Many theorists have begun querying the applicability of just war doctrines in this globalised, securitised, and institutionalised era; it has been suggested that our own international systems have now subverted the practicality of just war philosophies. Is there need for moral assessments on initiating warfare when Articles 2(4) and 51 of the United Nations Charter dictate that no reasoning other than self-defence is permissible? Likewise for debating moral conduct during war, which is covered by laws of armed conflicts such as the Geneva and Hague Conventions. This paper will address these core questions in order to analyse to what extent Just War Theory has retained or lost relevance and applicability in the 21st century.

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I. Introduction

Just War Theory, sometimes known as the 'just war tradition,' is the name given to the discipline of military philosophy that bridges the schism between the absolutes of realism and pacifism with subjective morality; "just war theory is situated between pacifism, which does not allow for war under any circumstances, and realism, which permits war whenever the interests of the state are at stake."[676] Just War Theory finds its roots and branches throughout human history; Algerian philosopher St. Augustine is usually credited with its introduction into Western literature. However, "legal and nonlegal notions on just war appear as early as the ancient Greek [civilisation] … the most famous being a passage in Aristotle's *Politics*."[677] Even the Roman Empire, one infamous for its military expansion, had a process to determine just war. "To the Romans, a war was just only if it was preceded by a solemn action taken by the *collegium fetialium*, a corporation of special priests, the *fetiales*…to decide whether a foreign nation had violated its duty toward the Romans."[678]

When Augustine began to write on just war in the 4th Century, the theory shifted away from the previously secular notions of warfare found in Greek and Roman philosophies, and toward to religious duty of the individual. The principal intent behind Augustine's Just War Theory was to question to what extent Christians could serve in the military without violating the teachings of Christianity. "In his *Contra Faustum*, for example, St. Augustine described the dilemma thus: '[I]s it necessarily sinful for a Christian to wage war?'"[679] Centuries later, Thomas Aquinas revived the Augustinian tradition and created the foundations of

[676] Nico Vorster, 'Just war and virtue: revisiting Augustine and Thomas Aquinas' (2015) 34(1) South African Journal of Philosophy 55, 55.
[677] Arthur Nussbaum, 'Just War – A Legal Concept?' (1943) 42(3) Michigan Law Review 453, 453.
[678] ibid 454.
[679] Rovert J. Delahunty and John Yoo, 'From Just War to False Peace' (2012) 13(1) Chicago Journal of International Law Article 3, 11.

classical Just War Theory by establishing objective principles and criteria for determining just war. Like Augustine, Aquinas kept his assessments of justice in warfare firmly within the framework of Christian morality. The works of Augustine, Aquinas, and countless other theorists over the course of human history established traditional just war thought on which all future developments were built.

The traditional just war doctrine comprises two fundamental principles which govern the morality of resorting to war (*jus ad bellum* (right to war)) and of conduct during warfare (*jus in bello* (justice in war)).[680] These two principles laid out a framework for understanding what may constitute a just *cause* of war, and just *behaviour* during warfare. *Jus ad bellum* contains four criteria which must be met to formulate a just cause of initiating warfare.[681] *Competent authority*: war must be waged by legitimate political actors within political systems that allow for justice (private citizens and dictators both fail this category equally); *just cause*: a fair reason to engage in war, such as self-defence against unprovoked aggression (invasion); *right intention*: war must be fought with the intention to "promote good and avoid evil"[682] in order to be just; and finally, *last resort*: "violence may only be used as a last resort in cases of 'strict necessity.'"[683] Similarly, within *jus in bello* "Aquinas frames the principles of *double effect* and *proportionality*,"[684] which dictate that reasonable measures must be taken to avoid collateral damage (the death or injury of non-combatants) and the force used must be proportional to the threat. These core pillars endured further centuries of analysis after Aquinas' death, but Just War Theory had faded in significance on the global stage until the bloody wars of the 20th Century renewed desire for determining just warfare.

[680] Jeff McMahan, 'The Ethics of Killing in War' (2004) 114(4) Symposium on Terrorism, War, and Justice 693, 693.
[681] Vorster (n 676) 60–4.
[682] ibid 61.
[683] ibid 64.
[684] ibid 62.

At the turn of the 21st Century, Just War Theory experienced a novel development by Canadian philosopher Brian Orend, who used Kantian philosophy to lay out a third category for the just war tradition; *jus post bellum* (justice after war). Orend highlighted the unfinished nature of Just War Theory in his 2000 paper *Jus Post Bellum*, and asserted the need for his third category, governing the termination of a conflict, "in terms of the cessation of hostilities and the move back from war to peace."[685] Orend illustrated five such principles, as with *ad bellum* and *in bello*, to determine the just close to a conflict. His first two points are derivative of existing just war philosophies: *just case for termination* and *right intention*.[686] The following three also lay out clear rules; *public declaration and legitimate authority* requires the terms of peace to be declared publicly and by a legitimate voice of the warring state(s), while *discrimination* and *proportionality* requires the victor to "differentiate between the political and military leaders, the soldiers, and the civilian population within Aggressor"[687] and ensure "any terms of peace … [are] proportional."[688]

This article will explore the just war tradition through a pluralistic and multi-levelled analysis to determine its relevance in assessing the morality of warfare in the 21st Century, beginning with a short discussion on the development of just war theory and the contributions of the 'father of international law' Hugo Grotius. Following this, the two major developments of Just War Theory will be discussed separately; first classical Just War Theory (*ad bellum* and *in bello*) will be analysed in the context of the contemporary UN-led global system to assess whether the principles of Just War Theory are contributing philosophies within the UN Charter. With reference to genocides committed in Rwanda, Kosovo, and Bosnia, it will be determined that the United Nations maintains a pacifistic philosophy. Through this reasoning, this paper aims to challenge "the assumption that the

[685] Brian Orend, 'Jus Post Bellum' (2000) 31(1) Journal of Social Philosophy 117, 118.
[686] ibid 128.
[687] ibid 129.
[688] ibid.

United Nations Charter system is a modernised form of historical just war theory."[689] Subsequently, the modern development of Just War Theory through the emergence of *post bellum* principles for post-war justice will undergo its own analysis with relation to the recent conflict in Iraq. This will highlight the real-world applications of *post bellum* principles and how privatisation of post-war reconstruction may be used to subvert these principles, providing aggressor nations with covert methods of reaping economic gain from warfare while also claiming to adhere to post-war justice. The paper will conclude that while Just War Theory remains a legitimate military philosophy and may be of use to society for analysing the nature of ethics and warfare, its substantive use to the society of states in legislating military regulation has waned significantly due to the establishment of the global United Nations system and the rise of private sector actors in warfare.

II. Developing Just War

For thousands of years of human history and development, "from the days of the city-states in Greece to the city-states of Italy almost two millennia later,"[690] the laws of warfare were consistent in their source and scope; "nations [did] not express the rules of war in written agreements; they [arose] instead from custom and tradition."[691] In addition, city states and warring nations rarely restricted *jus ad bellum* by law, opting instead to regulate *jus in bello*. The extent to which just causes of war were deliberated were "religious or moral considerations, rather than notions of international law."[692] Little changed in this regard over centuries and even though the "rise of the modern state led to fundamental changes in … the relationship between justice and war,"[693] the

[689] Delahunty and Yoo (n 679) 1 (abstract).
[690] ibid.
[691] ibid.
[692] ibid.
[693] ibid 16.

"shift in emphasis away from *jus ad bellum*"[694] in favour of exclusive regulation of *jus in bello* continued. This was accelerated by the works of Dutch theorist, lawyer, and diplomat, Hugo Grotius, often referred to as 'the father of international law.'

In Grotius' main works on warfare, *The Rights of War and Peace*, he "at first appears to follow the [just war] tradition"[695] through his acknowledgement that warfare cannot be just on both sides; the nature of moral debate in just warfare tending to cling onto the assumption that one 'just' side is fighting against an 'unjust' belligerent. However, Grotius rejected this black and white notion of morality in warfare. Grotius pointed out that wars declared by states tend to be viewed as 'just' on both sides, regardless of the justness of their respective causes. This is because the declaration of war by a public authority "confers upon the parties permission to harm the enemy."[696] Grotius' perceptions on *jus ad bellum* amounted to a novel realist approach, yet his "significant departure from tradition is not easy to perceive."[697] Grotius acknowledged that war cannot be just on both sides, but waters down this sentiment by asserting that "typically, all belligerents will claim to be in the right."[698] Further still, he also argued that neutral parties cannot effectively deduct the unjust party without risking themselves becoming embroiled in the conflict.[699] Consequently, without a higher authority than the nation-state with "the power to evaluate the claims,"[700] Grotius asserted that "like kings, they are answerable to no one else."[701] Due to this firmly realist perspective of statehood and warfare, Grotius deemed that Just War Theory could not be used to decide which belligerent enjoyed truly just cause and therefore, could not be used to determine which may wage war legally. "On

694 ibid 17.
695 ibid 18.
696 Nussbaum (n 677) 464.
697 ibid.
698 Delahunty and Yoo (n 679) 18.
699 ibid 18n.
700 ibid 18.
701 ibid.

this interpretation, just war theory is, for Grotius, like pacifism."[702]

However, Grotius did contribute to a significant evolution of Just War Theory; the (re-)secularisation of moral and legal thought on warfare. Even though a Protestant himself, Grotius "gave his work a secular foundation"[703] and based his analyses exclusively within the realms of humanity, not the words of God. "He stressed the secular character of this theory by the famous pronouncement that the theory would hold good "even if there is no God or if the affairs of men are of no concern to Him."[704] This was contrary to popular perception in his time, as common just war thought had relied on religious understandings of justice since St. Augustine himself moved Just War Theory away from the secular Ancient Greek philosophies and toward the juxtaposition between warfare and Christian values. Grotius' re-secularisation of Just War Theory, along with the need for a "new normative framework for the emerging European states system"[705] following the Peace of Westphalia in 1648 and the establishment of the modern state, laid the foundations for what "now constitutes the corpus of international *jus in bello*."[706]

III. Just Warfare in the Contemporary International System

By the turn of the 20th Century the world had seen the first attempts to have *jus in bello* norms "codified into contemporary international laws governing armed conflict."[707] The first Geneva Convention of 1864 and the first Hague Convention of 1899 are examples of 19th Century attempts to have *jus in bello* principles codified into international law. Both multilateral treaties dealt

[702] ibid 19.
[703] Nussbaum (n 677) 466.
[704] ibid.
[705] Delahunty and Yoo (n 679) 20.
[706] ibid.
[707] Brian Orend, 'War' [2009] Stanford Encyclopedia of Philosophy, Stanford University 6. <http://plato.stanford.edu/archives/spr2009/entries/war/> accessed 2 September 2021.

with *jus in bello* regulations such as proscribing the use of expanding bullets,[708] certain explosives[709] and asphyxiating gasses,[710] or affirming the right for the wounded to receive treatment regardless of nation[711] and the neutrality of medical actors in warfare.[712] Both of these treaties were subsequently replaced, amended, or expanded by further protocols or later conventions:

> The rules and principles of the law of armed conflict (LOAC) find their origin in (i) the Declaration of Paris of 1856; (ii) the Declaration of St. Petersburg of 1869; (iii) the Hague Peace Conferences of 1899 and 1907; (iv) the Geneva Protocol of 1925; (v) the Geneva Convention of 1929; (vi) the Four Geneva Conventions of 1949; and (vii) Two Additional Protocols of 1977.[713]

However, *jus ad bellum* remained mostly neglected by the international community until after World War One (WWI) when the interwar period saw the establishment of the first intergovernmental organisation dedicated to maintaining peace, the League of Nations. In the League Covenant, which also served as the Treaty of Versailles ending WWI, it was decided that any threat of conflict was "hereby declared a matter of concern to the whole League,"[714] removing from the member states their ability to espouse their own individual *jus ad bellum* moral philosophies. In addition, the Covenant also contains an outright ban on "external aggression [against] the territorial integrity and

[708] Detlev F. Wagts, 'The Hague Conventions and Arms Control' (2000) 94(1) The American Journal of International Law 31, 34.
[709] ibid.
[710] ibid 35.
[711] Convention for the Amelioration of the Condition of the Wounded in Armies in the Field (22 August 1864), Geneva, Article 6.
[712] ibid Article 1.
[713] Joanna K. Rozpedowski, 'Just Peace at War's End: The *jus post bellum* Principles as National and Human Security Imperatives – Lessons of Iraq and Kosovo' (2015) 15(3) Global Jurist 491, 494.
[714] The League of Nations, 'The League of Nations Covenant' (1919), Article 11.

existing political independence of all Members"[715] and a commitment to refuse "to resort to war until three months after the award by the arbitrators or the judicial decision,"[716] further restricting the ability of member states to engage with *jus ad bellum* discourse. These early decades of the 20th Century laid the foundations for further codification of warfare regulation into the international system which, along with the failure of the League of Nations to prevent World War Two (WWII), subsequently resulted in the establishment of the United Nations and its own Charter.

The UN Charter highlights its purpose, and by extension the purpose of the entire organisation, within Article 1 of its Charter: "To maintain international peace and security, and to that end: to take effective collective measures for the prevention and removal of threats to the peace, and for the suppression of acts of aggression or other breaches of the peace."[717] Although it may be tempting to consider the United Nations to be a justice-oriented organisation, Delahunty and Yoo note that many fall victim to this false narrative that intergovernmental organisations of the 20th Century were established on just war principles. "It may even describe what the drafters of the League of Nations or the United Nations Charter believed they were doing. But it is mistaken."[718] They go on to assert that attempting to establish rules "rooted in the abstract world of philosophy and morality, not the real world of diplomacy and conflict"[719] within these intergovernmental organisations had led to a "dysfunctional UN Charter system."[720] This fundamental misunderstanding of the UN system "creates the illusion that the current rules themselves promote justice when instead they protect a status quo that can

[715] ibid Article 10.
[716] ibid Article 12.
[717] The United Nations, 'The Charter of the United Nations' (1945), Article 1.
[718] Delahunty and Yoo (n 679) 2.
[719] ibid 3.
[720] ibid.

do little to restrain the actions of the great powers while discouraging interventions that would improve global welfare."[721]

The statement held in Article 1 is rooted in neither realism nor just war traditions; rather it unequivocally states the pacifist nature of the United Nations. "In other words, the central purpose of the Charter is to prevent war, not to promote justice or correct injustice."[722] One need not look far to find other signposts to the UN's pacifism. Article 2(4), for example, obliges members with a prohibition on using force against any other state's autonomy, effectively banning warfare outright: "All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the purposes of the United Nations."[723] The only relief from this comprehensive non-belligerence comes from Article 51, while allows for "individual or collective self-defence if an armed attack occurs against a Member,"[724] but only "until the Security Council has taken measures necessary to maintain international peace and security."[725] These excerpts from the Charter illustrate that the UN undoubtedly rejects notions of realism and just war philosophies and, in turn, confirm that this is a pacifistic organisation. This much is confirmed by "the absolute priority that the Charter gives to war prevention over all other goals."[726]

Naturally, the provisions laid out in the Charter directly cover the actions of member states, but the Charter also bestows upon the UN Security Council the legitimacy to authorise military force, so long as it is required to 'maintain international peace and security.' So, perhaps Just War Theory is engaged with within the Security Council, in informing their decisions to authorise military action? One would hope that "such uses of force would have

[721] ibid.
[722] ibid 35.
[723] The United Nations (n 717), Article 2(4).
[724] ibid, Article 51.
[725] ibid.
[726] Delahunty and Yoo (n 679) 35.

been required or permitted under some likely application of just war doctrine."[727] However, Chapter VII (Articles 39–51) of the Charter, which details "actions with respect to threats to the peace,"[728] disappoints in this regard. It would be reasonable to assume that the Security Council would be the perfect authority for debating the ethical philosophies of warfare, especially the notions of just war, in an organisation dedicated to maintaining peace. "But there is not even an approximate correspondence between the Council's Chapter VII decisions and the traditional tests of *jus ad bellum*."[729] The sad reality of the Security Council's rejection of the just war tradition can be highlighted across many cases. For example, one particularly significant case is that of Rwanda, where the UN Security Council did not authorise a timely intervention and subsequently failed to prevent a mass genocide.[730] Kosovo is another obvious case, where in 1999 the Security Council refused to authorize a NATO-intervention; even though this intervention was widely seen as necessary to protect the Kosovan people from genocide.[731] NATO's actions were not authorised by the Security Council, making the intervention an illegal act of aggression according to the Charter.

Kosovo was not the only former Yugoslavian state to suffer under UN pacifism, the Security Council also passed Resolution 713, "impos[ing] an embargo prohibiting Member States from shipping arms to Yugoslavia."[732] Even after the dissolution of Yugoslavia, the SC maintained the embargo, effectively criminalising arms shipments to any of the newly born states which were embroiled in a violent struggle for independence from Serbia, the seat of power in the former Yugoslavia. Indeed, "Bosnian Serbs were materially assisted by the Serbian government, which in turn was able to draw on the

[727] ibid 37.
[728] The United Nations (n 717), Chapter VII (subheading).
[729] Delahunty and Yoo (n 679) 37.
[730] ibid.
[731] ibid.
[732] ibid.

military assets of the former Yugoslav National Army."[733] However, Bosnia was almost completely unarmed, a fresh state with little military might or infrastructure. This led to what could only be described as the Serbs' genocide against the Bosnian Muslim population. Despite being fully aware of the situation, the Security Council rejected several calls to remove the embargo, as did the International Court of Justice (ICJ), the judiciary of the United Nations. Judge ad hoc Eli Lauterpacht asserted that Resolution 713 was in breach of the *jus cogens* peremptory prohibition on genocide; Lauterpacht summarised that "Resolution 713 called on Member States, 'albeit unknowingly and assuredly unwillingly,' to support 'the genocidal activity of the Serbs.'"[734] These cases highlight a clear failure of the Security Council to act in line with just war principles, whereby the United Nations has instead cemented itself as a pacifistic organisation even in the face of genocide.

Thus, with *jus in bello* norms codified into international law through multilateral treaties like the Geneva and Hague Conventions, and *jus ad bellum* criteria made obsolete by its replacement with a pacifist UN system, classical Just War Theory cannot be claimed to be as relevant as it was in millennia past. Now, though it maintains its status as a major military ethical philosophy, its substantive utility to states occupies little more than the metaphysical. Because Just War Theory cannot be used to drive state military decisions, it is obsolete for governing real-world military action. However, the modern development of Just War Theory also saw a third facet of just warfare brought to the forefront of moral philosophy. Coined by Brian Orend at the beginning of the 21st Century, *jus post bellum* (justice after war) governs post-war morality and the ethics of concluding an international conflict.

[733] ibid 38.
[734] ibid.

IV. *Privatus bellum*: The Subversion of *Jus Post Bellum* by the Private Sector

The resurgence of international significance of Just War Theory was a late 20th Century development, spurred by Michael Waltzer's book *Just and Unjust Wars* in 1977. At the break of the new millennium, *Jus post bellum* was coined by Orend in his paper of the same name, in which he asserted that Just War Theory "as currently conceived, is incomplete,"[735] and needed a third addition to govern post-war morality. This concept was expanded upon by Robert Williams and Dan Caldwell in *Jus Post Bellum: Just War Theory and the Principles of Just Peace*, who suggested four *post bellum* principles which should be met to ensure a moral transition to post-war peace for the losing belligerent. These principles are: "(i) the restoration of order; (ii) vindication of human rights; (iii) restoration of sovereignty; (iv) punishment of human rights violations."[736] This section will assess the suitability of these principles through a case study of the Iraq War, with a particular focus on private sector actors and their impact on post-war justice.

International law has thus far failed to articulate a policy framework aimed at deterring and punishing the actions of states who worsen the quality of life of post-war societies, or to provide effective remedies for the victims thereof.[737] This is perhaps due to the novel nature of *jus post bellum*, which had been developed upon very little when a US-led coalition invaded Iraq in 2003 in order to topple the Saddam Hussein administration. "After major combat operations in the Iraq War ended, many of America's European allies cited what Secretary of State Colin Powell called "the 'Pottery Barn rule': 'You break it, you own it.'"[738] The 'Pottery Barn rule' arose as a common theme in the discourse

[735] Orend (n 685) 117.
[736] Rozpedowski (n 713) 491.
[737] ibid 494.
[738] Robert E Williams and Dan Caldwell, 'Jus Post Bellum: Just War Theory and the Principles of Just Peace' (2006) 7 International Studies Perspectives 309, 315.

surrounding the Iraq War, based on the simple principle that if a victor state has caused damage to another in warfare, that victor should then front the economic support needed to ensure the citizens of the damaged state do not continue to suffer post-war. The US[739] and UK[740] did indeed commit to post-war economic aid programmes designed to support Iraq's reconstruction, as did many other nations and the World Bank.[741] However, two major fundamental issues with Iraq's post-war reconstruction serve to illustrate the feeble nature of *jus post bellum* in persuading victor states to ensure a just post-war transition.

The first issue seems to stem from the ideological persuasion of the victor states. While publicly espousing liberalism on the global stage, these nations still tend toward a realist perspective on international warfare. "US leaders often insist their actions are driven by deep idealistic convictions, but their actual behaviour is often strikingly consistent with realist predictions."[742] At the same time, it is "clear that Realism has dominated British foreign policy thinking since the late 1930s."[743] These ideological leanings may have dictated how *post bellum* principles were interpreted and implemented by the victorious coalition, leading to just war principles enacted through a framework of realist ideological self-interest. This made the reconstruction of Iraq a lucrative opportunity for the victors, seeing large reconstruction projects and ownership of vital Iraqi infrastructure being handed off to US and UK based corporations, sometimes in no-bid contracts, allowing for the funnelling of profits away from Iraq's own economy, and into the victors' instead.

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739 Ngaire Woods, 'The Shifting Politics of Foreign Aid' (2005) 81(2) International Affairs 393, 397.
740 ibid 403.
741 ibid 399.
742 Stephen M Walt, 'US Grand Strategy after the Cold War: Can Realism Explain it? Should Realism Guide it?' (2018) 32(1) International Relations 3, 4.
743 David Sanders and David Patrick Houghton, *Losing an Empire, Finding a Role: British Foreign Policy Since 1945* (Macmillan 2016) 267.

For instance, not only did British banking firm HSBC purchase a 70% controlling share of the new Iraqi national bank,[744] US oilfield services companies Washington Group and Halliburton raked in billions in US$ restoring Iraqi oilfields destroyed in the conflict, as reported in a controversial crowd-funded documentary into the reconstruction of Iraq.[745] Halliburton was the subject of great criticism in the US for what was considered opportunistic profiteering on the reconstruction efforts through high prices and lax standards.[746] This theme was endemic to the reconstruction efforts, resulting in large proportions of profits being secured by private sector actors from the victor coalition:

> Out of 59 prime contracts awarded from US appropriations in the 2004 financial year up to November 2004, 48 (more than 80%) went to US companies. Several of the remaining 11 contracts were with firms in US–UK joint venture, and one US–Jordanian joint venture, ANHAM. The remaining prime contracts were allocated to Italian, Israeli, Jordanian, Australian, British and Iraqi companies.[747]

Suspiciously, Halliburton had already "prepared a confidential 500-page document on how to handle Iraq's oil industry after an invasion and occupation of Iraq,"[748] months in advance of its need to, and was subsequently handed a no-bid contract to implement the plan.[749] This clear opportunism led to a "high-

[744] Khaled Yacoub Oweis, 'HSBC Buys Stake In Iraqi Bank' *Arab News* (Baghdad, 21 July 2005) <https://www.arabnews.com/node/252725> accessed 2 September 2021.
[745] Katrina vanden Heuvel, 'Iraq for Sale' (*The Nation*, 12 September 2006) <https://www.thenation.com/article/archive/iraq-sale/> accessed 2 September 2021.
[746] Erik Eckholm, 'Democrats Step Up Criticism of Halliburton Billing in Iraq' (*The New York Times*, 28 June 2005) <https://www.nytimes.com/2005/06/28/politics/democrats-step-up-criticism-of-halliburton-billing-in-iraq.html> accessed 2 September 2021.
[747] Sultan Barakat, *Reconstructing Post Saddam Iraq* (Routledge Publishing 2007) 109.
[748] Frederick William Engdahl, *Myths, Lies and Oil Wars* (Gertrud Engdahl 2012) 141.
[749] ibid.

profile debate about Halliburton's role in Iraq's reconstruction."[750]

The second issue with the *post bellum* principles enacted in Iraq is simply that they were utterly ineffective at ensuring any level of post-war justice for the Iraqi people, and certainly did not prevent the country from descending into abject chaos. This is, simply put, due to the large power vacuums left in the Iraqi state when the Saddam administration was toppled. This "allowed forces at the radical end of the spectrum to fill the vacuum left by the weakened government."[751] Famously, this culminated in the 2014 declaration of a terrorist caliphate across Iraqi and Syrian territory by a group known as the Islamic State of Iraq and Syria (ISIS), which took years of further warfare in Iraq before the Western nations declared ISIS finally "destroyed."[752] ISIS (or Daesh, their Arabic acronym) are an undeniable proof that *jus post bellum* in Iraq was neither competent nor compassionate.

Rather than ensuring post-war justice, the victorious US-UK coalition did the opposite; after destroying Iraqi infrastructure and selling off chunks of ownership of the Iraqi state to its allies and private actors, they allowed huge gaps in Iraqi governance and national security to go unmonitored until those gaps allowed for intensely sectarian groups to engage in battles for Iraqi territory, "especially as the economic situation worsen[ed] and rival factions be[came] enmeshed in a struggle for power and resources."[753] This rise of ISIS took place over a decade after the initial invasion of Iraq by the coalition, and added years onto the nation-state's recovery process while resulting in the losses of thousands of lives and destruction of countless historical and culturally significant sites across Iraq and Syria. According to a dedicated site, the body count in Iraq has topped

[750] Woods (n 739) 399.
[751] Simon Mabon and Stephen Royle, *The Origins of ISIS: The Collapse of Nations and Revolution in the Middle East* (Bloomsbury Publishing 2016) 120.
[752] Abdelillah Bendaoudi, *After the "almost 100 percent" Defeat of ISIS, What about its Ideology?* (Aljazeera Centre for Studies 2018) 2.
[753] Mabon and Royle (n 751) 156.

288,000 people, including combatants, since the initial invasion in 2003.[754] In addition, June of 2014 when ISIS declared their caliphate was the deadliest month of the entire 17-year period, with 4,088 civilian deaths.[755] "This data is based on 51,607 database entries from the beginning of the war to 28 Feb 2017, and on monthly preliminary data from that date onwards."[756] This mid-2014 figure narrowly surpassed the first two months of the war (March and April 2003), which totalled 3,977 and 3,438 civilian deaths, respectively. To be blunt, there could not be a clearer indication of a failure of *jus post bellum* principles than a higher post-war death rate than the war produced itself, clearly showing its failure to produce anything resembling post-war justice for the Iraqi people, instead serving only to further stack the victor's economies with ill-gotten gains.

V. Conclusion

Just War Theory is the result of thousands of years of human military ethical philosophy. It maintains its status as a valid school of moral thought and its effective engagement with substantive nuance means it can arguably offer more in way of real-world solutions than the absolutist ideologies of realism and pacifism could.

However, Just War Theory in its classical form (*jus ad bellum* and *jus in bello*) has been substituted by a novel UN-led system in which *in bello* principles have been codified into international law through international treaties regulating warfare, rendering the philosophy's possible impact on real-life international relations moot. Simultaneously, *ad bellum* principles have been replaced by the pacifist UN Charter system, which bans

[754] IraqBodyCount.org Editors, 'Iraq Body Count: The public record of violent deaths following the 2003 invasion of Iraq.' <https://www.iraqbodycount.org> accessed 09/02/2021.
[755] IraqBodyCount.org Editors, 'Database: Documented civilian deaths from violence. < https://www.iraqbodycount.org/database/> accessed 09/02/2021.
[756] ibid.

all forms of warfare not in self-defence. This might not have undermined Just War Theory to such a fundamental extent had the Security Council employed just war philosophies in its decision-making processes. However, the cases assessed in this paper highlight that this is not the case.

Finally, the optimistic *jus post bellum* principles are also subverted by the privatisation of warfare which has produced Machiavellian methods of reaping economic gain through private reconstruction projects within war torn nations. These novel developments have allowed private actors to purchase and develop chunks of state infrastructure for personal profit while ignoring the needs of local populations. Simultaneously, the victor nations play an active part in carving up and auctioning off the vital services and security of foreign populations all under the guise of aiding economic development. These two failings of *jus post bellum* have all but removed ethical considerations and notions of justice from post-war reconstruction.

Taking these individual but interrelated developments into account, it can be conclusively shown that just war doctrines are no longer having a significant impact in shaping state action, institutional policy, or international law. Therefore, while Just War Theory can certainly be used to aid our philosophical understanding of war, its historical context, and its ethical ramifications, it is no longer relevant as a model for regulating warfare in the 21st Century.

The Program for Making America and Europe Beautiful: 'Hipster Antitrust' and US and EU Antitrust Law and Policy

George Sakkopoulos[†]

This article analyses ideas central to the 'Hipster' (or 'New Brandesian') antitrust movement scholarship, as well as those integral to the dominant Chicago School of Antitrust, which the Hipsters oppose. It argues for the preservation of the Chicago School's consumer welfare standard and economic analysis and against the Hipsters' recommendation to use antitrust law as a tool to address concerns over social issues. It further assesses and compares US and EU antitrust law and examines the scholarship of Justice Louis Brandeis in evaluation of the Hipsters' claim to Brandeis' antitrust legacy, a claim found to be at least partly erroneous. The article concludes that American and European policymakers should refrain from adopting antitrust policies based on the Hipsters' recommendations.

I. Introduction

Recent years have seen antitrust law become an increasingly prevalent aspect of the political discourse. In the United States, antitrust debate has not attained such a high level of popularity since Theodore Roosevelt's[757] campaign[758] in the 1912

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[757] For Roosevelt's views, see United States Congress, *United States Congressional Serial Set, Volume 4906* (U.S. Government Printing Office 1906) 2: "There is a widespread conviction in the minds of the American people that the great corporations known as trusts are in certain of their features and tendencies hurtful to the general welfare"; Marsha E Ackermann and others (eds) *Encyclopedia of World History, Volume I* (Infobase Publishing 2008) 167: "Combinations in industry are the result of an imperative economic law which cannot be repealed by political legislation. The effort at prohibiting all combination has substantially failed. The way out lies, not in attempting to prevent such combinations, but in completely controlling them in the interest of the public welfare."

[758] Roosevelt, the former president, run against his protégée, incumbent president William Howard Taft, losing the Republican Party's nomination but becoming the only candidate

presidential election.[759] Meanwhile, the European Union has been an especially aggressive jurisdiction in regulating Big Tech,[760] fining Google more than $9 billion on three separate occasions.[761] Regulators on both sides of the Atlantic have increased their scrutiny of technology firms;[762] several high-profile politicians and public officials have advocated for tougher enforcement, with some even calling for the "breaking up" of Big Tech.[763] In this context, the 'Hipster Antitrust' academic movement (referred to as the 'New Brandeis Movement' by its proponents[764]) has gathered momentum.[765] The New Brandeisians argue that the

to finish better than third in the popular or electoral vote in the general election, see James Chance, *1912: Wilson, Roosevelt, Taft and Debs -The Election that Changed the Country* (Simon and Schuster 2009). Woodrow Wilson, the winner of the election, disagreed with Roosevelt on antitrust legislation; whereas Roosevelt campaigned on regulating trusts (e.g. Standard Oil Co, which the Roosevelt administration had sued; the case, *Standard Oil Co. of New Jersey v. United States* 221 US 1 (1911), was successfully argued before the Supreme Court by the Taft administration) in the public interest, Wilson wanted to break up existing monopolies and prevent new ones from emerging, see John M Murrin and others, *Liberty, Equality, Power: A History of the American People* (7th edn, Cengage Learning 2015) 584.

[759] Carl Shapiro, 'Antitrust in a time of populism' (2018) 61 International Journal of Industrial Organization 714, 715.

[760] Mainly the so-called 'Big Five': Amazon, Apple, Facebook, Google, and Microsoft.

[761] Aoife White, 'After $9 Billion in Fines, EU Says Something Nice About Google' (2020) *Bloomberg* <https://www.bloomberg.com/news/articles/2020-09-16/after-9-billion-in-fines-eu-says-something-nice-about-google> accessed 8 March 2021.

[762] David McLaughlin, 'Tech's New Monopolies' (2019) *Bloomberg* <https://www.bloomberg.com/quicktake/why-eu-is-reining-in-tech-giants-while-the-u-s-is-hands-off> accessed 14 November 2019.

[763] Elizabeth Warren, 'Here's how we can break up Big Tech' (8 March 2019) Medium Business <https://medium.com/@teamwarren/heres-how-we-can-break-up-big-tech-9ad9e0da324c> accessed 16 November 2019; Cat Zakrzewski, 'The Technology 202: Freshman Sen. Josh Hawley emerges as one of toughest Republican critics of Big Tech' (13 March 2019) *The Washington Post* <https://www.washingtonpost.com/news/powerpost/paloma/the-technology-202/2019/03/13/the-technology-202-freshman-sen-joshhawley-emerges-as-one-of-toughest-republican-critics-of-bigtech/5c88136a1b326b2d177d6069/> accessed 16 November 2019; The Economist, 'Is Margrethe Vestager championing consumers or her political career?' (16 September 2017) <https://www.economist.com/business/2017/09/14/is-margrethe-vestager-championing-consumers-or-her-political-career> accessed 16 November 2019.

[764] Lina M Khan, 'The New Brandeis Movement: America's Antimonopoly Debate' (2018) 9(3) Journal of European Competition Law & Practice 131.

[765] Even prompting some to say that Khan (and the movement) has "reframed decades of monopoly law": David Streitfeld, 'Amazon's Antitrust Antagonist Has a Breakthrough

focus of antitrust law ought to shift from the consumer welfare standard towards consideration of social and political issues such as income inequality, unemployment, online misinformation, and wage growth.[766] As concerns over the same issues are also prevalent in the EU,[767] it is worth asking whether EU antitrust law and policy could be used to address such ills. Hence, this article will first analyse the origins and the proposals of the Hipster Antitrust movement, and subsequently examine the insights US and EU policymakers could possibly gain.

II. The Hipster Antitrust Theory

The Hipster Antitrust movement is—according to Lina Khan, one of its major proponents and at the time of writing Chair of the US Federal Trade Commission[768]—the continuation of an economic and political perspective rooted in the Madisonian tradition[769] and US Supreme Court Justice Louis Brandeis'[770] jurisprudence.[771] The Hipsters assert that Brandeis "successfully updated America's antimonopoly regime, along Madisonian lines, for the industrial era" and reject the theories of the 'Chicago School,'[772] a tradition that has dominated antitrust thought for the

Idea' (7 September 2018) *The New York Times* <https://www.nytimes.com/2018/09/07/technology/monopoly-antitrust-lina-khan-amazon.html> accessed 12 November 2019.

[766] Lina M Khan, 'Amazon's Antitrust Paradox' (2016) 126(3) Yale Law Journal 710, 743.

[767] Maurits Dolmans and Tobias Pesch, 'Should We Disrupt Antitrust Law?' (2019) 5(2) Competition Law & Policy Debate 71, 72.

[768] David McCabe and Cecilia Kang, 'Biden Names Lina Khan, a Big-Tech Critic, as F.T.C. Chair' (17 June 2021) *The New York Times* <https://www.nytimes.com/2021/06/15/technology/lina-khan-ftc.html> accessed 23 July 2021.

[769] For an analysis of US Founding Father James Madison's constitutional legacy and how it contrasts to today's rising populist sentiment, see Anthony R Brunello, 'The Madisonian Republic and Modern Nationalist Populism: Democracy and the Rule of Law' (2018) 181(2) World Affairs 106.

[770] For an analysis of Justice Brandeis' achievements on the Court, see Joel K Goldstein and Charles A Miller, 'Brandeis: The Legacy of a Justice' (2016) 100(2) Marquette Law Review 461.

[771] Khan, 'The New Brandeis Movement' (n 764) 131.

[772] See Richard A Posner, 'The Chicago School of Antitrust Analysis' (1979) 127(4) University of Pennsylvania Law Review 925.

past four to five decades.[773] The Hipsters argue that there ought to be an antitrust regime which ensures that markets are structured in ways that promote openness and competition and accuse the Chicago School of abandoning this concept, thus contributing to rising economic inequality.[774]

As identified by Khan, the first core principle of Hipster Antitrust is that "antimonopoly is a key tool and philosophical underpinning for structuring society on a democratic foundation."[775] To the Hipsters, antimonopoly embodies the preservation of political and economic liberty. In order to safeguard the former, antimonopoly would serve as a check against oligarchy and abuses of private wealth by preventing concentrated economic power. In order to protect economic liberty, Khan references Brandeis in arguing that the structure of the economy affects the level of personal freedom.[776]

However, both arguments fall short. Regarding political freedom, the Hipsters seem to misunderstand the Madisonian Republic that they often allude to. The Founding Fathers, instead of creating a big government which prevents abuses of political power by deconcentrating industries, sought to deconcentrate government through federalism[777] and the separation of powers.[778] Further, the Hipsters' focus on certain companies, which they claim "call all the shots,"[779] would violate the principles of the Noerr-Pennington doctrine[780] which embodies

[773] Peter M Gerhart, 'The Supreme Court and Antitrust Analysis: The Near Triumph of the Chicago School' (1982) Supreme Court Review 319.
[774] Lina M Khan, 'The New Brandeis Movement: America's Antimonopoly Debate' (2018) 9(3) Journal of European Competition Law & Practice 131, 132.
[775] ibid 131.
[776] ibid.
[777] Larry N Gerston, *American Federalism: A Concise Introduction* (Sharpe 2007).
[778] George W Carey, 'Separation of Powers and the Madisonian Model: A Reply to the Critics' (1978) 72(1) The American Political Science Review 151.
[779] Khan, 'The New Brandeis Movement' (n 764) 131.
[780] *Eastern R Conference v. Noerr Motors* 365 U.S. 127 (1961); *United Mine Workers v. Pennington* 381 U.S. 657 (1965); "The Noerr-Pennington is grounded in the First Amendment to the US Constitution protection of political speech, and 'upon a recognition that the antitrust

the democratic liberties that the Hipsters purport to protect and even hails from the Pre-Chicago antitrust to which they would supposedly like to return. As far as economic freedom is concerned, the Hipsters seem to mistakenly see market concentration as a threat to an individual's freedom to participate in economic life.[781] Even if constitutional economic liberty exists in the United States, scholars tend to define it not in positive terms like the Hipsters (economic participation) but in the negative sense of freedom from interference.[782]

By contrast, notions of 'fairness' do exist in Europe.[783] However, several recent reports have reasonably recommended against a broadening of EU antitrust law goals to include an abstract notion of fairness in line with Hipster suggestions.[784] Further, the recent European Commission decision to block the merger between Alstom and Siemens roused the ire of the French and German governments,[785] prompting calls for reform of the European antitrust framework, including an update of the current merger guidelines to take greater account of competition at the global level and a right of appeal of the European Council that could override the decisions of the Commission.[786] The latter

laws, "tailored as they are for the business world, are not at all appropriate for application in the political arena." *(City of Columbia v. Omni Outdoor Advertising, Inc* 499 U.S. 365, 380 (1991), quoting *Noerr*, 141).

[781] A parallel with Walter Eucken's philosophy can be drawn here, see Christian Ahlborn and Carsten Grave, 'Walter Eucken and Ordoliberalism: An Introduction from a Consumer Welfare Perspective' (2006) 2(2) Competition Policy International 197.

[782] Randy E Barnett, *Restoring the Lost Constitution: The Presumption of Liberty* (Princeton University Press 2013).

[783] Raimundas Moisejevas and Ana Novosad, 'Some thoughts concerning the main goals of competition law' (2013) 20(2) Jurisprudence 627, 632.

[784] Jason Furman and others, *Unlocking digital competition* (Report of the Digital Competition Expert Panel, 2019); Jacques Cremer and others, *Competition Policy for the Digital Era* (European Commission Special Advisers' Report, 2019); Heike Schweitzer and others, *Modernising the Law on Abuse of Market Power* (Report for the German Federal Ministry for Economic Affairs and Energy, 2018).

[785] Janith Aranze, 'Getting on board - Siemens/Alstom' *GCR Q2* (London, 3 June 2019).

[786] German Federal Ministry for Economic Affairs and Energy and French Ministry of the Economy and Finance, 'A Franco-German Manifesto for a European industrial policy fit for the 21st Century' (2019) <https://www.bmwi.de/Redaktion/DE/Downloads/F/franco-german-manifesto-for-

suggestion is especially flawed as it would risk independent non-political antitrust enforcement. A less intrusive Commission is preferable.

Khan argues that antitrust law ought to be only part of a broader antimonopoly regime that would "create a system of checks and balances in the commercial and economic spheres."[787] She further argues that Hipster Antitrust is not synonymous with "big is bad" but that industries that tend towards monopoly ought to be regulated in ways that prevent executives from abusing their power and, instead, give executives "incentives to provide the best service possible."[788]

Taken together, these principles suggest[789] that Hipster antitrust excludes 'no fault monopoly' (i.e. there can be no finding of monopolisation without 'guilty behaviour'[790] and a finding of 'monopoly power' does not necessarily equate to a finding of the monopolisation prohibited by the Clayton Act,[791] the Sherman Act,[792] or the 'unfair practices' prohibited by the FTC Act[793]) and 'exploitative conduct' (i.e. a company's conduct that directly imposes an excessive disadvantage on consumers, such as excessive prices, without colluding with or excluding competitors, which is referred to as 'exclusionary conduct'[794]). However, the 'big is bad' mentality can manifest in many ways; the standard

a-european-industrial-policy.pdf?__blob=publicationFile&v=2> accessed 14 November 2019.

787 Khan, 'The New Brandeis Movement' (n 764) 131–2.

788 ibid 132.

789 Joseph Coniglio, 'Why the "New Brandeis Movement" Gets Antitrust Wrong' (2018) *Law 360* 2 <https://ssrn.com/abstract=3166286> accessed 15 November 2019.

790 Janice E Rubin, *Monopoly and Monopolization— Fundamental but Separate Concepts in U.S. Antitrust Law* (Congressional Research Service Report for Congress RS20241) 2–3.

791 Clayton Antitrust Act 1914 15 U.S.C. 12–27, s 7.

792 Sherman Antitrust Act 1890 15 U.S.C. §§ 1–38, s 2.

793 Federal Trade Commission Act 1914 15 U.S.C. §§ 41–58, s 5.

794 Michal S Gal, 'Monopoly Pricing as an Antitrust Offense in the U.S. And the EC: Two Systems of Belief About Monopoly?' (2004) 49 Antitrust Bulletin 343, 346.

indictment[795] of the *Von's Grocery* decision[796] is that it condemned conduct just because it resulted in more concentrated markets.[797]

Due to modern issues in areas such as intellectual property, energy supply, data protection, and surge pricing by monopolistic platforms, exploitative conduct regulation holds renewed importance.[798] Whilst both the United States and the European Union prohibit *exclusionary* conduct,[799] only the US supports non-intervention in cases of *exploitative* conduct.[800] The EU supports modest intervention on grounds of 'fairness' based on Article 102 of the Treaty on the Functioning of the European Union (TFEU),[801] which considers conduct that "directly or indirectly" imposes unfair purchase or selling prices or "other unfair trading conditions" to be abuse of a dominant position. This provision has been interpreted by the Court of Justice of the European Union (CJEU) as prohibiting not only exclusionary conduct, but also exploitative conduct.[802] For example, the prohibition of excessive pricing is based on the notion that the monopolist is abusing their monopoly position to "reap trading benefits that [they] would not have reaped if there had been normal and sufficiently effective competition."[803] Therefore, the

[795] Coniglio, (n 789) 2.
[796] *United States v Von's Grocery Co.* 384 U.S. 270 (1966).
[797] In that case, the US Supreme Court, in a majority opinion written by Justice Hugo L Black, decided that the mere loss of a competitor due to merger creating a less than 8 percent market share was sufficient to imply loss of competition.
[798] Tadashi Shiraishi, 'The Exploitative Abuse Prohibition: Activated by Modern Issues' 62(4) The Antitrust Bulletin 737, 751.
[799] Geoffrey A Manne, 'Why US Antitrust Law Should Not Emulate European Competition Policy' (Statement Before the United States Senate Committee on the Judiciary Subcommittee on Antitrust, Competition Policy, and Consumer Rights, 19 December 2018).
[800] "Size and power, apart from the way in which they were acquired or the purpose with which they are used, do not offend against the law" *(United States v. American Can Co* 256 U.S. 706 (1921)).
[801] Consolidated versions of the Treaty on European Union and the Treaty on the Functioning of the European Union (TFEU) [2016] OJ C202/1.
[802] Michal S Gal, 'Abuse of Dominance - Exploitative Abuses' in Ioannis Lianos and Damien Geradin (eds) *Handbook on European Competition Law* (Elgar 2013) 385, 385.
[803] *United Brands Co. v Commission* [1978] ECLI:EU:C:1978:22.

Hipsters are again closer aligned to EU antitrust law than they are to US antitrust.

The American approach emphasises the creation of the necessary conditions for competition, an element that is essential for encouraging and rewarding innovation.[804] Conversely, the European Commission sadly takes it for granted that antitrust law is beneficial not only for price, quality, and output, but also for innovation.[805] This assumption is unwarranted as there is no evident link between innovation and the degree of market concentration or power.[806] The EU stands to gain if its policymakers not only resist Hipster populism but also embrace non-intervention. To paraphrase Alan Greenspan, "no one will ever know what new products, processes, and machines failed to come into existence, killed by exploitative conduct intervention before they were born."[807] Perhaps Apple would have been *Apfel* or *Pomme*.

According to Khan, Hipster Antitrust focuses not on outcomes like the Chicago School (namely consumer welfare) but on structures and processes that "promote openness and competition."[808] In other words, Hipster Antitrust is based on the false binary between structure/process and outcome/welfare,[809] to which, Khan argues, social concerns such as income inequality relate.[810] However, the Hipsters' focus on structure for evaluating

[804] *Verizon v. Trinko* 540 U.S. 398 (2004).
[805] Pablo Ibanez Colomo, 'Restrictions on Innovation in EU Competition Law' (LSE Legal Studies Working Paper 22, 2015).
[806] J Gregory Sidak and David J Teece, 'Dynamic Competition in Antitrust Law' (2009) 5 Journal of Competition Law and Economics 581.
[807] The original quote reads "No one will ever know what new products, processes, machines, and cost-saving mergers failed to come into existence, killed by the Sherman Act before they were born" (Alan Greenspan, 'Antitrust' in Ayn Rand (ed), *Capitalism: The Unknown Ideal* (Penguin 1994) 63.
[808] Khan, 'The New Brandeis Movement' (n 764) 132.
[809] Coniglio (n 789) 2–3.
[810] Khan, 'The New Brandeis Movement' (n 764) "Contrary to how critics portray the New Brandeisians, this new school of thought does not promote using antitrust law to achieve a different set of social goals—like more jobs or less inequality. Doing so would replicate a key mistake of the Chicago School: overriding a structural inquiry about process and power with one that focuses on a narrow set of outcomes."

conduct suggests that Hipster Antitrust is concerned with "outcomes" to the same extent as the Chicagoans' consumer welfare standard. The difference between the two rests on the kind of outcome (i.e. the conduct's effect on market structure or welfare).[811]

The US Supreme Court, influenced by the Chicagoan Robert Bork,[812] decided in favour of applying an economic approach that assessed the conduct's effect on economic performance (i.e. welfare).[813] In supposedly rejecting this line of thought, the Hipsters are not wrongly accused of promoting the use of antitrust law to achieve social goals, as the US Supreme Court once did before the Chicago School came to prominence.[814] If this suggestion is indeed incorrect, then one wonders what their basis is for determining when conduct that increases concentration turns into prohibited monopolisation. If, on the other hand, the Hipsters believe that a focus on structure would serve as a tool to "assess market power,"[815] then it is difficult to see how their view is contrary to—and not "replicat[ing] a key mistake of"[816]—the Chicago School's consumer welfare standard. After all, the consumer welfare standard is a broad concept that takes into account not just price or quantity (as Khan suggests[817]), but also both static and dynamic consumer welfare.[818]

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811 Coniglio (n 789) 3.

812 Bork's *The Antitrust Paradox* (Basic Books 1978) is one of the most cited works on antitrust (Roger D Blair and D Daniel Sokol, 'The Rule of Reason and the Goals of Antitrust: An Economic Approach' (2012) 78(2) Antitrust Law Journal 471). Bork himself was nominated by President Ronald Reagan to the Supreme Court in 1987 but his nomination was infamously rejected by the Senate, see Ethan Bronner, *Battle for Justice: How the Bork Nomination Shook America* (Union Square 2008).

813 *Reiter v. Sonotone Corp* 442 U.S. 330, 343 (1979), quoting Robert H Bork, *The Antitrust Paradox* (Basic Books 1978).

814 *Brown Shoe Co. v. United States* 370 U.S. 294, 344 (1962).

815 Khan, 'The New Brandeis Movement' (n 764) 132.

816 ibid.

817 ibid.

818 Maria Ioannidou, 'The Role of Consumer Welfare in Competition Policy' (University of Oxford Centre for Competition Law and Policy Presentation, 26 November 2010) 7.

III. The Chicago School

The last idea outlined by Khan is the Hipster belief that the economy is structured "only through law and policy."[819] Therefore, Khan rejects the concept of "natural" market forces which she asserts is a false assumption on which the Chicago School's antitrust perspective rests.[820] This is a mischaracterisation of the position of the Chicago School, both economically and politically.[821]

On the economic side, the Chicagoans think that market forces, such as the technological advances to which Khan refers, are not natural but rather improvable through education and other such investments.[822] On the political side, the Chicago School's neoliberal "technocratic legal apparatus to correct market failure"[823] is clearly distinguishable[824] from the *laissez-faire* camp of classical liberals like Ludwig von Mises.[825] In reality, even Chicagoan assumptions about self-correction[826] are not intended to be taken as "natural market forces" but rather, as instruments to make economic predictions.[827] In fact, before the Chicago School, populism, not economics, was the basis for formulating antitrust rules.[828] No economist was consulted when the Sherman

[819] Khan, 'The New Brandeis Movement' (n 764) 132.
[820] ibid.
[821] Coniglio (n 789) 3.
[822] See Gary S Becker, *Human Capital: A Theoretical and Empirical Analysis, with Special Reference to Education* (3rd edn, University of Chicago Press 1994).
[823] Coniglio (n 789) 4.
[824] Michel Foucault in Michel Senellart (ed), *The Birth of Biopolitics* (Palgrave Macmillan 2008) 62.
[825] See Jorg G Hulsmann, *Mises: The Last Knight of Liberalism* (Mises Institute 2007) 1003 ('Against the Neo-liberals').
[826] Peter T Leeson, Christopher J Coyne, and Peter J Boettke, 'Does the Market Self-Correct? Asymmetrical Adjustment and the Structure of Economic Error' (2006) 18(1) Review of Political Economy 79.
[827] Milton Friedman, *Essays in Positive Economics* (University of Chicago Press 1966) 15.
[828] Gregory J Werden, 'Back to School: What the Chicago School and New Brandeis School Get Right' (Symposium on Re-Assessing the Chicago School of Antitrust Law 2018) 1.

Act[829] was drafted[830] and even the motivations of Senator Sherman, the principal author of the Act, are suspect.[831] Not until the early 1900's did economists become influential in forming antitrust policy and helped draft the Clayton Act and the FTC Act.[832]

However, it was the Chicago School that used rational economic modelling to assess antitrust rules, arguing that a company's conduct ought to be deemed prohibitively anticompetitive only when economic models indicated that "a profit-maximizing businessman would both adopt the practice and achieve an anticompetitive end by using it."[833] Indeed, for decades, it did not even have a positive program, only critiquing then mainstream antitrust.[834]

The Chicago School's greatest legacy lies not in their policy recommendations but rather in their conviction that economics is the soundest basis for antitrust. In fact, the Post-Chicago School,[835] which criticised the Chicagoans,[836] used

[829] The Sherman Act "was passed in 1890 in response to broad concerns about the political and economic power of large corporations in America." (Carl Shapiro, 'Antitrust in a time of populism' (2018) 61 International Journal of Industrial Organization 714, 715).

[830] George J Stigler, 'The Economists and the Problem of Monopoly' (1982) 72(2) The American Economic Review 1, 3.

[831] "Senator John Sherman of Ohio was motivated to introduce an antitrust bill in late 1889 partly as a way of enacting revenge on his political rival, General and former Governor Russell Alger of Michigan, because Sherman believed that Alger personally had cost him the presidential nomination at the 1888 Republican national convention … Sherman was able to pursue his revenge motive by combining it with the broader Republican goals of preserving high tariffs and attacking the trusts." (Patrick Newman, 'Revenge: John Sherman, Russell Alger and the origins of the Sherman Act' 174(3–4) Public Choice 257, 257; see also New York Times, 'SHERMAN TO ALGER' (New York, 25 March 1890) 4; New York Times, 'ALGER ANSWERS SHERMAN' (New York, 22 November 1895) 9.

[832] Luca Fiorito, 'When Economics Faces the Economy: John Bates Clark and the 1914 Antitrust Legislation' (2013) 25(1) Review of Political Economy 139, 160.

[833] Werden (n 828) 2.

[834] ibid 2–4.

[835] Herbert Hovenkamp seems to have been the first scholar to apply the phrase 'post-Chicago' to antitrust law in predicting the School's demise in Herbert Hovenkamp, 'Antitrust Policy after Chicago' (1985) 84 Michigan Law Review 213, 225.

[836] See Daniel A Crane, 'Chicago, Post-Chicago, and Neo-Chicago' (2009)76(4) University of Chicago Law Review 1911.

Chicagoan economics-laden methodology.[837] Therefore, the Hipsters' antithetical conviction of creating an antitrust regime where economic analysis is overshadowed by the furtherance of social goals—as desirable as they may be—is misguided and ought to be avoided by EU policymakers.

IV. Brandeisism and the Rule of Reason

The Hipster Antitrust movement contends that its intellectual roots are traceable to Justice Brandeis[838] and that they constitute a "revival" of Brandeisian Antitrust.[839] This idea prompts the analysis of Brandeis' views in this area. In 1911, Brandeis, as a private lawyer, commented[840] on remedies following the decision in the *American Tobacco* case[841] wherein the Supreme Court held that the company had unlawfully monopolised the US tobacco industry. Brandeis presented three arguments, all of which are now regarded as mainstream antitrust thought.[842] Over the next few years, he wrote[843] about antitrust public policy, arguing that regulation is essential[844] but that there is nothing in American industrial history to "indicate … any need whatever to limit the growth of a business in order to preserve competition."[845] He further argued against direct price regulation, deeming it unwise

[837] Gregory J Werden, 'Back to School: What the Chicago School and New Brandeis School Get Right' (Symposium on Re-Assessing the Chicago School of Antitrust Law 2018) 5.
[838] Mark Glick, 'The Unsound Theory Behind the Consumer (and Total) Welfare Goal in Antitrust' (2018) 63(4) The Antitrust Bulletin 455, 456.
[839] Tim Wu, 'Antitrust Revival, a Reading List' (2019) Medium <https://medium.com/@superwuster/antitrust-revival-a-reading-list-8ff8bcca0d67> accessed 20 November 2019.
[840] William S Stevens, *Industrial Combinations and Trusts* (Macmillan 1913) 485-498.
[841] *United States v. American Tobacco Co.* 221 U.S. 106 (1911).
[842] Werden (n 828) 11.
[843] For a bibliography, see United States Congress, *Special Committee to Study Problems of American Small Business* (U.S. Government Printing Office 1941) 46–8.
[844] Louis D Brandeis, 'Shall We Abandon the Policy of Competition?' (1912) 18 Case and Comment 494.
[845] Louis D Brandeis, 'Competition' (1913) 24 American Legal News 5, 6.

and unworkable,[846] and instead advocated for prohibitions on "methods of destructive or unfair competition."[847] All of these views are in the mainstream today.[848]

Brandeis' greatest concern was the advancement of small business.[849] In 1912, he criticised the Supreme Court's decision that resale price maintenance was unlawful under the Sherman Act and pressed for legislation that would make small businesses exempt from such prohibition so that they could collude on prices.[850] He argued that price competition between small businesses was wasteful as it hindered the profits of such enterprises and forced consumers to waste time on comparison shopping.

Brandeis did not solely believe in protecting small business; he disliked big business.[851] He argued that large businesses were wasteful as no single person had the mental capacity to run an ever-expanding enterprise. Therefore, he suggested that the only way for businesses to become large would be through criminal means, such as collusion and monopolisation. Once they had a firm grip on the market, such businesses would raise prices, thus hurting consumers. Brandeis argued that the importance of individual workers would be lost as a result of the scope of large businesses, and thus he preferred cooperatives where businesspersons take responsibility:[852] a

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[846] ibid 12–3; Louis D Brandeis, 'The Solution of the Trust Problem' *Harper's Weekly* (New York, 8 November 1913) 18.
[847] ibid 14.
[848] Werden (n 828) 12.
[849] Hence the title of a compilation of his works: Osmond K Fraenkel, *The Curse of Bigness: Miscellaneous Papers of Louis D Brandeis* (Viking Press 1934), inspired by Louis D Brandeis, 'The Curse of Bigness' *Harper's Weekly* (New York, 10 January 1914) 11.
[850] Louis D Brandeis, 'Cutthroat Prices: Competition That Kills' *Harper's Weekly* (New York, 15 November 1913) 10.
[851] See Brandeis' testimony before the Senate Committee on Interstate Commerce, Science, and Transportation in United States Congress, *Hearing before the Committee on Interstate commerce, United States Senate, Sixty-Second Congress, Volume I* (U.S. Government Printing Office 1912) 1146.
[852] In his letter to Robert W Bruere, which has been described as Brandeis' "creed in essence" (Alpheus Thomas Mason, *Brandeis: A Free Man's Life* (Viking Press 1946) 584-

reasonable, *Aristotelean,*[853] point of view. Individual consumers, however, were rarely on his mind.[854] This was a major error as the taste and preference structure of consumers—or at least, certain classes of consumers—is indispensable in a market economy.[855]

However, once on the court, Brandeis was less interventionist in antitrust cases than his colleagues.[856] For example, in an opinion reversing a patent ruling against a company, he held that "there must be a definite factual showing of illegality."[857] This view is not only reasonable but also more consistent with the Chicago School than the Hipsters.[858]

All of this is not to say that the Chicago School got everything right. Antitrust's rule of reason as articulated in Brandeis' majority opinion in *Chicago Board of Trade v. United States*[859]—"the standard for testing whether a restraint of trade violates the Sherman Act"[860]—has been unjustly criticised by some Chicagoans[861] and others.[862] Brandeis was right to hold that the impact on competition is what matters under the Sherman

585), see Melvin I Urofsky and David W Levy (eds) *Letters of Louis D. Brandeis: Volume V, 1921-1941: Elder Statesman* (SUNY Press 1978) 45–6.

[853] See Diana Mertz Hsieh, 'Aristotle on Moral Responsibility' (Washington University in St-Louis Plato and Aristotle Class 1995) and Susan Sauve Meyer, *Aristotle on Moral Responsibility: Character and Cause* (OUP 2011).

[854] Mark Jamison, 'Proponents of hipster antitrust fail to understand economic history and business realities' (American Enterprise Institute, 6 August 2019) <https://www.aei.org/technology-and-innovation/proponents-of-hipster-antitrust-fail-to-understand-economic-history-and-business-realities/> accessed 15 November 2019.

[855] Nathan Rosenberg, 'Adam Smith, Consumer Tastes, and Economic Growth' (1968) 76(3) Journal of Political Economy 361, 361.

[856] Victor H Kramer, 'The Antitrust Division and the Supreme Court: 1890–1953' (1954) 40(4) Virginia Law Review 433, 433 and 448.

[857] *Standard Oil Co (Indiana) v United States* 283 U.S. 163, 179 (1931).

[858] Werden (n 828) 12.

[859] *Chicago Board of Trade v. United States* 246 US 231 (1918).

[860] Gregory J Werden, 'Antitrust's Rule of Reason: Only Competition Matters' (2013) 79(2) Antitrust Law Journal 713.

[861] Robert H Bork, *The Antitrust Paradox* (Basic Books 1978) 44; Frank H Easterbrook, 'The Limits of Antitrust' (1984) 63 Texas Law Review 1, 12.

[862] Herbert Hovenkamp, *Federal Antitrust Policy, The Law of Competition and Its Practice* (5th edn, West Academic Publishing 2016) 336.

Act. However, Richard Posner (a Chicagoan)[863] in *Khan v State Oil Co*[864] criticised the narrowing of the rule in cases subsequent to Brandeis' opinion to mean that certain kinds of restraints, such as price fixing agreements, group boycotts, and geographical market divisions were illegal per se regardless of the 'nature and character' of the agreement. This was adopted by the Supreme Court,[865] and was the right outcome as it is clear that Brandeis' rule of reason facilitates far more flexibility in unique factual circumstances. The Supreme Court rightly concluded, under Chicagoan influences, that analysis under the rule of reason ought to focus on the economic consequences of a restraint.[866] This idea can be contrasted with the Hipsters' suggestion that social consequences ought to be the focus.

The rule of reason does not exist in EU antitrust law.[867] Indeed, it was explicitly rejected in *Metropole.*[868] In this case, the CJEU held that carrying out an examination of business practice under Article 101(1)—which precludes any form of collusion between undertakings which may have an adverse effect on undistorted competition within the internal market—based on the rule of reason result in Article 101(3) "los[ing] much of its effectiveness."[869] Article 101(3) creates an exemption to prohibited behaviour under Article 101(1) where the practice is beneficial to consumers (e.g., by facilitating technological advances) but does not restrict all competition in an area.

Nevertheless, an incorporation of the rule into Article 101(1) would undoubtedly be beneficial as it would help avoid formalistic analysis of agreements, an activity which the

[863] Judge Posner is the most cited legal scholar of the 20th century, see Fred R Shapiro, 'The Most-Cited Legal Scholars' (2000) 21(1) The Journal of Legal Studies 409.
[864] *Khan v. State Oil Co. 93 F.3d 1358* (7th Circuit 1996).
[865] *State Oil Co. v. Khan* 522 U.S. 3 (1997).
[866] *National Society of Professional Engineers v United States* 435 US 679 (1978).
[867] *Portugal Telecom SGPS, SA v European Commission* [2016] ECLI:EU:T:2016:368.
[868] *Métropole télévision (M6), Suez-Lyonnaise des eaux, France Télécom and Télévision française 1 SA (TF1) v Commission of the European Communities* [2001] ECLI:EU:T:2001:215.
[869] ibid.

Commission "habitually" engages in.[870] Such an incorporation would provide the European authorities with greater flexibility, and more time to focus on greater wrongdoings, while improving the dynamism of European industry in their competition with non-European firms in the global economy.

V. Conclusion

In 1965, Donald Turner[871] stated that he expected to soon hear that "a merger should be allowed because it will contribute to the President's program for making America beautiful."[872] The Hipster Antitrust movement's proposals would cause a return to such incoherent, vague, and irrational antitrust. The Chicago School was right to advocate for an economics-rooted antitrust. Its coming to dominance in the late 1970s was a welcome turn towards "rational antitrust law"[873] and away from the "imprecise populism" of the 1960s.[874] The Hipsters' antithetical conviction to create an antitrust regime where economic analysis is either paired with or replaced by the furthering of social goals—as desirable as they might be—is misguided.

The Hipsters' attempt to appropriate Justice Brandeis' legacy (and name recognition for that matter) is remarkable. They seem to reject Brandeis' reasonable views[875] whilst embracing the paradox at the centre of his philosophy: the thought that no one

[870] Valentine Korah, 'The Rise and Fall of Provisional Validity – The Need for a Rule of Reason in EEC Antitrust' (1981) 3(2) Northwestern Journal of International Law and Business 320, 357.
[871] Then Assistant Attorney General for the Antitrust Division of the US Department of Justice.
[872] Donald F Turner, 'Antitrust Enforcement Policy' (1965) 29 American Bar Association Section of Antitrust 187, 191.
[873] Bork (n 861) 117.
[874] Donald I Baker, 'Antitrust Law and Economics at the Political Frontier' in Robert J Larner and James W Meehan Jr (eds), *Economics and Antitrust Policy* (Quorum Books 1989) 141.
[875] The threat posed by big government, see Urofsky and Levy (n 852) 45–6.

is capable of managing an ever-larger business, yet someone *is* capable of designing and managing an entire economy.

Nevertheless, the Hipsters deserve credit for bringing matters such as misinformation and loss of privacy to the forefront of the political discourse. These may well be major problems, but they could be addressed purely through targeted regulatory and legislative solutions.[876] Antitrust law is not the appropriate tool. Therefore, US and EU policymakers ought to refrain from jumping on the Hipster bandwagon. Their proposals duly followed, one can expect to soon hear that not allowing a merger or any mergers will contribute to the program for making America and Europe beautiful.

[876] Dolmans and Pesch (n 767) 75–6.

Cross-Border Civil Litigation in the Post-Brexit Era: A Note on Jurisdiction and Enforcement

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Following the UK's exit from the European Union and the end of the transition period, the common framework governing jurisdiction and enforcement of civil and commercial matters (provided by the Recast Brussels Regulation and the Lugano Convention) no longer applies. This Article examines the legal framework which applies in the absence of these provisions and the potential impact on cross-border civil claims going forward. Whilst uncertainty still remains, the post-Brexit outlook is that matters of jurisdiction are, at least in the short-term, likely to become more complex and time-consuming.

I. Introduction

In the context of civil cross-border disputes, the two most significant European instruments governing jurisdiction and enforcement are the Recast Brussels Regulation (the "Recast Regulation")[877] and the Lugano Convention 2007 ('Lugano').[878] These provisions provide, for all intents and purposes, a uniform set of rules serving EU and EFTA member states for determining which court has the power to determine a claim and how

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[877] Regulation (EU) 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters [2012] OJ L351/1.

[878] Convention on jurisdiction and enforcement of judgments in civil and commercial matters [2007] OJ L339/3.

judgments of other Courts of EU and EFTA Member States are recognised and enforced.

The Recast Regulation applies within the EU. It regulates jurisdiction and enforcement of civil and commercial proceedings instituted on or after 10 January 2015. It replaced the previous Brussels I Regulation No 44/2001[879] and made some modifications to it (albeit not dramatically). Both regimes functioned very much on the basis of reciprocity between Member States. Before Brexit, the Recast Regulation naturally had direct effect in UK law by virtue of the UK's membership of the EU. However, following the end of the Brexit transition period on 1 January 2021, the Recast Brussels Regulation and its predecessor ceased to apply in the UK save for proceedings instituted before the end of the transition period.

Lugano is an international treaty signed in 2007. It was intended to mirror the Brussels I Regulation No. 44/2001 (the immediate predecessor of the Recast Regulation) as between the EU, three EFTA States (Iceland, Norway and Switzerland) and Denmark. It therefore effectively extended the Brussels I Regulation jurisdiction and enforcement regime to those non-EU Member States.

Lugano continues to apply in the UK to proceedings commenced before the end of the transition period. However, for proceedings commenced after this point it no longer applies.

The Brussels I Regulation (which Lugano effectively mirrors) and the Recast Regulation are very similar. Lugano is probably the 'next best thing' to Brussels. However, accession to the Convention as an independent contacting state is dependent

[879] Council Regulation (EC) 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters [2001] OJ L12/1.

on the consent of all contracting parties, including the EU.[880] It remains to be seen whether the UK will be permitted to accede.

The UK is now outside both the Recast Regulation and Lugano. There is no longer a reciprocal, uniform regime in place between the UK, the EU and the EFTA to govern matters of jurisdiction and enforcement. The fall-back position in respect of jurisdiction and enforcement is a recourse to the common law rules—a situation likely to be more cumbersome and uncertain.

II. The Recast Regulation—A Closer Look

(i) Jurisdiction

The Recast Regulation provides a simplified and uniform set of rules for determining which court has jurisdiction to decide a civil and commercial matter and the route for enforcing judgments when the defendant is based in the EU. It is prescriptive in the sense that jurisdiction is, with only a few, minor exceptions, a matter of rule, 'automatic' and not subject to the court's discretion. The principle underpinning the Recast Regulation is that a defendant should be sued in its country of domicile.[881] The Recast Regulation carves out several well-defined exceptions to this general rule. These are aimed at protecting 'weaker' parties to the litigation, such as consumers, employees and insurance policy-holders.

For example, in a claim against an insurer domiciled abroad, Article 11 provides that the insured may bring a claim directly against the insurer in their home court (the so-called *Odenbreit* jurisdiction—this has proved particularly useful in personal injury RTAs).[882] Additionally, Article 13 permits an insurer to be joined in proceedings which an injured party has

[880] Lugano (n 878), art 72(3).
[881] Recast Regulation (n 877), art 4(1).
[882] ibid, art 11(1)(b).

brought against an insured if the law of the court permits it.[883] These provisions are hugely beneficial for claimants in cases of personal injury who may find it difficult to travel to the courts of another EU Member State or to start proceedings there in order to pursue their claim. There are also provisions aimed at protecting consumers, for example, providing the consumer with a choice as to whether to bring proceedings in the courts of the Member State where the supplier is domiciled, or their own home courts (regardless of where the defendant is domiciled, even if it is a non-EU Member State[884]). The Recast Regulation also aims to protect employees by regulating jurisdictional rules over individual contracts of employment, for example, allowing an employee to sue an employer in the courts of the Member State the employer is domiciled,[885] the courts of the Member State the employee habitually works,[886] or the place the employer's business is situated, if the employee did not habitually work in any one country.[887] By contrast, an employer is constrained to bring proceedings in the courts of the Member State in which the employee is domiciled.

(ii) Enforcement

The Recast Regulation provides a simple pathway for the enforcement of a judgment in an EU state. The European Enforcement Order Regulation[888] provides for the recognition and enforcement of judgments and settlements on uncontested debt claims—for example, where liability is admitted, or default judgment has been obtained. It provides an expedient and cost-effective process whereby the relevant forms/documents are

[883] ibid, art 13(1).
[884] ibid, art 18(1).
[885] ibid, art 21(1).
[886] ibid, art 21(1)(b)(i).
[887] ibid, art 21(1)(b)(ii).
[888] Regulation (EC) 805/2004 of the European Parliament and of the Council of 21 April 2004 creating a European Enforcement Order for uncontested claims [2004] OJ L143/15.

provided and the court 'rubber stamps' the recognition of the judgment so that parties can proceed straight to enforcement. This no longer applies to proceedings commenced after the end of the Brexit transition period.

For contested claims, the Recast Regulation provides a uniform set of rules for enforcing judgments without the need for any 'special' procedure. A stated purpose of the rules is to "make the circulation of judgments in civil and commercial matters easier and faster within the Union, in line with the principle of mutual recognition."[889] This aim is achieved by enforcement being near-automatic.

For example, under Article 38: "a judgment given in a Member State and enforceable in that State shall be enforced in another Member State when, on the application of any interested party, it has been declared enforceable there."[890] Likewise, under Article 39: "a judgment given in a Member State which is enforceable in that Member State shall be enforceable in the other Member States without any declaration of enforceability being required."[891]

In line with the principles of certainty and mutual recognition, there are very limited grounds for refusing to recognise and enforce a foreign judgment of another Member State, namely if recognition is manifestly contrary to public policy, the judgment was given in default of appearance, or where the judgment is irreconcilable with an earlier judgment.[892] The applicant must simply provide the enforcing court with the required certificates and forms along with a copy of the

[889] Council of the European Union, 'Recast of the Brussels I regulation: towards easier and faster circulation of judgments in civil and commercial matters within the EU' (16599/12, PRESSE 483, 6 December 2012) <https://www.consilium.europa.eu/uedocs/cms_data/docs/pressdata/en/jha/134071.pdf> accessed 22 August 2021.
[890] Recast Regulation (n 877), art 38.
[891] ibid, art 39.
[892] ibid, art 45.

judgment.[893] There exists no requirement for a judge to acknowledge the enforceability of the foreign court judgment within the enforcing Member State.

III. Lugano

As addressed, Lugano effectively replicates the aforementioned provisions of the Brussels I Regulation.

The UK made an application to join Lugano as an independent contracting state on 8 April 2020. The three EFTA parties, Switzerland, Iceland, and Norway issued statements indicating their consent. However, the EU Commission has not been forthcoming. On 4 May 2021, the Commission issued a communication to the European Parliament and the Council to the effect that the EU should not consent to the UK's application, alluding to the fact that UK membership would offend the principles of the Single Market. The Commission drew emphasis to the nature of the Convention as a "flanking measure" of the internal market and, furthermore, that the non-EU states which have acceded to the Convention *"all participate, at least partly, in the EU's internal market"* whereas the *"United Kingdom is a third country without a special link to the internal market."*[894] The EU Commission's recommendation is not, however, binding. The final decision rests with the Council, by way of qualified majority voting. At the time of writing, however, no decision has been made.

Whilst acceding to Lugano would be an attractive post-Brexit alternative, there are still some drawbacks which should be highlighted.

Firstly, under Lugano, the courts of the non-EU Contracting States are merely required to "pay due account" to

[893] ibid, art 42.

[894] Commission, 'Assessment on the application of the United Kingdom of Great Britain and Northern Ireland to accede to the 2007 Lugano Convention' COM (2021) 222 final.

CJEU case law on the Brussels I Regulation.[895] Arguably, this may leave room for divergence as to the jurisdiction and enforcement rules. Since CJEU decisions are not binding on courts of Contracting States, there are no penalties for deviating from its decisions—it might be declared that Lugano lacks teeth.

Further, Lugano suffers from an absence of certain refinements incorporated into the Recast Regulation, for example, the 'Italian Torpedo': a tactic whereby a party could deliberately delay or frustrate the litigation by choosing to commence proceedings in a certain court in breach of an exclusive jurisdiction clause. Under the Recast Regulation, the court designated by the parties to the contract is given priority in deciding jurisdiction;[896] that is not the case under Lugano. This problem was recently highlighted by the English High Court in *Mastermelt v Siegfried*[897] where Waksman J rejected the argument that the Lugano Convention could be read in such a way as to solve the 'Italian Torpedo' problem in line with Article 31(2) of the Recast Regulation. Therefore, where the Recast Regulation does not apply, the Italian Torpedo problem may persist to derail timely resolution of claims.

However, Lugano would still provide the most effective method of providing parties with certainty as to where claims can be brought and enabling judgments to be enforced with minimum time and cost.

IV. A revival of the common law rules?

Absent any specific treaty or Convention—and until such time as the UK accedes to the Lugano Convention—the common law rules will apply to determine matters of jurisdiction and enforcement. Although the common law rules are sufficiently

[895] Lugano (n 878), prot 2, art 1.
[896] Recast Regulation (n 877), art 31(2).
[897] *Mastermelt Ltd v Siegfried Evionnaz SA* [2020] EWHC 927 (QB). See especially [25]–[31].

well developed to deal with jurisdiction and enforcement, they lack the certainty and uniformity of the EU rules which operated in favour of 'weaker' parties who may lack the resources to obtain specialist advice.

(i) Jurisdiction

The Civil Procedure Rules enable the Courts of England and Wales to exercise jurisdiction over foreign defendants where the dispute has a sufficient connection with England. The claimant must usually seek the permission of the court to serve the claim form on a defendant outside the jurisdiction.[898] To obtain this permission, the Claimant must meet a number of procedural hurdles.

Firstly, the Claimant must show a good arguable case that one of the jurisdictional gateways[899] applies. Secondly, it must be shown the claim has a reasonable prospect of success.[900] Thirdly, it must be shown that England is the proper place to bring the claim (the *forum conveniens* argument).[901] The court retains discretion to decline jurisdiction if it forms the view that a different country is a more appropriate forum.

This is a notably different framework from the EU rules where, once jurisdiction is established, cannot generally be overridden by an exercise of judicial discretion as to the appropriate forum.

The relevant principles as to the appropriate forum are derived from *Spiliada Maritime Corporation v Cansulex Ltd.*[902] A stay of the English proceedings on the grounds of *forum non conveniens*

[898] CPR 6.36.
[899] Found in 6B PD 3.1.
[900] CPR 6.37(1)(b).
[901] CPR 6.37(3).
[902] *Spiliada Maritime Corporation v Cansulex Ltd* [1987] AC 460 (HL) 476.

(the inverse of the *forum conveniens* doctrine) will only be granted if the court is satisfied that there is an alternative available forum, having competent jurisdiction, in which the case may be tried more suitably for the interests of all the parties and the ends of justice.

The court will consider procedural factors such as convenience, expense, possibility of conflicting judgments, cost regimes, levels of damages, location of witnesses, but may also consider normative issues such as substantive justice and procedural fairness. If there is an alternative available forum which is *prima facie* more appropriate, the court may still decline jurisdiction if, for instance, it is "satisfied, by cogent evidence, that there is a real risk that substantial justice will not be obtainable in that foreign jurisdiction."[903] In *Vedanta Resources PLC v Lungowe and Ors*,[904] the Supreme Court held that a group of Zambian claimants could proceed with their claim in England, notwithstanding the fact that Zambia was overwhelmingly the proper jurisdiction for the claim to be tried, due to the real risk that substantial justice would not be obtained in Zambia.[905] In *Vedanta*, Lord Briggs highlighted the cost and judicial resources spent litigating questions of forum:

> The fact that it has been necessary, despite frequent judicial pronouncements to the same effect, yet again to emphasise the requirements of proportionality in relation to jurisdiction appeals, suggests that, unless condign costs consequences are made to fall upon litigants, and even their professional advisors, who ignore these requirements, this court will find itself in the unenviable position of beating its head against a brick wall.[906]

It is clear, therefore, that since the common law framework permits arguments to be raised as to the appropriate

[903] *Vedanta Recources Plc v Lungowe and Others* [2019] UKSC 20 [88].
[904] ibid.
[905] ibid [85].
[906] ibid [14] (Lord Briggs).

forum, cross-border litigation in the UK may become more expensive and costly. The ongoing saga concerning the scope of the tort jurisdiction gateway in *Brownlie*[907] is a clear example of this. In *Brownlie,* the Supreme Court recently heard an appeal concerning the correct interpretation of the tort jurisdiction gateway in PD 6B para 3.1(9), namely the requirement that: "(a) 'damage was sustained, or will be sustained, within the jurisdiction; or (b) damage which has been or will be sustained results from an act committed, or likely to be committed, within the jurisdiction." The Supreme Court will soon decide whether consequential damages suffered in the UK (as opposed to Egypt where the accident occurred) are sufficient to trigger the tort jurisdiction gateway.

Drawn-out arguments over jurisdiction have led some commentators to argue that the common law rules on jurisdiction and enforcement are not fit for purpose. Professor Andrew Dickinson has argued that the rules are "untidy and ill-suited for the 21st century."[908] He refers to the cumbersome requirement to obtain permission before serving a claim form out of the jurisdiction, and the "complex and costly requirement" that the Claimant show that England and Wales is the 'proper place' to determine the claim. He instead recommends that the onus be shifted onto the defendant to demonstrate why the English Court should not have jurisdiction.[909]

(ii) Enforcement

Post-Brexit, the enforcement mechanisms of the Recast Regulation and Lugano no longer apply in the UK. As described by Professor Briggs, "English judgments would not be entitled to

[907] Appealed judgment: *FS Cairo (Nile Plaza) LLV v Brownlie* [2020] EWCA Civ 996.
[908] Andrew Dickinson 'Walking Solo – A New Path for the Conflict of Laws in England' (*ConflictofLaws.net*, 19 January 2021) <https://conflictoflaws.net/2021/walking-solo-a-new-path-for-the-conflict-of-laws-in-england/> accessed 21 August 2021.
[909] ibid.

automatic enforcement in the other Member States: they would lose their European passports. That is undeniably a loss."[910] Absent the Recast Regulation, Lugano, the Hague Convention or any other bilateral treaties, recognition and enforcement of judgments resulting from proceedings started after the end of the transition period will now depend upon the local rules of the enforcing state.

At common law, enforcing foreign judgments in England requires a party to issue a new claim on the judgment by way of Part 7 proceedings.[911]

The Court must be presented with evidence to show that the judgment was final and conclusive (i.e. not subject to appeal and not inconsistent with a previous judgment within the enforcing state) and be for a debt or definite sum of money. Further, in contrast to the EU rules, the jurisdiction of the issuing court must be established in line with the rules of English private international law. The judgment must not be an affront to English and Welsh public policy or principles of natural justice or have been obtained by fraud.

The grounds for challenging enforcement under the common law are broader than in the EU rules, therefore, it is easy to see a greater number of contested enforcement applications taking place for claims brought after the transition period.

V. The Post-Brexit Outlook

Where claimants cannot bring claims in their home courts, they must contend with the procedural rules of the foreign state of

[910] Adrian Briggs, 'Secession from the European Union and Private International Law: The Cloud with A Silver Lining' (Lecture at the Commercial Bar Association, 24 January 2017) <https://www.law.ox.ac.uk/sites/files/oxlaw/adrian_briggs_brexit_lecture.pdf> accessed 21 August 2021.
[911] CPR 7.

numerous categories, such as limitation, time periods for service/disclosure, and costs.

There are also real concerns with access to justice. Were the UK to lose the benefit of Brussels and Lugano's jurisdiction and enforcement mechanisms, there may be more drawn-out contention over the appropriate forum for proceedings, delaying litigation and resulting in increased time and cost. As stated by Stephanie Boyce, President of the Law Society, losing Lugano "pushes litigation beyond the reach of all but the deepest of pockets—the wealthiest corporations and individuals will still be able to enforce their rights. Without Lugano, access to justice will denied to those with smaller budgets."[912] In May 2021, NGOs and legal experts called upon the EU to grant the UK accession to Lugano, drawing attention to considerations pertinent to victims' access to justice. The joint statement asserts that the *forum non conveniens* doctrine "provokes jurisdictional arguments that add years to litigation …"[913] citing the example of *Lubbe & Others v Cape PLC* (2000) where around 1,000 claimants died awaiting the resolution of *forum non conveniens* arguments.

Losing the Recast Regulation and Lugano may also result in an increased risk of parallel proceedings in English and EU Member States with inconsistent judgments. Under those two instruments, there are mechanisms to avoid this occurring—if parties commence parallel proceedings, priority to determine jurisdiction is given to the court 'first seised' (however, under the Recast Regulation, where there is an exclusive jurisdiction clause in favour of a certain court, any other court must stay proceedings

[912] Stephanie Boyce (President of the Law Society of England and Wales), 'Losing Lugano? Opening the door to Justice delays' (*The Law Society*, 20 April 2021) <https://www.lawsociety.org.uk/en/topics/brexit/losing-lugano-opening-the-door-to-justice-delays> accessed 22 August 2021.

[913] NGOs and legal experts call on the EU to allow UK accession to Lugano Convention on access to justice grounds' (Statement, *European Coalition for Corporate Justice*, 13 May 2021) <https://corporatejustice.org/wp-content/uploads/2021/06/Lugano_UK_NGOExpert_OpenLetter_v04.pdf> accessed 22 August 2021.

until that court has decided jurisdiction, irrespective of which court was seised first).[914] There is no such mechanism under the common law, the court is instead given a discretion to grant a stay in the case of parallel proceedings. On 26 November 2020, the Law Society published a letter from the Law Societies Joint Brussels Office to the President of the EU (signed on behalf of a range of business organisations/professional bodies/trade associations) which echoes the following concern:

> Failure to agree an international framework would result in national rules applying. This presents the possibility of two or more courts having jurisdiction, or none, and in any event the parties will need recourse to courts in different countries to enforce the judgments. While the complexities of carrying out two legal procedures will be most off-putting to those with the least means, if there is no recourse to courts, this amounts to a denial of justice.[915]

It is also likely that enforcement will become more contentious, time-consuming, and costly. As mentioned above, in the absence of the Recast Regulation, Lugano, and any other international convention or treaty, the default position is the local enforcement rules of the enforcing state. It is plausible to imagine that numerous defences to enforcement could be raised at this stage, creating a barrier to enforcement.

Moreover, due to divergence in local enforcement rules of various Member States, it is likely that tailored legal advice will be required, thus resulting in increased costs. For example, according to French private international law, the so-called '*exequatur process*' prohibits the enforcement of a foreign judgment unless the jurisdiction of the foreign country's court over the case

[914] Recast Regulation (n 877), art 29.

[915] Letter to the President of the European Council (26 November 2020), available at <https://www.lawsociety.org.uk/en/contact-or-visit-us/press-office/press-releases/eu-urged-to-reopen-a-ready-made-route-to-justice-post-brexit> accessed 22 August 2021.

complies with French jurisdictional rules.[916] This may plainly create difficulties for a claimant seeking to enforce an English judgment in France, in the event of (perhaps subtle) disparity between the jurisdictional rules of English and French courts.

Acceding to Lugano would be the obvious means of bridging the gap and ensuring continuity of enforcement of judgments between the UK, EFTA, and EU states in the post-Brexit era. However, it remains to be seen whether the UK's participation will be permitted. The consequences of delayed enforcement for many vulnerable claimants—for example, catastrophically injured litigants who require immediate access to compensation in securing their medical, care, and accommodation necessities—are self-evident.

Commercial disputes, by contrast, are likely to be less adversely affected. Firstly, due to the prevalence of arbitration (which remains largely unaffected by Brexit due to the New York Convention) and secondly, because the UK has acceded to the 2005 Hague Convention on Choice of Court Agreements.[917]

The 2005 Convention requires the courts of Contracting States to give effect to exclusive choice-of-court clauses and enforce any resulting judgment from the court designated under that agreement. However, there remain certain limitations. Firstly, the rules do not apply to exclusive jurisdiction clauses where the matter is a claim for personal injury or a consumer claim, and hence the Convention will be of limited significance for a large amount of travel claims.

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[916] See *Cornelissen* case (Cour de Cassation, First Civil Chamber, 20 February 2007, Appeal No 05-14082). The Cour de Cassation applies the principle that there must be a connection between the subject matter of the dispute and the foreign court (see also Cour de Cassation, First Civil Chamber, 4 May 2017, Appeal No 16-13.645; Court of Cassation, First Civil Chamber, 15 May 2018, Appeal No 17-17.546).

[917] Convention on Choice of Court Agreements (Hague Conference on Private International Law) (concluded 30 June 2005) <https://www.hcch.net/en/instruments/conventions/full-text/?cid=98> accessed 22 August 2021.

Secondly, the Convention only applies to agreements entered on/after the Convention came into force in that State (this is a contentious issue, as the UK and EU disagree on the date the Convention came into force; the UK maintains that it applies from 1st October 2015 when it became a signatory,[918] whereas the EU argues that it only applies from January 2021 when the UK became a party in its own right).[919] The 2005 Convention, therefore, is no substitute for Lugano. It explicitly excludes consumer and employment contracts from its scope.[920] It does not apply to personal injury claims, even if the relationship is a contractual one.[921] Therefore, for non-commercial concerns it is of very limited application. Many litigants will therefore be required to resort to the private international law of the enforcing state.

A potential solution is for the EU and the UK to accede to the 2019 Hague Judgments Convention,[922] described at the Hague Conference as "a gamechanger in international dispute resolution."[923] This operates as a sister instrument to the 2005 Hague Convention, although its application is much wider (for example, applying to tortious and consumer claims). It requires the recognition and enforcement of judgments in civil or

[918] Ministry of Justice, 'Cross-border civil and commercial legal cases: guidance for legal professionals from 1 January 2021' (31 December 2020) <https://www.gov.uk/government/publications/cross-border-civil-and-commercial-legal-cases-guidance-for-legal-professionals/cross-border-civil-and-commercial-legal-cases-guidance-for-legal-professionals> accessed 9 September 2021. Paragraph 1.1 provides: "The 2005 Hague Convention on Choice of Court Agreements still applies to the UK (without interruption) from its original entry into force date of 1 October 2015."
[919] Commission, 'Notice to Stakeholders: Withdrawal of the United Kingdom and EU rules in the field of civil justice and private international law' (REV2, 27 August 2020) 9.
[920] ibid, art 2.
[921] ibid.
[922] *Convention on the Recognition and Enforcement of Foreign Judgments in Civil or Commercial Matters* (Hague Conference on Private International Law) (concluded 2 July 2019) <https://www.hcch.net/en/instruments/conventions/full-text/?cid=137> accessed 22 August 2021.
[923] Press Release of the Hague Conference on Private International Law (8 July 2019) <https://www.hcch.net/en/news-archive/details/?varevent=687> accessed 22 August 2021.

commercial proceedings given by courts of Contracting States and provides a cheap and straight-forward mechanism for so doing. A judgment must be recognised and enforced without any review of the merits (with limited grounds for refusing enforcement).

The 2019 Convention does not require an exclusive jurisdiction clause and therefore allows enforcement in a broader range of circumstances. There is academic support for the UK signing up to the Convention on the basis that the grounds of jurisdiction are more expansive than the common law (including, for example, the place of performance of the contract and the place of the act or omission in tortious actions).[924]

However, again, there are a number of limitations to the 2019 Convention. Firstly, at present only Israel, Ukraine, and Uruguay are signatories. Secondly, there is likely to be some delay before the Convention has effect; the UK must accede to the Convention in its own right and the Convention will not come into force until approximately 12 months after ratification—realistically, therefore, the Convention's impact would not be visible in the UK until at least 2022.

There is also some substantive limitation, the most obvious being that the Convention deals merely with enforcement and not jurisdiction. Additionally, interim measures are not considered to be 'judgments' for the purposes of the Convention,[925] and as such, an interim award of damages for a seriously injured claimant could be excluded. Exemplary and punitive damages are also unenforceable under the Convention. The carriage of passengers and goods is likewise excluded from

[924] See e.g. Reid Mortensen, 'Brexit and private international law in the Commonwealth' (2021) 17(1) Journal of Private International Law 18; Paul Beaumont, 'Some reflections on the way ahead for UK private international law after Brexit' (2021) 17(1) Journal of Private International Law 1.

[925] *Convention on the Recognition and Enforcement of Foreign Judgments in Civil or Commercial Matters* (n 922), art 3.1.B.

its scope,[926] presenting some uncertainty as to whether those injured in RTAs or airline disasters could enforce a judgment for damages.

Therefore, again, this Convention provides no substitute for Lugano which applies to all civil and commercial judgments, with the added benefit of jurisdictional rules to protect weaker parties.

There has been academic debate as to whether the UK could revert to pre-existing treaties.[927] Some argue that the Recast Regulation's predecessor (the Brussels Convention of 1968) could continue to apply between the fifteen signatory Member States as it has not been expressly repealed or replaced and retains its status as an international treaty (rather than as an instrument of EU law). Regrettably, there is no clear answer in this regard.

The UK has also signed up to pre-EU bilateral treaties with EU jurisdictions such as France (1934), Germany (1961), Austria (1962), Italy (1964), and the Netherlands (1969) (enshrined in the Foreign Judgments (Reciprocal Enforcement) Act 1933) which could potentially be revived to provide a mechanism for reciprocal enforcement of judgments. However, this is no substitute for a uniform, EU-wide system of enforcement.

VI. Conclusion

Overall, uncertainty continues to reign. The stance taken by the Commission in response to the UK's application to accede to Lugano is discouraging for litigants seeking to bring and defend

[926] ibid, art 2.1.F.

[927] See e.g. Andrew Dickinson, 'Dickinson on the Fate of the 1968 Brussels Convention: No Coming Back?' (*European Association of Private International Law*, 19 February 2021) <https://eapil.org/2021/02/19/dickinson-on-the-fate-of-the-1968-brussels-convention-no-coming-back/> accessed 22 August 2021.

cross-border claims in the UK, not least in cases involving parties with unequal bargaining power, such as personal injury, consumer, and employment cases. Accession to Lugano would bring about certainty and predictability for litigants and practitioners. Without it, cross-border civil claims are likely to be more time-consuming and costly. It remains to be seen whether the UK will be granted accession, and if not, whether English private international law will adapt in response to the post-Brexit era of cross-border civil law.