Manchester Review of Law, Crime and Ethics

The Student Journal of

The University of Manchester Law School

VOLUME XII

March 2024

The *Manchester Review of Law, Crime and Ethics* is an annual, student-led, peer-reviewed journal founded at The University of Manchester Law School. The Journal exhibits the best academic work in law, criminology and ethics, at the undergraduate and postgraduate levels.

Volume XII March 2024

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Typeset in Times New Roman
Printed in the United Kingdom
ISSN 2399-4630 (Print)
ISSN 2399-4649 (Online)

This year's volume was generously funded by The University of Manchester Law School.

The Editorial Board is grateful for the Law School's continued support.

Manchester Review of Law, Crime and Ethics

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Preface from the Head of the University of Manchester Law School

The Manchester Review of Law, Crime and Ethics is now a well-established publication, with more than a decade worth of peer reviewed articles on a wide range of current topics. It is a huge testament to the talents and energy of our student body, and the wider academic community, that there is both the appetite and capacity to produce a student-led journal of this quality. This project is very much in keeping with the wider spirit of Law here at Manchester. It reflects two dynamic relationships: that between academic staff and students, and that between the university and the wider world.

The creativity, knowledge, critical thinking, and passion for law apparent from the pages speaks highly of the authors, whatever their stage of life and career. I am extremely proud that this journal is product of contributions from almost forty people, coming together as authors, editors, and peer reviewers, and involving internal and external participants. This collaborative approach has borne some fascinating fruit, and is core to our discipline. The study and application of law is, by definition, a team activity: at its heart, it is a field of human activity concerned with community, and the rules and values which enable us to live, work, and hopefully flourish together. Robinson Crusoe, while alone on his island, did not require any law! However, as soon as human beings gather into groups, there is the need for regulation of behaviour and arbitration of disputes. If the norms which govern any society are to be just, inclusive, and flexible enough to meet the diverse aspirations of all of its members, they must come from dialogue and debate. The individuals, partnerships and teams who have

made this edition of the Journal possible have not only produced an invaluable resource for those with a scholarly interest in the subject, they have also fed into much needed societal debates.

As those familiar with this publication have come to expect, this edition covers a range wide of topics and ground. It encompasses, *inter alia*: constitutional questions, the adaption of tort to new technologies, and cutting age debates in the field of medical ethics. Anyone curious about law, criminology or bioethics should find material that is both relevant and inspiring. There is also a tribute by Suzanne Gower to the late Mark George KC. Mr George is perhaps best remembered for having acted for victims' families at the Hillsborough inquests, but was a compassionate and principled lawyer, who significantly changed the world for the better in his journey through it. It is typical of his commitment that he found time himself to contribute to this Journal.

I draw attention to finding time, because I am acutely aware of the level of work that has gone into producing this and every edition of the Manchester Review of Law, Crime and Ethics. Thoughtful, eloquent, and accurate legal commentary does not appear without long hours of work, from the first time that an author sits down with their laptop or notebook, to the final editorial authorisation of the print run. I am grateful for everything achieved by Jacob Wharton as Editor-in-Chief, as well as Che Yang as Deputy Editor-in-Chief, and the rest of the editorial team: Brogan Pritchard, Keran Wu, Khaled Albargouthi, Lester Kanyayi, Nicole Heng, Sevval Tuysuz, Sophie Harrison, and William Ziyan Zhang. Anyone who has ever been involved in editorial work knows how many hard yards you have put in to produce such a remarkable edition. I

have no doubt that the readership will be as appreciative as I am.

Professor Javier García Oliva
Head of Law, School of Social Sciences
The University of Manchester

March 2024

Preface from the Editor-in-Chief

Twelve years on from the very first Volume of this Journal, I find myself thinking back to the words of the Review's first Editor-in-Chief:

> "While it may have been a struggle, when the journal finally started coming together I realized that I was part of something truly amazing."[1]

More than a decade later, those words ring true. Crafting Volume XII required the monumental contributions of so many talented students, academics and practitioners—it is a privilege to have played a part in that. I feel honoured to present the fruits of that labour, and hope that each reader finds some enjoyment—some inspiration—in the works presented hereafter. Indeed, there is much inspiration to be found. Beyond their ordinary studies, their ordinary work, each contributor volunteered the time and effort to produce a series of excellent papers (which I can attest was no small commitment on any contributors' part). Be it as authors, editors, or peer reviewers, more than forty people contributed to the words you'll find in this Volume, not to mention the many of those who helped and guided these works beyond such capacities. On each page and in each sentence, the hard work and talent of those contributors is evident. Of that, I am most proud.

Truly, the efforts of so many talented individuals make the Review special, and it is on the efforts of previous

[1] Michael Kniec, 'Preface from the Editor-in-Chief' (2012) 1 Manchester Review of Law, Crime and Ethics

contributors that Volume XII is built. Of particular regard amongst them is Mark George KC, who sadly passed away in 2022. Many felt the impact of Mark and his work, be it assisting the representation of the families who lost loved ones in the Hillsborough Disaster, his work with Amicus, a charity working with death row inmates in the United States, or students at the University of Manchester who had the pleasure of learning from Mark (myself included). For Volume XI of the Review, Mark authored a paper on the crisis in the Criminal Justice System;[2] an incisive and considered piece on how the system reached its dire state, and the chances of its healing. In tribute to Mark, Suzanne Gower—having worked alongside Mark as a solicitor and once more whilst lecturing—has written a piece on the future of the Criminal Justice System, and the light at the end of the tunnel. For those of us at the Review, we are most grateful for Mark George's contribution to Volume XI, and are proud to present Suzanne's tribute to and continuation of that work in Volume XII.

Since its inception some twelve years ago, the Review has exhibited the exceptional works of the student body at the University of Manchester and more recently, beyond. Herein, you will find a number of incisive and thought-provoking papers authored by students hailing from universities throughout the United Kingdom, and delving into diverse topics. These academic papers display much of the best the University of Manchester and beyond has to offer yet in Volume XII, they are not the sole exhibition of students' talents. In a novel addition to the Review, this Volume presents a more direct application of students' long hours in libraries: an

[2] Mark George, 'The State We Are In: The Crisis of Criminal Justice and How we Got Here' (2022) 12 Manchester Review of Law, Crime and Ethics 164

evidence submission made to the Independent Commission for Counter-Terrorism. 'Look into the Shed' was first submitted to the Commission to guide its work and recommendations; here, you can see students' talent and hard work shine through.

The Review does not only exhibit works authored by students—as my predecessor described, the *next* generation of lawyers, ethicists, and scholars. In this Volume, we are honoured to present papers crafted by practitioners and academics lecturing at the University of Manchester: Suzanne Gower, Kirsty Keywood, and Neil Allen. In her tribute to Mark George KC, Suzanne explores the future of the crisis-stricken Criminal Justice System, and provides a hopeful view of that future. Kirsty and Neil have collaborated with students, Isabel and Joanna, to produce a co-authored piece exploring reform to the Mental Health Act to address its impact on marginalised communities and in particular, two over-represented groups: ethnic minority groups, and persons with a learning disability and/or autism. The contributions of such experienced and learned academics and practitioners provide invaluable—not to mention timely—insights into our law and its future.

Having discussed the contents of this Volume, it would be amiss to not show my gratitude to those who worked so hard to produce this work. In truth, the list of those to whom I owe gratitude for Volume XII proves far greater than I could hope to cover here. Perhaps foremost on that list though, must be my fellow editors. Che, my Deputy and teammate throughout this process, showed her eye for detail and responsibility from the outset. Balancing our work on Volume XII with university and working life would prove impossible alone—Che forever has my gratitude in sharing that responsibility. The Editorial Board merits no lesser a mention. Brogan, Keran, Khaled, Lester,

Nicole, Sevval, Sophie, and William were each exceptional in working alongside the authors to refine their papers, and build upon them further. Seeing the original essays at the start of the year, and the peer-reviewed, sophisticated and astute articles at the end was a great privilege, and speaks to the skill and passion for academia of each editor.

Finally—but by no means least—I'd like to thank our predecessors, Tom and Adam. During my time as an editor for Volume XI, I learned much with the guidance of Tom and Adam; since I took the mantle of Editor-in-Chief, they have not stopped supporting and guiding us through the process. Their names may not appear on this Volume beyond this preface, but their influences are present throughout.

Some eighteen months later, I find myself passing on the mantle also. Like Tom before me, I am vacating the seat of Editor-in-Chief, and passing that to Sevval Tuysuz. As an editor, Sevval demonstrated a meticulous eye for detail and analytical mind, helping to elevate an already impressive essay to a most impressive article. I much look forward to the future of the Review with Sevval, and to reading Volume XIII later this year.

Jacob Wharton
Editor-in-Chief

March 2024

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The Future of Justice: A tribute to Mark George KC

Suzanne Gower[†]

Prologue

Somewhat unusually, and perhaps self-indulgently, this article begins with a personal tribute to the friend, colleague and mentor who inspired this piece.

Mark George KC was a giant of the criminal bar; a passionate advocate for justice whose fierce intellect was combined with an insatiable work ethic and a simple desire to use his undoubted privileges for the benefit of others who may be less fortunate than he. His socialist beliefs underpinned his legal practice, as they did all parts of his life.

As he did with hundreds of other legal professionals, Mark had a major influence on my career. Each year he travelled to universities throughout England and Wales to seek recruits for the anti-death penalty charity 'Amicus – Lawyers for Justice on Death Row,' of which Mark was a trustee. He also delivered lectures on a variety of criminal justice topics to many generations of law students. I had the pleasure of working with him in various capacities in each of my last four jobs: as a criminal defence solicitor instructing him in serious Crown Court trials; in the Hillsborough Inquests, where we worked together on one of the family teams; as a charity worker,

[†] Suzanne Gower is a lecturer in Criminal Evidence and Miscarriages of Justice at the University of Manchester Law School. Suzanne is an experienced criminal defence solicitor (non-practising) and has higher rights of audience for criminal advocacy. Previously, Suzanne was the Managing Director of APPEAL, the charity law practice dedicated to challenging miscarriages of justice. Suzanne is carrying out doctoral research concerning wrongful allegations of historic sexual abuse.

campaigning for reform of the criminal justice system; and now, teaching Criminal Evidence and Miscarriages of Justice at the University of Manchester. Whether I was his instructing solicitor on a serious Crown Court trial or had brought him in as a guest lecturer to address a group of undergraduate students, I knew with certainty Mark would have the relevant audience in the palm of his hands within minutes. He was a compelling and fearless advocate on behalf of his clients, but also a brilliant criminal law scholar. I can still picture his grin at the foreman of the jury at the end of an attempted murder trial, passing forward a note to inquire if it would be acceptable for them to acquit the defendant of all charges on the indictment, and instead convict him of the far less serious charge of reckless wounding as they thought that would better reflect Mr George's explanation of the events.

Mark passed away in December 2022, just a matter of months after he published his review of the state of the criminal justice system as he saw it in Volume XI of this journal: 'The State We Are In: The Crisis of Criminal Justice and How We Got Here.'[3] In that study of the criminal justice system, Mark set out in intricate detail an exposition of the current crisis in criminal justice, outlining the problems combined with a detailed analysis of how they have arisen. His conclusion was an extremely pessimistic one, warning that, in his considered opinion, the situation facing criminal justice is now so stark that its continued existence is threatened:

> "it seems clear that, if the government fails to act very soon, the state of our criminal justice system, already on life support, may become unsustainable."[4]

[3] Mark George, "The State We Are in: The Crisis of Criminal Justice and How We Got Here." (2022) 11 *Manchester Review of Law, Crime and Ethics* 164–202.
[4] ibid 202.

This negative conclusion, however, feels to be a somewhat unsatisfactory ending to Mark's career; not because of any doubt over the sincerity of his concern over the future of justice, nor the truly perilous state in which the system finds itself, but because for all of his genuine concern, it is clear that he himself had never given up hope that it could be improved. My certainty comes from the knowledge that he continued to care immensely about the future of criminal justice; his final lecture on hearsay evidence to Criminal Evidence students at the University of Manchester was delivered only a matter of weeks before his untimely death. If he had truly believed that the criminal justice system had passed beyond a point of sustainability, surely he would not have invested his valuable time and energy in his last weeks in continuing to educate the next generation of criminal lawyers. Mark had clearly retained the belief that whilst the criminal justice system was in a perilous state, hope remains for its recovery through the continued hard work and endeavour of the practitioners who followed in his footsteps.

Abstract

A key theme in Mark's essay was the increased risk of wrongful convictions, which he saw as a natural consequence of the decline in criminal justice standards. The issue has been brought firmly into the public consciousness in a way not seen since the Irish terrorism miscarriages of justice of the late 1980's, not least due to the recent high-profile quashing of the conviction of Andrew Malkinson—who had served 17 and a half years in prison for a violent rape following the discovery of exculpatory DNA evidence—following on from the vast scale of the wrongful convictions of subpostmasters due to the Post Office Horizon scandal. Major inquiries are underway into both of these miscarriages

of justice,[5] so the issue will remain firmly in the public view for some time yet. As such, this paper will explore the key risks of miscarriages of justice and will examine measures currently being taken to alleviate that risk and maximise the possibility of their swift recognition and remedy. In the spirit of Mark George, it will endeavour to focus on the positive developments currently taking place, and highlight the work of the academics and legal practitioners who are dedicating their time and efforts in the aim of improving the system to the benefit of others in the future.

I. The Future of Justice Project

A new project was launched in parliament earlier this year by the All-Party Parliamentary Group on Miscarriages of Justice ('APPGMJ'), that being the Future of Justice Project. Experienced appellate lawyer, Glyn Maddocks KC (Hon.), is running the project alongside the campaigning journalist and academic, Jon Robins. The Future of Justice Project has now been registered as a charity[6] under the governance of Maddocks and Robins, who have been joined as trustees of the charity by Barry Sheerman MP, the Chair of the APPGMJ, and Sue James, the Chief Executive Officer of the Legal Action Group ('LAG'). The project will take over the role of providing the secretariat to the APPGMJ as they look to build upon the impressive work done by the Westminster Commission on Miscarriages of Justice, whose investigation and 2021 Report into the workings of the Criminal Cases Review Commission has formed the basis for the wide-ranging review of the laws concerning criminal appeals currently being undertaken by the Law Commission. This could present a once

[5] Dominic Casciani, 'Andrew Malkinson: Government announces inquiry into wrongful rape conviction' (*BBC News*, 2023) <https://www.bbc.co.uk/news/uk-66606328> accessed 22 September 2023; and Post Office Horizon IT Inquiry, 'About the Inquiry' (*Post Office Horizon IT Inquiry*) <https://www.postofficehorizoninquiry.org.uk/> accessed 22 September 2023.

[6] Registered Charity number: 1202823.

in a generation opportunity for reform in this complex and often over-looked area of law.

The Future of Justice Project will begin their work by launching inquiries into five different areas of the criminal justice system which they have identified as in need of reform: Science & the Courts; Media; Legal Policy; the Legal Profession; and, Criminal Appeals. This paper will now consider each area in turn to explore what would be required to make a difference in reducing the risk of miscarriages of justice.

II. Science and the courts

> "A successful appeal against wrongful conviction will most often demand fresh evidence, which may be derived from previous unused material, re-investigation of material with new techniques or reappraisal in the light of new understanding."[7]

Forensic science has played a significant role in nearly all notable miscarriages of justice, including the recent successful appeal in the Malkinson case. Key developments in DNA technology allowed for detailed analysis of the previously unidentified male DNA which had been discovered on a "crime specific" area of the victim's clothing and in scrapings from her fingernails where she had scratched the face of her attacker. That analysis led to the identification of a new suspect, referred to by the Court of Appeal as 'Mr B,' who has

[7] Carole McCartney and Louise Shorter, 'Police Retention and storage of evidence in England and Wales' (2020) 22(2) International Journal of Police Science & Management 123–136.

since been arrested on suspicion of these offences.[8] Little can be said about him whilst criminal proceedings against him remain live, but it was said in the appeal hearing that he had lived close to the crime scene at the time, had relevant previous convictions, no clear alibi for the night of the attack and crucially, fitted the victim's description of her assailant more closely than Mr Malkinson ever had.[9]

The referral of the case back to the Court of Appeal by the Criminal Cases Review Commission ('CCRC') had been solely on the basis that the new DNA analysis presented a real possibility that the Court of Appeal would quash the conviction, pursuant to section 9 of the Criminal Appeal Act 1995. Notably, they did not refer the case on the basis of non-disclosure of evidence relating to identification witnesses, which had also been raised by Mr Malkinson's application to the CCRC.[10] The Commission held that the evidence concerning material non-disclosure of evidence did not give rise to grounds to refer alone, but held that it could be seen as supportive of the sole ground for referral, namely the new DNA results. This is crucial as not only did the Court of Appeal go on to consider these additional grounds, but two of them were found to be grounds on which the appeal should succeed as, in the Court's view, they made the conviction unsafe, in addition to ground one. It is clear that had Mr Malkinson applied to the CCRC on the grounds of the issues of non-disclosure alone, the CCRC would not have found this a basis for referral as they were only prepared to refer the case once they were presented with the fresh forensic results by Mr Malkinson's legal representatives from the legal charity APPEAL.

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[8] Lauren Hirst and Tom Mullen, 'Andrew Malkinson's rape conviction quashed after 20-year fight' (*BBC News*, 2023) <https://www.bbc.co.uk/news/uk-england-manchester-66310919> accessed 21 November 2023.
[9] *R v Malkinson* [2023] EWCA Crim 954, [39] (Holroyde LJ).
[10] ibid [34] (Holroyde LJ).

APPEAL have been highly critical of the decisions by the CCRC, not least the failure to obtain the full police and prosecution files relating to the Malkinson case when he had first applied to them in 2012 and again in 2018, directly attributing this failure to fully utilise their investigative powers to Mr Malkinson's wrongful detention for an additional decade:

> "If the CCRC had uncovered the disclosure failings and referred Mr Malkinson's case to the Court of Appeal in 2009, when he first applied to the body, he would have been spared a decade of wrongful imprisonment."[11]

It is of major concern that the CCRC had seemingly not appreciated the significance of the non-disclosure of this evidence, when presented with the full details of the non-disclosure in the last application made by Mr Malkinson's legal representatives, having twice brought legal action against Greater Manchester Police to obtain full disclosure of the relevant documentation.[12] Doubts about the CCRC's willingness and ability to carry out basic investigatory tasks are critical considering the prominence given to their role in the post-conviction system, as noted by the Supreme Court in the case of *Nunn*:[13]

> "The safety net in the case of disputed requests for review lies in the CCRC. That body does not, and should not, make enquiries only when reasonable prospect of a conviction being quashed is already

[11] APPEAL, 'Andrew Malkinson – exonerated after 20 years' (*APPEAL*, 2023) <https://appeal.org.uk/andy-malkinson> accessed 15 October 2023
[12] ibid.
[13] *R (Nunn) v Chief Constable of Suffolk Constabulary* [2014] UKSC 37.

> demonstrated. It can and does in appropriate cases make enquiry to see whether such prospect can be shown. It has ample power, for example, to direct that a newly available scientific test be undertaken… What it ought not to do is to indulge the merely speculative. It is an independent body specifically skilled in examining the details of evidence and in determining when and if there is a real prospect of material emerging which affects the safety of a conviction. This exercise involves a detailed scrutiny of the other evidence in the case and a judgment on the likely impact of whatever it is suggested the fresh enquiries may generate. Whilst in principle the court retains control, via the remedy of judicial review, of the duty laid upon the police and prosecutors after the appeal process is exhausted, it is likely to determine, unless good reason for not doing so is provided, that relief by that route is inappropriate until the CCRC has had the opportunity to make a reasoned decision."

To examine fully the current challenges in relation to forensic science, a Westminster Commission—following the model of the Westminster Commission on Miscarriages of Justice—has been established under the co-chairmanship of leading forensic scientist Professor Angela Gallop CBE and Professor Dame Sue Black (The Baroness Black of Strome) DBE, a renowned anthropologist, anatomist and academic. The Commission also includes a variety of other experienced professionals, including Professor Carole McCartney, an academic who has written extensively on forensic science and issues relating to the retention and use of forensic evidence in the criminal justice system; also, Katy Thorne KC, a leading defence lawyer and Assistant Coroner, renowned for her

particular experience in cases involving complex forensic issues (notably, abusive head trauma).

The forensic science sector is currently in a state of considerable flux. The Science and Technology Select Committee of the House of Lords conducted a lengthy investigation into the role of forensic science in the criminal justice system and produced 'Forensic Science and the Criminal Justice System: A Blueprint for Change.'[14] The report's findings were highly critical of the state of forensic science and warned of pending disaster if immediate action was not taken to stabilise the market:

> "The quality and delivery of forensic science in England and Wales is inadequate… We have found that there has been a serious deficit of high-level leadership and oversight of forensic science from the Home Office and Ministry of Justice. Following our evidence session with the Ministers, we were not persuaded that enough had been done to address the piecemeal oversight and accountability of forensic science. We recommend that a Forensic Science Board be created to deliver a new forensic science strategy and take responsibility for forensic science in England and Wales.
> "Simultaneous budget cuts and reorganisation, together with exponential growth in the need for new services such as digital evidence, have put forensic science providers under extreme pressure. The result is a forensic science market which is becoming dysfunctional and which, unless it is properly regulated, will soon suffer the

[14] Science and Technology Committee, 'Forensic Science and the Criminal Justice System: A Blueprint for Change' (HL 2017–19, 333).

> shocks of major forensic science providers going out of business and putting justice in jeopardy. We recommend the role of the Forensic Science Regulator is reformed, expanded and resourced to provide this market regulation function."[15]

The report did prompt swift legislative action from the Government in relation to some of its recommendations. The Forensic Science Regulator Act 2021 has introduced a statutory role for the Forensic Science Regulator who is currently in the process of drafting a statutory code which will include significant changes: for instance, a new statutory accreditation scheme, in addition to new powers of enforcement and compliance intended to alter the forensic science market radically to address some of the identified deficiencies.

These changes will clearly not be sufficient to address all areas of concern identified by the Select Committee, whose findings and recommendations were wide-reaching. In particular, the report addresses issues such as inadequate availability of legal aid funding for forensic work for defence firms, contrary to the principles of equality of arms,[16] alongside other longstanding and contentious issues, including the exponential rise of digital evidence and the capability of the criminal justice system to deal with it.[17] The Select Committee damningly noted that they found no evidence of a "discernible strategy" to address concerns over the challenges to the criminal justice system posed by this issue.[18]

As such, the launch of the Commission on Forensic Science is likely to be welcomed by many in the forensic

[15] ibid.
[16] ibid ch 5, paras 117–123.
[17] ibid ch 5, paras 145–151.
[18] ibid 3.

science and legal communities. It is also noteworthy that the Law Commission has made specific reference to addressing concerns relating to forensic science in its overall review of the appellate system, including within its remit for review:

> "Laws governing the retention and disclosure of evidence for a case, including after conviction, and retention and access to records of proceedings."[19]

These concerns are likely to feature heavily in the scope of the Commission's inquiry as one of the Commissioners, Professor Carole McCartney, has researched extensively on the issue, carrying out both quantitative and qualitative research, from which she concluded:

> "Police retention and storage of material, post-conviction, is an opaque, unaudited landscape that is not fit for purpose."[20]

Concerns over problems occurring in relation to the retention and storage of evidence are not limited to post conviction cases. It was recently reported that McCartney and Shorter have obtained evidence that in England and Wales, lost or unavailable materials were responsible for the pre-trial collapse of 7,316 cases between September 2021 and September 2022, including 16 homicides (1.3% of the total number of homicides) and 123 sexual offences (1%).[21]

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[19] Law Commission, 'Law Commission to undertake review of the appeals system' (*Law Commission*, 2022) <https://www.lawcom.gov.uk/law-commission-to-undertake-review-of-the-appeals-system/> accessed 11 September 2023.
[20] McCartney and Shorter (n 7).
[21] Hannah Devlin, 'Missing evidence led to 16 homicides in England and Wales not going to trial' *The Guardian* (London, 2023) <https://www.theguardian.com/uk-news/2023/sep/03/lost-missing-evidence-cases-freedom-of-information-police> accessed 15 September 2023.

Again, the Malkinson case offers significant insight as the case perfectly demonstrates the potential harm that can be caused from failing properly to retain and store evidence. The Independent Office for Police Conduct ('IOPC') have now launched a formal investigation into Greater Manchester Police's ('GMP') investigation of Mr Malkinson, and specifically into a complaint raised by Mr Malkinson about the wrongful destruction of evidence by GMP[22] at a time when they not only knew that Mr Malkinson continued to maintain his innocence, but also that there was no forensic evidence linking him to the crime and that an unknown male DNA profile had been found on a "crime specific" part of the victim's clothing.[23] The presence of the initially unattributed male DNA profile was first discovered when the exhibits in the case had been examined as a part of Operation Cube, an operation which involved the re-examination of exhibits in murder and serious sexual assault cases due to concerns over several techniques which had been used.[24] As a result of this discovery, it is now known that the police, Crown Prosecution Service and Forensic Science Service all knew that another man's saliva had been found on the victim's clothing directly over the area where her nipple had been severed by biting.[25] All organisations were present at a 2009 meeting where, as The Guardian reported, the head of complex casework for the CPS in Manchester is recorded as indicating that they fully understood the

[22] Independent Office for Police Conduct, 'Independent investigation begins following wrongful conviction of Andrew Malkinson' (*IOPC*, 2023) <https://www.policeconduct.gov.uk/news/independent-investigation-begins-following-wrongful-conviction-andrew-malkinson> accessed 15 September 2023

[23] APPEAL (n 11).

[24] Mark Townsend, 'DNA scrutiny to prompt retrials' *The Guardian* (London, 2007) <https://www.theguardian.com/uk/2007/dec/23/ukcrime.theobserver> accessed 16 September 2023.

[25] Emily Dugan, 'Rape, DNA and injustice: a timeline of the Andrew Malkinson case' *The Guardian* (London, 2023) <https://www.theguardian.com/law/2023/aug/15/dna-and-injustice-a-timeline-of-the-andrew-malkinson-case> accessed 16 October 23.

significance of the discovery for the safety of the conviction, but did not propose to take any action beyond preparing to defend the conviction were Mr Malkinson able to convince the CCRC to refer the case back to the Court of Appeal:

> "If it is assumed that the saliva came from the offender, then it does not derive from Malkinson. This is surprising because the area of the clothing that the saliva was recovered from was crime specific."

However, he said "he did not see that there was a need to do any further work on the file" unless the case was brought to appeal, and then his focus would be on "bolstering the case against Malkinson."[26]

The CCRC were not persuaded to do the further work recommended by the Forensic Science Service, dismissing Mr Malkinson's application in 2012 noting that "the cost cannot be ignored" and "further work would be extremely costly,"[27] whilst claiming that the Court of Appeal would be unlikely to overturn the conviction on the basis of the testing which ultimately, over a decade later, formed the basis of Ground 1 of the successful application.

The IOPC investigation will be looking into GMP's response to the complaint made by Mr Malkinson concerning the decision to destroy the victim's clothing whilst they knew he remained a serving prisoner and that there existed unidentified DNA in "crime specific" areas of the clothing.[28] Indeed, the Code of Practice to the Criminal Procedure and Investigations Act 1996 sets out clearly at Paragraph 5.9 that

[26] Devlin (n 21).
[27] Devlin (n 21).
[28] IOPC (n 22).

all relevant material should be retained until the person has been released from custody.[29] Due regard must be given to the proposition that the consequences for GMP's failure to follow this rule could have been catastrophic not only for Mr Malkinson's quest to overturn his conviction, but also for a future trial for any other suspects in the case.[30] It seems odd to describe Andrew Malkinson as having been lucky, but it does appear that it was an act of chance that due to previous testing completed on the exhibits in his case during Operation Cube, samples of the exhibits remained in the forensic archive and survived the culling of exhibits which remained in the possession of GMP. Given the reluctance of the CCRC to refer the case on any basis other than fresh forensic evidence, the significance of this to the outcome cannot be overstated.

It is clear that Professor McCartney and the other members of the Westminster Commission on Forensic Science will have this case in mind as they seek to bring clarity to the rules surrounding the retention and storage of exhibits, and ensure that future appellants need not rely on such chance events to have access to the testing with the potential to establish the unsafety of their convictions.

III. Media/open justice

Another Commission is to be established under the Future of Justice Project, studying the role of the media in challenging

[29] Ministry of Justice, *Criminal Procedure and Investigations Act 1996 (section 23(1)) Code of Practice* (London, HMSO 2015) <https://www.gov.uk/government/publications/criminal-procedure-and-investigations-act-code-of-practice> accessed 16 September 2023.

[30] At the time of writing, another man—named only as Mr B—remains on police bail having been arrested on suspicion of the offences: Lauren Hirst and Tom Mullen, 'Andrew Malkinson's rape conviction quashed after 20-year fight' (*BBC News*, 2023) <https://www.bbc.co.uk/news/uk-england-manchester-66310919> accessed 21 November 2023.

miscarriages of justice and investigating potential threats to the principles of open justice. The Commission will be run by Co-Chairs, David James Smith, an experienced investigative reporter and former Commissioner at the CCRC, and Danny Shaw, the former BBC Home Affairs Correspondent and present commentator on criminal justice and policing issues.

Primarily, the Commission will be concerned with considering whether the fundamental principle of open justice—that justice must not only be done, but must be seen to be done—is being upheld in the criminal justice system. This issue was the subject of a report by the Justice Select Committee in 2022[31] following their inquiry into the effects of increasing levels of digitisation within the criminal justice system and the changing nature of reporting on criminal justice issues. The Justice Committee were particularly concerned with the impact of measures introduced to improve online access on transparency. They singled out the Single Justice Procedure ('SJP') as requiring review by HM Courts and Tribunals Service to ensure that it is as transparent as proceedings conducted in open court.[32] Recent press coverage has indicated that these warnings have not been heeded: concerns remain over the increasing use of the SJP and high risk of miscarriages of justice occurring in cases conducted in secret, without the presence of the defendant or a legal representative. The Telegraph has reported that in an attempt to clear the Magistrates Court backlog (which worsened considerably during the pandemic), over sixty percent of Magistrates Court cases are now heard via the SJP, which they

[31] Justice Committee, 'Open justice: court reporting in the digital age' (HC 2022-23, 339).
[32] ibid 3.

report has an admitted error rate of ten percent of cases.[33] The Ministry of Justice have defended the increased use of the SJP, claiming it is an "accessible, proportionate, effective and more efficient way of handling less serious cases,"[34] but their confidence in the appropriateness of the procedure is not shared by the Chair of Justice Select Committee, Sir Bob Neill. The former criminal barrister has urged ministers to "consider how the process could be made more open and accessible to the media and the public."[35]

It appears to be significant that critics of the SJP have now been joined by the Magistrates' Association, the body representing the very Magistrates who are responsible for operating the SJP, and who are clearly not persuaded that the arguments proffered by the Ministry of Justice in support of the SJP are sufficient to counter the deficits they are witnessing in the process:

> "Any operational benefit or efficiency improvement provided by such processes must be looked at through the prism of the impact on open justice, which must always be of paramount concern."[36]

The concerns outlined by the Magistrates' Association about the SJP are wide-ranging in nature, and are both systemic and operational. The Times reports that the Association have

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[33] Charles Hymas and Ben Butcher, 'Record number of court cases are being heard in secret' *The Telegraph* (London, 2022) <https://www.telegraph.co.uk/news/2022/06/08/record-number-court-cases-heard-secret/#:~:text=A%20record%2060%20per%20cent,a%20Telegraph%20investigation%20has%20found.> accessed 27 September 2023.

[34] ibid.

[35] ibid.

[36] Catherine Baksi, 'Filming in court 'boosts open justice'' *The Times* (London, 2023) <https://www.thetimes.co.uk/article/filming-in-court-boosts-open-justice-mfhdxn2z6> accessed 21 November 2023.

expressed concern that defendants are not sufficiently understanding the system to allow them to engage properly with the process:

> "As the system may appear to be administrative rather than judicial, people may not realise the importance of responding and thus risk ending up with a criminal conviction without entering a plea."[37]

The Association has also offered criticisms of the impact on the accessibility of cases conducted under SJP for the press and public, both at the time of the sessions as well as providing access to the results thereafter.

> "because the process cannot be observed, justice cannot be seen to be done".[38]

Another significant open justice issue to be considered by the Commission is the debate over the televising of criminal cases. The Criminal Justice Act of 1925 had made it an offence to film inside a courtroom,[39] but the introduction of the Crown Court (Recording and Broadcasting) Order 2020 has significantly altered this by allowing the broadcast of sentencing remarks in the Crown Court, albeit with a ten second delay to avoid breaching any reporting restrictions.[40] This move towards further opening up the criminal justice

[37] ibid.
[38] ibid.
[39] Criminal Justice Act 1925, s 41.
[40] Ministry of Justice, HM Courts & Tribunals Service, and Dominic Raab MP, 'Crown Court sentencing remarks to be broadcast for first time' (*Gov.uk*, 2022) <https://www.gov.uk/government/news/crown-court-sentencing-remarks-to-be-broadcast-for-first-time> accessed 17 September 2023.

system to public scrutiny has been broadly welcomed by both broadcasters and the Bar Council.[41]

The Westminster Commission will consider whether there is a case for further televising other parts of the criminal trial process. Any such move may well prove to be controversial, given the concerns expressed by the Criminal Bar Association about the impact of televising other parts of the trial on the very fairness of the proceedings:

> "Nothing must compromise the interests of justice, the primacy of a fair trial, and respecting the interests of vulnerable witnesses, witnesses generally and defendants."[42]

The Bar Council Chair, Mark Fenhalls KC, expressed similar concerns about the potential impact of televising criminal trials upon both the outcome of the proceedings, but also on how the legal system is perceived by the wider community:

> "If the scheme is expanded there may be concerns about how people react to having cameras on them and it's important that the Crown Court never becomes a source of entertainment or fodder for social media memes."

[41] ibid; Bar Council, 'Broadcasting Crown Court sentencing will shine a light on the system, says Bar Council (*Bar Council*, 2022) <https://www.barcouncil.org.uk/resource/broadcasting-crown-court-sentencing-will-shine-a-light-on-the-system-says-bar-council.html> accessed 17 September 2023.

[42] Clive Coleman, 'TV cameras to be allowed in Crown Courts in England and Wales' (*BBC News*, 2020) <https://www.bbc.co.uk/news/uk-51110206> accessed 17 September 2023

Former BBC Legal Correspondent, Clive Coleman, has articulated similar concerns and suggests it is unlikely that full coverage would ever be attempted:

> "It is difficult in a world of social media and deep fakes to imagine witness evidence ever being televised."[43]

It may well be that the Commission ultimately recommends a way of moving towards a criminal trial process more open to the general public but without supporting full televising of all criminal proceedings, such as televising sentencing hearings in the Magistrates Court or increasing the coverage of the trial process to include parts such as Counsel's speeches and the Judge's summing up, without including the witness evidence in this process.

It is clearly a crucial investigation for the Commission to conduct to allow them to develop an appropriate evidence base on which to make such a recommendation, with a view to increasing both public scrutiny and understanding of the criminal trial process, and to reduce the risk of errors occurring leading to wrongful convictions.

IV. The legal profession

Another identified area of concern has been the role of the legal profession in both preventing and remedying miscarriages of justice. The limitations of the quality of advice and representation offered to some defendants and the resultant

[43] Clive Coleman., 'Court on camera: televising cases can help inform public' *The Times* (London, 2023) <https://www.thetimes.co.uk/article/court-on-camera-televising-cases-can-help-to-inform-the-public-wpvm6skvv> accessed 21 November 2023.

likelihood of miscarriages of justice occurring has been an area of concern for some time[44] and yet, the Court of Appeal has been historically reluctant to allow appeals on the basis of ineffective assistance from Counsel.[45]

The Post Office Horizon IT Inquiry is exposing considerable links between the actions of the Post Office and their lawyers and the miscarriages of justice which occurred, but serious questions remain to be answered about the legal representation the victims may have themselves received given the scale of the injustices which occurred before being uncovered. A research project led by Professor Richard Moorhead at the University of Exeter has been established to explore fully the ethical issues which occurred in relation to the lawyers involved in this scandal, and how lessons can be learned for the future.[46]

The Future of Justice Project has decided to investigate this topic through the formation of a committee, rather than a commission, to allow it to look thematically at the full range of issues which arise in this context.

The Committee is being led by Dr Lucy Welsh, an academic and former criminal defence solicitor who has researched extensively on issues concerning access to legal advice and vulnerable defendants. She has been joined on the Committee by a group of academics, campaigners and lawyers with considerable experience of the subject matter, including

[44] Jon Robins, 'No defence: miscarriages of justice, lawyers and poor representation' (*The Justice Gap*, 2013) <https://www.thejusticegap.com/no-defence-miscarriages-of-justice-and-lawyers/> accessed 16 October 2023.
[45] Marcus Procter Henderson, 'Truly Ineffective Assistance: A Comparison of Ineffective Assistance of Counsel in the United States of America and the United Kingdom' (2002) 13(1) Indiana International and Comparative Law Review 317, 341.
[46] The Post Office Project, 'The Scandal' (*The Post Office Project*, 2023) <https://postofficeproject.net/about-the-project/> accessed 22 September 2023

Professor Ed Cape, professor of law at University of the West of England and author of the leading practitioner text, "Defending Suspects at Police Stations."

The Committee held its first evidence session in July 2023, focusing on issues arising at the very start of criminal proceedings, particularly problems in relation to the representation of suspects at police stations. The expert witnesses who appeared before the committee raised a wide variety of concerns over the lack of training and funding for legal representatives leading to poor quality representation, which is of particular concern in terms of the impact on vulnerable and neurodiverse detained persons.[47]

These concerns were summarised by one expert witness, Dr Roxana Dehaghani, a criminal justice researcher at Cardiff University, whose research focuses on the vulnerability of the accused:

> "A number of different things are happening that are a perfect storm – cuts to the number of police officers and a criminal defence profession is on its knees… There needs to be some sort of royal commission backed up by academic research and a system-wide deep-dive into everything that's going wrong."[48]

The Malkinson case can again prove instructive as to the harm that can result when errors occur during the initial police investigation and in particular, when the defendant's

[47] Abdallah Barakat, 'A 'perfect storm' in the justice system creates a crisis in police representation' (*The Justice Gap*, 2023) <https://www.thejusticegap.com/a-perfect-storm-in-the-justice-system-together-with-an-addiction-to-custody-was-creating-a-crisis-in-police-station-representation/> accessed 24 September 2023.
[48] ibid.

interests are not adequately protected by their legal representatives. Malkinson was initially represented by a duty solicitor who picked up on some of the irregularities which occurred during the identification procedures, made appropriate representations at the time and recorded his concerns in writing.

Unfortunately, shortly after this, Mr Malkinson elected to change representation due to pressure from other prisoners on remand who convinced the inexperienced Malkinson that it would be in his best interests to do so. Following the transfer of his representation, insufficient action was taken in relation to challenging the conduct of the identification procedures and identifying any breaches of Code D of the Police and Criminal Evidence Act 1984 which may have occurred.[49] It should be noted that the identification evidence was the crux of the prosecution case against Malkinson at trial and it is unknown what, if any, effect it may have had on the outcome of the trial had this evidence been challenged at trial.

V. Joint enterprise

A committee will also be established to look at the issue of joint enterprise, which remains a most controversial doctrine some seven years after the case of *R v Jogee*,[50] in which the Supreme Court ruled that the law had taken a "wrong turn" in allowing a person to be convicted as an accessory to a serious offence on the basis that they were involved in a joint criminal enterprise with another person and foresaw that that person might commit a more serious offence. In *Jogee*, the Supreme Court held that

[49] Home Office, 'PACE Code D 2017' (*Gov.uk*, 2017) <https://www.gov.uk/government/publications/pace-code-d-2017/pace-code-d-2017-accessible> accessed 24 September 2023.
[50] *R v Jogee, Ruddock v The Queen* [2016] UKSC 8, [2016] UKPC 7.

this interpretation was wrong and that to be convicted of the more serious offence, the party to the joint enterprise had to intend, not just foresee, that the other party to the joint enterprise would commit the offence in question.[51]

The Committee will be concentrating initially on responding to the Law Commission review, which has explicitly referenced a review of the 'substantial injustice' test applied by the Court of Appeal (Criminal Division) to out of time appeals brought following a change in law, within the terms of reference for their inquiry.[52] In *R v Johnson*,[53] the Court of Appeal said that in deciding whether the "substantial injustice" test has been met, it would "primarily and ordinarily have regard to the strength of the case advanced that the change in the law would, in fact, have made a difference" to the outcome.

The impact of this judgment in terms of severely restricting potential out of time appeals has drawn extremely strong criticism from lawyers and campaigners, including Felicity Gerry KC, lead counsel for Mr Jogee in the Supreme Court case, who has been extremely critical of the Court of Appeal's judgment in *Johnson* effectively undermining the Supreme Court's intentions in *Jogee*:

> "Joint enterprise exposes all that is wrong with our justice system and we, as lawyers, are forced to take opportunities to assist campaigners rather than see our justice system function fairly.

[51] ibid.
[52] Law Commission, 'Criminal Appeals: Summary of the Issues Paper' (*Law Commission*) <https://s3-eu-west-2.amazonaws.com/lawcom-prod-storage-11jsxou24uy7q/uploads/2023/07/14.321_LC_Criminal-Appeals-issues-paper_v4.1_WEB.pdf> accessed 24 September 2023.
[53] *R v Johnson* [2016] EWCA Crim 1613.

> "The late Lord Toulson worked it out, wrote a book chapter and sat on the case of *Jogee*. Unfortunately, it was then thought to be a good idea to announce (without hearing legal argument) that anyone affected by the error would not be able to appeal unless they had suffered a *substantial injustice*. What more injustice can there be to be wrongly convicted of murder, even if you did have a fight. The current worry is that *inferring* guilt is a guise for bias."[54]

> "In reality, the substantial injustice test amounts to the opinion of the Court of Appeal that an appellant is guilty anyway, without ordering a retrial. It beggars belief that an injustice, in this context, is not thought to be sufficient to make a conviction unsafe – isn't that what we understand a miscarriage of justice to really mean? That a person was wrongfully convicted."[55]

Concerns over the alleged disproportionate use of the doctrine against young men from a black background have been repeatedly raised in reports, including the Lammy Review[56] and 'The usual suspects,' a report by the Centre for Crime and Criminal Justice Studies.[57] A human rights charity,

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[54] Felicity Gerry, 'Joint enterprise exposes all that is wrong with our justice system' (*The Justice Gap*, 2018) <https://www.thejusticegap.com/joint-enterprise-exposes-all-that-is-wrong-with-our-justice-system/> accessed 24 September 2023.

[55] ibid.

[56] The Lammy Review, 'The Lammy Review' (*Gov.uk*, 2017) <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/643001/lammy-review-final-report.pdf>- accessed 24 September 2023.

[57] Helen Mills, Matt Ford, and Roger Grimshaw, 'The usual suspects: Joint enterprise prosecutions before and after the Supreme Court ruling' (2nd edition, Centre for Crime and Criminal Justice Studies 2022) <https://www.crimeandjustice.org.uk/sites/crimeandjustice.org.uk/files/Usual%20Suspects%202nd%20edition%20final%20version%208%20nov_1.pdf > accessed 24 September 2023.

Liberty, have recently made representations to the CCRC as a third-party intervener on cases involving three young black men convicted of joint enterprise murder, on the basis that they claim that the men had been unfairly targeted by an institutionally racist criminal justice system:

> "We know young Black men are particularly likely to be targeted by joint enterprise prosecutions, which unfairly sweep people into the criminal justice system – often on the basis of dubious evidence that young people were 'in a gang.'"[58]

It is apparent from such serious concerns persisting amongst academics, lawyers and campaigners about the current state of the law on joint enterprise, that the opportunity for the Committee to make a valuable and informed contribution to the Law Commission's review is to be welcomed.

VI. Compensation

The final established committee is that tasked with looking at the issue of compensation following miscarriages of justice. It will be chaired by Matt Foot, co-director of the charity APPEAL, who represented Andrew Malkinson in his criminal appeal. Foot was also previously the solicitor for other notable victims of miscarriages of justice, including Eddie Gilfoyle and Sam Hallam. The Hallam case is of particular reference in the context of this committee as he was one of the two appellants, along with Victor Nealon, who have taken their case for

[58] Liberty, 'Liberty raise alarm over human rights impacts of 'gang' evidence in joint enterprise cases' (*Liberty*, 2023) <https://www.libertyhumanrights.org.uk/issue/liberty-raise-alarm-over-human-rights-impacts-of-gang-evidence-in-joint-enterprise-cases/> accessed 24 September 2023.

compensation all the way to the UK Supreme Court,[59] and who are currently awaiting the judgment of the Grand Chamber of the European Court of Human Rights ('ECtHR') who heard the case in July 2023.

Both men were refused compensation having overturned convictions for which they had spent years in prison; Hallam serving seven years for a gang-related murder and Nealon serving 16 years for attempted rape. The case of Nealon has quite extraordinary parallels with that of Malkinson, with both men being convicted of serious sexual assaults on the basis of disputed identification evidence in the absence of any inculpatory forensic evidence linking them to the crime. Both men served lengthy prison sentences whilst continuing to protest their innocence, repeatedly requesting that DNA analysis be performed in applications rejected by the CCRC, before their own solicitors were able to access the exhibits and perform the testing which eventually led to their convictions being overturned. Both men spent an additional decade behind bars due to their refusal to admit guilt and carry out offending behaviour work to lower their risk for the Parole process.

In 2014, a new subsection was inserted into section 133 of the 1988 Criminal Justice Act. Section 133(1ZA) now provides that there will have been a miscarriage of justice "if and only if the new or newly discovered fact shows beyond reasonable doubt that the person did not commit the offence."[60]

It has always been controversial; indeed, the renowned human rights lawyer Baroness Kennedy spoke forcefully against it in a House of Lord debate during the passage of the bill:

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[59] *R (on the application of Hallam) v Secretary of State for Justice* [2019] UKSC 2.
[60] Anti-social Behaviour, Crime and Policing Act 2014, s 175.

> "To ask people to prove their innocence beyond reasonable doubt is an affront to our system of law—the common-law system, so beloved of this House and indeed beloved of me. It flies in the face of one of our key legal principles, which acknowledges that it is very difficult for people to prove their innocence. It is very difficult for people to prove that they are innocent beyond reasonable doubt: "Prove that you didn't do it"; "Prove that you didn't kill your baby"; "Prove that you didn't leave a bomb in the pub"; "Prove that you didn't set that fire."[61]

Hallam and Nealon have asked the ECtHR to bring some clarity to the definition of a miscarriage of justice under section 133(1ZA), and whether or not this new, tighter definition breaches the rights protected under Article 6(2) ECHR; namely, the presumption of innocence beyond the initial trial process by requiring applicants to prove they are clearly innocent of the offence in order to be compensated as an acknowledged victim of a miscarriage of justice. Indeed, does this so seriously impugn the person's reputation as to infringe their protected presumption of innocence?

(i) Operation of the statutory scheme

The opposition to the current scheme from justice campaigners has not abated during the early years of its operation. The Justice Gap report that data obtained under the Freedom of Information Act revealed that the Ministry of Justice had received 157 applications in the last two years under the statutory scheme and from these applications, paid out £10,000

[61] HL Deb 22 January 2014, vol 751, col 673.

only.[62] They contrasted this relative frugality with a two-year period from 2007 to 2009, during which they report that the Ministry of Justice paid out a total of £20.8 million in respect of 19 successful applications.[63]

The Malkinson case again offers considerable insight into the subject. It is not yet known whether Mr Malkinson will be granted compensation under the scheme, although he has instructed specialist civil litigation solicitors to advise him on his potential remedies.[64] However, his case has brought considerable attention on the subject of compensation for victims of miscarriages of justice. The debate on that subject has focussed on highly legal technical definitions in recent years, yet it seems important to note that legislative measures have all tightened the scope of eligibility for compensation. Indeed, this was not an accidental consequence, but the very aim of the scheme.[65] The reaction to the Malkinson case suggests the public has not paid much attention to the impact of the restrictions on compensation for victims of miscarriages of justice which have been put in place, but the tide does appear to be turning. Andrew Malkinson has put a human face on this debate which has resonated with the public in a way that other cases have failed to do. His suggestion that he may have to pay a contribution from his compensation to cover his board and

[62] Jon Robins, 'Top European human rights court to rule on miscarriage of justice compensation 'scandal'' (*The Justice Gap*, 2023) <https://www.thejusticegap.com/top-european-human-rights-court-to-rule-on-miscarriage-of-justice-compensation-scandal/> accessed 20 September 2023.
[63] ibid.
[64] Hickman & Rose, 'Kate Maynard in media following announcement of Malkinson public inquiry' (*Hickman & Rose*, 2023) <https://www.hickmanandrose.co.uk/kate-maynard-in-media-following-announcement-of-malkinson-public-inquiry/> accessed 20 September 2023.
[65] Ministry of Justice, 'Impact Assessment , Clarifying the circumstance sunder which compensation is payable for Miscarriages of Justice (England and Wales) (*Ministry of Justice*, 2013) 2 <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/197579/DOC002.PDF> accessed 16 October 2023

lodging costs from his period of incarceration was met with widespread outrage, eventually generating a response from the Prime Minister who condemned as 'unfair' the policy[66] which has been pursued by successive governments. Should Malkinson be refused compensation altogether—as Victor Nealon was—it seems certain to result in yet more widespread condemnation.

A further significant factor has been the growing awareness of the scale of the miscarriages of justice which victimised subpostmasters in the Post Office Horizon Scandal. In September 2023, it has been announced that all subpostmasters who have had their wrongful convictions overturned due to reliance on the discredited Horizon evidence will be eligible to claim £600,000 in compensation.[67] This new scheme seems to be a response to criticism of the overly complex arrangements which resulted in three separate schemes of compensation which manifested significant disparities in the compensation of subpostmasters; the Overturned Historical Convictions Scheme,[68] the Historic

[66] BBC News, 'Andrew Malkinson: Living costs for wrongfully convicted unfair – PM (*BBC News*, 2023) <https://www.bbc.co.uk/news/uk-england-manchester-66363354> accessed 20 September 2023.

[67] Department for Business and Trade, Post Office, and Kevin Hollinrake, 'Government announces £600,000 of new compensation for every wrongfully convicted Postmaster' (*Gov.uk*, 2023) <https://www.gov.uk/government/news/government-announces-600000-of-new-compensation-for-every-wrongfully-convicted-postmaster> accessed 24 September 2023.

[68] Wyn Williams, 'The Post Office Horizon IT Inquiry: Chair's Statement on Issues relating to Compensation' (*Post Office Horizon IT Inquiry,* 2023) <https://www.postofficehorizoninquiry.org.uk/sites/default/files/2023-01/Post%20Office%20Horizon%20IT%20Inquiry%20-%20Chair%27s%20Statement%20on%20Issues%20Relating%20to%20Compensation%20Issues%209.1.23%20%282%29.pdf> accessed 24 September 2023.

Shortfall Scheme,[69] and the GLO Compensation Scheme.[70] It is unclear at this stage why the compensation arrangements established for the aggrieved subpostmasters are so different to other, non-Post Office victims of miscarriages of justice, and the justification for such differential treatment. Could it be because of the Government's financial ties to the Post Office? Or, are there other reasons why this case is being treated differently, and what are they? The sheer number of complainants? The geographic spread of them? The prominent nature of the campaign? Or is it down to the profile of the victims in some way?

Or is this, taken alongside the significant interest in the Malkinson case, a tacit admission that the existing arrangements for compensation are unfair to victims of miscarriages of justice, and can no longer be justified to the wider public when scrutiny is applied? It is certainly an area of miscarriage of justice work which appears ripe for legislative and judicial review, and the work of this particular committee will be highly relevant to the development of this issue in the coming months.

VII. Conclusion

The high-profile natures of the Malkinson and Post Office cases have brought the horrors of miscarriages of justice to the attention of the public, which has previously been a prerequisite for any positive reforms aimed at reducing the risk of wrongful

[69] Post Office, 'The Horizon Shortfall Scheme' (*Post Office*, 2023) <https://www.onepostoffice.co.uk/scheme> accessed 24 September 2023.

[70] Department for Business and Trade and Department for Business, Energy & Industrial Strategy, 'Compensation Scheme for Group Litigation Order case postmasters' (*Gov.uk*, 2023) <https://www.gov.uk/government/publications/compensation-scheme-for-group-litigation-order-case-postmasters> accessed 24 September 2023.

convictions; the establishment of the Royal Commission on Criminal Justice on 14th March 1991, the very day that the 'Birmingham Six' finally walked free[71] offering the clearest possible example of this trait.

The ongoing Law Commission review of the law governing criminal appeals in England and Wales provides a significant legislative possibility for genuine reform, and the committees and commissions which have been established under the Future of Justice project ensure that they will be in the best position possible to make a real and substantive contribution to informing the nature of the debate. Beyond that opportunity, the Law Commission has the potential to provide Andrew Malkinson and the victims of the Post Office Horizon scandal with the best possible legacy—the real promise that others will not suffer from the same failings in the criminal justice system which has so blighted their lives. The Law Commission might provide that legacy by offering ideas for reform of the rules governing the retention and disclosure of evidence; strengthening the ability of defence practitioners to protect and advance the interests of detained persons in custody; reforming the funding of criminal defence work at all levels to work to restore the principle of equality of arms, and to ameliorate the harm caused when wrongful convictions occur by putting in place a swift, generous and effective scheme to provide for financial compensation.

The sum total of the developments outlined in this essay indicate that the criminal justice system may well be in the sorry state described so eloquently by Mark George, but if there is to be one real cause for hope, it can be in the people; the leading lawyers, academics, parliamentarians and

[71] *R v McIlkenny, Hunter, Walker, Callaghan, Hill and Power* (1991) 93 Crim App R 287 ('The Birmingham Six').

campaigners who are committing so much time and energy on trying to improve it in the plethora of ways explored here.

I feel sure that Mark would most certainly approve.

Unaffordable Rights: Reconciling the Supreme Court's Recent Decisions on the Legality of Fees

Maxwell Brodie[†]

PRCBC was a legal challenge to the fees imposed on the citizenship application of a child born in, and who has never left, the UK.[72] The Home Secretary imposed legal fees which were well in excess of the costs associated with the citizenship application. In return, this effectively prevented the applicant, and many others alike, from obtaining British citizenship.[73] Many commentators expected the Supreme Court to strike down the fees and reinforce the importance of citizenship and the rule of law. Instead, the court unanimously upheld the legality of the high fees and rooted their conclusion in ordinary rules of statutory interpretation.[74] To some, *PRCBC* represents a U-turn from the Court's decision in *UNISON*, which struck down high fees required by employment tribunal applications for failing a reasonable affordability test.[75] Is *PRCBC* representative of a shift in the highest court to a less interventionist judicial philosophy? This paper examines whether the Supreme Court's decision in *PRCBC* can convincingly be reconciled with *UNISON* by considering the nature of constitutional rights, as well as the relationship between primary and delegated legislation. This paper reveals the flaws in some commentators' criticism of *PRCBC* and argues that the two cases are compatible.

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[72] *R (Project for the Registration of Children as British Citizens) v Secretary of State for the Home Department* [2022] UKSC 3 (*PRCBC*).

[73] ibid.

[74] ibid.

[75] *R (UNISON) v Lord Chancellor* [2017] UKSC 51.

I. Introduction

The Supreme Court's decisions in *UNISON*[76] and *PRCBC*[77] have been subject to considerable comparison and allegations of incongruity.[78] This paper will analyse whether these cases can be reconciled in five parts, mirroring common criticisms in academic literature: (i) constitutional rights and the rule of law; (ii) the public interest in constitutional rights; (iii) the case law underpinning the constitutional nature of rights; (iv) delegated legislation curtailing primary legislation; and, (v) reasonable affordability.

This paper argues that the Court correctly classified access to citizenship as a statutory right and not a constitutional right in *PRCBC*. Access to citizenship, although in the public interest, is not inherent in the rule of law, nor is there case law declaring it a constitutional right. Accordingly, the Court's failure to apply *UNISON*'s 'reasonable affordability'[79] standard in *PRCBC* does not render the two cases contradictory. Finally, the conclusion in *PRCBC*—that fees set under delegated legislation lawfully interfere with rights under primary legislation, for such interferences were 'authorised'[80]—is compatible with *UNISON*'s analysis of delegated legislation.

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[76] ibid.
[77] *PRCBC* (n 72).
[78] Kelly Chong Yan Chan and Edward Lui, 'Citizenship, Charges and Common Law Constitutional Rights' (2022) 81 Cambridge Law Journal 225; Timothy Jacob-Owens, 'British Citizenship as a Non-Constitutional Status: The UK Supreme Court Ruling in PRCBC' (*Global Citizenship Observatory*, 14 February 2022) <https://globalcit.eu/british-citizenship-as-a-non-constitutional-status-the-uk-supreme-court-ruling-in-prcbc/> accessed 14 April 2022; Paolo Sandro, 'A "Political" Constitution, but for Whom? Citizenship Fees, Legality and the Limits of Doctrine' (*UK Constitutional Law Association*, 23 February 2022) <https://ukconstitutionallaw.org/2022/02/23/paolo-sandro-a-political-constitution-but-for-whom-citizenship-fees-legality-and-the-limits-of-doctrine/> accessed 14 April 2022.
[79] *UNISON* (n 75) [93].
[80] *PRCBC* (n 72) [27].

Therefore, this paper concludes that *PRCBC* and *UNISON* can be reconciled. Note that many aspects of each case are not considered in this paper, such as *UNISON*'s discussion of EU law or *PRCBC*'s analysis of pre-legislative materials, since these issues are not relevant in determining the compatibility of both cases.

II. Reconciling *PRCBC* and *UNISON*

(i) Constitutional rights and the Rule of Law

In *UNISON*, the Supreme Court held that application fees to bring a claim to the employment tribunal were unlawful. Critically, the Court determined that the fees effectively jeopardised access to justice, a common law constitutional right, and thus the 2013 Fees Order[81] was quashed.[82] In *PRCBC* a few years later, the court rejected the argument that the high fees for application to obtain British citizenship were unlawful. Amongst the main reasons for the court's dismissal of the appeal was that *PRCBC*, unlike *UNISON*, did not concern constitutional rights.[83] Whereas common law constitutional rights can only be overridden by express language, ordinary common law rights, as in *PRCBC*, are not subject to this special rule of construction.[84] Sections II(i) to II(iii) of this paper will apply Lord Reed's criteria characterising constitutional rights in *UNISON* to examine whether the Court in *PRCBC* was correct to conclude that access to citizenship is not a constitutional right. Note that counsel for the applicant in *PRCBC* did not argue that the right of access to citizenship was

[81] Employment Tribunals and the Employment Appeals Tribunal Fees Order 2013.
[82] *UNISON* (n 75) [66], [98].
[83] *PRCBC* (n 72) [33].
[84] ibid.

a common law constitutional right;[85] nonetheless, since much of the academic discussion argues otherwise, it is a point worth addressing.

One of the most challenging aspects of *UNISON*'s outline of the constitutional right of access to the courts is that the Supreme Court did not provide an exhaustive list of necessary or sufficient factors that distinguish constitutional rights from ordinary statutory rights. Nonetheless, Lord Reed's judgment highlights some unique features of the right of access to the courts which underline its distinctive nature. To begin with, his Lordship identified access to courts as being "inherent in the rule of law,"[86] on the basis that the core component of the rule of law is the notion that society is governed by law,[87] not by the will of the executive. Crucially, Lord Reed noted that it is the role of the courts to uphold the rule of law;[88] without the courts, the law is but "a dead letter."[89] Nonetheless, the existence of courts alone is insufficient to ensure that the rule of law is upheld. Individuals must have access to courts, without which the judicial branch would be incapable of performing its constitutional role.[90] Moreover, courts are designed to ensure that Parliament can perform its proper function and that its laws are applied.[91] Lord Reed notes how the right to vote, and the concept of the democratic accountability of Parliament, are rendered meaningless if not for individuals' access to the courts.[92]

[85] ibid.
[86] *UNISON* (n 75) [66].
[87] ibid [68].
[88] ibid.
[89] ibid.
[90] ibid.
[91] ibid.
[92] ibid.

Having outlined how the Court in *UNISON* relied on the inherency of individual's access to courts to the rule of law to establish its character as a constitutional right, it is necessary to examine whether the same holds true of the right under consideration in *PRCBC*. *PRCBC* concerned the right of a child to be registered as a British citizen,[93] as outlined in section 1(4) of the British Nationality Act 1981.[94] The Court's refusal to classify this as a constitutional right implies that the right to be registered as a citizen was not inherent in the rule of law.

This is correct and consistent with *UNISON*. While it is unquestionable that citizenship is of utmost value (as section II(ii) shall explore), its function is very different from that of access to courts. Notably, the right to be registered as a citizen does not impact the balance of powers between the branches of government. Although citizenship plays a significant role in an individual's life and gives rise to ancillary rights, its role is not critical in ensuring that the UK is governed by law—the right to citizenship is not essential in upholding the sovereignty of Parliament, and is thus excluded from being a constitutional right.

However, the counterarguments to this position must be considered. Firstly, even if the right of access to citizenship itself is not essential to the rule of law, it is a pre-requisite for other rights that have been acknowledged as constitutional.[95] Most notably, the European Court of Human Rights recognised in *Hirst v UK*[96] that the right to vote is "crucial to establishing and maintaining the foundations of an effective and meaningful democracy governed by the rule of law […]."[97] Lord Hodge,

[93] *PRCBC* (n 72) [1]–[2].
[94] British Nationality Act 1981, s 1(4).
[95] Jacob-Owens (n 78).
[96] *Hirst v UK (No 2)* (2005) ECHR 681.
[97] ibid [58].

who wrote the unanimous judgment in *PRCBC*, acknowledged this in *Moohan*.[98] Note, there are few examples of non-British citizens—Commonwealth or Irish citizens, for instance—who are able to vote in UK elections.[99] This connection between citizenship and the right to vote is identified in *PRCBC*, but ultimately dismissed.[100] Secondly, Paolo Sandro challenges the view that a right must be connected to the rule of law to be recognised as a constitutional right.[101] He notes that the freedom of expression is recognised as a common law constitutional right despite having no connection to the separation of powers or the sovereignty of Parliament.[102]

Although these points have some strength, on the whole, they do not prove that *UNISON* and *PRCBC* are inconsistent. Indeed, Lord Briggs raised the point concerning the right to vote during the oral arguments before the Supreme Court.[103] Counsel for the Home Secretary, Sir James Eadie QC, replied that the right to vote was too detached from the right to be registered as a citizen;[104] he submitted that the case law does not suggest that all rights which are intimately connected to other constitutional rights are themselves constitutional rights.[105] That submission is not without merit. There are innumerable rights which are connected to constitutional

[98] *Moohan v Lord Advocate* [2014] UKSC 67 [33].
[99] The Electoral Commission, 'UK Parliament Elections' (*The Electoral Commission*, 2019) <https://www.electoralcommission.org.uk/i-am-a/voter/types-elections/uk-parliament> accessed 2 May 2022.
[100] *PRCBC* (n 72) [21].
[101] Sandro (n 78); *R v Secretary of State for the Home Department, Ex p Brind* [1991] 1 AC 696, 734.
[102] ibid.
[27] The Supreme Court, 'Watch R (on the Application of The Project for the Registration of Children as British Citizens) (Appellant) v Secretary of State for the Home Department) (Respondent) (Expedited) - The Supreme Court' (*The Supreme Court*, 23 June 2021) <https://www.supremecourt.uk/watch/uksc-2021-0063/230621-pm.html> accessed 19 April 2022, afternoon session of 23 June 2021 at 1:42:53.
[104] ibid.
[105] ibid.

rights—recognising all of them as constitutional rights would drastically change the current law. Moreover, the scope of the common law right to vote has been consistently interpreted most narrowly.[106] In *Moohan,* for example*,* Lord Hodge (with whom four justices agreed) rejected in *obiter* the claim that prisoners had a common law right to vote, and went as far as saying that the common law right to vote excludes the right of universal and equal suffrage.[107] The connection between access to citizenship and rule of law, or indeed right to vote, is by nature weaker than the connection between the right to vote and universal suffrage; if that greater connection did not substantiate a finding of a constitutional right in *Moohan*, it stands to reason that the lesser connection in *PRCBC* does not necessitate that finding. Accordingly, the court in *PRCBC* was correct to dismiss the connection between citizenship and voting as a means of establishing the inherency of citizenship to the rule of law.

The second argument aforementioned is far stronger. Indeed, Sandro is right to suggest that constitutional rights need not be connected to the rule of law: his freedom of expression example demonstrates that connection to the rule of law may not be necessary in all cases, provided that Lord Reed's criteria in *UNISON* are satisfied. Consequently, this paper will now consider these criteria of constitutional rights laid out by the court in *UNISON*. If these criteria are satisfied, it would indicate that access to citizenship should have been deemed a constitutional right.

(ii) The public interest in constitutional rights

[106] Jacob Rowbottom, 'Freedom of Expression and the Right to Vote: Political Rights and the Common Law Constitution' in Mark Elliott and Kirsty Hughes (eds), *Common Law Constitutional Rights* (Hart Publishing 2020) 127–128.
[107] *Moohan* (n 98) [34].

In *UNISON*, having expounded the connection between access to courts and the rule of law, Lord Reed considered the public interest in access to courts.[108] While it is unclear whether this public interest element is necessary for the right to be constitutional, Lord Reed's emphasis on public interest implies that this is a relevant criterion in considering constitutional rights. Insofar as constitutional rights trigger the "special rule of statutory interpretation"[109] (examined further in section II(iv) of this paper), it seems reasonable that there should be some public interest in the right which justifies its special status. Furthermore, citizenship being less connected to the rule of law than access to courts made the requirement to demonstrate public interest even stronger in *PRCBC*. This paper considers why *UNISON* satisfies this public interest test before examining whether *PRCBC* similarly meets these criteria.

Lord Reed's argument that the right of access to courts holds public importance can be separated into two parts: direct and indirect public benefit. Concerning the former, he noted that the effects of court decisions extend beyond the parties to the dispute. Non-litigant parties are influenced by the outcome of the cases since court decisions establish precedents which form part of the law. Lord Reed exampled *Donoghue v Stevenson*—[110]a case that laid the foundation of tortious negligence, thereby affecting almost everyone.[111] With regard to that case, Lord Reed argued that the public benefit of access to courts is "not confined to cases in which the courts decide

[108] *UNISON* (n 75) [69]–[73].
[109] *PRCBC* (n 72) [33]; Temple Garden Chambers, 'Supreme Court Delivers Judgment in Leading Case on Principles of Statutory Interpretation – Temple Garden Chambers' (*Temple Garden Chambers*, 2 February 2022) <https://tgchambers.com/news-and-resources/news/supreme-court-delivers-judgment-in-leading-case-on-principles-of-statutory-interpretation/> accessed 25 April 2022.
[110] *Donoghue v Stevenson* [1932] AC 562.
[111] *UNISON* (n 75) [69].

questions of general importance."[112] Specifically, he noted that the mere existence of courts and the possibility of pursuing claims and obtaining remedies before them ensures that employment relations are based on the respect of rights.[113] As such, there is a strong public interest in the right of access to courts. Does this indicate that there is a public interest in the right of access to citizenship?

Whilst there was significant discussion of the personal benefit of citizenship,[114] there was minimal discussion of the public benefit in *PRCBC*. Nevertheless, there is strong support for the notion that the right of access to citizenship is of public importance. Firstly, as discussed above, citizenship enables a person to take part in the political life of the UK.[115] Moreover, current government guidance states that "British citizenship gives you the opportunity to participate more fully in the life of your local community."[116] Within UK society, it is undoubtedly in the public interest that representatives, whether local or in Parliament, accurately represent the public for whom they are responsible. Equally, it is in the public interest that those who can register as British citizens participate in democratic life and integrate into the community. Furthermore, recognition as a citizen has many legal benefits, not least the right to reside in the UK permanently, to work unrestricted, and to travel abroad.[117] Therefore, citizenship can enable one to participate more fully in the political, social, cultural, and economic

[112] ibid [71].
[113] ibid [72].
[114] *PRCBC* (n 72) [5].
[115] ibid [21].
[116] UK Visas and Immigration, 'Form B(OS): Guidance (Accessible Version)' (*Gov.uk*, February 2022) <https://www.gov.uk/government/publications/form-bos-guidance/form-bos-guidance-accessible-version> accessed 25 April 2022.
[117] London City Hall, 'Citizenship' (*London City Hall*, 22 June 2018) <https://www.london.gov.uk//what-we-do/communities/migrants-and-refugees/guidance-young-londoners-citizenship-residence/citizenship> accessed 25 April 2022.

dimensions of life. In turn, this promotes greater societal cohesion.[118]

There are also special considerations in *PRCBC*, for the applicant seeking registration as a citizen was a child (who has resided in the UK since birth).[119] The intervenor in *PRCBC* noted that for children, citizenship can play a vital role in the development of "identity, integration, [and] sense of belonging that [the UK] is their home."[120] With many of these children likely to continue residing in the UK, it is important for the well-being of society that they are provided the optimum conditions to flourish during their childhood. This, in turn, will enable them to actively engage and contribute to society in the future. As such, in addition to being a significant right for individuals, the right of access to citizenship is of great public benefit, particularly in the context of children–access to citizenship satisfies the first factor necessary to be deemed a constitutional right.

(iii) The case law underpinning the constitutional nature of rights

Having analysed the rule of law and the public benefit of access to justice, Lord Reed considered the jurisprudence recognising access to justice as a constitutional right in *UNISON*.[121] This paper will now analyse how the court utilised case law and whether equivalent case law exists in relation to the right of

[118] Migration Observatory, 'Citizenship: What Is It and Why Does It Matter?' (*Migration Observatory*, 28 March 2011) <https://migrationobservatory.ox.ac.uk/resources/primers/citizenship-what-is-it-and-why-does-it-matter/> accessed 25 April 2022.
[119] *PRCBC* (n 72) [2].
[120] *Project for the Registration of Children as British Citizens*, 'Why Is British Citizenship Important to Children and Young Adults?' (*Project for the Registration of Children as British Citizens*, 8 August 2015) <https://prcbc.org/what-we-do/> accessed 25 April 2022.
[121] *UNISON* (n 75) [74]–[85].

access to citizenship. Rather than considering how Lord Reed relied on each authority, the purpose of this analysis is to assess the manner in which the courts have addressed access to justice.

To begin, Lord Reed considered historical precedents concerning access to justice—not least the Magna Carta[122] and writings of Sir Edward Coke[123]—to highlight the long legal tradition of safeguarding of access to justice. Having used these older authorities to outline the notions underpinning access to justice, Lord Reed turned to more recent authorities, including *Leech*[124] and *Witham*,[125] to delve into particularities. In *Leech*, the Court of Appeal found secondary legislation *ultra vires* insofar as it failed to justify its interference with the right of access to courts. In characterising the right of access to courts, Steyn LJ stated, "even in our unwritten constitution it must rank as a constitutional right."[126] In *Witham*, Rose LJ noted that authorities have described access to justice as a constitutional right.[127] Thus, numerous historical and recent authorities recognise access to justice as a constitutional right.

In *PRCBC*, the situation was different: no authorities explicitly characterise access to citizenship as a constitutional right. However, some academics—Paolo Sandro, for instance—believe that the court in *PRCBC* should have considered it so in any case.[128] Sandro relies on the UK Supreme Court decision of *Pham v Secretary of State for the Home Department*[129] to compose his argument.[130] He suggests

[122] ibid [74].
[123] ibid [75].
[124] *R v Secretary of State for the Home Department, Ex p Leech* [1994] QB 198.
[125] *R v Lord Chancellor, Ex p Witham* [1998] QB 575.
[126] *Leech* (n 124) 210.
[127] *Witham* (n 125) [24].
[128] Sandro (n 78).
[129] *Pham v Secretary of State for the Home Department* [2015] UKSC 19.
[130] Sandro (n 78).

that *Pham*'s description of the right of access to citizenship as a 'fundamental right' in paragraphs 60 and 97 should be interpreted as synonymous with a 'constitutional right.'[131] However, Sandro is incorrect in arguing that *Pham* can be used to underpin the constitutional status of the right of access to citizenship. The passages which Sandro referenced do not purport that the right of access to citizenship is a fundamental nor constitutional right. In paragraph 60 of *Pham*, Lord Carnwath writes, "the issue concerns the removal of a status as fundamental, in domestic, European and international law, as that of citizenship."[132] The use of the word "fundamental" in this passage is intended to denote 'significant' or 'important;' Lord Carnwath did not intend "fundamental" to be understood in a technical sense of having a higher status among laws, nor that the law was constitutional. The same is true concerning Lord Mance's use of "fundamental" in paragraph 97: "[t]he present appeal concerns a status which is as fundamental at common law as it is in European and international law, that is the status of citizenship."[133] This sentence merely intends to demonstrate that all three jurisdictions take similar approaches to the status and importance of citizenship. Interpreting this sentence as supporting the constitutional nature of citizenship under UK law would mean that he intended to convey the same regarding European and international law, which was not Lord Mance's objective. Therefore, *Pham* cannot be used to classify the right of access to citizenship as constitutional.

Several features distinguish the rights concerned in *PRCBC* from *UNISON*. Unlike the right of access to courts (in *UNISON*), the right of access to citizenship (in *PRCBC*) is not inherent in the rule of law, nor is there case law declaring it constitutional in nature. Accordingly, the Supreme Court's

[131] ibid.
[132] *Pham* (n 129) [60].
[133] ibid [97].

decision in *PRCBC* to consider the right of access to citizenship as a mere statutory right found in the British Nationality Act 1981, instead of a constitutional right, is reconcilable with its decision in *UNISON*.

(iv) Delegated legislation curtailing primary legislation

The other central legal matter in both *UNISON* and *PRCBC* is the interaction between primary and secondary legislation. In *UNISON*, the appellants argued that the Fees Order (delegated legislation passed under the *vires* of the Tribunals, Courts and Enforcement Act 2007)[134] effectively cut down other statutory rights in primary legislation.[135] This argument relied on the principle established in *JCWI*:[136] "specific statutory rights are not to be cut down by subordinate legislation passed under the vires [sic] of a different Act."[137] In *UNISON*, the Supreme Court reaffirmed this principle, though declined to analyse it any further for it "does not add anything to the ground based on the common law right of access to justice."[138]

Thus, in *PRCBC*, the appellants relied on this principle to claim that citizenship application fees were *ultra vires*. Specifically, the claimants in *PRCBC* claimed that the Immigration and Nationality (Fees) Order 2016[139]—enacted under the *vires* of the Immigration Act 2014[140]—effectively cut down the appellants' rights to citizenship prescribed by the British Nationality Act 1981. Ultimately, the Supreme Court rejected this argument and held that the 2016 Fees Order was

[134] Tribunals, Courts and Enforcement Act 2007, s 42(1).
[135] *UNISON* (n 75) [103].
[136] *R v Secretary of State for Social Security, Ex p Joint Council for the Welfare of Immigrants (JCWI)* [1997] 1 WLR 275.
[137] ibid 290.
[138] *UNISON* (n 75) [104].
[139] The Immigration and Nationality (Fees) Order 2016.
[140] Immigration Act 2014, s 68(1).

appropriately authorised and did not unlawfully cut down statutory rights.[141]

Can this conclusion be reconciled with *UNISON* (and *JCWI*)? Paolo Sandro believes not. He argues that the court in *PRCBC* oversimplified the question as to whether the 2016 Fees Order was authorised.[142] In doing so, Sandro claims that the court's decision allows secondary legislation to undermine the rights set out in primary legislation so long as the primary legislation under which the delegated legislation passes is sufficiently "wide."[143] Moreover, Sandro argues that the 2016 Fees Order only implicitly removes statutory rights and that the principle endorsed in *UNISON* and *JCWI* was that express language is required. [144]

That said, the conclusion reached in *PRCBC* is consistent with *UNISON* and *JCWI*. Firstly, the language of the legislation authorising the Fees Order in *UNISON* differs greatly from that in *PRCBC*. In *UNISON*, the primary legislation empowers the Lord Chancellor to "prescribe fees" only;[145] it did not give guidance on the level at which to set the fees. In such a circumstance, the high fees and the excessive interference with access to justice had minimal connection to the primary legislation and, consequently, the intention of parliament. The situation in *PRCBC* is wholly different. Section 68(8)(b) of the Immigration Act 2014 (the primary legislation in question) explicitly allows the Secretary of State to set a fee in excess of the costs of processing the application.[146] Secondly, *UNISON*'s characterisation of the right of access to justice as a constitutional right had two

[141] *PRCBC* (n 72) [50].
[142] Sandro (n 78).
[143] ibid.
[144] ibid.
[145] Tribunals, Courts and Enforcement Act 2007, s 42(1).
[146] Immigration Act 2014, s 68(8)(b).

important consequences on the process of statutory interpretation: (1) the right "can only be taken away by express enactment"[147] and even when expressly enacted, (2) "it is interpreted as authorising only such a degree of intrusion as is reasonably necessary."[148] However, *UNISON* did not fundamentally change the court's approach to statutory interpretation in all cases. Sir James Eadie noted in oral argument that *UNISON* "is a principle of exceptionality."[149] Hence, Lord Reed spent near forty paragraphs detailing the nature of the right of access to justice as a constitutional right to justify this departure from the ordinary principles of statutory interpretation.[150] Since access to citizenship is not inherent in the rule of law and case law does not characterise citizenship as constitutional in nature, *PRCBC* is not concerned with the exercise of constitutional rights. Accordingly, the "normal canons of statutory interpretation apply"[151]—there is no presumption that the statute only authorises the most minimal intrusion necessary of the underlying statutory right. Thus, Lord Hodge correctly narrowed the question in *PRCBC* to whether the 2014 Act authorised the fees. Therefore, *PRCBC*'s conclusion that the 2016 Fees Order was not ultra vires can be reconciled with the decision in *UNISON*.

(v) Reasonable affordability

It is worth considering the final major difference between *UNISON* and *PRCBC*. In *UNISON*, the court determined that

[147] *UNISON* (n 75) [79].
[148] ibid [80].
[149] The Supreme Court, 'Watch R (on the Application of The Project for the Registration of Children as British Citizens) (Appellant) v Secretary of State for the Home Department) (Respondent) (Expedited) - The Supreme Court' (*The Supreme Court*, 23 June 2021) <https://www.supremecourt.uk/watch/uksc-2021-0063/230621-pm.html> accessed 19 April 2022, morning session 24 June 2021 at 0:44.
[150] *UNISON* (n 75) [65]–[102].
[151] *PRCBC* (n 72) [43].

the fees must be set at a level that "can *reasonably* be afforded"[152] by everyone; in *PRCBC*, the court did not reach the same conclusion. Indeed, the court acknowledged in *PRCBC* that "a large number of children and their families cannot afford the fee charged."[153] While this might appear contradictory, further analysis shows there is no such contradiction. To illustrate why, this paper will examine how the court reached the reasonable affordability test in *UNISON*.

Having identified the right of access to justice as a constitutional right, the court determined that interferences with constitutional rights "are presumed to be subject to an implied limitation [that] the degree of intrusion must not be greater than is justified by the objectives which the measure is intended to serve."[154] The first step in carrying out this process is determining whether the fees intrude the underlying right—in other words, whether the fees effectively prevent access to justice.[155] Since access to employment tribunals was of general relevance and benefit to the public, the right to access justice would be undermined if not everyone could afford access to employment tribunals.[156]

From laying out the step-by-step progression, it becomes apparent that the reasonable affordability test is premised on the basis that the right to access justice is a constitutional right—the reasonable affordability test is simply an application of the 'minimal interference' implied limitation that applies to restrictions on constitutional rights. Since *PRCBC*'s right of access to citizenship is not a constitutional right (as explained in sections II(i)–(iii) of this paper), the

[152] *UNISON* (n 75) [93].
[153] *PRCBC* (n 72) [20].
[154] ibid.
[155] ibid [90].
[156] ibid [91].

Supreme Court's failure to apply the reasonable affordability test in *PRCBC* is not inconsistent with *UNISON*. Nevertheless, this leads to an important question: if fees for exercising non-constitutional rights are not limited by reasonable affordability, could the Secretary of State have established any fee in *PRCBC*, even if it rendered the right impossible for most? To use Sandro's example, could the Secretary of State implement a one-million-pound application fee?[157] In turn, this would contravene the principle in *UNISON* that secondary legislation cannot cut down statutory rights.

Indeed, implementing such a fee would render the right of access to citizenship nugatory. However, the court's reasoning in *PRCBC* does not allow the imposition of any fee. Once again, the important question, as laid out in *PRCBC*, is whether the 2014 Act would have authorised such a fee. The 2014 Act sets out an exhaustive list of criteria for determining the appropriate application fee.[158] Setting such an astronomical fee would contravene the balancing of various factors under this list. Accordingly, *PRCBC*'s reasoning shows that the hypothetical million-pound fee would be ultra vires. Thus, this hypothetical example does not undermine the compatibility of *PRCBC* with *UNISON*. The Supreme Court's decision in *PRCBC* upholds the *JCWI* principle, as affirmed in *UNISON*.

III. Conclusion

Citizenship is of great importance in individuals' lives and to the nation and yet, the Home Office's £973 (now £1,012)

[157] Sandro (n 78).
[158] Immigration Act 2014, s 68(9).

citizenship application fee for children[159] leaves many eligible applicants unable to be registered as citizens. The child applicant in *PRCBC* is just one example of the countless children unable to exercise their right to obtain citizenship by consequence of that application fee. The Supreme Court's decision in *PRCBC*, upholding the legality of this application fee, led to strong criticism from academic commentators of incompatibility with the Court's earlier decision in *UNISON*. While critics rightly question the merits of such high fees, the target of their criticism is misguided. Unlike the right of access to justice in *UNISON*, the right of access to citizenship in *PRCBC* is not a constitutional right—despite a significant public interest in citizenship, it is not inherent to the rule of law, nor has it ever been recognized by the courts as being constitutional in nature. Accordingly, the reasonable affordability test outlined in *UNISON* does not apply to citizenship, and may not be used to defeat application fees' legality. While the applicant also argued that the relevant secondary legislation cut down their statutory rights, the argument correctly failed: the primary legislation specifically authorised high fees. While critics argue that the high fees undermine the rule of law, it would have been an even greater affront to the rule of law had the court struck down the fees in *PRCBC*.

[159] UK Visas & Immigration, 'Fees for citizenship applications and the right of abode from 4 October 2023' (*Gov.uk*, 4 October 2023) <https://www.gov.uk/government/publications/fees-for-citizenship-applications/fees-for-citizenship-applications-and-the-right-of-abode-from-6-april-2018> accessed 11 November 2023.

Driving into the Unknown: An Evaluation of Liability for Accidents Caused by Autonomous Vehicles under UK Law

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Autonomous vehicles ('AVs') promise to revolutionise transportation. Such vehicles use advanced sensors and artificial intelligence to navigate roads and avoid obstacles in traffic with limited to no human intervention. As AVs become more widely used, a critical question arises concerning *who* should be held liable for the harm their use might cause. This article shall examine if the Automated and Electric Vehicles Act 2018, product liability laws, and the law of contract can appropriately identify on whom liability falls where AVs cause accidents. Additionally, this article shall explore the trolley problem which confronts liability for AV-caused accidents: faced with inevitable harm to one or others, an AV must promptly elect to whom amongst different persons it should direct that harm, raising the question of who must be liable when an AV so acts. This paper aims to demonstrate that, although the current legal framework allows for the deployment of AVs, it requires significant adaptation to speak to the full prism of issues concerning AV-caused accident liability.

I. Introduction

In June 2016, the first fatal incident involving a vehicle in autopilot mode was reported in Florida. The vehicle's autopilot sensors failed to detect a truck crossing the highway ahead, subsequently colliding with the truck because it did not apply

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its braking system and allow the truck to pass.[160] The United States ('US') National Highway Traffic Safety Administration's ('NHTSA') investigation into the accident found there was no defect in the autopilot system.[161] A subsequent report by the US National Transportation Safety Board concluded that, whilst the manufacturer of the vehicle warned drivers to remain alert when using autopilot mode, drivers could easily disregard this caution as the vehicle's operational design allowed the driver to yield mental and manual responsibility of driving for an extended period.[162] Several other traffic accidents involving automated vehicles have occurred in recent years, including an accident in 2018 where an autonomous Uber vehicle struck and killed a pedestrian on a street in Arizona; this is considered the first pedestrian death caused by an autonomous vehicle.[163] Consequently, the driver who had engaged the vehicle's self-driving mode was accused of negligent homicide and Uber temporarily stopped testing its self-driving vehicles.[164] In a 2022 report, the NHTSA revealed that self-driving systems had

[160] United States National Highway Traffic Safety Administration, 'Summary Report: Standing General Order on Crash Reporting for Level 2 Advanced Driver Assistance Systems' (*United States National Highway Traffic Safety Administration*, 2022) 1 <https://www.nhtsa.gov/sites/nhtsa.gov/files/2022-06/ADAS-L2-SGO-Report-June-2022.pdf> accessed 28 August 2023.

[161] United States National Highway Traffic Safety Administration, 'Investigation: PE 16-007' (*United States National Highway Traffic Safety Administration*, 19 January 2017) 9 <https://static.nhtsa.gov/odi/inv/2016/INCLA-PE16007-7876.PDF> accessed 28 August 2023.

[162] United States National Transportation Safety Board, 'Highway Accident Report: Collision Between a Car Operating with Automated Vehicle Control Systems and a Tractor-Semitrailer Truck Near Williston, Florida May 7, 2016' (*United States National Transportation Safety Board*, 12 September 2017) 43 <https://www.ntsb.gov/investigations/accidentreports/reports/har1702.pdf> accessed 28 August 2023.

[163] Kate Conger, 'Driver Charged in Uber's Fatal 2018 Autonomous Car Crash' *The New York Times* (New York, 15 September 2020) <https://www.nytimes.com/2020/09/15/technology/uber-autonomous-crash-driver-charged.html> accessed 22 March 2023.

[164] ibid.

been involved in nearly 400 car accidents as of 15 May 2022.[165] There have not been any reported accidents involving autonomous vehicles in the United Kingdom ('UK'), yet the occurrence of accidents involving autonomous vehicles in the US has sparked a heated public discussion in the UK over the safety and regulation of autonomous driving systems. Amongst the key issues is who should be held responsible for accidents caused by automated vehicles.

In the case of accidents caused by conventional, non-autonomous vehicles, liability ordinarily befalls a culpable human driver whose actions, as the controller of the vehicle, were deemed to have wrongfully caused the accident. However, the emergence of autonomous vehicles renders the question of responsibility more complex since, at the occurrence of the accident, no human being would be exercising direct control of the vehicle's steering. Several parties could be held responsible. One could suggest the manufacturers of the automated vehicles should be liable, for the vehicles they launched onto the market caused an accident. Perhaps the software developers of the autonomous system should be liable for designing the system whose commands to the vehicle led to the accident. One may even argue that the human 'driver', that is the person communicating the necessary commands to the automated vehicle's system such as the destination of the vehicle, be held liable for the simple reason that the vehicle caused an accident whilst ultimately pursuing the 'driver's' instruction. Evidently, it is necessary to device clear and fair guidelines for determining liability in these accidents.

The purpose of this article is to examine the parties that could be held responsible for any damage caused by an

[165] United States National Highway Traffic Safety Administration, 'Summary Report' (n 160) 1.

autonomous vehicle and/or its internal Artificial Intelligence ('AI') system. This article will discuss two possible situations for accidents caused by an AV: where harm is caused by the actions of the AV driver, and where it is the consequence of a defect in the AV. To contextualise this discussion, this article will first introduce the definition and the driving automation standard of AVs. Thereafter, it will critically examine the UK's legal framework for liability for harm caused by an AV in an accident. The discussion will progress to the possible liability of AV producers, importers, and even suppliers for harm caused by the defective AV. Finally, this paper delves into a discussion of certain ethical issues surrounding AVs; most notably, the 'trolley problem.' The traditional trolley problem poses a dilemma in which a moral agent must decide whether to avert imminent harm on one person or a group by diverting the harm-causing event to another.[166] This ethical conundrum will foreseeably confront AVs. For instance, AVs may be in unfortunate situations where they can only save their passengers by colliding into other road users. Naturally, the question arises on who the AV must choose to harm if injury to at least one human being as succour to another is inevitable. This moral question extends to legal liability as it must be established who is liable for harm caused by the decision of an AV in face of a trolley problem. This article aims to examine liability for accidents caused by AVs, and to highlight the areas in need of legislative reform to ensure that the use of AVs does not pose an undue risk to public safety.

II. Definition of Autonomous Vehicles (AVs)

[166] Philippa Foot, *Virtues and Vices: and other essays in moral philosophy* (Oxford Academic, 2002) 24-33. See also Judith Jarvis Thomson, 'The Trolley Problem' (1985) 94 Yale LJ 1395.

An autonomous vehicle, also known as a self-driving vehicle or driverless car, is an intelligent vehicle which is independently operated by a computer system.[167] An AV utilises a sensor to scan the surrounding environment and adjust its movement autonomously—or make recommendations to the driver—based on the data it collects on traffic conditions, vehicle position and road obstacles.[168] AVs have multiple purposes and may take different forms, such as buses, taxis, emergency vehicles, or even autonomous surface vehicles; this article, however, will focus on personal AVs used by individuals for daily transportation. AVs usually incorporate an internal artificial intelligence ('AI') assistance technology, which is called the Advanced Driver Assistance Systems ('ADAS'). By systematically processing and analysing the data collected by on-board sensors, ADAS can alert human drivers to dangers they may not have noticed and recommend appropriate action. Thereby, ADAS may help to prevent accidents caused by errors and cognitive limitations of human drivers.[169]

The Society of Automotive Engineers ('SAE') Levels of Driving Automation, released in 2014 and revised in 2021, is the most cited classification standard in the AV industry and provides a useful means by which automated vehicles may be identified as such.[170] This standard provides a classification for the six levels of driving automation, ranging from Level 0 (no driving automation/L0) to Level 5 (full driving

[167] Mingfang Du, *Autonomous Vehicle Technology: Global Exploration and Chinese Practice* (1st edn, China Communication Press 2023) 1.
[168] ibid.
[169] ibid 1–4.
[170] Society of Automotive Engineers International, 'SAE Levels of Driving Automation™ Refined for Clarity and International Audience' (*Society of Automotive Engineers International*, 3 May 2021) <https://www.sae.org/blog/sae-j3016-update> accessed 28 August 2023.

automation/L5).[171] L0 vehicles, which are *not* AVs but are the most widely used vehicles currently, may have sensors which can provide some fundamental instructions like parking assistance, speed limit reminders, lane departure warnings, and other advisory indications.[172] Some driver support features appear in L1 and L2 vehicles, providing at least one automated function among steering, braking and acceleration. Drivers of L0, L1, and L2 vehicles must supervise the operational features of their vehicles constantly and drive manually depending on the level of the operating automatic mode.

The situation is slightly different for L3 vehicles whose autonomous systems can periodically take over driving.[173] Vehicles that fall under level 3 may make independent decisions under certain conditions. However, they still require human intervention as a "backup"—the vehicle can handle all driving tasks, but the human driver must remain attentive and ready to assume manual control whenever necessary. In L4 and L5 vehicles, a driver is generally not required to drive after engaging automated driving features. L4 vehicles can handle most driving tasks independently, but human intervention in driving may be occasionally required. For instance, a human driver may remain necessary to navigate complex or unique driving situations that the ADAS is unprepared to manage. In contrastL5 vehicles represent the highest level of autonomous driving as they can operate completely independently under any driving conditions. These vehicles are designed to manage driving tasks and adapt to any situation autonomously, making

[171] Society of Automotive Engineers International, 'SAE Standard News: J3016 automated-driving graphic update' (*Society of Automotive Engineers International*, 7 January 2019) <https://www.sae.org/news/2019/01/sae-updates-j3016-automated-driving-graphic> accessed 30 March 2023.
[172] Roger Kemp, 'Autonomous vehicles – Who Will Be Liable for Accidents?' (2018) 15 Digital Evidence & Electronic Signature Law Review 33, 33-34.
[173] Society of Automotive Engineers International, 'SAE Standard News' (n 171).

them fully self-sufficient.[174] When its user inputs a destination, the L5 vehicle and its system will take control and determine the best route to reach the destination.[175] However, the development of L5 vehicles still faces several challenges, such as improvement of electronic mapping, pattern recognition, cognitive algorithms, amongst other relevant fields; Du predicts that L5 vehicles require 15 more years of research and development before they are ready for purpose.[176] Nevertheless, AVs have the potential to significantly reduce—even eliminate—the need for human drivers, depending on the level of driving automation. For the purposes of this article, L3, L4, and L5 vehicles will be regarded as AVs whilst L0, L1, and L2 vehicles shall not, as those categories bear minimal or no autonomous driving features.

III. Harm caused by "drivers"

(i) The notion of driver

Conventionally, liability for harm caused by an errant vehicle in an accident is placed on its human driver.[177] A crucial question in AVs is whether AI systems, which gradually replace human drivers in taking control of the vehicle, fall within the definition and scope of a "driver" who will bear liability for accidents caused by the AV. The Automated and Electric Vehicles Act 2018 ('AEVA') establishes a new direct claim regime to govern liability in AV-caused accidents. Unfortunately, the AEVA does not define "driver," but instead requires the Secretary of State to publish an up-to-date list of

[174] Du (n 167) 4.
[175] ibid.
[176] ibid.
[177] Road Traffic Act 1968, ss 1–3A.

all automated motor vehicles.[178] As of March 2023, the Department for Transport provides that there are no self-driving vehicles listed for use in the UK, making the AEVA exist, to some extent, in a vacuum.[179] It bears noting that the Law Commission of England and Wales and the Scottish Law Commission released a joint report in 2022 discussing ways of improving laws governing the use of AVs.[180] The report does not seek to extend the definition of "driver," but introduces the concept of a "user-in-charge:" the person expected to drive the vehicle when it is not driving autonomously.[181] As reforms on laws regulating AVs are still in an exploratory phase, this article shall focus its analysis on the current legal framework.

Although the meaning of "driver" within the context of AVs is unclear in English law as yet, the definition of "driver" in international law is worth considering. The Vienna Convention on Road Traffic 1968 is an international treaty which the UK has signed and ratified. It sets standards for driving and promotes transnational consistency and compatibility in modern traffic laws. Article 8(1) and (5) of the Vienna Convention provide that every moving vehicle or combination of vehicles shall have a driver, and every driver shall be able to control their vehicle always. Article 8(3)–(4) elaborate that every driver should have the physical and mental capability to drive, and that drivers must have the appropriate knowledge and skill to operate the vehicle. Notably, Article 1(v) of the Vienna Convention defines a "driver" as "any person who drives a motor vehicle or other vehicle (including

[178] Automated and Electric Vehicles Act 2018, s1(1) and s1(3).
[179] Centre for Connected and Autonomous Vehicles and Department for Transport, 'Self-driving vehicles listed for use in Great Britain' (*Gov.uk*, 20 April 2022) <https://www.gov.uk/guidance/self-driving-vehicles-listed-for-use-in-great-britain> accessed 30 March 2023.
[180] Law Commission of England and Wales and Scottish Law Commission, *Automated Vehicles: joint report* (Law Com No 404; Scot Law Com No 258, 2022).
[181] ibid paras 2.45–2.46.

a cycle)." This definition specifically refers to a human driver. As a product of its time, the Vienna Convention's original definitions of "driver" only consider human drivers; the definitions do not capture—nor even envisage—AVs. The 2016 amendment of the Vienna Convention attempted to address the development of AVs: the inserted Article 8(5bis) stipulates that AVs are presumed to be under the control of a driver if their systems may be "overridden or switched off by the driver." Thus, article 8(5bis) allows for AVs to operate on roads as they are deemed to be under the control of a capable, human driver. However, beyond creating a presumption which permits AV use, the article does not definitively answer who, or *what*, qualifies as the driver of the AV when it is operating autonomously. By extension, the question of liability for an AV-caused accident is left unanswered.

(ii) The legal framework in the UK

Rather than focus on the notion of a driver, the AEVA establishes a unique liability regime for accidents caused by AVs, which recognises the complexities of AV technology and seeks to offer a tailored solution for those affected by it.[182] In terms of section 8(1)(a) of the AEVA, a vehicle will be considered to be "driving itself" if it is operated without the control or monitoring of a human driver. Section 2(1) states that:

> "Where—
>
> (a) an accident is caused by an automated vehicle when driving itself on a road or other public place in Great Britain,

[182] James Marson, Katy Ferris and Jill Dickinson, 'The Automated and Electric Vehicles Act 2018 Part I and Beyond: A Critical Review' (2019) 41 Statute Law Review 395, 396.

(b) the vehicle is insured at the time of the accident, and
(c) an insured person or any other person suffers damage as a result of the accident,
the insurer is liable for that damage."

This provision imposes strict liability on the insurer for harm arising from an accident caused by self-driving vehicles, provided the vehicle was insured in accordance with the Road Traffic Act 1988 ('RTA').[183] As such, claimants have a readily available means by which they can seek damages for the loss they suffered from an accident caused by an insured AV. The AEVA also covers situations where the accident-causing vehicle is not insured. Section 2(2) of the Act states that the owner of the vehicle is strictly liable for the damage "where (a) an accident is caused by an automated vehicle when driving itself" and "(b) the vehicle is not insured at the time of the accident". Section 2(1)–(2) guarantee that a person who has suffered harm from an accident caused by an AV has an actionable claim, even if the vehicle is uninsured.[184] In both provisions, the vehicle is considered to be "driving itself" whilst operating in a mode in which it is not being controlled nor necessarily monitored by an individual.[185] There is no requirement for the owner to be at fault, and it is no defence that the AV or its system were defective. Furthermore, the liability of the insurer or owner shall not affect any other person's liability regarding the accident by virtue of section 2(7). Other liable parties—manufacturers of faulty devices in the car, for instance—may be sued directly by the victim, or

[183] Automated and Electric Vehicles Act 2018, s8(1)(b). See also Road Traffic Act 1988, s 145.
[184] Ken Oliphant, 'Liability for Road Accidents Caused by Driverless Cars' (2019) 13 Singapore Comparative Law Review 190, 194.
[185] Automated and Electric Vehicles Act 2018, s 8(1)(a).

indirectly by the insurer or owner, in respect of the accident if their acts have a concrete causal link to the accident.[186]

The AEVA provides a basic framework of liability for accidents caused by AVs, but it also leaves significant uncertainty. Although the AEVA does not explicitly adopt the SAE standard for identifying and classifying AVs, it seems that L4 and L5 vehicles will be considered self-driving vehicles under the Act because L4 and L5 vehicles can operate themselves. However, it is unclear if L3 vehicles are considered self-driving vehicles since a human driver is required to monitor and operate the vehicle if requested by the ADAS. Section 1(1)(a) contemplates that vehicles "capable of, in at least some circumstances or situations, of safely driving themselves" will be considered AVs, but it is unclear whether the circumstances under which L3 vehicles operate autonomously suffice to be considered AVs under the Act. By virtue of this wording and unclarity, the Act fully applies in scope to L4 and L5 vehicles only, rather than adopting a broader approach that encompasses all AVs.[187] The potentially narrow scope of the AEVA withholds relief from victims in accidents caused by L3 vehicles when they are operated under minimal human control. For instance, in the scenario of an AV collision while a human driver is utilising the automated features of an L3 vehicle, the AEVA does not specify which party is liable for any resulting damages. Clarifying responsibility in such cases involves scrutiny of the actions of both the human driver and the automated system, with careful consideration of various factors; not least, the definition of AVs. To ensure the effectiveness of the Act, a more comprehensive definition of AVs should be developed and the degree of liability of a human driver, who must be identified, should be established.

[186] ibid s 5(1). See also Oliphant (n 184) 194.
[187] Marson, Ferris and Dickinson (n 182) 405–406.

A further contentious issue in the AEVA is the exclusion of the insurer's liability prescribed in section 4(1). The AEVA is based on the traditional motor vehicle insurance regime which places a responsibility on the human driver to maintain the safety of the vehicle, ensure its proper use, and maintain adequate insurance coverage.[188] In maintaining their AVs, the insured are expected to avoid "software alterations" and to install "safety-critical software updates;" should they fail to do so, the insurer relinquishes all liability in respect of the accident. However, the AEVA defines neither "software alterations" nor "safety-critical software updates"—without sufficient guidance, human drivers will not know the exact constraints and obligations that apply to altering and updating their AVs' software.

On the whole, the AEVA is a significant advancement in regulating the use of AVs in the UK. The Act states the legal responsibilities that insurers and owners have in cases of accidents caused by AVs. However, there are several deficiencies in the Act, not least the failure to define several key terms, such as the definition of "driver" and "automated vehicle." This lack of clarity could create confusion for human drivers, insurers, and the AV industry on the regulation and level of safety expected from the vehicles they purchase, operate, insure, or produce.

IV. Harm caused by defective products

Product liability law may also be applicable in determining ultimate liability for accidents caused by AVs: since AVs are operated by their automated systems, a technical issue within

[188] Road Traffic Act 1988, s 145.

their systems may lead to accidents.[189] Accordingly, as the responsibility of driving shifts from human drivers to AVs, the liability for AV-caused accidents may also shift from driver to manufacturer. Indeed, a person who has suffered loss caused by defective AVs or defects within their AI systems may bring a claim under the Consumer Protection Act 1987 ('CPA'). Section 45(1) of the CPA allows for recovery of damages from harm occasioned using defective products, which may include any ship, aircraft or vehicle. Therefore, an AV with its assisted system could be included in the realm of the CPA, which provides an effective approach for consumers to claim compensation.

(i) The concept of defective product

In practice, it is questionable whether the AI assistance system—as a type of software—could properly apply under product liability law due to the fogged concepts of "product" and "defect" in the context of AVs.[190] To date, the manufacturing of AVs and the software development of their AI assistance systems are generally done by the same entity, meaning parties can easily identify and bring a legal claim against that entity if the AVs prove defective. However, with the development of the AV industry, it is possible that the manufacturing process and software design will become separate. In that event, it is unclear whether product liability would fall on the vehicle manufacturer or software developer were an accident to be caused by an error in the assistance system. The matter is further complicated by the debate over

[189] Araz Taeihagh and Hazel Si Min Lim, 'Governing autonomous vehicles: emerging responses for safety, liability, privacy, cybersecurity, and industry risks' (2018) 39 Transport Reviews 103, 110.

[190] Steven van Uytsel, 'Different Liability Regimes for Autonomous Vehicles: One Preferable Above the Other?' in Steven van Uytsel and Vargas Vasconcellos (eds), *Autonomous Vehicles. Perspectives in Law, Business and Innovation* (1st edn, Springer 2020) 71–73.

whether AI can be considered a product for the purposes of product liability, contrasting the wide and long-standing acceptance of vehicles as products for that purpose. Uytsel suggests that software should be regarded as a product if it is delivered in a tangible vehicle;[191] McCormick, meanwhile, argues it may be classified as a service since it is downloaded through the internet.[192] This distinction is most important, for English law prescribes independent regimes of statutory rights for "products" and "services." For instance, in connection with contracts for the supply of goods, the consumer's statutory rights speak to standards of goods, installed goods, digital content within goods, third party rights in goods and more.[193] For "services," statutory rights cover standards of services, binding information, price of services and time for performance.[194] Moreover, the remedies for "product" and "service" are different. As such, it is necessary to identify which set of rights apply in respect of AVs' automated systems.

Unfortunately, there is not yet any judicial precedent in the UK on the classification of AVs' AI systems, although some guidance may be taken from the Court of Justice of the European Union. The Court of Justice defined "goods" as products that can be the subject of commercial transactions and have monetary value in *Computer Associates (UK) Ltd v Software Incubator Ltd*.[195] Accordingly, software is considered "goods" regardless of whether it is downloaded via the internet—it has commercial value and is capable of being the subject of a commercial transaction.[196] Although European

[191] ibid 71.
[192] Lucy McCormick, 'Product Liability' in Matthew Channon, Lucy McCormick and Kyriaki Noussia (eds), *The Law and Autonomous Vehicles* (1st edn, Informa Law from Routledge 2019) 37.
[193] Consumer Rights Act 2015, ss 9–17.
[194] ibid ss 49–50 and s 52.
[195] Case C-410/19 *Computer Associates (UK) Ltd v Software Incubator Ltd* [2022] 2 All ER (Comm) 139, para 34.
[196] ibid para 35.

Union law is no longer applicable in the UK, the AI system itself is likely applicable under the CPA considering the long-term influence of European Union law.

The concept of 'defect,' and lack of clarity surrounding it, poses yet more uncertainty to product liability in respect of AVs. Under section 3(1) of the CPA, a product is considered defective if it does not meet the safety expectations generally held by the public. Section 3(1) further provides that the public's safety expectations extend to both products comprising the final product and to risks of property damage, personal injury or death.[197] All relevant factors need to be considered in determining the general expectations of the public: for instance, any instructions or warnings provided with the product, the intended use of the product, and the date on which the producer supplied the product.[198] In *Wilkes v DePuy*,[199] the High Court took a holistic approach to evaluate the level of safety that the public is entitled to expect and asserted that there is no expectation for a product to be completely safe in all circumstances.[200] The court further emphasised that each situation should be considered on a case-by-case basis, evaluating the balance of risks and potential benefits, compliance with mandatory standards, the grant of regulatory approval and other similarly relevant factors.[201]

In the realm of AVs, the definition of "defect" requires further explanation due to AVs' unique nature and the complex technology engaged. Since AVs heavily rely on software and AI programming, a clear definition of the term "defective product" can help to establish a clear legal framework.

[197] Consumer Protection Act 1987, s 3(1).
[198] ibid s 3(2).
[199] *Wilkes v DePuy International Ltd* [2016] EWHC 3096 (QB), [2018] QB 627.
[200] ibid 642.
[201] ibid.

Furthermore, the definition would also provide some guidelines for manufacturers and software developers of AVs, ensuring that they adhere to appropriate safety and quality standards. The definition of "defect" provided by section 3(1) of the CPA lacks specificity, and once again highlights the need for mandatory standards and regulations in the AV industry.

(ii) Single or plural entities: who is liable?

Under the CPA, producers, brand-owners, and importers may be held liable for damages resulting from defective products. Section 2(1)–(2) provide that liability for damage caused wholly or partly by a defective product shall fall on

> "(a) the producer of the product;
> (b) any person who, by putting his name on the product or using a trademark or other distinguishing mark in relation to the product, has held himself out to be the producer of the product;
> (c) any person who has imported the product into a member State from a place outside the member States in order, in the course of any business of his, to supply it to another"

Accordingly and in the context of harm caused by defective AVs, manufacturers, brand owners, and importers of the vehicle are potentially liable. Also, a supplier can be liable if it fails to identify the producer or its upstream supplier within a reasonable period.[202] However, application of the CPA as such assumes that the AI system is an indivisible part of the AV, and the product is represented by both the hardware (vehicle) and software (AI system) components combined.[203] Under this "single entity" presumption, the responsibility will

[202] Consumer Protection Act 1987, s 2(3).
[203] Van Uytsel (n 190).

accordingly be placed on the manufacturer, brand-owner or importer of the vehicle. The "single entity" presumption simplifies the process of seeking legal action, giving as much protection to customers as possible. As complex systems that rely on various sensors, computers and software, the many dependent parts of an AV work together seamlessly, making it difficult to assign blame to merely one component in the accident.

In contrast to the "single entity" view of liability, the vehicle and the AI system may be considered as separate and divisible entities. Uytsel argues that if the AI system is downloaded into the vehicle and the manufacturer was not involved in developing the assistance system, the developer of the AI system should be the focus of liability.[204] Were that the case and the AI system itself considered a "product," its developer could be deemed the "producer" and incur liability under the CPA for accidents caused by the AV. Under section 2(1)–(2), however, the liability of the vehicle's manufacturer is not effaced by that of the AI developer. Section 2(5) of the CPA states that if two or more persons are liable for the same damage, their liability shall be joint and several, meaning the claimant can choose to sue one or all. The effect of viewing the vehicle and its AI system as separate would be to extend the umbrella of liability, as opposing to shifting it from one party to the other.

The involvement of the AI system developer undoubtedly complicates the issue of responsibility. In practice, AI systems base their upgrades on large amounts of data that are aggregated by many AVs from the same producer.[205] This ongoing process of learning necessitates a continuous inflow of new data to refine the reactions of the AI

[204] ibid.
[205] Du (n 167).

system.[206] As AI systems continue to learn and develop their own behavioural patterns and decision-making abilities without the participation of human developers, the definition of "producer" becomes increasingly blurred. Consequently, challenges will arise in identifying a person who can be rightly held responsible for the decisions made by the AI through its own learning process. As such, the adoption of a "double-entity" approach would inevitably lead to unresolvable complications, contrasting the "single-entity" approach—perhaps at this stage, it is more appropriate to view the vehicle and internal system as an integrated entity with shared liability.

The burden of proof poses yet another challenge for product liability law in respect of AV-caused accidents. Per section 19 of the CRA, consumers must discover the defect within a set period post-delivery to be entitled to a remedy. In the case of tiered remedies, however, the consumer has the benefit of a reverse burden of proof during the first six months of delivery.[207] Predictably, it would be difficult for the injured party to prove the AV caused the damage as victims would need to understand the complexities of AVs and their AI systems. Even under section 5(1) of the AEVA, the insurer and owner of the AV can bring a claim against the manufacturer indirectly. By nature of the complex workings of AVs, their AI systems etc, these parties may need assistance from expensive experts, which necessitates a time-consuming and costly trial. Accordingly, the threshold for a reverse burden of proof should be lower in the case of accidents alleged to have been caused by AVs. Further, measures must be implemented to protect injured parties' right of access to evidence in these situations—necessary data such as training records, testing results, relevant data of sensors on-board should be provided to injured parties by software developers. Furthermore, the court may also need

[206] ibid.
[207] Section 19(14)–(15) of the CRA.

to strike a balance between sensitive trade secrets and relevant data, ensuring the data for AV accidents is disclosed fairly.

(iii) Contract

Consumer rights under the CPA and CRA are not exhaustive; a purchaser of a defective AV may pursue a further claim against the seller, such as a dealership, or the vehicle's manufacturer under the law of contract. The consumer can sue the seller for a breach of express or implied contractual terms in relation to the sale of a defective product by virtue of sections 13(1) and 14(1)–(2) of the Sale of Goods Act 1979. On the other hand, the manufacturer remains contractually liable for any specific warranties or guarantees it made concerning the vehicle's safety and functionality, including its autonomous features. The liability of sellers and manufacturers is reinforced by section 2(1) of the Unfair Contract Terms Act 1977, which expressly bars them from excluding their contractual liability for negligence that causes personal injury or death. Consumers thus retain extensive protection for situations when they unwittingly purchase defective AVs.

(iv) Ethical concerns

A further dimension of product liability for defective AVs is the ethical issues surrounding the algorithms of the AI system. Developers create algorithms to make decisions which determine the AV's movements, raising the question of who is ultimately responsible for those actions. As self-driving technology continues to evolve, the ethical concerns surrounding its use become ever more pressing. Evans notes that the introduction of AVs will mark the unprecedented occasion when AI systems interact with humans in the physical

world, and at high speeds.[208] Since AVs are programmed and powered by machine learning, they must be trained on how to respond in certain situations. The programmed response must adhere to ethical standards, lest the AV be considered dangerous, and the designers of its AI face liability. However, the action may not be appropriate in all cases, especially since an ethical response is bound to the circumstances peculiar to each case and the prevailing norms of the time. It is doubtful that an AI can fully grasp this delicate conundrum, nor respond accordingly.

The existing literature on AV ethics focuses on situations in which an AV is faced with the distribution of inevitable harm in the event of a crash.[209] A fundamental concern raised by AVs is who the car will be designed to protect in the case where an accident is inevitable, and the car can either, say, swerve to the left and hit one pedestrian or to the right and hit five people. This evokes the classic thought experiment known as the 'trolley problem.' The archetypal version of this dilemma is that a tram is out of control, and a person standing next to a lever which diverts the tram must make a decision. On the tracks, there are five people unable to move, but another person unable to move on the alternate course. The question becomes: what should the person next to the lever do? To save five people by choosing to divert, and thus kill the one on the alternate track? To allow the tram to run its course and kill the five people? In the context of conventional vehicles, drivers may make an ethical judgment aligning with contemporary mores (and be held liable accordingly), but the developers of an AV's AI system are obliged to analyse such scenarios in advance and devise an

[208] Nicholas Evans, 'Ethics and Risk Distribution for Autonomous Vehicles' in Ryan Jenkins, David Černý, and Tomáš Hříbek (eds) *Autonomous Vehicle Ethics: The Trolley Problem and Beyond* (Oxford University Press 2022) 7.
[209] ibid.

appropriate algorithm.[210] In doing so, the developers of the AI system are compelled to recognise and take a stance on a crucial moral issue.

In practice, various qualitative factors may affect the final choice. For example, what if the five people are elderly and the one on the other track is a child? What would be the best option if those five people are criminals? There are countless permutations of this dilemma, and it is impossible to analyse all possible scenarios. A survey conducted by Bonnefon *et al* shows that many individuals believe that damage should be targeted on the operators of AVs as they are responsible for placing a potentially dangerous machine on the roadway.[211] Inversely, the majority of respondents indicated that they prefer not to buy an AV if the manufacturers choose to prioritise pedestrian safety.[212] As a result, manufacturers are forced to choose between using an algorithm widely believed to be unethical and an algorithm that consumers do not want to purchase. If manufacturers elect to favour the operator, then who should take responsibility for any personal injury, death, or loss of property? Should the developers designing the original algorithm be liable, simply because they chose to prioritise the safety of a certain party?

Regardless of the decision, manufacturers may yet be liable. Wu presents a 'liability dilemma' which suggests that were the manufacturers to produce AVs which would avoid colliding with five people by diverting from its course and necessarily killing another, the representative of the victim

[210] Oliver Jeffcott and Rose Inglis, 'Driverless cars: ethical and legal dilemmas' [2017] Journal of Personal Injury Law 19, 22.
[211] Jean-Francois Bonnefon, Azim Shariff and Iyad Rahwan, 'The Social Dilemma of Autonomous Vehicles' (2016) 352 Science 1573, 1574.
[212] ibid.

could succeed in legal action against the manufacturer.[213] On the other hand, if the manufacturer programmed the AV to stay its course and it killed a group of five people, the representatives of those five people could successfully claim against the manufacturer also. It appears that regardless of the ethical decision made by the manufacturer, they may yet remain liable.[214] Wu's liability dilemma study indicates that manufacturers must design AVs to prevent crashes with both large crowds and individuals in order to mitigate their legal responsibility.

UK law does not appear to have considered the trolley problem of AVs; that is, where an AV causes an accident owing to an ethical choice built in its algorithm.[215] It is imperative that legislators establish a clear legal framework that addresses the ethical considerations of AVs. Whatever solution or approach adopted, the framework must guarantee that ethical algorithms are standardised among all manufacturers, and that any algorithm prioritising the safety of the operator or pedestrians is ethically justified. Furthermore, the implementation of ethical standards may have a significant impact on the AVs market; it is crucial for AVs to operate reliably to establish public confidence. Therefore, careful consideration of all relevant factors—including public opinions, safety concerns, and ethical issues—is essential when resolving the trolley problem in the context of AVs.

[213] Stephen Wu, 'Autonomous vehicles, trolley problems, and the law' (2020) 22 Ethics and Information Technology 1, 11.
[214] ibid.
[215] Jeffcott and Inglis (n 210) 23.

V. Conclusion

Navigating liability in accidents caused by AVs is a multifaceted issue that involves technological, ethical and legal considerations. Under the AEVA, the insurer or owner of the vehicle is liable for accidents caused by the AV. While the AEVA unequivocally applies to L4 and L5 vehicles, it is less apparent if L3 vehicles will be considered as AVs under the Act. This creates uncertainty on the question of who is liable in accidents caused by L3 vehicles. Other sources of law governing liability for AV-caused accidents are similarly characterised by a lack of certainty and clarity. When a defect in the AV and its internal AI system is found to be the cause of the accident, ultimate liability may shift to the manufacturer or software developer under the law of contract, and the product liability laws of the CPA and CRA. However, it is unclear whether an AV's AI system would be properly classified as a product under these acts. Moreover, no authoritative guidance exists on what constitutes a defect in AI. Worryingly, the absence of performance standards for AVs allows for AVs to have no predictable way of responding to trolley problem scenarios they may encounter on the road. Road users will thus face the danger of sharing roads with AVs whose operation they are unsure of and cannot knowledgeably interact with.

It is evident that the existing legal frameworks are insufficient. A more robust and comprehensive legal framework on performance standards of AVs and liability for AV-caused accidents is urgently needed. Such a framework should not only be adaptable to technological advancements but also align with society's ethical views.

Abortion, Autonomy and Artificial Wombs: The Potential Impact of Partial Ectogenesis on Abortion Access in England and Wales

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In an era of accelerating biomedical innovations, partial ectogenesis looms as a double-edged sword for female bodily autonomy and reproductive rights. Rather than simplifying or 'solving' abortion access and the ethical issues inherent to that right, this technology wields the alarming potential to curtail women's right to safe and legal abortions. This article investigates the potential of partial ectogenesis as a 'solution' to the abortion debate, focusing on two significant hypotheses. Foremost, the paper scrutinizes the dilemma of ectogenesis abortion; specifically, instances where a woman intending to terminate her pregnancy is obliged to undergo foetal transfer surgery. This scrutiny engages with Räsänen's concept of the right to the death of a foetus, yet ultimately concludes that this supposed right is unconvincing. Despite there being no such right, this paper argues that the prospect of partial ectogenesis is incapable of resolving the core issues of the abortion debate, not least because of the inherent conflict between a woman's right to her own body and the proposed technology or rather, compulsion of such surgeries. Instead, this article posits that a more significant ethical and logical concern lies in misconceptions surrounding the term 'foetus' and how such misconceptions impact considerations of autonomy. Thereafter, this paper examines the potential for partial ectogenesis to alter the legal viability threshold set by the Abortion Act 1967—in particular, this paper explores the impact a shift in the viability threshold would have on female bodily autonomy. In the aim of resolving these concerns, this article concludes by advocating for the decriminalisation of abortion to safeguard female bodily

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autonomy against constraints on abortion access were the viability threshold legally revised. By addressing these crucial topics, this article aims to provide a nuanced analysis of the dialogue surrounding reproductive rights, bodily autonomy, and the complex interplay between emerging biotechnologies, medical ethics and legislative frameworks.

I. Introduction

Ectogenesis, or artificial womb technology, heralds a scientific advancement with the potential to revolutionise human reproduction, for such technology enables a foetus to undergo gestation in an artificial womb.[216] Complete ectogenesis refers to gestating an embryo from conception to birth outside of a woman's body; partial ectogenesis, meanwhile, refers to the "transfer of a partially developed embryo or foetus from the female body to an external womb for the remainder of the gestation period."[217] In 2017, a trailblazing experiment sustained lamb foetuses in artificial wombs for up to four weeks,[218] prompting Alan Flake, a renowned foetal surgeon, to predict that the group would test the artificial womb on "very premature babies" within three to five years.[219] Although this milestone has not been met, the prospect of an extracorporeal

[216] Elizabeth Chloe Romanis, 'Artificial womb technology and the frontiers of human reproduction; conceptual differences and potential implications' (2018) Journal of Medical Ethics 44; Seppe Segers, 'The Path toward ectogenesis: looking beyond the technical challenges' (2021) 22 BMC Medical Ethics.
[217] ibid Segers.
[218] Emily Partridge and others, 'An extra-uterine system to physiologically support the extreme premature lamb' (2017) Nature Communications 8; Haruo Usada and others, 'Successful Maintenance of physiological parameters in preterm lambs treated with ex vivo uterine environment therapy for a period of 1 week' (2017) 217 American Journal of Obstetrics and Gynecology.
[219] Rob Stein, 'Scientists Create Artificial Womb That Could Help Prematurely Born Babies' (*NPR,* 25 April 2017) <https://www.npr.org/sections/health-shots/2017/04/25/525044286/scientists-create-artificial-womb-that-could-help-prematurely-born-babies?t=1649142542907> accessed 1 April 2022.

human gestation environment is on the horizon. While being an exciting prospect in reproductive technology and neonatal medicine, this raises a plethora of ethical and legal quandaries, particularly in the context of abortion. Balancing abortion rights and the rights to access foetal transfer surgery—two morally divisive and partisan procedures—raises a myriad of questions concerning their co-existence within the existing ethical and legal frameworks. This analysis delves into the question of whether partial ectogenesis could serve as a panacea for the contentious debate on abortion, as some scholars have suggested.[220]

To contextualise the forthcoming discussion, the first section will elucidate current abortion law in England and Wales, and examine the relevant moral justifications underpinning abortion. This article will then consider two ways in which complete or partial ectogenesis could reshape abortion access: firstly, the issue of ectogenesis abortion and thereafter, the threat to the viability threshold enshrined in the Abortion Act 1967.

In the following section, this paper will scrutinise the possibility of partial ectogenesis replacing conventional terminations altogether where practicable, i.e., forcing women seeking abortions to undergo foetal transfer surgery, with their foetuses transferred to artificial wombs for continued gestation. This scrutiny necessitates an understanding of the existing right to abortion, namely its nature and scope. As such, this section will critically evaluate the work of Räsänen and his defence of

[220] Kevin Abel, 'The Legal Implications of Ectogenetic Research' (1974) 10(2) Tulsa Law Journal 243; Robert James Favole, 'Artificial gestation: new meaning for the right to terminate pregnancy' (1979) 21(3) Arizona Law Review 755.

a right to foetal perishing, highlighting its inherent flaws.[221] It will be acknowledged, however, that although there is no such right to the death of the foetus, this does not imply that partial ectogenesis will revolutionise abortion regulation—importantly, this chapter will argue that coercive foetal transfer surgeries fundamentally contravene the principle of women's bodily autonomy, thus negating the purported benefits of the technology.

Proceeding from that analysis, this paper will explore the ethical inconsistencies inherent in such coercion. That exploration will first illustrate the common misconception surrounding the normative status of the foetus, and the impact this has on the relevant debate. Thereafter, it will introduce the paramount principle of autonomy and examine the irrefutably important role it plays in this discussion. This paper seeks to establish that the first proposed solution—replacing all abortions with ectogenesis abortions—is fundamentally flawed.

The final section will investigate the possibility that partial ectogenesis renders a foetus viable at an earlier stage, and the implications this has for abortion regulation. Indeed, were the foetus capable of surviving *ex utero* earlier, this could precipitate calls to lower the 24-week limit—founded on the concept of viability—enshrined in section 1(1)(a) of the Abortion Act,[222] and thereby limit abortion access. Additionally, that section will also assess and advocate the potential decriminalisation of abortion in anticipation of this technological development.

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[221] Joona Räsänen, 'Ectogenesis, abortion and a right to the death of the foetus' (2017) 31(9) Bioethics 697.
[222] Abortion Act 1967, s 1(1)(a).

Ultimately, this article aims to establish that despite there being no justifiable right to the death of the foetus, considerations of autonomy and the normative status of the foetus carry far greater ethical significance and logical strength. Alongside the ramifications concerning viability, these factors converge to strongly endorse the position that the advent of artificial wombs should enhance, not diminish a woman's reproductive choices. Thus, partial ectogenesis need not—indeed, should not—have any revolutionary impact on current abortion access.

II. Current abortion law

To properly consider the potential impact of ectogenesis on access to abortion in England and Wales, it is essential to outline the current law regulating the practice, the moral justifications for the procedure, and the relevant moral status of the foetus.

As an extraordinarily divisive issue, the journey to the current regulation of abortion in England and Wales has been turbulent. The stringent prohibitions under Lord Ellenborough's Act 1803,[223] Lord Lansdowne's Act 1828[224] and the Offences Against the Person Act 1861[225] did not eliminate abortions, despite their intentions. Rather, they led to 'back-street', unsafe abortions, which were cited as a leading reason for David Steel MP's 1966 Medical Termination of

[223] Lord Ellenborough's Act 1803, s 1
[224] The Offences Against the Person Act 1828, s 13
[225] The Offences Against the Person Act 1861, ss 58–59.

Pregnancy Bill.[226] That Bill eventually became the Abortion Act 1967 which governs the law of abortion today.[227]

The Abortion Act does not 'decriminalise' abortion; it merely provides several defences to patients and medical practitioners undergoing/providing abortion services. These defences include the 'social ground' of abortion, requiring two medical practitioners agree that continuing the pregnancy would involve "risk, greater than if the pregnancy were terminated, of injury to the physical or mental health of the pregnant woman or existing children of her family."[228] The 'social ground' applies only if the pregnancy has not exceeded 24 weeks.[229] Abortions exceeding 24 weeks are permitted only if there is a "risk of grave permanent injury to the physical or mental health of the pregnant woman,"[230] a risk to the woman's life that is "greater than if the pregnancy were terminated,"[231] or, perhaps most controversially, if there is a "substantial risk" that the child will be born with "such physical or mental abnormalities as to be severely handicapped."[232]

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[226] Paul Cavadino, 'Illegal Abortions and the Abortion Act 1967' (1976) 16(1) The British Journal of Criminology 63.
[227] Abortion Act 1967 (AA 1967).
[228] AA 1967, s 1(1)(a).
[229] ibid.
[230] ibid s 1(1)(b).
[231] ibid s 1(1)(c).
[232] ibid s 1(1)(d). This provision has proved particularly problematic and has evoked several human rights-based arguments from its opponents. In *R (on the application of Crowter and another) v Secretary of State for Health and Social* Care [2022] EWCA Civ 1559, for example, Heidi Crowter and Maire Lea-Wilson argued that allowing foetuses with Down's syndrome to be aborted violated Articles 2, 3, 8 and 14 of the European Convention on Human Rights (ECHR), suggesting that this allowance was discriminatory and stigmatising to those with the condition. Although they were unsuccessful in their claims, their response does serve to reinforce the human rights-based concerns held by many in regard to abortion. However, their concerns in this case were with the rights of those living with 'physical or mental abnormalities,' not any rights claimed to be held by foetus itself.

(i) Legal status of the foetus

Under the common law, the foetus does not have legal personality until it is born alive. In *Paton v BPAS*,[233] the Court rejected the argument that an abortion could be prevented because the foetus had rights under Article 2 of the European Convention on Human Rights. Indeed, Sir George Baker P held that "[t]he foetus cannot, in English law, in my view have a right of its own until it is born and has a separate existence from its mother."[234] In *Kelly v Kelly* moreover, Lord Cullen ruled that an unborn foetus does not have the right to "continue to exist in the mother's womb" and that legally, it is not an individual with actionable rights.[235]

(ii) Moral arguments and the moral status of the foetus

Notwithstanding the foetus having no legal personhood, many insist it possesses a moral standing. For example, Brown contends that "[t]hroughout foetal development… the foetus has intrinsic moral status as a human being."[236] The framing of the foetus as a human being leads anti-abortion advocates to argue that not only does the foetus have a right to life, but that this right is stronger than the pregnant woman's right to an

[233] *Paton v Trustees of British Pregnancy Advisory Services* (1979) QB 276.
[234] ibid [279] (Sir George Baker P).
[235] *Kelly v Kelly* 1997 SC 285 (IH), 292 (Lord Eassie).
[236] Mark T Brown, 'The Moral Status of the Human Embryo' (2018) 43 The Journal of Medicine and Philosophy: A Forum for Bioethics and Philosophy of Medicine 132.

abortion.[237] Inversely, pro-choice proponents maintain that a foetus does not have a right to life and, in certain cases, a mother is not morally obligated to carry it to birth.[238]

It is imperative to underscore that the adjudication of the moral status of the foetus has a significant—if not decisive—impact on the parameters of any presumed abortion rights. Should the foetus possess moral parity with the woman, then any purported right to its death collapses by necessity. Conversely, if the foetus is devoid of any moral standing whatsoever, the ethical and moral debates invoked in the argument would be obsolete. The precise moral standing of the foetus is not the focus of the article but for the purposes of the forthcoming discussion, this paper assumes that the foetus has some moral status, but it is not equal nor superior to that of the pregnant woman. The portrayal of the foetus as a person with a right to life, and the impact this has on the ectogenesis debate, will be explored in depth in the third chapter of this article.

III. What does the right to abortion entail?

Abortion is defined as the "commonly used term for the termination of an established pregnancy, where 'established' is

[237] Dabney P Evans and Subasri Narasimhan, 'A narrative analysis of anti-abortion testimony and legislative debate related to Georgia's foetal 'heartbeat' abortion ban' (2020) 28(1) Sexual and Reproductive Health Matters 215; William Simkulet, 'The Moral Significance of Abortion Inconsistency Arguments' (2022) 14(1) Asian Bioethics Review 41; ProCon.org, 'Should Abortion Be Legal?' (*ProCon.org*, 24 June 2022) <https://abortion.procon.org> accessed 28 April 2022.

[238] Bertha Alvarez Manninen, 'A Pro-Choice Response to New York's Reproductive Health Act' (2021) 6(1) Philosophies 15; Sally Sheldon, 'The Decriminalisation of Abortion: An Argument for Modernisation' (2015) 36(2) Oxford Journal of Legal Studies 334.

taken to mean that the embryo has implanted in the uterus."[239] The contested terrain of abortion hinges on the stark polarisation of two ostensibly irreconcilable interests: a woman's incontrovertible right to exercise her bodily autonomy by terminating her pregnancy, and the contested right to life attributed to the foetus by staunch anti-abortion advocates.[240] However, abortion might become a largely obsolete concept given the proposition that ectogenesis may reconcile these conflicting ethical imperatives. Indeed, had the partial gestation technology in an artificial womb been available when the Abortion Act was codified, the jurisprudential and ethical architecture surrounding abortion law could have been profoundly different.

This theoretical reconciliation has led many legal and ethical scholars to suggest that "artificial wombs hail the end of abortion"[241] as ectogenesis challenges the justification for abortion rights,[242] those being largely founded on a pregnant woman's right to exercise bodily autonomy by terminating her pregnancy.[243] Within the current realms of medicine and

[239] Gavin Colthart, 'Abortion Law' (House of Commons Library, 17 December 2009) <https://researchbriefings.files.parliament.uk/documents/SN04309/ SN04309.pdf> accessed 10 April 2022. This definition itself has attracted criticism from anti-abortion activists who argue that abortion goes so far as to include the 'morning-after pill or insertion of an IUD', as these methods prevent implantation. In English and Welsh law, however, these claims were rejected in *R v Secretary of State for Health* (2021) EWHC 2536.

[240] Evans and Narasimhan (n 237); Simkulet (n 237).

[241] Claire Horn, 'Abortion Rights after Artificial Wombs: Why Decriminalisation is Needed Ahead of Ectogenesis' (2021) 29 Medical Law Review 80.

[242] Abel (n 220); Ji Young Lee and Andrea Bidoli, 'Abortion & Artificial Wombs' (*Philosophy Now*, 2021) <https://philosophynow.org/issues/144/Abortion_and_Artificial_Wombs> accessed 1 March 2022; Vernellia Randall and Tshaka C Randall, 'Built in Obsolescence: The Coming End to the Abortion Debate' (2008) 4(2) Journal of Health and Biomedical Law 291.

[243] ibid.

technology, the only way in which a woman can do so necessitates the death of the foetus. As a result, if ectogenesis could furnish a revolutionary solution—enabling these "two rights commonly thought to be in tension" to be concurrently actualised[244]—the repercussions for abortion access could be nothing short of seismic.

This idea is defended by those who hold the view that while a woman has the right to end her pregnancy, this does not entail the right to the death of the foetus. For example, Thomson wrote that while she does argue for the permissibility of abortion, she is "not arguing for the right to secure the death of the unborn child."[245] In contrast, a defence of such a right has been advanced by Räsänen, who outlines three main arguments in support of this position: the right not to become a biological parent, the right to genetic privacy, and the right to property.[246]

Before turning to the pivotal issue of whether partial ectogenesis would compel women to undergo foetal transfer, this paper must first interrogate the claim that abortion inherently involves a right to foetal death, for ectogenesis adds little to the debate should there be a right to the foetus' death. To this end, this paper shall critically assess Räsänen's three key arguments defending this supposed right.

(i) The right not to become a biological parent

[244] Eric Mathison and Jeremy Davis, 'Is There a Right to the Death of the Foetus?' (2017) 31(4) Bioethics 313.
[245] Judith Jarvis Thomson, 'A Defence of Abortion' (1971) 1 Philosophy and Public Affairs 47.
[246] Räsänen, 'Ectogenesis, abortion and a right to the death of the foetus' (n 221).

The first argument that Räsänen sets out in support of a right to the death of the foetus is the *Right Not to Become a Biological Parent Argument*.[247] He posits that being a biological parent causes harms which derive from parental obligations to the child and, in order to satisfy their interest in avoiding these harms, parents have the right to the death of the foetus.[248] Overall made a similar claim, admitting that ectogenesis abortions would force women to have biological children when they are seeking to avoid becoming a biological parent.[249] In essence, it is not that women seeking abortions do not want to be *pregnant*, but that they do not want to be *mothers.* Mackenzie described as such when she wrote that in choosing an abortion a woman is "choosing that there be no being at all in relation to whom she is in a situation of such responsibility."[250]

To fully analyse the strength of Räsänen's argument, we must first explore the 'harms' to which he refers, and to what extent these harms are viewed as a tangible problem by women who do not wish to be a parent. The 'harm' cited is what Cohen terms "attributional parenthood"[251] and includes socially or self-imposed feelings of obligation towards a biological child. Cannold's 1995 study provides some insight as to whether women consider this potential harm as a factor in

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[247] ibid 4.
[248] ibid.
[249] Christine Overall, 'Rethinking Abortion, Ectogenesis and Foetal Death' (2015) 46(1) Journal of Social Philosophy 126.
[250] Catriona Mackenzie, 'Abortion and Embodiment' (1992) 70(2) Australasian Journal of Philosophy 136. The responsibility to which Mackenzie is referring is what she described as the "responsibility for a particular future child." In pointing this out, Mackenzie is citing Ross: see also Steven L Ross, 'Abortion and the death of the fetus' (1982) 11 Philosophy and Public Affairs 232.
[251] Glenn Cohen, 'The Right Not to Be a Genetic Parent?' (2008) 81 Southern California Law Review 1115.

their decision to terminate a pregnancy.[252] The voices heard in this study speak of the worry that "to bring a child into existence is to accept responsibility for their child's well-being, perhaps for life."[253] This factor was of such importance to the interviewees that they concluded abortion indeed involves a right to the death of the foetus.[254] Thus, Räsänen's argument aligns with existing evidence, which consequently supports the idea of a right not to be a biological parent.

Albeit useful and insightful, this qualitative work cannot be deemed conclusive due to the sample size of only forty-five women[255] and yet, that study is not the sole evidential basis for the perceived or actual harms of attributional parenthood. In December 2021, Sisson provided an illuminating interview in which she discussed the choice between abortion and adoption.[256] The data Sisson cites is limited to women choosing between adoption and abortion, although it is, *mutatis mutandis*, equally applicable to the *Right Not to Become a Biological Parent Argument*: the data underpins the degree to which women wish to avoid the harms of biological parenthood, so much so that they chose abortion over adoption. In the interview, Sisson, having conducted extensive research into women's reproductive choices, reports that around 18,000 to 20,000 private domestic adoptions take place each year in the United States alone, in stark contrast to

[252] Leslie Cannold, 'Women, Ectogenesis and Ethical Theory' (1995) 12 Journal of Applied Philosophy 55.
[253] ibid 60.
[254] ibid.
[255] ibid 55.
[256] Gretchen Sisson, Mary Louise Kelly, Ashley Westerman and Sarah Handel, 'Sociologist says women are more likely to choose abortion over adoption' (*NPR*, 3 December 2021) <https://www.npr.org/2021/12/03/1061333491/sociologist-says-women-are-more-likely-to-choose-abortion-over-adoption?t=1650817690602> accessed 20 April 2022.

the roughly 900,000 abortions.[257] This gap is attributable, according to Sisson, to the profound psychological duress experienced by women who "relinquish their parental rights… [experience] a lot of grief, a lot of mourning [and] a lot of trauma."[258] Furthermore, a study published in 2017 by Sisson *et al* showed that among 231 women denied access to abortion, a paltry 9 percent opted for adoption.[259] Amongst the main reasons cited for this decision was that adoption can be deeply traumatic as birth mothers can experience grief after placement, echoing Sisson's prior conclusions.[260]

In both adoption and ectogenesis abortions, the premise of relinquishing parental rights yet feeling an obligation towards a biological child remains the same. Women have chosen to exercise their right to abortion rather than becoming a biological mother due to the psychological harm attached to forced motherhood.[261] If partial ectogenesis were to become available, it must follow that there should be a right not to be a biological parent to avoid that harm.

If such a right not to be a biological parent exists, does it then follow that there is a further right to the death of the foetus? Mathison and Davis think not,[262] employing the example of surrogates and gamete donors to illustrate their view that the psychological harm caused by attributional parenthood does not, and should not, give rise to a right to the death of the foetus. They proposed that "[i]f the right against

[257] ibid.
[258] ibid.
[259] Gretchen Sisson and others, 'Adoption Decision Making among Women Seeking Abortion' (2017) 27 Women's Health Issues 136.
[260] Ibid; Olga Khazan, 'Why So Many Women Choose Abortion Over Adoption' (*The Atlantic*, 20 May 2019) <https://www.theatlantic.com/health/archive/2019/05/why-more-women-dont-choose-adoption/589759/> accessed 15 April 2022.
[261] ibid.
[262] Mathison and Davis (n 244).

the harms of attributional parenthood entail further rights to prevent or avoid such harms in the case [of ectogenesis], they should entail similar rights in these cases as well."[263] Räsänen rejects this proposition, insisting that it is intuition based, and that "intuitions solely are not a sufficient reason to believe genetic ties do not matter in the case of gamete donors, surrogate mothers and ectogenesis abortion."[264] While Räsänen's objection is sound *prima facie*, a closer examination of Mathison and Davis' argument reveals conspicuous gaps in his critique. Mathison and Davis never insinuate that genetic ties are irrelevant, but rather that in the cases of surrogacy and gamete donation—where the psychological harms of attributional parenthood might be comparably significant—no such right to foetal death has been established. They propose that since no right exists in these cases, it is not congruent to argue that such a right should exist in ectogenesis abortion on the basis of the same harm.[265] Stratman also criticises Räsänen's intuition concern, suggesting that it is "the fact that surrogate mothers are not afforded any such rights, which demonstrates no such rights exist, not our intuitions."[266] Thus, the absence of such rights for surrogate mothers serves as strong evidence against the purported right, notwithstanding intuition.

A more logical criticism of Mathison and Davis' proposal is that under English law, should the surrogate change her mind and wish to avoid the psychological harm of becoming a biological mother, the surrogate can seek an abortion.[267] However, this criticism is difficult to sustain

[263] ibid 315.
[264] Räsänen, 'Ectogenesis, abortion and a right to the death of the foetus' (n 221) 7.
[265] Mathison and Davis (n 244).
[266] Christopher Stratman, 'Ectogestation and the Problem of Abortion' (2020) 34(4) Philosophy and Technology 683.
[267] AA 1967, s 1(1)(a)–(d).

acknowledging the fact that currently, the only way to end a pregnancy inevitably involves the death of the foetus. The surrogate, therefore, does not have a right to the foetus' death, but rather a right to terminate the pregnancy. It is worth noting, however, that surrogacy in the UK is governed by a legal framework that only permits it on altruistic grounds[268]—it could be argued that because a woman who chooses to be a surrogate makes the conscious decision to carry a pregnancy for another, the harms felt in these circumstances would not be as substantial as in a conventional pregnancy, thus undermining Mathison and Davis' approach.

What neither Räsänen nor Mathison and Davis have acknowledged is that invoking a potential right to the death of the foetus could also prove psychologically harmful to the parents. For example, Kazcor notes that "if we are focusing on avoiding the risk of substantial psychological harm, it is not biological parenthood we should avoid, but abortion."[269] Furthermore, Blackshaw and Rodger also acknowledge the potential harm abortion could inflict on the mother, writing that "in a society where ectogenesis is widespread, it seems plausible that there may well be negative social attitudes towards those who choose to kill the foetus."[270] Considering these proposals alongside quantitative evidence that abortion can often result in psychological damage,[271] there are grounds to conclude that positively choosing to kill the foetus might also

[268] Surrogacy Arrangements Act 1985, ss 1A–2
[269] Christopher Kazcor, 'Ectogenesis and a right to the death of the prenatal human being: A reply to Räsänen' (2018) 32(9) Bioethics 634.
[270] Bruce Blackshaw and Daniel Rodger, 'Ectogenesis and the case against the right to the death of the foetus' (2018) 33(1) Bioethics, 76.
[271] Priscilla K. Coleman, 'Abortion and mental health: quantitative synthesis and analysis of research published 1995-2009' (2011) 199(2) The British Journal of Psychiatry 180.

become a source of socially or self-imposed psychological harm. Consequently, the justification Räsänen presents for a right to the death of the foetus could simultaneously be used to advocate opposition to that very right.

While it is intellectually honest to acknowledge the potentially deleterious effects of attributional parenthood, extending this argument to assert an ensuing right to the death of the foetus falls into logical inconsistency. Such a stance, though emotionally charged, lacks a robust ethical foundation to justify such a sweeping claim, therefore weakening its contribution to the discourse on ectogenesis and abortion.

(ii) The right to genetic privacy

The second argument Räsänen proposes to defend a right to the death of the foetus is the *Right to Genetic Privacy Argument*.[272] For Räsänen, people have a right to genetic privacy and this right entitles genetic parents to the death of the foetus. To illustrate this argument, he proposes a thought experiment in which a mad scientist steals DNA to create and gestate a foetus that is genetically identical to the person whose DNA has been stolen.[273]

Although the argument as a whole proves implausible, it is important to consider the initial scenario in which Räsänen states that 'people have a right to genetic privacy.' In a scenario where one person steals another's DNA and uses it against their will, the latter has been wronged by that person undoubtedly, yet it is not a right to genetic privacy that is violated. Were a

[272] Räsänen, 'Ectogenesis, abortion and a right to the death of the foetus' (n 221) 7.
[273] ibid 8.

'mad scientist' to abscond with someone's genetic material without proper authorisation from that person, the crux of the violation lies in the unauthorised appropriation of one's corporeal self, rather the subsequent utilisation of that material. In contrast, Christine Overall makes a more convincing argument when she submits that advocating for ectogenesis as a 'solution' to the abortion debate means that healthcare workers and the state act 'analogously' when they 'deliberately stole' a woman's body part.[274] She writes that nobody has a 'right to seize one's own body parts against one's will.'[275] This is a stronger argument than Räsänen's insofar as it places central importance on the autonomy and the appropriation of part of one's self, as opposed to the subsequent use of private information. In this context, however, it is useful to exemplify the shortcomings of the very first premise of Räsänen's *Right to Genetic Privacy Argument*, in which he neglects the nuances of his proposed right.

Suppose that the first premise—asserting a 'right to genetic privacy'—were to succeed, Räsänen's argument falters nonetheless. Assume a hypothetical scenario in which a 'mad scientist' creates a foetus using a person's DNA without consent; this foetus, genetically identical to the DNA donor, has not perpetrated any wrong. Using another hypothetical to illustrate further: a person suffering from a rare illness could benefit from blood rich in specific antibodies, that being possessed by another individual. Should this blood, containing the individual's DNA, be stolen and transfused without consent, it would be logically flawed to argue that the DNA donor shall have a right to the beneficiary's death, regardless of them

[274] Overall (n 249).
[275] ibid.

ignorant of the blood's illicit origins. In this ethical construct, the culprit—the third party who has acted against the individual's will—bears the responsibility, not the unwitting beneficiary of the act. It is intellectually unsustainable and ethically questionable to claim that a violation of one's rights, even if proven, entitles one to harm against the unwitting beneficiary of a third party's wrong. Legal remedies should, thus, be directed at the transgressing third party, not the innocent result of the transgression. Consequently, Räsänen's hypothesis disintegrates under scrutiny—it fails to robustly substantiate a right to the death of the foetus based on the putative right to genetic privacy.

(iii) Property rights

Räsänen's third argument in defence of a right to the death of the foetus is grounded in property rights. He purports that a foetus is the property of its parents, and, as people can do what they like with their property, parents may 'destroy' their foetus.[276] He compares this to the disposal of surplus embryos in the practice of IVF:[277] the Human Fertilisation and Embryology Act 2008 characterises gametes and embryos as property,[278] requiring consent for their storage, use, and disposal. These examples indicate that *embryos* are indeed property, and Räsänen claims that inasmuch as both embryos and foetuses have the potential to become an infant, there are grounds to conclude it is permissible to have a right to the death of the foetus on grounds of property.[279] However, Räsänen later

[276] Räsänen, 'Ectogenesis, abortion and a right to the death of the foetus' (n 221) 9.
[277] ibid 10.
[278] The Human Fertilisation and Embryology Act 2008, sch 3.
[279] Räsänen, 'Ectogenesis, abortion and a right to the death of the foetus' (n 221) 9.

admits that "[o]bviously, children are not parents' property"[280] which, whilst true, raises an issue for his initial proposal to resolve. If both embryos and foetuses are accepted as property of the genetic parents but children are not, when does this transition take place? Is it at birth? Räsänen has previously stated that "infants are not persons… therefore [they] do not have a right to life"[281]—for Räsänen, infants have not crossed a threshold that allows them to be considered a person, "at least psychologically," with a defendable right to life.[282] Equally, Räsänen suggests that whilst an infant does not have a right to life, that "does not necessarily mean we have right to end their life. At least not without a good reason or justification." At which point does the foetus transition from property for which the parents have a right to end their life, to an infant which is not property and for whom they do not have a right to kill? Most logically, that watershed event is birth, although that raises issues in justifying a right to the death of the foetus in light of ectogenesis,

Blackshaw and Rodger note that accepting the transitional point as when the foetus "begins an existence independent from its mother"[283] would, in the case of ectogenesis, "enable the foetus to begin an independent existence far earlier, possibly even from conception if combined with IVF."[284] If the *Right to Property Argument* is accepted, the foetus would convert to non-property at a very early point in the gestational period in the context of partial ectogenesis. Therefore, if the watershed point is indeed

[280] ibid 12.
[281] Joona Räsänen, 'Pro-life arguments against infanticide and why they are not convincing' (2016) 30(9) Bioethics 656, 671.
[282] ibid 671.
[283] Blackshaw and Rodger (n 270).
[284] ibid.

independent existence from the mother, Räsänen's *Right to Property Argument* accepts the possibility of ectogenesis abortions in place of conventional abortions. Conversely, if there is no decisive line or watershed moment at which the foetus is no longer property, it is difficult to see how the right to the death of the foetus would not extend to infants also, for neither are persons with defendable rights to life in Räsänen's view.[285]

Räsänen's third argument is therefore inherently flawed; it fails to justify that abortion entails a right to the death of the foetus.

(iv) Collective rights

Finally, an overarching theme in Räsänen's argument is the depiction of the proposed right to the death of the foetus as a *collective* right.[286] While it does not feature amongst the main arguments used in his account, Räsänen frequently invokes it in an attempt to prove the stability of his claims. For instance, Mathison and Davis propose that—with regards to genetic privacy—there is the right that one's entire genetic code is not released without consent only.[287] Räsänen rebuts this by insisting that despite only 50% of the foetus' genetic material deriving from the mother, 100% of it comes from the genetic parents collectively. As such, Räsänen maintains that any right to the death of the foetus is a *collective* one and must be decided by both the biological mother and father together.[288] He

[285] Räsänen, 'Pro-life arguments against infanticide and why there are not convincing' (n 281) 671.
[286] Räsänen, 'Ectogenesis, abortion and a right to the death of the foetus' (n 221) 9–13.
[287] Mathison and Davis (n 244).
[288] Räsänen, 'Ectogenesis, abortion and a right to the death of the foetus' (n 221) 9.

compares this to two business owners making decisions about their company.[289]

Beyond the fact that every individual has a "uniquely expressed genotype that is *not* entirely derived from parents,"[290] the collective right that Räsänen repeatedly defends is a limited approach that does not hold in reality—not all women seeking abortions are able to make contact with the father. Following Räsänen's judgement, if a pregnant woman finds herself alone faced with raising a child, she is prohibited from seeking an abortion for she is not capable of finding out if her and the father unanimously "want the death of the foetus."[291] Whilst this decision is perhaps accessible for some women, the characterisation of the proposed right as collective neglects the realities faced by many women seeking abortions today.[292]

For those who may contact the father, the collective right argument is no less objectionable. By rendering the decision to terminate collective, Räsänen proposes to give a third party a power of veto over a woman's bodily autonomy. Räsänen's proposition transgresses the concept of autonomy

[289] Räsänen, 'Pro-life arguments against infanticide and why there are not convincing' (n 281) 671, 680.
[290] Kazcor (n 269).
[291] Räsänen, 'Ectogenesis, abortion and a right to the death of the foetus' (n 221) 9.
[292] For example, 81% of abortions in England and Wales in 2020 "were for women whose marital status was given as single, a proportion that has remained roughly constant for the last 10 years." – Department of Health and Social Care, 'Abortion statistics, England and Wales: 2020' (*Gov.uk*, 2020) <https://www.gov.uk/government/statistics/abortion-statistics-for-england-and-wales-2020/abortion-statistics-england-and-wales-2020> accessed 4 April 2022; Finer and others found that 48% of women seeking abortions did not want to be a single mother or was having relationship problems – Lawrence Finer and others, 'Reasons U.S Women Have Abortions: Quantitative and Qualitative Perspectives' (2005) 37(3) Perspectives on Sexual and Reproductive Health 110.

wholeheartedly, stripping it of its fundamental nature. By asserting that the right to the death of the foetus should be a collective decision between both parents, Räsänen paradoxically negates the very concept of autonomy for the woman. This proposition is not only inconsistent with the concept of autonomy, but also with the rulings of the courts: there is no shortage of judicial precedent refusing to grant the father such a right over a woman's body.[293] As such, defining the right to the death of the foetus as a collective one is myopic.

Although Räsänen fails to prove that there is a viable right to the death of the foetus, the assertion that partial ectogenesis will act in a revolutionary way to impact current abortion access remains unconvincing. This is owing to the fact that no woman can be forced to undergo a foetal transfer surgery.[294] A stronger criticism of the characterisation of partial ectogenesis as a 'solution' to the abortion debate is found in two key concepts: firstly, the proper conceptualisation of the foetus; and secondly, the integral concept of autonomy, a point that Räsänen not only neglects to acknowledge, but essentially undermines. These concepts and the role they play in this debate will now be considered.

VI. Redefining the foetus and the role of autonomy

Having established that Räsänen's arguments in favour of a right to the death of the foetus fail to substantiate such a right, the arguments of scholars who believe "artificial wombs hail

[293] *Paton* (n 233); *Kelly v Kelly* (1997) CS 285 (IH); *C v S* (1987) 1 All ER 1230.
[294] *Re B* (2002) 2 All ER 449: a patient of sound mind may refuse medical treatment, even if lifesaving.

the end of abortion"[295] may seem self-evident. That conclusion, however, does not follow from there being no right to the death of the foetus. Viewing partial ectogenesis as a panacea that reconciles a woman's right to terminate her pregnancy with a potential foetal right to life is, as per Horn, "hopelessly anachronistic"[296]—the debate transcends a simplistic juxtaposition of a woman's right to terminate her pregnancy and a foetus' right to life.

To insinuate that ectogenesis solves the abortion debate implies that all abortions will result in foetal transfer and artificial gestation. Although considerations such as attributional parenthood, genetic privacy and property rights may not sufficiently justify the inclusion of a right to the death of the foetus antecedent to the right to abortion, these concerns remain pertinent. It is not a foregone conclusion that all women seeking an abortion would opt for ectogenesis, just as most women do not choose adoption over abortion. The panacea deduction suggests the potential for women to be *forced* to do so.

This section aims to defend the conclusion that ectogenesis will not, and should not, have a thoroughgoing impact on abortion access such that women might be coerced into the removal of their foetuses for extracorporeal gestation. The defence of this position is twofold. Firstly, an examination of the foetus as 'tissue of human origin' will be used to advance the position that whilst Räsänen's triad of collective rights do not justify a right to the death of the foetus, it does not follow

[295] Horn (n 241).
[296] Claire Horn, 'Ectogenesis is for Feminists: Reclaiming Artificial Wombs from Anti-abortion Discourse' (2020) 6(1) Catalyst: Feminism, Theory, Technoscience 1.

that the foetus has the right to be gestated ectogenetically.[297] Secondly, the prevalent role women's bodily autonomy plays in such a dichotomising discussion will be analysed and used to establish that any claims that partial ectogenesis will solve the abortion debate are fundamentally incompatible with the paramount principle of autonomy.

(i) The foetus as 'tissue of human origin'

Defenders of the anti-abortion campaign view abortion as intrinsically wrong because the foetus is a human being, and therefore should have the rights associated with that legal and moral status.[298] Callahan and Knight refute this idea, denoting that prenatal human beings "lack the kinds of characteristics which compel the recognition of strong moral rights and are possessed by paradigm cases of persons."[299] Similarly, Overall propounds that "[t]o regard the foetus, during gestation, as being isolated from and independent of the woman is therefore an ontological and moral error."[300] The depiction of a foetus as its own entity, somehow separate from the pregnant woman, is a misleading portrayal that has permeated the anti-abortion campaign, conceptualising the foetus as having "interests and rights of its own that are often imaginable only at the expense

[297] Evie Kendal, 'Pregnant people, inseminators and tissues of human origin: how ectogenesis challenges the concept of abortion' (2020) 38 Monash Bioethics Review 197.
[298] Brown (n 236); Dianne N Irving, 'When Do Human Beings Begin? 'Scientific' Myths and Scientific Facts' (1999) 19 International Journal of Sociology and Social Policy 22.
[299] Joan C Callahan and James W Knight, 'Women, Foetuses, Medicine and the Law' in Helen Bequaert Holmes and Laura M Purdy (eds), *Feminist Perspectives in Medical Ethics* (Indiana University Press 1992) 226.
[300] Segers (n 216).

of the pregnant woman."[301] In particular, painting the foetus as a person could strengthen proposals that ectogenesis may in some way solve the abortion debate. Indeed, were the foetus a person, partial ectogenesis may well do so: the rights of the pregnant woman do not necessarily take priority if the foetus is equally viewed as a person with legal personality and rights.

On the contrary, Kendal proposes that foetuses are "most accurately classified as tissues of human origin that are dependent on a pregnant woman's body for life… such tissues do not possess rights or interests while they remain in the womb."[302] This description logically encompasses the fundamental difference between a human person and a foetus: the foetus is *dependent* on a person's body to survive. Without the pregnant woman's body, the foetus could not continue to exist, and so it does not hold that the two are somehow equal where rights are concerned. In law, as explained in the first section, the position is clear—the foetus does not have legal personality.[303]

Of course, the possibility of ectogenesis compromises the clarity of this distinction. The concept of partial ectogenesis necessitates that the foetus remains reliant on the pregnant woman up until any potential transfer to an *ex utero* environment; until that point, it remains a dependent entity within her body, and its rights cannot surpass hers. Prior to this transfer, it is logically incoherent to promote the idea that the rights of an entity dependent on a person for survival could take

[301] Heather Latimer, 'Reproductive technologies, foetal icons, and genetic freaks: Shelley Jackson's *Patchwork Girl* and the limits of the possibilities of Donna Haraway's Cyborg*'* (2011) 57(2) Modern Fiction Studies 318.
[302] Kendal (n 297).
[303] *Paton* (n 233).

precedence over the rights or interests of that person herself. Indeed, as Overall has admitted, her original 'solution' to abortion—providing a location *ex utero* for the foetus[304]—overlooks that performing foetal transfer surgery would be prioritising foetal survival over a woman's best interests.[305]

To further her point, Kendal frames the foetus within an analogous description, aligning it with "donated tissues and organs and cadavers [with a] connection to human lives."[306] In doing so, Kendal advances an autonomy-based argument antithetical to the attempt to compel pregnant women seeking abortions to undergo an invasive surgery,[307] yet may save the lives of foetuses nonetheless, for a woman may choose to donate "the foetal tissue for artificial gestation and subsequent adoption."[308] To further illustrate this argument, consider Kendal's depiction of a patient having a hip replacement choosing to donate their femoral head for use in other patients' bone grafts[309]—in a similar way, a pregnant woman may choose to donate the foetal tissue for artificial gestation and subsequent adoption.[310] In the former scenario, the patient having surgery is not morally obligated to donate their bone tissue, notwithstanding there being another patient who may need that tissue; in the latter scenario, there is no second patient. Kendal concludes that it would be "grossly inconsistent to suggest the… non-person can make such demands of the pregnant woman"[311]—indeed, it is difficult to see why a patient

[304] Overall (n 249) 130.
[305] ibid 130.
[306] Kendal (n 297).
[307] ibid.
[308] ibid.
[309] ibid.
[310] ibid.
[311] ibid.

has no moral obligation to a human person who might need that tissue, but owes a foetus—a non-person—such an obligation. If viewed as a tissue of human origin, the foetus' rights exist only in relation to the pregnant woman on whom it is dependent.

When the foetus is redefined as a dependent entity without equal nor superior rights to the person on whom it is dependent, a balance may be struck between the pregnant woman's right to decide their reproductive future and the ethical degree of respect owed to the foetus as 'tissue of human origin' with a connection to human life. That balance is struck in the pregnant woman having no right to the foetus' death, whilst the foetus has no right to be gestated ectogenetically. To enforce ectogenesis as the new norm for abortion would be to place the interests of the foetus above those of the pregnant woman, a problem that stems from a misconception surrounding the normative status of the foetus. Kendal's definition of 'tissues of human origin' accommodates both an intuitively and perhaps ethically necessary degree of respect for the foetus, and the prevalence of a woman's right to reproductive choice and bodily autonomy.

(ii) The importance of autonomy

The principle of autonomy should lie at the heart of any ethically divisive healthcare debate. Beauchamp and Childress define this is as "an extension of political self-governance by the individual; personal self-rule of the self while remaining free from both controlling interferences by others and personal

limitations… that prevent meaningful choice."[312] At its simplest, it is self-government. It has also been one of the core principles at the foundation of pro-choice campaigns, those being often underpinned by the recurring theme of respect for a woman's right to bodily autonomy and reproductive choice.[313] Indeed, Horn has rightly pointed out that the "ethical justification for abortion that undergirds the articulation of a legal right to the procedure in many jurisdictions is the understanding that forcing a person to carry a pregnancy against their will is a violation of their bodily autonomy."[314]

Considering this justification in light of the possibility of ectogenesis abortions, a similar argument could be invoked to defend a legal and moral right to not be forced to undergo foetal transfer. It seems inherently paradoxical to argue that a debate over a procedure (abortion) which has been ethically justified by concerns of violations of autonomy, could then be solved by another procedure (foetal transfer) which, if forced upon pregnant women, would violate their bodily autonomy.

This is yet more incongruous considering the difference in the degree of invasiveness of current abortion procedures and the prospective procedure of foetal transfer. Whilst these arguments are speculative as the details of foetal transfer surgery in humans are not yet clear, that procedure is likely to be more invasive than the majority of standard early

[312] Tom L Beauchamp and James F Childress, *Principles of Biomedical Ethics* (5th edn, Oxford University Press 2001) 58.
[313] British Pregnancy Advisory Service, 'Ten reasons to decriminalise abortion' (*British Pregnancy Advisory Service*) <https://www.bpas.org/get-involved/campaigns/briefings/10-reasons-to-decriminalise-abortion/> accessed 20 May 2022; NARAL Pro-Choice America Foundation, 'About us' (*NARAL*) <https://www.prochoiceamerica.org/about/> accessed 20 May 2022.
[314] Horn (n 241).

abortions. For instance, data shows that in 2020, 85% of the total abortions in England and Wales were medical abortions (the consumption of two pills).[315] Comparatively, the nature of the procedure and the methods used in the 2017 experiments[316] suggest the translocation of a foetus to an artificial womb is likely to resemble a Caesarean section. Indeed, Segers postulates that "[i]t is likely that this intervention will be no less risky than a Caesarean section, with the potential to be significantly riskier."[317] To contextualise this risk, the potential complications of a Caesarean section include, but are not limited to: blood clots, infection, haemorrhaging, damage to the kidneys and bladder, heightened risk of a uterine rupture, heightened risk of a hysterectomy, and pelvic organ prolapse.[318] Juxtapose this with the consumption of two pills, and the argument that ectogenesis could have any revolutionary impact on abortion is surely a reductive one. For ectogenesis to fully solve the abortion debate, women seeking abortions would *have* to undergo foetal transfers; a situation which, as has been highlighted hitherto, would seriously jeopardise not only a woman's right to bodily and reproductive autonomy, but also her physical well-being.

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[315] Department of Health & Social Care, 'National Statistics: Abortion statistics, England and Wales: 2020' (*Gov.uk*, 2020) <https://www.gov.uk/government/statistics/abortion-statistics-for-england-and-wales-2020/abortion-statistics-england-and-wales-2020> accessed 2 April 2022.

[316] Usada (n 218); Partridge (n 218).

[317] Segers (n 216). Note that Segers refers to Kingma and Finn, who made the suggestion that it is potentially riskier because the incision will be done earlier in the pregnancy "when the uterus is less stretched than in a term pregnancy," making the scar bigger and increasing the risks. See Elselijn Kingma and Suki Finn, 'Neonatal incubator or artificial womb? Distinguishing ectogestation and ectogenesis using the metaphysics of pregnancy' (2020) 34 Bioethics 354.

[318] NHS, 'Risks Caesarean section' (*NHS*, 2023) <https://www.nhs.uk/conditions/caesarean-section/risks/> accessed 4 April 2022; Tommy's, 'C-section — benefits and risks' (*Tommy's*, 2021) available at <https://www.tommys.org/pregnancy-information/giving-birth/caesarean-section/c-section-benefits-and-risks> accessed 4 April 2022.

To further strengthen this argument, it is not only the transfer procedure itself which must be considered, but also the timing of such a procedure. Under the Abortion Act, the vast majority of abortions take place up to 24 weeks:[319] in fact, 98.1% of abortions completed in England and Wales were performed before this point in 2020.[320] Furthermore, a recent study found that 90% of abortions happen before 12 weeks of pregnancy in most high-income countries.[321] The importance of these figures cannot be understated for as it stands, the 'biobag' being developed and tested is for foetuses who are at least 22-weeks old.[322] As a result, women would be required to carry their foetuses in their bodies until this point for abortions to result in foetal transfers—women would be compelled to be pregnant for up to 22-weeks. Margaret Little wrote that "[t]o be pregnant is to be *inhabited*. It is to be *occupied*."[323] To coerce women into being occupied against their will, to put them at risk of any one of the complications that could occur during pregnancy[324] for up to six months is incompatible with respect

[319] AA 1967, s 1(1)(a).
[320] Department of Health and Social Care, 'National Statistics: Abortion statistics, England and Wales: 2020' (n 315).
[321] BMJ, 'Nine out of 10 abortions done before 12 weeks in many high-income countries' (*BMJ*, 2019) <https://www.bmj.com/company/newsroom/nine-out-of-10-abortions-done-before-12-weeks-in-many-high-income-countries/> accessed 8 April 2022.
[322] Partridge (n 218); Usada (n 218).
[323] Margaret Olivia Little, 'Abortion, Intimacy and the Duty to Gestate' (1999) 2 Ethical Theory and Moral Practice 295 (her emphasis).
[324] These complications include high blood pressure, infections, depression, anxiety and preeclampsia. See Lawrence Leeman and Patricia Fontaine, 'Hypertensive disorders of pregnancy' (2008) 78 American Family Physician 93; Sonia Hernández-Diaz, Sengwee Toh & Sven Cnattingius, 'Risk of pre-eclampsia in first and subsequent pregnancies: prospective cohort study' (2009) British Medical Journal 338; Office on Women's Health, 'Pregnancy: pregnancy complications' (*OASH*, 2010) <https://www.womenshealth.gov/pregnancy/youre-pregnant-now-what/pregnancy-complications> accessed 10 April 2022.

for autonomy. Furthermore, it is inconsistent with the definition of foetuses as tissues of human origin—it irrefutably places the interests of a potential human being above the rights of an existing person upon whom the potential human being is dependent.

Thomson once asserted that "if a human being has any just, prior claim to anything at all, he has a just, prior claim to his own body."[325] If lawmakers were to adopt any real enforcement of artificial gestation, allowing current abortions to be replaced by ectogenesis abortions, the state would, in a sense, be claiming the pregnant person's body, at least until the point of foetal transfer. Such "crude paternalism"[326] is, as Brazier and Cave suggest, the "antithesis of respect for autonomy."[327]

V. The doctrine of viability

Having examined and rejected the first potential way in which ectogenesis could impact abortion access, this article shifts focus to examine the second potential realisation of this impact. In anticipation of partial ectogenesis, Alghrani (amongst other scholars) suggested that the point of viability (the point at which a foetus could survive on its own) could be reduced, thus

[325] Thomson (n 245).
[326] Margaret Brazier and Emma Cave, *Medicine, Patients and the Law* (6th edn, Manchester University Press 2016) 87.
[327] ibid.

challenging current abortion rights.[328] This is because, as Horn summarises, "while we can ethically justify a woman ending a pregnancy if it impinges on her body, we cannot justify her terminating a foetus that could survive on its own."[329] Although that argument is strong, Horn's case for decriminalising abortion ahead of ectogenesis shall be explored to the conclusion that if abortion is redefined as 'healthcare' as opposed to a defendable crime, the second way in which partial ectogenesis could impact abortion rights is equally uncompelling.

(i) Viability

In a medical context, viability is the foetus' capacity to "survive independent of a pregnant woman's womb."[330] This notwithstanding, there exists an unsettling paradox: while medical experts have not arrived at a standard definition or consistent methodology for assessing foetal viability, British law presumes to do precisely that. Specifically, section 1(1)(a) of the Abortion Act lays down a seemingly incontrovertible threshold for foetal viability.[331] Similarly, the Infant Life (Preservation) Act 1929 ('ILPA') recognises foetuses that are born post-28 weeks as capable of living independently of the

[328] Amel Alghrani, 'Viability and abortion: lessons from ectogenesis?' (2014) 4(6) Expert Review of Obstetrics & Gynecology 625; Seppe Segers, 'The Path toward ectogenesis: looking beyond the technical challenges' (2021) 22 BMC Medical Ethics 59; Lydia Di Stefano and others, 'Ectogestation ethics: The implications of artificially extending gestation for viability, newborn resuscitation and abortion' (2020) 34(4) Bioethics 371.
[329] Horn (n 241). Note that Horn does not support this argument herself, but rather she is summarising the claims made by those who do.
[330] Jonathan Glover, *Causing Death and Saving Lives* (Penguin Books 1990) 124.
[331] Joanna Erdman, 'Theorizing Time in Abortion and Human Rights' (2017) 19(1) Health and Human Rights Journal 29.

womb.[332] Such legal presumptuousness seemingly reveals a blatant intellectual dissonance in the legal 'viability threshold.' This is, in essence, a legally manufactured fiction, designed to draw a final conclusion to a contested and ever-changing matter of medical science. The the insistence on a stringent viability threshold within the statutory framework remains somewhat artificial if not academic, devoid of the nuances and complexities that characterise the medical discourse on the matter.

Some scholars have disputed the claim that partial ectogenesis could challenge abortion access by impacting the point of viability. For example, Romanis maintains that viability is "not a conceptually legitimate basis for abortion regulation,"[333] and Kendal acknowledged that viability "is not an intrinsic trait of a foetus once it reaches a certain point in development, but is rather the result of a complex interplay of situational factors, of which advanced technology represents just one."[334] For the purposes of this argument, however, this article will proceed by accepting—and exploring—the idea that ectogenesis will lower the point of viability, thus undermining abortion rights.

If a foetus can survive in an artificial womb before 24-weeks' gestation, the provisions established under section 1(1)(a) of the Abortion Act will no longer accurately reflect a gestational limit. Subsequently, Brown noted that Parliament

[332] Infant Life (Preservation) Act 1929 ('ILPA'), s 1(2).
[333] Elizabeth Chloe Romanis, 'Is 'viability' viable? Abortion, conceptual confusion and the law in England and Wales and the United States' (2020) 7(1) Journal of Law and the Biosciences 1.
[334] Kendal (n 297).

could return to the test set out in the ILPA,[335] which encapsulates the legal protection of the life of a child "capable of being born alive,"[336] as seen in *Rance v Mid-Downs Health Authority*[337] and *C v S.*[338] This, however, is not a promising solution: beyond acknowledging the detrimental impact such a reform would have on the pro-choice campaign that has hitherto been successful in permeating abortion law, this could also pose significant legal challenges by burdening the courts with the role of gatekeeping abortion. This role would involve judging on a case-by-case basis whether a foetus is 'capable of being born alive.' Notwithstanding policy-based and logistical objections to this scenario, judges are "not medical professionals and often rely on medical evidence, which would suggest that a foetus is always 'capable of being born alive' with an artificial womb,"[339] as Brown rightly suggests. As a result, there are compelling grounds to argue that the prospect of ectogenesis could, in some respects, obviate viability as a legal threshold and lead to calls for its removal from the statute books, thereby criminalising all abortions that fall under section 1(1)(a). Although ectogenesis represents a significant advancement in neonatal technology, it may yet pose a grave detriment to access to abortion. In that light, the call to 'decriminalise' abortion ahead of ectogenesis is one that intends to guard abortion rights from the challenges that ectogenesis may create, particularly concerning viability.

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[335] James Brown, 'My Body My Choice: How Might Artificial Wombs Endanger the Viability Doctrine? Limits to Abortion, Criminalisation and Reconciling the Maternal/Foetal Balance' (2021) The London School of Economics Law Review <https://blog.lselawreview.com/2021/04/my-body-my-choice> accessed 21 March 2022.
[336] ILPA 1929, s 1(1).
[337] *Rance v Mid Downs Health Authority* (1991) 1 All ER 801.
[338] *C v S* (n 293).
[339] Brown (n 335).

(ii) Decriminalisation

Horn presents a carefully constructed comparison of three jurisdictions and their current abortion laws: the UK (England and Wales, and Scotland only), the USA and Canada.[340] She uses differences in the Canadian context (where abortion is decriminalised throughout pregnancy) and the UK (where abortion remains a criminal offence) to reinforce the proposition that decriminalising abortion means that "the capacity of artificial womb technologies to lower the viability threshold need not pose a corresponding challenge to abortion rights."[341] In Canada, artificial womb technology (ectogenesis, for instance) pose no such challenge to abortion rights as the law does not attempt to strike a temporal compromise between the potential life of the foetus and the bodily autonomy of a pregnant person. Rather, "the right to reproduce or not to reproduce" has been confirmed through case law as "an integral part of modern woman's struggle to assert her dignity and worth as a human being."[342] Currently, the law in the UK frames abortion as a procedure that requires an ethical and legal justification: a criminal offence that requires a justifiable defence. As such, women cannot access abortion in the same manner as other types of healthcare. The law is structured in a way that places doctors in the role of abortion gatekeepers,

[340] Claire Horn, 'Gestation beyond mother/machine: legal frameworks for artificial wombs, abortion and care' (*Birkbeck Institutional Research Online*, 2020) <https://eprints.bbk.ac.uk/id/eprint/45856/1/Claire%20Horn%20final%20thesis.pdf> accessed 25 March 2022.
[341] ibid.
[342] *R v Morgentaler* [1988] 1 SCR 30 (Supreme Court of Canada).

prescribing a set of criteria that must be met before an abortion is allowed.[343]

Redefining abortion as necessary and accessible healthcare would it set the procedure within a "reproductive justice framework"[344] which would serve to decriminalise abortion, bringing UK law in line with that of Canada. In that case, ectogenesis would pose no challenge to abortion rights by lowering the viability threshold, for no such threshold would exist at law were abortion decriminalised and instead framed as a right—partial ectogenesis need not result in a major restriction of the reproductive autonomy that woman have so far achieved. Instead, the decriminalisation of abortion in aniticipation of ectogenesis would cause artificial womb technologies to enhance reproductive decision making, not restrict that autonomy.

VI. Conclusion

There is no compelling reason that partial ectogenesis should have any revolutionary impact on abortion access. To suggest otherwise is to risk regressing in the ongoing challenge for reproductive rights and autonomous choice.

Singer and Wells suggest that "if the feminist argument for abortion takes its stand on the right of women to control their own bodies, feminists at least should not object" to the use

[343] Although outside the scope of this article, it is important to acknowledge that the role of doctors as gatekeepers has been heavily criticised by pro-choice campaign groups and in the literature. See for example: Jane O'Neill, 'Abortion Games: The Negotiation of Termination Decisions in Post-1967 Britain' (2018) 104(359) History 169.
[344] Horn (n 340).

of ectogenesis.[345] Following this rhetoric, they have both accurately identified the main justification for abortion, and concurrently neglected that imposing ectogenesis abortions threatens that very same thing. This line of reasoning profoundly misrepresents the nuanced intricacies of women's bodily autonomy. The central matter is not whether ectogenesis as a technology undermines autonomy *per se*; rather, it is the imposition of ectogenesis in place of conventional abortion methods that constitutes a grievous infringement on women's rights to control their own bodies. Therefore, to suggest that ectogenesis shall 'solve the abortion debate' is not merely overtly simplistic, but also dangerously reductive.

Abortion is the right to terminate one's pregnancy, not a right to the death of the foetus. Should ectogenesis become a reality, the nature of that right remains unchanged. To impose invasive ectogenesis procedures would infringe that right, and female bodily autonomy more generally. Rather, the law should integrate partial ectogenesis into medical practice in a way that remains compatible with autonomy, allowing a woman to terminate her pregnancy and, if desired, to allow the tissues of her origin to be gestated ectogenetically.

A significant shift in perceptions of viability away from 20-22 weeks is unlikely given that the technology for gestating a foetus in an artificial womb from this stage is not yet available, yet it remains that ectogenesis may lower the point of viability as the technology develops.[346] As such,

[345] Peter Singer and Deane Wells, *The Reproduction Revolution: New Ways of Making Babies* (Oxford University Press 1984) 135.
[346] Elizabeth Chloe Romanis and Claire Horn, 'Artificial Wombs and the Ectogenesis Conversation: A Misplaced Focus? Technology, Abortion and Reproductive Freedom' (2020) 13 International Journal of Feminist Approaches to Bioethics 174.

decriminalising abortion is a logical measure that addresses the potential impact this technology could have on abortion access if an altered medical understanding of viability threshold were translated into law.

Ultimately, partial ectogenesis is an exciting technology that could save the lives of extremely premature foetuses. Further, it could enhance autonomy by providing options for women who are personally anti-abortion, but who find themselves in circumstances where they do not wish to have a child. However, to characterise partial ectogenesis as a 'solution' to abortion—to force women to have foetal transfer surgery lest they face criminal sanctions for conventional abortions as a result of a reduced viability threshold—is to take the power over their own bodies which women have fought for, and to place it back in the hands of the state. Indeed, as Kendal rightly submitted, "[i]n a future where ectogenesis is available, it is likely some women seeking abortions will be delighted… However, it does not hold that women should be coerced into selecting this option."[347]

[347] Kendal (n 297).

Revisiting Marxist Perspectives on Punishment in the Age of Mass Incarceration: A Critical Analysis of the Contemporary Use of Prison

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In the age of mass incarceration, the use of prison as a means of punishment has come under ever more scrutiny, and perhaps rightfully so: whilst carceral punishment was established with the principle aim of deterring criminality, its ability to do so currently is questionable. With that in mind, this article aims to critically examine the contemporary use of prison through a traditional Marxist lens. It begins by analysing the economic and political structures that shape prisons, drawing on Rusche and Kircheimmer's seminal typology of control, discipline, and deterrence. It then explores the limitations of this typology; particularly, its hyperfocus on the retributive functions of carceral punishment, and its deterministic simplification of prison as an unequivocally undesirable place. The second part of this article investigates the broader limits of the traditional Marxist perspective, critiquing its sole reliance on economy at the expense of other essential characteristics. Drawing on racial capitalism—a neo-Marxist perspective—it explores the critical intersection between race and capitalism, manifest in mass incarceration and immigration detention in the United States and the United Kingdom. It suggests that the disproportionate number of black and brown individuals incarcerated in these countries can be traced to the legacy of slavery, colonialism, and racial capitalism, which continue to shape the political economy of punishment today. The article concludes that whilst the traditional Marxist perspective provides some insight into the economic and political systems underpinning the current prison system, it is unable to explain the complexities of mass incarceration.

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I. Introduction

In the last twenty years, the number of individuals sentenced to prison has increased by approximately 24% globally, with contemporary penal institutions now hosting more than 10.77 million inmates worldwide.[348] Advocates for carceral punishment generally emphasise its core purpose of deterrence, particularly special deterrence (incapacitation which reduces criminal behaviours and therefore recidivism) and general deterrence (intimidation that reinforces the threat of sanction to the public).[349] With an internationally soaring prison population, however, the ability of prison to achieve these aims is deeply questionable. In response to such questions concerning the purpose of prison, a recently awakened branch of penology—"the sociology of punishment"—has concerned itself with investigating the narrative foundations of penality, and has set forth questions of functionality from the perspectives of culture and history.[350] One way in which this manifests is through the economy, a perspective that is particularly influenced by the seminal work of Karl Marx and Friedrich Engels; namely, *The Communist Manifesto*.[351] Developing the sociological perspective presented in that work—famously termed Marxism—Marx and Engels theorised that prisons exist to serve the economic and political interest of the ruling class to maintain a capitalist system.[352] Under capitalism, there is a hierarchical class system comprising the bourgeoisie, those who own the means of

[348] Helen Fair and Roy Walmsley, *World Prison Population List* (13th edn, World Prison Brief 2021) 2.
[349] Andreia de Castro Rodrigues and others, 'Prison Sentences: Last Resort or the Default Sanction?' (2018) 25 Psychology, Crime & Law 171.
[350] David Garland, 'Sociological Perspectives on Punishment' (1991) 14 Crime and Justice 115, 119.
[351] Karl Marx and Friedrich Engels, 'The Communist Manifesto' in Jeffrey C Isaac (ed), *The Communist Manifesto* (first published 1848, Yale University Press 2012).
[352] David Garland, *Punishment and Modern Society: A Study in Social Theory* (University of Chicago Press 2012).

production, and proletariat, those whose labour is modestly commodified and cruelly exploited in the workplace to serve the ruling class.[353] This creates a surplus value, in which the profit earned proliferates the gains of the bourgeoisie and extenuates deprivation in the lives of the proletariat, thereby reinforcing the divided capitalist system. Though Marx and Engels were not commenting on the penal system directly, this perception of society has influenced numerous penologists to position carceral punishment in relation to economic and class structures.[354]

The aim of this article is to examine the extent to which these economic perspectives can foster an understanding of the current function of imprisonment, particularly in an age of mass incarceration. The first part of the article will draw upon Rusche and Kirchheimer's three functions of imprisonment (control, discipline, and deterrence)[355] and explore their relevance to the regimes present in contemporary carceral spaces. It will also critically explore the limitations of that work, arguing that it oversimplifies the role of prison by focusing solely on its retributive functions whilst disregarding the potential benefits of prison labour in rehabilitating inmates and providing skills that might improve their prospects upon release. In addition, it is argued that Rusche and Kirchheimer's deterrent function is largely simplistic and ignores the possibility that prison, for some, may act as a place of refuge, and hence does not redirect them to the labour market in the service capitalism.

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[353] Marx and Engels (n 351).

[354] For example, see Dario Melossi and Massimo Pavarini, *The Prison and the Factory: Origins of the Penitentiary System* (40th Anniversary Edition, Palgrave Macmillan 2018); Georg Rusche and Otto Kirchheimer, *Punishment and Social Structure* (Columbia University Press 1939); Steven Box, *Recession, Crime and Punishment* (Springer 1987); Johan Thorsten Sellin, *Slavery and the Penal System* (Elsevier Scientific Publishing 1976).

[355] Georg Rusche and Otto Kirchheimer, *Punishment and Social Structure* (Columbia University Press 1939).

In the second part of the article, the broader limits of the traditional Marxist perspective will be investigated, specifically its hyperfocus on economy, often at the expense of other significant social and ideological factors, such as race. This will involve a discussion on the neo-Marxist perspective of racial capitalism, particularly in relation to incarceration and immigration detention in the United States and the United Kingdom.

More generally and throughout, it will be argued that whilst traditional Marxist perspectives offer valuable insights into the underlying economic and political structures of contemporary prison systems, their ability to explain the complexities of mass incarceration is limited.

II. Carceral punishment as a tool for control, discipline, and deterrence

(i) Controlling and disciplining the poor

The most influential development of the Marxist perspective in the field of penology is that of Rusche and Kirchheimer in *Punishment and Social Structure.*[356] The authors argue that prison is not simply a form of punishment; rather, it is a tool seized by the bourgeoisie to control, discipline, and deter the proletariat from committing crime. Indeed, the prison population tends to comprise those from low socio-economic backgrounds, often including unemployed and homeless individuals; in the United Kingdom, for instance, roughly two-

[356] ibid.

thirds of prisoners are unemployed before custody.[357] Arguably, these individuals are likely to be incarcerated by authorities for the purpose of serving capitalism, that being distinctly evident when prisoners are forced to cover labour shortages, such as in kitchens and laundries.[358] The hope is that the skills developed can prepare them to integrate into the labour market once released.[359] As a form of social and economic control, the bourgeoisie can weaponise carceral punishment as a tool to coerce the formerly unwilling to work and in turn, the profit gained generates wealth for those in power.[360] The capitalist system is reinforced as a result: working-class prisoners produce more economic value than they are paid, and are thereby subordinated further as the bourgeoise are endowed more economic power.[361]

In the 21st century, prison labour still exists to serve capitalism. For example, in the United Kingdom, prisoners were pressured to fill labour shortages caused by Brexit;[362] in particular, food manufacturers called upon the government to provide them with exploitative prison work to solve the labour

[357] Ian Brunton-Smith and Kathryn Hopkins, 'The Impact of Experience in Prison on the Employment Status of Longer-Sentenced Prisoners after Release: Results from the Surveying Prisoner Crime Reduction (SPCR) Longitudinal Cohort Study of Prisoners' (*Ministry of Justice*, 2014) <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/296320/impact-of-experience-in-prison-on-employment-status-of-longer-sentenced-prisoners.pdf> accessed 27 August 2023.

[358] HM Government, 'Prison Life' (*Gov.uk*, unknown) <https://www.gov.uk/life-in-prison> accessed 22 April 2023.

[359] Rusche and Kirchheimer (n 355).

[360] Georg Rusche and Barbara Yaley, 'Prison Revolts or Social Policy Lessons from America' (1980) 13 Crime and Social Justice 41.

[361] Melossi and Pavarini (n 354).

[362] Virginia Mantouvalou, 'Working Prisoners are Trapped in State-Mediated Structures of Exploitation; Using them only to Fill Brexit Labour Shortages is a Bad Idea' (LSE British Politics and Policy, 27 September 2021) <https://blogs.lse.ac.uk/politicsandpolicy/prisoners-labour-shortages/> accessed 27 August 2023.

crisis in the meat industry.[363] As established in the United Kingdom's National Minimum Wage Act 1998, working prisoners are excluded from entitlement to a minimum, and arguably humane, wage.[364] Instead, prisoners working for either the state or private employers earn an average of £9.60 per week for the exploitative labour they provide,[365] sometimes working up to 60 hours.[366] If prisoners refuse to undertake work offered by the state, it could lead to further punishment, including limited access to TV, reduced visits from friends and family, and reduced access to gyms.[367] By consequence, prisoners are forced and entrapped in structures of exploitation that are state mediated.[368] In other words, laws that are governed by the bourgeoisie exclude working prisoners from essential labour rights; as a result, prison labour is coercive and contravenes one's will and dignity. Contemporary prison practices evidence the disciplinary state control of the poor to serve capitalism, thereby substantiating the position that the Marxist perspective of punishment is useful in understanding the current use of prison.

Although contemporary prison labour can be theorised as serving capitalism, it is arguable that it can also encourage and empower prisoners to reintegrate into society. From a functionalist perspective, this serves as a positive, rather than

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[363] Julie Hyland, 'UK Businesses Call for Prisoners to be Used to Plug Labour Shortage' (*World Socialist Web Site*, 15 September 2021) <www.wsws.org/en/articles/2021/09/15/pris-s15.html> accessed 11 March 2023.

[364] National Minimum Wage Act 1998, s 45(1).

[365] The Howard League for Penal Reform, 'Business Behind Bars: Making Real Work in Prison Work' (*The Howard League for Penal Reform*, 2011) <https://howardleague.org/wp-content/uploads/2016/05/Business_behind_bars.pdf> accessed 27 August 2023.

[366] Alessandro Maculan, Daniela Ronco and Francesca Vianello, *Prison in Europe: Overview and Trends* (European Prison Observatory 2014).

[367] Jenna Pandeli, Michael Marinetto and Jean Jenkins, 'Captive in Cycles of Invisibility? Prisoners' Work for the Private Sector' (2019) 33 Work, Employment and Society 596.

[368] Mantouvalou (n 362).

exploitative, function.[369] Supporting this view, Fenwick highlights how prison labour allows prisoners to acquire valuable job skills that may be useful when seeking employment after their release[370]—rather than deeming prison labour as exploiting the poor, it can function as a tool for rehabilitation. In enhancing inmates' employability on release, it reduces the recidivism rate.[371] This is evident in Norway, which has one of the lowest recidivism rates globally at roughly 20%.[372] This is largely due to its more progressive and humane system, apparent in Holden Prison which hosts training programs that equip prisoners with basic educational and labour skills for employability.[373] Notably, the individuals residing at Holden Prison have largely the same rights as any other Norwegian citizen—prison does not punish them further, as it is understood that prison itself is the punishment.[374] To an extent, this undermines the Marxist perspective that prison labour is a tool to exploit the proletariat in the interest of the capitalist system. Countries that follow a similar approach to Norway construct their carceral punishment upon notions of rehabilitation and reintegration, rather than exploitation.[375] Prison labour based on rehabilitation and reintegration strengthens social solidarity, as prisoners are positively, rather than exploitatively, transformed into productive members of

[369] Émile Durkheim, *The Division of Labor in Society* (translation first published 1933, George Simpson tr, Collier Macmillan 1964).
[370] Colin Fenwick, 'Private Use of Prisoners' Labor: Paradoxes of International Human Rights Law' (2005) 27 Human Rights Quarterly 249.
[371] Jeffrey R Kling, 'The Effect of Prison Sentence Length on the Subsequent Employment and Earnings of Criminal Defendants' (Discussion Paper #208, *Princeton University*, February 1999) <https://web.archive.org/web/20130903130247/http://www.princeton.edu/wwseconpapers/papers/dp208.pdf> accessed 27 August 2023.
[372] Maegan Denny, 'Norway's Prison System: Investigating Recidivism and Reintegration' (2016) 10 Bridges: A Journal of Student Research 22.
[373] Emma Jane Kirby, 'How Norway turns Criminals into Good Neighbours' (*BBC*, 7 July 2019) <https://www.bbc.co.uk/news/stories-48885846> accessed 16 April 2023.
[374] ibid.
[375] Denny (n 372).

society.[376]

(ii) Deterring the poor

The second dimension of Rusche and Kirchheimer's Marxist sociological perspective suggests that carceral punishment can deter the proletariat from crime and in turn, direct them to the labour market through the principle of less eligibility.[377] Cyndi Banks defines less eligibility as:

> "[a philosophy that the] conditions the offender will experience in prison *must* be worse than anything he or she is likely to endure outside the prison in order to restrain the "reserve army of labour" from crime; that is, to serve as a deterrent to the poor."[378]

In other words, the penal system ensures that the proletariat cannot sustain a living through criminal means, and those who try are threatened with severe penalties; thereby, the proletariat are discouraged from engaging in criminal behaviour.[379] Instead, they are encouraged to accept the general condition of capitalism and submit to work as this is more appealing than experiencing punishment and unpleasant conditions inside prisons and workhouses.[380] Indeed, Rusche and Kirchheimer believe that there is a causative relationship between the severity of punishment and society's economic circumstances, with less severe punishments during times of

[376] Ashley Aubuchon-Rubin, 'Rehabilitating Durkheim: Social Solidarity and Rehabilitation in Eastern State Penitentiary, 1829-1850' (2009) 5 International Journal of Punishment and Sentencing 12.
[377] Rusche and Kirchheimer (n 355).
[378] Cyndi Banks, *Criminal Justice Ethics: Theory and Practice* (1st edn, SAGE 2004) 122 (emphasis added).
[379] Rusche and Kirchheimer (n 355).
[380] Melossi and Pavarini (n 354).

abundance and more severe punishment during times of scarcity.[381] De Giorgi builds on this from a neo-Marxist perspective, arguing that the threat of punishment is also influenced by broader societal and political factors, and that the penal system serves not only as a tool of economic exploitation, but as a means of social control also.[382]

The principle of less eligibility and its assumptions on severity are apparent in the functioning of the contemporary prison system which has proven harsh and brutal in several nations. In the United States in particular, the principle of less eligibility has been a prominent feature of penal policy, especially in relation to the quality of life and standards of living in prison.[383] Godfrey and Rovner contend that one of the most dehumanising features of the American penal system is solitary confinement, which is comprised of small, arguably inadequate-sized cells which restrict interpersonal interaction, access to daylight, and exercise.[384] This is likely to result in reduced brain activity and leads many to suffer from mental health problems, such as depression and paranoia.[385] The number of individuals in solitary confinement has only increased in American prisons, often justified as a response to the spread of Covid-19 through carceral institutions in 2020,[386] in spite of recommendations that confinement is not the most appropriate response insofar as it perpetuates more harm than it prevents.[387] Sieh asserts that this is an unjust form of severe

[381] Rusche and Kirchheimer (n 355).
[382] Alessandro De Giorgi, 'Punishment and Political Economy' in Pat Carlen and Leandro Ayres França (eds), *Alternative Criminologies* (Routledge 2017).
[383] Edward W Sieh, 'Less Eligibility: The Upper Limits of Penal Policy' (1989) 3 Criminal Justice Policy Review 159.
[384] Nicole B Godfrey and Laura L Rovner, 'COVID-19 in American Prisons: Solitary Confinement is Not the Solution' (2020) 2 Arizona State Law Journal 127.
[385] ibid.
[386] ibid.
[387] ibid.

punishment, and expression of the principle of less eligibility,[388] whereby more harsh criminal justice responses deter inclinations for criminality. From a Marxist perspective, conditions are deliberately made unpleasant for inmates in pursuit of the principle of less eligibility; specifically, the intention is to maximise the deterrent effect of a custodial sentence and encourage engagement in the labour market.[389]

As incarceration rates are higher than in past, however, the ability of less eligibility to deter criminality amongst the proletariat is questionable. The original principle remains particularly irrelevant as for some populations, prison conditions could not be substantially worse than their current living situation.[390] This is notably evident in the case of homeless persons who often live in already harsh and degrading conditions, with limited access to basic necessities such as food, shelter, and healthcare.[391] As such, the threat of harsh prison conditions may not serve as a deterrent; inversely, these individuals may see incarceration as a viable, even safer, alternative to their current circumstance. Revealing what Schneider terms the "reverse cycle of carcerality,"[392]—a concept perhaps opposite to the principle of less eligibility—the harsh living conditions of the homeless act as a form of deterrent, whilst prison offers sanctuary despite its harshness.[393] Carceral spaces may also be seen as a form of shelter for those subject to violence and abuse. This is particularly pertinent for rough sleeping women who are at risk of physical and sexual violence, as prison offers a level of

[388] Sieh (n 383).
[389] John Irwin, *Prisons in Turmoil* (3rd edn, Little, Brown and Company 1980).
[390] Luisa T Schneider, 'Let Me Take a Vacation in Prison Before the Streets Kill Me! Rough Sleepers' Longing for Prison and the Reversal of Less Eligibility in Neoliberal Carceral Continuums' (2023) 25 Punishment & Society 60.
[391] ibid.
[392] ibid 76.
[393] ibid.

protection and support not found in their local communities.[394] Clearly, the principle of less eligibility does not impact everyone in the same way; instead, it varies as a form of deterrence with the characteristics and social circumstances of the individuals involved.[395]In the context of mass incarceration, in which prison numbers are continuously rising, the traditional Marxist perception of prison as a deterrent is particularly insufficient.

III. The role of race in economics, capitalism, and imprisonment

(i) Mass incarceration of African Americans: the case of the United States

Another significant criticism of traditional Marxism concerns its narrow and deterministic perceptions of the use of imprisonment, insofar as it offers an economic rationale only.[396] Racial capitalism—a term created by neo-Marxist scholars—must also be considered due to the inextricable ties between capitalism, imprisonment, and race.[397] As Stuart Hall contends, race is an extricable function of how class is lived,[398] as is evident in the United States: the contemporary polarisation of racial groups has positioned ethnic minorities in a racialised underclass and target of the state's punitive economic

[394] Sandra Bucerius and others, 'Prison as Temporary Refuge: Amplifying the Voices of Women Detained in Prison' (2021) 61 The British Journal of Criminology 519.
[395] Sieh (n 383).
[396] Zeus Leonardo, 'The Unhappy Marriage between Marxism and Race Critique: Political Economy and the Production of Racialized Knowledge' (2004) 2 Policy Futures in Education 483. Adrian Howe, *Punish and Critique: Towards a Feminist Analysis of Penalty* (first published 1994, Routledge 2005).
[397] De Giorgi (n 382).
[398] Stuart Hall, 'New Ethnicities' in Kuan-Hsing Chen and David Morley (eds), *Stuart Hall: Critical Dialogues in Cultural Studies* (Routledge 1996).

control.[399] Exacerbating this, racial profiling (a product of the role of subconscious racial bias in street-level policing) has led to African American individuals being arrested and incarcerated at nearly five times the rate of their white counterparts.[400] With forced labour remaining legal as punishment for criminality as stated in the 13th amendment, the legacy of slavery endures in the contemporary American penal system.[401] African American prisoners are coerced to work for mere pennies a day, with the profits reaped by the state and private corporations.[402] Some individuals are not compensated at all for their work, which suggests they are incarcerated for the sole purpose of strengthening the labour market.[403] For Hedges, the contemporary carceral system in the Unites States in fact functions like a forced labour camp, illustrative of a form of modern-day slavery;[404] indeed, African American prisoners are paid as little as $1.20 for eight hours of work.[405] Arguably, these camps accumulate capital and resources for those in power to reinforce capitalist, racist structures.[406] For example, the Corrections Corporation of America, the largest owner of for-profit prisons, made $1.7 billion in 2013 as a result of

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[399] Loïc Wacquant, 'Deadly Symbiosis: When Ghetto and Prison Meet and Mesh' (2001) 3 Punishment and Society 95. Leonardo (n 396).

[400] Ashley Nellis, 'The Color of Justice: Racial and Ethnic Disparity in State Prisons' (*The Sentencing Project*, 13 October 2021) <https://www.sentencingproject.org/reports/the-color-of-justice-racial-and-ethnic-disparity-in-state-prisons-the-sentencing-project/> accessed 27 August 2023.

[401] Danielle E Jones, 'The Unknown Legacy of the 13th Amendment' (*The Gettysburg Compiler: On the Front Lines of* History, 2016) <https://cupola.gettysburg.edu/compiler/187/> accessed 27 August 2023.

[402] Rose M Brewer and Nancy A Heitzeg, 'The Racialization of Crime and Punishment Criminal Justice, Color-Blind Racism, and the Political Economy of the Prison Industrial Complex' (2008) 51 American Behavioral Scientist 625.

[403] Loïc Wacquant, *Punishing the Poor: The Neoliberal Government of Social Insecurity* (Duke University Press 2009).

[404] Chris Hedges, 'The Prison State of America' (*Truthdig*, 29 December 2014) <www.truthdig.com/articles/the-prison-state-of-america/> accessed 11 March 2023.

[405] ibid.

[406] Robert P. Weiss, '"Repatriating" Low-Wage Work: The Political Economy of Prison Labor Reprivatization in the Postindustrial United States' (2001) 39 Criminology 253.

prison labour, largely derived from the work of African American individuals.[407] Beyond using carceral punishment as a form of sanction, it also functions as an avenue for profit manifest in a specifically racialised form.

(ii) Mass detention of migrants: the case of the United Kingdom

The connection between prison labour and racial capitalism is no less evident in immigration detention; that is, the practice of detaining foreign nationals whilst their immigration status is resolved.[408] In the United Kingdom, the number of detainees held in custody has increased from 250 in 1993 to over 4,000 in 2017.[409] Amongst these detainees, individuals from countries with primarily black and brown populations are disproportionately represented, and are detained for notably longer periods than those from primarily white countries.[410] For instance, 90% of Australian nationals were released before reaching 28 days in detention in 2019, contrasting only 40% of Jamaican nationals.[411] Similar to the case in the Unites States, this is a form of racial bias, emerging from political presumptions at the forefront of the Home Office's decision-making.[412] Perhaps justified as a form of carceral punishment, black migrant prisoners are employed as a means to provide cheap labour that contributes to the political economy of the

[407] Hedges (n 404).
[408] Stephanie J Silverman, Melanie Griffiths and Peter William Walsh, 'Immigration Detention in the UK' (*The Migrant Observatory*, 2022) <https://migrationobservatory.ox.ac.uk/wp-content/uploads/2021/09/MigObs-Briefing-Immigration-Detention-in-the-UK.pdf> accessed 11 September 2023.
[409] Stephen Shaw, 'Review into the Welfare in Detention of Vulnerable Persons: A Report to the Home Office by Stephen Shaw' (*Home Office*, 14 January 2016) <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/490782/52532_Shaw_Review_Accessible.pdf> accessed 27 August 2023.
[410] Mark Townsend, 'Home Office "uses racial bias" when detaining immigrants' *The Guardian* (21 June 2020) <https://www.theguardian.com/politics/2020/jun/21/home-office-uses-racial-bias-when-detaining-immigrants> accessed 27 August 2023.
[411] ibid.
[412] ibid.

state.[413] For instance, several private corporations in the United Kingdom—GEO, for instance—are saving £1.5 million a year by paying detainees £1 per hour to perform jobs otherwise undertaken by workers earning the national minimum wage.[414] In reducing the costs of labour in detention centers, private corporations reap a higher profit. Such detainees serve a purpose for the state, which requires cheap labour to generate profits for private corporations, thereby widening the gap in the class economic structure. Moreover, those in immigration detention are more directly hyper-exploited as a source of cheap labour compared to British national prisoners:[415] immigration detainees are prohibited from working after release, paradoxically meaning they may be pushed toward exploitative forms of work in illegal and unregulated employment.[416] Similar to the mass incarceration of African American individuals in the Unites States, the mass detention of migrant individuals in the United Kingdom for the purpose of cheap labour manifests in a highly racialised form, and evidences the position that economic imperatives *alone* do not adequately nor holistically explain carceral practices. From this discussion, it is evident that a more contemporary perspective, contingent on racial critique, is more expressive of mass incarceration than the traditional, purely economic Marxist perspective.

[413] Katie Bales and Lucy Mayblin, 'Unfree Labour in Immigration Detention: Exploitation and Coercion of a Captive Immigrant Workforce' (2018) 47 Economy and Society 191.
[414] Phil Miller, 'True Scale of Captive Labour Revealed' (*Corporate Watch*, 22 August 2014) <https://corporatewatch.org/true-scale-of-captive-migrant-labour-revealed/> accessed 11 March 2023.
[415] Julia O'Connell Davidson, 'Troubling Freedom: Migration, Debt, and Modern Slavery' (2013) 1 Migration Studies 176.
[416] Bales and Mayblin (n 413).

IV. Conclusion

As mass incarceration has come to the forefront in contemporary debates about carceral punishment, scholars have competed to unpack the theoretical foundations of imprisonment. The Marxist perspective in particular has garnered increased attention due to its distinct depictions of capitalism, economy, and class, for each intersects with carcerality. This article has critically analysed the applicability of this perspective to explicate the fundamental functionality of imprisonment. Alongside exploring its capabilities to unpack certain elements of mass incarceration, it has more broadly maintained that due to the complexities in current trends of confinement, the traditional Marxist perspective is somewhat limited in developing a holistic understanding the use of prison.

Drawing on Rusche and Kirchheimer's seminal Marxist typology of control, discipline, and deterrence, this article argued that prison labour is often weaponised as a tool for exploitation of the proletariat, with all profit going to private corporations to reinforce capitalist structures. That being said, it is important not to characterize prisons as purely exploitative: drawing on the perspectives of functionalist scholars, this article explored carcerality's positive dimensions, for prison is frequently restorative and aids in reintegration into the community.

The principle of less eligibility, forming the latter part of Rusche and Kirchheimer's typology, provides an explanation for the harsh and brutal conditions of the current carceral system that reflect ideological positions conducive to custodial sentences as a form of deterrence. However, this article contended that the principle does not suffice as an explanation of contemporary penal trends, as incarceration rates remain high. For some individuals in fact, custodial

sentences do not act as a deterrence against criminality, but instead create a place of safety more attractive than their existing standard of living. The proficiency of this principle to reflect the ability of imprisonment to redirect *all* individuals towards the labour market is hence limited.

Finally, this article explored the critical position that traditional Marxist perspectives are relatively narrow due to their intense focus on economy at the expense of other social influences. Though it is important to emphasise the role of economic imperatives, there must be consideration of intersecting characteristics that marginalise the proletariat also, especially considering the role of race and racial capital in the United States and United Kingdom. In conclusion, this article contends that although traditional Marxist perspectives offer some insight into the economic and political systems underpinning trends of incarceration, that insight is limited as to the contemporary carceral system.

Reflectively, the article is limited in its primary focus on the United States and United Kingdom when providing illustrative examples. Whilst the article does offer an in-depth analysis of the Marxist perspective on the contemporary function of prison, its scope is limited to these two Western countries. This is likely to restrict the generalisability of this article's conclusions to other countries with different political, economic, and cultural contexts. Hence, to provide a more extensive examination of the global use of prison through a Marxist lens, future research could extend the scope of analysis to other Western and non-Western countries.

Liberty, Equality, Disability? Reforming the Mental Health Act 1983 to Address the Over-Inclusion of People from Marginalised Communities

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This article represents a collaboration between staff and students from the mental health law undergraduate course at the University of Manchester. It explores a series of reforms proposed in the Draft Mental Health Bill and considers their impact for people from racialised communities, and also for people with a learning disability and/or autism. The article reflects on whether the over-inclusion of these communities within Mental Health Act admissions will be achieved through domestic legal change.

I. Introduction

Since the commencement of the Mental Health Act 1983, there has been a considerable shift in the values and principles that

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[*] We are grateful to Hannah Schofield for her invaluable assistance in the presentation of this article.

underpin professional practice[417] and inform debates on the appropriateness of legal norms for people in need of care and support.[418] Allied to the increasing significance of individual choice and autonomy evident in the law on patient consent, information disclosure and mental capacity law, the concept of equality has also gained centre-stage in debates concerning the appropriateness of compulsory mental health regimes. In 2017 the Government announced its intention to reform the Mental Health Act 1983 to reflect at least some of these emerging changes. To that end, an independent review, chaired by Sir Simon Wessely, produced recommendations, many (but not all) of which featured in a Draft Mental Health Bill. This in turn was considered by a Joint Select Committee in 2022. Although the government has decided not to press ahead with legislative reform in the 2022–23 parliamentary session, the proposals will, at the very least, inform future debates about the appropriateness of compulsory mental health intervention in a culturally and ably diverse world.

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[417] In particular, the significance of person-centred planning and recovery-oriented models of care for people with mental disabilities. See NHS England, 'Personalised Care' (*NHS*) <www.england.nhs.uk/personalisedcare/> accessed 24 October 2023; Think Local Act Personal, 'Making it Real for Personalisation in Mental Health' (*TLAP*, 2019) <https://www.thinklocalactpersonal.org.uk/_assets/TLAPMakingitReal-Personalisation-for-Mental-Health.pdf> accessed 24 October 2023; Nathanial Dell, Charvonne Long, and Michael Mancini, 'Models of mental health recovery: An overview of systematic reviews and qualitative meta-syntheses' (2021) 44(3) Psychiatric Rehabilitation Journal 238–253.

[418] Of particular importance is the significant shift to autonomy and equality-affirming approaches to health law generally and mental disability law in particular, the latter being advocated by the UN Convention on the Rights of Persons with Disabilities. See George Szmukler, *Men in White Coats: Treatment Under Coercion* (Oxford University Press 2018); John Dawson, 'A realistic approach to assessing mental health laws' compliance with the UNCRPD' (2015) 40 International Journal of Law & Psychiatry 70–79; Eilionóir Flynn and others (eds), *Global Perspectives on Legal Capacity Reform Our Voices, Our Stories* (Routledge 2019).

On the international stage, the principle of non-discrimination in mental health contexts has achieved international recognition by consequence of the UN Convention on the Rights of Persons with Disabilities ('CRPD'). Of prime concern in medical law contexts has been the right to equal legal capacity prescribed by Article 12 of the Convention, which seeks to secure equal enjoyment of legal rights without restriction on grounds of disability, and the provision of supported decision-making for those who may be unable to demonstrate the skills necessary for legal capacity unaided.[419] Moreover, advocating for the "the full and equal enjoyment of all human rights and fundamental freedoms by all persons with disabilities, and to promote respect for their inherent dignity," Article 14 of the Convention requires that any deprivations of liberty that occur in respect of people with disabilities are undertaken on an equal basis with non-disabled people.[420] The consequences of this equality-affirming agenda between disabled and non-disabled people have been debated at length in academic and policy contexts,[421] and are beyond the scope of this paper. Of increasing concern, however, is the extent to which discrimination is occurring through the differential applications of the mental health laws between particular groups of service users whose inclusion within the Mental Health Act 1983 has generated significant controversy in recent years.

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[419] UN Convention on the Rights of Persons with Disabilities ('CRPD'), Article 12: Equal recognition before the law.

[420] ibid Article 14: Liberty and security of person

[421] See Jillian Craigie and others, 'Legal Capacity, Mental Capacity and Supported Decision-Making: Report from a panel event' (2019) 62 International Journal of Law and Psychiatry 160; George Szmukler, '"Best interests", "Will and Preferences" and the UN Convention on the Rights of Persons with Disabilities' (2019) 18(1) World Psychiatry 34; Michael Ashley Stein and others (eds), *Mental Health, Legal Capacity and Human Rights* (Cambridge University Press 2021).

In this article, we profile the writing of two former students from the LLB undergraduate course in Mental Health Law. Isabel Makin and Joanna Walkowiak consider the impacts of mental health law reform insofar as they impact on two groups of individuals whose experiences of Mental Health Act detention have come to prominence through their over-representation in Mental Health Act admissions data. Walkowiak considers the impact of the law reform agenda on people from racialised communities, whilst Makin reflects on the reform proposals as they impact on the lives of people with autism and/or a learning disability. Their insights have been woven together by their tutors, Kirsty Keywood and Neil Allen, to offer some reflections on the equality agenda and the need to acknowledge the impacts of intersectional discrimination evident in broader health contexts. It is well-documented, for example, that people with learning disabilities and autism experience a range of health inequalities—for instance, unequal access to services means that people with learning disabilities are at much higher risk of premature death and unmet health needs than their counterparts without learning disabilities.[422] This was brought to light perhaps most starkly during the Covid-19 pandemic, where deaths from Covid-19 infection far outstripped the death rate of those without a learning disability.[423] In addition, people from racialised communities continue to experience unequal access to health services, particularly mental health services, and with starkly increased

[422] Mencap, 'Learning Disability – Health Inequalities' (*Mencap*) <https://www.mencap.org.uk/learning-disability-explained/research-and-statistics/health/health-inequalities> accessed 20 October 2023.

[423] National Institute for Healthcare Excellence, 'NICE impact people with a learning disability' (*NICE*, 2021) <https://www.nice.org.uk/about/what-we-do/into-practice/measuring-the-use-of-nice-guidance/impact-of-our-guidance/nice-impact-people-with-a-learning-disability> accessed 20 October 2023.

rates of maternal mortality.[424] The charge of institutional racism is rightly becomingly insistent in the context of mental health care.[425]

It is clear, then, that in many health domains people from marginalised and racially minoritised communities are prevented from accessing vital services yet simultaneously, they are over-represented in Mental Health Act admissions. Why should it matter that particular populations are prioritised for coercive care in preference to less draconian alternatives? It matters because the principle of least restriction—which operates to safeguard against unjustified state encroachment into individual freedom—seems to be most under threat in the case of marginalised communities. Such practices ought be characterised as state-facilitated discrimination that erodes the dignity of service users and signals that not all lives have equal worth. Issues of inequality in the delivery of health services and the application of health laws are a pressing matter of concern, not only because they offend against the principle of non-discrimination prized within our legal system, but also because the persistent inattention to these issues prompt us all to consider what sort of society we want to live in and why.

II. Racism, Culture and the Mental Health Act 1983

The reasons behind the over-representation of people from racialised communities in the Mental Health Act admissions

[424] Dharmi Kapadia and others, 'Ethnic Inequalities in Healthcare: A Rapid Evidence Review' (*NHS Race and Health Observatory*, 2023) <https://www.nhsrho.org/wp-content/uploads/2023/05/RHO-Rapid-Review-Final-Report_.pdf> accessed 20 October 2023.

[425] See Dharmi Kapadia, 'Stigma, Mental Illness & Ethnicity: Time to Centre Racism and Structural Stigma' (2023) 45(4) Sociology of Health and Illness 855.

data is not well-understood. Although people from Black, Asian and Minority Ethnic groups are detained more often than patients from the ethnic majority,[426] not all studies found significant differences between ethnic groups,[427] and it is speculated that those that did are possibly cited more often.[428] Some papers present hypotheses as proven findings, building knowledge on an unsound basis.[429] What is more, research rarely explores the situation of migrants, asylum-seekers and refugees, who are in a more precarious position than the general population.[430] The Wessely review recommended improving data on ethnicity and use of the Mental Health Act 1983, for currently accessible research is not robust enough,[431] and based on insufficient primary evidence.[432] This may explain law reformers' reluctance to provide robust legal recommendations to address the problems until more is known about those issues. That very failure, though, has been criticised insofar as reformers "did not sufficiently acknowledge nor provide

[426] Sarah Bunn and Charlie Williams, 'Mental Health Act Reform – Race and Ethnic Inequalities' (POSTnote 671, UK Parliament May 2022); Phoebe Barnett and others, 'Ethnic variations in compulsory detention under the Mental Health Act: a systematic review and meta-analysis of international data' (2019) 6(4) Lancet Psychiatry 305, 305.
[427] See Swaran Singh and others, 'Ethnicity as a Predictor of Detention under the Mental Health Act' (2014) 44 Psychological Medicine 997; ibid Barnett and others.
[428] Swaran Singh and others, 'Ethnicity and the Mental Health Act 1983 Systematic Review' (2007) 191(2) British Journal of Psychiatry 99, 103.
[429] See Barnett and others (n 426) 314.
[430] Mariam Vahdaninia and others, 'Mental Health Services Designed for Black, Asian and Minority Ethnics (BAME) in the UK: a Scoping Review of Case Studies' (2020) 24(2) Mental Health and Social Inclusion 82, 86; Narinder Bansal and others, 'Understanding ethnic inequalities in mental healthcare in the UK: a meta-ethnography' (2022) 19(12) PLOS Medicine <https://doi.org/10.1371/journal.pmed.1004139> accessed 24 October 2023.
[431] Independent Review of the Mental Health Act 1983, *Modernising the Mental Health Act: Increasing choice, reducing compulsion* (HMSO 2018) 59 ('the Wessely Review').
[432] Swaran Singh and others (n 427) 1003; Barnett and others (n 426) 306.

targeted solutions to the mental health service inequalities created by institutional racism."[433]

Indeed, whilst there may be too little data on the topic, there is an existing evidence base concerning institutional racism within mental health services. Research suggests that "socially constructed categorization"[434] plays a critical role in the prevalence of mental illness. In comparison to the ethnic majority, service users from racialised communities are more likely to have less accumulated wealth, worse paid jobs, and are more likely to live in deprived areas.[435] It is accepted that "poverty, deprivation, and economic inequality are toxic to mental and physical health."[436] Arguably, though, the understanding of how environment influences mental health is not sufficiently acknowledged within mainstream clinical practice,[437] which instead focuses more on diagnosis, clinical symptoms, and medication.[438] Too often, mental health practitioners underestimate the experience of service users, especially those who have social connections abroad and live

[433] Kapadia and others (n 424) 31.

[434] Neil Boast and Paul Chesterman, 'Black People and Secure Psychiatric Facilities' (1995) 35(2) British Journal of Criminology 2.

[435] Centre for Mental Health, *58: Poverty, Economic Inequality and Mental Health* (*Centre for Mental Health*, 2022) <https://www.centreformentalhealth.org.uk/wp-content/uploads/2022/07/CentreforMentalHealth_PovertyMH_Briefing.pdf> accessed 24 October 2023; James Nazroo, Kamaldeep Bhui, and James Rhodes, 'Where Next for Understanding Race/Ethnic Inequalities in Severe Mental Illness? Structural, Interpersonal and Institutional Racism' (2020) 42 (2) Sociology of Health & Illness 267.

[436] Centre for Mental Health, ibid 1.

[437] Simon Dein, 'Mental Health in a Multiethnic Society' in Teifion Davies (ed), *ABC of Mental Health* (John Wiley & Sons Inc 2009) 82.

[438] Vanessa Lawrence and others, 'Ethnicity and Power in the Mental Health System: Experiences of White British, Black Caribbean People with Psychosis' (2021) 30 Epidemiology and Psychiatric Sciences 6.

through social isolation,[439] language barriers and stress associated with migration.

Given that mental disorder is in significant part socially constructed and situated,[440] academic research plays a key role in exposing the ways in which dominant conceptions of race and culture are deployed to shore up biomedical accounts of mental disorder, and also in highlighting how professional practices may perpetuate the over-inclusion of marginalised communities within the scope of the Act. Like the Act in its current state, the Draft Mental Health Bill retains an excessively broad definition of mental disorder and the lack of cultural sensitivity within the mental health workforce can lead to assessing and treating patients as being mentally disordered when their behaviour and/or cognitions are culturally situated. On a policy level and in the aim of limiting the risk of diagnostic bias, the government has developed PCREF—the Patient and Carer Race Equality Framework—to develop a culturally sensitive workforce.[441] As the mental health workforce is largely White British[442] and untrained in cultural literacy, its members may misinterpret symptoms of minority

[439] Anjum Memon and others, 'Perceived Barriers to accessing mental health services among black and minority ethnic (BME) communities: a qualitative study in Southeast England' (2016) 6(11) British Medical Journal Open <https://pubmed.ncbi.nlm.nih.gov/27852712/> accessed 24 October 2023.

[440] Suman Fernando, 'Racism in Psychiatry' in Suman Fernando (ed), *Mental Health, Race and Culture: Third Edition* (Bloomsbury Publishing Plc 2010); Kevin White, 'The social construction of mental illness' in Bruce Cohen (ed), *Routledge International Handbook of Critical Mental Health* (Routledge 2017).

[441] NHS England, 'Advancing Mental Health Equalities' (*NHS England*) <https://www.england.nhs.uk/mental-health/advancing-mental-health-equalities/> accessed 20 October 2023.

[442] Chiara Solari and Joseph El-Khoury, 'Doctor's ethnicity also matters' (2010) 3(2) The Psychiatrist 72.

ethnic patients.[443] It has been observed that, "staff are often wary of the Black community, fearing criticism and not knowing how to respond, and fearful of young Black men."[444] People from racialised communities do not benefit from shared decision-making and are given less space to articulate their preferences than white services users and carers.[445]

The government's commitment to piloting and evaluating culturally appropriate advocacy for people detained under the Act is to be welcomed, although these advances take place at the level of policy, rather than law. It would be a mistake to conclude that measures rooted in *policy* are necessarily weaker and less valuable than those expressed through *law*—much of the challenge in mental health care relates to implementation as much as it does to normative legal change. Nevertheless, it is regrettable that the reform proposals lack a set of statutory principles that could comprise a commitment to equality and anti-racism. Making non-discrimination a guiding statutory principle would condemn current discriminatory practice in the use of Mental Health Act 1983 and urge medical professionals to pay special attention to the issue of racism, perhaps prompting them to rethink how subconscious bias influences their decision-making processes when using the Act. Such a measure would also have significant symbolic value. The placing of anti-racism on a statutory footing within the new Act would signal a visible

[443] See Singh and others (n 428) 103; Claire Henderson and others, 'Mistrust of Mental Health Services: Ethnicity, Hospital Admission and Unfair Treatment' (2015) 24(3) Epidemiology and Psychiatric Science 258.
[444] Jeffrey Kerner and others, 'Racial Disparity in the Clinical Risk Assessment' (2020) 56 Community Mental Health Journal 587.
[445] Lawrence and others (n 438) 5.

commitment to chart a more responsive path towards eliminating inequality in the mental health system.

III. Mental health, power and risk

While amendments to civil admission powers under the Mental Health Act 1983 would modify the risk threshold required for detention, it is far from certain that this would address the over-inclusion of people from racialised communities. Significantly, the Draft Mental Health Bill fails to provide a sufficiently detailed legal definition of risk, simply elevating the standard to one of "serious harm."[446] Moreover, although the Bill demands a multi-faceted assessment by the professionals (requiring consideration of both proximity and magnitude of risk), the criteria remain subjective and do not ensure consistency in admission decision-making. By consequence, the enhanced risk threshold may yield little difference in practice and may be 'compensated' by a strongly risk-averse attitude of Mental Health Act practitioners.[447]

As risk and danger are concepts with ascribed, non-objective meaning,[448] risk assessment is not only a clinical matter; it is subject to influence by subconscious biases. There is the possibility that "human rights become a lottery"[449] in the context of mental health law as the statutory risk criteria allow

[446] Draft Mental Health HC Bill (2022–2023) cl 3.
[447] The Wessely Review (n 431) 6–7.
[448] Hershel Prins, 'Incapacitating the Dangerous in England and Wales: High Expectations – Harsh Reality' [2002] Journal of Mental Health Law 5, 11.
[449] Peter Bartlett, 'Re-Thinking *Herczegfalvy*: The ECHR and the Control of Psychiatric Treatment' in Eva Brems (ed), *Diversity and Human Rights: Rewriting Judgments of the ECHR* (Cambridge University Press 2012) 352.

arbitrary decision-making. This is particularly evident in the case of Black people, whom medical professionals perceive as more dangerous than those from other cultural backgrounds.[450] It is reported that "Black patients were restrained for 35% of their violent incidents, while White patients were restrained for only 9% of incidents,"[451] and "increased perceived risk of violence" is cited among reasons for disproportionate detention.[452] Mental health services tend to perceive users from racialised communities as 'difficult' and use more restrictive measures to manage them.[453] On the other hand, people from racialised communities are more likely to have negative experiences with offered mental health services, due to lack of cultural awareness, stigmatisation, language barrier, and being unable to choose the gender of a medical practitioner attending them.[454] It is deeply regrettable that current reforms do not embrace the need for mandatory training in human rights and equality,[455] suggested as necessary to improve people's experience of mental health care.[456] If unaccompanied by

[450] Nazroo and others (n 435).

[451] Rachel Spector, 'Is There Racial Bias in Clinicians' Perceptions of the Dangerousness of Psychiatric Patients? A Review of the Literature' (2001) 10(1) Journal of Mental Health 5, 12.

[452] Barnett and others (n 426) 305.

[453] Joint Committee on the Draft Mental Health Bill, *Oral evidence: Draft Mental Health Bill* (2022 23, HL 128, HC 696) Q50 <https://committees.parliament.uk/oralevidence/11381/html/> accessed 27 November 2023; the Wessely Review (n 431) 293.

[454] Ella Miller, Stella Bosun-Arije, and Mandu Stephen Ekpenyong, 'Black and ethnic minority carers perceptions on mental health services and support in the United Kingdom: a systematic review' (2021) 20(4) Journal of Public Mental Health 298, 304–306.

[455] Joint Committee on the Draft Mental Health Bill (n 453) Q49 <https://committees.parliament.uk/oralevidence/11381/html/> accessed 27 November 2023.

[456] Julia Darko, 'How Can General Practice Improve the Mental Health Care Experience of Black Men in the UK?' (2021) 71(704) British Journal of General Practice 124, 125.

appropriate workforce preparation, changing formal risk criteria may not prevent inappropriate detentions under the Act.

IV. Mental Health Act detentions for people with learning disabilities and/or autism

For decades, there have been concerns over the extent to which the Act is appropriate for those with learning disabilities and/or autism; conditions that are lifelong and not prone to 'treatment' in the conventional sense. Nevertheless, removing these individuals from the longer-term powers of detention under the Mental Health Act 1983, as the government has proposed, risks some people with learning disabilities with challenging behaviour being managed by criminal justice agencies, detained under Deprivation of Liberty Safeguards, or "that no care will be provided at all."[457] That being said, reports into institutionalisation following the infamous Winterbourne View[458] scandal reveal institutional 'care'' settings to be highly distressing for people with a learning disability or who are neuro-atypical. The choice as to which of these legal responses is appropriate seems unacceptably stark in light of insufficient community support to avoid hospital admission.

The Wessely Committee—the review body tasked with setting out the reform agenda in 2018—concluded that the Mental Health Act 1983 is being used "inappropriately for people with learning disability, autism or both."[459] 'Such detentions were occurring due to sparse resources in

[457] The Wessely Review (n 431) 185.
[458] Paul Kenyon, 'Undercover Care: The Abuse Exposed' (*BBC One Panorama*, 31 May 2011) <https://www.bbc.co.uk/programmes/b011pwt6> accessed 9 Nov 2022.
[459] The Wessely Review (n 431) 184.

community care—for many people, detention has become the default option for managing challenging behaviour, with no "realistic prospect of discharge"[460] as there are too few suitable placements or finance to support them. After many abuse scandals involving people with learning disabilities detained in Assessment and Treatment Units under the Act, law reform proposals have sought to minimise the number of 'unsuitable long-stay wards.'[461] The Draft Mental Health Bill 2022[462] provided a new framework to improve the care of individuals with learning disabilities and/or autism through modified detention criteria, reformed Care and Treatment Reviews, and enhanced support for community services. However, there remains a strong argument that the proposed reforms will do little to prevent inappropriate detention rates as it is "primarily the lack of community support rather than the legislative framework that has resulted in continued detentions for this group."[463]

That being said, the reforms to the detention criteria remain a step in the right direction—under the Government's proposals, detention under section 3 would be lawful only where the person has a 'psychiatric disorder,' as distinct from learning disabilities or autism.[464] This change would ensure their treatment is focused on the mental disorder they suffer with, as opposed to their learning disability and/or autism. The Wessely review also recommended that any behaviour raising

[460] ibid.
[461] Department of Health and Social Care, *Reforming the Mental Health Act* (Cmd 501, 2021) ('the White Paper'); Explanatory Notes to the Draft Mental Health HC Bill (2022–2023) para 15.
[462] Draft Mental Health HC Bill (2022–2023).
[463] Equality and Human Rights Commission ('EHRC'), *Response to the White Paper on Reforming the Mental Health* Act (2021) 47.
[464] Draft Mental Health HC Bill (2022–2023) cl 2–3.

concerns under the Act must be identified and associated with the mental health condition, and not due to an unmet support, social, emotional or physical need.[465] If conduct results from the latter, the detention criteria for section 2 would not be met. Nonetheless, the impact of this proposal may not be as significant as promised, despite it being immediately appealing. The Equality and Human Rights Commission has expressed concerns that the new detention criteria will not affect detention rates as serious behavioural consequences associated with learning disabilities and/or autism risk merely being relabelled as psychiatric disorders.[466] Inpatient psychiatric units can be very stressful environments and where individuals are assessed under section 2 of the Act, such assessments may wrongly give rise to a belief that the individual has an additional mental health problem. Placing a person in a stressful environment can lead to them exhibiting outbursts of emotional and aggressive behaviour as a way of communicating their distress;[467] this ultimately distorts assessments through 'diagnostic overshadowing,'[468] whereby the cause of the conduct has been overlooked and misidentified, making their condition significantly worse than before detention.

Indeed, studies show that 70% of people with autism are diagnosed with at least one co-occuring mental health

[465] The Wessely Review (n 431) 82.
[466] EHRC (n 463) 48.
[467] Sheila Hollins, Keri-Michèle Lodge, and Paul Lomax, 'The case for removing intellectual disability and autism from the Mental Health Act' (2019) 215 The British Journal of Psychiatry 633, 633.
[468] Lauren Ramsey, 'Systemic Safety Inequities For People with Learning Disabilities: A Qualitative Integrative Analysis of the Experiences of English Health and Social Care for People with Learning Disabilities, their Families and Carers' (2022) 21 International Journal for Equity in Health 4.

conditions, and almost 50% are diagnosed with multiple such conditions.[469] Beyond the risk of mislabelled or misattributed disorders and the consequences thereof (as aforementioned), it may be misleading to believe the reform will impact the rising detention rates by a significant amount if the vast majority already meet the criterion of having a co-occuring mental health condition. In addition, there is concern that the Mental Capacity Act 2005 ('MCA') will maintain high admission rates since the complex interface between the Acts may make it easier to deprive people of their liberty through the proposed Liberty Protection Safeguards for those who lack capacity to make a decision about their admission.[470] .

V. Homes not hospitals

It is uncontroversial to suggest that those with a learning disability and/or autism generally respond better to community care, including speech and language or behavioural therapy, rather than being detained in hospital settings. Following the Winterbourne View scandal, the Government proposed that "everyone inappropriately in hospital will move to community-based support as quickly as possible, and no later than 1 June 2014."[471] This ambitious target was not met due to the

[469] Meng-Chuan Lai and others, 'Prevalence of Co-Occurring Mental Health Diagnoses in the Autism Population: A Systematic Review and Meta-Analysis' (2019) 6 The Lancet Psychiatry 819.

[470] Lucy Series, 'No Loss of Safeguards for People with Autism or Learning Disability Taken 'Out' of the Mental Health Act' (*The Small Places*, 2022) <https://thesmallplaces.wordpress.com/2022/06/24/no-loss-of-safeguards-for-people-with-autism-or-learning-disability-taken-out-of-the-mental-health-act/> accessed 17 October 2022.

[471] Department of Health, *Transforming Care: A National Response to Winterbourne View Hospital Department of Health Review: Final Report* (Department of Health 2012) 9.

complexities involved. In 2015, the Government decided to redouble its efforts through the Building the Right Support plan,[472] highlighting the over-reliance on hospitals, placing these individuals 'away from their homes and communities.'[473] Neither the *Building the Right Support* policy nor the *NHS Long Term Plan*[474] has succeeded in reducing the bed numbers of people with a learning disability and/or autism by their promise of 35-50%.[475]

The failure to meet their target directly resulted from insufficient community support and provision for persons with learning disabilities and/or autism, and the lack of investment in those services—these vital services operate below the level required to assist people with a learning disability and/or autism.[476] A severe financial revaluation is needed to raise the number of community services for these individuals and to avoid inappropriate detentions. Yet, rather than addressing this urgent monetary crisis, the Government hoped that their legislative reform—implementing the new risk detention criteria, for instance—would address the issues by "reducing the reliance on specialist inpatient services."[477] This dire consequence of avoiding funding queries puts these individuals at risk, thus demanding a "realistic assessment of the number

[472] NHS England, *Building The Right Support* (*NHS England*, 2015) <https://www.england.nhs.uk/wp-content/uploads/2015/10/ld-nat-imp-plan-oct15.pdf> accessed 27 November 2023.
[473] ibid 9.
[474] NHS England, *The NHS Long Term Plan* (NHS England 2019).
[475] That said, they have made a dent in the statistics by reducing numbers by 20%: Emily Haves, *Community Care for People with Learning Disabilities and/or Autism* (*House of Lords Library*, 2021) <https://lordslibrary.parliament.uk/community-care-for-people-with-learning-disabilities-and-or-autism/> accessed 11 October 2022.
[476] ibid.
[477] The White Paper (n 461) 9; Health and Social Care Committee, *The Treatment Of Autistic People And People With Learning Disabilities* (2021-22, HC 21) 11.

of specialist beds that are required to meet their needs safely and effectively… rather than relying on the NHS commissioners' assumptions."[478]

Improvement is needed to support living in the community and to give effect to Article 19 of the CRPD,[479] particularly as it surrounds "education, employment, social and leisure opportunities."[480] Choices as to where and how to live have knock-on effects of "[increasing] dignity, [reducing] the likelihood of unintended adverse outcomes and [reducing] the risk of subsequent relapse."[481] The Draft Mental Health Bill responds by creating statutory duties on commissioning bodies to "ensure an adequate supply of community services"[482] and "seek[s] to ensure that the needs of people with autism or a learning disability can be met without detaining them under Part II of this Act."[483] This legislative duty, in line with the principle of least restriction, would hopefully prevent default admissions "in the absence of effective community-based assessment and treatment options,"[484] as more consideration towards the individual is needed. Nonetheless, funding is paramount because without it, inappropriate detentions will only increase.

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[478] John Taylor, 'Transforming Care for People with Intellectual Disabilities and Autism in England' (2021) 8 The Lancet Psychiatric 943.
[479] UNCRPD, Article 19: Living independently and being included in the community.
[480] Joint Committee on the Draft Mental Health Bill (n 453) Q35 <https://committees.parliament.uk/oralevidence/11380/html/> accessed 27 November 2023.
[481] The Wessely Review (n 431) 12.
[482] Explanatory Notes to the Draft Mental Health HC Bill (2022–2023) para 2.
[483] ibid para 11.
[484] Department of Health, *No Voice Unheard, No Right Ignored – A Consultation For People With Learning Disabilities, Autism And Mental Health Conditions* (Cmd 9007, 2015) 24.

VI. Conclusion

Reforming the Mental Health Act has been a complex and difficult process. Earlier attempts to undertake large-scale reform were jettisoned in favour of piecemeal changes in 2007. There were opportunities to tackle the increasingly better understood impact of racism in mental health service delivery and inappropriate institutional management of people with learning disabilities, yet those opportunities were missed. In 2023, these issues have become ever more insistent and yet, there is every chance that history will repeat itself.[485] Beyond the law reform process, pressures on NHS funding offer limited prospect of the investment in mental health services necessary to make the principle of least restriction a reality.[486] Given the likely delay to law reform, it is imperative that the Equality and Human Rights Commission plays an assertive role in tackling discrimination in the use of the Mental Health Act in respect of people from marginalised communities. Additional support for such intervention can and should be drawn from the United Nations Committee on the Rights of Persons with Disabilities, whose General Comment 6 provides a necessary reminder of the multiple and intersectional dimensions of disability discrimination that require attention.[487] In this, as in other areas

[485] Kat Lay, 'Thousands 'will be betrayed' if mental health reforms ditched' *The Times* (2023) <https://www.thetimes.co.uk/article/thousands-will-be-betrayed-if-mental-health-reforms-ditched-gvlbnc0zp> accessed 27 November 2023.

[486] Care Quality Commission, State of Care 2022/23 (*CQC*, 2023) <https://www.cqc.org.uk/publications/major-report/state-care/2022-2023> accessed 24 October 2023.

[487] UN Committee on the Rights of Persons with Disabilities, *General comment No.6 on equality and non-discrimination* (2018) CRPD/C/GC/6. On racism and health, see UN Human Rights Office of the High Commissioner, *Report by the Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health - Racism and the Right to Health* (2022) A/77/197.

of mental disability law, it may be that the push for transformation of mental health law and policy will require the support of international norms to effect this necessary legal change.

Is it Inconsistent to Reject Legislative Intent Whilst Endorsing a Purposive Approach to Statutory Interpretation?

Leon Qiu[†]

In the realm of statutory interpretation, the relationship between the purposive approach and 'legislative intent' has long been a subject of debate. The 'Inconsistency Thesis' ('IT') lies at the core of that debate, and posits that rejecting legislative intention is inconsistent with a purposive interpretation of statutes. Drawing from various judicial perspectives, this article explores differing views on that thesis; some equating legislative intention to statutory purpose, whilst others advocate for a clear distinction. This paper delves into this intricate discourse, identifying three distinct conceptualisations of 'legislative intent:' the State-of-Mind, Group Agency, and Shorthand accounts. It argues that the debate's controversies stem from these different conceptualisations, but ultimately defends the Shorthand Account. Additionally, this article refutes the claim that replacing 'intent' with 'purpose' would clarify the debate, emphasising the metaphorical value of the term 'legislative intent.' Through this exploration, the paper underscores the need for a consistent conceptual framework in discussing legislative intent, advocating for clarity and precision in the field of statutory interpretation.

I. Introduction

Statutory interpretation stands at the cornerstone of the legal system and yet, there remains a rigorous debate surrounding the fundamental relationship between 'legislative intent' and the purposive approach. Several judges—not least Lord Hodge and Lord Sales—equate legislative intention with statutory

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purpose.[488] However, not all judicial figures agree with this perspective: for instance, Sir John Laws and Chief Justice French have highlighted the importance of distinguishing between 'intent' and 'purpose.' At the heart of this discourse lies the 'Inconsistency Thesis' ('IT'), which suggests that rejecting legislative intention is at odds with a purposive interpretation. This paper delves into this debate by first introducing the 'Thesis of Entailment or Equation' ('TE') as a necessary and sufficient condition of IT, not to mention the point on which the debate turns, before explaining the nature and conceptualisation of purposive interpretation. Thereafter, this paper examines the debates surrounding purposive interpretation and Parliamentary intention from three distinct perspectives: the State-of-Mind Account; the Group Agency Account; and, the Shorthand Account. These three perspectives stem from three different conceptions of 'legislative intent,' and this article will argue that one conception proves most compelling, which in turn supports IT. Finally, this essay will evaluate the objection to IT that 'purpose' may be a more viable label than 'intent' by exploring the differences between those concepts—or lack thereof—and emphasising the metaphorical significance of 'legislative intent.'

II. Unpacking the debate

(i) The major issue

[488] Lord Hodge, 'Statutory Interpretation: A Collaboration between Democratic Legislatures and the Courts?' (Address to the Government Legal Service for Scotland, November 2021) 21 <https://www.supremecourt.uk/docs/statutory-interpretation-a-collaboration-between-democratic-legislatures.pdf> accessed 23 March 2022; Lord Sales, 'In Defence of Legislative Intention' (Denning Society Lecture, November 2019) 11 <https://www.supremecourt.uk/docs/speech-191119.pdf> accessed 23 March 2022.

The 'Thesis of Entailment or Equation' suggests that when interpreting statutes, adopting a purposive approach *entails or equates* to giving effect to legislative intent. Inasmuch as IT suggests the rejection of the latter is incompatible with the former, IT necessitates that legislative intent is the same as purposive interpretation, or at least a necessary consequence of purposive interpretation, as TE suggests—TE is a necessary *and* sufficient condition of IT.

Under the entailment thesis, the interpreter will be bound to dismiss purposive interpretation if they are unwilling to agree with the legislative intent, for purposive interpretation entails the manifestation of legislative intent. Under the equation thesis in the alternative, declining purpose whilst accepting intent is contradictory, for they are one and the same, or equivalent at the least. Therefore, if TE is true, it is guaranteed that IT is true. This essay will now move on to the controversy around TE.

(ii) The controversy at a glance

TE, and IT thereby, is not an uncommon view amongst the judiciary. For instance, Lord Hodge described legislative intention and statutory purpose as 'synonyms;'[489] similarly, Lord Sales opined that the concepts have the same meaning[490]—these senior and eminent judges explicitly endorsed the equation thesis. Most likely, other judges shared the same view, albeit expressing their view more implicitly. For example, Lord Bingham claimed that "undue concentration on the minutiae … may lead the Court to neglect the *purpose* which Parliament *intended* to achieve when it enacted the statute … The Court's task … is to give effect to Parliament's

[489] ibid.
[490] ibid.

purpose."[491] Here, it seemed that Lord Bingham assumed the interchangeability of "purpose" and "intent." In *Pepper v Hart*,[492] Lord Griffiths also used the terms "interchangeably" to describe the relationship between Parliamentary intention and the purposive approach to statutory interpretation.[493]

Not all judges agree with TE, however. Sir John Laws, for instance, has commented that the difference between intent and purpose is very important.[494] Chief Justice French further elaborated on that distinction, noting that it "reflects ordinary usage."[495] Before delving deeper into this fierce disagreement, this article now turns to explaining the meaning and application of the purposive approach.

III. The purposive approach

(i) Purposive, literal, or both?

The 'purposive interpretation' often appears contradictory to a seemingly competing approach, 'literal interpretation.' A general, likely oversimplified description of purposive interpretation is that, when necessary, the interpreter should depart from the best literal understanding of a provision and instead adopt a 'strained interpretation' which fits the purpose

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[491] *R (Quintavalle) v Secretary of State for Health* [2003] UKHL 13 [8] (emphasis added).
[492] *Pepper (Inspector of Taxes) v Hart* [1993] AC 593, 618.
[493] Sir John Laws, 'Statutory Interpretation – The Myth of Parliamentary Intent' (Speech at the Renton Lecture, November 2017) 15 <http://www.statutelawsociety.co.uk/wp-content/uploads/2017/11/The-Myth-of-Parliamentary-Intent-text.pdf> accessed 21 March 2022.
[494] ibid 19.
[495] Robert French, 'Bending Words: The Fine Art of Interpretation' (Lecture at University of Western Australia, March 2014) 14 <https://cdn.hcourt.gov.au/assets/publications/speeches/current-justices/frenchcj/frenchcj20Mar14.pdf> accessed 21 March 2022.

of the provision.[496] On the other hand, the literal approach demands the interpreter adhere to the precise literal meaning or, in instances of ambiguity, one of the several literal meanings;[497] an interpretation must also align with the grammatical meaning of the passage.[498] Whilst the purposive approach concentrates on the provisional purpose, the literal approach focuses on the plain meaning.

As observed by Lord Griffiths, the days have long passed since the courts adopted a strict constructionist view of interpretation, obliging them to adopt the literal meaning of the language.[499] Now, the courts adopt a purposive approach, under which they aim to give effect to the true purpose of the legislation and are willing to consider substantial extraneous material concerning the context in which the legislation was enacted.[500] In a 1997 case, for instance, the court was presented with the question of whether creditors who obtained notice of a meeting through means other than the nominee could attend and vote.[501] Whilst a literal reading of the statutory rule might suggest only those notified by the nominee could participate, the court, emphasising the broader "scheme of Part VIII of the Act," held that all creditors with actual notice of the meeting were entitled to attend and vote, regardless of how they received that notice.[502] This decision exemplifies the courts' preference for a purposive approach, looking beyond the literal wording to understand and apply the broader statutory purpose.

Nonetheless, it would be inaccurate to claim the courts

[496] Francis Bennion, *Understanding Common Law Legislation: Drafting and Interpretation* (Oxford University Press 2009) 35.
[497] ibid 37.
[498] ibid.
[499] ibid.
[500] ibid.
[501] *In re A DEBTOR (No 400-IO-1996); In re A DEBTOR (No 401-IO-1996)* [1997] 1 WLR 1319.
[502] ibid 1328.

have wholly embraced a purposive approach. Indeed, certain provisions might still allow for an interpretation that aligns with both literal and purposive constructions. Even in cases where such compatibility is absent, the courts do not simply set aside the words, text, and grammar without due consideration. Instead, the courts balance "the literal meaning of the words … and the context and purpose"[503]—whilst interpretations can be strained, they must remain within the bounds set by the text. In a case concerning a defendant who produced the shape of a gun with his fingers in his jacket, the House of Lords quashed the conviction of possessing an imitation firearm.[504] In response to the proposition that a purposive interpretation would allow this conviction, Lord Bingham stated that:

> "[o]ne cannot possess something which is not separate and distinct from oneself. An unsevered hand or finger is part of oneself. Therefore, one cannot possess it … What is possessed must under the definition be a thing. A person's hand or fingers are not a thing."[505]

As is evident in Lord Bingham's passage, the courts work within the boundaries set by the words contained in the statute while striving to give effect to the broader statutory purpose.

Therefore, "the difference between purposive and literal construction is in truth one of degree only."[506] Although sometimes judges disagree on this degree,[507] they find common ground in the necessity to take purpose into account. When choosing between a literal meaning and a strained meaning

[503] *Oliver Ashworth (Holdings) Ltd v Ballard (Kent) Ltd* [2000] Ch 12, 34.
[504] *R v Bentham* [2005] UKHL 18.
[505] ibid 8.
[506] *Oliver Ashworth (Holdings) Ltd v Ballard (Kent) Ltd* (n 503) 34.
[507] As an example, see *Kostal UK Ltd v Dunkley and others* [2021] UKSC 47, 30; ibid 109.

which better fits the purpose, the purposive approach inclines the court to elect for the latter. Consequently, adopting a purposive approach does not entail disregarding the text itself—interpreters use statutory purpose to give meaning to the words, not render the words meaningless. The literal meaning remains a necessary element to be taken into account during the interpretation process.

(ii) Determining the statutory purpose

Generally, the 'purpose' of an enactment is taken to be either (1) a problem the enactment is passed to ratify, or (2) a generally positive change the enactment aims to effect.[508] To extract this 'purpose,' the court may look at a wide range of materials, including statements of purpose in the text, other parts of the statute,[509] punctuation, format and structure, domestic law at the time of the enactment,[510] judicial decisions on the identical language used,[511] external aids to construction,[512] and relevant EU and international law. One can easily envision that this procedure could be both time-consuming and costly. Consequently, it is reasonable to consider that the literal meaning of the text still bears much sway, and the purposive approach cannot totally depart from that meaning.

At this point, it remains uncertain whether TE is accurate. This article will now explore the various interpretations of the term 'legislative intent;' as will soon

[508] David Lowe and Charlie Potter, *Understanding Legislation: A Practical Guide to Statutory Interpretation* (Bloomsbury Publishing Plc 2018) 3.45 <http://ebookcentral.proquest.com/lib/ed/detail.action?docID=6198764> accessed 16 March 2022.
[509] ibid 3.44.2.
[510] ibid 3.44.3.
[511] ibid 3.44.4.
[512] ibid 3.44.6.

become evident, judges and scholars understand and employ this term differently.

IV. Accounts of legislative intent

(i) The State-of-Mind Account

The ordinary meaning of 'intent' is "a conscious state of mind whereby an individual person proposes to act in a particular way".[513] Assuming this is the correct understanding of 'intent,' TE is then equivalent to TE1: when interpreting statutes, adopting a purposive approach entails or equates with giving effect to the conscious state of mind of the legislature. TE1, however, provides an uncompelling account. In Jeremy Waldron's words, a legislature is "a large multi-member assembly, comprising hundreds of persons with diverse views, affiliations, and allegiances."[514] Such an assembly has no 'mind,' so it cannot possess a state of mind.[515] Justice Scalia further concluded that the existence of legislative intent is "contrary to all reality."[516] Even were it to somehow exist, it would remain "undiscoverable in any real sense."[517] Many judges and scholars have expressed a similar concern.[518]

Even if there is a way to discern these objections, TE1 remains uncompelling, for interpreting 'intent' in this manner

[513] Sir John Laws , 'The Nature of Legislative Intent' (2016) 132 Law Quarterly Review 159.
[514] Jeremy Waldron, *Law and Disagreement* (Oxford University Press 1999) 142.
[515] Laws (n 513).
[516] Antonin Scalia, *A Matter of Interpretation: Federal Courts and the Law - New Edition* (Princeton University Press 2018) 32.
[517] Max Radin, 'Statutory Interpretation' (1930) 43 Harvard Law Review 863, 870.
[518] For example, see Andrew Burrows, *Thinking about Statutes: Interpretation, Interaction, Improvement* (Cambridge University Press 2018) 19; William N Eskridge and Antonin Scalia, 'Textualism, the Unknown Ideal?' (1998) 96 Michigan Law Review 1509.

is intuitively different from 'purpose.' For instance, one could claim that the purpose of the human eye is to let people see, without speaking to the intent of a particular deity, if any.[519] Just as the purpose of an eye has nought to do with a particular agent's 'intent,' the purpose of a statutory provision could not be determined through a search for some 'intent.' After all, the purposive approach, as conceptualised in Section III, looks nothing like "a question about the *psychology of crowds.*"[520]

'Intent' seemed to have worked well in a contract law background, as the Courts normally rely on the parties' intentions to interpret contractual provisions.[521] However, there are not parties to a piece of legislation, unlike a contract.[522] Interpreting 'intent' in this manner fails to capture the idea of the "policy behind the statute,"[523] which is the very focus of the purposive approach. Indeed, the states of mind of the parliamentarians who vote in favour of a certain piece of legislation may incorporate considerations beyond policy, including desires to earn publicity, to align with their political affiliations, or even to appease certain interest groups. A 2017 political psychology study found that for Dutch members of parliament, "[v]otes appear to be a more important determinant of politicians' reference point than is policy [*sic*]."[524] Therefore, the traditional understanding of 'intent' as merely a 'state of mind' is too narrow and potentially misleading when applied to legislative interpretation.

(ii) The Group Agency Account

[519] French (n 495) 14.
[520] Elisabeth Laing, 'Pepper v Hart: Where Are We, How Did We Get Here, and Where Are We Going?' (2006) 11 Judicial Review 44, 19.
[521] Laws (n 493) 21.
[522] ibid 22.
[523] Burrows (n 518) 19.
[524] Jona Linde and Barbara Vis, 'Do Politicians Take Risks Like the Rest of Us? An Experimental Test of Prospect Theory Under MPs' (2017) 38 Political Psychology 101.

On the other hand, linguistic intuitions may substantiate a different conclusion. Indeed, people ascribe 'intent' to *groups* all the time.[525] Media coverage has discussed that certain "Russian forces … were intent on overwhelming Kyiv at the war's start with tanks and artillery;"[526] similarly, a football coach has recently commented on another team, saying, "[t]hey want to avoid risk in neutral areas. They are aggressive and when they win the ball, they play."[527] Both the Russian forces and football team are groups, yet discussing these groups' intent is not unnatural nor abnormal. Similarly, in the context of contract law, the involved parties may be corporations or organisations, and yet attributing intent to such parties has always been deemed as proper. Therefore, a group can effectively function as a rational agent,[528] and referring to the intent of this agent is entirely valid, both in ordinary language and within the legal framework. Following this rationale, a legislature could also demonstrate agency:[529] "[l]egislators jointly act to make a reasoned choice that the proposal seems to make out when read as a whole, and in this way the legislature forms a group agent."[530] In this sense, it is accurate to attribute intention to the legislature to achieve certain goals, often referred to as 'statutory purpose.' As inanimate objects,

[525] Stephen Breyer, 'On the Uses of Legislative History in Interpreting Statutes' 65 Southern California Law Review 31, 865.
[526] Andrew E Kramer and Neil MacFarquhar, 'Russia in Broad Retreat From Kyiv, Seeking to Regroup From Battering' *The New York Times* (2 April 2022) <https://www.nytimes.com/2022/04/02/world/europe/ukraine-russia-kyiv.html> accessed 8 April 2022.
[527] David Clayton, 'Guardiola Wary of Atleti Attacking Threat' (*Man City*, 2022) <https://www.mancity.com/news/mens/manchester-city-v-atletico-madrid-pep-guardiola-injury-update-63784667> accessed 8 April 2022.
[528] Richard Ekins, *The Nature of Legislative Intent / Richard Ekins.* (University Press 2012) 73.
[529] Lord Sales JSC (n 490) 4.
[530] Ekins (n 528) 236–237.

statutes do not possess intentions; it is their creators that do.[531]

Adopting the Group Agency Account, TE is equivalent to the following statement (TE2): when interpreting statutes, employing a purposive approach involves or is tantamount to upholding the legislature's purpose in crafting these statutes.

Unlike the State-of-Mind Account, it follows from the Group Agency Account that TE is true—whilst TE1 proves uncompelling, TE2 provides a far stronger account. As such, it seems that whether TE is true turns on which account is adopted. The next question, then, is which—if either—is compelling between the State-of-Mind and Group Agency accounts. One way to establish which account is most compelling is to refer to how interpreters—i.e. judges—in fact use the term 'legislative intent.'

(iii) The Shorthand Account

It seems that neither account captures judges' thinking when they refer to 'legislative intent,' for judges have insisted that 'intent' is an objective test: there are established rules and elements for its determination. In other words, they use the term 'legislative intent' as a name, tag, and assertion of compliance.[532] Lord Nicholls made this point explicitly:

> "[t]he task of the Court is often said to be to ascertain the intention of Parliament expressed in the language under consideration. This is correct and may be helpful so long as it is remembered

[531] Richard Ekins and Jeffrey Goldsworthy, 'The Reality and Indispensability of Legislative Intentions' (2014) 36 Sydney Law Review 39, 57.
[532] Diggory Bailey and Luke Norbury, *Bennion, Bailey and Norbury on Statutory Interpretation* (8th edn, LexisNexis 2020) 12.3, 134; Daniel Greenberg, *Craies on Legislation* (12th edn, Sweet and Maxwell 2020) 16.1.4.

> that the 'intention of Parliament' is an *objective* concept, not subjective. The phrase is a *shorthand reference* to the intention which the Court *reasonably imputes* to Parliament in respect of the language used. It is not the subjective intention of the minister or other persons who promoted the legislation. Nor is it the subjective intention of the draftsman, or of individual members or even a majority of individual members of either House."[533]

The same rationale can be seen from the High Court of Australia: determining legislative intent is asserted as "*a statement of compliance with the rules of construction*," both common law and statutory, which have been utilised to achieve the desired outcomes and are known to parliamentary drafters and the courts.[534] This account of 'legislative intent' is very attractive because of its popularity among judges[535]—it captures the underlying thought process that many judges have in mind when employing the inherently ambiguous and counter-intuitive concept. It is even quite reassuring to see judges treating legislative intent as fiction, as the paramount consideration remains the specific rules of construction—statutory interpretation remains subject to legal principles, rather than being influenced by studies of the 'psychology of crowds.'[536] Under this account, TE is equivalent to TE3: when interpreting statutes, adopting a purposive approach entails or equates with complying with all relevant rules of construction.

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[533] *R v Secretary of State for the Environment, Transport and the Regions, ex p Spath Holme Ltd* [2001] 2 AC 349, 396 (emphasis added).
[534] *Lacey v Attorney-General of Queensland* [2011] HCA 10 [43] (emphasis added).
[535] *Wilson v First County Trust Ltd (No 2)* [2003] UKHL 40 [56]; *Moyna v Secretary of State for Work and Pensions* [2003] UKHL 44 [24]; *Momcilovic v The Queen* [2011] HCA 34 [170]; *McNutt v Transport for London* [2019] EWHC 365 [27]; Lord Hodge (n 489) para 21.
[536] Laing (n 520) 19.

From a purely logical standpoint, TE3 is most likely inaccurate: the purposive approach includes some—not all—rules of construction. Pragmatically, however, the purposive approach and rules of construction largely overlap—after all, the rules of construction are known to parliamentarians and draftsmen.[537] Indeed, suppose an interpreter is to give effect to the legislative intent. To do so, they must comply with the rules of construction, including those related to the purposive approach, as discussed in Section III (specifically, those contextual matters an interpreter might take into account). To conclude, whether TE is true depends on which account we adopt and insofar as the Shorthand Account presents the most compelling account and is compatible with TE, TE is true and supports IT.

V. Is "purpose" a better label?

Alternatively, one might doubt whether it is necessary to resolve the compatibility of rejecting legislative intent with a purposive approach altogether. Rejecting legislative intent is not to reject all the principles and rules of construction to which it refers; rather, it implies that this name tag, or label, is "misleading and unhelpful."[538] If it is a less favourable label than 'purpose,' adhering to 'purpose' might be beneficial for the clarity and accessibility of the discussion around statutory interpretation. Nonetheless, one could doubt whether replacing 'intent' with 'purpose' would do any good: whilst 'intent' might be considered fictitious, is 'purpose' any more realistic? Per Ekins and Goldsworthy, "[i]t is self-contradictory to dismiss legislative intentions as fictions but to keep talking

[537] *Lacey* (n 534) [43]
[538] Laws (n 493) para 2.

about statutory purposes." [539] Indeed, a statute lacks the capacity to think, make decisions or possess its own agendas and purposes; 'statutory purpose' is also something the interpreter imputes to the provision at hand.

Further, it should be stressed that the term 'legislative intent' carries metaphorical values. It serves as a warning sign concerning the delineation between interpretation and legislation,[540] acting as a reminder of the separation of powers[541] and conveying a message to judges about their role in adjudication.[542] It is not a depiction of the legislature; such an expectation should not have been held for it in the first place.

VI. Conclusion

In summary, this article has argued that rejecting legislative intention does not align with using a purposive approach when interpreting statutes. This article investigated three different ways of understanding legislative intent—the State-of-Mind Account, Group Agency Account, and the Shorthand Account—and showed that the core of the debate's controversies arises from these different conceptions. This article then established that the former two accounts do not reflect the actual usage of the term 'legislative intent' and explained why the Shorthand Account is to be preferred. Finally, it was argued that understanding the issue as a relabelling process, namely from 'intent' to 'purpose', would not resolve the debate.

[539] Ekins and Goldsworthy (n 531) 57.
[540] Burrows (n 518) 18.
[541] Victoria Nourse, 'A Decision Theory of Statutory Interpretation: Legislative History by the Rules' [2012] The Yale Law Journal 70, 85.
[542] ibid.

Ultimately, this exploration highlights the need for a clear and consistent way of discussing legislative intent and purposive interpretation when working with statutes. By doing so, both scholars and legal professionals can engage in more lucid and productive conversations on the topic, leading to a better grasp of the complexities involved in statutory interpretation and the discussion of 'legislative intent.'

On the Analysis of Non-Western Medical Practice Using Theories of Western Medical Ethics

Isabel Zak[†]

Locally accepted moral standards shape healthcare legislation, yet such legislative decisions should not be insulated from scrutiny by non-local ethical theories. This paper aims to demonstrate the relevance and propriety of applying Western bioethical theories to healthcare scenarios beyond the Western cultural context. Western cultures place a strong emphasis on individualism, and value individuals' rights and liberties; in contrast, many non-Western cultures prioritise collectivist values, such as community wellbeing. These fundamental differences impact healthcare practice within a culture, including the way that a patient and their healthcare team make treatment decisions. A fair ethical analysis of healthcare practice must not involve axioms biased towards a particular cultural value for it is not possible to derive normative claims from cultural practices.

This paper demonstrates that the three dominant theories in Western medical ethics—utilitarianism, deontology, and principlism—are not biased towards individualism, despite their origins in the Western cultural context. Each theory is assessed individually, paying particular mind to 'autonomy' and potential misinterpretations grounded in cultural biases. Additionally, this paper argues that to investigate a scenario in a non-Western culture using a Western theory of medial ethics is an opportunity to invite discussion between philosophers of different backgrounds, not an attempt to impose cultural norms upon others. Investigation of practices with non-local ethical theories fosters dialogues that can

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contribute to more robust ethical theories, better healthcare practices and, by extension, improved patient care.

I. Introduction

Healthcare legislation and practice vary globally, with nations often opting for antithetical regulation of contentious healthcare practices, such as abortion.[543] Like non-medical legislation, cultural norms influence local healthcare legislation and accepted ethical standards[544] and, by consequence of that influence, it can be argued that all nations aim to draft legislation that guides healthcare practitioners towards morally correct practices. Under this premise, the reason that abortion is legal in some countries yet not others is due to a genuine difference in what is identified as the morally correct state of affairs, i.e., whether a person ought to be able to terminate their pregnancy. The close relationship between culture and determination of moral correctness[545] may lead one to believe that it is improper to analyse practices so strongly influenced by culture using an ethical theory developed independently from the culture of the medical practice in question.

This paper is split into four analytical sections. Section II of this paper explores the influence of cultural dimensions—specifically, collectivism and individualism—on an individual's understanding of moral acts, and how these cultural dimensions may affect information disclosure in healthcare.

[543] Marge Berer, 'Abortion Law and Policy around the World: In Search of Decriminalization' (2017) 19(1) Health and Human Rights Journal 13.
[544] Roger Cotterrell, 'Law in Culture' (2004) 17(1) Ratio Juris 1.
[545] Jonathan Haidt, Silvia H Koller and Maria G. Dias, 'Affect, Culture, and Morality, or Is It Wrong to Eat Your Dog?' (1993) 65(4) Journal of Personality and Social Psychology 613.

The third section explores the 'is-ought fallacy' developed by David Hume to support the argument that within the metaethical framework of non-cognitivism, the belief that it is improper to analyse cultural practices with independently developed ethical theories is unfounded. Section IV expands on that argument by demonstrating that the three major theories of Western medical ethics (utilitarianism, deontology, and principlism) are not inherently biased towards the cultural dimension of individualism nor Western cultural practices. Finally, Section V discusses the advantages of applying ethical theories cross-culturally, with reference to the disclosure of sensitive diagnoses.

II. Collectivism and individualism: cultural states

In 1980, Hofstede (a social psychologist) devised a method of describing cultures that uses six pairs of opposing ideals, including individualism and collectivism.[546] Hofstede's model describes cultures by identifying where a culture lies between each set of ideals,[547] although the discussion in this paper is limited to the individualism-collectivism spectrum. A culture is neither purely collectivistic nor individualistic, and the degree to which a culture is collectivistic or individualistic is not static.[548] In a more individualistic culture, people tend to view themselves as independent from others, with an 'I' mentality being prevalent. Characteristically, individuals in such cultures prioritise their own well-being and/or that of their immediate family, maintain a strong sense of a right to personal privacy,

[546] Geert Hofstede, 'Dimensionalizing Cultures: The Hofstede Method in Context' (2011) 2(1) Online Readings in Psychology and Culture 1.
[547] ibid.
[548] ibid.

and consider their personal beliefs sacrosanct.[549] Individualism is predominant in Western cultures and those heavily influenced by Western European colonialism, including the United States, Mexico, Western European nations, and countries in the 'Global North'.[550] In contrast, a 'we' mentality characterises collectivism, emphasising extended social and familial ties that define the 'in-group,'[551] collective decision-making within the in-group, and a sense of belonging.[552] This dimension is more prevalent in Eastern cultures and countries in the 'Global South'.[553] That being said, recent research suggests that both Eastern and Western cultures are becoming more moderate on the individualism-collectivism spectrum.[554]

To illustrate the individualism-collectivism spectrum and its impact on moral beliefs, take the acceptability of deceptive acts. In their 2014 study, Dmytro *et al* presented scenarios of deception and honesty to 360 children and teenagers;[555] these children were either Han Chinese or Euro-Canadian. The Han Chinese subjects' approval ratings of deception or honesty were more context dependant than those of the Euro-Canadian subjects:

> "[Both Euro-Canadian and Han Chinese] students evaluated lies for collectives less negatively than lies-for-self. Chinese students, however, rated

[549] ibid.
[550] ibid. See also R Stephen Parker, Diana L Haytko and Charles M Hermans, 'Individualism and Collectivism: Reconsidering Old Assumptions' (2009) 8(1) Journal of International Business Research 127.
[551] A group of people with a shared interest or identity (e.g., members of a parish).
[552] Hofstede (n 546).
[553] ibid.
[554] Parker and others (n 550).
[555] Dana Dmytro and others, 'Development of cultural perspectives on verbal deception in competitive contexts' (2014) 45(8) Journal of Cross-Cultural Psychology 1196.

> truths-against-country and truths-against-school less positively than Canadian students."[556]

In addition, Han Chinese subjects were inclined to describe falsehoods that protected collectives, such as their school, and truths that harmed collectives as neither lies nor truths.[557] This is consistent with the hypothesis that in more collectivist cultures, the wellbeing of the in-group is paramount—the truths-against-school were such that they would harm the in-group (members of the school). Whilst Euro-Canadian students interpreted statements as either lies or truths regardless of context, the Han Chinese students' classification of certain falsehoods and truths as neither lies nor truths suggests a different interpretation of the nature of deception. The identification of certain falsehoods as neither lies nor truths by Han Chinese students is consistent with an earlier study comparing the approval ratings of deceptive acts between Chinese and American university students.[558] Like Dmytro, Seiter found that certain acts identified as deception by American students were identified as neither deception nor honesty by Chinese students.[559]

The impact of culture on an individuals' approval of deception and their identification of what qualifies as deception is relevant to healthcare. Importantly, it demonstrates that acceptable types of truths/falsehoods are not necessarily consistent between cultures. The impact of this moral disagreement is evident in settings where physicians from one

[556] ibid.
[557] ibid.
[558] John Seiter, Jon Bruschke and Chunsheng Bai, 'The acceptability of deception as a function of perceivers' culture, deceiver's intention, and deceiver-deceived relationship' (2002) 66(2) Western Journal of Communication 128.
[559] ibid.

culture have sensitive information to disclose to a patient from another,[560] or when comparing standards of practice regarding information disclosure in healthcare settings between cultures. Extrapolating from the discussed studies, a physician's moral approval of the disclosure of sensitive information to a patient may be impacted by their culture. However, to determine whether such a healthcare decision is morally right, one must analyse the situation without relying on culture as evidence for the validity of their argument, as is explored in the following section.

III. Universalism and moral disagreements

This paper approaches ethics from the perspective of universalist moral cognitivism. Universalism asserts there is a single moral reality, whilst moral cognitivism asserts that moral sentences perform the same 'reality representing' function as ordinary sentences by attempting to identify properties. Under moral cognitivism, moral beliefs and statements are truth-apt: the belief that 'murder is bad' is either true or false in the same way that the belief that 'the sun will rise tomorrow' is true or false.

Universalism is necessary for a single ethical theory to be coherently applied to multiple situations. To illustrate the desirability of universalism, the 'Twin Earth' thought experiment—originally proposed by Hilary Putnam[561]—will be presented and discussed. This experiment involves two

[560]Abby R Rosenberg, and others, 'Truth telling in the setting of cultural differences and incurable pediatric illness' (2017) 171(11) JAMA Pediatrics 1113.
[561] Hilary Putnam, 'The Meaning of "Meaning"' in Keith Gunderson (ed), *Language, Mind, and Knowledge* (University of Minnesota Press 1975) 131.

universes: Earth One and Earth Two. Both Earths have a liquid called 'water' with identical physical properties and uses. However, analysing their chemical compounds reveals that the water on Earth One is H_2O, whereas the water on earth two is XYZ. Despite having a name that sounds the same and describes something with the same properties, XYZ is not H_2O and thus, Earth One 'water' is not Earth Two 'water.' This demonstrates that the meaning of the word 'water' is relative to each universe. Therefore, arguments between a person from each Earth as whether XYZ is truly 'water' are a misunderstanding of the other's language; once the relativity of the word usage is clarified, the debate would cease. If a relativist theory of morality is apt, the same must be true of moral debate: the meaning of *good* would be context-dependent.

Such a view is unsatisfactory. There is a sense that one *ought* to act well, and that there is a specific way to do so. When people debate whether an action is *good,* they are debating properties: whether this action qualifies as a *good* action, and whether this action possesses the property of *goodness.* If a debate about morals is merely a debate about semantics or a property with a variable definition, the gravity of the discussion is lost. Similarly, the non-cognitivist approach loses some of the gravity of a moral discussion because, with this approach, moral statements are not truth-apt.[562] The lack of a truth-apt moral reality means that moral statements are closer to attitudes than beliefs.[563] For the non-cognitivist, the statement, 'murder is bad,' can express a non-cognitive mental state (expressivism)

[562] Mark Van Roojen, 'Moral Cognitivism vs Non-Cognitivism' in Edward N Zalta (ed), *The Stanford Encyclopedia of Philosophy* (The Metaphysics Research Lab, Philosophy Department, Stanford University 2018).
[563] ibid.

such as the disapproval of murder, or the prescription, 'do not murder' (prescriptivism).[564] In both cases, some of the weight behind a moral debate is lost: if moral sentences are merely attitudes, they are not truth-apt—no moral statement may be wrong, and moral debate concerns convincing another to share the same attitude only, rather than discovering the truth.

Moral cognitivism holds that moral disagreements revolve around properties, not semantics. Such moral properties need not be tangible for people to engage in discussions. Gibbard's work in *The Reasons of a Living Being*[565] supports the notion that genuine disagreements occur when they concern concepts, allowing for more meaningful debate about the nature of *good* as a concept where there is ultimately a single correct conception. In any case, moral properties cannot be identified as easily as non-moral properties such as velocity or tensile strength. The difficulty encountered when grappling with the concept of *good* results in different cultures developing varying moral theories. Moral differences between cultures represent disagreements about what is identified as *good* or *bad*; the action or state of affairs is either *good* or *bad*, independent of whether it is identified as such.

While cultures reflect how the world *is,* normative ethical theories describe how the world *ought to be*. It is not possible to derive the '*ought'* from the '*is'* in a compelling way, as argued by Hume in *A Treatise of Human Nature.*[566] If,

[564] Mark Van roojen, *Metaethics: A Contemporary Introduction* (1st edn, Routledge 2015) 5.
[565] Allan Gibbard, 'The Reasons of a Living Being' (2002) 76(2) Proceedings and Addresses of the American Philosophical Association 49.
[566] David Hume, *A Treatise of Human Nature* (Clarendon Press 1739) Book III, Part I, Section I.

hypothetically, a group of people murder others with abandon, proceeding from the observation that 'the state of affairs is such that people are murdered with abandon' to the concept, 'this state of affairs is bad,' requires an evaluative premise—that is, the belief that murdering with abandon is wrong. As Hume notes, this evaluative premise is not inherent in plain factual statements such as 'murdering with abandon is the current state of affairs.' So, if a culture endorses murderous actions, it could not be such that murder is simultaneously good in the pro-murder culture and bad in other, anti-murder cultures unless there is no universal cognitivist metaethical reality. Therefore, a cognitivist ethical theory cannot rely on cultural practice as evidence for its validity.

IV. Individualism in western medical ethics

Culture and philosophy are interrelated, but distinct. Western philosophy (those schools derived from the Greek school of thought) has heavily influenced Western culture and *vice versa*, yet philosophical theories must withstand scrutiny absent culture as proof of their validity—as discussed, *ought* may not be derived from *is.* In the context of analysing non-Western medical practice, this means there cannot be cultural individualism internal to the ethical theory being used. The theory cannot be sound and have the axiom, 'individuals are more important than groups,' because the truth of the axiom is unknown. This does not entail forcibly imposing Western philosophical norms upon the analysed cultures. To impose an ethical theory upon others is "to alienate human beings from their own decision-making [and] is to change them into

objects."[567] To reduce humans from moral agents to moral objects is, arguably, impermissible under all three of the ethical theories discussed in this paper. Regardless, practices in other cultures can be subject to scrutiny by Western moral theories. The resulting scrutiny should not serve to impose Western culture or values, but rather invite dialogue with philosophers from those cultures. A more detailed discussion of the separation of culture and philosophy will be provided in a later section.

It is important to note that this paper takes a Western perspective, which means the discussion in this paper is limited to the three main Western ethical theories aforementioned: utilitarianism, deontology and principlism. Furthermore, it is important to consider Quine's statement regarding the evaluation of philosophical theory: "we can not [*sic*] detach ourselves from [a philosophical theory] and compare it objectively with an un-conceptualized reality."[568] This paper will evaluate those moral theories from within their own frameworks to assess whether they manifest an improper preference for Western individualism. The argument advanced is that none of the three theories, when viewed internally, espouse the notion that a person can exist independently of others, or that the 'I' is more valuable than the 'we.' Perhaps this is contrary to appearances: *prima facie*, principlism seems to fall prey to Western individualism, although utilitarianism and deontology are more evidently non-individualistic.

(i) Utilitarianism

[567] Paulo Freire, *Pedagogy of the Oppressed* (Penguin Random House 2007) 58.
[568] Willard Van Orman Quine, 'Identity, ostension, and hypostasis' (1950) 47(22) Journal of Philosophy 621.

Utilitarianism equates 'good' with 'pleasure.' Accordingly, that which maximises pleasure is *good*,[569] though most utilitarian theories qualify that quality as a higher form of pleasure.[570] Mill, for instance, posits that the sought satisfaction ought to be intellectual, as "a beast's pleasures do not satisfy a human being's conception of happiness."[571] Thus, the utilitarian does not use 'pleasure' in the colloquial sense, but as a specific term built on engaging the intellect, imagination, and moral sentiment;[572] the more an activity engages these faculties, the more morally pleasurable the activity is. Moreover, Mill explicitly acknowledges the interconnected nature of humans: "[t]he deeply rooted conception which every individual even now has of himself as a social being."[573] For the utilitarian, there is an explicit demand to act for the benefit of society—one's interests are no more important than those of their fellow humans.[574] Utilitarianism explicitly demands that people do not consider themselves separate from the rest of society.

Modern utilitarian theories can be divided into two camps: act and rule. For the act utilitarian, there are no general proclivities on certain actions. The correctness of an action is determined by calculating the happiness outcomes of that particular action. As such, there is no inherent aversion against killing inasmuch as the act of killing one person to save several others would be considered a good act. Rule utilitarianism

[569] John Stuart Mill and Mary Warnock (ed), *Utilitarianism* (first published 1861, 20th edn, William Collins Sons & Co 1990) 257.
[570] Stephen Nathanson, 'Act and Rule Utilitarianism' (*Internet Encyclopedia of Philosophy*, 2014) <https://iep.utm.edu/util-a-r/> accessed 15 April 2023.
[571] Mill (n 569) 258.
[572] ibid 8.
[573] ibid 287.
[574] ibid 269.

hybridises act utilitarianism and deontology. The rule utilitarian develops a set of rules derived from the evaluation of acts as pleasure maximising or minimising.[575] For the rule utilitarian, acts that decrease pleasure are judged as 'bad.' For instance, denying a child education is bad because it is linked to a failure to maximise pleasure—the child will lose out on intellectual pursuits.

In terms of medical ethics, utilitarianism serves as a counterbalance to individual rights and liberties.[576] Utilitarianism argues that using resources for the benefit of one person at the expense of many is morally wrong. Insofar as individualism is concerned, utilitarianism takes humans as discrete units when evaluating pleasure.[577] Accordingly, utilitarian theory emphasises the importance of individuals, for society is a collective of individuals. The moral calculus inherent to utilitarianism demands recognition of people as individuals, but also the interdependence of their pleasure and pain, and that actions often affect multiple people. In the case of medical decision-making, there is an explicit demand that the patient consider the impact of their care on other people, although there is no demand that the patient makes their decision alone or in conference with their in-group. This allows utilitarianism to be tailored to the cultural context in which it is applied. Another moral theory, deontology, presents a similarly society-oriented view, albeit with a different approach.

(ii) Deontology

[575] ibid 263.
[576] Jharna Mandal, Dinoop Korol Ponnambath, and Subhash Chandra Parija, 'Utilitarian and deontological ethics in medicine' (2016) 6(1) Tropical Parasitology 5.
[577] Mill (n 569) 260.

Deontology is an explicitly autonomy-based moral theory. Like utilitarianism, it recognises the interconnectedness of people. The position held by deontologists can be presented as a series of categorical imperatives (moral laws) deduced through pure reason.[578] Autonomy is central to deontological theories and is explicitly referenced in some categorical imperatives,[579] yet autonomy is not synonymous with individualism. The division between autonomy and individualism is best illustrated by one framing of the categorical imperative which states that it is impermissible to treat a person as a means to an end because all persons are ends in themselves.[580] To be an end in oneself, one must enact autonomy of the will—one must deliberate correctly.[581]

Correct deliberation does not espouse cultural individualism: the results of correct deliberation are that moral rules must be universalisable,[582] making all persons equal. Moral rules, however, are identified *a priori*. Deontology posits that it is possible to perform moral deliberation without experiential knowledge,[583] let alone relying on others' guidance. Although Kant poses that moral deliberation is possible without the agent engaging with other people, the outcomes of deontological deliberation are not individualistic. Ultimately, the maxims entailed by deontology are those which can be universalised and as such, they are maxims which recognise society as integral to humanity.[584] Therefore, for the

[578] Immanuel Kant, *Groundwork for the Metaphysics of Morals* (first published 1785, Yale University Press 2008) 31–41.
[579] Erik Joseph Wielenberg, *Robust Ethics: The Metaphysics and Epistemology of Godless Normative Realism* (Oxford University Press 2014).
[580] Kant (n 578) 55–56.
[581] ibid.
[582] ibid 36–37.
[583] ibid 26.
[584] ibid.

deontologist, it is impossible to hold that morally, 'I am a special exception;' such a statement cannot be universalised. The suggestion that deontology is individualistic in the cultural sense due to the value placed on autonomy mischaracterises deontology.

A deontological theory of medical ethics requires patients to receive support and tools to enable them to act as autonomously as possible. This does not imply a demand for the patient to view themselves as separate from their family, or to ignore their family's needs. A maxim that obliges a person to make decisions as if humans did not interact with one another would not be valid, as it is not universalisable and misconstrues human nature: 'one ought to make decisions as though one does not interact with other moral agents' is a maxim that applies only to a reality where there is a single moral agent. The moral imperative of truth-telling exists, in part, because lying treats other moral agents as objects. If all moral deliberations were made without recognition of the existence of other moral agents, there would be far-reaching consequences for ethics and society. For instance, if there were only one moral agent in the world, the concept of 'theft' could not exist because there would be no other moral agent from whom to steal. Evidently, this is not consistent with the accepted view of reality (that there are many moral agents). Additionally, Aristotle has argued that part of the nature of being human is to be a part of families and societies.[585] Rather than espousing cultural individualism, deontology endorses the idea that all persons are equal, not unlike the principle of justice

[585] Aristotle, *Politics* (Oxford University Press 2009); Aristotle, *Nicomachean Ethics* (Hackett Publishing Company 2014).

in Principlism which requires the consideration of others in decision-making.

(iii) Principlism

This section will argue that it is possible to divorce principlism (as defined by Beauchamp and Childress' four principles of medical ethics) from Western cultural individualism. Beauchamp and Childress' four principles are autonomy, non-maleficence, beneficence, and justice.[586] They define autonomy as the types of actions made by agents, "(1) intentionally, (2) with understanding, and (3) *without controlling influences* that determine the action."[587] The latter point must not be misinterpreted to preclude joint decision-making; rather, the patient in need of assistance must not be forced into a given decision, but be provided the conditions necessary to make the choice themselves. This is not unlike the collectivistic patient who makes the decision by conferring with their in-group. The definition of autonomy is not individualistic as the quantifier 'controlling' emphasises the importance of permitting a patient to deliberate. Rather than requiring a patient to make decisions alone, Beauchamp and Childress wish to illustrate the importance of allowing a patient to make the best possible decision for themselves—a decision which, depending on cultural context, could be to follow the wishes of their in-group.

It is possible to misinterpret the principle of autonomy due to Western cultural biases. Within the theory, a person may act autonomously whilst experiencing influence. Beauchamp and Childress go so far as to argue that "coercion and

[586] Tom Beauchamp and James Childress, *Principles of Biomedical Ethics* (8th edn, Oxford University Press 2019) 104.
[587] ibid (emphasis added).

controlling manipulation are occasionally justified;"[588] after all, controlling influences such as family constraints and obligations are not universally concerning. Such influences are a natural part of life, and Beauchamp and Childress explicitly endorse a respect for autonomy that accepts these influences.[589] That said, it must be conceded that someone who falls prey to the Western cultural norm of individualism may identify non-morally concerning familial influence as morally concerning. However, this is a failure of the agent to correctly deliberate and identify what qualifies as morally concerning; due to cultural indoctrination, this person fails to accurately understand the state of affairs.

Furthermore, the principle of autonomy is not independent of the other three principles: whilst autonomy is significant, it is no more important than beneficence, non-maleficence, or justice.[590] Although Beauchamp and Childress envision a relationship between physician and patient in which the physician treats the patient as an individual rather than a member of a family unit, the physician is not permitted to ignore the patient's existence as a member of a community of 'healthcare users.' The physician must balance the patient's needs with the good of society, not least ensuring the proper distribution of available funds for treatments.

V. Application of a Western ethical theory to a non-Western culture*

[588] ibid 139.
[589] ibid 139.
[590] ibid 141.
* This section is heavily influenced by the works of Paulo Freire

The ethical assessment of a non-Western culture based on the standards of a Western moral theory is not a task to be taken lightly. Culture is a mix of customs and beliefs, some of which are positive and others negative. The culture itself cannot be labelled as good or bad, but the individual actions taken by persons within the culture can be. This intent of advocating for the application of a Western moral theory to a non-Western situation is an assessment of an *individual's* actions (or a single state of affairs) using Western moral theory. An act is not exempted from scrutiny simply because it is traditional, although the context in which the act takes place may demand consideration (unless one strictly adheres to a deontological framework).

To apply a moral theory should never be to impose cultural norms. For instance, a deontologist firmly believes that lying is morally wrong. If that deontologist enters a country and notices that most people tell white lies, it would not be coherent with their moral reality to deem that, because there is a culture of lying, they cannot evaluate the correctness of the lying acts. This deontologist, however, cannot seek to enforce their beliefs upon the citizens; instead, they must engage the citizens in debate over the moral status of lying. The citizens may ultimately conclude that the deontologist's beliefs are faulty, but if the debate is not taken up, the opportunity to learn from one another is lost. If a moral theory is so construed that it is impossible to apply coherently to a different culture, the moral theory fails to do what it ought to: correctly identify 'good,' and how we ought to act. Rather than imposing a moral theory upon another culture, the course of action is to engage in a synthesis between people: to learn from one another.

Many of the concerns about applying a Western theory of medical ethics to a non-Western context are related to the cultural differences that guide practice. As the deception/honesty studies explored in Section II indicate, cultural differences can have significant impacts on what types of disclosure are considered morally acceptable. Given that the goal of medicine is the patient's improved health,[591] decisions about disclosing information must be made with the intention of maximising patient wellbeing. The application of a Western theory to a non-Western culture can highlight these differences and thereby maximise patient wellbeing by challenging the practice, or even providing a framework to challenge the theory. In Kuwait, for instance, it is common for physicians to follow family members' requests to not disclose cancer diagnoses to patients.[592] In such instances where behaviours or standards of practice contravene norms set by a Western theory, there is an opportunity to explore why such practices exist and whether they benefit patients. That said, following such requests is not *necessarily* in violation of theories of Western medical ethics; many deontologists consider some degree of deceit (i.e., through omission) to be morally acceptable.[593] Whether such forms of deceit are morally acceptable in healthcare, however, is beyond the remit of this paper.

The tension that arises from the dispute is an opportunity to explore why certain practices exist and whether

[591] Aristotle, *Nicomachean Ethics* (n 585).
[592] Alomari Qasem and others, 'Disclosure of cancer diagnosis and prognosis by physicians in Kuwait' (2002) 56(3) International Journal of Clinical Practice 215. See also Christina Arnaoutoglou and others, 'Disclosing the truth to terminal cancer patients: a discussion of ethical and cultural issues' (2010) 16(4) Eastern Mediterranean Health Journal 442, 445.
[593] James Edwin Mahon, 'The Definition of Lying and Deception' in Edward N Zalta (ed), *The Stanford Encyclopedia of Philosophy* (The Metaphysics Research Lab, Philosophy Department, Stanford University 2016).

it is appropriate to change them. Analysing cross-cultural differences through the lens of medical ethics allows the separation of judgments deriving from cultural norms from genuine philosophical concerns. In the case of non-disclosure of cancer diagnoses, a genuine philosophical controversy about patient treatment exists: by withholding information, the physician infringes the patient's autonomy, restricts their ability to self-govern, and may decrease the patient's pleasure by denying the patient the opportunity to understand their experience. These concerns are no less important to explore in the non-Western situation than in the Western situation, especially because physicians in every culture pursue the same goal: the improved health of their patients. Analysing practice standards through non-local ethical theories fosters a better understanding of the benefits and pitfalls of accepted practices.

VI. Conclusion

The three popular Western theories of medical ethics are not inherently biased towards the Western cultural ideal of individualism. Nevertheless, it remains possible for a lazy philosopher to interpret these theories through the lens of Western cultural individualism. The term 'autonomy' can be misconstrued as a demand to exist independently from family and society, or as a demand that a person never make a decision that is supported by their in-group. The Millian notion that each person counts as an equal, single unit in the moral calculus can be misinterpreted to suggest that the impact of an event on person A will have no effect on person B. Indeed , a biased interpreter can present these theories in a way that appears to espouse Western cultural individualism, despite their lacking any inherent predisposition for individualism. This is, in part,

why it is crucial to provide individuals from diverse backgrounds the opportunity to engage in philosophical debates. A person from Nottingham may interpret Kant's work differently from a person from Shanghai, and their debate can result in not only a better understanding of the original work, but also a neo-Kantian moral theory more robust than the original.

Like other theories, schools of Western medical ethics can be interpreted with the tone of Western cultural individualism and—without appropriate care given to their study—be presented to support it. When carefully analysed, utilitarianism, deontology, and principlism (the three predominant theories of Western medical ethics) are founded upon philosophical argument independent of culture. When applied to non-Western contexts, these theories allow discussion of philosophical concerns without reliance on cultural norms to explore the causes of concern. From a metaethical standpoint, this paper argues for universalism for universalism of a moral theory and the concepts discussed in therein is necessary for any real moral debate. A relativist theory of ethics leads to a deeply unsatisfying conclusion, whereby moral debate is largely reduced to a matter of coincidental word similarity. Based on the evidence presented that moral reality must be universal, a Western theory of medical ethics may be applied to a non-Western culture. 'Good' is 'good' no matter where the word is spoken, and a truly bad action remains 'bad' regardless of where it is taken.

Maximum Diversion and Minimum Intervention should be the Fundamental Principles of any Youth Justice System

Chandrika Abedin[†]

Numerous young children are encountering the dehumanising and net-widening effects of the adult criminal system—diversionary practices should be implemented to counteract this. The youth justice system ('YJS'), not unlikely a pendulum, swings between welfare and punishment, whilst a middle ground is yet to be established to effectively rehabilitate young offenders. This article explores the development and criticisms of the YJS, arguing maximum diversion and minimum intervention should be the fundamental principles of that system. A child-first, offender-second approach should be adopted, to view children as individuals and incorporate them in the solution, rather than viewing them as the problem. This would reduce the racial disparity and enhance criminalisation of young BAME offenders by decreasing the distance they feel within the system. Creating educational and constructive strategies, and identifying a child's goals will empower young offenders to actively participate in rehabilitation processes and remove the stigmas associated with young offenders. This article concludes that curating welfare-focused diversionary strategies is an appropriate way to address the problems and needs of a child within the YJS.

I. Introduction

The Youth Justice System ('YJS') operates as a pendulum, swinging between welfare and punishment, alternating between harsh and lenient concepts of rehabilitation. As time progressed, these antithetical paradigms of youth justice realities turned to focus on punishment, without reaching an

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accepted middle ground with welfare;[594] this shift in focus impacts recidivism by consequence of labelling children as criminals from a young age.[595] These unfortunate consequences suffered by children within the YJS must be acknowledged for effective reform. To counteract the dehumanising effects of the adult criminal system on children, diversion has been oft-proposed as an alternative to the net-widening effects of any youth justice intervention, such as custody.[596] Indeed, intervention is counter-productive for children and the severity of sanctions increases the number of children becoming involved with systems of control.

As such, the YJS has promoted diversionary approaches as beneficial to target young people involved in crime, although there remain questions as to whether the YJS uses such approaches to the extent that it should. Diverting children from the consequences of formal YJS intervention reduces the risk of offending, that being often enhanced by the severe forms of sanctioning enabled by the YJS.[597] Diversion involves using cautioning as a way to shift children from formal criminal justice sanctions to minimise penalisation; it is activated by the prevailing use of welfare-focused intervention programmes outside of the formal YJS. Diversionary practices have gained a "strong-hold in Western youth justice

[594] Cassandra Long, 'Putting an End to the Punishment and Rehabilitation Pendulum' (*Criminology Student Work*, 2018) Criminology Student Work <https://scholarworks.merrimack.edu/cgi/viewcontent.cgi?article=1001&context=crm_studentpub> accessed 2 May 2023.
[595] ibid.
[596] Stanley Cohen, 'Prisons and the Future of Control Systems: From Concentration to Dispersal' (1997) in Mike Fitzgerald and others (eds), *Welfare in Action* (Routledge & Kegan Paul with The Open University Press 1997).
[597] David Garland, *Punishment and Modern Society: A Study in Social Theory* (Clarendon Paperbacks 1990). See also Lesley McAra and Susan McVie, 'Youth Justice? The Impact of System Contact on Patterns of Desistance from offending' (2007) 4(3) European Journal of Criminology 315.

systems,"[598] as it is suggested that formal intervention is detrimental, disrupting informal care networks and heightening social and structural problems. It appears desirable to focus on maximum diversion to reduce the criminogenic effects that intervention has on children, avoiding the stigmatisation of labelling children from a young age. This developed a form of diversion founded on normalising anti-interventionist principles and a child-centred approach to permit children to make beneficial contributions to society in their adulthood. Shifting the focus onto a child's needs allows clear goals for young offenders to be mapped out using diversionary strategies, thus permitting them to see a future beyond criminalisation, in a safe and nurturing environment. Black, Asian, Mixed-race, Chinese and 'other' children are often seen to be entering the system more than white children, and are over represented in the YJS;[599] further, evidence has suggested children from an ethnic minority background tend to receive longer custodial sentences.[600] Maximum diversion has been recommended to reduce racial disparity and criminalisation as it allows the racial bias occurring from custodial penalisation or court convictions to be removed, and a child to be viewed individually. This allows accurate representation of a child's background, experiences, and values by curating diversionary practices specifically tailored to the child in question.

[598] Kelley Richards, 'Blurred lines: reconsidering the concept of 'diversion' in youth justice systems in Australia' (2014) 14(2) Youth Justice 122.
[599] Youth Justice Board for England and Wales, 'Ethnic disproportionality in remand and sentencing in the youth justice system' (*Youth Justice Board*, 2021) <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/952483/Ethnic_disproportionality_in_remand_and_sentencing_in_the_youth_justice_system.pdf> accessed 29 September 2023.
[600] Bober Yasin and Georgina Sturge, 'Ethnicity and the criminal justice system: What does recent data say on over-representation?' (*House of Commons Library*, 2020) <https://commonslibrary.parliament.uk/ethnicity-and-the-criminal-justice-system-what-does-recent-data-say/> accessed 29 September 2023.

However, to understand diversionary practices and their development over time, one must consider youth justice ideologies, for children are individuals and have different needs. To effectively curate diversionary strategies, one must acknowledge that children will respond differently to criminal justice interventions. Currently, there is a deterministic view of children who offend, dominating the way these children's behaviours and their lives are perceived. A child-centred approach, however, places children first and offenders second. This modern archetype views children as individual, active constructors of their lives. Behaviours and experiences are often misled by the adult-centric approach and socio-structural inequalities that enhance the offender perspectives of a child, therefore diversionary strategies should focus on providing children with child-friendly services and appropriate forms of intervention which portray offending as normalised childhood behaviour, rather than asserting children to a "miniaturised and adulterised YJS."[601] By acknowledging children first and their individualistic natures, welfare or justice-based diversionary practices can be created. A constructive partnership with children can help to identify their needs, problems, external influences on their behaviour, and an appropriate way to address these. This is a positive and inclusionary strategy, enlisting just treatment for children and avoiding the stigmatisation of an offender-first approach. Children are more likely to engage and comply with constructive diversionary practices if the children are viewed as individuals and involved in the solution process to achieve their goals, rather than part of the problem.

This paper argues that maximum diversion and minimum intervention should be the fundamental principles of any YJS. Firstly, it explores how the YJS has developed.

[601] Kevin Haines and Stephen Case, *Positive Youth Justice: Children First, Offenders Second* (Bristol University Press 2015).

Thereafter, it examines the early criticisms of the system that lead to the initial early intervention strategies. This is followed by a discussion as to why there should only be minimum intervention for children due to the individualistic nature of their needs and experiences. As explored in the following sections, children will be more inclined to cooperate with diversionary strategies that view them as individuals, rather than applying a 'one-size-fits-all' mechanism of intervention, often having adverse effects. Finally, this article will conclude with a proposal for maximum diversion to reduce criminalisation and racial disparity within the YJS.

II. Diversion in the YJS

Diversion is often described as using cautionary methods to deter children from offending, but this perspective has changed considerably through the decades.[602] Many arguments for maximum diversion stem from the dehumanising effects of prison and its inability to prevent re-offending.[603] Exposing young people to such severe restrictions at a young age can negatively impact their growth and development into adulthood. Childhood is a person's "most intensely governed sector"[604] of their life—young offenders are predisposed to greater governance. If this governance is performed in a harmful, rather than constructive, manner, it could precipitate further offending. As a result, the governance of children has changed remarkably since the creation of the separate YJS.

[602] ibid.
[603] Vicki Randal, 'Changes in Diversionary Strategies within the Youth Justice System of England and Wales (1908-2010) & Their Consequences for Children & Young People within the Youth Justice System of England & Wales' (Master of Philosophy Thesis, University of Bedfordshire 2011).
[604] Nikolas Rose, *Governing the Soul* (Routledge 1989) 121.

This has developed in agreement with ideological perspectives and judicial considerations.[605]

The 1930s through 1960s saw a child-centred welfarist approach, focusing on the child's needs, not their deeds.[606] This approach appears ideal for modern society inasmuch as society evinces a progressive culture: children endure different experiences, and their needs differ from their peers. These needs are not easily determined by their actions, and thus an approach predicated on their needs is ideal. While a child's offences were punishable under the welfarist approach, they were examined in a welfarist manner which considered that children are not fully cognitively developed.[607]

The 1970s witnessed a hybridised welfare and justice system, although the extent of intervention proved excessive and unfair, leading to a surge in the number of children entering the criminal justice system.[608] Reactions to this "carceral bonanza"[609] led to minimal intervention influenced by a 'back to justice movement'[610] to reduce the net-widening effects of the system.[611] As a result of overt interventionist approaches, children were exposed to the criminogenic effects of socialising with the prison population, which hindered both the child's growth and the efficacy of the system itself. The intention behind intervention was to reduce crime, but it failed to do

[605] Barry Goldson, *Dictionary of Youth Justice* (Willan 2008).
[606] Stephen Case and others, 'Youth Justice: Past, Present and Future' (2015) 13(2) British Journal of Community Justice 99.
[607] ibid.
[608] Vicki Randall (n 603).
[609] Tim Bateman and John Pitts (eds), *The RHP Companion to Youth Justice* (Russel House Publishing 2005) 2–12.
[610] Edwin Schur, 'Radical Non-Intervention: Rethinking the Delinquency Problem' (1974) 80(2) American Journal of Sociology 542.
[611] Elliott Currie, *Confronting Crime: An American Challenge* (Pantheon 1985).

so:[612] Bateman and Pitts argued these high reconviction rates were a product of secure institutions.[613] Consideration should be given to diverting children into less criminogenic provision. This is especially so considering the common academic perception that intervention does not diminish crime—perhaps diversion should be given ascendancy. [614]

Cohen suggested net-widening has often exacerbated the problems diversionary practices were created to resolve, by diverting resources from youths most in need to youths who perhaps need no intervention.[615] That said, one can argue that early intervention strategies promote net-widening significantly more than diversionary practices ever have. Therefore, this argument suggests unnecessary criminalisation of children is counter-productive and indeed, criminogenic.[616] Decreasing youth custody will reduce detrimental effects on vulnerable children,[617] and perhaps using diversion will guide them to a better life, absent long-term harm.

III. Adopting a child-first approach

Children are not fully developed to manage the complexities of life,[618] and require family or school to discipline and deepen

[612] John Pitts, *The New Politics of Youth Crime: Discipline or Solidarity?* (Russell House Publishing Ltd 2003).
[613] Bateman and Pitts (n 609).
[614] Haines and Case (n 601).
[615] Stanley Cohen, *Visions of Social Control: Crime, Punishment and Classification* (Polity Press 1985).
[616] Edwin Lemert, *Human Deviance, Social Problems and Social Control* (Prentice Hall, 1967). See also Lesley McAra and Susan McVie, 'Youth Crime and Justice: Key Messages from the Edinburgh Study of Youth Transitions and Crime' (2010) 10(2) Criminology and Criminal Justice 179.
[617] Barry Goldson, *Vulnerable Inside: Children in Secure and Penal Settings* (The Children's Society 2002).
[618] Phillipe Ariès, *Centuries of Childhood* (Pimlico 1966).

their socialisation.[619] In past, a juvenile 'delinquent' was seen as the result of insufficient parental supervision or a lack of proper education.[620] Notwithstanding this concept being debatable today, a child-first, offender-second approach remains desirable. Applying methods of supervision, review, assessment, and planning to strategically align with the perspectives and opinions of children could create a more engaging and empowering experience for them.

The theme of individuality is particularly significant. Children are individuals and possess different interests and views—this should be reflected in decision-making processes, rather than applying a one-size-fits-all process, especially to children who are not fully developed nor capable of defending themselves. Previously, interventionist practices were pursued to prevent children from participating in offending and anti-social behaviour from an early stage.[621] However, this was developed on the premise that children's behaviour is predictable and led to a problematic—even nonsensical—approach. There appears to be a universal form of intervention being applied to children, yet this neglects the complexities and diverse nature of children's lives, for they are subjected to a multitude of influences.[622] Therefore, implementing a common, one-size-fits-all approach is misguided when paying due mind to the diversity within children's lives.

Concerning diversion, international pressures have shaped youth justice policy development in accordance with minimum standards—key international agreements emphasise

[619] Roger Matthews, *Doing Time: An Introduction to the Sociology of Imprisonment* (MacMillan Press 1999) 154.
[620] ibid.
[621] Stephen Case (n 606).
[622] ibid.

diversionary measures and upholding liberty for children.[623] For instance, Article 3(1) of the UN Convention on the Rights of the Child ('CRC') suggests that the 'best interests'[624] of children should be the 'primary consideration,'[625] whilst Article 12 ensures children have the 'right to voice their views' and have those views heard in accordance with their age and maturity.[626] Despite these generally accepted standards being asserted in the CRC, there remains great disparity between jurisdictions.[627] According to Winterdyk, this is a consequence of youth justice reform being dictated by political agendas, social norms, and public opinion.[628] It is probable that moral panic regarding youth crime increased pressure on policymakers to make certain reforms; more often than not, more punitive. In England and Wales, public and media concerns following Jamie Bulger's killing[629] influenced policy by presenting youth crime to be more prolific than it is:[630] the coverage played on the sense of anxiety regarding youth crime exploited by politicians and the media, deepening the public's wish for more repressive and punitive policies to be implemented within the YJS.[631]

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[623] Annina Lahalle, 'Introduction' in Willie Carney, (ed) *Juvenile Delinquents and Young People in Danger in an Open Environment* (Waterside Press 1996).
[624] UN Convention on the Rights of The Child 1989 ('UNCRC'), Art 3(1).
[625] ibid.
[626] ibid Art 12.
[627] John Muncie, 'The Globalization of Crime Control. The Case of Youth and Juvenile Justice: Neo-liberalism, Policy Convergence and International Conventions' (2006) 9(1) Theoretical Criminology 35–64.
[628] John Winterdyk, 'Juvenile Justice in the International era' in Philip Reichel and Jay Albanese (eds), *Handbook of Transnational Crime and Justice* (Thousand Oaks, Sage 2005).
[629] *Reg v Home Secretary, Ex parte Venables and Thompson* [1997] UKHL 25.
[630] Barry Goldson, 'Viewpoint – The Significance of the Bulger case 20 years on' (*University of Liverpool*, 11 February 2013) <https://news.liverpool.ac.uk/2013/02/11/viewpoint-the-significance-of-the-bulger-case-on-youth-justice-policy/?> accessed 20 June 2023.
[631] ibid.

Despite the aforementioned inclination of international conventions and the like, competing international pressures have created tension between welfarist and punitive political discourse.[632] Winterdyk described the struggle to find a 'balance between accountability and rehabilitation'[633] as an unstable model of youth justice. Such instability may well be detrimental to juveniles within the system—if policymakers struggle to create a system balancing welfare, justice, and accountability, it is likely that the number of children entering the system will not decrease. Previous literature has suggested variations in approaches can be traced to Classical School and Positivism.[634] Classical School posits blame upon the offender and their choices, engendering the belief that the offender should be punished accordingly.[635] On the other hand, Positivism highlights environmental and social factors, placing greater emphasis on the offender, as opposed to the act. This approach is prevention-based, and supports welfarist involvements, focusing on understanding the reasons behind the act.[636]

As a result of these dichotomous schools of thought, the youth justice process has developed into a pendulum swinging between welfare and punitive approaches. Welfarist approaches place emphasis on child protection and reorientate policy and practice towards fulfilling children's rights and needs. By embracing the children-first approach, the YJS can oversee and promote a positive, child-friendly framework for the treatment and development of children. While acting within the boundaries of the formal system, a promotional

[632] Lesley McAra, 'The Cultural and Institutional Dynamics of Transformation: Youth Justice in Scotland, England and Wales' (2004) 35 Cambrian Law Review 23–54.
[633] John Winterdyk (n 628) 458.
[634] Francis Cullen, *Criminological Theory: Past to Present* (6th edn, Oxford University Press 2017).
[635] ibid.
[636] ibid.

diversionary approach employs meaningful, participatory and engaging practices, thereby prioritising children's goals, needs and feelings.[637] Despite the common perception that criminal acts should be punished through a punitive approach, a welfarist children-first approach incorporates intervention practices in a more supportive and suitable manner. This approach enables children to voluntarily express their feelings rather than resorting to compulsion and coercion, as typically seen in prison environments. However, welfare discourse is often challenged by accountability discourse—if a child possesses the rights of citizenship, then they are old enough to take accountability for their actions. At certain ages, children can join the military, consent to sexual interactions, drive a car, all of which demand responsibility. The reasoning follows that if they are of age to perform such actions, then they are of age to accept accountability for criminal actions. As such, accountability is accompanied by blame, often resulting in hard punishment portrayed as 'just deserts.'[638] Nonetheless, accountability should not always incite penal repercussions as although children attain major responsibility in some situations in life, those are subject to prior education specific to those matters; for instance, driving lessons and exams are required before they can drive a car alone, and sexual education in school informs sexual decision-making. It is mistaken to assume a child attains major responsibility by reason of meeting specific ages alone, for it is an ongoing educational process. Hence, hard punishment is misguided in many situations involving children.

[637] Anne Robinson, *Foundations for Youth Justice: Positive Approaches to Practice* (1st edn, Routledge 2014).
[638] Neal Hazel, 'Cross-national comparison of youth justice' (*Youth Justice Board*, 2008) <https://dera.ioe.ac.uk/7996/1/Cross_national_final.pdf> accessed 22 April 2022.

In recent years, policymakers in England and Wales have emphasised personal responsibility, reflecting an overarching approach towards preventing offending.[639] For instance, policymakers have shown support for the progressive diversion model, which prioritises child-focused decision-making and constructive interventions that promote capacity-building and achievement in the aim of reducing the negative outcomes oft-seen in the YJS.[640] By entitling children to personal responsibility and creating a partnership between children and youth justice practitioners, effective consultative and inclusionary diversion strategies can be enforced and the negative consequences created by intervention reduced.[641] In the last ten or so years, there has been a general shift from welfarism to instigating interventions only where necessary and for the shortest duration possible. Such inclinations, however, are hamstrung by the lack of judicial support in England and Wales, which makes it challenging to shift the focus of interventions towards education and rehabilitation for the child, rather than primarily emphasising the offence. Perhaps inspiration should be taken from Czech Republic and Australia, both of which emphasise the importance of reintegrating a child back into the community and restoring positive relationships.[642] Indeed, considering the potential impact of a custodial sentence on a child's integration into

[639] See the Crime and Disorder Act 1998.

[640] Kevin Haines and others, 'The Swansea Bureau: A model of diversion from the Youth Justice System' (2013) 41(2) International Journal of Law, Crime and Justice 167.

[641] Stephen Case and Kevin Haines, 'Risks, rights or both? Evaluating the common aetiology of negative and positive outcomes for young people to inform youth justice practice' (2011) 19(1) Criminology and Social Integration 1.

[642] Helena Válková**,** 'The New Juvenile Justice Law in the Czech Republic' (2004) Conference of the European Society of Criminology, Amsterdam Paper to the European Society of Criminology Working Group on Juvenile Justice' (2004) < https://www.oijj.org/sites/default/files/documentos/documental_2135_en.pdf> accessed 24 April 2022.

society[643] aligns with the concept of minimal intervention. It appears that care, education, and social rehabilitation (maximum diversion) should be at the forefront of the YJS. Indeed, maximum diversion and minimum intervention should be the fundamental principles of the YJS.

IV. Criticisms of the current system

(i) Early intervention

Pearson described the current YJS as 'swamped,'[644] in great part due to an increase in prosecutions for minor offences. This is a result of policymakers' obsession with early intervention, directing attention towards changing young people's behaviour early in their careers.[645] The New Labour governments of Tony Blair and Gordon Brown pushed for crime prevention and risk-led managerialism, suggesting that crime could be pre-empted by targeting risk factors and anti-social behaviour early in childhood.[646] Under Blair, sections 65–66 of the Crime and Disorder Act 1998 undermined diversion by implementing an interventionist system of Reprimands and Final Warnings.[647] This employed a 'two-strikes and you're in court rule,'[648] leading to more children appearing in court for minor offences. In 2022, 13,800 children were cautioned or sentenced, with

[643] Karin Bruckmuller, *International Handbook of Juvenile Justice* (2nd edn, Spinger Cham 2016).
[644] Geoffrey Pearson, 'Youth, Crime and Society' in Mike Maguire, Rod Morgan, and Robert Reiner (eds), *The Oxford Handbook of Criminology* (Clarendon Press 1994).
[645] Jack Straw and Alun Michael, *Tackling Youth Crime: Reforming Youth Justice* (Labour Party 1996).
[646] Kevin Haines and Stephen Case, *Understanding Youth Offending: Risk Factor Research, Policy and Practice* (1st edn, Willan Publishing 2009).
[647] Crime and Disorder Act 1998, ss 65–66.
[648] Barry Goldson, 'Child criminalisation and the mistake of early intervention' (2007) 102(69) Centre for Crime and Justice Studies 27.

8,000 first time entrants to the YJS.[649] Early intervention targets young people supposedly at risk of participating in offences or anti-social behaviour; it can be initiated based on an assessment of risk driven by a pre-judgement of one's character, rather than reacting to the commission of an offence. Labelling children as 'potential offenders' exposes them to formal intervention solely relying on assumptions as to who they are—rather than preventing children entering the system, it criminalises both children and their families. Labelling theory is relevant here as it suggests people will act in ways reflective of how they have been labelled; once the label has been established, it is difficult to remove it. A child is stigmatised as a potential criminal, insofar as they have been labelled as such, therefore they will assume this is how they should act.[650] Often, a child with knowledge of their label may believe this is how they will always be described and see no reason to change this perception. Beyond ethical objections to labelling a child as a potential criminal, the self-defeating nature of intervention strategies that impose such labels results in the creation of more outsiders. Consequently, this form of social control leads to deviance,[651] and generates delinquent identities for children who may not necessarily engage in offending behaviour later. As academics have noted, presuming anti-social five-year-olds will become criminals encourages the criminalisation of children at a young age.[652] Henceforth, opting for minimal,

[649] Youth Justice Board for England and Wales, 'Youth Justice Statistics: 2021 to 2022' (*Youth Justice Board*, 26 January 2023) <www.gov.uk/government/statistics/youth-justice-statistics-2021-to-2022/youth-justice-statistics-2021-to-2022-accessible-version> accessed 20 June 2023.
[650] Howard Becker, *Outsiders* (Free Press 1997).
[651] Lemert (n 616).
[652] Carole Sutton, David Utting, and David Farrington, 'Support from the Start: Working with Young Children and their Families to Reduce the Risks of Crime and Anti-Social Behaviour' (*Department for Education and Skills*, 2004) <https://www.crim.cam.ac.uk/sites/www.crim.cam.ac.uk/files/rb524.pdf> accessed 24 April 2022.

rather than excessive, intervention may be essential in safeguarding young people: intervention decisions should be tailored to each individual to mitigate the risks associated with early intervention.[653] Findings suggest early intensive forms of contact can be more damaging for children—to reduce offending, intervention should be minimal with maximum diversion as a more practical approach to crime prevention.[654]

(ii) Racial disparity

Racial disparity is prevalent within the YJS, whereby black, Asian and minority ethnic young people are subject to racial bias and overt discrimination. Benjamin Kentish found that Black people made up 12% of the prison population, despite representing 3% of the population in England and Wales.[655] As aforementioned, labelling has an adverse effect on children and the use of stigmatising words can harm children's prospects. A word oft-used in discussions about crime is 'gang' which can often signal ethnicity rather than the connection between groups of suspects.[656] The two concepts of gang and ethnicity have been habitually linked in research and the social cultural world; visual representation of this connection is often given by films, television, news and music, as well as in academic research wherein a significant amount of the qualitative work

[653] Lesley McAra and Susan McVie (n 597).
[654] Barry Goldson and John Muncie, 'Rethinking Youth Justice: Comparative Analysis, International Human Rights and Research Evidence' (2006) 6(2) Youth Justice 91–106.
[655] Benjamin Kentish, 'Revealed: How 'racial bias' at the heart of criminal justice system means black people in UK more likely to be in prison than those in US' *The Independent* (08 September 2017) <www.independent.co.uk/news/uk/home-news/black-people-prison-uk-more-likely-us-lammy-review-a7935061.html> accessed 29 September 2023.
[656] Owen Bowcott and Vikram Dodd, 'Exposed: 'racial bias' in England and Wales criminal justice system' *The Guardian* (8 September 2017) < www.theguardian.com/law/2017/sep/08/racial-bias-uk-criminal-justice-david-lammy> accessed 20 June 2023.

on gangs examines 'racial and ethnic homogenous gangs,'[657] particularly focusing on black and Hispanic groups. This creates a narrative suggesting groups of ethnic minority children are automatically gangs, as it is explored in academic research that community and environmental factors play a vital role in portraying why gangs flourish in communities majorly occupied by ethnic minorities.

Such narratives have a material impact in the YJS: young black people are 9 times more likely to be imprisoned than their white peers,[658] resulting in BAME defendants seeing the YJS as a segregation between themselves and white children.[659] Their trust in authority figures and practitioners diminishes, leading to increased resistance to participate. Lammy suggested the YJS should work with local communities closely to reduce public stigmatisation of BAME defendants, as well as reducing the race gap by allowing all children—regardless of race—access to diversionary practices.[660] The link between racial disparity and criminalisation could be a result of the judiciary not being ethnically representative, as only 7% of the judiciary belong to BAME backgrounds[661]—there is a lack of clear understanding on how a child's ethnicity can impact their daily life, and the judiciary's decisions.[662] Indeed, the adopted interventionist practices suggest the YJS lacks meaningful internal oversight and requires external

[657] Adrienne Freng, *Race, Ethnicity, and Street Gang Involvement in an American Context* (Oxford University Press 2019).
[658] ibid.
[659] Alan Travis, 'Young black people nine times more likely to be jailed than young white people – report' *The Guardian* (1 September 2017) <www.theguardian.com/society/2017/sep/01/young-black-people-jailed-moj-report-david-lammy> accessed 29 September 2023.
[660] Lammy Review, 'Lammy Review: final report' (*Gov.uk*, 2017) <www.gov.uk/government/publications/lammy-review-final-report> accessed 29 September 2023.
[661] Bowcott and Dodd (n 656).
[662] ibid.

scrutiny.[663] Embracing diversionary policies that recognise children as unique individuals with diverse influences and backgrounds can foster a nurturing and trusting environment. Such an environment would ensure children of all races feel protected by the justice system and are more willing to cooperate and participate in rehabilitation methods. To achieve this aim, the YJS could increasingly recruit BAME adults. This way, children could have a trusting figure who understands their way of life, and it could help prevent criminalisation based on rase.

(iii) The age of criminal responsibility

The low age of criminal responsibility is yet another controversial aspect of the YJS. Maximum diversion seeks to divert children from the harsh realities of intervention, imprisonment, and the consequences of socialising within the prison environment. However, the low age of criminal responsibility leads to the involvement of children in interventionist practices from an early age. By consequence, maximum diversion is most desirable. In England and Wales, the age at which a child can be prosecuted for a criminal offence is set at 10 years old. This is low by European standards: for instance, the age of criminal responsibility in Sweden is 15, and that in Germany is 14. Previously, the doctrine of *doli incapax* prevented a child under 14 being held criminally responsible if the prosecution could not prove they knew their actions were seriously wrong. The Crime and Disorder Act 1998 abolished *doli incapax*,[664] meaning the YJS no longer has any device to differentiate between serious offences and playground bullying behaviour, such as stealing

[663] ibid.
[664] Crime and Disorder Act 1998, s 34.

lunch money.[665] With the 1998 Act, the range of situations in which children could be held in custody expanded, leading to more children facing court proceedings and custody from the age of 10. As a result, their childhood vulnerabilities and moral incapacity are neglected, to their detriment.

Children may possess a basic moral understanding, but may not grasp the consequences of their actions until they reach full maturity. A child cannot defend themselves in a criminal court, nor do they have the capacity to comprehend the severity of their actions—a child's Article 6 right to a fair trial is endangered.[666] By contrast, it is clear that UN enactments seek to divert children to a more positive life: Article 40(1) of the CRC recognises the significance of a child's age and promotes children's reintegration into society to establish a positive role.[667] In any case, an individual is considered an adult once they reach the age of 18, yet certain defendants transition into adulthood during the criminal process. Currently, defendants are treated in accordance with their age when they first appear in court. Therefore, in 2021, Rob Butler MP proposed a bill to guarantee that young people who commit crimes before turning 18 would continue to be treated within the YJS.[668] This would enhance a young person's chance of rehabilitation, for they do not gain maturity suddenly upon turning 18; there is no watershed. Meanwhile, children under 18 can be diverted away from court disposal but upon turning 18, this option is no longer available, regardless of the age at which they committed the

[665] Justice, 'Youth Justice' (*Justice*, 2022) <https://justice.org.uk/youth-justice/> accessed 21 April 2022.
[666] Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention of Human Rights), Article 6.
[667] UNCRC, Art 40(1).
[668] Maeve Keenan, 'Youth Justice: Is reform on the way for young people who turn 18 while in the criminal justice system?' (*Kingsley Napley Criminal Law Blog*, 2021) <www.kingsleynapley.co.uk/insights/blogs/criminal-law-blog/youth-justice-is-reform-on-the-way-for-young-people-who-turn-18-while-in-the-criminal-justice-system> accessed 19 April 2022.

offence. The issue lies in delays: as the CPS does not prioritise youth cases, cases are often delayed for so long that a child will be 18 by the date of the trial, despite being 17, even 16, when the crime was committed.[669] This can have a detrimental impact as they will be tried as an adult and the courts will not offer the constructive diversionary practices that benefit them cognitively. Instead, they are an adult in the eyes of the law, thereby denying young people the justice they deserve.[670]

The ambiguity of a criminal investigation—particularly when accompanied by delays—can have a detrimental impact on a child's formative years. Adolescence is a crucial period marked by substantial maturation and cognitive development. The uncertainty surrounding a criminal verdict hinders children from learning and developing significant personal and emotional characteristics, ultimately impacting their future.[671] It seems necessary to pass the aforementioned bill to reduce the number of children entering the system, specifically by ensuring young people who commit crimes before turning 18 are treated in the YJS, regardless of the date of trial. Consideration should be given to the development of children in their formative years and the individualistic nature of their development and learning from their surroundings. By prioritising the best interests of children and recognising their capacities and rights, child-focused approaches can be created through informed decisions. Similarly, recognising the structural barriers created by the low age of criminal responsibility allows for the establishment of a constructive and empowering relationship with children,

[669] ibid.
[670] ibid.
[671] Suzanne O'Rourke and others, 'The development of cognitive and emotional maturity in adolescents and its relevance in judicial contexts' (S*cottish Sentencing Council*, February 2020) <www.scottishsentencingcouncil.org.uk/media/2044/20200219-ssc-cognitive-maturity-literature-review.pdf> accessed 29 September 2023.

nurturing their pro-social identity and development.[672] Diversionary practices engage children or young offenders within education and rehabilitate them to make positive contributions and succeed in society amongst their peers. Maximum diversion should be fundamental to the YJS to promote a child's human rights and give them best chance to flourish in society.

V. Promoting positive youth justice and recognising the individualistic nature of children

A key theme lies in the individualistic nature of children: each child is unique, but is seen as incomplete.[673] Children need assistance to grow into mature, fully discerning adults. The YJS holds great power through diversionary practices to mould vulnerable children into positive members of society. Children see the world differently from adults and are actively building knowledge of their surroundings,[674] hence the best way to decriminalise children is to view situations from their perspective. Sentencing children is a difficult process for judges and yet, custody should be the last resort, even for grave offences. Paragraph 4.10 of the sentencing guidelines for children suggests that consideration should be given to a child's emotional and developmental age, as well as their chronological age.[675] This treats children as individuals, applying an appropriate reduction to their sentence. Children of the same age can have different levels of maturity; this is due

[672] Stephen Case and Ann Browning, 'Child First Justice: The research evidence-base' (*Loughborough University*, 2021) <https://yjresourcehub.uk/images/Evaluation%20Library/YOT_Talk_Full_Report_European_Journal_of_Criminology_March_2021.pdf> accessed 20 June 2023.
[673] Berry Mayall, 'The sociology of childhood in relation to children's rights' (2001) 8(3) The International Journal of Children's Rights 243–259.
[674] Jane Piaget, *Play, dreams and imitation in childhood* (WW Norton Company 1956).
[675] Sentencing Council, 'Sentencing Children and Young People' (*Sentencing Council*, 2017) para 4.10.

to environmental factors, familial relationships, and cognitive processes.[676] Learning theories can develop our understanding of these factors and help establish a causal connection with sentencing decisions for children.

Skinner observed that behaviour is influenced by the environment, and specific behaviours are reinforced differently.[677] Children should differentiate between rewarded and punishable behaviour,[678] yet some environments reinforce criminal acts and attach apathetic consequences to that behaviour. When a child observes the behaviour within these environments, they often imitate this based on the consequences of the actor's behaviour.[679] The principles of behaviourism are useful in highlighting the link between the brain's responses to rewards and repeated actions. However, Ballard argued that behaviourism as an educational approach has its limitations since it fails to account for individual needs such as disability, mental capacity, and environmental influences, making it challenging for all to learn equally.[680] Therefore, Taylor advocated an increased pressure on teachers to implement differentiation in the classroom.[681] This applies equally to the proposal for maximum diversion and minimum intervention. Acknowledging that not all children can learn effectively through a universal behavioural method—and recognising that a child's brain responds well to positive reinforced actions—diversionary strategies can be developed to incorporate both principles. Behaviourism demonstrates that children are unique individuals who learn from their

[676] Burrhus Frederic Skinner, 'Operant Behaviour' (1963) 18(8) American Psychologist 503.
[677] ibid.
[678] ibid.
[679] ibid.
[680] Keith Ballard, 'The Limitations of Behavioural Approaches to Teaching: Some Implications for Special Education' (1987) 34(3) The Exceptional Child 197.
[681] Sasha Taylor, 'Contested Knowledge: A Critical Review of the Concept of Differentiation in Teaching and Learning' (2017) 1 Warwick Journal of Education 55.

environment. Therefore, detailed investigations into these factors should be conducted before sentencing, aiming to encourage more rehabilitative sentences. Take *JRO,* for instance, where a 13-year-old was charged with rape and other aggravating offences. Before his sentence, he was placed in a centre for young people to undertake education and therapeutic work having demonstrated harmful sexual behaviour.[682] This case and the success of the measure had a positive impact to encourage the use of rehabilitative sentences as it demonstrates that even in severe circumstance like rape, children will benefit more from educational and reconstructive measures. Imposing custodial sentences, even for grave offences, appears inappropriate for children, particularly those under 14. Utilising institutions that can constructively address their offending behaviour and cater to their specific needs seems more beneficial. The International Juvenile Justice Observatory conducted research to explore alternatives to custody for young children; this included intensive and remand fostering programmes with core minimum guidelines and practices specifically designed for young people.[683] The Observatory's research indicates that young offenders have an increased need for "education, support and integration into society and community."[684] By enabling foster carers to play a role in empowering and educating children, a positive social identity can be cultivated, addressing their offending behaviour as well as personal needs. This in turn can decrease anti-social behaviour and the opportunity to re-offend. Children's behaviours and ideologies are not set in stone for they are actively learning—a child who commits a grave offence, such as rape, may yet change their outlook and understanding. With

[682] *Regina v JRO* [2022] EWCA Crim 85.
[683] International Juvenile Justice Observatory, 'Alternatives to Custody for Young Offenders' (*International Juvenile Justice Observatory*) <www.oijj.org/en/our-work/research/highlighted-research-projects/alternatives-to-custody/> accessed 20 June 2023.
[684] ibid.

the right diversionary and rehabilitative practices, they can be diverted from criminal behaviour. Custodial sentences prevent active understanding of the world and stunt cognitive growth by excluding them from their learning environment. Accordingly, cognitive capacity and developmental age should be taken into account before sentencing, as the most effective means of decriminalising children is through constructive teaching and guidance away from criminal behaviour.[685] This approach proves more beneficial than early intervention or custodial sentences, which may stigmatise them as 'criminals.'

VI. Maximum diversion

The YJS aims to ensure children live a "safe, crime-free life and make a positive contribution to society."[686] Priority should be given to a child's best interests and constructive endorsement of their potential. To achieve this, children in the YJS should undergo a thorough assessment that focuses on their strengths, weaknesses, and social identity. This ensures that a child's voice is heard so they can actively participate in the process, and it also builds a trusting relationship. If the purpose is to find an outcome that best serves the child, then their broader context should be accounted for. The criminalisation process, however, is often exclusionary, particularly the penal aspects.[687] Thus, the logic behind criminalisation appears counteractive in addressing problematic behaviour, hence why maximum diversion is

[685] Ministry of Justice and Youth Justice Board for England and Wales, 'Standards for children in the youth justice system 2019' (*Gov.uk*, 2019) <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/957697/Standards_for_children_in_youth_justice_services_2019.doc.pdf> accessed 29 April 2022.
[686] ibid.
[687] Traci Schlesinger, 'Decriminalizing racialized youth through juvenile diversion' (2018) 28(1) Future of Children 59.

favourable as it takes a proactive role in reversing the negative implications of criminalisation. Diversion advocates for children's rights and the ability to articulate their needs into constructive approaches. It is child-focused to successfully maintain desistance and empower children. Children require adult nurturing and education to flourish and develop: youth justice resources should be diverted into building cohesive communities[688] and restoring trusting relationships with adults in their lives.

The adversarial process poses a concern for children, given their developmental limitations that hinder their ability to cope with the emotionality and invasive examination,[689] *ergo*, it does not seem fair nor useful to put a child through the court and custodial process. The intended outcome of the YJS is to desist children from crime; it is counter-productive to engage them in traumatic court processes and exclude them from society. Therefore, increasing funding to out-of-court disposals would enhance children's emotional and cognitive competence by imparting problem-solving and anger management techniques. Child-skills training and therapy can positively reinforce productive behaviour and negatively reinforce anti-social and offensive behaviour.[690] These diversionary practices can be individualised to meet young people's specific needs.

Studies have demonstrated that the distance children feel with the YJS and the importance for their voices to be

[688] Lesley McAra and Susan McVie, 'Maximum Diversion and Minimum Intervention: An Evidence Base for Kilbrandon' (2014) 2(3) Scottish Justice Matters 21.
[689] Janet Weinstein, 'And Never the Twain Shall Meet: The Best Interests of Children and the Adversary System' (1997) 52 University of Miami Law School 80.
[690] Andy Ross and others, 'Prevention and Reduction: A review of strategies for intervening early to prevent or reduce youth crime and anti-social behaviour' (*Gov.uk*, 2010) <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/182548/DFE-RR111.pdf accessed> accessed 5 May 2022.

heard are considered in how the system affects their life.[691] Deakin purported negative labels (e.g. 'risky' or 'offender') create a cyclical process of stigma and interacts with social inequalities, ultimately damaging children's life chances.[692] Young people understand and experience stigma in different ways and often will respond through anti-social behaviour or by re-offending, creating a need for minimal, necessary, positive and non-stigmatising intervention. Stigmatising children from a young age can inhibit their positive engagement in wider society and limit their growth and access to valuable future opportunities—while some children are able to defy the labels imposed upon them, not all are capable of doing so. Therefore, labels should not be imposed upon children as to provide a safe environment for children to express their opinions and feelings. This can be done by reducing the use of risk-management techniques, including enforcement and surveillance.[693] This would reduce the sense of detachment that children feel towards the YJS and discourage their reluctance to participate in proactive methods that foster empowerment and enable children to evolve into contributing members of society. By recognising the complexities of stigma and the effect it has upon policies and practices, punitive interventionist methods can be minimalised in favour of more individualised policies that seek to protect children from disastrous prospects.[694] In addition to stigma, racial disparity within the YJS exacerbates this disconnection, as children from ethnic minority backgrounds often experience more police intervention based on their skin colour. Consequently, there are more black and Asian children entering

[691] Skinner (n 676).
[692] Case (n 606).
[693] Jo Phoenix and Laura Kelly, ''You have to do it for yourself': Responsibilization in youth justice and young people's situated knowledge of youth justice practice' (2013) 53(3) British Journal of Criminology 419.
[694] Tracy Shildrick, 'Lessons from Grenfell: Poverty propaganda, stigma and class power' (2018) 66(4) The Sociological Review 783.

the system and receiving harsher court sentences than white children.[695] Therefore, the YJS must deliver cultural responses to support ethnic minority children, following Lammy Recommendation 31 which suggests that smaller organisations should specifically target the needs of ethnic minority children[696] (for example, the Alliance of Sport uses physical activity to engage and divert children).[697] If children feel they are more likely to be criminalised by authorities, they will feed into the stigmatisation and act adversely as a result. Hence, the recurring problem with early intervention: labelling vulnerable children, which foreseeably directs them onto a criminal career. Hence, maximum diversion should be prioritised and awarded sufficient funding to allow young people to flourish and become rewarding members of society.

VII. Conclusion

In conclusion, maximum diversion and minimum intervention should be the fundamental principles of any YJS. Diversion provides better outcomes for children and keeps them safe. It is clear that a balance must be made between welfare and punishment in order to rehabilitate young offenders and offer them a better quality of life. Interventionist strategies have been undertaken by policymakers, and it is clear that these are having an adverse effect by stigmatising vulnerable children.

For the YJS to flourish and achieve its goal of helping and protecting children, it must accept the individualistic nature of children and the cognitive development they are

[695] Youth Justice Board for England and Wales, 'Understanding racial disparity' (*Gov.uk*, 2021) <www.gov.uk/government/publications/understanding-racial-disparity> accessed 25 April 2022.
[696] Lammy Review (n 660).
[697] Youth Justice Board for England and Wales (n 695).

undertaking. Indeed, the YJS should adopt a child-first, offender-second approach, incorporating children in the solution by constructively creating outcomes and learning exercises to empower young offenders. Viewing children as the solution, rather than the problem, actively encourages them to engage in the rehabilitative process, rather than charging them with custodial sentences. By contrast, stigmatisation founded in labelling children as potential offenders excludes them from the process, and risks increasing recidivism. Therefore, by identifying children's future goals and allowing them to make positive contributions to society, it reduces the criminogenic effect intervention has on children.

Policymakers possess the opportunity to shape young people and help them avoid the criminal justice system through rehabilitative sentences and learning opportunities. This includes reducing the racial disparity within the system, where it appears ethnic minority children are often seen to be entering the system more than white children. Children from certain communities are often pre-conceived as young offenders based on their cultural and social heritage but by viewing children individually and accurately accounting for their background, familial experiences, and values, diversionary practices can be tailored to each individual child. This aids the reduction in racial disparity and removes the racial bias from custodial penalisation and convictions.

Maximum diversion should be the central focus of the YJS in the aim of nurturing young people and delivering justice. Young people are the future—more should be done to build a society that enhances them and directs them towards a better way of life.

The European Convention on Human Rights: An Ineffective Way to Tackle Destitution

Anthea Siew Yu[†]

Destitution, also known as extreme poverty, is a crucial human rights issue, for destitution violates the human rights and dignity of the destitute. The number of estimated households experiencing destitution in the United Kingdom ('UK') is alarmingly high, demonstrating the urgent need to address this issue. In the UK, the principal means of protecting human rights and dignity is the Human Rights Act 1998 which incorporated the European Convention of Human Rights, the focus of this article. This article aims to examine the effectiveness of the ECHR in tackling destitution, both directly and indirectly, with reference to previous case law on destitution. This article argues that the ECHR is ineffective in lifting the destitute out of destitution due to its inadequate protection of economic, social and cultural rights ('ESCRs'). This article then explores reforms which might mitigate the shortcomings of the ECHR; namely, requiring the state to prioritise the issue of destitution and take immediate actions to tackle that issue by increasing focus on ESCRs, and/or creating an explicit right to be free from destitution in domestic law.

I. Introduction

Destitution has been an alarming issue in the UK, even before the COVID-19 pandemic. In 2016, the Joseph Rowntree Foundation published a report suggesting that destitution is increasing in the United Kingdom ('UK'), and that the state must take steps to tackle destitution.[698] In terms of legal means, the ECHR remains the foremost mechanism of tackling

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[698] Suzanne Fitzpatrick and others, 'Destitution in the UK' (*Joseph Rowntree Foundation*, 27 April 2016) <https://www.jrf.org.uk/report/destitution-uk> accessed 2 April 2022.

destitution; indeed, destitution undermines human dignity, which forms the basis of that convention.

This paper begins by offering a definition of destitution, and exploring its link to human rights. Upon that basis, the paper critically examines the ECHR's effectiveness in tackling destitution by examining the Convention from two perspectives. First, this article explores the rationale and basis for use of the ECHR to tackle destitution, and analyses its overall effectiveness in that pursuit within the UK. In contrast, the second section examines how civil and political rights in the ECHR—specifically, Article 3 and Article 8—can be used to indirectly tackle destitution, and their efficacy in doing so. In light of these perspectives, this article concludes that the ECHR is ineffective in tackling destitution. Given that inefficacy, the paper recommends that the UK increase its focus on economic, social and cultural rights ('ESCRs'), and create an explicit right to be free from destitution in domestic law. It is necessary to ensure that destitution in the UK is tackled effectively, as the insufficiency of the ECHR undermines human rights and human dignity.

II. Destitution and human rights

Traditionally defined, a person experiences destitution if they are not working and must rely on charities, alms, and welfare programmes to survive,[699] although the definition of destitution has changed over time. The Joseph Rowntree Foundation stated that a person experiences destitution if (i) they lack two or more of the six essential items (shelter, food, heating, lighting, clothing and footwear, and basic toiletries) or (ii) their income

[699] Partha Gangopadhyay, Sriram Shankar, and Mustafa Rahman, 'Working Poverty, Social Exclusion and Destitution: An Empirical Study' (2014) 37 Economic Modelling 241.

is extremely low such that they are unable to purchase the six essentials themself.[700] For those subject to the Immigration and Asylum Act 1999 (asylum seekers, for instance), the Act defines destitution in a broader sense. If they cannot access adequate accommodation or meet other essential living needs, they are considered destitute, which in turn gives rise to a statutory duty incumbent on the state to lift them out of destitution; this will be discussed further when analysing the effectiveness of Article 3.[701] Per the Joseph Rowntree Foundation, there were roughly 2,388,000 people experiencing destitution in the UK in 2019 (before the outbreak of COVID-19), and that figure represented a 35% increase from 2017,[702] highlighting the gravity of destitution in the UK. It is most likely that Brexit and the outbreak of COVID-19 have worsened the rate of destitution as many individuals have lost their jobs and sources of earnings.[703]

Experiencing destitution, as so many in the UK do, undermines human rights and human dignity.[704] Skogly, amongst others, claimed that destitution arises due to the violation of a range of rights,[705] especially the denial of economic, social and cultural rights ('ESCRs'), which are directly related to destitution.[706] For example, if the right to an adequate standard of living and the right to social security were

[700] Fitzpatrick and others (n 698).
[701] Immigration and Asylum Act 1999, s 95(3).
[702] ibid 3.
[703] Luke Graham, 'Destitution as the Non-Realisation of Economic, Social, and Cultural Rights' (*justfair*, 15 December 2020) <https://justfair.org.uk/destitution-as-the-non-realisation-of-economic-social-and-cultural-rights/> accessed 10 April 2022.
[704] Mark Simpson, '"Designed to reduce people…to complete destitution": human dignity in the active welfare state' (2015) EHRLR, 1, 66–67.
[705] Sigrun Skogly 'Is there a right not to be poor?' (2002) 2 (1) Human Rights Law Review 65. Note that Skogly focuses on poverty, not destitution, but that her arguments can be extended to destitution.
[706] Luke Graham, 'Destitution as A Denial of Economic, Social and Cultural Rights: Addressing Destitution in The UK Through a Human Rights Framework' (PhD Thesis, Lancaster University 2011) 257.

adequately protected, destitution would not occur. Indeed, if human rights are said to be protected by the state, destitution can be avoided.

III. The turn to the ECHR

The Council of Europe created the ECHR to provide greater unity between the member states, and to maintain and further realise the fundamental rights of human beings.[707] The UK ratified the ECHR in 1951,[708] and introduced the Human Rights Act 1998 to incorporate the ECHR into domestic law; thereby, the courts are required to comply with the ECHR "so far as it is possible to do so."[709] The ECHR was drafted after World War II when the protection of liberty was paramount due to the mass killing and widespread disregard for human dignity during the war—its primary purpose was to protect civil and political rights.[710] As a comparison, the African Charter on Human and Peoples' Rights ('ACHPR')—drafted much later, in 1981—focuses more on ESCRs. The importance of that greater focus and protection of ESCRs cannot be understated, as the ACHPR implicitly requires the state to protect the citizens' right to adequate food.[711] If the right to adequate food is adequately protected, that protection will help lift the destitute out of destitution, and thus protect their human dignity.

Insofar as the ECHR focuses on civil and political rights and provides only limited protection for ESCRs, perhaps tackling destitution was not the purpose of the ECHR. Indeed,

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[707] Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention of Human Rights).
[708] Bernadette Rainey, *Concentrate Human Rights Law* (4th edn, Oxford University Press 2018) 16.
[709] Human Rights Act 1998, s 3.
[710] *N v The United Kingdom* App no 26565/05 (ECtHR, 27 May 2008) [24].
[711] African Charter on Human and People's Rights.

the ECHR does not include the explicit right to be free from destitution.[712] That said, the UK has ratified other international treaties which prioritise ESCRs and could tackle destitution directly and more effectively, such as the International Covenant on Economic, Social and Cultural Rights ('ICESCR'), yet those treaties are not incorporated into domestic law and thus have little impact on the domestic courts. Indeed, insofar as the UK does not incorporate most ESCRs into domestic law, they are persuasive to domestic courts, not binding.[713] Absent any direct legal means of tackling destitution, claimants can rely only on the ECHR to challenge destitution, despite there being no explicit right to be free from destitution. That reliance, however, is a particular issue in the UK given the ECHR's lack of any explicit right to be free from destitution, and consequent absence of direct means to challenge destitution. The lack of alternative statutory or common law protection against destitution is a worrying aspect of the legal framework in the UK.[714]

Such a focus inattention to ESCRs has invoked criticism from some quarters; not least, Marxism. Marxists have criticised the 'liberal understanding' of human rights, claiming that the rights falling within that understanding are civil and political in nature, and hence lack the focus of ESCRs.[715] That claim is not without merit: claimants are required to rely on the civil and political rights in the ECHR to tackle destitution indirectly. This reflects the ineffectiveness of the ECHR in tackling destitution: claimants may challenge destitution only via a 'backdoor' mechanism. Besides that, it shows that the claimant can rely on the ECHR to challenge

[712] European Convention on Human Rights (n 707).
[713] Ilias Bantekas and Lutz Oette, *International Human Rights Law and Practice* (3rd edn, Cambridge University Press 2020) 429.
[714] Skogly (n 705) 63.
[715] Darren O'Byrne, 'Marxism and Human Rights: New Thoughts on an Old Debate' (2019) 24 (3) The International Journal of Human Rights 638, 641–642.

destitution only if their destitution violates civil and political rights also. As illustrated hereafter, it is extremely difficult to prove that experiencing destitution has violated civil and political rights. Beyond the inefficacy of those 'backdoor' mechanisms, the ECHR is ineffective in tackling destitution inasmuch as claimants can challenge destitution indirectly only.

IV. The (in)effectiveness of Article 3 and Article 8 in tackling destitution

(i) Article 3 of the ECHR

To indirectly challenge destitution, the claimant may choose to rely on Article 3. That provision prohibits torture, and inhuman or degrading treatment or punishment.[716] That prohibition is absolute and unqualified, meaning derogation is impermissible, and a violation may never be justified by the state, even where public interest is involved.[717] Hence, interference with Article 3 is strictly prohibited, and the state cannot exercise the doctrine of margin of appreciation in interpreting and applying that provision.[718]

To successfully rely on Article 3, the claimant must satisfy certain requirements. Firstly, claimants must prove that the government policy or administrative decision they sought to challenge constitutes 'treatment.'[719] Lord Scott suggested that a mere failure by the state to provide support in order to

[716] David Harris and others, *Law of the European Convention on Human Rights* (4th edn, Oxford University Press 2018) 237.
[717] ibid.
[718] *R v Secretary of State for the Home Department ex parte Adam, Tesema and Limbuela* [2005] UKHL 66 [55].
[719] Harris and others (n 716) 238.

prevent destitution is insufficient to constitute 'treatment.'[720] In other words, experiencing destitution alone does not suffice for 'treatment' where a 'positive action' by the state is required.[721] Secondly, the 'treatment' must meet the minimum level of severity to be considered degrading.[722] The 'severity threshold' will be determined on a case-by-case basis,[723] and the courts have applied a high threshold in determining whether the 'treatment' was severe enough to engage Article 3.[724] The High Court claimed that experiencing destitution itself does not meet the minimum level of severity, and more is needed to reach the 'severity threshold' of Article 3.[725] These hurdles—insurmountable by destitution alone—indicate that Article 3 is ineffective in tackling destitution as it increases the obstacles claimants face not only by requiring they prove that they experienced destitution, but also by failing to recognise destitution as an actionable harm. That being said, Article 3 is a very powerful tool in tackling destitution if the 'severity threshold' can be successfully proven—due to its absolute and unqualified nature, the courts may not accept any justification for the violation of Article 3, i.e. the cause of destitution.

There are two cases in which the claimant successfully engaged with Article 3 to indirectly challenge destitution. Firstly, in the case of *Adams, Tesema and Limbuela*,[726] the claimants were asylum seekers denied social security and prohibited from working legally in the UK, hence they experienced destitution.[727] The court held that the combination of these two policies constituted 'positive action,' which could

[720] *Limbuela* (n 718) [66].
[721] ibid [56].
[722] Harris and others (n 716) 238.
[723] ibid.
[724] *N v UK* (n 710) [43].
[725] *R (W, A Child by His Litigation Friend J) v The Secretary of State for the Home Department* [2020] EWHC 1299 (Admin) [42].
[726] *Limbuela* (n 718).
[727] ibid.

constitute 'treatment.'[728] Secondly, in *MSS v Belgium and Greece*,[729] an Afghan asylum seeker was deported to Greece by Belgium and successfully claimed that the detention and living conditions were so inadequate as to constitute inhuman treatment.[730] Despite their success, these cases demonstrate that claimants can only rely on Article 3 to challenge destitution in limited circumstances. Further, it is telling that both examples of successful cases related to asylum seekers, as it suggests this category of claimants may be more likely to successfully engage with Article 3 in challenging destitution. As Heri argues, asylum seekers are one category of 'vulnerability' which has often influenced the ECHR's interaction with destitution.[731] Statutory provisions protect asylum seekers as they are treated as a vulnerable group under the state's control─ they are incapable of gaining income and hence dependent on the state. Their relationship with the state invokes a responsibility incumbent on the state to prevent them from experiencing destitution to the extent of avoiding non-compliance with the ECHR, as required in the Asylum and Immigration provisions.[732] Hence, the state affords greater protection, and the courts are much more willing—albeit still not especially willing—to accept that the state's action constitutes 'treatment' and meets the 'severity threshold' when asylum seekers are involved. However, most people are not subject to the Asylum and Immigration provisions and therefore cannot benefit from the state's responsibility to prevent their destitution, making it unlikely for the general public to succeed in engaging with Article 3 in destitution cases. Such a hurdle indicates that Article 3 is ineffective in tackling destitution.

[728] ibid [56].
[729] App no 30696/09 (ECtHR, 21 January 2011).
[730] ibid.
[731] Corina Heri, *Responsive Human Rights Vulnerability, Ill-treatment and the ECtHR* (Hart Publishing 2021).
[732] *Limbuela* (n 718) [67].

(ii) Article 8 of the ECHR

Article 8 provides both a positive and negative obligation for the state to protect the right to respect for private and family life.[733] The scope of protection of Article 8 is relatively broad, for the circumstances in which the state is obliged to act under Article 8 are non-exhaustive and the European Court of Human Rights has increasingly explored such circumstances.[734] Turning to the application of Article 8 here, destitution is usually related to social security. If the state adequately realises the right to social security, it will prevent destitution by ensuring a sustainable income and adequate standard of living.[735] However, as the ECHR does not protect the right to social security, claimants can rely on Article 8 to challenge destitution in limited circumstances. Namely, the social security policy in question must be incompatible insofar as it interferes with three of Moreham's five categories of interest protected by Article 8: the "freedom from interference with physical and psychological integrity," "the right to be free to develop one's identity" and "the right to live one's life in the manner of one's choosing."[736]

Article 8 does not give the state a general duty to protect the claimant's right to a home, health treatment or financial

[733] European Convention on Human Rights (n 707).
[734] Bernadette Rainey, Pamela McCormick and Clare Ovey, *Jacobs, White, and Ovey: The European Convention on Human Rights* (8th edn, Oxford University Press 2021) 407.
[735] Luke Graham, 'Using Economic, Social and Cultural Rights to Tackle Destitution in the UK' (*justfair*, 19 February 2021) <https://justfair.org.uk/home/blog/guest-blog/using-economic-social-and-cultural-rights-to-tackle-destitution-in-the-uk/> accessed 4 May 2022.
[736] Nicole Moreham, 'The Right to Respect for Private Life in the European Convention on Human Rights: A Re-Examination' (2008) EHRLR <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2383507> accessed 17 May 2022.

support.[737] However, the courts may establish state responsibility where there is a 'direct and immediate link' between the act or policy of the state and the private and family life of the claimant.[738] In *Bernard*, the claimant proved the 'direct and immediate link' and the court found a violation of Article 8.[739] However, the court proffered no clear guidance on how the 'direct and immediate link' was proven in that case. O'Cinneide argues that such a requirement is ambiguous,[740] and not without good reason: the lack of clear guidance might make it difficult, even ineffective, for future cases to establish state responsibility and engage with Article 8.

Unlike Article 3, Article 8 is a qualified right where the state may justify its interference with that right if the interference is in accordance with the law and is necessary in a democratic society to achieve a legitimate aim, such as the protection of national security or the economic well-being of the country.[741] The state's interference must be proportionate to the legitimate aim and the state must seek to protect this aim to justify the interference.[742] In *R SC and others*,[743] the claimants argued that limiting child tax credit to a maximum of two children is incompatible with Article 8 as it limited the parents' freedom of choice to have additional children. Further, they argued the additional child would be positioned as a burden, affecting their integration into the family.[744] However, the court

[737] Colm O'Cinneide, 'A Modest Proposal: Destitution, State Responsibility and the European Convention on Human Rights' (*SSRN*, 2008) <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1370241> accessed 4 May 2022.
[738] *Botta v Italy* App no 21439/93 (ECtHR, 15 January 1996).
[739] *R (Bernard) v London Borough of Enfield* [2002] EWHC 2282 (Admin).
[740] O'Cinneide (n 737) 15.
[741] Ruth Costigan and Richard Stone, *Civil Liberties & Human Rights* (11th edn, Oxford University Press 2017) 229.
[742] *Smith and Grady v The United Kingdom* (1999) 29 EHRR 493.
[743] *R (SC and others) v Secretary of State for Work and Pensions* [2021] UKSC 26.
[744] ibid [26]–[27].

held that the policy was legitimate: the state is not obliged to provide child tax credit to every additional child, and there was no violation of Article 8.[745] The court stated that the question of whether it is right to limit child tax credit to two children is a political concern, not a legal issue within the remit of the courts.[746] Due to the qualified nature of Article 8, the courts do not find a violation of Article 8 easily: the claimant must prove that the social security policy was arbitrary to the extent that the interference is unjustified and disproportionate, which is no doubt a difficult ask. This difficulty and escape mechanism for the state indicate that Article 8 is ineffective in tackling destitution—claimants rarely succeed in their claim, and thus the state is unobliged to provide resources to individuals to prevent them from living in destitution.

(iii) Are Article 3 and Article 8 of the ECHR effective in tackling destitution?

Although the destitute can rely on Article 3 and Article 8 ECHR to tackle destitution, the case law reveals that both articles are ineffective, and claimants rarely succeed in their challenges. Indeed, Article 3 and Article 8 were not originally created to tackle destitution which increases the hurdles for the claimant to rely on these rights in challenging destitution—claimants may only succeed in limited circumstances. Moreover, cases that successfully relied on Article 3 and Article 8 in challenging destitution did not find experiencing destitution as the wrong, but instead recognised that the harm suffered when experiencing destitution violated civil and political rights. Hence, it indicates that suffering destitution is unactionable absent a consequent or additional violation of the civil and political rights protected in the ECHR. By consequence, the states do not view destitution as a human

[745] ibid [210].
[746] ibid [208].

rights issue nor recognise a duty to lift the destitute out of destitution, but instead avoid breaching the civil and political rights in ECHR alone.[747] The articles which claimants rely on to tackle destitution are ineffective; consequently, it is imperative to find an alternative means of tackling destitution.

V. Improving the approach to tackling destitution in the UK

As explored, the ECHR is ineffective in tackling destitution, and the courts are reluctant to intervene in the executive's policymaking in destitution cases since that ordinarily involves allocation of public funds and resources, which falls within the executive's discretion.[748] And yet, despite placing a heavy burden on the state, it remains vital for the state to protect human rights—especially the ESCRs that are oft neglected—to ensure that all experience the *minimum* standard of living at least, and to minimise the number of people suffering destitution. Such protection would be in line with the concept of the minimum core obligation established by the Committee on Economic, Social and Cultural Rights, that being the necessity to entitle every person to the minimum standard of fundamental ESCRs, regardless of the state's level of resources.[749] Were the state to meet this obligation, it would inevitably lift the destitute out of destitution. The UK should give greater priority to ESCRs to tackle destitution by incorporating the ICESCR into domestic law, for instance, such

[747] Gráinne McKeever, Mark Simpson, and Ciara Fitzpatrick, 'Destitution and Paths to Justice' (*The Legal Education Foundation*, 2018) 73 <https://research.thelegaleducationfoundation.org/wp-content/uploads/2018/06/Destitution-Report-Final-Full-.pdf> accessed 21 November 2023.
[748] *R (SC)* [2021] UKSC 26 [208].
[749] Committee on Economic, Social and Cultural Rights, *CESCR General Comment No.3: The Nature of States Parties' Obligations (Art 2, Para 1, of the Covenant)* (1990) E/1991/23 [10].

that ESCRs are justiciable in domestic courts and thereby provide greater, explicit protection of ESCRs to tackle destitution directly and effectively in the UK.

Another way to tackle destitution more effectively is by creating an explicit right to be free from destitution in domestic law, thereby placing a duty on the government to ensure that all experience the minimum standard of living and are free from destitution.[750] Given the extremely high number of individuals currently experiencing destitution, urgent action via a statutory duty would ensure the basic needs of these individuals are met, even if it would not necessarily address the root cause of the issue. As Simpson, McKeever and Fitzpatrick argue, although a statutory right does not address the structural problems that cause destitution, having a statutory duty is "merely a means to an end"—it could encourage a shift towards a system that pays due mind to the issue of destitution.[751] Having a direct way to tackle destitution not only protects human rights and human dignity, but it could also provide better guidance and certainty on how to tackle destitution effectively in the future. By clearly and explicitly establishing the state's responsibility to tackle destitution, there would be no ambiguity like that arising from *R (Bernard) v London Borough of Enfield*, in which the court failed to provide clear guidelines on how the 'direct and immediate link' was proven to engage Article 8. Having a direct means of tackling destitution and clear guidance on how the courts might tackle destitution could help in combatting the issue much more effectively.

VI. Conclusion

[750] Graham (n 706) 250–251.

[751] Mark Simpson, Gráinne McKeever, and Ciara Fitzpatrick, 'Legal Protection Against Destitution in the UK: The Case for a Right to a Subsistence Minimum' (2023) 86(2) Modern Law Review 465–497, 495.

To conclude, destitution is a prevalent issue in the UK that the state should prioritise to avoid the violation of human rights and dignity caused by destitution. Under the current law, the destitute must rely on the ECHR as a backdoor mechanism to tackle destitution for there are insufficient direct legal means of addressing destitution. However, this article has established that the ECHR is ineffective in tackling destitution, in great part because it was not designed to protect ESCRs, not to mention there being no direct nor explicit right to be free from destitution. Despite it being possible to indirectly challenge destitution through Article 3 and Article 8 ECHR, the several hurdles for those suffering destitution make it most unlikely for the general public to succeed in using either article to address destitution. Indeed, Article 3 and Article 8 are civil and political rights that are not effective as means to tackle destitution, nor were they designed with that in mind. Therefore, to ensure that the UK protects the human rights and dignity of the destitute, the state requires a more effective way—or responsibility—to tackle destitution. To achieve this, the UK must give greater priority to ESCRs in both law and policy, and/or create an explicit right to be free from destitution in domestic law. By doing so, ESCRs can be justiciable in domestic courts without the ambiguity of the existing case law, which could then tackle destitution effectively.

Look in the Shed: Effective Investigation of Violations of the Right to Life

Christopher Adair, Claudia Joyce Choo, Joshua Garside, and Christopher Thirkell[†]

Submission of evidence to the Independent Counter-Terrorism Commission – 16 December 2022. This submission of evidence examines events that took place during the Troubles in Northern Ireland and the procedural obligation of the UK to conduct an effective investigation into alleged violations of the right to life (Article 2 ECHR). The submission focuses on the killing of Michael Tighe and the wounding of Martin McCauley in the 'Hayshed Shooting' of 1982. The proposal included in the Northern Ireland Troubles (Legacy and Reconciliation) Bill to grant immunity from prosecution on request to those implicated in fatal shooting incidents is addressed. It is recommended that this proposal is withdrawn and that the government ensures that investigation reports connected with fatal shootings by security personnel during the Troubles are published in full.

I. Introduction

1. This submission has been written by third-year LLB Law students at the University of Manchester, currently studying the Counter-Terrorism and Human Rights module. We would like to thank members of the Commission, Sir Peter Fahy and Tufyal Choudhury, for attending our presentation of this work and for their insightful comments and considerations, which have guided our thinking.

[†] Christopher Adair, Claudia Joyce Choo, Joshua Garside, and Christopher Thirkell have achieved LL.B. (Hons), University of Manchester. Claudia Joyce Choo is currently studying LL.M. International Legal Studies, New York University.

2. Research for this submission was conducted under the supervision of Dr Graham Smith. The methodology relied primarily on Google searches and the European Court of Human Rights (ECtHR) HUDOC search engine. Work was between the four members of the team with each taking responsibility for a research strand before collective discussion. Freedom of Information Requests to the Northern Ireland Policing Board and Northern Ireland Police Service relating to Operation KLINA (see further below) are outstanding.[752]

II. Core concepts

3. In this section, we clarify core concepts that are often used in the submission.

4. *Effective investigation:* under ECHR case law, there is a procedural obligation to conduct an effective investigation into an alleged violation of Article 2 of the European Convention on Human Rights (ECHR). The investigation must be opened on the own motion of the State and must conform to the criteria of adequacy, thoroughness, independence and impartiality, promptness, public scrutiny (within reason), and the victim must be involved in the investigation. An effective investigation is required to combat a culture of impunity and hold those who have done wrong to account.[753]

[752] In the event that we are invited to give oral evidence to the Independent Counter-Terrorism Commission, it is hoped that the FOI requests will add to understanding of Operation KLINA.

[753] Directorate General of Human Rights and Rule of Law, *Guidance on Eradicating impunity for serious human rights violations* (Council of Europe, 2011) <https://rm.coe.int/1680695d6e> accessed 22 November 2011.

5. *Accountability:* refers to the state, as well as individuals, being held liable for alleged wrongdoing. This links to the common law principle of the rule of law, which is integral to maintaining our democratic values as a nation. In the interest of accountability, it follows that the ECHR effective investigation requirements are adhered to. A lack of accountability runs the risk of creating a culture of impunity.

6. *Impunity:* refers to the failure to hold individuals to account for their wrongdoing, specifically in the context of this submission alleged violations of Article 2 of the ECHR.[754]

III. Evidence

7. John Stalker, then Deputy Chief Constable of Greater Manchester Police, was appointed to investigate three shootings in Northern Ireland within the space of a month at the end of 1982 by members of the Royal Ulster Constabulary ('RUC'). The first was the killing of alleged IRA members, Eugene Toman, Sean Burns and Gervaise McKerr on 11 November. The second was the 24 November shooting of Michael Tighe and Martin McCauley: we will return to this in more detail below. The third was the killing of unarmed Seamus Grew and Roddy Carroll in Armagh City on 12 December. Each shooting

[754] UN – E/CN.4/2005/102/Add.1 ""Impunity" means the impossibility, de jure or de facto, of bringing the perpetrators of violations to account – whether in criminal, civil, administrative or disciplinary proceedings – since they are not subject to any inquiry that might lead to their being accused, arrested, tried and, if found guilty, sentenced to appropriate penalties, and to making reparations to their victims." <https://documents-dds-ny.un.org/doc/UNDOC/GEN/G05/109/00/PDF/G0510900.pdf?OpenElement> accessed 3 December 2022.

was carried out by the RUC's Headquarters Mobile Support Unit (HMSU), which had been trained by an SAS regiment and was under the control of the Special Branch.[755] By 1986, due to the inability of Stalker to acquire Tape 042 (see further below), which led him to deliver numerous interim reports, the investigation had stalled. Stalker was subsequently removed from the Inquiry as the result of a disciplinary investigation and Chief Constable of West Yorkshire Police, Colin Sampson, was appointed to continue the Northern Ireland investigation. In his book about what was commonly known as the shoot-to-kill affair, Stalker wrote that he was 'not welcomed by the RUC'[756] and Sampson was particularly critical of the role played by MI5.[757] Investigation reports by Stalker and Sampson have never been released to the public.

8. Crucially, Stalker found that members of the HMSU had not been told to give false accounts to investigating detectives. They had decided individually to tweak their narratives within official reports to fit in with events as they had unfolded to avoid accountability for their wrongful actions at the time.

9. The 'Hayshed Shooting' of 24 November 1982 resulted in the death of Michael Tighe, aged 17 years, and the injuring of Martin McCauley, 19. The hayshed was the subject of a joint surveillance operation between the RUC and MI5 based on information provided by an informant. Included

[755] Ian Cobain, 'Northern Ireland: when Britain fought terror with terror', *The Guardian* (2015) <https://www.theguardian.com/news/2015/jul/09/northern-ireland-terror-shoot-to-kill> accessed 3 December 2022.
[756] John Stalker, *Stalker* (Penguin Books 1988).
[757] Cobain (n 755).

among the intelligence received was that the hayshed had been used to store explosives used in a bombing in nearby Kinnego, which killed three police officers, and the names of three people who were also targeted by the RUC in November 1982. MI5 bugged the hayshed and the recording on Tape 042 was central to Stalker's investigation. Stalker found that the tape and transcript had been destroyed by the RUC and Sampson later found that MI5 had a copy of the tape, which was not disclosed to Stalker and was subsequently also destroyed, which Lord Chief Justice Morgan was later to call 'reprehensible.'[758] Arrested after the fatal shooting of Tighe, McCauley was convicted of firearms offences in 1985, overturned in 2014.[759] At the Court of Appeal, McCauley's counsel read from parts of the Stalker/Sampson Reports, the first time that they were placed on public record.[760]

10. Table I (Appendix) highlights the eight occasions on which the UK has been found in breach of the procedural obligation to conduct an effective investigation following deaths caused by the police or security services in Northern Ireland. The *McCann* case did not take place in Northern Ireland but, as it is a seminal case on the procedural obligation and involved British security personnel and suspected IRA members, it has been included for clarity.

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[758] *R v McCauley* (CA in Northern Ireland, 10 September 2014) [21] <https://www.casemine.com/judgement/uk/5a8ff87060d03e7f57ec06d5> accessed 3 December 2022.

[759] The Newsroom, 'Conviction against McCauley quashed', *Northern Ireland World* (Belfast, 20 May 2014) <https://www.northernirelandworld.com/news/conviction-against-mccauley-quashed-2643261> accessed 3 December 2022.

[760] The case is presumed to be unreported after efforts to find the law reports proved unsuccessful.

11. Operation KLINA was an investigation carried out by Police Scotland between 2015 and December 2020 into the destruction of Tape 042. The report was delivered over two years ago and is yet to be published.[761]

12. Clause 18 of the Northern Ireland Troubles (Legacy and Reconciliation) Bill (Troubles Bill),[762] currently in its second reading in the House of Lords, provides for an individual suspected of a criminal offence committed during the Troubles to apply for immunity from prosecution, provided they have given an account of the events which describes their conduct and is true to the best of their knowledge or belief.[763]

13. Between 27 June and 1 July 2022, the Council of Europe Commissioner for Human Rights visited the UK and expressed concern about the Troubles Bill. In the Report of her visit, she found the following:

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[761] David Young, 'Police report on MI5 evidence destruction case passed to prosecutors' *Belfast Telegraph* (Belfast, 3 December 2020) <https://www.belfasttelegraph.co.uk/news/northern-ireland/police-report-on-mi5evidence-destruction-case-passed-to-prosecutors-39822771.html> accessed 3 December 2022.

[762] Northern Ireland Troubles (Legacy and Reconciliation) HC Bill (2022–23) [23].

[763] The Bill establishes a new Independent Commission for Reconciliation and Information Recovery (ICRIR). This will review all outstanding legacy cases concerning Troubles-related deaths. Under clause 18, however, the ICRIR can grant immunity from prosecutions to individuals based on the following conditions:

1. that the individual has requested immunity from the ICRIR;
2. that the panel receiving the request is satisfied that the ICRIR possesses an account of events given by the individual, which describes the individual's conduct which forms part of the Troubles, and is true to the best of the individual's knowledge or belief; and
3. that the panel is satisfied that this information would tend to expose the individual to a criminal investigation or prosecution for a particularly serious Troubles-related offence.

a. there was deep scepticism about the UK government's motivation for the Bill considering its interest in preventing the investigation and prosecution of security personnel;
b. enacting the bill would close avenues for seeking truth and justice by victims and families which they regard as highly valuable;
c. that the requirement to give statements that are true to the best of the individual's knowledge or belief constitutes a subjective and low bar for immunity, with no objective way to verify the accuracy of the statement or give victims the opportunity for rebuttal (which would therefore embolden perpetrators);
d. the proposal runs a significant risk of being found incompatible with the ECHR and were this Bill to be enacted and subsequently deemed a violation, this would constitute a further delay for victims and their family members to access justice, some of whom may never see it in their lifetimes.[764]

14. In November 2022, former soldier David Holden was found guilty of gross negligence manslaughter for the death of Aidan McAnespie in February 1988 at a security checkpoint in Aughnacloy. It was found that Holden had pointed a machine gun at McAnespie and assumed it was not cocked, even though there was no apparent danger in the circumstances. Holden gave a false account that his

[764] Dunja Mijatović, 'Commissioner for Human Rights of the Council of Europe: Report following her visit to the United Kingdom' (*Council of Europe*, 2022) <https://rm.coe.int/report-on-the-visit-to-unitedkingdom-from-27-june-to-1-july-2022-by-d/1680a952a5> accessed 29 November 2022.

hand slipped and that he could not see McAnespie as he was passing through a 'blind spot.'[765]

IV. Discussion

15. The Hayshed Shooting serves as an ideal case study of the difficulties the UK government has encountered in meeting its procedural obligation to conduct an effective investigation and protect against the risk of a culture of impunity.

16. Fabrication of false narratives of what happened at the Hayshed Shooting by RUC officers who were present at the scene is evidence of an attempt to evade accountability. Investigators' uncritical acceptance of the evidence provided by the officers leaves the investigation into the shooting vulnerable to a challenge that it was not compliant with the obligation to conduct an effective investigation on the grounds that the thoroughness criteria were not met.[766] Furthermore, failure to thoroughly check officer accounts gives rise to a suspicion that there was collusion between investigators and RUC officers for the purpose of protecting them from criminal proceedings and points to the existence of a culture of impunity.

17. Similarly, the refusal of the RUC and MI5 to release Tape 042 amounted to deliberate interference with the effectiveness of the Stalker/Sampson investigation and is further evidence of the existence of a culture of impunity.

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[765] BBC News, 'Aidan McAnespire: Ex-soldier found guilty of checkpoint shooting', (*BBC*, 25 November 2022) <https://www.bbc.co.uk/news/uk-northern-ireland-63754980> accessed 3 December 2022.
[766] *Kaya and others v Turkey* App no 4451/02 (ECtHR, 19 February 1998).

18. Further, fabrication and destruction of evidence undoubtedly undermine the adequacy criteria of an effective investigation, which requires that on the evidence, an investigation should result in the identification and punishment of those responsible for a violation of Article 2.[767] Such a finding could not be made in the Hayshed case as a consequence of the RUC and MI5 undermining the effectiveness of the investigation.

19. There is also evidence that the promptness effective investigation criteria were impeded. In addition to safeguarding the thoroughness and adequacy requirements, these criteria (which also requires that an investigation is conducted expeditiously and in a timely fashion throughout its duration) serves to protect against the perception of collusion between investigators and suspects.[768] A consequence of the initial refusal of the RUC to hand Tape 042 over to Stalker was that critical evidence was not obtained by the investigators before it was destroyed.

20. Nearly 40 years have passed since the investigation into the Hayshed Shooting was opened, yet reports by Stalker or Sampson have not been fully disclosed to the public, which is contrary to the public scrutiny effective investigation criteria.[769] This criteria is intended to achieve accountability in practice as well as in theory, and the

[767] *Ramsahai and Others v The Netherlands* App no 52391 (ECtHR, 15 May 2007); Directorate General of Human Rights and Rule of Law (n 753).
[768] *Yasa and others v Turkey* App no 1910/09 (ECtHR, 22 February 2011); European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment ('CPT'), *Combating Impunity* (*Council of Europe*, 2004) <https://rm.coe.int/16806cd08c> accessed 1 December 2022.
[769] *Jordan v UK* App no 24746/94 (ECtHR, 4 May 2001); ibid CPT.

publication of investigation documents may dispel public concern that there is impunity for violations of the right to life. It is evident that the failure to publish these reports has interfered with the rule of law and protection of human rights in Northern Ireland, and there is a real prospect that those responsible for the shootings will not be called to account.

21. The failure to publish these reports should further be considered in light of the Council of Europe's recommendation that, where a violation of an ECHR right has been found, all necessary action to punish those responsible should be taken, including implementing practical measures to combat institutional cultures of impunity and removing those who tolerate it from office.[770] This should, at the very least, warrant full publication and —if the reason for the delay is the desire of office holders to hinder accountability mechanisms— further prosecutorial action should be taken against them.

22. In this context, Operation KLINA is important. The lack of publication of the KLINA Report points to a legacy of impunity, and suggests that the culture of impunity that existed some 40 years ago survives to this day, despite over 25 years of the Peace Process. Nobody has been called to account for the Hayshed Shooting and it is hard to understand why the KLINA findings have been withheld, other than to protect members of the security forces from criminal investigation and prosecution. Likewise, this lack of publication exacerbates the failure

[770] This requires adequate penalties, applied in a coherent and non-discriminatory manner, and should implement policies and practical measures to prevent institutional cultures which promote impunity and remove from office individuals found to be tolerating impunity; see Directorate General of Human Rights and the Rule of Law (n 753).

to satisfy the public scrutiny element of an effective investigation. Full publication of the KLINA report is necessary to demonstrate accountability in Northern Ireland and dispel any perception of collusion between those alleged to have violated the right to life and investigators, and a culture of impunity.

23. Clause 18 of the Northern Ireland Troubles (Legacy and Reconciliation) Bill suggests that this culture of impunity functions at the level of central government. Critically, in giving an individual the opportunity to avoid being subject to investigation, if enacted Clause 18 would legitimise—and actively encourage—subversions of the rule of law, undermine human rights protections and ensure that perpetrators of serious human rights violations are never called to account. Damage to the effective investigation criteria could be fatal. Allowing an individual to apply for immunity will create an opportunity to escape punishment altogether. In regard to thoroughness, all elements of this criteria would be meaningless if the opening of the investigation may be prevented on the application of the individual concerned on grounds that they may be prosecuted. Similarly, despite the importance of the independence and impartiality of investigations into Troubles-related incidents (as illustrated by the number of revelations in the so-far published elements of the Stalker and Sampson investigations, and in the interest of meeting compliance with the Article 2 procedural obligations), this clause reduces the degree of oversight exercised by independent officials responsible for prosecution decisions. Arguably, to meet the procedural obligation to conduct an effective investigation, the UK should leave prosecution decisions wholly to an established, separate

and impartial body, and should not allow an individual to decide on their own volition whether to request immunity.

24. Further, as highlighted by the Council of Europe Commissioner for Human Rights in her review of the Troubles Bill, the conditions that individuals have to meet in applying for immunity (providing an account that is true to the best of their knowledge and belief) runs counter to the criteria of adequacy, thoroughness, and independence and impartiality. The application procedure fails to allow that consideration be given to whether an individual is in-fact deserving of punishment for a violation or an assessment of all of the evidence of the surrounding circumstances. As the Commissioner points out, this will embolden human rights abusers and will perpetuate cultures of impunity. If enacted, the Troubles Bill would protect individuals like David Holden from being brought to justice in the future.

25. In addition, the Commissioner found that by permitting immunity, the Bill will shut down one of the most important avenues to justice available to victims of Troubles incidents and their families. This would not only prevent progress on outstanding cases which have yet to be properly investigated, but it will also render the considerable time and expense that went into concluding investigations like Operation KLINA futile.

26. Particularly concerning is the fact that this proposal may permit the government to avoid institutional accountability for any part played in Troubles-related incidents. As the Council of Europe Commissioner found, there is scepticism around the motives for the Troubles Bill, which may be attributed to a desire to sustain a

culture of impunity amongst government officials. Should government officials avoid investigation and prosecution, this will constitute a particularly grave failure to conduct an effective investigation since this—as the ECtHR has warned—can lead to the appearance of collusion or tolerance of human rights violations.[771] This may risk inflaming tension between state institutions and members of public, which could have long-term serious consequences for peace and security.

27. Finally, enacting the Troubles Bill would amount to a dangerous precedent, as it opens the possibility of Parliament prohibiting investigations into historic events. This may encourage security forces to delay investigations, contrary to the promptness requirement (as was done by MI5 and the RUC, by refusing to give Stalker the required evidence) in the hope that future legislation would cause further damage to the conduct of effective investigations, in violation of the ECHR.

V. Findings

28. As set out in evidence and discussed above, Clause 18 of the Troubles Bill, if enacted, seriously risks UK compliance with the procedural obligation to conduct an effective investigation into alleged violations of Article 2 ECHR. An individual who applies for immunity could open a Pandora's Box and result in further damage to democracy, the rule of law and the protection of human rights.

[771] *Kukayev v Russia* App no 29361/02 (ECtHR, 15 November 2007).

29. The destruction of evidence that was central to the investigation of the Hayshed Shooting and the failure to publish the Stalker, Sampson, and KLINA reports establishes the willingness of the UK government to avoid its obligations under international law.

VI. Recommendations

30. *Recommendation 1*
Clause 18 should be excised from the Northern Ireland (Legacy and Rehabilitation) Bill due to the risk it poses to governmental and individual accountability.

31. *Recommendation 2*
Parliament must refrain from including similar provisions in future legislation in the interest of maintaining and strengthening government commitment to the protection of human rights.

32. *Recommendation 3*
The Stalker, Sampson, and Operation KLINA Reports should be declassified and published in their entirety.

VII. Appendix

Table I: UK violations of Article 2 ECHR connected with the Northern Ireland Troubles
Cases:

- *McCann and others v UK*[772]
    - Year of violation: 1988

[772] App no 18984/91 (ECtHR, 27 September 1995).

    - Year of judgement: 1995
    - Details: On 6 March, three IRA suspects were shot in Gibraltar by SAS officers to prevent a potential terror attack. At the time of the shooting, none of the suspects were armed. The car in which the bomb was placed was found in Marbella two days later.[773]
    - State of execution of judgement: UK has executed its obligations as a result of the judgement.[774]
- *Jordan v UK*[775]
    - Year of violation: 1992
    - Year of judgement: 2001
    - Details: Pearse Jordan, son of the applicant, was shot and killed by a RUC officer. Jordan was unarmed. The four civilian witnesses heard no warning shout from the officer or saw any threatening actions from Jordan.[776]
    - State of execution of judgement: The Committee of Ministers decided in March 2021 to close its examination of the case in regards to individual measures, but not for general measures.[777]
- *McKerr v UK*[778]
    - Year of violation: 1982
    - Year of judgement: 2001

[773] ibid [100].
[774] *McCann and others v UK* App no 18984/91 (Committee of Ministers, 22 March 1996).
[775] App no 24746/94 (ECtHR, 4 May 2001).
[776] ibid [16].
[777] Resolution CM/ResDH(2021)50 (Committee of Ministers, 11 March 2021).
[778] App no 28883/95 (ECtHR, 4 May 2001).

    - Details: The unlawful killing of Gervaise McKerr, initially investigated by Stalker in 1984. The facts surrounding his death remained in dispute at the time of the judgment.[779]
    - State of execution of judgement: As of December 2020, general measures had still not been implemented and the inquest and investigation not completed.[780]
- *Shanaghan v UK*[781]
    - Year of violation: 1991
    - Year of judgement: 2001
    - Details: Shanaghan was killed by a masked gunman while driving to work. The Applicant alleged that the police at the scene showed no concern for his life, that no ambulance was called and they denied a priest approaching to give the last rites.[782] The investigating police officer revealed at the inquest he knew who the killer was but was unable to prove it.[783]
    - State of execution of judgement: As of December 2020, general measures had still not been implemented and the inquest and investigation still not completed.[784]
- *Kelly and others v UK*[785]
    - Year of violation: 1987
    - Year of judgement: 2001

[779] ibid [12].
[780] Interim Resolution CM/ResDH(2020)367 (Committee of Ministers, 3 December 2020).
[781] App no 37715/97 (ECtHR, 4 May 2001).
[782] ibid [22].
[783] ibid [26].
[784] Committee of Ministers (n 780).
[785] App no 30054/96 (ECtHR, 4 May 2001).

    - Details: Nine people were killed by soldiers and members of the RUC at Loughgall Police Station. It followed a shootout between IRA men and the soldiers. The DPP concluded that the evidence did not warrant any prosecutions. The applicants contend that only one victim's family was informed of this.[786]
    - State of execution of judgement: As of December 2020, general measures had still not been implemented and the inquest and investigation not completed.[787]
- *McShane v UK*[788]
    - Year of violation: 1996
    - Year of judgement: 2002
    - Details: There was a disturbance in Derry on 12 July; the RUC fired plastic bullets into the crowd. Dermot McShane was ran over by an armoured personnel carrier and was killed.[789]
    - State of execution of judgement: The Committee of Ministers decided in March 2021 to close its examination of the case in regards to individual measures, but not for general measures.[790]
- *McCaughney and others v UK*[791]
    - Year of violation: 1990
    - Year of judgement: 2013

[786] ibid.
[787] Committee of Ministers (n 780).
[788] App no 43290/98 (ECtHR, 28 May 2002).
[789] ibid.
[790] Committee of Ministers (n 777).
[791] App no 43098/98 (ECtHR, 16 July 2013).

    - Details: McCaughey and Desmond Grew were killed by British soldiers in Loughgall. McCaughey was hit by ten high-velocity bullets.[792] The shed where they were killed was under surveillance as a suspected IRA arms dump. The soldiers believed they were under fire, although no shots were fired. The DPP decided not to prosecute and did not directly notify the families.[793]
    - State of execution of judgement: As of December 2020, general measures had still not been implemented and the inquest and investigation not completed.[794]
- *Collette and Michael Hemsworth v UK*[795]
    - Year of violation: 1997
    - Year of judgement: 2013
    - Details: John Hemsworth was hit in the face with a truncheon by an officer of the RUC and kicked while on the ground. In October 1997, he started to experience headaches and died on 1 January 1998 from a cerebral infarction.[796] No inquest was held at the time. In 2000, the Attorney General ordered an inquest.[797] The inquest found his death was probably caused by the truncheon hit and it was 'highly probable' one or more of the officers that day were responsible for his death.[798]

[792] ibid [8].
[793] ibid [14].
[794] Committee of Ministers (n 780).
[795] App no 58559/09 (ECtHR, 16 July 2013).
[796] ibid [10].
[797] ibid [13].
[798] ibid [30].

- State of execution of judgement: The Committee of Ministers decided in March 2021 to close its examination of the case in regards to individual measures, but not for general measures.[799]

[799] Committee of Ministers (n 777).