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Preface from the Head of the University of Manchester Law School

It gives me great pride and pleasure to provide a preface for another edition of the *Manchester Review of Law, Crime and Ethics*. The 2025 authors have successfully upheld the high standards that we have come to expect, and we have a fascinating array of diverse articles. It is always a huge joy to dip into a collection like this, and see what you will pull out, like putting your hand into a packet of *Celebrations* or *Cadbury's Heroes*. All of contributions tackle a topical and enticing issue of law or ethics.

We begin with Gemma Llufrío's consideration of "Psychedelic Medicine: A Re-Emerging Framework in Psychiatric Research", exploring whether the current legal prohibitions in this area are rational and justified in light of the available scientific evidence. Given the scale of the current mental health crisis in the United Kingdom, and the number of people living with long term and debilitating conditions, discussions about the regulation of potential therapies could not be more timely.

We then move on to an analysis of the effectiveness of the probation system, in Erin Deane's article "Evaluating the Probation Service's Effectiveness in Achieving its Mantra: Assess, Protect, Change." The piece considers these issues across a broad span of time, before reaching nuanced conclusions with regard to the contemporary paradigm.

The focus then shifts to the medical arena, for Tunku Ameerah's "Deemed Consent? Navigating Autonomy in England's Soft Opt-Out Organ Donation Landscape", setting the challenge in devising appropriate legal approaches to the

questions against the backdrop of a global organ shortage crisis, with individuals of all ages on waiting lists, desperately hoping for life saving and life transforming treatment.

Returning to crime, Lama Aljama explores the historical development of aspects of *mens rea* in “The Judicial Shift: Evaluating the Abolition of the Caldwell Test and its Impact on Recklessness”. Questions of fairness and consistency when it comes to imposing criminal responsibility are crucial and remain extremely relevant for both victims and perpetrators in the twenty first century.

Foundational issues of justice, and the purposes of law are also at stake in the discussion by Rosie Jones, but this time in a civil context, in the next article, “Delivering Babies or Delivering Justice? Reforming Clinical Negligence Law for Obstetric Claims.” Jones not only considers the function of the present legal framework, but also interrogates its underlying purpose.

In the following piece, “Evaluating Police Interview Practices in England and Wales: Adherence to the ‘Mendez Principles’ on Effective Interviewing”, Scarlett Pickford continues the theme of looking beyond the text of the law, and addresses why legislative commitments are futile, if cultural, practical and economic factors undermine capacity to deliver them on the ground.

The interface between abstract principles and real-world challenges is also a key theme of Neeki Kaivan Arkian’s insightful discussion in “From Code to Contracts: Rethinking Justice in the Age of Smart Contracts”. The legal discourse is enhanced by interdisciplinary strands in respect of computer science, and blockchain technology studies.

This excellent collection then closes with Zhiyi Wan's comparative study of Innocence projects in the UK and US, identifying shortcomings but also making constructive suggestions for reform. All of these pieces share a common commitment to improving our processes of law, justice and decision-taking, in order to render the world a more equitable, safe and inclusive place for all. This is a worthy aspiration, and all of the contributors should be satisfied with the dedication that they have shown in furthering it.

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

April 2025

Preface from the Editor-in-Chief

Thirteen years on from the inception of the Manchester Review of Law, Crime and Ethics, I find myself echoing the sentiment of my predecessors: the process of bringing the Review to life is both challenging and a privilege. This journal is testament to what can be achieved when talented students and academics come together with a shared commitment to scholarship, rigour, and the pursuit of ideas.

Behind every article lies months of research, careful editing, and critical engagement. Authors, peer reviewers, editors, or advisors have each left their mark on the pages that follow. The result is a collection of works that not only inform but also provoke, inspire, and encourage further debate.

This year's contributions span an extraordinary breadth of topics. We open with Gemma Llufrío's exploration of psychedelic medicine and its potential role in psychiatric research, a piece that challenges long-standing legal assumptions in light of urgent public health needs. We then examine the probation system's ability to "Assess, Protect, Change" in Erin Deane's measured critique, before turning to Tunku Ameerah's nuanced analysis of autonomy in England's soft opt-out organ donation regime.

The criminal law is interrogated in Lama Aljama's assessment of the Caldwell test and its consequences for recklessness, while Rosie Jones addresses the civil law's handling of obstetric negligence claims and their underlying purpose. Scarlett Pickford evaluates the gap between legal commitments and practical realities in police interviewing, while Neeki Kaivan Arkian takes us to the cutting edge with a discussion on smart contracts and justice in the digital age. Finally, Zhiyi Wan offers a comparative study of Innocence

Projects in the UK and US, pairing critique with constructive reform proposals. The diverse perspectives gathered in this year's volume demonstrate that the pursuit of legal and ethical progress is not the work of one generation or one discipline, but a shared and ongoing effort.

I owe profound thanks to the editorial board consisting of Ehikowoicho Okpla, Jacob Sharif, Jennifer Forshaw, Zi Fang Ma, and Ziad Mohamed. Their diligence, judgement, and unwavering support made this volume possible, and they deserve credit for their meticulous work in refining and strengthening each article. I also extend my gratitude to Professor Javier García Oliva, Head of the University of Manchester Law School, for his continued encouragement, and to my predecessor, Jacob Wharton, for his guidance.

I would also like to express my gratitude for our authors who, not only have contributed exceptional works to the Review, but also patiently supported our publication. Their support during this challenging but rewarding period has been noteworthy.

Finally, I wish to acknowledge my predecessors, whose dedication built the strong foundation upon which this volume stands. I am confident that my successor, Jennifer Forshaw will ensure that the Review thrives and lives up to its name. May Volume XIII serve as an invitation to engage with the pressing legal and ethical questions of modern time.

Sevval Merve Tuysuz
Editor-in-Chief

August 2025

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Psychedelic Medicine: A Re-Emerging Framework in Psychiatric Research

Gemma Llufrío[†]

Psychedelic drugs as adjuncts within therapy is a highly encouraging, yet elusive research area. This paper brings to bear an amalgamation of literature acquired from seven databases, spanning across disciplines of law, criminology, psychiatry and politics to address why psychedelic drugs were banned, investigate their potential for treating particularly burdensome mental illnesses and what implications this has for law and policy. Psychedelics were found to consistently yield profound benefits across three debilitating mental health disorders; thus, this paper contends there is a dire need for political reform to allow for psychedelics in clinics to treat chronic, treatment-resistant mental health disorders in the UK.

I. Introduction

Mental illness is the second largest contributor to the burden of disease in England,¹ with a record high number of referrals to mental health services made in England in the past year.² Additionally, treatment resistance, defined as the ‘failure of a

[†] BA (Hons) Criminology and Sociology, University of Manchester. Gemma is due to start her MSc Mental Health Law & Ethics at Kings College London in September 2025.

¹ Public Health England, ‘Health profile for England: 2019’ <<https://www.gov.uk/government/publications/health-profile-for-england-2019>> accessed 13 December 2022.

² NHS Digital, ‘Mental Health Services Monthly Statistics, Performance December 2021, Provisional January 2022’ <<https://digital.nhs.uk/data-and-information/publications/statistical/mental-health-services-monthly-statistics/performance-december-2021-provisional-january-2022>> accessed 2 December 2022.

disorder to respond positively or significantly to treatment'³ affects up to 60% of patients with psychiatric disorders.⁴

However, many of those struggling with particularly obstinate mental disorders are not being adequately treated in current treatment plans, with complete continued remission rarely being reached.⁵ This research will focus on the effectiveness of 3,4-Methylenedioxymethamphetamine (“MDMA”) for treating post-traumatic stress disorder (“PTSD”), psilocybin for treating major depressive disorder (“MDD”) and lysergic acid diethylamide (“LSD”) for treating addiction. Whilst there is heterogeneity in the acceptance of addiction as a mental health disorder, with some rejecting the neuroscientific understanding and claiming it to be a myth,⁶ this paper follows the National Institute on Drug Abuse in classifying addiction as a mental health disorder as it ‘involves functional changes to brain circuits.’⁷

The mental health issues outlined above are incredibly disabling and yet, despite studies highlighting the efficacy of controlled psychedelic drug use to tend to these disorders, current restrictive drug policy renders further research and

³ American Psychological Association, ‘Treatment Resistance’ (APA Dictionary of Psychology, 19 April 2018) <<https://dictionary.apa.org/treatment-resistance>> accessed 5 January 2023.

⁴ OD Howes, ME Thase, and T Pillinger, ‘Treatment Resistance in psychiatry: State of the Art and New Directions’ [2022] 27(1) *Molecular Psychiatry*. <<https://doi.org/10.1038/s41380-021-01200-3>> accessed 10 January 2023.

⁵ SH Kennedy and P Giacobbe, ‘Treatment Resistant Depression—Advances in Somatic Therapies’ [2007] 19(4) *Annals of Clinical Psychiatry* 279 <<https://doi.org/10.1080/10401230701675222>> accessed 10 January 2023; KS Alharbi, ‘Treatment-resistant depression: Therapeutic trends, challenges, and Future Directions’ [2012] 6(6) *Patient Preference and Adherence* <<https://doi.org/10.2147/ppa.s29716>> accessed 10 January 2023.

⁶ S Peele, ‘Addiction Myths’ [2012] 158(5549) *RSA Journal* 20 <<https://www.jstor.org/stable/26204086>> accessed 14 January 2023.

⁷ National Institute on Drug Abuse, ‘Drug Misuse and Addiction’ <<https://nida.nih.gov/publications/drugs-brains-behavior-science-addiction/drug-misuse-addiction>> accessed 14 January 2023.

development into this propitious field of treatment incredibly arduous to carry out, hindering progression within medicine.⁸ This paper thus aims to answer the overarching research question: should UK drug policy be reformed to allow psychedelics in clinics to treat chronic, treatment resistant mental health disorders? It will then address subsidiary questions of *why* psychedelics are not widely available, *what* benefits they are shown to yield and *how* current policy should be reformed to enable psychedelic-assisted psychotherapy (“PAP”).

To thoroughly collate literature to address the research questions, this paper adopts a self-developed protocol to conduct systematic searches across many different databases to be as comprehensive and reliable as possible. The search conducted at the University of Manchester library by subject guide “law and criminology” provided 14 electronic databases, two of which were helpful: the Applied Social Science Index and Abstracts (ASSIA) and PsycInfo. A search was also conducted under the “psychological sciences” subject guide, which provided further helpful databases such as ScienceDirect, HeinOnline and Medline; searches were also conducted on PubMed and ClinicalTrials.gov. The search strategy included any forms of articles across any time period, limited to those published in English, with the main searches being conducted from November 2022 to February 2023.

As searching progressed, some search terms were refined to allow for a manageable amount of data. Searching on

⁸ DJ Nutt, LA King, and DE Nichols, ‘Effects of Schedule I Drug Laws on Neuroscience Research and Treatment Innovation’ [2013] 14(8) Nature Reviews Neuroscience 577 < <https://doi.org/10.1038/nrn3530> > accessed 10 January 2023; A Penn, CG Dorsen, S Hope, and WE Rosa, ‘CE: Psychedelic-Assisted Therapy’ [2021] 121(6) the American Journal of Nursing 34 < <https://doi.org/10.1097/01.NAJ.0000753464.35523.2> > accessed 10 January 2023.

PubMed with the broad search terms “psychedelics” and “mental health” with no additional filters produced 232 results. Further text mining, searching for “psychedelic-assisted psychotherapy”, produced 98 results. As there was still extraneous data, for example, PAP for autism,⁹ searches were conducted using medical subject headings to narrow the search to each mental disorder and psychedelic drug of focus, for example: (“MDMA” [MeSH Terms]) AND (PTSD treatment), which produced 51 results. Excluding all immaterial literature leaves 34 relevant publications from this database. A final screening process, scanning titles and abstracts for relevance and noting the aims, methods, participants, study design and findings of those that were clinical trials, further rules out unsuitable data. Finally, through meticulously examining the research to ensure credibility and relevance in the context of this paper, 29 articles remain. Additionally, extensive manual scoping of references from evaluated studies and checking of their references provided further relevant literature.

Notably, most data was found for PAP with MDMA and psilocybin, presumably due to their designated “breakthrough therapy” statuses.¹⁰ Comparatively, the literature pool for LSD-assisted psychotherapy was significantly more modest, with most research being conducted

⁹ AL Danforth and others, ‘Reduction in Social Anxiety after MDMA-assisted Psychotherapy with Autistic adults: a randomized, double-blind, placebo-controlled Pilot Study’ [2018] 235(11) *Psychopharmacology* 3137 < <https://doi.org/10.1007/s00213-018-5010-9> > accessed 10 January 2023; A Markopoulos and others, ‘Evaluating the Potential Use of Serotonergic Psychedelics in Autism Spectrum Disorder’ [2022] *Frontiers in Pharmacology* 12 < <https://doi.org/10.3389/fphar.2021.749068> > accessed 10 January 2023.

¹⁰ An FDA drug development pathway. To qualify, ‘[the drug] must demonstrate that it’s intended to treat a serious, life-threatening condition, with preliminary evidence supporting a substantial advantage at a clinically significant endpoint over existing drugs’. See AA Feduccia and others, ‘Breakthrough for Trauma Treatment: Safety and Efficacy of MDMA-Assisted Psychotherapy Compared to Paroxetine and Sertraline’ [2019] 10(650) *Frontiers in Psychiatry* 2 < <https://doi.org/10.3389/fpsy.2019.00650> > accessed 10 January 2023.

prior to prohibition laws, highlighting a gap in the literature regarding LSD in contemporary clinical studies.

The search approach differed slightly for the history of psychedelics. Using ASSIA and Google Scholar as the main database and search engine, an initial search in the former with “history of psychedelic drugs” produced 64 articles; several were especially helpful.¹¹ As this search engine provides such a large amount of literature, the most relevant articles were reviewed. From this, the “related articles” tab was used to explore more affiliated material. The search for data on navigating political reform combined insight from thinktanks and non-profit organisations,¹² and transcripts of parliamentary debates accessed via Hansard.

This paper argues that psychedelic drugs are efficacious in treating chronic mental health disorders and thus drug policy reform should occur to allow psychedelics in clinics. It begins in chapter II by outlining the history of psychedelic drug prohibition, with reference to influential figures in the US, the role of the UN and the crucial policies that were implemented which halted further psychedelic research in the UK. Chapter III presents the acquired data on PAP for the three selected disorders. Chapter IV considers the politics of drug policymaking; discusses implications the outlined evidence has for political reform and how this could transpire. Finally, this paper concludes with a summary of each

¹¹ *ibid*; COMPASS Pathways, ‘COMPASS Pathways Receives FDA Breakthrough Therapy Designation for Psilocybin Therapy for Treatment-Resistant Depression’ (Compasspathways.com, 2018) <<https://compasspathways.com/compass-pathways-receives-fda-breakthrough-therapy-designation-for-psilocybin-therapy-for-treatment-resistant-depression/>> accessed 15 December 2022.

¹² Such as the Beckley Foundation, the Multidisciplinary Association for Psychedelic Studies (MAPS), the Drug Policy Alliance, Release, the Heffter Research Institute, Drug Science and Transform Drug Policy Foundation.

chapters' contributions in answering the research questions and addresses the strengths and limitations of the research.

II. The History of Psychedelics

(i) Origins of Psychedelics

The earliest psychedelic synthesis begins with MDMA, synthesised in 1912 in Darmstadt by chemist Dr. Anton Köllisch at German pharmaceutical company, Merck.¹³ However, MDMA was not widely studied until the late 1970s and early 1980s, when pharmacologist and chemist, Alexander Shulgin, began exploring its effects within psychotherapy.¹⁴

The next drug to be synthesised was LSD by the Swiss chemist Albert Hofmann at Sandoz Pharmaceutical Laboratories in 1938. Hofmann realised its hallucinogenic effects when he accidentally ingested it in 1943;¹⁵ him and his colleagues then later synthesised psilocybin in 1958.¹⁶ The synthesis of these psychedelics laid the foundation for early research into the therapeutic potential of psychedelic drugs.

(ii) First Wave of Psychedelic Research

¹³ U Benzenhöfer and T Passie, 'On the Early History of "Ecstasy"' [2006] 77(1) *Neurologist* 95 < <https://doi.org/10.1007/s00115-005-2001-y> > accessed 10 January 2023.

¹⁴ U Benzenhöfer and T Passie, 'Rediscovering MDMA (ecstasy): the Role of the American Chemist Alexander T. Shulgin' [2010] 105(8) *Addiction* 1355 < <https://doi.org/10.1111/j.1360-0443.2010.02948.x> > accessed 10 January 2023.

¹⁵ E Dyck, 'LSD: a New Treatment Emerging from the past.' [2015] 187(14) *Canadian Medical Association Journal* 1079 < <https://doi.org/10.1503/cmaj.141358> > accessed 10 January 2023.

¹⁶ A Hofmann and others, 'Konstitutionsaufklärung Und Synthese Von Psilocybin' (1958) 14(11) *Experientia* 397 < <https://doi.org/10.1007/bf02160424> > accessed 10 January 2023.

Psychedelics began to enter psychiatry as early as the 1950s, with Sandoz providing LSD to psychiatrists for research under the name “Delysid”. Following this, over 1,000 clinical papers considered 40,000 patients for the use of LSD as a therapeutic adjunct to psychotherapy between 1950 and 1965 to treat alcohol use disorder (“AUD”), depression and anxiety.¹⁷ The results from these early research papers were overall promising, being touted by the media as a “revolutionary psychiatric medicine”.¹⁸ Psilocybin, marketed as “Indocybin” by Sandoz, was also provided for research, and displayed safety and efficacy for an array of mental health conditions.¹⁹ In the late 1970s to mid-1980s, MDMA began being studied for treating PTSD and other mental disorders.²⁰ However, before the neuroscientific mechanisms of MDMA could be investigated, it diffused out from supervised use, becoming available in tablet form, known as “ecstasy”, particularly burgeoning in the dance music scenes.²¹ Consequently, an increasingly negative association of ecstasy with several deaths, which were actually typically associated with hyperthermia,²² resulted in an emergency ban on MDMA

¹⁷ R Masters and J Houston, *The Varieties of Psychedelic Experience* (Park Street Press 2000); B Sessa, *The Psychedelic Renaissance: Reassessing the Role of Psychedelic Drugs in 21st Century Psychiatry and Society* (Muswell Hill Press 2012).

¹⁸ S Siff, *Acid Hype: American News Media and the Psychedelic Experience* (University of Illinois Press 2015), 61.

¹⁹ RJ Strassman, ‘Hallucinogenic Drugs in Psychiatric Research and Treatment Perspectives and Prospects’ [1995] 183(3) *The Journal of Nervous and Mental Disease* 127

< https://journals.lww.com/jonmd/Abstract/1995/03000/Hallucinogenic_Drugs_in_Psychiatric_Research_and.2.aspx > accessed 27 March 2023.

²⁰ L Grinspoon and JB Bakalar, ‘Can Drugs Be Used to Enhance the Psychotherapeutic Process?’ (1986) 40(3) *American Journal of Psychotherapy* 393 < <https://doi.org/10.1176/appi.psychotherapy.1986.40.3.393> > accessed 10 January 2023.

²¹ M Collin, *Altered State: the Story of Ecstasy Culture and Acid House* (Google Books: Profile Books 2010).

²² AR Green., E O’Shea, and MI Colado, ‘A Review of the Mechanisms Involved in the Acute MDMA (ecstasy)-induced Hyperthermic Response’ [2004] 500(1-3)

declared by the Drug Enforcement Agency (“DEA”) in 1985, placing it on the list of Schedule I drugs under the Controlled Substances Act (“CSA”).²³ Subsequently, stringent drug laws were implemented across the US, resulting in international drug prohibition implementation.

(iii) Why Were Psychedelics Banned?

(a) Pivotal Figures in the US

The following discusses three central figures for drug prohibition, the first of which is former commissioner of the US Federal Bureau of Narcotics, Harry J. Anslinger (1930-1962), who played a pivotal role in shaping early US drug policy. Whilst there were earlier prohibitive acts, such as The Harrison Narcotics Act of 1914,²⁴ Anslinger’s role as commissioner inspired further punitive drug laws and encouraged a cultural and legal framework to demonise and criminalise drugs. Examples include passing the Marihuana Tax Act of 1937 which criminalised cannabis use, cultivation and distribution across the country; and his contribution to the passing of the Narcotic Control Act of 1956, which imposed strict penalties, even introducing the death penalty for certain drug offences.²⁵ These drastic laws paved the way for future anti-drug policies in the US.

European Journal of Pharmacology 3 < <https://doi.org/10.1016/j.ejphar.2004.07.006> > accessed 10 January 2023.

²³ National Institute on Drug Abuse, ‘What Is the History of MDMA?’ (National Institute on Drug Abuse, 2017) <<https://nida.nih.gov/publications/research-reports/mdma-ecstasy-abuse/what-is-the-history-of-mdma>> accessed 25 January 2023.

²⁴ M Szalavitz, ‘One Hundred Years Ago, Prohibition Began in Earnest—and We’re Still Paying for It’ (Pacific Standard, 2015) <<https://psmag.com/social-justice/one-hundred-years-ago-prohibition-began-earnest-still-paying-97243>> accessed 10 January 2023.

²⁵ MA Kleiman and JE Hawdon, Encyclopedia of Drug Policy (SAGE Publications 2010) 543 < <https://doi.org/10.4135/9781412976961> > accessed 21 December 2022.

Known for his vehement, and arguably irresponsible, advocacy of recreational psychedelic use in the 1960s, former psychologist and Harvard University Professor Timothy Leary, alongside his colleague Richard Alpert, also played a prominent role in the discourse surrounding psychedelics in the US. Following his formation of the Harvard Psilocybin Project in 1960, Leary concluded that psychedelics should be introduced to the public for personal, spiritual benefits and began advocating for their non-medical use, with his phrase “turn on, tune in, drop out” becoming a famous counterculture slogan central to the blossoming hippie movement.²⁶ This triggered a surge of negative media coverage, with LSD being associated with exaggerated reports of “bad trips”, psychosis, accidental deaths and suicides.²⁷ As a result, public perception of psychedelics drastically shifted from positive to overwhelmingly negative. This epoch of moral panic, defined by Cohen as a time period where “a condition, episode...or person...become[s] defined as a threat to societal values and interests”,²⁸ had distinct reverberations on the previously auspicious psychedelic work, with many esteemed experts disapproving of Leary’s “antics” for sparking a “public bonfire of all their hard-won knowledge and experience” developed in

²⁶ E Goode and N Ben-Yehuda, ‘Moral Panics: Culture, Politics, and Social Construction’ [1994] 20 *Annual Review of Sociology* 149 < <https://www.jstor.org/stable/2083363> > accessed 10 January 2023.

²⁷ MH Keeler and CB Reifler, ‘Suicide during an LSD Reaction’ (1967) 123(7) *American Journal of Psychiatry* 884 < <http://dx.doi.org/10.1176/ajp.123.7.884> > accessed 10 January 2023; Siff (n 18); W Hall, ‘Why Was Early Therapeutic Research on Psychedelic Drugs abandoned?’ [2022] 52(1) *Psychological Medicine* < <https://doi.org/10.1017/S0033291721004207> > accessed 10 January 2023; RJ Strassman, ‘Adverse Reactions to Psychedelic drugs. a Review of the Literature’ (1984) 172(10) *The Journal of Nervous and Mental Disease* 577 < https://journals.lww.com/jonmd/Citation/1984/10000/ADVERSE_REACTIONS_TO_PSYCHEDELIC_DRUGS_A_REVIEW.1.aspx > accessed 22 March 2023.

²⁸ S Cohen, *Folk Devils and Moral Panics: the Creation of the Mods and Rockers* (3rd edn, Routledge 2011), 1 < https://infodocks.files.wordpress.com/2015/01/stanley_cohen_folk_devils_and_moral_panic.pdf > accessed 24 January 2023.

the earlier decade.²⁹ Consequently, Sandoz stopped providing the drugs in 1965, resulting in an abrupt termination in research.³⁰

In response to the rise in uncontrolled psychedelic use associated with Leary and hippie counterculture, former president of the USA, Richard Nixon (1969-1974), played a vital role in expediting drug prohibition by rapidly enforcing drug controls. Some crucial contributions include Nixon's establishment of the DEA in 1970, implemented to enforce drug laws and regulations in the US, and his 1971 "war on drugs" campaign. As top aide John Ehrlichman later confirmed, the campaign aimed to stigmatise drug use and target hippies and black people, stating they aimed to get "the public to associate the hippies with marijuana and blacks with heroin... then criminalize both heavily, [so] we could disrupt those communities."³¹ Additionally, Nixon signed into law the CSA of 1970, the central piece of US legislation prohibiting drug use. This crusade towards drug prohibition also continued after Nixon's presidency, when later, President Ronald Reagan's (1981-1989) wife, Nancy Reagan, began an anti-drug campaign in 1984, coining the slogan "Just Say No"³² and perpetuating the prohibitionist stance within public and political discourse.

Ergo, Anslinger's initial draconian laws and the adverse reverberations of Leary's non-medical advocacy of

²⁹ M Pollan, *How to Change Your mind: The New Science of Psychedelics* (Penguin Books 2018), 140.

³⁰ Siff (n 18).

³¹ T LoBianco, 'Report: Aide says Nixon's war on drugs targeted blacks, Hippies' (CNN, 2016) ch.3 < <https://edition.cnn.com/2016/03/23/politics/john-ehlichman-richard-nixon-drug-war-blacks-hippie/index.html> > accessed 19 January 2022.

³² Drug Policy Alliance, 'A Brief History of the Drug War' (Drug Policy Alliance, 2021) <<https://drugpolicy.org/issues/brief-history-drug-war>> accessed 27 January 2023.

psychedelic drugs were advanced by Nixon's presidency and war on drugs, which, in turn, influenced global prohibitive drug policy delineated with the following UN treaties.

(b) Drug Policy of the UN

Whilst it has been acknowledged that drug prohibition has a long history, the acceleration of this prohibitive stance occurred in the US in the 1960s and 1970s. This resulted in three UN treaties, which together form the legal and conceptual foundation for global drug control and regulation. The first of these treaties is the 1961 UN Single Convention on Narcotic Drugs initiated by the US. This single convention aimed to create a unified drug control system, codifying all existing agreed conventions since The Hague Convention of 1912 into one.³³ It established a harm ranked hierarchy, placing identified "narcotic" drugs³⁴ into one of four schedules, purportedly reflecting their risk and medical uses, with schedule IV being deemed the most harmful, and schedule I the least. It obligates parties to "limit exclusively to medical and scientific purposes the production, manufacture, export, import, distribution of, trade in, use and possession of drugs."³⁵ It also required parties to "adopt any *special measures of control* which in its opinion are necessary... and prohibit the production, manufacture, export and import of, trade in, possession or use of any such drug except for amounts which may be necessary for *medical and scientific research only*."³⁶ This act thus allowed for bans to be placed on psychedelic drugs if they were deemed to render public health and welfare

³³ D Bewley-Taylor and M Jelsma, 'Regime change: Re-visiting the 1961 Single Convention on Narcotic Drugs' [2012] 23(1) International Journal of Drug Policy 72 < <https://doi.org/10.1016/j.drugpo.2011.08.003> > accessed 10 January 2023.

³⁴ Controlling primarily plant-based substances such as coca, opium, marijuana and their derivatives.

³⁵ Single Convention on Narcotic Drugs 1961, Art 4 para 1c.

³⁶ *ibid*, Art 2 para 5a–b.

concerns despite not being explicitly listed; for example, the US state law banning LSD in California and Nevada in 1966.³⁷

In the following decade, newer stimulants and psychedelics were becoming increasingly pervasive, thus, the 1971 UN Convention on Psychotropic Substances was introduced to control this range of “psychotropic substances.”³⁸ The distinction between the definition of “narcotics” controlled under the Single Convention and these newly defined “psychotropic substances”, however, is unclear,³⁹ highlighting the incoherent nature of the prohibitive conventions and showing that the single convention “failed in its aim of being the ‘single’ instrument within international drug control.”⁴⁰ Similarly to its predecessor, the 1971 Convention established drug scheduling frameworks to “prohibit all use except for scientific and *very limited medical purposes* by duly authorized persons, in medical or scientific establishments which are directly under the control of their governments or specifically approved by them.”⁴¹ However, unlike the single convention, Schedule I is the most restrictive category, and IV the least in this newer convention. Psychedelics are explicitly listed here as Schedule I drugs, deemed to pose a serious risk to public health with no recognised therapeutic value according to the Commission on Narcotic Drugs, meaning that research using these substances requires “a special license or prior authorization.”⁴² Yet, approval and applications for these

³⁷ CNDC, ‘Desert Sun 31 May 1966—California Digital Newspaper Collection’ (CNDC, 1966) < <http://cdnc.ucr.edu/cgi-bin/cdnc?a=d&d=DS19660531.2.6> > accessed 27 January 2023.

³⁸ Convention on Psychotropic Substances 1971.

³⁹ TNI, ‘The UN Drug Control Conventions’ (Transnational Institute, 2015) < <https://www.tni.org/en/publication/the-un-drug-control-conventions#4> > accessed 23 January 2023.

⁴⁰ Bewley-Taylor (n 33).

⁴¹ Convention on Psychotropic Substances 1971.

⁴² TNI (n 39); *ibid*, Art 7b.

licenses is an incredibly lengthy and difficult process, which will be addressed in the latter part of this chapter.

The final of the three conventions, the 1988 UN Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances,⁴³ whilst relevant for understanding global drug policy, did not explicitly contribute to psychedelic drug prohibition.

Individual domestic laws are applied for each country; in the US, the vital piece of legislation governing drug use is the aforementioned CSA of 1970.⁴⁴ This act places all substances regulated under federal law into one of five schedules, with schedule I being the most restrictive. Drugs categorised as schedule I require three criteria: firstly, a high abuse potential, secondly, no currently accepted medical use and thirdly, a lack of accepted safety for the use of the drug under medical supervision.⁴⁵ Psychedelic drugs were unjustly placed in schedule I, meaning psychedelic research became significantly more arduous and expensive, resulting in a near halt in publications.

(c) Drug Policy of the UK

Similar to the US, the history of drug prohibition in the UK also precedes the UN conventions and, whilst there were no clear contributions from specific political figures, prohibition was still prevalent. For example, The Pharmacy Act of 1868 is the

⁴³ As the illegal drug market grew exponentially, this convention focused on adopting more repressive measures to tackle organised crime. Criminal sanctions for drug related activity were passed to address aspects of illicit traffic more adequately in narcotics and psychotropic substances and be firmer on administrative measures. See the Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances 1988.

⁴⁴ The Controlled Substances Act 2018 (US).

⁴⁵ Nutt (n 8).

first piece of UK legislation which establishes a system of restricting the sale of drugs to pharmacists, giving details on how they should be licensed and limited.⁴⁶ Later acts were also passed to restrict and regulate drugs, namely, the Defence of the Realm Act (“**DORA**”) of 1914, which banned the sale of psychoactive drugs to troops,⁴⁷ amended in 1916 to ban sale to anyone outside of the medical or veterinary profession.⁴⁸ The Dangerous Drugs Act of 1920 also aimed to control the import, export, production, and sale of ‘dangerous’ drugs, imposing fines and imprisonment for non-compliance.⁴⁹

As for current policy, the UK is governed by two key pieces of legislation: the 1971 Misuse of Drugs Act (“**MDA**”), and the 2016 Psychoactive Substances Act (“**PSA**”).⁵⁰ The MDA brought the UK into line with the UN conventions, underpinning all of UK drug policy with this twofold approach to drug scheduling. Firstly, controlled drugs are categorised into three classes (A, B and C), which determines the severity of its penalties for offences such as drug supply, production and possession, with Class A being deemed the most harmful, and thus carrying the harshest penalty. Secondly, the 2001 Misuse of Drugs Regulations (“**MDR**”) categorises controlled drugs into one of five schedules, regulating the granted clinical uses with reference to their perceived harm potential and medical use. Here, schedule 1 is the strictest category, consisting of drugs determined to have no accepted medical use and a high abuse potential. In other words, “the MDR determines what

⁴⁶ M Johnston, ‘Anniversary of the Pharmacy Act: 150 Years of Medicines Safety’ [2018] *The Pharmaceutical Journal* < <https://pharmaceutical-journal.com/article/news/anniversary-of-the-pharmacy-act-150-years-of-medicines-safety> > accessed 22 January 2023.

⁴⁷ Such as cocaine, opium and cannabis.

⁴⁸ Defence of the Realm Act 1914.

⁴⁹ V Berridge, ‘Drugs and Social Policy: the Establishment of Drug Control in Britain 1900-30’ (1984) 79(4) *Addiction* 17 < <https://doi.org/10.1111/j.1360-0443.1984.tb03837.x> > accessed 10 January 2023.

⁵⁰ Misuse of Drugs Act 1971; Psychoactive Substances Act 2016.

should be done,⁵¹ whereas the MDA determines what should not be done.” The MDA also established the Advisory Council on the Misuse of Drugs (“ACMD”), who are responsible for making recommendations to the government on the control of drugs, including classification and scheduling under the MDA.⁵² Here, psychedelics are categorised as class A, schedule 1 drugs.

The second piece of UK legislation is the PSA, a blanket ban on all substances which have a psychoactive effect that aims at stopping the rising market for new psychoactive substances, with exceptions such as alcohol, tobacco, and caffeine.⁵³ This act regulates the production and supply of psychoactives not controlled by the MDA. Together, these two pieces of legislation impose a strict ban on drugs, which drastically impedes psychedelic research.

(iv) Reverberations of Drug Laws on Neuroscience Research

Whilst the stringent scheduling of psychedelics as class A, schedule 1 drugs does not completely prohibit all drug research, it has severely censored such research and made it a very difficult and lengthy process.

Firstly, conducting drug research under UK regulation requires a lot of investment. The application process for a hospital to obtain a license to research for schedule 1 drugs takes around a year, costs thousands of pounds and is subject to regular police reviews once granted.⁵⁴

⁵¹ Nutt (n 8), 578.

⁵² GOV.UK, ‘AboutUs’ (GOV.UK,2013) <
<https://www.gov.uk/government/organisations/advisory-council-on-the-misuse-of-drugs/about> > accessed 23 January 2023.

Psychoactive Substances Act 2016.

⁵³ Psychoactive Substances Act 2016.

⁵⁴ Nutt (n 8).

Secondly, hospitals also face difficulty when obtaining the pharmaceutical substance even if approval and licensing for study is granted, as psychedelic drugs require custom synthesis due to their strictly controlled status. This is another huge expense, for example, one custom synthesis company in Boston provides psilocybin at a cost of about \$12,000 per gram.⁵⁵

Thirdly, for many grant-providing bodies, the presumed highly dangerous nature of schedule 1 drugs appears to be a powerful deterrent, exacerbating its problems of high expenses, long waiting times and in turn, a lack of willing grant-providers.⁵⁶ This clearly illustrates how current drug policy is dramatically impairing neuroscience, particularly psychedelic research, and halting the progression of promising new treatments. Consequently, there has been limited research exploring PAP since the 1980s, although there has been a revival in research since the mid-2000s.

(v) Psychedelic Renaissance

Previous preliminary research on psychedelics from the 1950s until the mid-1970s seemed promising yet lacked clinical robustness in terms of study design. However, as these studies were abruptly halted from the moral panic of the late 1960s and political prohibition agendas, they did not have an opportunity to be researched further before being banned; thus, there has been a resurgence since the early 2000s attempting to recover the lost benefits of psychedelics. The double-blind, placebo-controlled clinical study on psilocybin published by Griffiths and others can be viewed as holding a significant impact in this

⁵⁵ Nutt (n 8), 579.

⁵⁶ *ibid.*

psychedelic renaissance.⁵⁷ This marked the first study in more than forty years to robustly examine the neuropsychological effects of psychedelics. Personal experimentation taking small but frequent doses of psychedelics, known as micro-dosing, also stimulated a revival in the interest of psychedelic study.⁵⁸

(vi) Conclusion

Overall, the history of drug prohibition, spearheaded by figures in the US, had an international impact on drug policies, which curtailed psychedelic studies, making modern research into psychedelics an incredibly expensive, long-winded process. As the evidence presented in the following chapter makes increasingly clear, this paper argues that these laws will need to be revised to enable research to be undertaken for PAP.

III. Psychedelics in Psychotherapy

Despite restrictive laws, studies conducted into PAP have been incredibly encouraging. This chapter delineates the data retrieved in the literature search, addresses the benefits of PAP and answers the research question of *why* psychedelics should be incorporated into therapy via policy. As there is an immense amount of literature, this paper has specifically selected those which had the most robust research designs, such as

⁵⁷ RR Griffiths and others, 'Psilocybin Can Occasion mystical-type Experiences Having Substantial and Sustained Personal Meaning and Spiritual Significance' [2006] 187(3) *Psychopharmacology* 268 < <https://doi.org/10.1007/s00213-006-0457-5> > accessed 10 January 2023.

⁵⁸ J Fadiman, *The Psychedelic Explorer's Guide: Safe, Therapeutic, and Sacred Journeys* (Park Street Press, 2011); V Polito and P Likhaitzky, 'The Emerging Science of microdosing: a Systematic Review of Research on Low Dose Psychedelics (1955 – 2021) and Recommendations for the Field' [2022] 139 *Neuroscience & Biobehavioral Reviews* 104706 < <https://doi.org/10.1016/j.neubiorev.2022.104706> > accessed 10 January 2023.

randomised controlled trials (“**RCT**”),⁵⁹ and thus credible findings to ensure the highest quality data is presented. Across the three subsections, findings unanimously demonstrate consistent efficacious results. Considering the indisputable potential of PAP, the section follows in discussing individual and public health benefits it could provide and argues for policy reform in the UK to enable psychedelics in psychotherapy.

(i) MDMA and Post-Traumatic Stress Disorder

PTSD is a mental disorder which can develop following experience of, or being witness to, a major traumatic and distressing life event.⁶⁰ It is characterised by incredibly debilitating symptoms such as reliving the event through flashbacks and nightmares, insomnia, feelings of guilt, isolation, and irritability.⁶¹ Complex Post-Traumatic Stress Disorder (“**CPTSD**”) develops in a subset of those with PTSD, usually after prolonged exposure to a series of horrific events, sometimes resulting in pervasive personality change.⁶² In the UK, PTSD is very common among those experiencing or

⁵⁹ Accepted as the gold standard for evidence in clinical research. See DH Peters, ‘Models and Research in CTs’ in L Chaitow, G Harris, and S Morrison (eds), *A Practical Guide for Health Professionals* (Churchill Livingstone 2002), 25–69; E Hariton and JJ Locascio, ‘Randomised Controlled Trials - the Gold Standard for Effectiveness Research’ [2018] 125(13) *BJOG: an International Journal of Obstetrics & Gynaecology* 1716 < doi: <https://doi.org/10.1111/1471-0528.15199> > accessed 10 January 2023.

⁶⁰ National Institute for Health and Care Excellence, ‘Post-Traumatic Stress Disorder’ (National Institute for Health and Care Excellence, 2022). <<https://cks.nice.org.uk/topics/post-traumatic-stress-disorder/background-information/definition/>> accessed 4 January 2023.

⁶¹ NHS, ‘Post-traumatic Stress Disorder’ (nhs.uk, 2021) <https://www.nhs.uk/mental-health/conditions/post-traumatic-stress-disorder-ptsd/overview/> accessed 26 January 2023.

⁶² NHS, ‘Complex PTSD – Post-traumatic Stress Disorder’ (nhs.uk, 2021) <<https://www.nhs.uk/mental-health/conditions/post-traumatic-stress-disorder-ptsd/complex/>> accessed 10 January 2023; JL Herman ‘Complex PTSD: a Syndrome in Survivors of Prolonged and Repeated Trauma’ [1992] 5(3) *Journal of Traumatic Stress* 377.

witnessing traumatic events, with an estimated 1 in every 3 developing the condition.⁶³ Despite this prevalence, current pharmacological treatments are limited to two selective serotonin reuptake inhibitors (“SSRIs”): sertraline and paroxetine, which demonstrate limited efficacy with an estimated 40-60% of patients not responding to the compounds.⁶⁴ Likewise, many participants also have poor remission rates, high drop-out rates or fail to respond to evidence-based trauma-focused psychotherapies,⁶⁵ thus emphasising the need for further research into more effective PTSD treatments.⁶⁶

(a) MDMA in Psychotherapy

The following selected trials collectively display clear efficacy for MDMA in psychotherapy across multiple participants; for example, those with CPTSD and highly affected social groups, such as military personnel. The long-term outcomes from MDMA-assisted psychotherapy for PTSD are also presented,

⁶³ NHS (n 61).

⁶⁴ MM Steenkamp, BT Litz, CW Hoge, and CR Marmar, ‘Psychotherapy for Military-Related PTSD: a Review of Randomized Clinical Trials’ [2015] 314(5) JAMA 489.

⁶⁵ CA Gutner, MW Gallagher, AS Baker, DM Sloan, and PA Resick, ‘Time Course of Treatment Dropout in Cognitive-behavioral Therapies for Posttraumatic Stress disorder’ [2016] 8(1) Psychological Trauma: Theory, Research, Practice, and Policy < <https://doi.org/10.1037/tra0000062> > accessed 10 January 2023; C Lewis, NP Roberts, S Gibson, JI Bisson, ‘Dropout from Psychological Therapies for post-traumatic Stress Disorder (PTSD) in adults: Systematic Review and meta-analysis’ [2020] 11(1) European Journal of Psychotraumatology 1709709 < <https://doi.org/10.1080/20008198.2019.1709709> > accessed 10 January 2023.

⁶⁶ J Ipser, S Seedat, and DJ Stein, ‘Pharmacotherapy for post-traumatic Stress Disorder - a Systematic Review and meta-analysis’ [2006] 96(10) Suid-Afrikaanse Tydskrif Vir Geneeskunde 1088 < <https://pubmed.ncbi.nlm.nih.gov/17164942/> > accessed 10 January 2023; RJ Ursano and others, ‘Practice Guideline for the Treatment of Patients with Acute Stress Disorder and Posttraumatic Stress Disorder’ [2004] 161(11 Suppl) The American Journal of Psychiatry 3 < <https://pubmed.ncbi.nlm.nih.gov/15617511/> > accessed 10 January 2023; DJ Stein, J Ipser, and N McAnda, ‘Pharmacotherapy of Posttraumatic Stress disorder: a Review of meta-analyses and Treatment Guidelines’ [2009] 14(1 Suppl 1) CNS Spectrums 25 < <https://pubmed.ncbi.nlm.nih.gov/19169191/> > accessed 10 April 2023.

as well as the impact of this treatment on specific personality traits, providing a well-rounded, strategically selected presentation of data.

The first RCT assessing the safety and efficacy of MDMA-assisted psychotherapy for treatment-resistant PTSD in modern psychiatry was conducted by Mithoefer and others.⁶⁷ In this pilot study, 20 patients⁶⁸ were randomised in a double-blind design with 12 receiving psychotherapy in conjunction with MDMA and 8 receiving an inactive placebo. The primary outcome measure was the clinician-administered PTSD scale (“CAPS”),⁶⁹ with findings showing a significant decrease in CAPS scores from baseline to post-treatment for the experimental group, displaying a clinical response⁷⁰ of 83.3%, compared to a score of 25% in the placebo group.⁷¹ Ergo, this study provided remarkably promising preliminary findings for MDMA-assisted psychotherapy. Later, Wagner and others reanalysed data from the study to investigate the therapeutic effect of MDMA on personality, and how it may act as a mechanism of long-term change for those with PTSD. In this double-blind, randomised trial, the researchers used the NEO-

⁶⁷ MC Mithoefer and others, ‘The Safety and Efficacy of \pm 3,4-methylenedioxymethamphetamine-assisted Psychotherapy in Subjects with chronic, treatment-resistant Posttraumatic Stress disorder: the First Randomized Controlled Pilot Study’ [2010] 25(4) *Journal of Psychopharmacology* 439 < <https://doi.org/10.1177/0269881110378371> > accessed 10 January 2023.

⁶⁸ Subjects met DSM-IV criteria for chronic PTSD diagnosis and to display treatment-resistant symptoms, defined as a Clinician-Administered PTSD Scale (CAPS) score of >50 following a minimum of three months of prior SSRI or SNRI treatment, as well as at least six months of psychotherapy, see *ibid*.

⁶⁹ Clinician-Administered PTSD Scale; a 30-item questionnaire corresponding to the DSM-5 diagnosis for PTSD. Known as the gold standard in PTSD assessment. See US Department of Veterans Affairs, ‘Clinician-Administered PTSD Scale for DSM-5 (CAPS-5) - PTSD: National Center for PTSD’ (Va.gov, 2014) < <https://www.ptsd.va.gov/professional/assessment/adult-int/caps.asp> > accessed 24 January 2023.

⁷⁰ Defined as >30% reduction from baseline in CAPS total severity score.

⁷¹ Mithoefer (n 67).

PI-R⁷² to investigate whether heightened openness and decreased neuroticism⁷³ following MDMA-assisted psychotherapy contributed to a reduction in PTSD⁷⁴ symptoms in 20 subjects.⁷⁵ There were two experimental sessions of MDMA-assisted or placebo⁷⁶ psychotherapy. Results of this study displayed a significant interaction between increased openness and decreases in PTSD symptoms, and a decrease in neuroticism demonstrating notable decreases in CAPS score, with a substantially larger improvement in the MDMA group than the placebo group.⁷⁷ These subjects showed an “enduring, clinically meaningful benefit from MDMA-assisted psychotherapy”,⁷⁸ extending the previously noted findings and speculating that MDMA may act as a unique catalyst which increases openness, consequently reducing PTSD symptoms. As such, Wagner and others present empirical support which surpasses the scope of specific PTSD symptoms and displays profound alterations to personality structure, resulting in persisting personality change.⁷⁹

Other studies also support the finding that reductions in PTSD following MDMA-assisted psychotherapy are sustained,⁸⁰ with recent review by Jerome and others being

⁷² A 240-item inventory that defined human personality in terms of the five factor model, see PT Costa and RR McCrae, ‘The Revised NEO Personality Inventory (NEO PI-R) Professional Manual’ (Odessa, FL: Psychological Assessment Resources, 1992).

⁷³ Defined in terms of association with traits of ‘fantasy, aesthetics, feelings, actions, ideas, and values’ (MT Wagner and others, ‘Therapeutic Effect of Increased openness: Investigating Mechanism of Action in MDMA-assisted Psychotherapy’ [2017] 31(8) *Journal of Psychopharmacology* 967, 969 <<https://doi.org/10.1177/0269881117711712> > accessed 23 April 2024.)

⁷⁴ Defined in terms of association with traits of ‘anxiety, angry hostility, depression, self-consciousness, impulsivity, and vulnerability’, see Wagner n 73.

⁷⁵ *ibid.*

⁷⁶ MDMA group: n = 12, placebo: n = 8.

⁷⁷ Wagner (n 73).

⁷⁸ *ibid.*, 969.

⁷⁹ *ibid.*

⁸⁰ See MC Mithoefer and others, ‘Durability of Improvement in post-traumatic Stress Disorder Symptoms and Absence of Harmful Effects or Drug Dependency after 3,4-

particularly prominent.⁸¹ In this longitudinal pooled analysis of six phase 2 trials, a significant reduction in CAPS-IV total severity scores from baseline to treatment exit was found (56%), which continued to decrease (to 67%) one-year post-treatment, reinforcing that MDMA-assisted psychotherapy can have long-term positive effects on PTSD symptoms.⁸²

Another noteworthy study is the phase 2 double-blind RCT by Ot'alara and others.⁸³ In this study, 28 people with chronic PTSD were randomised to an active MDMA dose⁸⁴ group, or a low dose⁸⁵ group to compare the effects. Results displayed the active groups had the largest reductions in CAPS scores⁸⁶ with no drug-related serious adverse events, and PTSD symptoms remained lower than baseline after a 12-month follow up, with 76% no longer meeting PTSD criteria.⁸⁷ As the prevalence of PTSD in military veterans, personnel and first responders is significantly greater than that of the general

methylenedioxymethamphetamine-assisted psychotherapy: a Prospective long-term follow-up Study' [2012] 27(1) Journal of Psychopharmacology 28 < <https://doi.org/10.1177/0269881112456611> > accessed 10 January 2023; P Oehen and others, 'A randomized, Controlled Pilot Study of MDMA (\pm 3,4-Methylenedioxymethamphetamine)-assisted Psychotherapy for Treatment of resistant, Chronic Post-Traumatic Stress Disorder (PTSD)' [2012] 27(1) Journal of Psychopharmacology 40 < <https://doi.org/10up.1177/0269881112464827> > accessed 10 January 2023.

⁸¹ L Jerome and others, 'Long-term follow-up Outcomes of MDMA-assisted Psychotherapy for Treatment of PTSD: a Longitudinal Pooled Analysis of Six Phase 2 Trials' [2020] 237(8) Psychopharmacology 2485 < <https://doi.org/10.1007/s00213-020-05548-2> > accessed 23 April 2024.

⁸² *ibid.*

⁸³ GM Ot'alara and others, '3,4-Methylenedioxymethamphetamine-assisted Psychotherapy for Treatment of Chronic Posttraumatic Stress disorder: a Randomized Phase 2 Controlled Trial' [2018] 32(12) Journal of Psychopharmacology 1295 < <https://doi.org/10.1177/0269881118806297> > accessed 10 January 2023.

⁸⁴ 100mg (n = 9) and 125mg (n = 13).

⁸⁵ 40mg (n = 6).

⁸⁶ With mean (standard deviation) changes of -26.3 (29.5) for 125 mg, -24.4 (24.2) for 100 mg, and -11.5 (21.2) for 40 mg.

⁸⁷ Ot'alara (n 83).

population,⁸⁸ Mithoefer and colleagues investigated the safety and efficacy of MDMA for chronic PTSD among these highly affected groups in a phase 2 double-blind RCT with 26 participants. Participants were randomly assigned to one of three dose-varied groups: active control (30mg), 75mg, or 125mg⁸⁹ plus psychotherapy. At the primary endpoint, both the 75mg and 125mg groups exhibited significantly more pronounced reductions in PTSD symptom severity compared to the 30mg group.⁹⁰ These findings are particularly extraordinary as current treatment options are especially limited in effectiveness for these badly impacted social groups.

Promisingly, the first phase 3, double-blind RCT has been conducted by Mitchell and others.⁹¹ In this trial, 90 participants were randomised 1:1 to experimental or placebo groups to undergo psychotherapy. PTSD symptoms⁹² and functional impairment measured with the SDS⁹³ were assessed at baseline and two months after the final experimental session.⁹⁴ MDMA was observed to result in a noteworthy and strong reduction in CAPS-IV and total SDS score, compared to

⁸⁸ 17.1% for military personnel and veterans, 10-32% of first responders, compared with 8% in general population, see MC Mithoefer and others, '3,4-methylenedioxymethamphetamine (MDMA)-assisted Psychotherapy for post-traumatic Stress Disorder in Military veterans, firefighters, and Police officers: a randomised, double-blind, dose-response, Phase 2 Clinical Trial' [2018] 5(6) *The Lancet Psychiatry* 486 < [https://doi.org/10.1016/s2215-0366\(18\)30135-4](https://doi.org/10.1016/s2215-0366(18)30135-4) > accessed 23 April 2024.

⁸⁹ 30 mg (n=7), 75 mg (n=7), or 125 mg (n=12).

⁹⁰ Mean change CAPS-IV total scores: -58.3 [SD 9.8] for 75mg group, -44.3 [28.7] for 125mg group, compared with -11.4 [12.7] for the 30 mg group. See Mithoefer (n 88).

⁹¹ JM Mitchell and others, 'MDMA-assisted Therapy for Severe PTSD: a randomized, double-blind, placebo-controlled Phase 3 Study' [2021] 27(6) *Nature Medicine* 1025 < <https://doi.org/10.1038/s41591-021-01336-3> > accessed 10 January 2023.

⁹² As measured with the CAPS.

⁹³ Sheehan Disability Scale. See Multidisciplinary Association for Psychedelic Studies, 'Sheehan Disability Scale (SDS) – Overview' (MAPS, 2021) < https://maps.org/wp-content/uploads/2021/05/sheehan_disability_scale.pdf > accessed 12 January 2023.

⁹⁴ Mitchell (n 91).

the placebo, elucidating that “MDMA-assisted therapy is highly effective in treating individuals with severe PTSD, and treatment is safe and well-tolerated.”⁹⁵

The concordance between the findings of the presented studies clearly illustrates the profound clinical benefits of MDMA-assisted psychotherapy for treating PTSD. This high statistical homogeneity among research results thus further supports the campaign for psychedelics to treat chronic, treatment-resistant disorders in clinics.

(ii) Psilocybin and Major Depressive Disorder

MDD is characterised by persistent low mood, anhedonia,⁹⁶ feelings of guilt or worthlessness, lack of energy, poor concentration, appetite changes, sleep disturbances or suicidal thoughts.⁹⁷ It is a serious public health burden, ranked as the third largest contributor to the burden of disease worldwide by the World Health Organisation, which has projected it will rank first by 2030.⁹⁸ Treatment-resistant depression (“**TRD**”), used to describe those who have had no response to adequate antidepressant treatments, affects up to 30% of adults with MDD.⁹⁹ Those with MDD have abnormal brain functioning,

⁹⁵ *ibid*, 1025.

⁹⁶ i.e., the inability to feel pleasure, see S Bhandari, ‘What Is Anhedonia?’ [online] (WebMD, 2020) <<https://www.webmd.com/depression/what-is-anhedonia>> accessed 12 January 2023.

⁹⁷ N Bains and S Abdijadid, ‘Major Depressive Disorder’ (PubMed, 2022) <https://www.ncbi.nlm.nih.gov/books/NBK559078> accessed 12 January 2023. Per the DSM-IV, an individual requires a minimum of five of the specified symptoms, with at least one being either depressed mood or anhedonia causing social or occupational dysfunction for MDD diagnosis.

⁹⁸ World Health Organisation (WHO), ‘The Global Burden of disease: 2004 Update’ (WHO,2008) <http://www.who.int/healthinfo/global_burden_disease/2004_report_update/en/> accessed 12 January 2023.

⁹⁹ NIHR, ‘What Is treatment-resistant depression? New Report Calls for Clearer Definition to Inform Research and Improve Treatment’ (NIHR, 2021) <

with more segregated communication between brain regions,¹⁰⁰ and current pharmacological treatments display limited efficacy, adverse effects, discontinuation issues and high relapse rates.¹⁰¹ Psilocybin, however, has been shown to open these regions up and make the brain more “flexible, fluid [and] less entrenched in the negative thinking patterns associated with depression”,¹⁰² hence, can provide a promising alternative treatment.

<https://www.maudsleybrc.nihr.ac.uk/posts/2021/december/what-is-treatment-resistant-depression-new-report-calls-for-clearer-definition-to-inform-research-and-improve-treatment/> > accessed 12 January 2023.

¹⁰⁰ FF Zhang and others, ‘Brain Structure Alterations in depression: Psychoradiological Evidence’ [2018] 24(11) *CNS Neuroscience & Therapeutics* 994 < <https://doi.org/10.1111/ens.12835> >; JP Hamilton and others, ‘Default-mode and task-positive Network Activity in Major Depressive disorder: Implications for Adaptive and Maladaptive Rumination’ [2011] 70(4) *Biological Psychiatry* 327 < <https://doi.org/10.1016/j.biopsych.2011.02.003> > accessed 28 January 2023.

¹⁰¹ S Kolovos and others, ‘The Effect of Treatment as Usual on Major Depressive disorder: a meta-analysis’ [2017] 210 *Journal of Affective Disorders*, 72 < <https://doi.org/10.1016/j.jad.2016.12.013> > accessed 10 January 2023; SG Hofmann, ‘Effect of Treatments for Depression on Quality of life: a meta-analysis’ [2017] 46(4) *Cognitive Behaviour Therapy* 265 < <https://doi.org/10.1080/16506073.2017.1304445> > accessed 10 January 2023; P Haddad, ‘The SSRI Discontinuation Syndrome’ [1998] 12(3) *Journal of Psychopharmacology* 305 < <https://doi.org/10.1177/026988119801200311> > accessed 10 January 2023; C Locher and others, ‘Efficacy and Safety of Selective Serotonin Reuptake Inhibitors, Serotonin-Norepinephrine Reuptake Inhibitors, and Placebo for Common Psychiatric Disorders among Children and Adolescents’ [2017] 74(10) *JAMA Psychiatry* 1011 < <https://doi.org/10.1001/jamapsychiatry.2017.2432> > accessed 10 January 2023.

¹⁰² R O’Hare, ‘Magic Mushroom Compound Increases Brain Connectivity in People with Depression’ (Imperial News, Imperial College London, 2022) <<https://www.imperial.ac.uk/news/235514/magic-mushroom-compound-increases-brain-connectivity/>> accessed 12 January 2023; see also RE Daws and others, ‘Increased Global Integration in the Brain after Psilocybin Therapy for Depression’ [2022] 28(4) *Nature Medicine* 844 < <https://doi.org/10.1038/s41591-022-01744-z> > accessed 10 January 2023 and RL Carhart-Harris and others, ‘Psilocybin for treatment-resistant depression: fMRI-measured Brain Mechanisms’ [2017] 7(1) *Scientific Reports* < <https://doi.org/10.1038/s41598-017-13282-7> > accessed 10 January 2023.

(a) Psilocybin in Psychotherapy

The medicinal potential of psilocybin began being reintroduced into modern psychiatry in the mid-2010s and has been rapidly increasing since due to the optimistic findings.¹⁰³ Leading researcher in the field, Carhart-Harris, and colleagues conducted the first open-label feasibility study to investigate the efficacy and safety of psilocybin in 12 patients with unipolar TRD.¹⁰⁴ Participants were administered two oral doses of psilocybin¹⁰⁵ and depressive symptoms were measured with the QIDS.¹⁰⁶ Findings displayed a marked reduction in depressive symptoms¹⁰⁷ both 1 week and 3 months after high-dose treatment; additionally, 67% achieved complete remission after 1 week,¹⁰⁸ with 58% still in remission after 3 months.¹⁰⁹ In a 6-month follow-up, treatment outcomes continued to be positive, and psilocybin was “generally well-tolerated with no serious adverse events.”¹¹⁰ Whilst these findings do present a promising prototype for TRD treatment, the limitations such as a lack of control group, open-label design and small sample

¹⁰³ See S Correa da Costa and others, ‘Psychedelic Drugs for Psychiatric Disorders’ [2022] 440 *Journal of the Neurological Sciences* 120332 < <https://doi.org/10.1016/j.jns.2022.120332> > accessed 10 January 2023.

¹⁰⁴ RL Carhart-Harris and others, ‘Psilocybin with Psychological Support for treatment-resistant depression: an open-label Feasibility Study’ [2016] 3(7) *The Lancet Psychiatry* 619 < [https://doi.org/10.1016/s2215-0366\(16\)30065-7](https://doi.org/10.1016/s2215-0366(16)30065-7) > accessed 23 April 2024. Participants were required to have moderate to severe major depression, with no improvement even after receiving two sufficient courses of antidepressant treatment from different pharmacological categories lasting for a minimum of six weeks during their current depressive episode.

¹⁰⁵ *ibid.* 10mg and 25mg, 7 days apart, in a psychologically supportive environment.

¹⁰⁶ *ibid.* 16-item Quick Inventory of Depressive Symptoms (QIDS).

¹⁰⁷ *ibid.* (mean QIDS difference -11.8 , 95% CI -9.15 to -14.35 , $p=0.002$, Hedges' $g=3.1$) and 3 months (-9.2 , 95% CI -5.69 to -12.71 , $p=0.003$, Hedges' $g=2$). (See Carhart-Harris et al., 2016).

¹⁰⁸ *ibid.* A score of <9 on the BDI (Beck's Depression Inventory).

¹⁰⁹ *ibid.*

¹¹⁰ RL Carhart-Harris and others, ‘Psilocybin with Psychological Support for treatment-resistant depression: six-month follow-up’ [2017] 235(2) *Psychopharmacology* 399 < <https://doi.org/10.1007/s00213-017-4771-x> > accessed 10 January 2023.

size mean strong inferences cannot be made, however, it encouraged further, more robust, research. Similarly, Griffiths and others compared the effects of a very low, placebo-like dose with a high dose of psilocybin in their double-blind randomised trial with 51 cancer patients. Results displayed that the high dose psilocybin produced substantial, sustained¹¹¹ decreases in depression, with no reported serious adverse events; equivalent findings have also been affirmed in further research, supporting the increasingly expanding, promising evidence for psilocybin-assisted psychotherapy.¹¹²

Furthermore, Johnson and others highlight the unwarranted placement of psilocybin as schedule 1 of the MDA, depicting that it has a very low abuse potential and *no* physical dependence potential,¹¹³ thus claiming that, when used in an appropriate clinical setting, it is more likely to contribute to public health improvement than pose any risk.

More recently, Davis and others conducted a randomised trial involving 27 participants with MDD. Participants were assigned randomly to either an immediate treatment group or a delayed treatment group.¹¹⁴ Depression severity as the primary outcome was assessed with the GRID-HAMD.¹¹⁵ Results displayed a greater decrease in mean depression score from baseline to the first day post-treatment

¹¹¹ With about 80% of participants continuing to show clinically significant decreases in depressed mood and anxiety in 6-month follow-up.

¹¹² N Gukasyan and others, 'Efficacy and Safety of psilocybin-assisted Treatment for Major Depressive disorder: Prospective 12-month follow-up [2022] 36(2) Journal of Psychopharmacology 151 < <https://doi.org/10.1177/02698811211073759> > accessed 10 January 2023; RR Griffiths and others, 'Psilocybin Occasioned mystical-type experiences: Immediate and Persisting dose-related Effects' [2011] 218(4) Psychopharmacology 649 < <https://doi.org/10.1007/s00213-011-2358-5> > accessed 10 January 2023.

¹¹³ According to the 8 factors of the CSA.

¹¹⁴ Immediate treatment: n = 15, delayed treatment: n = 12.

¹¹⁵ With the GRID-Hamilton Depression Rating Scale (GRID-HAMD).

among the immediate treatment group than the delayed treatment group, which significantly reduced through the later 4-week follow-up. Across the total sample, 17 participants (71%) at week 1 and 17 (71%) at week 4 had a clinically significant response to the intervention,¹¹⁶ and 14 participants (58%) at week 1 and 13 participants (54%) at week 4 were in remission.¹¹⁷ This again displays the beneficial, sustained results of psilocybin-assisted psychotherapy for MDD.

Due to the array of positive research, the Medicines and Healthcare products Regulatory Agency granted a clinical trial authorisation in 2020 for the largest phase 2b double-blind RCT of psilocybin for TRD to date ($n = 233$), conducted by Goodwin and others at Compass Pathways.¹¹⁸ It aimed to understand the efficacy and safety of a single dose of psilocybin 25mg ($n = 79$) or 10mg ($n = 75$), compared to 1mg ($n = 79$), in TRD patients simultaneously receiving psychotherapy. The study displayed psilocybin produced rapid, sustained reductions in symptoms in participants in the 25mg group. By week 3, almost 30% (29.1%) of patients who received the 25mg dosage were in remission, with double the number of patients in this group having a maintained response at week 12, compared with the 1mg dosed group.¹¹⁹ Some serious adverse events among a minority of participants in the 25mg and 10mg groups were noted;¹²⁰ however, this is regularly observed among TRD populations, and mean suicidal ideation scores didn't worsen in any treatment group.¹²¹ A similar study by

¹¹⁶ $\geq 50\%$ reduction in GRID-HAMD score.

¹¹⁷ ≤ 7 GRID-HAMD score.

¹¹⁸ GM Goodwin and others, 'Single- Dose Psilocybin for a Treatment-Resistant Episode of Major Depression' [2022] 387(18) *New England Journal of Medicine* 1637 < <https://doi.org/10.1056/nejmoa2206443> > accessed 10 January 2023.

¹¹⁹ *ibid.* 20.3% of patients in the 25mg group vs 10.1% in the 1mg group.

¹²⁰ See *ibid.*, 1644-1645.

¹²¹ COMPASS Pathways, 'COMPASS Pathways Announces Publication of Phase 2b Study of COMP360 Psilocybin Therapy for treatment-resistant Depression in the *New England Journal of Medicine*' (Compass Pathways, 2022)

von Rotz and others also compared a single, moderate dose of psilocybin¹²² to placebo ($n = 52$).¹²³ These results reinforced previous research findings, displaying the psilocybin group showed a drastic decrease in symptom severity¹²⁴ which were substantially greater than those in the placebo condition 2 weeks post-intervention, with 54% of participants in the experimental condition reaching remission.¹²⁵ No serious adverse events were recorded in this study.

Overall, the many studies displaying profound benefits of psilocybin-assisted psychotherapy for treating such debilitating conditions like MDD and TRD suggest policy should be re-evaluated based on consistent scientific evidence. Encouragingly, in response to the positive results from the initial phase 2b trial, Compass Pathways are in the process of a phase 3, international, randomised, fixed single-dose, double-blind, placebo-controlled study with 378 TRD participants.¹²⁶ This study, with its incredibly robust design and large sample size, is very promising for the future of PAP.

<<https://compasspathways.com/compass-pathways-announces-publication-of-phase-2b-study-of-comp360-psilocybin-therapy-for-treatment-resistant-depression-in-the-new-england-journal-of-medicine/>> accessed 15 January 2023.

¹²² 0.215mg/kg body weight. See von Rotz et al (2023) for further details.

¹²³ R von Rotz and others, 'Single-dose psilocybin-assisted Therapy in Major Depressive disorder: a placebo-controlled, double-blind, Randomised Clinical Trial' [2023] 56 eClinicalMedicine 101809 < <https://doi.org/10.1016/j.eclimm.2022.101809> > accessed 10 January 2023.

¹²⁴ -13.0 points in comparison with baseline score.

¹²⁵ von Rotz (n 123). As per the MADRS (Montgomery-Åsberg Depression Rating Scale) remission criteria.

¹²⁶ COMPASS Pathways, 'A Phase III, Multicentre, Randomised, Double Blind, Placebo- controlled Study to Investigate the Efficacy, Safety, and Tolerability of a Single Administration of COMP360 in Participants with Treatment-resistant Depression' (COMPASS Pathways, 2023) <<https://clinicaltrials.gov/ct2/show/NCT05624268>> accessed 28 February 2023.

(iii) LSD and Addiction

In terms of the total harm caused, alcohol surpasses all other drugs, followed by heroin,¹²⁷ as substantiated with recent statistics that indicate a high number of drug-related deaths.¹²⁸ AUD is classified as a brain disorder, characterised by heavy drinking with “an impaired ability to stop or control alcohol use despite adverse social, occupational, or health consequences.”¹²⁹

Diagnoses vary from mild, moderate, and severe depending on the number of symptoms experienced in a 12-month period.¹³⁰ Between April 2021 and March 2022, 289,215 adults were in contact with drug and alcohol services in the UK, with 49% there for opioid addiction, and 29% for alcohol alone.¹³¹ Current treatment for addiction includes oral medications and psychological counselling; however, existing

¹²⁷ DJ Nutt, LA King, and LD Phillips, ‘Drug Harms in the UK: a Multicriteria Decision Analysis’ [2010] 376(9752) *The Lancet* 1558 < [https://doi.org/10.1016/s0140-6736\(10\)61462-6](https://doi.org/10.1016/s0140-6736(10)61462-6) > accessed 10 January 2023.

¹²⁸ Office for National Statistics (ONS), ‘Deaths Related to Drug Poisoning in England and Wales’ (ONS, 2022) <<https://www.ons.gov.uk/peoplepopulationandcommunity/birthsdeathsandmarriages/deaths/bulletins/deathsrelatedtodrugpoisoninginenglandandwales/2021registrations>> accessed 21 January 2023.

¹²⁹ NIAAA, ‘Understanding Alcohol Use Disorder’ (NIAAA, 2021) <<https://www.niaaa.nih.gov/publications/brochures-and-fact-sheets/understanding-alcohol-use-disorder>> accessed 25 January 2023. AUD defined as >3 drinks per day or >7 drinks in a week for women, and >4 drinks per day or >14 drinks in a week for men, see National Institute on Alcohol Abuse and Alcoholism, see NIAAA, ‘Drinking Levels Defined’ (NIAAA, 2017) < <https://www.niaaa.nih.gov/alcohol-health/overview-alcohol-consumption/moderate-binge-drinking>> accessed 25 January 2023.

¹³⁰ With the DSM-5: Mild = 2-3 criteria; moderate = 4-5 criteria; severe = 6 or more criteria. See *ibid*.

¹³¹ GOV.UK, ‘Adult Substance Misuse Treatment Statistics 2021 to 2022: Report’ (GOV.UK, 2023) <<https://www.gov.uk/government/statistics/substance-misuse-treatment-for-adults-statistics-2021-to-2022/adult-substance-misuse-treatment-statistics-2021-to-2022-report#summary>> accessed 1 February 2023.

treatment displays only modest efficacy,¹³² with many patients not achieving recovery.¹³³ Furthermore, current statistics on the efficacy of addiction recovery treatment programmes may be unreliable, as, oftentimes, treatment services push for rapid completions so patients' cases can be immediately closed to reach internal "successful completion" targets, thus not accounting for later potential relapses.¹³⁴ Data on remission, therefore, does not always reflect genuine sustained, successful completions, and should be interpreted through a critical lens.

(a) LSD in Psychotherapy

As much of the data on LSD was conducted prior to prohibitive laws, the literature included in this subsection relies predominantly on meta-analyses and literature reviews of these studies which elucidate benefits of LSD for addiction, particularly AUD. Thus, it is imperative that further research into LSD-assisted psychotherapy performed under modern trial standards is conducted.

The record for LSD-assisted psychotherapy remained relatively incoherent until 2012, when a meta-analysis by Krebs and Johansen analysed six of the most robust RCTs conducted prior to legal restrictions¹³⁵ with a total of 536

¹³² PN Miller, SW Book, and SH Stewart, 'Medical Treatment of Alcohol Dependence: a Systematic Review' [2011] 42(3) *International Journal of Psychiatry in Medicine* 227 < <https://doi.org/10.2190/PM.42.3.b> > accessed 10 January 2023.

¹³³ MA Schuckit, 'Alcohol-use Disorders. The Lancet' [2009] 373(9662) 492 < [https://doi.org/10.1016/s0140-6736\(09\)60009-x](https://doi.org/10.1016/s0140-6736(09)60009-x) > accessed 10 January 2023.

¹³⁴ W Floodgate, 'From Maintenance to recovery: Exploring the Reorientation Towards Recovery in British Drug Policy During a Time of Reform and Economic Austerity' (PhD Thesis, 2017) https://research.manchester.ac.uk/files/66046259/FULL_TEXT.PDF accessed 25 January 2023.

¹³⁵ Bowen and others, 'Lysergic Acid Diethylamide as a Variable in the Hospital Treatment of Alcoholism' [1970] 150(2) *The Journal of Nervous and Mental Disease* 111 < <https://doi.org/10.1097/00005053-197002000-00003> > accessed 10 January 2023; LE Hollister, J Shelton, and G Krieger, 'A Controlled Comparison

participants, to evaluate the clinical efficacy of LSD in treating alcoholism.¹³⁶ This pooled analysis of the trials with single drug doses¹³⁷ reported a superiority in the effect of LSD in a controlled setting, providing a statistically and clinically “significant beneficial effect on alcohol misuse”,¹³⁸ with “59% of the LSD-treated participants being significantly improved at the first post-treatment follow-up, compared to 38% of the control participants.”¹³⁹ Furthermore, remission rates during follow-up were almost double in the experimental groups compared to the placebo control groups. This meta-analysis thus displays LSD to have at least equivalent efficacy compared to other available treatments.¹⁴⁰ This finding was

of Lysergic Acid Diethylamide (LSD) and Dextroamphetamine in Alcoholics’ [1969] 125(10) *American Journal of Psychiatry* 1352 < <https://doi.org/10.1176/ajp.125.10.1352> > accessed 10 January 2023; A Ludwig and others, ‘A Clinical Study of LSD Treatment in Alcoholism [1969] 126(1) *American Journal of Psychiatry*’ 59 < <https://doi.org/10.1176/ajp.126.1.59> > accessed 10 January 2023; WN Pahnke and others, ‘The Experimental Use of Psychedelic (LSD) Psychotherapy’ [1970] 212(11) *JAMA: the Journal of the American Medical Association* 1856 < <https://doi.org/10.1001/jama.1970.03170240060010> > accessed 10 January 2023.; RG Smart and others, ‘A Controlled Study of Lysergide in the Treatment of Alcoholism. 1. the Effects on Drinking Behavior’ [1966] 27(3) *Quarterly Journal of Studies on Alcohol* 469 < <https://doi.org/10.15288/qjsa.1966.27.469> > accessed 15 January 2023; M Tomsovic and RV Edwards, ‘Lysergide Treatment of Schizophrenic and Nonschizophrenic Alcoholics; a Controlled Evaluation’ [1970] 31(4) *Quarterly Journal of Studies on Alcohol* 932 < <https://doi.org/10.15288/qjsa.1970.31.932> > accessed 10 January 2023.

¹³⁶ TS Krebs and P-Ø Johansen, ‘Lysergic Acid Diethylamide (LSD) for alcoholism: meta-analysis of Randomized Controlled Trials’ [2012] 26(7) *Journal of Psychopharmacology* 994 < <https://doi.org/10.1177/0269881112439253> > accessed 10 January 2023.

¹³⁷ With active drug doses from around 210 to 800 mcg, and control doses around 50mcg.

¹³⁸ Krebs and Johansen (n 136), 1000.

¹³⁹ MP Bogenschutz and MW Johnson, ‘Classic Hallucinogens in the Treatment of Addictions’ [2016] 64 *Progress in Neuro-Psychopharmacology and Biological Psychiatry* 250 (as cited in Krebs and Johansen (n 136)).

¹⁴⁰ Krebs and Johansen (n 136). Other available treatments refer to naltrexone, acamprostate or disulfiram here, see H Krampe and H Ehrenreich, ‘Supervised Disulfiram as Adjunct to Psychotherapy in Alcoholism Treatment’ [2010] 16(19) *Current Pharmaceutical Design* 2076 < <https://doi.org/10.2174/138161210791516431> > accessed 10 January 2023; S Rösner and others, ‘Acamprostate for Alcohol

also consistent with results from most non-RCTs and open-label trials.¹⁴¹

Researchers note, however, that the profound effects were observed up to 6 months, but not statistically significant in the long-term as they began to fade within 12 months, opening a future research gap to fill, namely, studies to assess the effectiveness of repeated LSD doses to treat AUD.

Following this, a contemporary systematic literature review of LSD RCTs was conducted by José-Fuentes and others to inform discussion on integrating LSD into modern psychiatry.¹⁴² 11 papers including 567 patients with a dose range from 20 to 800mcg were reviewed, with the majority focusing on AUD. One of the studies, Pahnke, in the double-blind, active-placebo RCT,¹⁴³ displayed considerable improvements in AUD symptoms¹⁴⁴ in the LSD group compared to the control group at 6 months.¹⁴⁵ Furthermore,

Dependence' [2010] (9) Cochrane Database of Systematic Reviews < <https://doi.org/10.1002/14651858.cd004332.pub2> > accessed 10 January 2023; S Rösner and others, 'Opioid Antagonists for Alcohol Dependence' [2010] (12) Cochrane Database of Systematic Reviews < <https://doi.org/10.1002/14651858.cd001867.pub3> > accessed 10 January 2023.

¹⁴¹ See FS Abuzzahab and BJ Anderson, 'A Review of LSD Treatment in Alcoholism' (1971) 6(4) International Pharmacopsychiatry 223 < <https://doi.org/10.1159/000468273> > accessed 10 January 2023; M Mangini, 'Treatment of Alcoholism Using Psychedelic Drugs: a Review of the Program of Research' [1998] 30(4) Journal of Psychoactive Drugs 381 < <https://doi.org/10.1080/02791072.1998.10399714> > accessed 10 January 2023.

¹⁴² J José Fuentes and others, 'Therapeutic Use of LSD in Psychiatry: a Systematic Review of Randomized-Controlled Clinical Trials [2020] 10 Frontiers in Psychiatry < <https://doi.org/10.3389/fpsy.2019.00943> > accessed 10 January 2023.

¹⁴³ n = 117.

¹⁴⁴ Observed by Global Adjustment (defined as the overall attainment and total life adjustment and stability of the individual, see C Savage and OL McCabe, 'Residential Psychedelic (LSD) Therapy for the Narcotic Addict' [1973] 28(6) Archives of General Psychiatry 808, 814 < <https://doi.org/10.1001/archpsyc.1973.01750360040005> > accessed 10 January 2023, (ANCOVA, p < 0.05) and Drinking Behaviour (ANCOVA, p < 0.025) measures, see Pahnke (n 135).

¹⁴⁵ Pahnke (n 135).

Tomsovic and Edwards evaluated the therapeutic potential of LSD for AUD across three groups:¹⁴⁶ one LSD treatment group and two control groups.¹⁴⁷ The findings showed more participants in the LSD group were abstinent compared to control group one at three months, “maintaining this superiority at one year in several grades.”¹⁴⁸ Another study mentioned in the review is the double-blind trial by Hollister and others, who noted significant improvements for LSD groups at the two-month time horizon, however, there were no significant differences at the six-month point.¹⁴⁹ Notwithstanding, some studies did not obtain a statistically significant difference between experimental and control groups,¹⁵⁰ however this heterogeneity among findings has been attributed to the significant variance among methods, designs, set, settings, and aftercare in the studies.¹⁵¹ Ergo, “the important therapeutic value of LSD is revealed”¹⁵² and the establishment of a standardised method to reliably assess LSD as a psychotherapeutic adjunct is necessary. The distinct serotonergic therapeutic effects, such as the alteration of consciousness and psychointegration¹⁵³ and the production of persisting brain changes¹⁵⁴ seems to be unique to psychedelics.

¹⁴⁶ n = 77.

¹⁴⁷ Tomsovic (n 135). Control group 1 had no treatment; control group 2 had usual treatment ‘Regular Alcoholic Rehabilitation Program’.

¹⁴⁸ José Fuentes (n 142), 9.

¹⁴⁹ Measured by the Drinking Behavior Scale Scores.

¹⁵⁰ See, e.g., Ludwig (n 135); FG Johnson, ‘LSD in the Treatment of Alcoholism’ [1969] 126(4) *American Journal of Psychiatry* 481 < <https://doi.org/10.1176/ajp.126.4.481> > accessed 10 January 2023.

¹⁵¹ José Fuentes (n 142), 11.

¹⁵² *ibid.*, 11.

¹⁵³ M Winkelman, *Shamanism: a Biopsychosocial Paradigm of Consciousness and Healing* (Santa Barbara, Calif.: Praeger, 2010); M Winkelman, ‘A Paradigm for Understanding Altered Consciousness; the Integrative Mode of Consciousness’ in Etzel Cardeña and Michael James Winkelman (eds), *Altering Consciousness Multidisciplinary Perspectives* volume 1 (Santa Barbara: Praeger ABC-CLIO, 2011).

¹⁵⁴ MP Bogenschutz and JM Pommy, ‘Therapeutic Mechanisms of Classic Hallucinogens in the Treatment of addictions: from Indirect Evidence to Testable

Therefore, when administered in a controlled setting, these effects are extended as psychophysiological processes to aid alleviation of addictive behaviours,¹⁵⁵ advancing evidence for the imperativeness of further research into psychedelic-assisted addiction treatment.

Whilst AUD is the predominant literature basis of LSD research, there has also been promising preliminary research into opioid addiction treatment. For example, Ludwig and Levine conducted a 70-patient controlled comparison of five treatment techniques with differing combinations of LSD, hypnosis, and psychotherapy to evaluate which produced the most noteworthy change and to what extent it relieved addiction symptoms.¹⁵⁶ Participants were randomly assigned to one of the five conditions, each receiving one therapeutic session.¹⁵⁷ At the 2-month follow-up, the greatest improvement (per a designed questionnaire) was reported amongst the hypnodelic group,¹⁵⁸ displaying supporting evidence for LSD in therapy to treat debilitating opioid addiction. In the following decade, another controlled trial conducted by Savage and McCabe randomly assigned 78 volunteer heroin addict inmates to a control¹⁵⁹ or experimental

Hypotheses' [2012] 4(7-8) Drug Testing and Analysis 543 < <https://doi.org/10.1002/dta.1376> > accessed 10 January 2023.

¹⁵⁵ M Winkelman, 'Psychedelics as Medicines for Substance Abuse Rehabilitation: Evaluating Treatments with LSD, Peyote, Ibogaine and Ayahuasca' (2014) 7(2) Current Drug Abuse Reviews 101 < <https://doi.org/10.2174/1874473708666150107120011> > accessed 3 January 2023.

¹⁵⁶ AM Ludwig and J Levine, 'A Controlled Comparison of Five Brief Treatment Techniques Employing LSD, Hypnosis, and Psychotherapy' [1965] 19(3) American Journal of Psychotherapy 417 < <https://doi.org/10.1176/appi.psychotherapy.1965.19.3.417> > accessed 10 January 2023.

¹⁵⁷ Group 1: psychotherapy, group 2: hypnotherapy, group 3: LSD with no psychotherapeutic intervention, group 4: LSD with psychotherapy, group 5: LSD with hypnotherapy (referred to as *hypnodelic* therapy by Ludwig and Levine).

¹⁵⁸ (group 5) - those with LSD with hypnotherapy.

¹⁵⁹ Control group was usual outpatient, clinic program with daily urine drug monitoring and weekly group therapy, see Savage (n 144).

condition, which included 4-6 weeks of residential treatment with one LSD session.¹⁶⁰ The study aimed to investigate the efficacy of LSD for chronic heroin users, finding comparative abstinence data significantly favoured LSD participants, with 33.3% of the treatment group achieving at least one-year post-treatment abstinence, compared to just 5% of the control group. Whilst the absence of differentiation between the impact of LSD administration and other factors of the residential treatment period is a limitation, the findings of this study demonstrate auspicious results and contribute to the promising evidence-based discourse surrounding LSD and addiction treatment.

Despite the impressive evidence of LSD-assisted psychotherapy for addiction, progress within research has remained modest. This could be a result of the controversial history of LSD, which means obtaining regulatory approval is more difficult due to the stigma the drug carries.¹⁶¹ Additionally, the longer-lasting psychoactive effects of LSD may mean psilocybin or MDMA are preferable; however, given the strong evidence base for LSD-assisted psychotherapy, it should be considered as a treatment option. Encouragingly, a 126 participant,¹⁶² multicentre, double-blind, randomised, active-placebo controlled phase 2 RCT into LSD for those with AUD is underway in 2024, set to be complete in 2028.¹⁶³

¹⁶⁰ One single high dose (300-450µg).

¹⁶¹ Mangini (n 141).

¹⁶² Estimated.

¹⁶³ F Müller, 'LSD Treatment for Persons with Alcohol Use Disorder (LYSTA)' (ClinicalTrials.gov, 2022) <<https://beta.clinicaltrials.gov/study/NCT05474989>> accessed 28 January 2023.

(iv) Conclusion

The applaudable findings of PAP delineated in this chapter indicate solid justification for further research due to their incredible benefits when administered under appropriately supervised clinical settings, extremely high safety profiles,¹⁶⁴ and unique neuroscientific effects.¹⁶⁵ In the context of mental health conditions impacting an increasing number of people, with mental disorders currently being the leading cause of disability, the necessity for transformation within the mental health support sector has never been more crucial.

To this, enabling psychedelics in clinics would have drastic individual and public health benefits. Most current medicine for psychiatric disorders require daily use for extended time periods, which is associated with serious adverse effects¹⁶⁶ and is costly for both the individual and healthcare system. Furthermore, most prescribed medicines require many weeks to display therapeutic effects, in stark contrast with the current psychedelic studies that only use one to three drug doses yet display long-term therapeutic benefits. While there may be a need for a short-term investment in time and resources

¹⁶⁴ E Freeska, 'Therapeutic guidelines: Dangers and contra-indications in Therapeutic Applications of Hallucinogens' in T Roberts and M Winkelman (eds), *Psychedelic Medicine: New Evidence for Hallucinogenic Substances as Treatments* (Preager, 2007); RG dos Santos and others, 'Efficacy, tolerability, and Safety of Serotonergic Psychedelics for the Management of mood, anxiety, and substance-use disorders: a Systematic Review of Systematic Reviews' [2018] 11(9) *Expert Review of Clinical Pharmacology* 889 < <https://doi.org/10.1080/17512433.2018.1511424> > accessed 10 January 2023.

¹⁶⁵ RL Carhart-Harris and others, 'The Effects of Acutely Administered 3,4-Methylenedioxymethamphetamine on Spontaneous Brain Function in Healthy Volunteers Measured with Arterial Spin Labeling and Blood Oxygen Level-Dependent Resting State Functional Connectivity' [2015] 78(8) *Biological Psychiatry*, 554 < <https://doi.org/10.1016/j.biopsych.2013.12.015> > accessed 10 January 2023.

¹⁶⁶ PC Götzsche, 'Deadly Psychiatry and Organised Denial' (Google Books, Art People 2015).

for PAP sessions, the treatment itself would involve only one or a few sessions in total. Ergo, the benefits of PAP would surpass those of current pharmacotherapy and standard psychotherapy in terms of enduring benefits. From this perspective, not only would PAP be less costly for society in the long term, but it would also provide more treatment choice for individuals with treatment-resistant conditions who suffer from low quality of life due to their disorder, indirectly reducing the burden of disease and increasing quality of life, particularly in the long term.¹⁶⁷

Overall, the social stigma surrounding psychedelics in medicine should be challenged in response to the presented evidence-based findings of the effectiveness of PAP, and it is a moral responsibility of the governing body and field of medical professionals to campaign for change to legally enable these effective treatments for mental health conditions. Ways in which this change could proceed are outlined by Winkelman and Roberts in the following ways:¹⁶⁸ firstly, political pressure on regulatory agencies via media education and activities in public health and policy organisation; secondly, the application of the immense, abundantly clear therapeutic potential of psychedelics elucidated by the scientific, clinical, ethnographic, and cross-cultural evidence to public education in order to exacerbate pressure to effect administrative regulation changes; thirdly, collective social action, as opposed to a mere increase in scientific trials, is required to encourage

¹⁶⁷ RG dos Santos and others, 'The Use of Classic Hallucinogens/Psychedelics in a Therapeutic Context: Healthcare Policy Opportunities and Challenges' [2021] 14(14) Risk Management and Healthcare Policy 901 < <https://doi.org/10.2147/rmhp.s300656> > accessed 10 January 2023.

¹⁶⁸ M Winkelman and TB Roberts, 'Conclusions: Guidelines for Implementing the Use of Psychedelic Medicines' in T Roberts and M Winkelman (eds), *Psychedelic Medicine: New Evidence for Hallucinogenic Substances as Treatments* (Preager, 2007).

the pre-existing evidence to be considered, as this paper expands on in the subsequent chapter.

IV. Navigating Political Reform

Over the fifty years since the MDA was passed, there have been drastic developments in psychedelic drug knowledge, safety and efficacy in treating mental health disorders. Yet, the drug policy of the UK remains governed by the aforementioned bipartite system of the MDA and MDR, categorising psychedelic drugs as those which have no recognised medical use and a high potential for abuse. Since its passing, “the MDA has never been subject to formal government evaluation or review”¹⁶⁹ and continues to pose a significant barrier in enabling research, impeding the development of neuroscientific research and disregarding psychedelics as efficient treatments in the sphere of psychiatry.¹⁷⁰

This chapter addresses the research question of why we have not yet seen profound political change by discussing the politics of drug policymaking, with reference to contemporary parliamentary discussion; and delineates the challenges of getting scientific knowledge to become accepted evidence in politics. It follows by arguing that drug policy should be underpinned by evidence-based findings to allow for scientific progression within medicine. Finally, it concludes by addressing a suggestion of *how* this political reform could materialise within the UK.

¹⁶⁹ Transform, ‘The Misuse of Drugs Act: Counting the Costs’ (Transform, 2022) <<https://transformdrugs.org/publications/the-misuse-of-drugs-act-counting-the-costs>> accessed 30 January 2023.

¹⁷⁰ Nutt (n 8).

(i) The Politics of Drug Policymaking

The introduction and adaptations of drug policy is a heavily politicised process, with a multitude of opportunities as well as barriers for those in influential positions. Policymakers are becoming increasingly encouraged to develop evidence-based policies in association with those deemed experts in the field. However, the process of translating evidence into policy outcomes is seldom straightforward and tends to be a very intricate undertaking.¹⁷¹ In the current system, the ACMD, an independent panel of experts responsible for evaluating government drug laws and soliciting their specialist advice to inform policy, plays an important role. This is because ministers are compelled to consult them prior to forming statutes under the MDA and before laying orders before parliament, but do not *have* to act on their advice.¹⁷² In his auto-ethnography of UK drug policy advisory panels, Stevens explores how the bureaucratic processes, agenda-setting, self-censorship and filtering of information can produce a narrow knowledge pool that excludes politically undesirable yet pivotal evidence that would otherwise shape effective policy.¹⁷³

Who is granted an “expert” title is a pertinent obstacle within the ACMD, with the panel selection process often exhibiting a form of nepotism, influenced by structural inequalities which favours those who exist in networks with other members of similar social backgrounds and beliefs. These

¹⁷¹ See CH Weiss, ‘The Many Meanings of Research Utilization’ [1979] 39(5) Public Administration Review 426 < <https://doi.org/10.2307/3109916> > accessed 27 January 2023.

¹⁷² SL Taylor, ‘Evidence-based Policy? the re-medicalization of Cannabis and the Role of Expert Committees in the UK, 1972–1982’ [2016] 37 International Journal of Drug Policy 129, 130 < <https://doi.org/10.1016/j.drugpo.2016.04.014> > accessed 10 January

¹⁷³ A Stevens, ‘The Politics of Being an ‘Expert’: a Critical Realist Auto-Ethnography of Drug Policy Advisory Panels in the UK’ [2021] 10(2) Journal of Qualitative Criminal Justice & Criminology, < <https://doi.org/10.21428/88de04a1.a536a85b> > accessed 10 April 2023.

relational networks produce a “politics of familiarity”,¹⁷⁴ which can exclude suitable, qualified experts and in turn, restrict the scope of available evidence. This “political vetting of candidates”¹⁷⁵ thus deters applicants from vocalising opposing political stances prior to joining a panel if they wish to be chosen as a suitable expert.

An example of this is the ACMD applicants Graham Parsons and Niamh Eastwood, who were denied acceptance following surfacing instances on twitter where they expressed contrary opinions from ministers. This displays the nature of the checks which candidates considered for these roles undergo “to ensure they are *suitable* to hold these vital public positions.”¹⁷⁶ Thus, these sufficiently competent applicants were denied admission due to their seemingly controversial opinions, which could purportedly arouse concern regarding political embarrassment if they were approved experts.¹⁷⁷ From a sociological perspective, it is clear that the criteria to be accepted into a position of power in the politics of drug policymaking is specific and biased, meticulously controlled and directed at obtaining experts whose beliefs align with the dominant, pre-existing political ideology. The inevitable result is that alternative perspectives are excluded, and the knowledge pool is narrowed.

This process of self-censorship not only affects the freedom of panel applicants to proclaim potentially controversial opinions, but also carries through to those who make it into distinguished positions. The complex relationship between evidence and policy therefore remains within the

¹⁷⁴ *ibid.*, 7.

¹⁷⁵ *ibid.*, 7.

¹⁷⁶ M Busby, ‘Expert Quits Home Office Drug Panel over ‘political vetting’ (The Guardian, 2019) <https://www.theguardian.com/politics/2019/oct/06/expert-quits-home-office-drug-panel-over-political-vetting> accessed 22 January 2023.

¹⁷⁷ Stevens (n 172).

internal political processes. Whilst the ACMD are a “prime venue for work of experts in creating knowledge for policy”,¹⁷⁸ their relationship with the government can be a site of tension within politics.

For example, the current preventative stance regarding drug use adopted by UK government perpetuates and reinforces a stigma surrounding discussion about drugs and their potential benefits. Thus, not only are the voices of the panels homogenised due to the partiality in the selection of applicants but being viewed as a pro-drug person in the context of an anti-drug political climate could be deemed as political suicide.¹⁷⁹ This fractious relationship between the government and advisory panels has been exemplified in drug classification discourses previously. For example, in 2009, when Professor David Nutt compared the significantly higher recorded annual deaths from horse riding with the low annual deaths linked to ecstasy. With this, he argued that the poor quality of research papers about ecstasy warranted them being retracted, which resulted in him being swiftly asked to step down as chair of the ACMD.¹⁸⁰ In a letter responding to Nutt’s controversial claim, home secretary Alan Johnson asserted “it is important that the *government’s messages on drugs are clear* and as an advisor, you do nothing to undermine public understanding of them.”¹⁸¹ This example thus displays how internal conflict can arise

¹⁷⁸ S Jasanoff, *The Fifth Branch: Science Advisers as Policymakers* (Harvard University Press 1990).

¹⁷⁹ A Unlu, T Tammi, and P Hakkarainen, ‘Policy Windows for Drug Consumption Rooms in Finland’ [2022] 39(3) *Nordic Studies on Alcohol and Drugs* p.145507252110692 < <https://doi.org/10.1177/14550725211069287> > accessed 14th January 2023.

¹⁸⁰ A Travis, ‘Alcohol Worse than Ecstasy - Drugs Chief’ (The Guardian, 2009) <<https://www.theguardian.com/politics/2009/oct/29/nutt-drugs-policy-reform-call>> accessed 16 January 2023.

¹⁸¹ Institute of Alcohol Studies (IAS), ‘Prof David Nutt Sacked from Advisory Council on the Misuse of Drugs’ (IAS, 2009) <<https://www.ias.org.uk/news/prof-david-nutt-sacked-from-advisory-council-on-the-misuse-of-drugs/>> accessed 19 January 2023. Emphasis added.

between advising bodies who present their expertise, and governments who fear being viewed as lenient on drugs, resulting in a cherry-picking of evidence which supports the notion that drugs are dangerous. Due to this fear of political suicide, many of those in influential positions to shape agenda setting for drug policy therefore abstain from a fore fronted position in the process of policy development.¹⁸²

This perspective that governing bodies disregard evidence which may contest pre-existing political values is also elucidated with the contemporary discussion of PAP in parliamentary debates. For example, a recent debate about reviewing drug legislation in light of the numerous PAP trials suggested the schedule 1 status of psilocybin is hindering research and should be rescheduled to schedule 2. The response to this claimed that “once [the government has] had [the ACMDs] advice on the topic, including the implications for psychedelic drugs...we will *obviously* take an appropriate decision in relation to research.”¹⁸³ Yet, this same line of debate has occurred in political discourse a year prior; with the ACMDs advice being provided,¹⁸⁴ only to receive a response from the minister for crime and policing, Kit Malthouse, stating that “the government currently have *no plans* to review the 1971 MDA.”¹⁸⁵ This further shows how the government often overrule the ACMDs recommendations, even considering their incredibly possible, socially productive policy proposals, because they may not support the current anti-drug narrative, despite claiming to “obviously” respond appropriately when provided with their advice.

¹⁸² Unlu (n 179).

¹⁸³ HC Deb 14 November 2022, vol 722, col 11.

¹⁸⁴ See HC Deb 18 October 2021, vol 701, col 4; and HC Deb 22 March 2021, vol 691, col 605.

¹⁸⁵ HC Deb 22 March 2021, vol 691.

Furthermore, the suggestion of drug consumption rooms (“DCR”)¹⁸⁶ proposed by the ACMD as a means of reducing opioid-related deaths in the UK was briefly responded to seven months later, with the government explicitly stating they had no plans to fund DCR.¹⁸⁷ It is clearly illustrated here that “policymaking tends to favour the politically feasible over the technically possible.”¹⁸⁸ Thus, the process of drug policymaking is inextricably linked with politics, power and selectivity from the outset and throughout. With narrowed evidence being anecdotally chosen from a strategically selected range of experts, some very plausible policy options, such as PAP and DCR, are disregarded despite supporting evidence.¹⁸⁹ Ergo, a holistic lens must be applied to address the invariably political and sociological nature of drug policymaking in the UK. Despite the difficulties addressed, political reform is pivotal and should be encouraged with regards to PAP.

(ii) How Political Reform Could Occur

For political reform to transpire, there must be an opportunity for discussion to emerge and alternative options to be considered; this aperture is referred to by Kingdon as a policy

¹⁸⁶ Supervised drug consumption facilities, where illicit drugs can be used under the supervision of trained staff. See EMCDDA, ‘Drug Consumption Rooms: an Overview of Provision and Evidence’ (EMCDDA, 2018) https://www.emcdda.europa.eu/topics/pods/drug-consumption-rooms_en accessed 16 January 2023.

¹⁸⁷ D Rhodes, ‘Drug Consumption Rooms Ruled out by Government’ (BBC News, 2017) <<http://www.bbc.co.uk/news/uk-england-40674453>> accessed 21 January 2023. See ACMD’s statement in ACMD, ‘Reducing Opioid-Related Deaths in the UK’ (ACMD, 2016) <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/576560/ACMD-Drug-Related-Deaths-Report-161212.pdf> accessed 17 January 2023.

¹⁸⁸ M Monaghan, E Wincup, and K Wicker, ‘Experts, Expertise and Drug Policymaking’ [2018] 57(3) *The Howard Journal of Crime and Justice* 422 <<https://doi.org/10.1111/hojo.12265>> accessed 10 January 2023.

¹⁸⁹ Stevens (n 172).

window.¹⁹⁰ From this perspective, political reform is complex, but if interpreted adequately by participants in the policy process, it can be used to facilitate change.

Kingdon argues that for a window to open, there must be an interaction of three crucial process streams: a problem stream, a policy stream and a political stream.¹⁹¹ The first process, the problem stream, refers to the opinions and attitudes of the public regarding some social issue, which reaches a high level of awareness and becomes a significantly defined problem.¹⁹² The policy stream contains the recommendations or proposed solutions for the problem from researchers, advisory panels, and others in the policy community.¹⁹³ The political stream includes the ideas and values that influence politics, which are pivotal to determining whether a policy idea is deemed worth ratifying. Whilst these three streams are important, they only constitute substantial political leverage when combined in a mutually constitutive way. In the context of this paper, the proposal of psychedelic drug rescheduling can fit with this policy window perspective in the following way.

The formerly mentioned crisis surrounding mental health constitutes the problem stream element as an identified major public health issue;¹⁹⁴ with this, the incredibly productive findings from researchers' PAP RCT and recommendations from the ACMD proposing rescheduling of psychedelics

¹⁹⁰ JW Kingdon, *Agendas, Alternatives and Public Policies* (2nd ed, Longman 2003).

¹⁹¹ *ibid.*

¹⁹² J Cho and A Trent 'Validity in Qualitative Research Revisited' [2006] 6(3) *Qualitative Research* 319 <<https://doi.org/10.1177/1468794106065006>> accessed 10 January 2023.

¹⁹³ Unlu (n 179), 212.

¹⁹⁴ British Medical Association (BMA), 'Shameful Statistics Show a Mental Health Crisis That Is Spiralling out of Control as Demand Far Outweighs capacity, Warns BMA' (BMA Media Centre, 2022) <<https://www.bma.org.uk/bma-media-centre/shameful-statistics-show-a-mental-health-crisis-that-is-spiralling-out-of-control-as-demand-far-outweighs-capacity-warns-bma>> accessed 4 January 2023.

constitute the policy stream component as cogent solutions to the problem. As for the political stream, there has been a positive escalation in supportive, evidence-based media coverage of the potential of PAP, depicting changing national ideas and values on the clinical use of psychedelics.¹⁹⁵ Ergo, policy entrepreneurs should use their influential political standing to “soften up” the proposals of new ideological preferences,¹⁹⁶ as policy windows may not remain open for too long. Alongside these publicly visible participants, the media can also play an instrumental role in shaping the discourse around policy alternatives and “bridging the gap between research, policy and legislative change.”¹⁹⁷ Thus, it could be said that there are increasing indicators that a policy window may open to enable opportunity for psychedelics to be rescheduled in the UK, given that the window is used productively.

In order to “move towards a social and political engagement with [psychedelic] drugs driven by evidence-informed policy and practice”,¹⁹⁸ Moore and others outline ways to integrate the therapeutic potential of MDMA into UK

¹⁹⁵ P Tullis, ‘How Ecstasy and Psilocybin Are Shaking up Psychiatry’ [2021] 589(7843) *Nature* 506 < <https://doi.org/10.1038/d41586-021-00187-9> > accessed 10 January 2023; Horizon, ‘Psychedelics Paired with Therapy Could Treat Chronic Mental Health Conditions’ (*Horizon Magazine*, 2022) <<https://ec.europa.eu/research-and-innovation/en/horizon-magazine/psychedelics-paired-therapy-could-treat-chronic-mental-health-conditions>> accessed 16 January 2023; Z Cormier, ‘Magic-mushroom Drug Lifts Depression in First Human Trial’ (*Nature*, 2016) <<https://doi.org/10.1038/nature.2016.19919>> accessed 10 January 2023.

¹⁹⁶ Unlu (n 178), 216.

¹⁹⁷ S Lenton, ‘Beyond Modelling and evidence: Bridging the Gap between Drug Policy Research and Drug Policy Practice’ (*Research Gate*, 2007) <https://www.researchgate.net/publication/251818024_Beyond_modelling_and_evidence_Bridging_the_gap_between_drug_policy_research_and_drug_policy_practice/stats> accessed 29 January 2023.

¹⁹⁸ K Moore, H Wells, and A Fielding, ‘Roadmaps to Regulation: MDMA’ (Beckley Foundation, 2019) <https://www.beckleyfoundation.org/wp-content/uploads/2019/12/MDMA_Roadmap_To_Regulation-Digital-Copy-0512.pdf> accessed 16 January 2023.

drug policy without largely disrupting the government's prohibitionist political stance.¹⁹⁹ A phase of this process includes the rescheduling of MDMA from schedule 1 to schedule 2 under the MDR to facilitate access to PAP, though this paper expands this proposal to apply to all psychedelic drugs. A benefit of this rescheduling is that it would have no impact regarding drug diversion to the recreational sphere, as psychedelics would remain under the current stringent controls in this regard. Therefore, those in parliament who commence the rescheduling can be positioned as encouraging the progression of scientific research without being viewed as “soft on drugs.”²⁰⁰ As stated previously, this concern often prevents stakeholders from being too discerning towards drug advocacy, hence, this slight amendment in legislation is unlikely to result in political suicide for those involved. Taking this into account, this roadmap for regulation seems to be a reasonable proposal, maintaining a restrictive position on drugs whilst no longer drastically burdening the progression of promising mental health treatments.

(iii) Conclusion

Overall, whilst drug policymaking is complex and entangled with politics and sociology, it is imperative that evidence-based findings guide future policy choices.²⁰¹ This change is a pivotal duty of policy entrepreneurs, researchers and the ACMD to effectively use a policy window to commend drug policy reform; but ultimately, it is a moral obligation of the governing body to amend the currently restrictive schedule 1 status of psychedelics to schedule 2 to enable PAP to prosper and treat the millions of people suffering with chronic mental health disorders.

¹⁹⁹ *ibid.*, as part of the Beckley Foundation’s Global Initiative for Drug Policy Reform.

²⁰⁰ *ibid.*

²⁰¹ *ibid.*

V. Conclusion

This paper has answered the research questions throughout the chapters; firstly, it has addressed why psychedelics are not widely available for use, with reference to the vital influential figures and acts passed in the US which pioneered global drug laws. It has then addressed the subsequent implementation of UK drug laws in response to the international consternation surrounding psychedelics, which resulted in erroneous prohibition of said drugs, drastically impacting the accessibility of psychedelics for research and largely halting progression within medicine.

Secondly, it has presented the vast literature delineating the extensive benefits of using psychedelics for treatment of obstinate mental health disorders, such as PTSD, MDD and addiction, addressing the research question asking what advantages PAP can provide.

Thirdly, to provide a response to the research question of how UK drug policy can be reformed to make psychedelics available for clinician administration, it has acknowledged the inherent politics involved in the process of policymaking, discussing the difficulties of evidence entering politics with reference to political suicide and selectivity of knowledge and experts. It has then suggested that the UK is on the brink of entering a policy window in relation to psychedelic drug schedule reform. Furthermore, it has discussed how policy reform could materialise, namely, with rescheduling psychedelics from schedule 1 to schedule 2 to allow for PAP to medicate those experiencing the sustained tribulation of the discussed mental health disorders, whilst simultaneously accounting for political fears of appearing soft on drugs.

(i) Strengths and Limitations

As the overarching research question encompassed a range of academic domains, this paper's literature search and understanding required a broadened knowledge of expertise. Thus, a strength of this article is the amalgamation of multiple research areas such as law, psychiatry, criminology and politics which together form a holistic, comprehensive argument. Furthermore, the extended literature review design of this paper mandated a rigorous and systematic data search, enabling a thorough evaluation to ensure the research questions were well-informed and competently addressed with contemporary literature on PAP.

Whilst acknowledging the strengths, undertaking empirical research may have provided new insights and yielded alternative perspectives that the literature-based design of this paper could have missed. For example, empirical work could have allowed for a more in-depth, new contribution to existing theory with the obtained data.

(ii) Closing Remarks

To close this final chapter and conclude the paper on an optimistic note, the future for PAP is reassuringly promising, with public opinion appearing to be progressing in a positive way.

With this increasing acceptance of the therapeutic potential of psychedelics, a growing number of individuals in more esteemed and authoritative positions, such as researchers, politicians, policy entrepreneurs, and think tanks, are campaigning for this crucial change in UK policy to be taken seriously. This is especially the case for psilocybin and MDMA, whilst LSD still lags slightly behind in terms of

progressive research. As previously expounded, this delayed development in LSD-assisted psychotherapy is likely related to the tarnishing of its legacy numerous decades ago, however, it is likely that this tainted reputation will soon dissipate, and there will be fruitful political reform for psychedelics considering the highly encouraging findings from PAP showcased by contemporary research.

Evaluating the Probation Service's Effectiveness in Achieving its Mantra: Assess, Protect, Change

Erin Deane[†]

The Probation Service supervises low to high-risk offenders. The service aims to protect the public and reduce the rate of re-offending by rehabilitating the offender throughout the supervision. However, the success of the UK's Probation Service is very much up for debate. The Probation Service's current mantra is to "Assess, Protect, [and] Change" offenders. This paper analyses whether the UK's current approach towards probation can achieve this, through analysing each aim, its definition, and different perspectives in this field. The paper provides for both the modern and historical probation system in the UK and assess how gradual reforms have influenced today's system. The paper finally explores the aims collectively, as opposed to individually, and question to what extent the Probation Service is achieving this mantra. This paper concludes that the Probation Service is having limited success in regard to the 'assess' and 'protect' elements and is failing to facilitate considerable 'change' in offenders' behaviour. Following this report, the Probation System should undergo further reform to achieve its aims.

I. Introduction

This paper is a consideration of the UK Probation Service, an institution within the criminal justice system that supervises offenders in the community. The Probation Service is subjected to wide debate concerning its role, and whether it is achieving its current mantra to "Assess, Protect, Change."²⁰² This paper provides a detailed analysis into the Probation Service, engaging in different perceptions from both sides of the argument on its role, aims, and achievements with considerations for both the historical and modern service. The

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²⁰² HM Prison and Probation Services, 'The Target Operating Model for Probation Services in England and Wales: Probation Reform Programme' (London, 2021) 7 – 8.

current role of probation will be explored in light of the current mantra and liken ‘assess’ to the risk assessment of offenders, ‘protect’ to public protection from harm, and ‘change’ as synonymous with rehabilitation and the ability to change offenders’ behaviour. This paper questions whether each of these individual aims are being achieved, and whether the Probation Service can achieve the assessment, protection, and rehabilitation of offenders simultaneously, or whether the system is only capable of achieving one aim at the expense of another. Finally, it assesses whether the current mantra is ultimately being achieved by the Probation Service. This paper concludes that the mantra is being achieved to an extent, however, there needs to be greater recognition of the aims individually.

II. Defining the Probation Service

His Majesty’s Prison and Probation Service (HMPPS) sits in the Ministry of Justice and is not defined as an institution, but rather explored through its aims; it is suggested this open exploration enables a richer understanding, since an explicit definition would be restrictive²⁰³ and would highlight “a profound problem of legitimacy for supervision.”²⁰⁴ Nonetheless, the Government views the Probation Service to be “a statutory criminal justice service that supervises offenders released into the community, while protecting the public.”²⁰⁵

The lack of definition, however, fails to address whether the Probation Service is an alternative punishment to

²⁰³ Robinson and McNeill, ‘Punishment in the Community: Evolution, Expansion, and Moderation’ [2017] in Liebling, Maruna, & McAra, *The Oxford Handbook of Criminology* (6th edn, OUP, 2017) pt iv, ch 38.

²⁰⁴ *ibid.*

²⁰⁵ HM Prison and Probation Services, *Prisons and Probation: About Us*. [2022] <<https://www.gov.uk/government/organisations/probation-service/about>> accessed 3rd January 2023.

imprisonment, or a punishment on its own. If the Probation Service is the former, then there is a presumption that it is successfully achieving all elements of its mantra. However, the need for the Probation Service to be an alternative to custody is fuelled by the overcrowding of prisons and the introduction of ‘just deserts.’²⁰⁶ This is accelerated in modern society with both the prison population and the rates of ‘mass probation’²⁰⁷ drastically increasing; in 1960, the UK’s prison population was estimated to be 27,000 but this had increased to 39,000 by 1970.²⁰⁸ Moreover, research suggests that only 45 to 50% of offenders who experienced probation through a community sentence are “diverted from custody.”²⁰⁹ These statistics suggest the Probation Service is failing to offer an alternative punishment to custody, therefore failing to achieve its mantra—how can there be sufficient ‘assess[ment], protect[ion], [and] change’ of the offender if the service cannot provide an alternative to custody afterwards?

This failure is reinforced by society’s perception that probation is not a serious form of punishment, and that it allows offenders to escape the consequences of crime.²¹⁰ Whilst probation services may be appreciated for providing a punishment without the degrading impacts of prison,²¹¹ it would be inaccurate to describe probation as an alternative to incapacitation. Critics suggest that the reformed Probation

²⁰⁶ Criminal Justice Act 1991.

²⁰⁷ Michelle Phelps, ‘The Paradox of Probation: Community Supervision in the Age of Mass Incarceration’ [2013] *Law Policy* 35 (1) – (2): 55 – 80.

²⁰⁸ Andrew Rutherford, ‘Prisons and the Process of Justice’ [1984] in Hucklesby and Wahidin, *Criminal Justice* (2nd edn, OUP, 2013) ch 8.

²⁰⁹ Pease, Billingham, and Earnshaw, ‘Community Service Assessed in 1976’ (Home Office Research Study, No.39, London: HMSO, 1977) in Hucklesby and Wahidin, *Criminal Justice* (2nd edn, OUP, 2013) ch 8.

²¹⁰ Case, Johnson, Manlow, Smith, Williams, *The Oxford Textbook on Criminology* (2nd edn, OUP, 2021) p 4, ch 24.

²¹¹ Mair, ‘Community Sentences’ [2013] in Hucklesby and Wahidin, *Criminal Justice* (2nd edn, OUP, 2013) ch 8.

Service is too interventionist²¹² and results in the ‘net widening’ of possible offenders.²¹³ Cohen suggested that probation and other alternative punishments resulted in social control becoming widespread, enabling covert coercion.²¹⁴ Consequently, as social control widened so did the ‘net’ for criminals, thus resulting in higher levels of offending. Cohen’s theory is, arguably, the most critical of the Probation Service being viewed as an alternative to custody, as it results in a more punitive policy system. While a punitive system is more favoured by the public,²¹⁵ it does not offer an effective alternative to custody— any breach of probation terms results in incarceration.²¹⁶ This contributes to the idea that the Probation Service is not capable of achieving its mantra, especially in regard to protection, without harbouring a reliance on incarceration.

These concerns are shared in the US, with their probation service actively seeking alternatives to incapacitation, rehabilitation, and successful reintegration. Like in the UK, the US’ probation service is negatively perceived, with critics calling for its abolishment. The US’ system is viewed as “a leading driver of high prison admissions”²¹⁷ and is seen to promote incarceration, inequalities, and discriminatory stereotypes. The perception of the US’ probation system therefore echoes British concerns

²¹² Rob Canton, *Why Punish?* (1st edn, Palgrave, 2017) ch 7.

²¹³ Stanley Cohen, *Visions of Social Control: Crime, Punishment, and Classification* (1st edn. Polity, 1985).

²¹⁴ *ibid.*

²¹⁵ Case (n 210).

²¹⁶ Van Zyl Smith, Snacken and Hayes, ‘One cannot legislate kindness’ Ambiguities in European legal instruments on non-custodial sanctions’ (*Punishment & Society*, 17(1), 2015) 3 – 26 in Liebling, Maruna, & McAra, *The Oxford Handbook of Criminology* (6th edn, OUP, 2017) pt iv, ch 38.

²¹⁷ TCR Staff, ‘Study Calls for Abolishing Probation and Parole’ [2022] *The Crime Report* < <https://thecrimereport.org/2022/08/12/study-calls-for-abolishing-probation-and-parole/>> accessed 22nd November 2023.

with probation and how overtime it has lost the central focus of rehabilitation, instead becoming concerned with risk and policy. Whilst the shared concerns may validate the claim that the UK's system is also failing, it must be acknowledged that the US' and UK's legal systems operate differently with different forms of policing, offending, and imprisonment rates. Consequently, these findings are not directly applicable to the UK.

III. History

The Probation Service has developed over time, and these revisions may be useful for analysing whether the current system is fulfilling its mantra; when comparing the current system to those prior, one can see a shift in focus and prioritisation. The 'probation order' was introduced in 1907²¹⁸ as the first statutory punishment, besides imprisonment. Initially, the 'probation order' was a charitable service, derived from Christianity, which sought to 'advise, assist, and befriend' offenders. There was a greater emphasis on rehabilitation,²¹⁹ through characterizing a system of support and punishment without the detrimental effects of imprisonment.²²⁰ Despite this, the probation system continued to develop over the 20th century. The religious focus began to decline and there was a growing individualistic focus, such as how the relationship between probation officers and offenders influence rehabilitation.²²¹

²¹⁸ Probation of Offenders Act 1907.

²¹⁹ Garland, 'Probation and the Reconfiguration of Crime Control' [1997] in Liebling, Maruna, & McAra, *The Oxford Handbook of Criminology* (6th edn, OUP, 2017) pt iv, ch 38.

²²⁰ Robinson and McNeil, 'Community Punishment: European Perspectives' [2016] in Liebling, Maruna, & McAra, *The Oxford Handbook of Criminology* (6th edn, OUP, 2017) pt iv, ch 38.

²²¹ Burnett and McNeil, 'The place of the officer-offender relationship in assisting offenders to desist from crime' (*Probation Journal* 52(3), 2005).

The introductions of the National Probation Service (NPS) and the National Offender Management Service (NOMS) provided supervisory and managerial elements for probation officers to retain control over offenders. In 2015, the system underwent further reform. This established a part-nationalised and part-privatised system of probation, which divided the operation into the NPS and the Community Rehabilitation Companies (CRCs). NPS were responsible for the supervision of high-risk offenders, whereas CRCs were responsible for low to medium risk offenders. This reform subjected the Probation Service to controversy; many viewed the reform as a money-making scheme, which caused a decline in public trust of probation. It was an expensive failure,²²² which necessitated further reform. This led to the Transforming Rehabilitation Policy.²²³ The Probation Service was returned to the public sector, while the previous structure of NPS and CRCs influenced the modern mantra of “Assess, Protect, Change.”²²⁴ Evidently, the modern system of probation places a greater focus on ‘assess[ment]’ through risk management, in comparison to the previous rehabilitative ‘advise, assist, and befriend’ approach. The reform attempted to resolve the issues sparked by privatisation. However, by the time of enforcement, the criminal justice system was managing the consequences of COVID-19. Four years later, the current probation service still faces criticisms as the “probation supervision provided under contract [has been found] to be sub-standard, and much of it demonstrably poor.”²²⁵ This has resulted in debate as to whether the new system of probation is beneficial in fully

²²² Harry Anison, ‘Transforming Rehabilitation as ‘policy disaster’: Unbalanced policymaking and probation reform’ [2018] Probation Journal. (doi:10.1177%2F0264550518820117).

²²³ Ministry of Justice, ‘Transforming Rehabilitation and the Probation Reform Programme’ [2018].

²²⁴ HMPPS (n 202).

²²⁵ Annual Report of the Chief Inspector of Probation [2019].

achieving the mantra of ‘Assess, Protect, Change’, or whether it is only capable of being achieved to a “sub-standard” level.²²⁶

IV. Current System

The Probation Service operates where either a community order,²²⁷ or a suspended sentence order²²⁸ is given by the courts. The ‘probation order’²²⁹ was reformed into the ‘community rehabilitation order’ under the Criminal Justice Act 2003.²³⁰ This empowered the Probation Service to supervise and support offenders in the community, by ensuring that probation requirements were met, that offenders received rehabilitation and that said offenders established skills needed for reintegration into society.²³¹

There are different requirements which can be imposed on offenders serving a community order.²³² A few examples include unpaid work,²³³ curfews,²³⁴ drug and alcohol rehabilitation,²³⁵ or an electronic tagging.²³⁶ The power of the Probation Service to maintain adherence to these requirements demonstrates its ability to achieve risk assessment, public protection, and rehabilitation of the offender. For example, a requirement of drug rehabilitation²³⁷ ensures public protection by reducing the number of addicts in society, whilst simultaneously contributing to the offender’s own

²²⁶ *ibid.*

²²⁷ Criminal Justice and Court Services Act 2000.

²²⁸ Criminal Justice Act 2003.

²²⁹ Probation of Offenders Act 1907.

²³⁰ Criminal Justice and Court Services Act 2000.

²³¹ Case (n 210).

²³² *ibid.*, s 177.

²³³ *ibid.*, s 177(1)(a).

²³⁴ *ibid.*, s 177(1)(e).

²³⁵ *ibid.*, s 177(1)(i).

²³⁶ *ibid.*, s 177(1)(m).

²³⁷ *ibid.*, s 177(1)(i).

rehabilitation. This showcases how the Probation Service can successfully achieve its mantra, as each element could occur simultaneously. This potential is further exemplified by the system's regional structure and local voice; this presence allows the Probation Service to develop on the foundations of trust and confidence by delivering "Assess, Protect, Change" at the local level.²³⁸ The evolution of the Probation Service has therefore impacted its functioning, its mantra, and concerns regarding its performance.²³⁹

V. Assess

'Assess' is the first element of the Probation Service's mantra and is arguably being achieved. 'Assess' refers to the Probation Service's role in assessing the offender's risk to society and the risk of re-offending; this risk assessment is conducted prior to sentencing, and it determines the level of intervention necessary. The assessment procedure is praised for determining punishment reflective of risk, whereby those considered a higher risk experience a greater level of intervention.²⁴⁰ Risk assessments are often considered the most crucial part of probation.²⁴¹ This praise suggests the Probation Service is successfully conducting risk assessments to a high standard.

The assessment is dependent on the risk that offenders pose to the public and whether there is a risk of offenders receiving a custodial sentence.²⁴² There is a suggestion that the introduction of risk assessments is as result of the issues

²³⁸ HMPPS (n 202).

²³⁹ HM Inspectorate of Probation, 'An inspection of probation services in Hammersmith, Fulham, Kensington, Chelsea & Westminster PDU' [2022].

²⁴⁰ McGuire and Priestly, *What works: Reducing reoffending Guidelines from research and practice* [1995] Wiley.

²⁴¹ HM Prison (n 202).

²⁴² Mair and Lloyd, 'Prediction and Probation: an introduction' [1989] in Hucklesby and Wahidin, *Criminal Justice* (2nd edn, OUP, 2013) ch 8.

associated with alternative punishments to custody,²⁴³ such as reoffending. Therefore, the limited introduction of risk assessments represents a change in focus between the current and historical probation service; today, there is a greater focus on risk and protection, whereas previously the primary focus was on rehabilitation. This demonstrates changing values in today's system of probation and the divergence from the 'advise, assist, and befriend' approach. This departure perhaps indicates public protection being prioritised over rehabilitation and Christian values. The Probation Service presents itself to be accurately conducting risk assessments because these assessments are used as a tool for justifying and facilitating the use of Probation for public protection. It reiterates how this is a prominent aim in today's approach, as opposed to rehabilitation, thus it has gradually dominated the penal policy.²⁴⁴

Despite this focus, the Probation Service's process of assessing offenders is openly criticised due to the assessments being conducted by the probation officers themselves. Arguably, this enables the potential for bias in decision-making due to the high levels of discretion. Statistically, 25% of offenders are likely to change risk category during their sentence, highlighting how the current form of risk assessment is non-definitive.²⁴⁵ This is further demonstrated by the racial discrepancies in sentencing; ethnic minorities are disproportionality represented in criminal justice statistics, and research has found there to be correlation between disadvantaged individuals (such as ethnic minorities) and a higher risk of re-offending.²⁴⁶ This is applicable to probation

²⁴³ Mair (n 211).

²⁴⁴ Canton (n 212) ch 7.

²⁴⁵ Annison, Burke, and Senior, 'Transforming Rehabilitation: Another example of English 'exceptionalism' or a blueprint for the rest of Europe?' [2014] *European Journal of Probation*.

²⁴⁶ Social Exclusion Unit 'Reducing Reoffending by Ex-prisoners' [2002].

as the risk assessment is dependent on a systematic formula concerning age, crime, class, and gender. There is not necessarily consideration for individual differences nor circumstances, which runs the risk of fuelling racial stereotypes and statical over-representations by automatically associating disadvantaged individuals with causing risk.²⁴⁷ This potential bias would suggest that the Probation Service is not conducting fair assessments. Canton questioned how the system could be conducting accurate risk assessments when it had been determining risk systematically.²⁴⁸ The consideration of individual differences and circumstances is crucial in establishing effective punishments, as punishments should be tailored to an individual's needs which can only be identified through such individual consideration. This is reiterated through the 'responsivity principle', which is associated with the acknowledgment of different factors influencing individuals' behaviours—once these factors have been properly considered, an appropriate punishment can be adopted.²⁴⁹ McGuire and Priestly claim that whilst responsivity is the most important principle, it has become neglected, thus ideal in principle yet overlooked in practice.²⁵⁰ Thus, the process of the assessment of offenders has become associated with injustice and unequal practices, as it fails to consider the influence of situational circumstances on risk.

VI. Protect

'Protect' is the next element of the mantra, which explores the Probation Service's aim for public protection. The Probation Service perceives itself to be successful in this area, primarily through its use of conducting accurate risk assessments which

²⁴⁷ Canton (n 212) ch 7.

²⁴⁸ *ibid.*

²⁴⁹ McGuire and Priestly (n 245).

²⁵⁰ *ibid.*

keep ‘dangerous offenders’ out of society. The protection of the public is achieved through monitoring the offender and providing suitable interventions for their needs, such as drug and alcohol courses. However, this notion of public protection should be questioned—if it were true, it does not explain why society favours custodial sentences rather than community orders. One would assume that society generally prefers custodial sentences since this type of punishment deprives offenders of their liberty, making it near impossible for re-offence during said sentence. In comparison, orders of probation risks potential re-offending; the Probation Service cannot provide a certainty of public protection when this risk exists. This is exemplified in instances where people on probation have committed further serious offences, such as murder and rape.²⁵¹ It is because of this that, arguably, the Probation Service appears to be over-ambitious when claiming to prioritise public protection, especially when one considers the high levels of public anxiety surrounding probation today.²⁵²

Alongside the explicit aims to ‘Assess, Protect, Change’,²⁵³ the Probation Service simultaneously achieves protection through deterrence, retributive and restorative justice. The concept of retributive justice derives from the Roman principle of *lex talionis*, in which the punishment resembles the offence committed in kind and in degree. The Probation Service serves retributive justice through punishing offenders using different restrictions,²⁵⁴ such as prohibiting certain activities²⁵⁵ or imposing curfews.²⁵⁶ The Probation

²⁵¹ HM Inspectorate of Probation, ‘Independent serious further offence review of Damien Bendall’ (2023).

²⁵² Canton (n 212) ch 7.

²⁵³ HMPPS (n 202).

²⁵⁴ Criminal Justice Act 2003, s 177.

²⁵⁵ *ibid*, s 177(1)(d).

²⁵⁶ *ibid*, s 177(1)(e).

Service also serves restorative justice, the notion regarding offenders correcting their wrongs, through making amends or rebuilding relationships. This is evident through the Probation Service's focus on community and rehabilitation. However, one may argue that restorative justice was more prevalent in the historical mantra of 'advise, assist, and befriend.' Furthermore, the Probation Service established a system which discourages people from offending. Today, probation focuses on punitive punishments and harsher requirements for re-offenders—a stark contrast to the historical rehabilitative approach.

This paper submits that the current Probation Service is achieving public protection by expanding its duties further than its mantra, which is seen as too narrow. These broader achievements, alongside harsher requirements for community orders,²⁵⁷ have positively affected the Probation Service's reputation; as mentioned, society initially perceived probation as a system which allowed offenders to escape punishment, however probation is now seen as a benefit to the community²⁵⁸ while still protecting the public.

Nevertheless, an alternative perception would acknowledge that statistically incarceration and probation rates are increasing.²⁵⁹ This data suggests that public protection is not being entirely achieved, else incarceration rates would decrease. This implies the Probation Service is only contributing to public protection to an extent.

VII. Change

The final element of the Probation Service's mantra is synonymous to the rehabilitation of the offender. The extent to

²⁵⁷ *ibid*, s 177.

²⁵⁸ Robinson and McNeil (n 219).

²⁵⁹ Tim Newburn, 'Criminology' (3eds, Routledge, 2007).

which rehabilitation is being achieved is subjected to much debate, with many critics believing that the modern Probation Service is failing to rehabilitate offenders.²⁶⁰

Rehabilitation derives from a consequentialist approach and suggests that the punishments given must allow enough time for officers to support the offender in order to reduce re-offending.²⁶¹ Rehabilitation should focus on the individual's needs and address the cause of their offending, encompassing both communal and individual contribution to 'change'. The communal and individual contribution has led academics to suggest 'reintegration' to be a better term for rehabilitation.²⁶² McNeil explored rehabilitation through the legal, moral, social, and psychological availability to 'change';²⁶³ his theory is praised for providing substantial understanding surrounding the concept of rehabilitation. Despite this, there should be caution when considering academic perspectives (including McNeil)²⁶⁴ due to the notable disparities between academics on what rehabilitation is. The different understandings on rehabilitation, alongside the evolution of the Probation Service, contributes to the current presumption that rehabilitation is not being achieved.²⁶⁵ This is because, as mentioned, the previous focus had been on the rehabilitative ideals associated with community-based punishments, however this focus changed following the

²⁶⁰ Allen, 'The Decline of the Rehabilitative Ideal: Penal Policy and Social Purpose' [1981] in Liebling, Maruna, & McAra, *The Oxford Handbook of Criminology* (6th edn, OUP, 2017) pt iv, ch 38.

²⁶¹ Radzinowicz, 'The Results of Probation' [1958] in Burnett and McNeill, 'The place of the officer-offender relationship in assisting offenders to desist from crime' [2005] *Probation Journal*, 52(3): 221–242.

²⁶² McGuire and Priestly (n 245).

²⁶³ Robinson and McNeill (n 203).

²⁶⁴ *ibid.*

²⁶⁵ Allen (n 260).

American movement of ‘what works?’²⁶⁶ This caused a shift in the understanding of rehabilitation in light of social and political changes, contributing to probation moving from a humanitarian approach with a focus on rehabilitation to a risk-focused service which holds the offender responsible.²⁶⁷ The change had resulted in probation becoming increasingly focused on the political aspiration to reduce re-offending,²⁶⁸ however the data regarding the increasing prison and probation rates suggests that no positive change is occurring nor being achieved.²⁶⁹ Therefore, instead of questioning the extent to which rehabilitation is being achieved, it should be questioned why rehabilitation is not being achieved.

(i) Relationships

The relationship dynamic between the probation officer and the offender could contribute to unsuccessful rehabilitation. Their relationship is crucial in driving an offender’s motivation to change and legitimising probation service.²⁷⁰ The relationship’s influence on rehabilitation is useful when considering the modern and historical systems—currently, the relationship is likened to obedience.²⁷¹ It is a professional working relationship,²⁷² which highlights the drastic change from the previous ‘befriending’ approach. The National Probation Directorate reiterated the importance of the

²⁶⁶ Martinson, ‘What Works? – Questions and Answers about Prison Reform’ [1974] in Hucklesby and Wahidin, *Criminal Justice* (2nd edn, OUP, 2013) ch 8.

²⁶⁷ Allen (n 260).

²⁶⁸ Garland (n 218).

²⁶⁹ McGuire and Priestly (n 245).

²⁷⁰ Rex, ‘Desistance from Offending: Experiences of Probation’, [1999] in Burnett and McNeill, ‘The place of the officer-offender relationship in assisting offenders to desist from crime’ [2005] *Probation Journal*, 52(3): 221–242.

²⁷¹ Robinson and McNeill (n 203).

²⁷² Oxford Dynamics of Recidivism Study [1992] in Burnett and McNeill, ‘The place of the officer-offender relationship in assisting offenders to desist from crime’ [2005] *Probation Journal*, 52(3): 221–242.

officer/offender relationship, citing that “regular close supervision by a probation officer can be a highly effective way to tackle offending behaviour.”²⁷³ However, this statement is seen as contradictory since modern reforms resulted in the previous individual and personalised relationship between officer/offender being lost. Today, there is a greater focus on the system’s efficiency and ability to process offenders. This is further exemplified by the probation officer guiding the offender to accredited programmes for intervention. It represents how there is little, if any, personal contact between the probation officer and offender,²⁷⁴ with the current relationship being likened to “diagnosing a fault in a motor car.”²⁷⁵ There is, therefore, a strong argument that rehabilitation cannot be achieved when there is a lack of nurture between the probation officer and offender.²⁷⁶ The offender is no longer being supported and motivated to change through one-to-one contact, thus there is suggestion that the relationship between the probation officer and offender should be reformed back to the former. This would arguably drive rehabilitation,²⁷⁷ as it currently seen as being neglected.²⁷⁸

²⁷³ Watson, ‘Memorandum Submitted to the House of Commons Home Affairs Committee, Minutes of Evidence’ [2003] in Burnett and McNeill, ‘The place of the officer-offender relationship in assisting offenders to desist from crime’ [2005] *Probation Journal*, 52(3): 221–242.

²⁷⁴ Burnett and McNeill, ‘The place of the officer-offender relationship in assisting offenders to desist from crime’ [2005] *Probation Journal*, 52(3): 221–242.

²⁷⁵ Watson (n 273).

²⁷⁶ Mann, ‘Effective Implementation’ [2004] in Burnett and McNeill, ‘The place of the officer-offender relationship in assisting offenders to desist from crime’ [2005] *Probation Journal*, 52(3): 221–242.

²⁷⁷ Knott, ‘Evidence-based Practice in the National Probation Service’ [2004] in Burnett and McNeill, ‘The place of the officer-offender relationship in assisting offenders to desist from crime’ [2005] *Probation Journal*, 52(3): 221–242.

²⁷⁸ Smith, ‘The Uses and Abuses of Positivism’ [2004] in Burnett and McNeill, ‘The place of the officer-offender relationship in assisting offenders to desist from crime’ [2005] *Probation Journal*, 52(3): 221–242.

(ii) Social Exclusions

Nonetheless, an alternative interpretation would recognise that the relationship between the probation officer and offender only contributes to ‘change’ to an extent. This is because, alongside the individual drive to change, there is the requirement for societal contributions to ‘change’.²⁷⁹ In order to achieve successful rehabilitation, the Probation Service needs to support the ‘human capital’ (the individual drive to change) and the ‘social capital’ (the influence society has on change such as through housing or employment).²⁸⁰ Canton explored rehabilitation as a right for individuals achieved through social inclusion; he suggested there are some punishments which accelerate rehabilitation, whilst others reduce rehabilitation.²⁸¹ Imprisonment, for example, slows rehabilitation due to isolation and the break-down of relationships.²⁸² Canton argues that rehabilitation is crucial, but that the current Probation Service is not properly achieving it because the system fails to acknowledge social contribution to ‘change’.²⁸³ Hence, the current approach is detrimental to rehabilitation because research has not focused on the social contributions and, consequently, failed to address society’s accountability. While the current system is in use, ‘change’ cannot occur because “helping individuals to stop offending [...] should not detract from the need to address the social and economic context of crime.”²⁸⁴

²⁷⁹ Oxford Dynamics (n 272).

²⁸⁰ Biestek, ‘The Casework Relationship’ [1961] in Burnett and McNeill, ‘The place of the officer-offender relationship in assisting offenders to desist from crime’ [2005] *Probation Journal*, 52(3): 221–242.

²⁸¹ Canton, (n 212) ch 6.

²⁸² *ibid.*

²⁸³ *ibid.*

²⁸⁴ Raynor and Vanstone, ‘Probation Practice, Effectiveness and the Non-treatment Paradigm’ [1994] in Hucklesby and Wahidin, *Criminal Justice* (2nd edn, OUP, 2013) ch 8.

(iii) Desistance

Desistance is a branch of rehabilitation contributing to the Probation Service failing to achieve ‘change’. Desistance is the process “of moving [on] from offending to successful social integration.”²⁸⁵ Whilst desistance is considered important for the probation service to achieve ‘change’, it further echoes previous concerns regarding the importance of social capital to allow individuals to support their change;²⁸⁶ desistance reiterates how the individual desire can never be enough to facilitate change if there is no consideration for societal contributions. Shapland’s research challenges the view that probation achieves rehabilitation and desistance, which introduces further doubt into the efficiency of the probation’s ability to ‘change’ offenders.²⁸⁷ The research found that many individuals associate probation with attempting to promote desistance, however the research exemplifies that the current Probation Service is instead too focused on helping to motivate the individual’s drive to change and not on the social circumstances which facilitate said change.²⁸⁸ This research further reiterates how the Probation Service is neglecting societal contributions to offending, thus not achieving rehabilitation. Nevertheless, while desistance research like Shapland’s²⁸⁹ raises important points in understanding the Probation Service’s achievements in regard to rehabilitation,

²⁸⁵ Kirkwood and McNeill, ‘Integration and reintegration: comparing pathways to citizenship through asylum and criminal justice’ [2015] in Liebling, Maruna, & McAra, *The Oxford Handbook of Criminology* (6th edn, OUP, 2017) pt iii, ch 33.

²⁸⁶ Farrall, ‘Supervision, Motivation and Social Context: What Matters Most when Probationers Desist?’ [2004] in Burnett and McNeill, ‘The place of the officer-offender relationship in assisting offenders to desist from crime’ [2005] *Probation Journal*, 52(3): 221–242.

²⁸⁷ Shapland, Farrall, and Bottoms, ‘Global Perspectives on Desistance: Reviewing What We Know, Looking to the Future’ [2016] in Liebling, Maruna, & McAra, *The Oxford Handbook of Criminology* (6th edn, OUP, 2017) pt iv, ch 38.

²⁸⁸ *ibid.*

²⁸⁹ *ibid.*

desistance research is contested for being under-representative²⁹⁰ due to its small sample groups.²⁹¹

Nonetheless, the different contributing factors to rehabilitation all reiterate similar ideas concerning individual and social capital. Moreover, the current probation system is neglecting the acknowledgement that in order to ‘change’, individuals need social resources such as housing or employment. Rehabilitation should be considered a social construct going beyond an individual’s drive to change²⁹² and that there can be no change without the social resources.

VIII. Conclusion: Is the Probation Service Mantra Being Achieved?

It may be argued that the Probation Service is achieving its mantra because there is some ‘assess[ment], protect[ion], [and] change’ occurring. However, when looking at each element in greater depth, it can be concluded that ‘assess’ and ‘protect’ are being achieved to a small extent, while the element of ‘change’ is arguably not being achieved at all.

Firstly, the element of ‘assess’ has resulted in limited success. The risk assessment of offenders is recognised to be the central focus of the reformed Probation Service, however the process of assessing offenders does not account for individual circumstances. Therefore, whilst risk assessments are being conducted, the results are inaccurate due to bias.

²⁹⁰ Burnett (n 274).

²⁹¹ Maruna and Mann, ‘Reconciling Desistance and What Works’ (HM Inspectorate of Prison, 2019) <<https://www.justiceinspectorates.gov.uk/hmiprobation/wp-content/uploads/sites/5/2019/02/Academic-Insights-Maruna-and-Mann-Feb-19-final.pdf>> accessed 3rd January 2023.

²⁹² McNeill, ‘Three aspects of desistance?’ [2014] Discovering Desistance website <<http://blogs.iriss.org.uk/discoveringdesistance/2014/05/23/three-aspects-of-desistance>> accessed 3rd January 2023.

Likewise, ‘protect’ is only being achieved to a small extent. The ability for the Probation Service to ensure public protection has become reliant on resorting to incapacitation should the process fail. This suggests that the Probation Service cannot properly contribute to the protection of society.

In contrast, the Probation Service is not achieving considerable ‘change’. There is a failure to recognise societal contributions in offending and, consequently, there is increasing prison and re-offending rates. The shift in focus from rehabilitation to risk reiterates how rehabilitation is no longer a primary focus. Following this analysis, it is reasonable to assume that the transformation of the Probation Service was detrimental to its efficiency in assessing offenders, public protection, and rehabilitation. The modern system is problematic and does not consider the wider complexities of the system.²⁹³ Ultimately, one would argue that the transformation placed the Probation Service under too much strain, restricting it from successfully achieving the mantra. Despite this, it should be acknowledged that this system was only enforced from 2019. Immediately after its introduction, the criminal justice system was faced with the detrimental impacts of COVID-19. Whilst it would be accurate to conclude that the Probation Service is not currently achieving its mantra, there should be recognition of the fact that no long-term conclusion can be reached while it is still in its infancy.

²⁹³ Annual Report (n 223).

Deemed Consent? Navigating Autonomy in England's Soft Opt-Out Organ Donation Landscape

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Amidst the global organ shortage crisis, calls for more altruistic systems of organ donation have intensified. Whilst the deemed consent organ donation model has gained popularity, it is inevitably contentious. This paper explores the implications of England's transition from an opt-in to a soft opt-out organ donation system under the Organ Donation (Deemed Consent) Act 2019, analysing its effects on autonomy, consent, and organ availability. This paper advocates in favour of the soft opt-out system. Beginning with an analysis of the legislative background, it examines the Act's intricacies, highlighting a pivotal shift towards presumed consent. It scrutinises the complexities of family consultation within the soft opt-out system, acknowledging both its potential benefits and limitations in respecting the wishes of the deceased. It then explores communication strategies crucial for informed decision-making and increasing donation rates, drawing insights from Spain's successful implementation of presumed consent. This paper emphasises the necessity of public awareness campaigns to dispel misconceptions and foster public trust. Whilst acknowledging the ambiguity surrounding the efficacy of presumed consent alone, this paper advocates for a comprehensive approach prioritising autonomy and fostering informed decision-making. It concludes that while the opt-out system is not a panacea capable of solving organ shortages, the soft opt-out approach offers the most promising path forward. By emphasising ongoing efforts to raise awareness and facilitate meaningful discussions, this paper suggests that the full potential of the opt-out system may only be realised in the long term, underscoring the need for continual evaluation and adaptation in tackling the organ shortage.

I. Introduction

The global organ shortage crisis has forced many countries to reflect on whether the current organ donation policies they have in place are appropriate to help alleviate the problem. For deceased organ donation, countries typically adopt either an opt-in or an opt-out system. In an opt-in system, such as the one

previously employed in England, individuals who wish to donate their organs after death are encouraged to sign up to the national organ donation register and provide explicit consent, otherwise known as an ‘express consent’ policy.²⁹⁴ Nevertheless, even in the absence of formal registration, lawful deceased donation could still proceed with the consent of the family.²⁹⁵ Meanwhile, in an opt-out system, all individuals are deemed to have consented to be a deceased organ donor unless they record a decision to opt-out during their lifetime.²⁹⁶ Between 2020 and 2022 England,²⁹⁷ the Netherlands,²⁹⁸ and Scotland²⁹⁹ shifted from the opt-in to the opt-out system and Northern Ireland followed suit in Spring 2023.³⁰⁰ The Organ Donation (Deemed Consent) Act 2019³⁰¹ brought this change into effect in England.

This paper examines the impact of the introduction of the opt-out system in England. Part II summarises the legal background, before and after the change in 2020. Part III discusses the effects of the legislative change on autonomy and consent. It argues that a soft opt-out system is ideal for respecting the wishes of the public—those expressed but not reflected in consent rates under the previous opt-in system—while also efficiently increasing the supply of organs without

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²⁹⁴ Harriet Rosanne Etheredge, ‘Assessing Global Organ Donation Policies: Opt-In vs Opt-Out.’ (2021) 14 Risk Management and Healthcare Policy <<https://www.ncbi.nlm.nih.gov/pmc/articles/PMC8128443/>> accessed 22 December 2022.

²⁹⁵ Human Tissue Act 2004, s 3.

²⁹⁶ British Medical Association, ‘Parliamentary Brief: Organ Donation (Deemed Consent) Bill 2017-19’ (British Medical Association 1 February 2019) <<https://www.bma.org.uk/media/1423/bma-briefing-on-organ-donation-deemed-consent-bill-hoc-in-england-feb-2019.pdf>> accessed 22 December 2022.

²⁹⁷ Organ Donation (Deemed Consent) Act 2019.

²⁹⁸ Dutch Donor Act 2018 (Netherlands).

²⁹⁹ Human Tissue (Authorisation) (Scotland) Act 2019.

³⁰⁰ Organ and Tissue Donation (Deemed Consent) Act (Northern Ireland) 2022.

³⁰¹ ODDCA (n 297).

infringing on individual autonomy. This is followed by Part IV, which discusses the importance of communication, between the state and the general public, in ensuring respect for autonomy. Part V analyses the evidence showing the efficacy of the opt-out system to increase organ supply in the UK as well as other European countries. Finally, this paper concludes that a soft opt-out system is more effective in reducing the organ shortage than the previous opt-in system.

II. Background: Before and After the Legislative Shift

Before analysing the concerns and implications of the new opt-out system in England, it is necessary to set out the details of the previous and current frameworks. Prior to the implementation of the Organ Donation (Deemed Consent) Act 2019,³⁰² England had an opt-in system in place—a system in which the onus was on the individual to take active steps to register on the Organ Donor Register. If an individual did not do so, then after their death, ‘appropriate consent’ to donate could be given by an appointed person according to section 3(6)(b) of the Human Tissue Act 2004.³⁰³ If this was not possible, section 3(6)(c)³⁰⁴ of the same Act sets out that a person in a qualifying relationship could also give ‘appropriate consent,’ with section 27(4)³⁰⁵ outlining the hierarchy of relatives in a qualifying relationship. Despite there being multiple ways to give consent to organ donation, the consent rate in 2017/18 for England was only 66%.³⁰⁶ As of August 2018, 6500 people in the country were on the organ transplant

³⁰² *ibid.*

³⁰³ HTA (n 295).

³⁰⁴ *ibid.*

³⁰⁵ *ibid.*

³⁰⁶ Welsh Government, ‘Together for Health – Organ Donation Annual Report 2018’ (2018) <<https://www.gov.wales/sites/default/files/publications/2018-12/organ-donation-annual-report-2018.pdf>> [4] accessed 22 December 2022.

waiting list.³⁰⁷ Evidently, this system was not effective in meeting the demand for organs which meant 3 people died each day due to this shortage.³⁰⁸ To address this issue and increase the number of organ donors, thereby boosting the availability of organs for transplantation, England enacted legislation to adopt an opt-out or ‘deemed consent’ model. Wales was the first country in the United Kingdom to introduce such a model through the Human Transplantation (Wales) Act 2013.³⁰⁹ Since its inception in 2015, the pre-pandemic annual consent rate for donation has risen from 59% in 2015/16, to 64% in 2016/17, and further to 70% in 2017/18.³¹⁰ The number of actual deceased organ donors also increased by 21% in 2017/18 compared to 2016/17. Therefore, the preliminary data suggests that such a model could help to reduce the organ shortage.

England’s ‘Max and Keira’s Law,’³¹¹ also known as the Organ Donation (Deemed Consent) Act 2019,³¹² and the Human Tissue (Permitted Material: Exceptions) (England) Regulations 2020 came into force on 20 May 2020, amending the Human Tissue Act 2004. Under this new legislation, all adults aged 18 and over are automatically deemed to have consented to organ donation upon their death unless they have formally recorded a decision to opt-out of donation, which can

³⁰⁷ Department of Health & Social Care, ‘Consultation Outcome: Consultation on introducing ‘opt-out’ consent for organ and tissue donation in England’ (Department of Health & Social Care updated 5 August 2018) <<https://www.gov.uk/government/consultations/introducing-opt-out-consent-for-organ-and-tissue-donation-in-england/consultation-on-introducing-opt-out-consent-for-organ-and-tissue-donation-in-england>> accessed 22 December 2022.

³⁰⁸ *Ibid.*

³⁰⁹ Human Transplantation (Wales) Act 2013.

³¹⁰ WG, (n 306).

³¹¹ NHS Blood and Transplant, ‘Timeline for Max and Keira’s Law: How England Moved to an Opt-out System for Organ Donation’ <<https://www.organdonation.nhs.uk/uk-laws/organ-donation-law-in-england/timeline-for-max-and-keiras-law/>> accessed 22 December 2022.

³¹² ODDCA (n 297).

easily be completed online.³¹³ However, consent cannot be deemed for ‘excepted adults’ who fall within one of the excluded groups: (i) those not ordinarily resident in England for at least 12 months prior to their death,³¹⁴ and (ii) those who have lacked the mental capacity for a significant period before their death to understand the effect of the legislative change.³¹⁵

Additionally, the opt-out system will not apply to novel or rare organ transplants; rather, it will only apply to ‘permitted material’³¹⁶ such as hearts, kidneys, lungs, livers, pancreases, tissue, bones, and corneas, which are routinely transplanted.³¹⁷ For organs not covered under the scope of ‘permitted material,’ explicit ‘appropriate consent’ must still be obtained, akin to the previous opt-in system. This approach could positively influence public sentiment toward the deemed consent model as the public may be less willing to donate organs that fall outside the remit of the more commonly transplanted ‘permitted materials.’ Many people might opt-out because they perceive the inclusion of tissues such as the face under this model as too personal or integral to their identity. Furthermore, it should not be overlooked that many people may have never considered the possibility of donating organs for these novel or rare transplants and therefore, could not reasonably be deemed to have consented.³¹⁸

³¹³ NHS Blood and Transplant, ‘Register Your Decision: About your choices on the NHS Organ Donor Register’ <<https://www.organdonation.nhs.uk/register-your-decision/>> accessed 22 December 2022.

³¹⁴ HTA (n 295), s 9(a).

³¹⁵ *ibid*, s 9(b).

³¹⁶ *ibid*, s 3(6A)(d).

³¹⁷ NHS Blood and Transplant, ‘What can you donate?’ <<https://www.organdonation.nhs.uk/helping-you-to-decide/about-organ-donation/what-can-you-donate/>> accessed 22 December 2022.

³¹⁸ Nicola J Williams, Laura O’Donovan, Stephen Wilkinson, ‘Presumed Dissent? Opt-out Organ Donation and the Exclusion of Organs and Tissues’ (2022) Volume 30, Issue 2 *Medical Law Review*, 268.

The opt-out system will also not apply if ‘a person who stood in a qualifying relationship to the person concerned immediately before death provides information that would lead a reasonable person to conclude that the person concerned would not have consented.’³¹⁹ This conditionality upon confirmation by those in a qualifying relationship is this model’s defining feature as a soft opt-out model. While the exact criteria for what constitutes a ‘reasonable person’s conclusion’ are not ascertained, a specialist nurse will approach individuals in a qualifying relationship³²⁰ and give them the ‘opportunity to demonstrate’ that the deceased did not wish to be a donor.³²¹ If the qualifying relationship list has been exhausted with no one available to consult, the donation will not proceed.³²² It should be highlighted that the hierarchy of qualifying relationships does not apply when providing information about whether the deceased would not have consented; instead, it is the quality of the information provided by any person in a qualifying relationship that should be considered.³²³ However, in circumstances where consent cannot be deemed, the hierarchy would need to be followed.³²⁴ The problem with this is that different people will have different proximity of relationships with different relatives, which might not follow the same order of the set out hierarchy. They may have problematic relationships with those higher on the hierarchy, who might not make a decision respecting the deceased’s wishes. It is, therefore, appropriate to question the impact this legislative shift has on autonomy.

³¹⁹ HTA (n 295), s 3(6B).

³²⁰ Human Tissue Authority, ‘Code of Practice, Code F: Donation of solid organs and tissue for transplantation, Part two – Deceased organ and tissue donation’ (2020) 190.

³²¹ HTA (n 295) s 27(4).

³²² HTA (n 319) 191.

³²³ *ibid*, 192.

³²⁴ HTA (n 295) s 27(4).

III. Autonomy and Consent

Autonomy is a fundamental principle of bioethics that is strongly emphasised and intricately linked to consent,³²⁵ making it a critical consideration within the context of deceased organ donation. The opt-out system was introduced in England to address the organ shortage on the premise that it would reflect the wishes of the broader populace whilst increasing donation rates.³²⁶ While studies show that 80% of individuals would support deceased organ donation ‘in principle’,³²⁷ only 39% registered to donate on the Organ Donor Register under the previous framework.³²⁸ When asked if they would support the shift to opt-out in England, Scotland, and Northern Ireland, 65% of individuals said yes.³²⁹ The significant disparity between expressed intent to register and actual registration numbers highlights that individuals would not go out of their way to take active steps to register. With deemed consent as the default, individuals who wish to donate no longer need to take proactive steps to register, whilst those who are undecided or indifferent will likely choose to remain within the ‘in’ (donor) group, as individuals are “less likely to deviate from the default and remain with the status quo due to the concept of loss aversion.”³³⁰ The opt-out model is often proposed in behavioural economics as it is believed to increase the supply of organs.³³¹ Whether this approach will sufficiently increase the supply to meet the demand for organs in England depends on a multitude of factors, including whether individuals will

³²⁵ *Airedale NHS Trust v Bland* [1993] UKHL 17, [1993] AC 789.

³²⁶ BMA, (n 296).

³²⁷ DHSC, (n 307).

³²⁸ BMA, (n 296).

³²⁹ *ibid.*

³³⁰ Jessica Li, Till Nikkolka, ‘The Effect of Presumed Consent Defaults on Organ Donation’ (2016) < <https://www.ifo.de/DocDL/dice-report-2016-4-li-nikkolka-december.pdf>> accessed 24 December 2022.

³³¹ Williams, O’Donovan and Wilkinson, (n 318).

now be reluctant to donate by opting out due to perceived infringements on their autonomy, possibly rendering this model counterproductive. However, the opt-out system is the truly consent-focused approach: if most people agree they would donate, then this model will correspond with a larger proportion of the population's wishes. Thus, negating the possibility of this being counterproductive and discrediting the idea that this will infringe upon autonomy.

The organ deficit in England has created perpetual tension between consent and the interests of people awaiting transplants. In instances where individuals neither express an intention nor opt-out during their lifetime, the state may presume 'implicit' consent. In these situations, inaction—given awareness of and access to the option to opt out—is construed as consent,³³² aimed at fulfilling a greater ethical obligation to save lives, as the deceased would have no further need for their organs. However, it should be reiterated that moving to this system still gives people the freedom to not donate if they wish to do so. This decision can be recorded for any reason—personal or religious—although with a few formalities to observe. NHS Blood and Transplant is committed to empowering individuals of different faiths and beliefs to make informed decisions by providing them with information about the views of major religions on deceased organ donation.³³³ Although the general consensus of these major religions is that organ donation is permitted and in line with their values, NHS Blood and Transplant appreciates that this is still a personal decision to make.³³⁴ For some individuals, the decision is not

³³² Anna Zimmerman, 'Public Policy Through the Lens of Necessity: Post Death Organisation' (2021) 7 *Voices in Bioethics*.

³³³ NHS Blood and Transplant, 'Organ Donation and Your Beliefs' <<https://www.organdonation.nhs.uk/helping-you-to-decide/your-faith-and-beliefs/>> accessed 26 December 2022.

³³⁴ NHS Blood and Transplant, 'An Islamic Perspective on Organ Donation' <<https://www.organdonation.nhs.uk/helping-you-to-decide/your-faith-and->

driven by religion, but by concerns of bodily integrity.³³⁵ There are those who wish to remain whole after death, perceiving the concept of organ donation as a violation of the body to which they feel a strong attachment, resulting in them withholding or retracting consent.³³⁶ Although this may appear irrational on a superficial level, if society places strong emphasis on respecting one's autonomy whilst they are alive, then the same respect should be given to individuals who choose to not donate after death, irrespective of their rationale. The state also recognises where families have legitimate concerns and provides them the opportunity to have a say in the decision-making process posthumously.

This soft opt-out system also provides another way to safeguard one's autonomy with regard to organ donation. It gives the opportunity for family members to opt-out after death if the deceased did not have the chance to do so themselves during their lifetime, albeit an opportunity that raises other concerns. As previously discussed, following the qualifying relationship hierarchy and allowing particular family members to decide for the deceased may not be the ideal way to respect and reflect the deceased's wishes, given how every relationship

beliefs/islam/> accessed 26 December 2022; NHS Blood and Transplant, 'A Buddhist Perspective on Organ Donation' <<https://www.organdonation.nhs.uk/helping-you-to-decide/your-faith-and-beliefs/buddhism/>> accessed 26 December 2022; NHS Blood and Transplant, 'A Christian Perspective on Organ Donation' <<https://www.organdonation.nhs.uk/helping-you-to-decide/your-faith-and-beliefs/christianity/>> accessed 26 December 2022; NHS Blood and Transplant, 'A Hindu Perspective on Organ Donation' <<https://www.organdonation.nhs.uk/helping-you-to-decide/your-faith-and-beliefs/hinduism/>> accessed 26 December 2022; NHS Blood and Transplant, 'A Jewish Perspective on Organ Donation' <<https://www.organdonation.nhs.uk/helping-you-to-decide/your-faith-and-beliefs/judaism/>> accessed 26 December 2022; NHS Blood and Transplant, 'A Sikh Perspective on Organ Donation' <<https://www.organdonation.nhs.uk/helping-you-to-decide/your-faith-and-beliefs/sikhism/>> accessed 26 December 2022.

³³⁵ Jordan Miller, Sinéad Currie, Ronan E. O'Carroll, 'If I Donate My Organs It's a Gift, If You Take Them It's Theft': A Qualitative Study of Planned Donor Decisions Under Opt-out Legislation' (2019) 19 BMC Public Health, 1463.

³³⁶ *ibid.*

is unique with different degrees of proximity. Having said that, it could be argued that if the individual was strongly against organ donation, they would have opted out during their lifetime—provided they were aware of the law and the procedures for doing so. If they did not, then it should be justified to use the qualifying relationship hierarchy method, as this is merely an additional opportunity to opt-out under the soft opt-out system in which family consultation is an intrinsic feature. Ultimately, in order to find a solution to the organ shortage, governments must find the most efficient way of increasing organ supply. A hard opt-out system, which does not take into consideration the views and feelings of family members, is likely to be the easiest way of procuring organs upon death. Despite this, the privilege extended to family members to be consulted and override presumed consent should not be removed altogether if the government intends to achieve a balance between efficiency and consent. To be able to possibly meet the aims of the government to address the organ shortage whilst still being sensitive towards autonomy and consent, a soft opt-out system is the best middle ground.

IV. Communication and Public Awareness

Communication is central to this entire discussion: (i) communication from the individual to the state about their decision, (ii) communication between individuals in a family unit about each other's wishes, as well as (iii) communication from the state to the individual about the change in legislation. Having addressed the first point in the initial half of this paper the discussion will now move to the second point.

In the absence of a recorded decision to not donate by the deceased themselves, family members, or more accurately, those who stood in a qualifying relationship would need to demonstrate the deceased's unwillingness to consent, which is

often difficult to do. This is because most people would not have had this conversation before death to make their family aware, citing reasons such as ‘it has never come up in conversation,’ ‘not wanting to talk about death,’ and ‘donation is a personal choice which does not have to be talked about.’³³⁷ In practice, however, when the family expresses disapproval, it is highly unlikely for doctors to proceed with organ donation as they do not want to further hurt families who are already in a vulnerable position.³³⁸ While family members cannot revoke legally valid consent given by the deceased during their lifetime, “their views will always be taken into account throughout the donation process and will have a strong influence on whether or not donation proceeds.”³³⁹ NHS Blood and Transplant reveals that there are hundreds of missed opportunities for transplants each year because family members who are left uncertain about the relative’s donation decision end up choosing to object.³⁴⁰ Trusting what the family thinks and honouring the family’s decision to not donate renders the opt-out system—which is hoped to increase organ supply—counterproductive. On top of this, in reality, this affects the deceased more than the family, as those who were happy to donate have potentially lost their autonomy to do so. It could be argued that the solution to this limitation of the soft opt-out system is to replace it with a hard opt-out system, where the family does not play any role, so their objection does not matter. Even if a hard opt-out system solves the issue of supply, it potentially creates a problem far worse—loss of autonomy

³³⁷ NHS Blood and Transplant, ‘Families Need to Talk About Organ Donation, to Give Thousands Waiting the Chance of a ‘New Beginning’ <<https://www.organdonation.nhs.uk/get-involved/news/families-need-to-talk-about-organ-donation/>> accessed 6 January 2023.

³³⁸ NHS Blood and Transplant, ‘Get the Facts About Organ Donation’ <<https://www.organdonation.nhs.uk/helping-you-to-decide/about-organ-donation/get-the-facts/>> accessed 6 January 2023.

³³⁹ HTA, (n 320), 89.

³⁴⁰ NHS (n 334); NHS (n 333).

for both the individual and the family after death. Without room for family involvement, there is no opportunity to ensure the deceased's wishes are respected if no decision was recorded. At the same time, an opt-in system does not address the issue of supply to begin with. Hence, the soft opt-out system offers the best middle ground, addressing both elements of supply and autonomy, provided that individuals communicate their decision to their family members.

Besides this, another issue to examine is whether the state has adequately communicated the change of legislation to members of the public. The Organ Donation (Deemed Consent) Act 2019³⁴¹ came into force during the first lockdown of the COVID-19 pandemic in England in May 2020. Given the pressing nature of the pandemic at the time, it is no surprise that news of this change in legislation was overshadowed by the news and threat of COVID-19. Without public awareness, it cannot be said that an individual has met a 'substantial degree of understanding' to make an autonomous choice to consent to donating their organs under this new system.³⁴² It is not simply an issue of the autonomy of individuals possibly being undermined, but also an issue of potentially a significant proportion of the population, who are now new organ donors, being unaware of a change in the system.³⁴³ Parsons and Moorlock argue that sufficient public awareness efforts must be made 'for a system of deemed consent to constitute respect for autonomy,' and that deemed consent, in instances where the legislative change has not been communicated, increases the chances of 'forced organ 'donation'' happening.³⁴⁴ This paper

³⁴¹ ODDCA (n 297).

³⁴² Tom L. Beauchamp, James F. Childress, *Principles of Biomedical Ethics* (Oxford University Press 2001) p. 59.

³⁴³ Jordan A. Parsons, Greg Moorlock, 'A Global Pandemic is not a Good Time to Introduce 'Opt-Out' for Organ Donation' (2020) Volume 20, Issue 2 *Medical Law International*, 155.

³⁴⁴ *ibid.*

concedes to this and further argues that this lack of public awareness can erode public trust in the healthcare system. In times of crises, such as COVID-19 and national strikes, where the people of this country are faced with a scarcity of health resources, levels of public trust can have an impact on organ donation consent rates. One of the misconceptions is that those who are organ donors will not be prioritised for life-sustaining treatment and that their deaths would be hastened to procure organs—a misconception that can potentially prompt them to register a decision to opt-out. NHS Blood and Transplant have explicitly stated that healthcare professionals have a duty of care to save lives of individuals above all else and that discussion about organ donation will only start when end-of-life care planning has started.³⁴⁵ Whilst fully supporting the change in the system from opt-in to opt-out in principle, there is a need for the government to conduct public awareness campaigns more aggressively, with the added measure of revisiting public opinion in order to gauge the level of knowledge they are equipped with so as to not undermine autonomy.

V. Evidence

The organ shortage in the UK is serious, with 6,269 patients waiting for a transplant at the end of March 2022 but only 1,397 deceased donors in the same period.³⁴⁶ During 2021-2022, 429 patients sadly died while on the transplant waiting list.³⁴⁷ Compared to before the opt-out system was implemented in 2018-2019, the statistics were 6,077 patients on the waiting list,

³⁴⁵ NHS (n 334).

³⁴⁶ NHS Blood and Transplant, 'Organ and Tissue Donation and Transplantation Activity Report 2021/22' (2022) <<https://nhsbt.dbe.blob.core.windows.net/umbraco-assets-corp/27108/activity-report-2021-2022.pdf>> [2] accessed 7 January 2023.

³⁴⁷ *ibid.*

1,600 deceased donors, and 400 patient deaths.³⁴⁸ These numbers do not show an accurate picture of the effect of the new opt-out system in the UK because of disruptions brought about by the pandemic. The increase in supply of organs hoped for is not seen here because transplant centres temporarily suspended and reduced donation and transplant activities at the height of the pandemic.³⁴⁹ Therefore, this paper must look elsewhere in Europe to determine whether an opt-out system has proven to be effective.

Spain is considered the gold standard with regard to organ donation as it has by far the world's highest organ procurement rate from deceased donors at 35 donors per million of population.³⁵⁰ The Spanish law for presumed consent was introduced in 1979, but numbers did not start showing until 1989 when infrastructural changes were made, which makes it difficult to determine cause and effect.³⁵¹ Quigley et al. point out that countries with an opt-out system have the highest procurement rates such as Spain, Austria, and Belgium.³⁵² However, countries with the opt-out system, such as Greece and Bulgaria, also have the lowest procurement rates, which shows that "there is no straightforward relationship between number of donations and legislative

³⁴⁸ NHS Blood and Transplant, 'Organ and Tissue Donation and Transplantation Activity Report 2018/19' (2019) <<https://nhsbtdb.e.blob.core.windows.net/umbraco-assets-corp/16537/organ-donation-and-transplantation-activity-report-2018-2019.pdf>> [2].

³⁴⁹ NHS Blood and Transplant, 'Re-opening of Transplant Programmes' <<https://www.odt.nhs.uk/covid-19-advice-for-clinicians/re-opening-of-transplant-programmes/>> accessed 16 January 2023.

³⁵⁰ John Fabre et al., 'Presumed Consent is Unnecessary' (2010) Volume 341 *BMJ*, 4973.

³⁵¹ John Fabre, 'Presumed Consent for Organ Donation: A Clinically Unnecessary and Corrupting Influence in Medicine and Politics' (2014) Volume 14(6) *Clinical Medicine* (London, England) 567.

³⁵² Muireann Quigley, Margaret Brazier, Ruth Chadwick, Monica Navarro Michel, David Paredes 'The Organs Crisis and the Spanish Model: Theoretical Versus Pragmatic Considerations' (2008) Volume 34 *Journal of Medical Ethics*, 223.

action.”³⁵³ At Vall d’Hebron Transplant Centre in Spain, communication about donations and transplants is normalised to ‘make it a visible process’ and ‘above all, inform citizens.’³⁵⁴ The power of communication to build trust and encourage more individuals to donate should not be underestimated, which might be the key to Spain’s success story. The Spanish National Transplant Organization has guidelines in place on how to communicate the prospect of deceased organ donation as they ‘consider it to be very important to establish the helping relationship with the family from the beginning and to maintain it to the end as it increases the likelihood of the family accepting donation.’³⁵⁵

Ultimately, this paper acknowledges that evidence about the effect of a presumed consent organ donation system is ambiguous. Opt-out alone, without going above and beyond in terms of communication, is likely not sufficient to achieve our desired outcome in the UK.

VI. Conclusion

In summary, the opt-out system alone is not a panacea that will solve the organ shortage. This paper has found that the soft opt-out system is the best middle ground compared to other systems. While an opt-in system arguably protects autonomy by requiring explicit consent, the current soft opt-out system respects individual choice, capturing broader public support for organ donation. In order for England to successfully meet organ demand, the government must prioritise informed autonomy within the current system, ensuring that individuals are well-

³⁵³ *ibid.*

³⁵⁴ Vall d’Hebron, ‘Transplant Center’ <<https://www.vallhebron.com/en/about-us/strategic-projects/transplant-center>> accessed 17 January 2023.

³⁵⁵ National Transplant Organization (Spain), ‘Good Practice Guidelines in the Process of Organ Donation’ (2011) 52.

informed about their option to opt out. Additionally, efforts are still needed to raise awareness amongst the public about the change in legislation five years post-implementation, as campaigns most likely failed to reach the public during COVID-19. These are needed to trigger conversations between family members and the wider public so that nobody's autonomy is undermined. The impact of opt-out in the UK remains unclear due to insufficient evidence from the pandemic period, but in the long-run, the soft opt-out system proves more effective in reducing the organ shortage than the previous opt-in system. The numbers may not yet be apparent, but they will become evident in due course.

The Judicial Shift: Evaluating the Abolition of the Caldwell Test and its Impact on Recklessness

Lama Aljama[†]

Defining the parameters within which recklessness imposes criminal responsibility has posed an enduring challenge for the judiciary. This article critically evaluates the House of Lords's decision to abolish the Caldwell recklessness test. It contends that the House of Lords' decision did not underestimate the significance of the Caldwell test but rather recognised its inherent flaws. By abolishing it, the House of Lords acknowledged the test's departure from the fundamental principles of culpability and its misinterpretation of the will of Parliament, thereby raising concerns about judicial overreach into the legislative domain. This article contends that the abolition of the Caldwell test was on compelling grounds, due to its unjust implications for individuals, particularly children, who lack the cognitive ability to evaluate risks obvious to reasonable people. Additionally, this article argues that the proposed modification of the Caldwell test would not have effectively amended the test's injustice and instead would have overcomplicated the law. The abolition of the Caldwell test and the reinstatement of the Cunningham test emerges as the most appropriate decision, representing a critical step in ensuring a fairer and more consistent approach to criminal liability that safeguards the interests of vulnerable people.

I. Background

Many criminal offences require 'recklessness' as a *mens rea* element. Generally, recklessness refers to the act of taking an unjustified risk that causes unlawful harm.³⁵⁶ Legal interpretations of recklessness have evolved significantly. In *Cunningham*,³⁵⁷ the courts used a subjective test to determine recklessness, finding it when the defendant had personally "foreseen that the particular kind of harm might be done, and

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³⁵⁶ Law Commission, Report on The Mental Element in Crime (Law Com No.89) [50].

³⁵⁷ *R v Cunningham* [1957] 2 QB 396 (DC).

yet has gone on to take the risk of it.”³⁵⁸ Lord Diplock introduced an objective recklessness test in *Caldwell*³⁵⁹ due to concerns about individuals avoiding liability through a “deliberate closing of the mind”³⁶⁰ to obvious risks. The Caldwell test found recklessness where the defendant did not foresee a risk obvious to a reasonable person; or where the defendant actually foresaw a risk.³⁶¹

The Caldwell test caused controversy as it charged defendants, specifically youth in cases like *Elliott*,³⁶² who honestly did not foresee the risks of their actions due to their lack of capacity. The test was criticised for punishing individuals who lacked the cognitive ability to foresee harm that a reasonable person might. This culminated in the abolition of the test in *R v G*,³⁶³ where two boys caused criminal damage by starting a fire. Under Caldwell, the boys were held liable despite not foreseeing the risk of damage.³⁶⁴ The House of Lords overruled the Caldwell test, reinstating Cunningham recklessness.³⁶⁵

II. Culpability

Lord Bingham, in *R v G*,³⁶⁶ highlighted the injustice of the Caldwell recklessness test to individuals incapable of recognising reasonable risks, highlighting a critical flaw in the court’s approach to culpability. He explained that, as a “salutary principle,”³⁶⁷ convictions should not merely depend

³⁵⁸ *ibid.*

³⁵⁹ *R v Caldwell* [1982] AC 341 (HL).

³⁶⁰ *R v G* [2003] UKHL 50, [2004] 1 AC 1034 [32] (Bingham L).

³⁶¹ *ibid.*

³⁶² *Elliott v C (A Minor)* [1983] 1 WLR 939 (QB).

³⁶³ *R v G*, (n 360).

³⁶⁴ *ibid.*

³⁶⁵ *ibid.*

³⁶⁶ *R v G* [32] (Bingham L).

³⁶⁷ *ibid.*

on the defendant's acts or omissions, since a culpable state of mind must also be present.³⁶⁸ As a result, he described, for reasons other than self-intoxication and a "deliberate closing of the mind,"³⁶⁹ an act involving a risk to others with a genuine lack of recognition of the risks by the defendant should not be deemed as culpable.³⁷⁰ Supporting this with the well-established rule "*actus non facit reum nisi mens sit rea*,"³⁷¹ Lord Bingham concluded that the Caldwell test wrongfully exposes those who are merely "accused of stupidity or lack of imagination" to criminal liability.³⁷² He supported this conclusion by expressing the jury's moral unease with the conviction of the defendants in *R v G*.³⁷³ Lord Bingham's assertion of the Caldwell test's conflict with the rudimentary principle of culpability suggests the test's further incompatibility with other conviction principles rooted in culpability, such as fair labelling and autonomy. Consequently, Lord Bingham's argument for the abolition of the test was highly appealing. It can be argued that the conclusion that the Caldwell test created injustice for individuals incapable of appreciating reasonable risks formed sufficient rationale for its abolition since it exposed the test's flaw on a rudimentary level.

III. Misinterpretation

The Caldwell test exhibited a further critical flaw—its misinterpretation of the term "recklessness," revealed by its injustice to groups such as children. This argument is an expansion of Lord Bingham's claims in *R v G*,³⁷⁴ as he

³⁶⁸ *ibid.*

³⁶⁹ *ibid.*

³⁷⁰ *ibid.*

³⁷¹ A man cannot be found guilty based on his guilty actions since his mind must also be guilty.

³⁷² *R v G* (n 366).

³⁷³ *ibid.*

³⁷⁴ *R v G* (n 366).

explained that the term was specifically misinterpreted in the application of section 1 of the Criminal Damage Act 1971 (the 1971 Act). Lord Bingham stated that the misinterpretation “is offensive to principle and is apt to cause injustice,”³⁷⁵ hence, indicating that it critically needed correction through the abolition of the Caldwell test.

Lord Diplock’s original definition of “recklessness” in Caldwell described it as “careless, regardless, or heedless, of the possible consequences of one’s acts.”³⁷⁶ Williams³⁷⁷ and Jefferson³⁷⁸ have criticised this interpretation, suggesting that it wrongfully equated recklessness to carelessness. Williams argued that the defendant should only be considered “reckless” if he does not have regard for “the possibility of doing damage—is not deterred by that known possibility from pursuing his line of action.”³⁷⁹ Additionally, he explained that the term “reckless” implied a sense of condemnation since a reckless person is expected to know the risks he is causing.³⁸⁰ Jefferson distinguished this from “carelessness,” which he explained to be when the defendant merely “fell short of the standard expected of reasonable persons,”³⁸¹ such as the children in *R v G*.³⁸² Despite these critiques, there is no evidence indicating that Parliament intended “carelessness” to be included under the charge of being “recklessness.” On the contrary, as Lord Steyn explained, the term “recklessly” replaced “maliciously” within section 1 of the 1971 Act following the Law Commission’s recommendations to

³⁷⁵ *ibid.*

³⁷⁶ *Caldwell* [1982] AC 341 (HL) [351] (Diplock L).

³⁷⁷ Glanville Williams ‘Recklessness Redefined’ (1981) 40 *The Cambridge Law Journal* 252.

³⁷⁸ Michael Jefferson, ‘Recklessness: The Objectivity of the Caldwell Test’ (1999) 63 *Journal of Criminal Law* 57.

³⁷⁹ Williams (n 377) 265.

³⁸⁰ *ibid.*

³⁸¹ Jefferson (n 378), 63.

³⁸² *R v G* (n 366).

consciously modernise its language while not altering its meaning.³⁸³ The synonymous use of “recklessly” and “maliciously” indicates that Parliament merely intended the offence to include what has been defined earlier as “reckless” due to its negative connotation. The Caldwell test’s extension of the meaning of “recklessness” beyond Parliament’s will suggests a troubling intrusion into the legislative arena, undermining the principle of separation of powers. Ultimately, the combination of the Caldwell test’s potentially damaging misinterpretation of the law and its injustice towards individuals with lower cognitive capacities provided a strong rationale for its abolition.

IV. Modification

As previously mentioned, the House of Lords abolished Caldwell recklessness after realising its injustice to those who cannot appreciate risks. While many advocates of Caldwell recklessness claimed that the test should have been merely modified to include the defendant’s lower capacity within a reasonable person’s perspective, such modifications would not have addressed the core problems of the test. Henceforth, its replacement with the Cunningham test was more appropriate.

As explained by Lord Bingham, merely modifying the Caldwell test in the suggested manner would not have addressed its previously explained contradiction with basic principles of culpability.³⁸⁴ This claim is indeed very logical: while the jury might find that a reasonable person of the same capacity as the defendant would have foreseen the risks, the defendant might still have not. Hence, the test would still convict those without a proven culpable state of mind, which creates injustice.

³⁸³ *R v G* [45] (Steyn L).

³⁸⁴ *R v G* [37] (Bingham L).

However, advocates of merely modifying the test, such as Kimel³⁸⁵ and Amirthalingam,³⁸⁶ suggest that its abolition would also contradict basic principles of culpability by not convicting liable defendants. In support of this view, Kimel highlighted that some people act with a “genuine disregard for the safety of others.”³⁸⁷ Amirthalingam further argued that culpability must still be found where the defendant does not appreciate risks they objectively “ought to have adverted,”³⁸⁸ for reasons other than self-intoxication.³⁸⁹ However, Edmund-Davies explained that if the defendant “closes his mind to a risk he must realise that there is a risk”³⁹⁰ which can be proven in court. This explanation indicates that a subjective test, like Cunningham, is capable of convicting those who deliberately chose to not recognise risks. Thus, since the suggested modification would not address Caldwell’s flaw in culpability, its replacement with Cunningham was arguably more appropriate.

Additionally, the modification of the Caldwell test would have overcomplicated the law regarding recklessness. Lord Bingham explained that altering the test for children would require altering it for other groups, which would create complicated disputes regarding the characteristics that should be considered when applying the test.³⁹¹ His lordship further suggested that such modification’s speculative element would

³⁸⁵ Dori Kimel, ‘Inadvertent Recklessness in Criminal Law’ (2004) 120 Law Quarterly Review 548.

³⁸⁶ Kumaralingam Amirthalingam, ‘Caldwell Recklessness Is Dead, Long Live Mens Rea’s Fecklessness’ (2004) 64 The Modern Law Review 491.

³⁸⁷ Kimel (n 385) 552.

³⁸⁸ Amirthalingam (n 386) 500.

³⁸⁹ *ibid.*

³⁹⁰ *Caldwell* [1982] AC 341, (HL) [358] (Edmund-Davies L).

³⁹¹ *R v G* [33] (Bingham L).

complicate the jury's task and likely lead to less reliable verdicts.

In response to this, Kimel encouraged the modification of the test to include the different varieties of groups of lesser capacities within the objective Caldwell test. While agreeing with the claimed complexity of that modification and its burden on the jury, Kimel argued that the jury's job is already highly complicated and modifying the test would not influence that. Lord Bingham's argument seems more convincing as it aims to improve the law rather than complicate it. Although the jury is capable of dealing with complex tasks, increasing them would risk the consistency of decisions. Accordingly, it seems more convincing to simplify the law by abolishing and replacing the Caldwell test instead of pursuing modifications.

V. Conclusion

In conclusion, the House of Lords' decision to abolish the Caldwell recklessness test can be justified by the test's inherent flaws. Most prominently, the Caldwell test's attachment of culpability to individuals who are unable to reasonably appreciate risks clearly reflects its injustice. Furthermore, the test's expansion of the parliamentary meaning of recklessness to include carelessness represents an unjustified judicial intrusion into the legislative domain. Based on this, the abolition of the Caldwell recklessness test appears legitimate. As alternatively suggested, the mere modification of the Caldwell test to include the defendant's lower capacity within a reasonable person's perspective would still unjustly extend culpability and over-complicate the law. Consequently, the Caldwell test's complete replacement with the Cunningham test was highly appropriate.

Delivering Babies or Delivering Justice? Reforming Clinical Negligence Law for Obstetric Claims

Rosie Jones[†]

Obstetric claims constitute a significant portion of clinical negligence cases, highlighting systemic issues within obstetrics and the legal framework governing clinical negligence. Whilst compensation is commonly awarded for injuries sustained during childbirth, it falls short of being able to truly provide justice for claimants. Justice requires the prevention of recurring negligence and the assurance of accountability. When this is accomplished, it can be considered that justice is being delivered to obstetric claimants. However, with scandals such as those in the Furness General Hospital, it can be said that justice is rarely being delivered and the reformation of clinical negligence law is therefore imperative. Whilst prior scholarship has focussed on reforming clinical practices or compensation schemes, this paper advocates for a multi-stranded approach to reform. Namely, this paper advocates for the (1) elimination of blame culture, (2) continuation of initiatives such as the Early Notification Scheme, and (3) differentiation between violations and errors to foster a culture of learning and improvement. Implementing these reforms can enhance the quality of obstetric care whilst reducing the frequency of negligence claims, henceforth advancing the delivery of both babies and justice.

I. Introduction

Clinical negligence is commonly governed by tort law, though private patients may bring claims for breach of contract. In tort, the claim can be brought directly against the individual physician, vicariously against the hospital, or sometimes both. This paper focusses specifically on obstetric cases as this is the single largest cost to the taxpayer of clinical negligence claims.

During 2022/23, obstetric claims represented 13% of the total number of clinical negligence claims received by the NHS Litigation Authority but were 64% of the total value of

new claims.³⁹² This represents a 2% increase in claims compared to the previous year, highlighting that there is an abundance of issues facing not only clinical negligence claims, but also the NHS as a system.³⁹³ These claims are also considerably expensive, with the total clinical negligence payments in 2023/23 costing £2.6 billion.³⁹⁴ Henceforth, there is a clear need for reform to deliver justice to patients and improve the system, leading to a higher quality of service and a fall in the volume of claims.

Although existing clinical negligence law does indeed deliver compensation and some form of resolution, it does not deliver appropriate justice for patients. Justice can be achieved when lessons are learnt, mistakes are not repeated, and the cycle of blame culture is broken. The current approach neither delivers justice nor does it lead to improvements, facilitating the consistent rise in claims.

Despite being extremely difficult to accomplish, various steps can be taken to attain justice. For instance, reform consisting of, *inter alia*, a distinction between violations and errors should be adopted in pursuit of this aim. This utilitarian approach would steer away from the repetitive practice of paying out and create an improved system for both doctors and patients.

II. Compensation as Incomplete Justice

Before discussing reform, it is important to discuss how the current negligence system operates to understand its

† LL.B. (Hons) Law, University of Manchester.

³⁹² NHS Resolution, Annual report and accounts 2022/23 (The Stationery Office 2023) 58.

³⁹³ *ibid.*

³⁹⁴ *ibid.*

shortcomings. The current law in this area has developed in a piecemeal fashion, incorporating certain ethical principles as well as recognising secondary victims' psychiatric injury claims. This demonstrates that the law is adapting to societal changes in an effort to provide appropriate justice. However, the law remains inadequate in providing redress for claimants.

In order to be successful in a clinical negligence claim, the claimant must establish a duty of care, breach, and causation. Firstly, Lord Atkin established in *Donoghue v Stevenson* that the duty of care applies to “persons who are so closely and directly affected by my act that I ought reasonably to have them in contemplation as being so affected when I am directing my mind to the acts or omissions which are called into question.”³⁹⁵ Since this is generally a straightforward assessment, Brazier and Cave contend that there is usually no issue in establishing the duty of care in clinical negligence cases.³⁹⁶

Secondly, the test for a breach of duty, as seen in *Bolam*, involves “the standard of the ordinary skilled man exercising and professing to have that special skill.”³⁹⁷ Henceforth, “a doctor is not negligent if he is acting in accordance with a practice accepted as proper by a responsible body of medical men skilled in that particular art.”³⁹⁸ Crucially, the *Bolitho* test stipulates that a doctor should not be able to escape liability for merely producing evidence from a number of experts that his opinion and actions accord with accepted medical practice.³⁹⁹ Similarly, inexperience is not an excuse as

³⁹⁵ *Donoghue v Stevenson* [1932] AC 562 (Lord Atkin).

³⁹⁶ Margaret Brazier and Emma Cave, *Medicine, Patients and the Law* (6th edn, Manchester University Press 2016).

³⁹⁷ *Bolam v Friern HMC* [1957] 1 WLR 582 (McNair J).

³⁹⁸ *ibid.*

³⁹⁹ *Bolitho v City and Hackney Health Authority* [1997] 4 All ER 771.

the standard of skill and care must consistently be maintained at a reasonably competent level.⁴⁰⁰

Lastly, the negligence element (causation) is reinforced through the ‘but-for’ test. This test outlines that the claimant must establish that the breach of duty caused the injury or suffering sustained. A successful proof of causation will lead to one hundred per cent compensation, but without the causal link, the claim will fail. Importantly, there are exceptions to the ‘but-for’ test, as confirmed in *Chester v Afshar*.⁴⁰¹ For instance, an omission in the form of failure to warn a patient constitutes causation under Chester since patients have the right to be informed about significant risks.

These three main factors, alongside elements such as remoteness of damages, make up the process of compensating patients. This process aims to be as fair as possible by considering a range of factors and elements to test negligence. As well as legal considerations, the use of ethical considerations further ensures efficiency as seen in *Montgomery v Lanarkshire*.⁴⁰² The Supreme Court ruling in Montgomery decided in favour of the claimant and is a landmark case concerning informed consent. The ruling received monumental influence as it was “a radical move away from English law’s traditional respect for clinical expertise.”⁴⁰³

Nadine Montgomery’s son was born with cerebral palsy as a result of shoulder dystocia during her labour. Nadine sued for damages, claiming that had she been informed of the increased risks of shoulder dystocia during a vaginal delivery,

⁴⁰⁰ *Wilsher v Essex AHA* [1986] AC 1074.

⁴⁰¹ *Chester v Afshar* [2004] UKHL 41.

⁴⁰² *Montgomery v Lanarkshire Health Board* [2015] UKSC 11.

⁴⁰³ Jonathan Montgomery and Elsa Montgomery, ‘Montgomery on informed consent: an inexpert decision?’ (2016) *J Med Ethics* 89 <<https://pubmed.ncbi.nlm.nih.gov/26811487/>> accessed 8 May 2023.

she would have chosen differently. The *Montgomery* decision established that “it is the doctor's responsibility to explain to her patient why she considers that one of the available treatment options is medically preferable to the others, having taken care to ensure that her patient is aware of the considerations for and against each of them.”⁴⁰⁴

Ultimately, the court ruled in favour of *Montgomery*, highlighting the role of autonomy (one of Beauchamp and Childress’ four principles of medical ethics) and identifying the use of ethical considerations as a form of resolution and adequate compensation.⁴⁰⁵ Despite this significant decision, there has been limited change in practice. Chan contends, “Doctors at the coalface have received little official direction on how their practice should change in light of the ruling ... Some hospitals are in the process of updating their procedures on informed consent, but few have completed this.”⁴⁰⁶ This suggests that justice has not been attained if the ruling has not impacted the everyday workings of obstetricians and the mistake has not been learnt from.

Two years later, the court in *Re (a Minor) v Calderdale* would shed more light on factors affecting the success of psychiatric injury claims.⁴⁰⁷ In *Calderdale*, both the mother and grandmother (as a secondary victim) succeeded in their claims after witnessing a lifeless baby and a sustained period of resuscitation.⁴⁰⁸ Generally, it is unclear whether witnessing a traumatic birth constitutes a compensable injury since birth itself is considered painful and uncomfortable even without

⁴⁰⁴ *Montgomery v Lanarkshire Health Board* [2015] UKSC 11 [95].

⁴⁰⁵ Tom Beauchamp and James Childress, *Principles of Biomedical Ethics* (5th edn, OUP 2001).

⁴⁰⁶ *ibid.*

⁴⁰⁷ *Re (a Minor) and Others v Calderdale & Huddersfield NHS Foundation Trust* [2017] EWHC 824.

⁴⁰⁸ *ibid.*

negligence. In this case, however, Lindsey argues that “the failure to act did not cause the sudden shocking event; it failed to prevent it.”⁴⁰⁹

Lindsey continues, “Once a healthcare professional is involved and negligently fails to take steps to avoid the unwanted outcome, the law should step in to provide redress and therefore the judgement is evidently legally justifiable.”⁴¹⁰ This recognition suggests that the clinical negligence system can be efficient in providing fair judgements by considering a range of factors to successfully award damages to patients. However, as Sheppard notes, it is often difficult to prove causation.⁴¹¹ Consequently, in many cases, damages are not always awarded due to this high threshold, resulting in justice not being delivered to patients.

III. Repeating the Same Mistakes

The Oxford English Dictionary defines justice as “the maintenance of what is just or right by the exercise of authority or power, the assignment of deserved reward or punishment, and the giving of due deserts.”⁴¹² This substantiates that by rewarding patients with compensation, only half of justice is

⁴⁰⁹ Jaime Lindsey, *Psychiatric Injury Claims and Pregnancy: Re (a Minor) and Others v Calderdale & Huddersfield NHS Foundation Trust* [2017] EWHC 824 (2017) 26 MLR 117 <<https://academic.oup.com/medlaw/article/26/1/117/4139718>> accessed 6 May 2023.

⁴¹⁰ *ibid.*

⁴¹¹ Georgina Sheppard, ‘Proving Causation In Medical Negligence Cases – A Closer Look’ (Nelsons, March 17 2024) <<https://www.nelsonslaw.co.uk/causation-medical-negligence/#:~:text=It%20is%20fair%20to%20say,negligent%20treatment%20had%20not%20occurred.>> accessed 1 June 2024.

⁴¹² Oxford English Dictionary (3rd edn, OUP | 2023) <<https://www.oed.com/viewdictionaryentry/Entry/102198#:~:text=Administration%20of%20law%20or%20equity,punishment%3B%20giving%20of%20due%20deserts>> accessed 1 May 2023.

being delivered. The “maintenance of what is just or right” is left untouched by the laws of clinical negligence.⁴¹³

If one perceives that merely compensating those who have suffered at the hands of clinical negligence can be recognised as justice, then society would be stuck with a primitive medical service that is blindingly troubled with designating blame. The purpose of justice is not only assigning rewards or punishment, but also learning from the mistakes that have been made. The opportunity to be educated and alter a system based upon an error will create a medical service that provides optimal care for patients.

This is exemplified by the catalogue of errors in the Furness General Hospital scandal, which resulted in the deaths of one mother and eleven babies.⁴¹⁴ This tragedy was highlighted in the Morecambe Bay Investigation and the Kirkup Report.⁴¹⁵ Before these investigations took place, the series of mistakes were never revealed and thus no action was taken “until 5 serious incidents occurred in 2008.”⁴¹⁶ The report revealed that the faults consisted of a lack of clinical competence from the staff as well as a failure to correct errors and issues that occurred within the hospital.⁴¹⁷ Therefore, if justice had been served in the earlier cases, the latter cases would never have been permitted to happen as the system would have been corrected.

⁴¹³ *ibid.*

⁴¹⁴ Nick Trigg, “Furness baby deaths inquiry: ‘Lethal mix of failures’” (2015) <<https://www.bbc.co.uk/news/health-31699607>> accessed 2 May 2023.

⁴¹⁵ Bill Kirkup, *The Report of the Morecambe Bay Investigation* (The Stationery Office 2015).

⁴¹⁶ Department of Health and Social Care, *Morecambe Bay Investigation Report* published (2015) <<https://www.gov.uk/government/news/morecambe-bay-investigation-report-published>> accessed 3 May 2023.

⁴¹⁷ *ibid* [13]-[15].

Kirkup highlights “a pattern of failure to recognise the nature and severity of the problem, with, in some cases, denial that any problem existed, and a series of missed opportunities to intervene that involved almost every level of the NHS.”⁴¹⁸ He continues, “Had any of those opportunities been taken, the sequence of failures of care and unnecessary deaths could have been broken.”⁴¹⁹ In other words, the lacuna for error would have decreased and improvements to the care system would have been made upon the judgement of initial cases.

The urge for a culture of learning instead of blame would steer away from the repetitive practice of paying out and could rejuvenate attitudes within the healthcare system. More importantly, it is vital to note that once issues and errors have been exposed, they must be acted upon in order to serve complete justice. Unfortunately for the claimants of the Furness General Hospital scandal, justice has evidently not been served.

Soon after Kirkup, the Ockenden Report was written in response to widespread concern about the condition of maternity care provided at the Shrewsbury and Telford Hospital NHS Trust. The report was commissioned to investigate infant as well as maternal deaths and aimed to understand the causes of these incidents. Clarkson and Hegdekar state that, “the Ockenden Report demonstrated that the issues identified at Morecambe Bay were not confined to that specific Trust, and sadly the latest Kirkup Report shows lessons have not been learnt in the seven years since then.”⁴²⁰

⁴¹⁸ Bill Kirkup, *The Report of the Morecambe Bay Investigation* (The Stationery Office 2015) 5.

⁴¹⁹ *ibid.*

⁴²⁰ Stephen Clarkson and Meghana Hegdekar, ‘Kirkup Report into East Kent Maternity Services is a sad reflection of unlearned lessons in hospitals across England’ (Leigh Day, 19 Oct 2022) <<https://www.leighday.co.uk/news/blog/2022-blogs/kirkup-report-into-east-kent-maternity-services-is-a-sad-reflection-of-unlearned-lessons-in-hospitals-across-england/>> accessed 8 May 2023.

The report further suggested that clinical negligence laws in England were not serving justice for patients, and there was an urgent need for reform.

IV. Eliminating Blame Culture

According to the Bristol Royal Infirmary Inquiry, one of the key reasons for a lack of correction of errors in clinical negligence is blame culture.⁴²¹ The focus of blaming either an individual or the system for the mistakes that occurred does not provide justice and can easily become the centre of the claim. For example, if staff members are continuously assigned blame, they could become fearful of repercussions, which could lead to a culture of silence and reluctance to report errors. Furthermore, the media can play a significant role in amplifying blame upon an individual, which would lead to staff distancing themselves from the blamed individual and create divisions within the work environment.

Daniels and Andrews point out that “each time a health care professional comes into contact with a patient or makes a decision regarding a patient's care, the chance of error arises.”⁴²² This exemplifies the effect of blaming key individuals within a healthcare system that has a plethora of contributing factors, such as limited resources. This unfairly places total blame on the individual, though in some situations this may be appropriate. One example is the case of Ian Paterson, who was convicted of “wounding with intent after

⁴²¹ Secretary of State for Health, *The Report of the Public Inquiry into children's heart surgery at the Bristol Royal Infirmary 1984–1995, Learning from Bristol* (Cm 5207(1), 2001).

⁴²² Stephen Daniels and Lori Andrews, ‘Medical Professional Liability and the Delivery of Obstetrical Care: Volume II: An Interdisciplinary Review’ (National Academies Press (US) | 1989) Chapter 10, *The Shadow of the Law: Jury Decisions in Obstetrics and Gynaecology Cases*.

carrying out unnecessary breast procedures.”⁴²³ However, for the majority of clinical negligence claims, blame can usually be traced to multiple factors not necessarily connected to the staff’s conduct.

*MC & JC Birmingham Women's NHS Foundation Trust*⁴²⁴ highlights that there are numerous systemic issues that could result in errors, including short staffing, poor communication, and busy hospitals. As Mr Judge Turner rationalises, “It is perfectly understandable that those who suffer such tragically adverse outcomes will tend to assume that the doctors and midwives are to blame. This is particularly so where the unfamiliar context of an extremely busy antenatal ward is apt to give the impression of a lack of appropriate support.”⁴²⁵

Moreover, another problem with blame culture is the impact investigations have on hospital staff. There have been reviews of the impact of ongoing investigations on doctors showing that a rapid deterioration in both physical and mental health can occur during trials. The Medical Director at the Medical Protection Society contends, “A hearing itself can last several days if not weeks, and press can attend and report on the case throughout which can create long-term reputational damage and a sense of shame for the doctor.”⁴²⁶

Importantly, not only does blame culture cause traumatic experiences for those involved in claims, but it can

⁴²³ Michele Paduano, ‘Seven new inquests opened in rogue surgeon probe’ (2023) <<https://www.bbc.co.uk/news/articles/c1vqven4nd3o>> accessed 7 May 2023.

⁴²⁴ *MC & JC Birmingham Women's NHS Foundation Trust* [2016] EWHC 1334 (QB).
⁴²⁵ *ibid* [94].

⁴²⁶ Medical Protection Society, ‘GMC report on doctors who have died Whilst under investigation welcomed’ [2022] <<https://www.medicalprotection.org/uk/articles/gmc-report-on-doctors-who-have-died-Whilst-under-investigation-welcomed>> accessed 8 May 2023.

also lead to the practice of defensive medicine.⁴²⁷ This results in patients not receiving adequate treatment due to staff's fear the medical care required is increasingly complex and carries higher risks of error. Due to this concern, doctors may choose to perform the easier operation to avoid litigation. This causes major risks to patient well-being as well as diverts the focus away from healthcare. As Merry argues, "The primary objective of both the legal and the medical systems should be the promotion of safe and effective healthcare."⁴²⁸ This outlook is easily achievable if blame culture is erased from clinical negligence.

For these reasons, it can be regarded that justice indeed is not delivered to patients, as seen in the Furness General Hospital scandal. The elimination of blame culture would aid the system in understanding the mistakes made and simultaneously adjust and tailor methods and procedures to patients. As Merry puts forth, "The focus should therefore be on those who do have the influence or authority to make changes which promote safety within the healthcare system. Prosecuting or suing practitioners who have no such influence or authority, such as junior doctors, simply sets the scene for the same errors to be made again."⁴²⁹

V. The Need for Reform

As discussed, it is evident that attempts should be made to ensure mistakes are not repeated. Henceforth, there is an urgent need for reform to tackle the injustices currently being delivered to patients. For instance, a no-fault system could

⁴²⁷ Public Accounts Committee Managing the costs of clinical negligence in hospital trusts, (2017) HC 397 [5].

⁴²⁸ Alan Merry, 'How does the law recognize and deal with medical errors?' [2009] J R Soc Med. 265 <<https://www.ncbi.nlm.nih.gov/pmc/articles/PMC2711199/>> accessed 8 May 2023.

⁴²⁹ *ibid.*

focus on the claimant and provide assistance or compensation for the injuries they have suffered. Within such a scheme, the patient has to show that they have suffered in a particular way as a result of their medical treatment, yet they do not need to prove any negligence. This type of reform focuses on causation and tests the causal link between the breach of duty and the damage suffered.

In New Zealand, the adoption of this mechanism appears successful because accountability and compensation are two separate claim systems. The New Zealand no-fault compensation scheme requires patients to show ‘treatment injury’. This means that there is no need to establish fault but instead to show that the injury occurred during medical treatment and is more than a minor or temporary injury. However, as Wallis admits, “[Whilst] New Zealand’s system of no-fault compensation ... generates novel patient safety data for learning, these have yet to translate into improvement in patient safety.”⁴³⁰

Furthermore, obstacles facing New Zealand’s no-fault compensation scheme include the potential for compensation not being provided for the entirety of the financial and personal losses experienced from the injury. This is because this approach focusses on the injury alone as opposed to the whole impact of it. Moreover, the reform alone does not provide a platform to learn from errors but merely creates a speedy process to resolve claims in comparison to other schemes. As such, with patient well-being at the core of serving justice to claimants, the no-fault system would not be the most appropriate method of reform.

⁴³⁰ Katharine Wallis, ‘No-fault, no difference: no-fault compensation for medical injury and healthcare ethics and practice’ [2017] Br J Gen Pract. 38 <<https://www.ncbi.nlm.nih.gov/pmc/articles/PMC5198606/>> accessed 7 May 2023.

Instead of this, the continuation of the Early Notification Scheme would be an optimal approach for obstetric negligence cases. The Early Notification Scheme highlights the need to “investigate potential eligibility for compensation and take proactive action to reduce legal costs and improve the experience for the family and affected staff.”⁴³¹ This has also encouraged trusts to be more open about incidents and created an environment of learning from mistakes instead of becoming enwrapped in blame culture.⁴³² Therefore, the scheme is appropriate for providing complete justice because it not only focuses on compensation but also improves the work environment.

Whilst accountability is needed to identify weaknesses within such a system, it should only be a platform to educate instead of blame. The importance of such a scheme is highlighted by the Chief Medical Officer's consultation paper titled “Making Amends”. The paper proposes that any NHS Redress Scheme should always include care for severely neurologically impaired babies.⁴³³ For example, a baby who sustained injuries caused by clinical negligence, resulting in cerebral palsy, should receive some form of a managed care package, a lump sum payment for specific equipment to help the child through life, and various other compensatory rewards. Despite the government not accepting this scheme, the proposal highlights the need for more than just compensation to achieve true justice for families.

Such a type of rectification would be carefully assessed, and the eligibility for claimants would include several

⁴³¹ NHS ‘Early Notification Scheme’ (resolution.nhs.uk, 5 April 2024) < <https://resolution.nhs.uk/services/claims-management/clinical-schemes/clinical-negligence-scheme-for-trusts/early-notification-scheme/> > accessed 4 June 2024.

⁴³² *ibid.*

⁴³³ Paduano (n 423).

features. The major criterion to be met would be that the birth would have to have taken place under NHS care, and the damages suffered should meet the threshold of a severe neurological impairment related to the birth. If such a scheme is adopted for obstetric claims, it would provide the best outcome for claimants, simultaneously providing justice and lessons or errors that can be learnt from.

Additionally, the Maternity and Newborn Safety Investigations body (MNSI) would also constitute part of the strategy to improve obstetric care within the NHS. By conducting independent investigations, the MNSI would further deter from blame culture. This is because independent investigations are conducted by impartial individuals unrelated to the work environment, thus reaching a fact-based conclusion unclouded by blame culture or whistleblowing.

Hence, the Early Notification Scheme and the MNSI will provide true justice even if it leads to an influx of claims. As Fenn puts forward, “A system that generates more claims, and therefore an increased burden on clinicians and managers, is not necessarily a bad system.”⁴³⁴ Thus, if the number of investigations increases, this would not be problematic as it would highlight the plethora of errors, mistakes, and risks involved in birth injuries.

Moreover, the MNSI makes safety recommendations to improve services provided based on their independent investigations. This further highlights the strength of the MNSI in identifying weaknesses in healthcare systems. As such, not

⁴³⁴ Paul Fenn, Alastair Gray, Neil Rickman, and Adrian Towse, ‘Making amends for negligence’ [2004] BMJ 417
<[120](https://www.ncbi.nlm.nih.gov/pmc/articles/PMC344248/#:~:text=The%20chief%20medical%20officer's%20consultation,fault%20scheme%20for%20all%20patients>” accessed 8 May 2023.</p></div><div data-bbox=)

only would mistakes be recognised but improvements or alterations could be put in place to avoid them in the future, increasing patient safety.

Finally, a more suitable method of reform would consist of a distinction between violations and errors. This distinction would note that errors are unintentional, whereas a violation is intentional and often involves choice.⁴³⁵ This proposal would specifically aid obstetric claims in ensuring that justice is delivered in its entirety. Negligence can be considered as a spectrum or a sliding scale, which means not all cases should be treated the same when the claimant has won their case. The distinction would focus on how violations cannot be repeated, yet both errors and violations would be recoverable by claimants under such a scheme.

Whilst at one end a medical error could arise, something much more neglectful such as a violation could occur towards the other end. A medical error, for example, would consist of a prescription error or a delay in treatment, whereas a violation would consist of a doctor making a choice that another reasonable doctor would not have in the same circumstances. The difference between an error and a violation is extensive and should thus require different outcomes. As Samara points out, “It is worth noting that medical errors can occur regardless of the doctors’ experience.”⁴³⁶ This specific distinction denotes that errors are unintentional whilst “violations involve choice and are intentional.”⁴³⁷

⁴³⁵ Merry (n 428).

⁴³⁶ Evangelia Samara, Lambros Tzoumas, Konstantinos Tzoumas, Minas Paschopoulos, Petros Tzimas and Georgios Papadopoulos, ‘Medical Liability in Obstetrics/Gynecology and Co-liability With Anesthesiology in Greece: A Retrospective Study’ [2022] *Cureus* 10 <<https://www.ncbi.nlm.nih.gov/pmc/articles/PMC9710962/>> accessed 3 May 2023.

⁴³⁷ Merry (n 428).

A violation demands compensation, accountability, and retribution, whereas an error would require compensation and an urge to rectify the situation. Although seemingly insignificant, this distinction would force systemic issues to be recognised by understanding the error that caused the injury. For example, if the error stemmed from a lack of resources or staff, a direct rectification would be to improve resource allocation and recruitment. Similarly, the recognition of a violation would provide further accountability. This distinction would also ensure that doctors do not resort to defensive medicine because errors would be treated as opportunities to improve as opposed to punishment. Consequently, this improves the healthcare environment for doctors and patients together.

VI. Conclusion

In conclusion, it can clearly be evidenced that justice is not currently a key focus within obstetric negligence claims. Unfortunately, the spotlight is on compensation. Despite this form of resolution being some comfort to claimants, no matter how substantial an award of damages may be, it will never be able to undo the damage created or the trauma faced by the parties. Justice is only ever attainable if the mistakes are not repeated.

Recognising, adjusting, and implementing lessons learnt from errors will lead to an improvement in care. In addition to this, the continuation of the Early Notification Scheme and a distinction between violations and errors would shift the focus towards an optimal system of care. The right to health should not be obscured by blame culture or reduced by defensive medicine. As the Ockenden review succinctly recognises, “The learning of lessons and embedding of meaningful change ... in maternity care overall is essential both

for families involved in this review and those who will access maternity services in the future.”⁴³⁸

With obstetrics claims being the largest litigation expenditure in clinical negligence, the call for reform is louder than ever and increasingly concerning. It is only appropriate that for such a highly skilled and funded obstetric sector providing breakthroughs like in vitro fertilisation (IVF), the legal system should deliver justice in conjunction. By addressing the outlined inefficiencies, excellence in obstetrics can be pursued. In turn, this will ensure that patients can trust obstetric care, instead of fearing a system that fails to care for both mother and child.

⁴³⁸ Donna Ockenden, *Emerging Findings and Recommendations from the Independent Review of Maternity Services at The Shrewsbury and Telford Hospital NHS Trust* (HC 1081, 2020).

Evaluating Police Interview Practices in England and Wales: Adherence to the ‘Mendez Principles’ on Effective Interviewing

Scarlett Pickford[†]

The ‘Mendez Principles’ were introduced with the aim of replacing coercive interrogations with rapport-based interviews. This paper examines the extent to which post-arrest custodial police interview practices in England and Wales conform to them, specifically assessing conformity to principle two, on practice, and principle three, on vulnerability. Overall, the paper argues that despite clear legislative commitment to these particular principles, cultural, practical, and economic barriers limit the extent to which police practices conform to them in practice. This paper advocates for improved police training and resourcing of appropriate adults, though ultimately a wider cultural shift from coercive to rapport-based policing is necessary to aid the transformation of police interviewing practices.

I. Introduction

The intention of police interviews are to elicit accurate information from individuals during the process of an investigation.⁴³⁹ Although they can occur in a range of contexts, this paper specifically explores post-arrest, rather than voluntary, police interview practices that occur within police custody in England and Wales. The discussion focuses on principles two and three of the ‘Mendez Principles’, seeking to understand the extent to which police interview practices conform to the implementation of legal safeguards and respond to vulnerability. Overall, this paper argues that, despite clear legislative commitment to these particular ‘Mendez

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⁴³⁹ A Wakefield and J Fleming, *The SAGE Dictionary of Policing* (London: SAGE Publications Ltd, 2009) <<https://dx.doi.org/10.4135/9781446269053>> accessed 25th January 2023.

Principles’, cultural, practical and economic barriers limit the extent to which police practices conform to them in practice.

II. Legal Safeguards in Police Interview Practices

(i) Overview of Principle Two

The second ‘Mendez Principle’ relates to gathering accurate and reliable information while implementing appropriate legal safeguards. Adherence to this principle is necessary to address the issue of inadmissibility of evidence and confessions obtained through interview practices.⁴⁴⁰

(ii) The Right to Silence

The right to silence, a pivotal legal safeguard, is upheld through standardised interview protocols.⁴⁴¹ Prior to initiating any questioning, officers are mandated to administer a caution, thereby apprising interviewees of their right to silence. However, given the complexity of the caution since the introduction of adverse inferences following the Criminal Justice and Public Order Act 1994, less than 50% of criminal justice actors can adequately explain its meaning, mystifying the interviewees understanding of their right.⁴⁴² Even when the right to silence is invoked by interviewees, the extent to which interview practices implement this legal safeguard in practice continues to be undermined as officers lack a respectful awareness of innocent reasons for silence, including fear of reprisal, bewilderment and resistance against institutional

⁴⁴⁰ Police and Criminal Evidence Act 1984, s. 76.

⁴⁴¹ *ibid*, Code C, 10.5.

⁴⁴² IC Clare, GH Gudjonsson and PM Harari, Understanding of the Current Police Caution (England and Wales) (*Journal of Community & Applied Social Psychology* 8(5), 1998) 323-329.

power.⁴⁴³ Instead, police interview practices in response to silence are characterised by a presumption of guilt, influenced by the cultural belief that “the innocent should have nothing to hide.”⁴⁴⁴

(iii) Access to Legal Advice

Subsequently, the right to legal advice has become the most critical legal safeguard as it ensures that the interviewee understands and is able to access all other rights during the police interview.⁴⁴⁵ For example, legal advice is imperative for ensuring the right to a fair trial under the Human Rights Act⁴⁴⁶ by protecting against compelled self-incrimination. Yet, the extent to which interview practices facilitate access to legal advice is limited, with only 60% of interviewees requesting legal advice and 48% receiving it.⁴⁴⁷

Whilst there are a range of factors affecting access to legal advice, the use of ploys prior to an interview to deter interviewees from accessing their rights is found to be very common.⁴⁴⁸ These include reading rights too quickly and incomprehensibly or informing them of associated delays, fuelling their “let’s get it over with mentality.”⁴⁴⁹ This may be

⁴⁴³ D Kurzon, *The right of silence: A socio-pragmatic model of interpretation* (Journal of Pragmatics 23(1), 1995) 55–69; H Quirk, *The Rise and Fall of the Right of Silence: Principle, Politics and Policy* (Taylor & Francis Group London, 2017) 18.

⁴⁴⁴ *ibid.*

⁴⁴⁵ *ibid.*

⁴⁴⁶ Human Rights Act 1998.

⁴⁴⁷ L Skinnis, *Police Custody: Governance, Legitimacy and Reform in the Criminal Justice Process* (Abingdon, Oxon; New York: Willan, 2011) 113.

⁴⁴⁸ L Skinnis, ‘*Let’s Get it Over With: Early Findings on the Factors Affecting Detainees’ Access to Custodial Legal Advice* (Policing & Society 19(1), 2009) 58-78; V Kemp, NJ Balmer and P Pleasence, *Whose Time is it Anyway?: Factors Associated with Duration in Police Custody* (Criminal Law Review 10, 2012) 736–752; L Welsh, L Skinnis and A Sanders, *Sanders & Young’s Criminal Justice* (5th edition, Oxford: Oxford University Press, 2021) 155-209

⁴⁴⁹ *ibid.*

intentional, as legal safeguards are viewed as a hindrance to achieving crime control ‘results’, central to the occupational identity of policing.⁴⁵⁰ However, ploys may also be the unintended consequence of overfamiliarity, given the highly routinised and repetitive nature of informing interviewees of their rights.⁴⁵¹

III. Rapport and Information Gathering

Apart from legal safeguards, conformity of police interview practices to establishing and maintaining rapport with interviewees is critical to their ability to elicit accurate and reliable information, in line with the ‘Mendez Principle’.⁴⁵² The PEACE Investigative Interviewing Framework, which provides a shift from accusatory interview practices to encouraging suspects to give their account through open questioning and active listening without prejudice, has increased the extent to which interview practices conform to the principle.⁴⁵³ Technological developments facilitating mandatory audio recordings⁴⁵⁴ and permitted visual recordings⁴⁵⁵ also have regulatory and accountability functions for ensuring police practices conform to less oppressive modes of interviewing given the ‘new visibility’ and transparency of interrogations.

⁴⁵⁰ Quirk (n 443).

⁴⁵¹ Skins (n 448).

⁴⁵² Association for the Prevention of Torture, Principles on effective interviewing for investigations and information gathering (APT, 2021) <<https://interviewingprinciples.com/#comp-179e548ce41>> accessed 24th January 2023.

⁴⁵³ College of Policing, Investigative Interviewing (College of Policing, 2013) <<https://www.college.police.uk/app/investigation/investigative-interviewing/investigative-interviewing>> accessed 12th December 2022.

⁴⁵⁴ Police and Criminal Evidence Act 1984, Code E.

⁴⁵⁵ *ibid*, Code F.

However, conformity to the principle is limited given continued evidence of interview practices involving biased and coercive questioning tactics to elicit confessions which aid the prosecution, such as the presentation of false evidence and knowledge claims.⁴⁵⁶ Conformity to oppressive practices and rejection of the PEACE model is a result of PEACE training being inapplicable to the workplace and a lack of continual supervision and evaluation.⁴⁵⁷ Moreover, there is clear evidence that police practice is learnt vicariously through cultural transmission and observation; to increase conformity to this principle, it is recommended that forces offer internal support systems for the PEACE framework with role models to disseminate “good practice.”⁴⁵⁸

IV. Addressing Vulnerability in Police Interviews

(i) Defining Vulnerability

The third ‘Mendez Principle’ relates to identifying and addressing the needs of those in situations of vulnerability. Vulnerability is a contested concept, therefore evaluating the extent to which interview practices conform to this principle depends on what perspective of vulnerability is adopted. “Universal vulnerability” is an aspect of the human condition as the social structures, relationships and institutions we

⁴⁵⁶ Quirk (n 443); M McConville, A Sanders and R Leng, *The case for the prosecution : police suspects and the construction of criminality* (Abingdon, England; New York, New York: Routledge, 1991) 68; SM Kassin, SA Drizin, T Grisso, GH Gudjonsson, RA Leo and AD Redlich, Police-induced confessions: Risk factors and recommendations (Law and Human Behavior 34(1), 2010) 3-38; E Carter, *Analysing police interviews: Laughter, confessions and the tape* (Bloomsbury Publishing, 2011) 106-143.

⁴⁵⁷ C Clarke, R Milne and R Bull, *Interviewing Suspects of Crime: The Impact of PEACE Training, Supervision and the Presence of a Legal Advisor* (Journal of Investigative Psychology and Offender Profiling 8(2), 2011) 149–162.

⁴⁵⁸ BP Martine, W Rebecca and C Susan, *Improving the competency of police officers in conducting investigative interviews with children* (Police Practice and Research: An International Journal 11(3), 2010) 211-226.

become embedded within inevitably create harm.⁴⁵⁹ The custody environment and police interview context more specifically give rise to human relations characterised by significant power imbalances given the interviewees are entirely reliant on the interviewer's (police) discretion for their enjoyment of their human rights.⁴⁶⁰ Therefore, it may be argued that the context of the police interview itself needs to be understood as a 'situation of vulnerability', hence all interviewees should be identified and addressed as "vulnerable, frightened and unsure."⁴⁶¹

However, rather than conforming to the principle of universal vulnerability, police interview practices conform to identifying and addressing situations of "heightened vulnerability" with regards to specific risk factors. In law, a vulnerable person is defined as anyone who, because of a mental health condition or mental disorder, may have difficulty understanding or communicating effectively or as a juvenile who is vulnerable by virtue of their age.⁴⁶²

(ii) The Role of Appropriate Adults

The most significant way that police interview practices conform to the principle of identifying and addressing such vulnerability is through the mandatory provision of appropriate adults, whose role is to safeguard the rights, entitlements, and welfare of vulnerable interviewees.⁴⁶³ Consequently, the police

⁴⁵⁹ MA Fineman, *The Vulnerable Subject: Anchoring Equality in the Human Condition*, (Yale Journal of Law and Feminism 20(1), 2008) 1-23.

⁴⁶⁰ L Skinnis, L Rice, A Sprawson and A Wooff, *Police legitimacy in context: an exploration of "soft" power in police custody in England* (Policing: An International Journal of Police Strategies & Management 40(3), 2017) 601-613.

⁴⁶¹ A Edwards, *The Role of Defence Lawyers in a 'Rebalanced' System in E Cape and RP Young (eds), Regulating Policing: The Police and Criminal Evidence Act 1984 Past, Present and Future* (Oxford: Hart Publishing, 2008) 221-253.

⁴⁶² Police and Criminal Evidence Act 1984, Code C, 1.13.

⁴⁶³ *ibid*, 1.17.

interview facilitates the participation of vulnerable persons using reasonable adjustments and enhanced protections. This is illustrative of an equitable rather than equal approach that focuses on achieving the same outcome, rather than treatment, for all interviewees and result-orientated forms of equality.⁴⁶⁴ The conformity of police interview practices to the implementation of such adjustments and response to need relies on the identification of vulnerability during the “Safer Detention Risk Assessment” which precedes the police interview.⁴⁶⁵ Accountability for conformity to this principle is enhanced by the legislative responsibility for any discovered risk factors and subsequent support to be documented.⁴⁶⁶

(iii) Issues in Risk Assessment

However, the content and delivery of risk assessments are found to be inconsistent both from national guidance and between force areas, with evidence of overly formulaic delivery and a lack of focus on key risk factors to vulnerability.⁴⁶⁷ Moreover, many vulnerabilities, including neurodiversity, may not always be immediately apparent or “performed”, leading to a problem of under identification and unmet needs:⁴⁶⁸ for example, in 2018-19, only 6.2% of

⁴⁶⁴ KS Cook and KA Hegtvædt, *Distributive justice, equity, and equality* (Annual Review of Sociology 9(1), 1983) 217-241.

⁴⁶⁵ College of Policing, *Detention and Custody Risk Assessment* (College of Policing, 2013) < <https://www.college.police.uk/app/detention-and-custody/detention-and-custody-risk-assessment>> accessed 25th January 2023.

⁴⁶⁶ Police and Criminal Evidence Act 1984, Code C, 3.8.

⁴⁶⁷ MJ Stoneman, L Jackson, S Dunnett and L Cook, *Variation in detainee risk assessment within police custody across England and Wales* (Policing and Society 29(8), 2019) 951-967.

⁴⁶⁸ R Dehaghani, *He's Just Not That Vulnerable: Exploring the Implementation of the Appropriate Adult Safeguard in Police Custody* (Howard Journal of Crime and Justice 55(4), 2016) 396-413; E Angiolini, *Report of the independent review of deaths and serious incidents in police custody* (Home Office, 2017) <<https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attach>

detentions resulted in a need for an appropriate adult being recorded despite an estimated prevalence rate of 22%.⁴⁶⁹ Even when vulnerability is identified, police interview practices do not always address it, as officers are deterred from involving appropriate adults due to time constraints and lack of availability given their voluntary basis.⁴⁷⁰ Even when they are present, appropriate adults often provide an ineffective and passive safeguard due to under-training and misunderstanding of the role.⁴⁷¹

In addition, police interview practices effectively deny the inherent vulnerable status of children, with minimal evidence of adjustments compared to adult interviews.⁴⁷² This is due to dominant cultural beliefs within the police about children as ‘mini-adults’ and about child criminality as an expression of free will, given the changing nature of childhood and the increased maturity and autonomy afforded to juveniles since the implementation of Police and Criminal Evidence Act 1984 (PACE).⁴⁷³ This exemplifies the nonconformity of interview practices to the ‘Mendez Principle’.

ment_data/file/655401/Report_of_Angiolini_Review_ISBN_Accessible.pdf accessed 1st November 2021.

⁴⁶⁹ C Bath and R Dehaghani, *There to Help 3: the identification of vulnerable adult suspects and application of the appropriate adult safeguard in police investigations in 2018/19* (National Appropriate Adult Network, 2020) <https://orca.cardiff.ac.uk/id/eprint/135354/1/2020_There_To_Help_3.pdf> accessed: 15th December 2022.

⁴⁷⁰ M Bevan, *Making Good the Imbalance? Examining the Appropriate Adult Role In Children in police custody: adversity and adversariality behind closed doors* (Oxford: Oxford University Press, 2024); R Dehaghani, *Vulnerability in police custody: police decision-making and the appropriate adult safeguard* (London; New York: Routledge, Taylor & Francis Group, 2019).

⁴⁷¹ Dehaghani (n 470).

⁴⁷² M Bevan, *The pains of police custody for children: a recipe for injustice and exclusion?* (British Journal of Criminology 62(4), 2022) 805-821.

⁴⁷³ R Dehaghani, *Vulnerable by law (but not by nature): examining perceptions of youth and childhood ‘vulnerability’ in the context of police custody* (The Journal of Social Welfare & Family Law 39(4), 2017) 454-472.

V. Conclusion

In conclusion, this paper has explored the conformity of post-arrest police interview practices (within the custody environment) in England and Wales to principles two and three of the 'Mendez Principles'. Legal regulation of interview practices, mainly through PACE and associated Codes of Practice, mandate conformity to the gathering of accurate and reliable information, implementation of legal safeguards and adequate identification and response to vulnerability. However, this paper has established that current cultural, practical and economic contexts of policing limit the extent to which police interview practices conform to these principles in practice. Henceforth, improved investment in police training and resources for appropriate adults and an organisational shift in police cultural beliefs are necessary in order to improve the conformity of police interview practices to these 'Mendez Principles'.

From Code to Contracts: Rethinking Justice in the Age of Smart Contracts

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DISCLAIMER

The views expressed herein are those of the author alone and do not necessarily reflect the views of the International Tribunal or the United Nations in general.

This paper explores the transformative impact of *lex cryptographia*, such as smart contracts and decentralised autonomous organisations (DAOs), on justice and transactional interactions in blockchain technology. In addition to progress in artificial intelligence and the Internet of Things, blockchain technology has the potential to greatly change regulatory systems by advocating for a transition from conventional legal frameworks to automated, code-based governance. The objective is to thoroughly evaluate the influence of this change on the equilibrium between efficiency and fairness in transactions, closely examining the possibility of a justice system that favours libertarian principles over utilitarian morals. This essay contends that smart contracts, through their functionality and theoretical foundations, have the potential to democratise transactions and decrease dependence on intermediaries. However, it also highlights the concern that smart contracts may inadvertently incorporate capitalist biases into automated justice systems, potentially leading to legal outcomes that deviate from human-centred notions of justice.

This essay utilises legal theory, computer science, and blockchain technology studies to examine the intricate connection between code and law. The article envisions a future in which legal procedures could be automated and made more easily accessible. However, it also cautions against the potential ethical difficulties and inequalities that may arise as a result of this transformation. The key findings indicate that blockchain technology presents novel methods for optimising legal transactions, but it also presents notable obstacles in maintaining the alignment of justice with human values and social fairness.

I. Introduction

This article explores the dual capacity of smart contracts to democratise and depersonalise justice, marking a valuable contribution to the existing body of literature on the convergence of technology and law. The article explores the importance of adopting a well-rounded strategy that utilises technological progress whilst ensuring ethical ideals and social fairness are protected. The paper emphasises the crucial role of interdisciplinary research in managing the intricacies of this digital revolution.

In doing so, this essay focusses on how *lex cryptographia*, particularly through the operation of smart contracts and blockchain, decentralised autonomous organisations (DAOs), could work alongside artificial intelligence like Large Language Models to supplement regulation by laws. Additionally, this essay analyses how computer code could neglect the human based view of justice by fostering automated justice and algocracies where the capitalist system is increasingly disconnected from human views of justice. This results in the conditions of code upholding a Bitcoin maximalist/ libertarian view of justice.

II. Bridging the Divide Between Code and Law

Therefore, the blockchain's multifunctionality allows cryptography technology to serve as a technological infrastructure for many different types of actions, transactions, and information based on computer code. This results in the notion of *lex cryptographia*, especially as blockchain like Ethereum is increasingly used to operate computer codes with legal implications like smart contracts.

However, older blockchain networks like Bitcoin struggle with scalability issues. Bitcoin can only process about 3.3 to 7 transactions per second due to its 1-megabyte block size limit and 10-minute block creation time.⁴⁷⁴ This represents a technological limitation for Bitcoin's growth, as it runs on a similar code that cannot handle a larger quantity of transactions. Similarly, proof-of-work (PoW) mechanisms used by networks like Bitcoin are "costly and energy-intensive,"⁴⁷⁵ therefore, being unsustainable, representing a practical limitation.

Nevertheless, AI is always learning and improving, therefore, *lex cryptographia* will likely become more efficiently implemented. However, the key problem with *lex cryptographia* is that there is extreme difficulty translating legal terms and language into computer code if the code writer is not skilled in both legal language and code writing. Therefore, since computer code is not recognised and understood by most of society, computer code may never completely replace laws as long as smart contracts require a legal contract to work alongside them to clarify the contract terms. A primary obstacle lies in the fact that legal frameworks encompass subjective components like ethics, empathy, and interpretation, all of which are challenging to recreate in inflexible programming code. For instance, smart contracts rely

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⁴⁷⁴ Andrew Marshall, Bitcoin Scaling problem Explained (Cointelegraph, 02 March 2017) <<https://cointelegraph.com/explained/bitcoin-scaling-problem-explained>> accessed 12 September 2024.

⁴⁷⁵ Supra, Transactions per Second (TPS): The Complete Guide, (21 September 2021) <https://supra.com/academy/transactions-per-second/> accessed 12 September 2024.

on deterministic "if-then" logic, which is effective for certain rule-based procedures but inflexible when it comes to complicated or ambiguous legal scenarios that call for human discretion and judgement.⁴⁷⁶ Furthermore, it might be challenging to incorporate the precise specifications required for automation in smart contracts because many legal agreements purposefully provide leeway for interpretation to account for unanticipated circumstances or growing relationships.⁴⁷⁷ However, it must be considered reasonable that this trend will likely reverse as a result of legal technology and the growing importance of digital literacy.

Contrary to this, Carron & Botteron more accurately defined smart contracts as “a computerised program between two or more parties, whose conditions are defined in advance and stored in the blockchain.”⁴⁷⁸ According to this definition, jurisdictions may reasonably allow smart contracts to replace legal contracts since they store the necessary information to constitute ‘smart’ legal contracts with terms and conditions of an offer and an acceptance. Therefore, despite smart contracts being limited to executing specific, objective conditions (for example, "if X occurs, do Y") and cannot interpret subjective or nuanced legal concepts, smart contracts satisfy the conditions of a legal contract and may be used in scenarios whereby issues of duress or consideration are not the focus as these issues may be difficult to address purely through code. Terms and conditions are not always legally binding simply

⁴⁷⁶ Stuart D. Levi, An Introduction to Smart Contracts and Their Potential and Inherent Limitations (26 May 2018) <https://corpgov.law.harvard.edu/2018/05/26/an-introduction-to-smart-contracts-and-their-potential-and-inherent-limitations/> accessed 12 September 2024.

⁴⁷⁷ Michael Matthews, How Smart Contracts are Changing Legal Contracts, 11 December 2020) https://www.americanbar.org/groups/law_practice/resources/law-technology-today/2020/how-smart-contracts-are-changing-legal-contracts/ accessed 12 September 2024.

⁴⁷⁸ Daniel Kraus, Thierry Obrist and Olivier Hari (eds), Blockchains, Smart Contracts, Decentralised Autonomous Organisations and the Law (Edward Elgar 2019).

because they are recorded on a blockchain. The enforceability of smart contracts under law is still up for debate and can differ from state to jurisdiction. For instance, although certain legal systems might accept smart contracts in certain situations, others would not, especially when it comes to more complicated or arbitrary legal issues like consideration or duress. According to Carron and Botteron, smart contracts provide new avenues for automation, but they do not completely replace existing legal frameworks. Carron and Botteron indicate that, although these contracts can streamline some transactional procedures, they do not replace the necessity for conventional legal structures. Rather, smart contracts complement traditional frameworks, especially in situations where legal supervision is required to resolve conflicts or guarantee justice. Carron and Botteron, for instance, draw attention to the limitations of smart contracts when it comes to dealing with matters such as duress, unconscionability, or other arbitrary legal doctrines. These legal precepts are frequently interpreted by humans and are not entirely encapsulated in code since code is limited by the particular logic it is designed to follow.

Moreover, Carron and Botteron explain how smart contracts are “automatically executed or enforced without the need for a third party.”⁴⁷⁹ As a result, when smart contracts are coded into the blockchain, further human interference is not necessary for their operation and execution in light of their autonomy. Therefore, Carron and Botteron evidence this argument for finding that *lex cryptographia* would ensure a balance between the price and execution of the command by reducing the cost and time of transactions and replacing the need for lawyers in complex negotiations.

⁴⁷⁹ *ibid.*

Furthermore, smart contracts have the ability to self-execute more complex tasks, including staking on decentralised applications. The smart contract can penalise the person by reducing the amount of money they have locked up if they try to commit fraud or violate the protocol in any other way. Thus, smart contracts guarantee automated justice by automatically determining whether a contract's terms have been met and carrying out the necessary directive or penalty if a breach occurs.⁴⁸⁰

Nevertheless, it is crucial to keep in mind that smart contracts are limited to operating according to their pre-programmed logic; they are unable to interpret complex, subjective conditions or adjust to unanticipated events.⁴⁸¹ In order to start their execution, a lot of smart contracts also depend on outside data sources known as "oracles". In essence, these oracles are outside sources that give the smart contract information.⁴⁸² Furthermore, the functioning of smart contracts is contingent upon the upkeep of the underlying blockchain network by miners or validators - an additional means of external involvement. In the event of conflicts or unforeseen circumstances, human intervention is frequently necessary to decipher and settle matters that the smart contract is unable to handle on its own.⁴⁸³

To add to this, by automatically executing the required command or punishment in the correct "proportion", smart

⁴⁸⁰ Satoshi Nakamoto, Bitcoin: A Peer-to-Peer Electronic Cash System (2008) https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3440802 accessed 15 February 2023.

⁴⁸¹ Nick Szabo, 'The Idea of Smart Contracts' (1997) <https://www.fon.hum.uva.nl/rob/Courses/InformationInSpeech/CDROM/Literature/L_OTwinterschool2006/szabo.best.vwh.net/idea.html> accessed 15 February 2023.

⁴⁸² Alexey Mikhaylov, 'Oracles in Blockchain: Bridging the Gap Between On-Chain and Off-Chain Data' (2021) (Journal of Blockchain Research).

⁴⁸³ Vitalik Buterin, 'Ethereum: The Ultimate Guide to Smart Contracts and Decentralized Applications' (2013).

contracts also ensure views of just desert.⁴⁸⁴ This further ensures a balance between the price and execution of the command by removing the role of centralised intermediary institutions such as courts and banks. This reflects how *lex cryptographia* makes human transactions more democratic and upholds a libertarian view of social justice; the transparent and decentralised nature of smart contracts allows individuals to exercise their liberty through the free market instead of institutions. However, smart contracts' idea of justice is extremely binary. Just desert theory in criminal justice requires consideration of context, intent, and mitigating factors, and it is very difficult for code to capture these nuances.⁴⁸⁵

On the other hand, *lex cryptographia* results in algocracies where there is a shift of power from legal institutions to code writers. Therefore, as the key developers of blockchain interactions and transactions, any underlying philosophical beliefs or political values that the community of code writers are dedicated to may influence the computer code and subsequently human interactions in subtle but significant ways.

There are various possible issues with the idea that *lex cryptographia* will lead to algocracies, in which code writers gain influence over legal institutions. It is possible that developers and writers of code are not held to the same standards of responsibility and oversight as traditional legal organisations. Instead of reflecting broader social norms or legal principles, this may result in judgements and regulations embedded in smart contracts that reflect the developers'

⁴⁸⁴ Aristotle, *The Nicomachean Ethics* [c. 350 BC] (WD Ross translation, Oxford University Press 2009) 85.

⁴⁸⁵ A Narayanan, J Bonneau, E Felten, A Miller, S Goldfeder, *Bitcoin and Cryptocurrency Technologies: A Comprehensive Introduction* (1st edn, Princeton University Press 2016).

personal biases or ideas. Furthermore, the political and philosophical views of the code-writing community may have a subtle impact on the functionality and design of smart contracts. As a result, code may be biased or fall short in addressing the various needs and viewpoints. Additionally, the move to code-based governance may marginalise particular groups or interests by excluding viewpoints and voices that are under-represented in the development community.

As a result, the fairness of this balance between the price and execution of commands can be manipulated by code writers for their own benefit or for the benefit of pure capitalists whose desire for wealth could drive the development of blockchain technology to disconnect from human ideals of justice. Therefore, with code being a fairly new field of study, many people may fail to understand any wrong or misled code and therefore, the conditions of the code could be manipulated to merely ensure a capitalist system on the blockchain rather than an egalitarian one.

III. The Evolution of Justice: Automated Enforcement and Decentralised Governance

Alternatively, blockchain governance may make sure that the Cypherpunk philosophy drives the development of blockchain technology. According to the Ethereum whitepaper, “Ethereum is an open software platform based on blockchain technology that enables developers to build and deploy decentralized applications.”⁴⁸⁶ Therefore, blockchain is deliberately decentralised to disconnect from a capital system model. In fact, within the raw data of Bitcoin’s genesis block is The

⁴⁸⁶ The Blockchain Review, Ethereum White Paper Made Simple <https://static1.squarespace.com/static/567bb4f069a91a95348fa0b2/t/5ce11f4f0f06d30001ff5402/1558257488828/Intrepid+Ventures+Ethereum-White-Paper-Made-Simple.pdf> accessed 26 January 2022.

Times's headline from January 30th, 2009: "Chancellor on brink of second bailout for banks." This reflects a protest of the use of public funds to bail out banks and central institutions who were responsible for the 2008 financial crisis.⁴⁸⁷

As such, bitcoin and the blockchain originate from a strong frustration with the economic status quo, further supporting the argument that code is expected to remain connected to a libertarian view of justice with privacy and decentralisation at its foundation. As a result, the community of code writers on the blockchain are likely to be dedicated to the ideology that the internet should be a space of freedom of expression where ideas and items are not subject to control and surveillance by centralised institutions. Admittedly, the diversity and heterogeneity of the blockchain community and its objectives also mean there is a risk of code being disconnected from human views of justice.

However, there has been a noticeable shift away from the cypherpunk philosophy.⁴⁸⁸ Even beyond plans like BlackRock's, Bitcoin mining was initially accessible to individual users with personal computers but is now increasingly industrialised.⁴⁸⁹ There is a concentration of power in the hands of large mining pools/companies in China, reducing the importance of decentralisation for Bitcoin. Similarly, as Bitcoin has gained mainstream attention (and as crypto scams are on the rise), many businesses and exchanges have had to comply with new regulations, which represents a

⁴⁸⁷ Andrew, 'The Bitcoin Genesis Block: How It All Started' (CoinShots, 3 Jan 2022) <<https://www.coinshots.com/news/the-bitcoin-genesis-block-how-it-all-started>> accessed 26 January 2022.

⁴⁸⁸ Kraus, Obrist and Hari, (n 479).

⁴⁸⁹ M. Donnelley, 'The State of Bitcoin Mining: From Cypherpunk Dreams to Industrial Reality' (2021) (Journal of Blockchain Research) 6(2), 45-67.

shift towards regulatory compliance that contradicts the Cypherpunk ideal of a system operating outside state control.⁴⁹⁰

Furthermore, smart contracts open up the possibility of governance through DAOs on the blockchain. DAOs would ensure a balance between the price and execution of a command because they use smart contracts to carry out complex activities like governance without needing the hierarchical structure of a firm.⁴⁹¹ This subsequently reduces the cost of making decisions, especially since DAOs calculate data and make the best decisions for the firm.⁴⁹² Although it is unclear whether a DAO can have legal personality, it may be even less realistic to expect DAOs to have a moral code and take responsibility for their actions.

Despite their decentralised nature, DAOs frequently encounter centralisation problems due to the possibility of "whale monopolies" arising from the substantial voting power that large token holders, or "whales," can amass. This undercuts DAOs' democratic principles and implies that in actuality, DAOs would not be able to maintain price/execution balance or even function without human participation. It is already difficult to hold firms responsible for certain actions, and DAOs reflect an even more abstract concept than such firms in both organisation and legal classification. However, due to the blockchain's fluid and abstract nature, smart contracts and DAOs are said to have developed outside of legal authority away from any specific jurisdiction's control, making them legal constructs according to some scholars. A few jurisdictions

⁴⁹⁰ D.G. Baur, T. Dimpfl, 'Regulation and Bitcoin: A Changing Landscape. Journal of Financial Regulation and Compliance' (2020) 28(2), 170-185.

⁴⁹¹ A Wright, P. De Flippi 'Decentralized Blockchain Technology and the Rise of Lex Cryptographia' <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2580664> (2015) accessed 15 February 2023.

⁴⁹² H. Dao, 'The Emergence of Decentralized Autonomous Organizations: Governance in a Decentralized World' (2021) (Journal of Blockchain Research) 7(1), 55-76.

are starting to look into giving DAOs legal recognition. For instance, in the US, Wyoming, Vermont, and Tennessee have all passed laws designating specific DAOs as legal companies.⁴⁹³ Currently, meanwhile, the majority of states do not acknowledge DAOs as independent legal persons. This leads to basic issues because most legal systems do not allow DAOs to hold property, enter into contracts, or be held accountable as an entity.⁴⁹⁴ This indicates that they operate in a legal grey area rather than operating outside the law.

In present times, smart contracts do not play a major role in enforcing legal contracts because they cannot observe real-life data; they are not currently sophisticated enough to translate real-life human complexities into computer codes. Smart contracts are programs that can be executed on various platforms. Smart contracts can exist and operate on blockchains and other distributed ledger technologies or even centralised systems. Therefore, smart contracts can interact across different blockchain networks and with external data sources through oracles, they can be designed to receive and process information from off-chain sources,

However, blockchains are isolated networks that cannot natively access off-chain data, therefore, when the execution of a command takes place outside the blockchain information is inaccessible to the smart contract and the transaction is not executable. This limitation prevents smart contracts from interacting with external information, which is crucial for many applications. The main challenges are that blockchains are isolated and cannot natively access off-chain data and ensuring that the data provided by oracles is accurate,

⁴⁹³ J. McGowan, 'Wyoming's DAO Law and the Future of Decentralized Governance' (2021) (Harvard Law School Forum on Corporate Governance).

⁴⁹⁴ J. Lichtenstein, 'Legal Challenges and Uncertainties Surrounding DAOs. Stanford Journal of Blockchain Law and Policy' (2022) 3(1), 12-30.

timely, and tamper-proof is not straightforward. Due to this, smart contracts are used in relatively limited areas. For instance, oracles act as sensors from external systems in the physical world and feedback vital information to the smart contract to certify the terms of the contract have been satisfied. Importantly, oracles often require some level of trust, which contradicts the trustless nature of blockchain systems and is problematic when dealing with physical assets that cannot be directly verified on-chain. The oracle problem suggests that since an oracle determines what a smart contract understands, a compromised oracle results in a compromised smart contract. Although the potential legal implementation of computer code is still limited, this could change in the future if blockchain starts operating in communication with other technology and artificial intelligence. Smart contracts could be adopted in a wider range of legal contractual relationships to execute a more complex set of rights and obligations, even possibly replacing laws.

IV. Navigating the Future: Legal Challenges and Technological Integration

Alongside the Internet of Bodies and the Internet of Things, the self-enforcing nature of smart contracts could potentially allow devices to exchange an offer and acceptance on behalf of their owner not based on their active knowledge but on data analysis about the owner's needs. For example, Carron and Botteron point out "a smart car will automatically contract with an electricity supplier to load its batteries when the levels are low."⁴⁹⁵ This ensures a balance between the price and execution of a command because it is significantly cheaper and quicker for contractual parties to engage in a relationship

⁴⁹⁵ Daniel Kraus, Thierry Obrist, and Olivier Hari (eds), *Blockchains, Smart Contracts, Decentralised Autonomous Organisations and the Law* (Edward Elgar 2019).

through “seamless machine to machine [sic] transactions that remove the need for human interaction” instead.⁴⁹⁶

However, smart contracts are designed to be deterministic in the sense that, given the same inputs, they will always produce the same outputs and follow the same sequence of steps. Nonetheless, they are not inherently immutable, as some smart contracts include functions such as SELFDESTRUCT that allow them to be deleted, or they may use DELEGATECALL to execute code from another contract. Additionally, smart contracts that rely on external data feeds (oracles) can introduce non-deterministic elements if the data source is unreliable or inconsistent. Therefore, while smart contracts aim to ensure automated execution based on predefined terms, they cannot interpret human intentions or make exceptions based on context. If the code contains errors or if parties wish to alter the terms, adjustments to the smart contract can be complex and often require substantial intervention. Computer code alone lacks the sophistication to handle judgments that typically involve human experience, moral values, and intuition.

Consequently, when a smart contract realises the conditions for performance, the code will execute the command automatically, creating contractual obligations that may not always match the parties’ intentions. This is why the *contra proferentem* rule stipulates that unclear contract terms should be interpreted against the interests of the party who draughted them. This can also happen with traditional contracts. In Carron and Botteron’s car example, the owner of the smart car may not want to pay that expense until a later time due to financial

⁴⁹⁶ Andrés Guadamuz, ‘All Watched Over by Machines of Loving Grace: A Critical Look at Smart Contracts’ (2019) 35(6) CLSR <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3805473> accessed 26 January 2022.

difficulties. As such, smart contracts are disconnected from a utilitarian view of justice, since code cannot calculate what outcome will achieve the greatest happiness for parties. Even when the parties agree between themselves that the contract should not be carried out, they will not be capable of changing the computer code to achieve a utilitarian view of justice. However, to a legal positivist, “it is in no sense a necessary truth that laws reproduce or satisfy certain demands of morality.”⁴⁹⁷ Therefore, morality is merely a secondary concern of justice, and unjust rules are still rules.

V. Conclusion

In conclusion, the potential legal implementation of computer code is still limited due to the complexity of translating legal knowledge into code. However, code could potentially replace laws at a very high level of automation because smart contracts and DAOs could rule many aspects of human life if the blockchain operates alongside future technology. Smart contracts and DAOs will also significantly lower the time and cost of transactions, ensuring a balance between the price and execution of the command.

Although, there is a risk that code will be disconnected from certain individual human views of justice such as utilitarianism through automated justice and algocracies. For example, power-hungry investors could push their capitalist views into the code on the blockchain to manipulate and control the market for their own financial gain. However, it is not accurate to claim computer code will be utterly disconnected from all human feelings of justice since humans will ultimately determine the conditions of the code and its outcomes. Furthermore, through algocracies and blockchain governance,

⁴⁹⁷ H.L.A. Hart, *The Concept of Law* (3rd edn, Clarendon Press 2012) 185-186.

a libertarian view of justice may be ensured since most code writers and algocracies. For example, power-hungry investors could push their capitalist views into the code on the blockchain to manipulate and control the market for their own financial gain. However, it is not accurate to claim computer code will be utterly disconnected from all human feelings of justice since humans will ultimately determine the conditions of the code and its outcomes. Furthermore, through algocracies and blockchain governance, a libertarian view of justice may be ensured since most code writers and bitcoin maximalists are expected to abide by this.

A Comparative Analysis of the Innocence Projects in the UK and US

Zhiyi Wan[†]

"Convicting the right person" is a cornerstone of the rule of law and a fundamental right for all. The criminal justice system, however, often deviates from this principle. It is for this reason that the Innocence Project, which aims to restore justice, exists. While its UK branch has made efforts toward this goal, it has struggled to achieve the same level of success as its US counterpart, which boasts a higher rate of overturned convictions. This article attempts to provide a succinct view of the effectiveness of the Innocence Project based on quantitative research derived from the findings of the Innocence Project and the Criminal Cases Review Commission, two organisations tasked with unravelling the flaws of the legal system. It acknowledges the UK Innocence Project's shortcomings but also emphasises its value and offers constructive suggestions for improvements, in furtherance of the shared mission of convicting the right person.

I. Introduction

The UK Innocence Project (IPUK) was established under the lead of the US Innocence Project (IPUS). IPUS encouraged the UK to set up its counterpart to mitigate the futility of the Criminal Cases Review Commission (CCRC) in overturning wrongful conviction cases. This essay will first outline the form in which both innocence projects in the UK and the US exists. It then considers the effectiveness of as well as the criticisms and suggested reforms for the IPUK. Finally, it concludes that innocence projects have a place in the UK, and it is unfair to attack them without giving any credit.

II. Innocence Project (UK)

Due to the funding cuts to the CCRC, the Innocence Network UK (INUK) was created in attempt to fill the gap left by the CCRC by overseeing possible wrongful conviction cases to the

Court of Appeal (CACD). It investigates and checks the eligibility of the cases and educates the victims on filing their cases. It also trains leaders to run their own innocence projects. To date, numerous innocence projects have been established under the umbrella of INUK. Given that both innocence projects and CCRC have the same objective of providing a means to the victims of miscarriages of justice, CCRC should actively engage with the innocent projects as they have the resources to achieve its purpose.

There are also university-based innocence projects such as the Cardiff Innocence Project, which successfully overturned two cases, one in 2014 and one in 2018.⁴⁹⁸ With the rising recognition of the flaws of the CCRC, the London Innocence Project (2010) and Manchester Innocence Project (2020) were subsequently created. These types of innocence projects are mainly formed by students and overseen by legal professionals, evaluating cases and identifying if there is a ground to appeal. By participating in these projects, students experience first-hand the miscarriages of justice in the real world, raising their awareness of the issue in the process. As a result of early education, students who eventually enter the legal field may take a more cautious and responsible approach to their clients, reducing the possibility of miscarriages of justice, benefiting the state in the long term.

III. Innocence Project (US)

The IPUS was established in 1992 and has successfully exonerated 237 people.⁴⁹⁹ Similar to IPUK, IPUS strives to

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⁴⁹⁸ *R v George* [2014] EWCA Crim 2507; *R v Jones* [2018] EWCA Crim 2816.

⁴⁹⁹ Innocence Project, “Exonerations Data”, <
<https://innocenceproject.org/exonerations-data/>>, accessed 25 May 2022.

improve and reform the law by collaborating with the courts and the Innocence Project's Policy Department to address and reform the leading causes of wrongful convictions.

Nonetheless, a distinct feature of IPUS is that it has the power to conduct DNA tests. For example, the Ohio Innocence Project (OIP) had performed a scientific test of gun residue, which resulted in the release of the East Cleveland three.⁵⁰⁰ IPUS also focuses on improving the situation of the exonerees by locating their Social Security numbers and finding their family members. Additionally, OIP arranged medical support for one of the exonerees, McMeans, and even bought him his car.⁵⁰¹ It could be observed that IPUS has a wider ambit in tackling miscarriages of justice than IPUK, and it also aids the victims after their release.

IV. It's Effective!

To begin with, innocence projects act as a “last resort” for victims whose application had been rejected by the CCRC; the cut of legal aid has especially hindered the victims' access to legal advice in making an application to the CCRC.⁵⁰² Without a legal representative, many applicants failed to understand the process and requirements for submitting to CCRC and made multiple submissions repeatedly, indirectly contributing to CCRC's backlog of cases.⁵⁰³ This is evident by the findings of the CCRC, which found a 90% increase in unrepresented applicants in recent years, or in cases such as *R v Conaghan*,

⁵⁰⁰ Cincinnati Law, Interview with East Cleveland 3, University of Cincinnati (17th February 2020).

⁵⁰¹ Ohio Innocence Project, “OIP Review” (7th edn), <<https://mydigitalpublication.com/publication/?m=44644&i=689369&p=12&ver=html5>>, accessed 25 May 2020.

⁵⁰² Legal Aid, Sentencing and Punishment of Offenders Act 2012.

⁵⁰³ Claire McGourlay, Interview with Lucy Welsh, University of Manchester (17th November 2021).

where unqualified third parties such as wives and friends represented four applicants.⁵⁰⁴

These innocence projects were seen as the last resort for applicants seeking to clear their names, especially for prisoners, as they are unable to request post-conviction disclosure.⁵⁰⁵ In the case of Victor Nealon, the CCRC rejected his application on the basis that they would not seek access to the forensic evidence unless Mr Nealon had materials that could support his claim.⁵⁰⁶ Without access to the forensic evidence, which may be used as supporting materials, Mr Nealon's application was unlikely to be successful. It was the persistence of his solicitor that successfully overturned Mr Nealon's conviction. Without the assistance of legal professionals or a third party such as the innocence project, applicants face difficulties in overcoming the threshold of the CCRC. Therefore, it would be unfair to criticise the ineffectiveness of the innocence projects, as they provide a better chance for these applicants to succeed by filing their applications properly.

Secondly, innocence projects help reduce the CCRC's workload. Innocence projects avoid repeated submissions and ensure that the applications comply with the CCRC's test. For instance, APPEAL has assisted 60 people in their applications and referred 35 cases to the CCRC.⁵⁰⁷ Accordingly, it saves time by reviewing unqualified applications and emphasising potential claims. This may curb the "desktop review" concerns

⁵⁰⁴ Criminal Cases Review Commission, "Annual Report and Accounts" (2020), p14; *R v Conaghan & Ors* [2017] EWCA Crim 597.

⁵⁰⁵ *R (Nunn) v Chief Constable of Suffolk Constabulary* [2014] UKSC 37.

⁵⁰⁶ *R (on the application of Nealon) v Secretary of State for Justice* [2019] UKSC 2.

⁵⁰⁷ Holly Greenwood, "Rethinking Innocence Projects in England and Wales: Lessons for the Future" (2021) *The Howard Journal* Vol 60 No 4, pp. 459–492, 474.

that have been discussed by many academics and INUK.⁵⁰⁸ This criticism reflects the irresponsible method of the CCRC in reviewing the applications, which is to merely assess the case presented by the applicants without further investigation (e.g., undertaking prison visits). As a result, INUK submitted that the lack of a systematic investigation method by the CCRC resulted in a “lottery” of getting a good quality review.⁵⁰⁹

Moreover, there are possibly thousands of prisoners who require the help of the CCRC.⁵¹⁰ However, the process of applying to the CCRC in prison without legal assistance is complicated for a layperson. Other than the lack of funding as mentioned above, CCRC also admitted in the Post Office case that they are currently facing a lack of supporting staff.⁵¹¹ This further worsens the chances of obtaining a good quality review of the application. It would be unfair to attack the innocence projects as they have helped ease the application process for the applicants and reduce the burden of the CCRC.

Thirdly, university-based innocence projects raise students’ awareness. Findley observed that innocence projects trained the students to be more sceptical of the criminal justice system and open to admit the failings of the system.⁵¹² Students equipped with such a mindset are empowered to correct the

⁵⁰⁸ Innocence Network UK, “Criminal justice system still failing the innocent” (19 December 2011) <<http://www.innocencenetwork.org.uk/criminal-justice-system-still-failing-the-innocent>> accessed 7 December 2023.

⁵⁰⁹ *ibid.*

⁵¹⁰ Stephanie Roberts and Lynne Weathered, “Assisting the Factually Innocent: The Contradictions and Compatibility of Innocence Projects and the Criminal Cases Review Commission” (2009) *Oxford Journal of Legal Studies*, Vol 29, No 1, pp 43 – 70, 62.

⁵¹¹ *Bates and Others v Post Office Ltd* [2019] EWHC 3408 (QB); John Hyde, “CCRC admits it lacks funds to handle glut of Post Office cases” *The Law Gazette* (26 May 2021) < <https://www.lawgazette.co.uk/news/ccrc-admits-it-lacks-funds-to-handle-glut-of-post-office-cases/5108641.article> >, accessed 25 May 2022.

⁵¹² Keith Findley, “The Pedagogy of Innocence: Reflections on the Role of Innocence Projects in Clinical Legal Education” (2006) 13 *Clin Law Rev* 231-278, 241.

flaws of the legal system, maintaining the importance of developing the legal values of “justice, fairness, and high ethical standards.”⁵¹³ Education thus indirectly resolves instances of miscarriages of justice, such as non-disclosure issues. It would not be fair to attack the innocence projects, as these benefits could be observed in the long term.

Nevertheless, only 25 applications were received from six university innocence projects, and Cardiff contributed half of them.⁵¹⁴ In 2017, 23 out of 26 IPUK’s innocence projects were active but only 12 remained in 2020.⁵¹⁵ This may be due to a lack of support as it requires a full-time investigator or lawyer to supervise the case.⁵¹⁶ Cardiff University is the only university that has a full-time case worker, and this resulted in a higher number of applications to CCRC. Besides, the public might not trust students-based innocence projects as much as an innocence project like INUK, which comprises professionals. Therefore, there are doubts as to whether innocence projects are effective.

V. Is it ineffective?

As premised on the above, universities’ innocence projects only managed to refer a few cases. Dr Michael Naughton described them as a “recruiting tool” to attract students to their course.⁵¹⁷ The lack of resources and students only working during term time contributed to this low referral rate. Some

⁵¹³ The Lord Chancellor's Advisory Committee on Legal Education and Conduct, “First Report on Legal Education and Training” (1996).

⁵¹⁴ Jon Robins, “University innocence projects: where are they now?” *The Guardian* (27 Apr 2016) < <https://www.theguardian.com/law/2016/apr/27/university-innocence-projects-where-are-they-now> >, accessed 25 May 2022.

⁵¹⁵ Louise Hewitt & Clarie McGourlay, “Still Standing: Innocence work in England and Wales” (2021) *The Wrongful Conviction Law Review*, 2(3), 226–239, 235.

⁵¹⁶ *ibid*, 233.

⁵¹⁷ Robins (n 514).

may argue that the same conditions apply to the IPUS, but they do have a higher referral rate.

Unlike its UK counterpart, US students who are one step away from being a qualified lawyer may undertake cases.⁵¹⁸ Additionally, in the UK, academic supervision is required, and students lack the power of investigation which may deter the process of obtaining evidence. On the contrary, US students possess such power and are able to engage with the clients directly. Moreover, the academics run the IPUK, whereas qualified criminal lawyers run the IPUS, hence they are in a better position to provide legal assistance.⁵¹⁹ Due to IPUK's restricted framework, it would be unfair to say that IPUK has failed to overturn convictions effectively.

Secondly, the coverage of IPUK is limited to factual innocence, thus disregarding technical miscarriages of justice such as abuse of process. According to the court that overturned multiple convictions in the Post Office case, a "material failure of disclosure," which obstructed the victims' right to a fair trial, was a contributory factor to the abuse of process that occurred in that case.⁵²⁰ As a result, between 1999 and 2015, around 700 convictions were secured, yet it was not until 2020 that the first conviction that was quashed. It is outrageous that the issue only attracted serious attention after more than 900 subpostmasters were convicted, solely due to technical errors! This means that it is more challenging to overturn a conviction, for fresh evidence is always required. This, coupled with IPUK's limited investigatory power, leads to fewer opportunities to acquire fresh evidence. In contrast, IPUS is entitled to arrange DNA

⁵¹⁸ Hewitt & McGourlay (n 515) 233.

⁵¹⁹ Greenwood (n 507) 471.

⁵²⁰ BBC, "Post Office scandal: Widower of jailed worker loses legal bid" (London, 15 August 2023).

tests and have compensated 268 exonerees because of it.⁵²¹ The power to perform DNA testing has resulted in 52% of wrongful convictions in IPUS cases being overturned.⁵²² Thus, the limited power of IPUK contributed to the low referral rate.

Furthermore, the non-coverage of technical miscarriages of justice does not support victims who face sentencing or partial innocence issues. For instance, a person who is convicted of murder, who instead should have been convicted of manslaughter will not receive support from IPUK because of its technical nature, despite the fact that the person may receive a longer imprisonment term than he deserves.⁵²³ It could be observed that IPUK has lost focus on the general meaning of “miscarriages of justice” and the purpose of supporting every victim of miscarriages of justice.

VI. Looking into the Future of IPUK

Quirk criticised the innocence projects for usurping the function of the CCRC to screen cases.⁵²⁴ Given that CCRC is the only route for reopening the case, Greenwood suggested that going through innocence projects before CCRC might result in potential delays and even contamination of evidence.⁵²⁵ Evidently it is necessary to examine whether innocence projects should be abolished.

⁵²¹ Innocence Project (n 499).

⁵²² *ibid.*

⁵²³ Michael Naughton and Gabe Tan, “Claims of Innocence: An introduction to wrongful convictions and how they might be challenged” (2010) <<http://www.innocencenetwork.org.uk/wp-content/uploads/2012/05/Claims-of-Innocence.pdf>>, accessed 25 May 2020.

⁵²⁴ Hannah Quirk, “Uncovering disclosure errors: appeals, innocence projects and the Criminal Cases Review Commission” (2021), in: E. Johnston and T. Smith (Eds.), *The Law of Disclosure: A Perennial Problem in Criminal Justice*, Abingdon: Routledge, 96.

⁵²⁵ Greenwood (n 507) 483.

This paper disputes that claim, especially after the significant cuts in legal aid. The CCRC conceded to its inability to assist every victim and recognises the contribution of the innocence projects.⁵²⁶ Innocence projects subordinate the CCRC by providing pre-stage assistance, for example by filtering out applications that lack credit, thereby reducing the potential delay mentioned above. This position is tantamount to CCRC subordinating CACD. Just as CCRC considers cases to refer to but does not decide on the outcome of the case, IPUK considers the possibility of satisfying CCRC's threshold but does not refer cases to CACD. IPUK does not usurp the function of the CCRC but supports its performance.

However, IPUK is inefficient, hence, reform is urgently needed. Firstly, more power should be conferred on them, which Norris identified as one of the keys to the success of the IPUS.⁵²⁷ IPUK should be capable of conducting DNA tests and obtaining evidence by themselves, and since most universities have science courses, they could easily access professionals and scientific equipment to conduct the tests.

Secondly, the CCRC's "real possibility" test should refer to the Scottish CCRC's test to include lurking doubt cases. CACD has only admitted 19% of fresh evidence cases in 2016, which is considerably lower than in 1990 (61%).⁵²⁸ The successful appeal rate is even lower, with 2% in 2016, compared with 17% in 1990.⁵²⁹ Therefore, IPUK should cover victims of miscarriage of justice, including technical miscarriages of justice, rather than limiting victims of wrongful

⁵²⁶ Michael Naughton and Carole McCartney, "The Innocence Network UK" (2004) *Legal Ethics*, Vol 7, No 2, 141-158, 152.

⁵²⁷ Robert Norris, "Framing DNA: social movement theory and the foundations of the innocence movement" (2021) *Journal of Contemporary Criminal Justice*, 33(1), 26-42.

⁵²⁸ Stephanie Roberts, "Fresh evidence and factual innocence in the Criminal Division of the Court of Appeal" (2017) *Journal of Criminal Law*, 81(4), 303-27, 319.

⁵²⁹ *ibid.*

convictions. The success rate for victims of wrongful convictions is potentially lower due to the need for fresh evidence, especially where IPUK has no power to investigate.

Moreover, APPEAL suggested a cost-free tribunal that allows IPUK to challenge the CCRC's decision.⁵³⁰ This suggestion arises from the fact that the CCRC is prone to second-guessing the CACD and only refers cases that the CACD is likely to accept. If IPUK could challenge the CCRC's decision, they would no longer be constrained by CCRC's narrow interpretation of the test, which may increase their success rate. However, another independent body might not be the solution. The establishment of the CCRC was prompted by the need to replace the Home Secretary's ineffective role in reviewing cases, which led to a series of high-profile cases of miscarriages of justice including the Guildford Four (1974) and the Birmingham Six (1975).⁵³¹ Yet, nearly 30 years later, the CCRC was criticised for the same issue. Therefore, if history is any indication, issues such as accountability, independence, and transparency may arise.

Third, with INUK ceasing, there is a reduction of 66% in organisations undertaking innocent work.⁵³² There should be an independent headquarters that oversees all innocence projects to provide an opportunity to liaise. For example, IPUS had an annual conference with the local innocence projects and Asia innocence projects to help tackle their cases. The Taiwan innocence project, for instance, adopts a cooperative approach

⁵³⁰ APPEAL, "Twenty-five steps towards a less error-prone criminal justice system" < <https://www.thejusticegap.com/twenty-five-steps-towards-a-less-error-prone-criminal-justice-system/> > accessed 25 May 2022.

⁵³¹ *R v Richardson, Conlon, Armstrong, Hill*, The Times, 20 October 1989; *R v McKenny, Hunter, Walker, Callaghan, Hill and Power* (1991) 93 Crim. App. R. 287.

⁵³² Robins (n 513) 235.

with the prosecution to reduce the issue of non-disclosure.⁵³³ Quirk argued that the position of IPUS is unlike that of IPUK by acting as “the legal equivalent of emergency relief”, which the Miscarriages of Justice Support Service has provided.⁵³⁴ However, no legal assistance is provided to the victims who wish to challenge their case. Innocence projects and campaign groups could be integrated for better strategies’ structuring; for example, campaigning for the high potential cases and accordingly exerting the CCRC and legislature to consider the issues.

VII. Conclusion

In summary, there are distinct features between IPUS and IPUK and although reforms are crucial it is unfair to overlook the benefits that IPUK provides. The success of IPUS would offer IPUK insights on how to overcome their inadequacies, such as being armed with the power to conduct DNA tests. Problems also lie in the conservative manner of the judiciary and the CCRC. A uniform organisation such as INUK is necessary to ensure that IPUK is making progress. Additionally, due to the limited funding and resources, the standard of the CCRC should not be expected of universities’ innocence projects. Lastly, the success rate of the innocence projects should be measured in terms of the rate of legal assistance, for it is one of their goals and they did not make the decision to refer cases to CACD.

⁵³³ USALI, “Trends in the Innocence Movement in Asia and the U.S.” (8 December 2020), < <https://usali.org/institute-news/event-recording-trends-in-the-innocence-movement-in-asia-and-the-us> >, accessed 25 May 2022.

⁵³⁴ Hannah Quirk, “Identifying miscarriages of justice: Why innocence in the UK is not the answer” (2007) *Modern Law Review*, 70:5, 759-777, 772.

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