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MANCHESTER REVIEW OF LAW, CRIME AND ETHICS

Volume V | October 2016

Manchester Review of Law, Crime and Ethics

The Student Journal of
The University of Manchester, School of Law

VOLUME V
OCTOBER 2016

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

VOLUME V OCTOBER 2016

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Typeset in Times New Roman
Printed in the United Kingdom

ISSN 2399-4630 (Print)
ISSN 2399-4649 (Online)

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

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

Manchester Review of Law, Crime and Ethics

Preface from the Head of the School of Law

It is my pleasure to welcome the fifth edition of this review. What started out as an idea from the student body has now become a feature of the Law School which is developing an increasing reputation in the field. It covers the full range of areas of our work and involves students on all programmes.

The papers show the keen interest of our community in exploring cutting-edge issues and reflect the intellectual diversity and inter-disciplinarity that is a distinctive feature of scholarship within the School. I hope all readers find something of interest and many in our community are encouraged to contribute in the future.

The authors are to be congratulated, as is the editorial team who have put in many hours of work. As Head of School, I am very proud that this review is continuing to thrive. I look forward to reading many more future volumes.

Toby Seddon
July 2016

Preface from the Editor-in-Chief

It has been quite the year for the English legal landscape. With the Brexit victory in the EU referendum and the subsequent political turmoil, the state of English law is set to change over the coming years. I am already looking forward to reading the next volume, as the impact of Brexit will be prominent.

I am delighted to be able to present to you Volume V of the Manchester Review of Law, Crime and Ethics. The Review seeks to highlight the success of students studying at the University of Manchester, School of Law. We have made some key strides towards advancing the review this year, having put all four previous volumes on the newly launched School of Law website, as well as placing them on HeinOnline, which will heighten readership and make the Review more accessible in the modern era. Furthermore, for University of Manchester students, we have placed physical copies of the Review in the Main Library.

The inaugural Manchester Review of Law, Crime and Ethics Newsletter was launched this May, which further highlights the writing skills of the students at the University of Manchester. The Newsletter covers a range of legal and commercial topics, and the goal is for it to be published twice per year.

I would not be able to write the preface for this volume without the help of several key individuals. Firstly, I would like to thank all of the student editors who have worked tirelessly alongside their study schedules to edit articles and liaise with authors and academics. Their work is truly appreciated.

Secondly, the support of the School of Law is hugely appreciated. Without their continued support the Review would not be possible. Thirdly, the work done by Kirsty Hawksworth and her technical team is paramount to much of the Review's success this year. Without such support the Review would not be as accessible as is currently the case. Fourthly, I would like to thank Dinah Crystal OBE and Maureen Barlow for their continued help in guiding the Review to new heights. Finally, I would like to thank you, the reader, for taking the time to read the Review. Without you, the Review would be obsolete.

I would also like to take this opportunity to introduce my successor, Rohan Shah, who will undoubtedly enhance the success of the Review during the upcoming academic year.

On behalf of the entire Editorial Board, I hope you enjoy the articles contained within this volume. We are also extremely grateful to have received an article from Lesley Anderson QC. Her continued support, along with that of the rest of her peers on the Honorary Advisory Board, is greatly appreciated.

Enjoy!

Matthew Lowry
July 2016

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An analysis of a democratised House of Lords: the cost of wisdom

Liam Reynolds[1]

This article looks at the role of the House of Lords in the English legal and political system. Its goal is to elucidate the functions it performs and to defend its current membership, which is entirely unelected. The House of Lords would be compromised if we introduced a democratic element to it, and thus, this article argues strongly in favour of an unelected Upper Chamber. This is done through an analysis of the benefits gained from the current composition of the House of Lords and the problems of democratisation. Through an analysis of the current structure of the chamber and by refuting its criticisms, this article highlights the importance of an unelected second chamber.

I. Introduction

The UK Parliament is a bicameral legislature composed of the House of Commons and the House of Lords. Fully elected, the membership of the House of Commons is argued to be an unquestionably democratic institution.[2] Yet, the House of Lords holds no such democratic legitimacy as its membership is entirely appointed. Membership of the Lords is divided into two main categories: the 'Lords Temporal,' which can further be broken down into around 600 life peers[3] and 92 hereditary peers,[4] and the 26 'Lords Spiritual,'[5] who are also senior representatives of the Church of England. Research shows strong support for a fully or partially

[1] LL.B. Candidate, The University of Manchester, School of Law.
[2] Mark Elliott and Robert Thomas, *Public Law* (2nd edn, Oxford University Press 2014) 172.
[3] Historically, life peerages were not awarded until the Life Peerages Act 1958.
[4] See Weatherill Amendment, House of Lords Act 1999, s 2.
[5] Ecclesiastical Commissioners Act 1847, s 2.

elected second chamber both among the public[6] and among MPs,[7] but reform has proved very difficult.

This article calls for the rejection of a wholly or partially elected House of Lords in favour of more pragmatic reform. A discussion of the current membership of the Lords and the issue of voter apathy in the UK will stand as reasons against election in the Lords. This article will then explore an analysis of the Lords Spiritual and upon that suggests grounds for reform, ending with an unequivocal rejection of the continued existence of the remaining hereditary members.

II. The Lords and democracy

Before discussing reform of the Lords, an analysis of its current functions is necessary. Archer notes three main constitutional justifications for the Lords' existence: the deliberation of time in order to reflect on legislation, a system of scrutinising and revising the drafting of legislation, and as a mechanism of keeping the Commons from acting in an omnipotent fashion.[8] Besides these legislative functions, the Lords also allows persons "other than party politicians"[9] to participate in government. This article submits two grounds upon which the democratisation of the Lords is likely to threaten such functions.

Firstly, democratisation may negate the nonpartisan expertise afforded by the Lords. Membership is granted to certain distinguished individuals: Lord Bingham notes that among such individuals are retired diplomats, lawyers, academics and others for whom running for election would be inconceivable.[10] By their very

[6] Ian Cruse, 'Public Attitudes Towards the House of Lords and House of Lords Reform' (26 July 2012) House of Lords Library, LLN 2012/028 <www.parliament.uk/briefing-articles/LLN-2012-028.pdf> accessed 9 March 2015.
[7] Alexandra Kelso, 'New Parliamentary Landscapes' in Richard Heffernan, Philip Cowley and Colin Hay (eds), *Developments in British Politics* (9th edn, Palgrave Macmillan 2011) 67.
[8] Peter Archer, 'The House of Lords, Past, Present and Future' (2000) 70 Pol Q 396, 396-397.
[9] John Alder, *Constitutional & Administrative Law* (9th edn, Palgrave Macmillan 2013) 227.
[10] Lord Bingham of Cornhill, 'The House of Lords: its future?' (2010) Apr PL 261, 268.

membership to the Lords, they have found a political role free of electioneering and largely free from party whips. This is especially true of nearly one quarter[11] of members who are 'crossbenchers,' not belonging to any political party. Such persons provide non-partisan advice and viewpoints that are extremely useful to a legislature dominated by party politics. One could argue that democratic legitimacy is the most important value in the modern age, making the current state of the Lords unsustainable in a modern democratic era.[12] However, the imposition of democracy in the Lords is likely to negate the combined wealth of knowledge and experience its current membership provides.

Secondly, democratisation of the Lords opens the doors for career politicians, especially in the current context of voter apathy, which will limit true democratic election of the Lords. The UK political landscape presently suffers from voter apathy: in the 1950 general election, 85% of the population voted, compared with only 59% in 2001.[13] With this information considered, elections for the House of Lords would replicate the pattern of voting in the current House of Commons, and consequently create a "carbon copy"[14] chamber of career politicians. Even academics in favour of an elected chamber have recognised the importance of a House of Lords relatively free from short-term political pressures.[15] It becomes difficult to advocate for an elected Upper Chamber when there is an apathetic electorate, unlikely to improve the state of democracy in the UK.

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[11] Crossbenchers account for 181 of the 789 Lords as of 12 March 2015 (see 'Membership of the House of Lords' <http://www.parliament.uk/mps-lords-and-offices/lords/?sort=1&type=6> accessed 12 March 2015).

[12] Robert Leach, Bill Coxall and Lynton Robins, *British Politics* (2nd edn, Palgrave Macmillan 2011) 244.

[13] International Institute for Democracy and Electoral Assistance, 'Voter Turnout Data for United Kingdom' <http://www.idea.int/vt/countryview.cfm?id=77> accessed 13 March 2015.

[14] Lord Bingham (n 10) 267.

[15] Gavin Phillipson, '"The Greatest Quango of Them All", "A Rival Chamber" or "A Hybrid Nonsense"? Solving the Second Chamber Paradox' (2004) Sum PL 352, 379.

The utility of the Lords, however, goes far beyond issues of composition. A crucial practical role of the Upper Chamber is scrutiny and revision of legislation,[16] which has been emphasised by recent changes to working tax credits. The controversy concerned a draft Statutory Instrument[17] made under section 66(1) of the Tax Credits Act 2002, which sought to drastically reduce the amount of working tax credits to be paid to low-income workers. The Lords voiced their disapproval to the changes by voting (albeit with a slim majority) to delay the legislation.[18] However, these powers are rarely used and more rarely still on issues contentious to the political landscape.

Despite the Lords' powers being that of delaying legislation rather than vetoing,[19] its effects can be profound. It delays the will of the government, and its rarity invites a great amount of media attention and public embarrassment for the government. This is perhaps not significant in itself, as no government will go unscathed and without incident, but this particular characteristic demonstrates how toxic the delaying powers of the Lords can be to government plans.

In November 2015, during the Autumn Statement, the Chancellor of the Exchequer announced that such changes to tax credits would be abandoned. Of course, no explicit mention of the Lords was made, but it is clear that the negative vote of the Lords – and with it, the media attention – influenced the government's reversal of its position on tax credits. Thus, the Lords is arguably not simply a chamber of delays, but a force with key political impact. The Lords do not need to be elected on party political mandates to have a far-reaching and effective impact on the English legal and political systems.

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[16] Archer (n 8).
[17] The Tax Credits (Income Thresholds and Determination of Rates) (Amendment) Regulations 2015 (draft).
[18] 'Tax Credits: Lords Vote to Delay Controversial Cuts' (*BBC News*, 26 October 2015) <http://www.bbc.co.uk/news/uk-politics-34631156> accessed 25 November 2015.
[19] As was the case before the Parliament Acts.

III. Lords Spiritual

This article now considers the role of the twenty-six Lords Spiritual who serve as representatives of the established Church of England. Of all the national legislatures in Europe, the UK Parliament is the only one to have distinctive religious representation.[20] The Lords Spiritual see their role as providing spiritual leadership, improvement of the legislative process, and representing the diocese.[21] However, the idea that the Lords Spiritual act as the voice of all people of faith is extremely dubious: they officially represent only the established church regarding one denomination of Christianity. The 2011 Census shows that the proportion of the population identifying as Christian has fallen significantly since 2001, while other faiths have increased in number, and around a quarter of the population does not identify with any religion.[22] With the proliferation of different faiths, and indeed no faith, the composition of the Lords Spiritual hardly seems appropriate today.[23] Reform in this area is needed to provide a balanced and representative House, but the form it should take is contested.

The Royal Commission on the Reform of the House of Lords suggested widening religious representation to include other Christian denominations.[24] It is argued that in a multi-faith, and increasingly agnostic or atheist society, there should be no special place for any faith in the legislature. The Wakeham Report recommended that the Appointments Commission of the House of

[20] Frank Cranmer, John Lucas and Bob Morris, 'Church and State: a mapping exercise' (April 2006, University College London Constitution Unit) <http://www.ucl.ac.uk/spp/publications/unit-publications/133.pdf> accessed 15 March 2015.
[21] Anna Harlow, Frank Cranmer and Norman Doe, 'Bishops in the House of Lords: a critical analysis' (2008) Aut PL 490, 498.
[22] Office for National Statistics, 'Religion in England and Wales 2011' (11 December 2012) <http://www.ons.gov.uk/ons/dcp171776_290510.pdf> accessed 14 March 2015.
[23] Leach, Coxall and Robins (n 12) 245.
[24] Royal Commission on the Reform of the House of Lords, *A House for the Future* (Cm 4534, 2000) para 15.9, 152 ('The Wakeham Report').

Lords should appoint those who would be perceived as broadly representative of the different faith communities."[25]

This article, however, concurs with Archer: the very existence of the Lords Spiritual raises questions of legitimacy. Other than history and tradition, the established Church does not have a claim to representation greater than that of any other interest group.[26] The best way forward would be to remove the Lords Spiritual category but retain religious representation in the Lords. By granting spiritual leaders peerages in numbers that broadly represent the number of people supporting that faith, the representation that the Church of England enjoys would remain protected, while giving other faiths a voice in the Upper Chamber.

Electing such peers should be rejected on the same grounds. The number of people who would vote is likely to be slim, particularly as the candidates would likely only appeal to people of the corresponding faith. Such persons are also unlikely to run for election and engage with political ideology. Followers of religion, like all interest groups, ought to be represented in the legislature, but no such group should be given a special position above others.

IV. Hereditary peers

We now turn to a brief discussion of the remaining hereditary peers in the House of Lords. As mentioned, the Lords now holds only 92 hereditary peers following the House of Lords Act 1999. Retaining 92 hereditary peers was a political compromise to secure support for reform on the opposition benches and in the Lords itself. Nevertheless, it must be questioned why the hereditary element still exists within the Lords. This article laments the amendments to the Constitutional Reform and Governance Bill,[27] which removed the clauses that sought to end the system of by-elections for deceased

[25] ibid, para 15.15, 154.
[26] Archer (n 8) 401.
[27] Constitutional Reform and Governance HC Bill (2009-10) [142] which later passed as the Constitutional Reform and Governance Act 2010, without reform to the hereditary peer by-election system.

hereditary peers. In time, the hereditary element would have ended entirely.

Whilst this article rejects an elected House, it recognises that hereditary appointments are completely unacceptable in a modern, meritocratic democracy. Those appointed in such a manner may contribute knowledge, but this is secondary to the fact that their place in the Lords has come about by accident of birth rather than merit.[28] Any meaningful further reform of the second chamber will need to involve serious deliberations on finally removing all hereditary members.

V. Conclusion

This article posits that an elected second chamber is not desirable and the continuing debate on electing the Lords is meaningless and counterproductive. Electing members of the Lords would detract from the wisdom contained within the chamber, increase party political electioneering, and is unlikely to attract voters. It is recognised, however, that calls for reform hold weight. The hereditary element of the Lords must be eradicated entirely and the Lords Spiritual must be more representative of the population of the UK, thereby removing the Church of England's special status. The way forward is controversial and contested, but pragmatic and piecemeal reform is more realistic and agreeable than uprooting the delicate balance of the legislature. Democracy is a fundamental principle of any free society, but for a chamber focused on scrutiny and revision, we must uphold a more calculated and purposeful process [29] than one relying on electoral chance.

[28] Lord Bingham (n 10).
[29] Archer (n 8) 402.

Article 8 and the evolution of healthcare law

Maya Kotob[30]

Article 8 has been used by UK courts and the European Court of Human Rights in cases regarding the provision and restriction of healthcare to individuals. This article explores the extent to which this has had an impact on the evolution of medical law. To do so, this article will examine the different interpretations given to Article 8, and their corresponding powers in aiding the evolution of medical laws. The interpretation of a 'positive' right stemming from Article 8 is observed to have a prominent impact on medical laws, as was the case in *VC v Slovakia*,[31] where a positive obligation was found on the state to prevent non-consensual sterilisations. Although the finding of a 'negative' Article 8 right does not possess equal power in enticing evolution of the law, there are cases where a negative interpretation has aided the development of medical laws: this was witnessed in the UK following the *Diane Blood* case.[32] This article then examines the effect of 'margins of appreciation' on Article 8's impact on medical law. It notes that although margins of appreciation have, in many cases, formed a barrier to the evolution of laws in areas of moral and social controversy, Article 8 has nonetheless managed to impact certain contentious areas in the law, such as Ireland's strict laws on abortion.[33] This article finally argues that although UK assisted-dying laws have not yet evolved, Article 8 still contributed to the potential recognition of a 'right to die.'

I. Introduction

Article 8 of the European Convention on Human Rights (ECHR) confers upon individuals the right for their private and family lives to be respected. Potentially, this right has expansive application. It could be used by a 60-year old woman fighting for her right to access funded fertility treatment, under the rationale that interference with that access interferes with her private life. This

[30] LL.B. Candidate, The University of Manchester, School of Law.
[31] *VC v Slovakia* [2014] 59 E.H.R.R. 29.
[32] *R v HFEA Ex Parte Diane Blood* [1999] 2 WLR 806.
[33] *A, B, and C v Ireland* [2010] ECHR 25579/05.

right could also be potentially raised by a man fighting his partner's access to abortion, claiming that allowing his child to be aborted would be an interference with his right to start a family. More radically, this right could even be raised by elderly individuals who have had enough of their lives, and are claiming their right to die. Clearly, the scope for interpretation of Article 8 is very wide. Courts are left to balance the interests of individuals with the interests of the community to carefully determine how narrow or how wide they will interpret the provisions of Article 8, as the depth of their interpretation has the capacity of dramatically impacting the law. This article aims to explore how the impact of Article 8, although it has been somewhat held back by wide margins of appreciation and exceptions under Article 8(2), has played a significant role in the evolution of medical law.

II. Article 8: 'far-reaching effects'

In 2002, the prisoner Gavin Mellor argued that the Secretary of State's refusal to grant him access to artificial fertilisation treatment, preventing him and his wife from conceiving a child during his time in prison, unjustifiably interfered with his Article 8 and 12 rights.[34] The Secretary of State alleged that it is legitimate to prevent prisoners from accessing artificial insemination facilities, as this limitation naturally comes as a result of an applicant's imprisonment. The Court of Appeal upheld the Secretary of State's decision. They held that although denying Mellor this access clearly interfered with his Article 8 right, this was justified under Article 8(2) as it was necessary in the interests of public safety.[35] They feared that granting prisoners such rights might undermine the state's penal system in the eyes of the nation.[36]

[34] *R. (on the application of Mellor) v Secretary of State for the Home Department* [2002] Q.B. 13.
[35] Following *X v United Kingdom* [1975] 2 D. & R. 105.
[36] [2002] Q.B. 13 [32] (Lord Philips).

By way of this decision, the court interpreted the provisions of Article 8 in a way that makes an individual's Article 8 right capable of being legitimately violated in cases where the right might offend public opinion. This notion is exactly what the Grand Chamber of the ECtHR disagreed with in *Dickson v United Kingdom*.[37] Kirk Dickson found himself to be in the same position as Mellor, fighting for his right to reproduce during his time in prison. The Grand Chamber explicitly stated that it is not legitimate for individuals to automatically forfeit their Article 8 rights, purely based "on what might offend public opinion."[38] Thus, the Grand Chamber held that the exceptions under paragraph 8(2) are not applicable, making the interference into Dickson's Article 8 right disproportionate and illegitimate.

This change in the legal position on prisoners' rights from *Mellor* to *Dickson* shows that a slight change in the courts' interpretation of the provisions of Article 8 is capable of influencing medical laws to incorporate better individuals' rights. This shows that Article 8 could indeed have "far-reaching effects,"[39] albeit depending on how widely or narrowly the courts interpret its provisions.

III. Positive obligation or negative right?

One of the largest uncertainties regarding the scope of Article 8 lies in the question of whether Article 8 imposes positive obligations on the state to promote a right to privacy or whether it merely infers a duty not to interfere with that privacy. Addressing this question, the decision in *Sheffield and Horsham v. UK*[40] accorded that a positive obligation may be found to exist upon balancing the general interests of the community and the interests of the individual

[37] [2007] ECHR 44362/04.
[38] [2007] ECHR 44362/04 [67]-[68].
[39] Margaret Brazier and Emma Cave, *Medicine, Patients, And The Law* (Penguin Books 2011) 42.
[40] [1998] 27 E.H.R.R 163.

concerned. Moreover, the decision in *R v North West Lancashire Health Authority*[41] conceded that ECtHR jurisprudence does in fact suggest that a state may be guilty of interfering with an individual's Article 8 right simply by inaction.[42] Thus it seems that some sort of positive obligation is indeed imposed by the article, albeit the extent of this obligation remains entirely unclear.

The reason why this question is important, and is debated repeatedly in courts, is because a positive obligation stemming from Article 8 has the capability to influence healthcare law more significantly than a mere negative right. In other words, if a positive obligation is found, Article 8 would no longer merely prevent the state from engaging in activities that infringe individuals' private lives, but would actually impose a duty on the state to fulfil a certain obligation, so that individuals' private lives are respected.

Whether or not a positive obligation will be found by the courts depends on the specific circumstances of the case at hand. Before a positive obligation is found, special regard is given to the exceptions laid out in 8(2), and the margin of appreciation that is granted to individual states. So, for instance, upon the question of whether the article confers upon a state the positive obligation to provide unlimited funded access to IVF treatment to individuals, the courts are most likely to answer *no*. This is because courts, even when preserving Article 8, are reluctant to interfere with how health authorities choose to allocate and weigh priorities in funding treatments from finite resources.[43] Thus, the margin of appreciation has been left quite wide in areas dependent on the allocation of resources, leaving decisions on this issue primarily up to national healthcare authorities. What also allows for this 'hands-free' approach is the incorporation of a state's 'economic wellbeing' as

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[41] [2000] 1 W.L.R. 977, CA.

[42] Though it was noted that the cases where such interference had been found do not go beyond an obligation to adopt measures to prevent serious infractions of private or family life by subjects of the state.

[43] *R v North West Lancashire Health Authority, ex p A, D and G* [2000] 1 WLR 977, 1000 G (Buxton LJ). This was confirmed more recently in *R (Condliff) v North Staffordshire Primary Care Trust* [2011] EWHC 872 (Admin).

part of one of the exceptions in Article 8(2). Nevertheless, this is not to say that this position will never change; the development in courts' attitudes regarding the positive obligations[44] that Article 8 confers could possibly help individuals such as Charlotte McPhillips,[45] who promised to take her case to the ECtHR after being denied access to IVF treatment. It should be noted however, that thus far, courts seem to be only willing to interfere on a resource-allocation decision, and impose a positive obligation on a health authority to provide a certain treatment or drug, when Article 8 is proven to have been infringed due to a flaw in the decision-making process, [46] or when an irrational policy led to the treatment/drug being refused.[47]

However, the interpretation of a positive obligation from the provisions of Article 8 certainly left its mark on the law in *VC v Slovakia*.[48] The ECtHR found that Article 8 confers upon states the positive obligation to provide effective legal safeguards to protect the reproductive health of women. The absence of such safeguards was enabling women to be sterilised without their consent. The court ruled that the state had a duty under Article 8 to actively protect women from such serious interventions into their private lives. This means that Slovakia must alter its laws to comply with the ruling.

However, it is not only when a positive obligation is found to stem from Article 8 that the law is affected. In 1999, Diane Blood brought an application for judicial review arguing that section 28(6)(b) of the Human Fertilisation and Embryology Act 1990, which declared that children who were born as a result of a post-mortem conception will have their father recorded on their birth

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[44] A. R Mowbray, *The Development Of Positive Obligations Under The European Convention On Human Rights By The European Court Of Human Rights* (Hart Pub 2004), Chapter 6.

[45] Kent Online, 'Charlotte McPhillips From Rainham Denied IVF Treatment On NHS Because Partner Robert Howard Has A Child' (2015) <http://www.kentonline.co.uk/medway/news/woman-denied-ivf-as-partner-33020/>.

[46] Christopher Danbury and Christopher Newdick, *Law And Ethics In Intensive Care* (OUP 2010), Chapter 5.

[47] *R v North Derbyshire Health Authority, ex p Fisher* [1997] 8 Med LR 327; *R (Rogers) v Swindon NHS Primary Care Trust* [2006] EWCA Civ 392.

[48] [2014] 59 E.H.R.R. 29.

certificates as 'unknown,' infringed on her and her children's Article 8 rights.[49] Her success resulted in Parliament enacting the Human Fertilisation and Embryology (Deceased Fathers) Act 2003[50] which changed this legal position.

IV. The hurdling impact of a wide margin of appreciation

It is where the margin of appreciation is especially wide where the impact of Article 8 on the law is minimal.[51] This is why Article 8 did not manage to influence the law in Natalie Evans' case.[52] Evans was challenging her ex-partner's right to withdraw his consent to have their embryo implanted in her uterus, arguing that allowing him to do so prevented her from ever having a genetically related child, and thus was a direct and unjustifiable violation of her Article 8 right. Since there was no international or European consensus as to the point at which a sperm donor should be allowed to revoke his consent regarding the use of his genetic material,[53] and since this issue primarily revolved around competing Convention interests between two individuals,[54] the Grand Chamber held that states were entitled to a broad margin of appreciation in this field. The legal requirement of consent was thus held to be within the UK's margin of appreciation, and was left unchanged. Arguably what made this case particularly controversial, and in turn stopped the domestic and European courts from interpreting Article 8 in a way that might influence the law, is the fact that they were balancing Evans' right to become a genetic mother with her ex-partner's right to choose not to be a father.[55] Understandably, to force states to allow women to

[49] *R v HFEA Ex Parte Diane Blood* [1999] 2 WLR 806.
[50] The 2003 Act has now been repealed, but the Human Fertilisation and Embryology Act 1990 was amended in 2008 to the same effect.
[51] Yutaka Arai, 'The Margin Of Appreciation In The Jurisprudence Of Article 8 Of The European Convention Of Human Rights' (1998) 16 Netherlands Quarterly of Human Rights.
[52] *Evans v United Kingdom* [2008] 46 E.H.R.R. 34.
[53] [2008] 46 E.H.R.R. 34 [59].
[54] [2008] 46 E.H.R.R. 34 [73].
[55] Glenn Cohen, 'The Right Not to be a Genetic Parent?' (2008) 81 S. CAL. L. REV. 1115.

override men's rights to withdraw consent would be a clear invasion of their rights to private life.

The law on abortion is arguably an area where the margin of appreciation hurdled the evolution of the law the most. Given that abortion is a culture-sensitive topic, states have been given freedom to interpret Article 8 in a way that allows access to abortion, as well as in a way that prevents it. Therefore, while it has been held that countries such as Ireland have not violated women's Article 8 rights by significantly restricting access to abortion,[56] countries such as Italy have also been held not to be violating men's rights by allowing abortion facilities.[57] Thus, understandably, the role of Article 8 in influencing the law in this area has been nominal. Having said that, courts are nonetheless becoming more willing to interpret Article 8 in this field to protect individuals from blanket or non-procedural bans against abortion. Thus, the ECtHR accepted C's arguments in *A, B and C v Ireland*[58] when she claimed that the lack of an effective legal procedure by which she could establish her right to abortion infringed her Article 8 right. This rare Article 8 victory left Ireland obliged to comply with the European Court's recent ruling. That is, even in areas of significant controversy, Article 8 has managed to contribute to the evolution of medical law.

V. Article 8's contribution to the right to die

Section 2(1) of the Suicide Act 1961 criminalises the act of assisting suicide. Moreover, there is no provision in the law that gives individuals the right to receive assistance in suicide in *any* circumstance. Collectively, this is what Dianne Pretty,[59] Debbie Purdy,[60] and Tony Nicklinson[61] tried to challenge before domestic

[56] See A and B's claims in *A, B, and C v Ireland* [2010] ECHR 25579/05.
[57] *Boso v. Italy* [2002] ECHR 50490/99.
[58] [2010] ECHR 25579/05.
[59] *Regina (Pretty) v Director of Public Prosecutions* [2001] UKHL 61; *Pretty v United Kingdom* [2002] 35 E.H.R.R. 1.
[60] *R (Purdy) v DPP* [2009] UKHL 45.
[61] *R. (on the application of Nicklinson) v Ministry of Justice* [2014] UKSC 38.

and European courts, relying heavily on Article 8 to make their claims.

Pretty was claiming that the DPP's failure to give her husband immunity from prosecution if he assisted her suicide unreasonably infringed her human rights.[62] All of the domestic courts, including the House of Lords, found that Article 8 was not engaged. The general consensus was that Article 8 relates to the manner in which a person conducts his life, not the manner in which he departs from it, and that any alternative interpretation would extinguish the benefit on which the right was supposedly based.[63] The ECtHR disagreed with this, holding that Article 8 in fact confers a right of self-determination, which includes a right to choose when and how to die.[64] However, this was a short lived victory for Pretty as the European Court held that the interference with Article 8 was nevertheless justified under Article 8(2), reasoning that such laws are necessary to protect the vulnerable.[65] Nevertheless, this 'short-lived victory' is what allowed the House of Lords in *Purdy*[66] to widen their previously narrow interpretation of Article 8 and hold that Purdy's Article 8 right was in fact engaged, and unjustifiably being impinged on, when the DPP refused to issue a clear policy on when and why suspected suicide abettors are prosecuted. Evidently, the House of Lords conceded that one's interest in how one dies is at least partly covered by the scope of Article 8.

In *Nicklinson*,[67] the Supreme Court adopted this widened interpretation of Article 8 and held that Nicklinson's Article 8 right was engaged when he was denied assistance in suicide. However, the Supreme Court held that the interference once again is justified under Article 8(2). Though this decision may appear to be the epitome of the Article 8's failure in triggering the evolvement of the laws on assisted dying, it was perceived at the time to be somewhat

[62] *Regina (Pretty) v Director of Public Prosecutions* [2001] UKHL 61.
[63] [2001] UKHL 61 [18].
[64] [2002] 35 E.H.R.R. 1 [17].
[65] [2002] 35 E.H.R.R. 1 [74].
[66] *R (Purdy) v DPP [2009]* UKHL 45.
[67] In *R. (on the application of Nicklinson) v Ministry of Justice* [2014] UKSC 38.

of a 'paradoxical success'. This is because five of the nine Supreme Court judges in *Nicklinson* in fact held that it would not necessarily be inappropriate (under the Human Rights Act 1998) to declare section 2 of the 1961 Act incompatible with the Convention.[68] However, only Lord Kerr and Lady Hale were prepared to issue a declaration of incompatibility in the present case.[69] The other 3 judges were of the view that it was not the right time to do so, and wanted to give Parliament time to explore and establish "ethically and intellectually consistent rules"[70] on this issue. Thus, despite the ruling of the Supreme Court judges, Article 8 was, for the first time in a UK court, indeed recognised to have the potency of impacting the laws on assisted dying. Nicklinson's failure in his case can be said not to have been the consequence of the narrow scope, or the narrow interpretation, of Article 8, and rather can be attributed to the fact that the judges were being overly deferential to the state and Parliament, to the extent that it has been argued that they have misunderstood how the Human Rights Act is supposed to work.[71] In fact, Mrs. Nicklinson, to no success, challenged the court's evident deference to parliament, in front the ECtHR.[72] However, the European Court held Mrs Nicklinson's case inadmissible, and the UK Supreme Court's conduct appropriate, under the Human Rights Act 1998.

Even though Article 8 failed to amend the laws of assisted dying in *Nicklinson,* it was nonetheless successful in highlighting the need for amended laws in the UK, and the need for the transformation of UK's legal response to assisted dying from blanket criminalisation to regulated legal recognition. Parliament arguably received this message: the House of Commons, in July 2015, proposed an 'Assisted Dying' bill. The bill would have

[68] [2014] UKSC 38 [72]-[73], [75]-[76], [111]-[112], [125], [148], [150], [163]-[164], [188], [190], [191], [196]-[197], [202], [299]-[300], [325], [326]-[327], [347]-[348].
[69] [2014] UKSC 38 [113], [115]-[119], [125]-[129], [148]-[149], [150], [188], [190], [196]-[197], [201], [224], [234], [257], [267], [289], [290], [294], [298].
[70] [2014] UKSC 38 [890-891] (Lord Mustill).
[71] E. Wicks, 'THE SUPREME COURT JUDGMENT IN NICKLINSON: ONE STEP FORWARD ON ASSISTED DYING; TWO STEPS BACK ON HUMAN RIGHTS: A Commentary On The Supreme Court Judgment In R (Nicklinson) V Ministry Of Justice; R (AM) V Director Of Public Prosecutions [2014] UKSC 38.' (2014) 23 Medical Law Review.
[72] Nicklinson and Lamb v. the United Kingdom (application nos. 2478/15 and 1787/15).

enabled competent adults who are terminally ill to choose to be provided with medically supervised assistance to end their own life. However, the bill did not pass its second reading in the House of Commons, and failed on 11 September 2015.

It is beyond the scope of this article to examine the intricacies of the bill's failure; however, it ought to be noted that it is likely that a significant contributing factor to the bill's failure was the fact that assisted dying remains taboo. It was largely perceived that the proposed bill would be "legally and ethically totally unacceptable,"[73] or would open a "Pandora's box"[74] and "overturn 2,000 years of the Hippocratic Oath."[75] However, as public opinion continues to evolve, and foreign laws continue to progressively accept the notion of assisted dying,[76] the taboo surrounding this issue may start to shrink, and legal and ethical acceptance of assisted dying may then succeed. The time that this might take does not attenuate Article 8's contribution to this area of the law. Article 8 successfully shone the light on this "morally divergent issue,"[77] and allowed the courts to recognise that individuals' human rights are engaged, and potentially impinged on, by blanket criminalisation of assisted dying. The judge's deference to Parliament, and its fear of this taboo, may have stopped Article 8's power to change the law from crystallising, but this does not stop the public from acknowledging and recognising the need for assisted dying laws, and indeed the morality of such a claim. Thus, even though the law has not yet evolved, it can be argued that Article 8 has brought us one step closer.

[73] HC Deb 11 September 2015, cols 671.
[74] HC Deb 11 September 2015, cols 679.
[75] ibid.
[76] Canada recently legalised physician assisted suicide (PAS) following the case of *Carter v. Canada (Attorney General)* 2015 SCC 5, [2015] 1 S.C.R. 331.
[77] Alexandra Mullock, 'The Supreme Court Decision In Nicklinson: Human Rights, Criminal Wrongs And The Dilemma Of Death' [2015] Journal of Professional Negligence.

VI. Conclusion

It seems that with time, the expectations of individuals regarding what they should be able to do in their private and family life without interference from the state is increasing. The 'pragmatic' approach[78] taken by judges in interpreting Article 8 has allowed national laws to evolve in such a way that keeps pace with social developments. Thus, medical law is increasingly protecting individuals' interests in controversial topics surrounding rights to have abortions and rights for prisoners to conceive, amongst others. That being said, wide margins of appreciation and exceptions under Article 8(2) have arguably held back the Article's potential impact on the law, particularly in areas that affect the public, economic, or social wellbeing of a country. Nevertheless, this has certainly not stopped Article 8 from having a dramatic impact on the law over time. Assisted dying is an area of the law which is yet to evolve from its traditional legal position. However, Article 8 has arguably significantly contributed to the law's evolution, as it has allowed the courts to recognise the engagement of individuals' human rights by the legal prohibition of assisted dying, and helped establish precedent in which judges can explicitly state their willingness to issue a declaration of incompatibility regarding assisted dying laws (or lack of), in the future.

[78] Judges are able to take a pragmatic approach by way of the 'Living instrument doctrine' which expresses the principle that the Convention is interpreted in the light of present day conditions and evolves through the interpretation of the Court; Yutaka Arai, 'The Margin Of Appreciation In The Jurisprudence Of Article 8 Of The European Convention Of Human Rights' (1998) 16 Netherlands Quarterly of Human Rights.

The role of legitimate expectations in establishing a jurisprudence constante in international investment law

Dumitru Filip[79]

Academics and practitioners have long criticised the fragmented nature of, and the uncertainty created by, the Investor State Dispute Settlement mechanism. At the centre of this debate lies the absence of the doctrine of binding precedent for investment tribunals. In other words, the *ad hoc* nature of arbitration means that tribunals have complete discretion on how to interpret treaty provisions and can disregard the decisions of other tribunals. This might suggest the absence of any kind of jurisprudence with persuasive authority. However, it will be argued that investment tribunals have the necessary instruments for generating an authoritative jurisprudence and have indeed produced one. Furthermore, this paper highlights arbitrators' practices of citing previous tribunals and only diverging from them when they are not persuaded by their reasoning. This essay compares such practice with jurisprudence constante, which, although not binding, places an obligation on tribunals to consider previous case-law. Even though there are currently no treaty obligations upon tribunals to consider investment jurisprudence in their decisions, it will be asserted that this duty arises from the general principle of legitimate expectations. This essay argues that by citing precedents, tribunals encourage investors and states to believe that they will continue this practice and will start taking into consideration previous investment awards before rendering decisions. Moreover, this essay also highlights that states are aware of this practice since they have amended their legislative framework to better reflect changes in investment jurisprudence. Therefore, the thesis of this essay is that when governments enact acts that go against jurisprudence constante without giving proper justifications, they will breach the internationally recognised principle of legitimate expectations.

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I. Introduction

Of the numerous criticisms addressed at Investor State Dispute Settlement (ISDS), the most cited one has been its fragmented nature.[80] Stephen Schill, for example, is vocal about the dangers of such fragmentation.[81] Academics supporting this view have been eager to point out the bilateral nature of most investment treaties and conflicting arbitral decisions arising from them.[82] The uncertainty in investment arbitration is of such an extent that a number of disputes concerned the precise meaning of the term 'investment.'[83] Indeed, there is no doctrine of *stare decisis* or binding precedents in international law. Article 59 of the Statute of the International Court of Justice (ICJ) explicitly provides that "[t]he decision of the Court has no binding force except between the parties and in respect of that particular case."[84] Article 38 of the same statute states that judicial decisions constitute only "subsidiary means for the determination of rules of law."[85] Nevertheless, while not formally binding, decisions are cited and relied upon with regularity, both by the court itself and by counsel appearing before it. As sharply observed by Hersch Lauterpacht in his analyses of the practice of the Permanent Court of International Justice, currently superseded by the ICJ, "[t]hey will be stones in the growing edifice even if in theory the builders are free not to continue to build upon them."[86]

These critics, however, often overlook how states and investors worldwide adopt their behaviour as a response to formally

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[80] Stephan Schill, *The multilateralization of international investment law* (Vol. 2, Cambridge University Press 2009).
[81] ibid 26.
[82] G Van Harten & M Loughlin, 'Investment treaty arbitration as a species of global administrative law' (2006) 17(1) European Journal of International Law 121-150.
[83] Vargiu P, 'Beyond Hallmarks and Formal Requirements: a "Jurisprudence Constante" on the Notion of Investment in the ICSID Convention' (2009) 10(5) Journal of World Investment and Trade 753.
[84] United Nations, Statute of the International Court of Justice, 18 April 1946.
[85] ibid Article 38.
[86] Hersch Lauterpacht, The Development of International law by the International Court (Pinter 1934) 6.

unrelated awards. The growing number of disputes under International Investment Treaties (IITs) has led to a burgeoning corpus of case-law, which includes an evident trend toward citing the decisions of prior investment tribunals. Interestingly, the strategies which arbitrators employ when referring to precedents suggest a treaty-overarching regime of investment law, which, even though not binding, has persuasive authority. In this system, the investment tribunal decisions are the nuclei and the driving force of its development. The more established a certain line of reasoning becomes, the harder it is for a tribunal to depart from it. In that sense, the system of precedent in investor-state relations is more similar to *jurisprudence constante* than *stare decisis*.[87] *Jurisprudence constante* is defined as a series of adjudicated cases that establishes a consistent and uniform application of a certain rule.[88] In stark contrast with *stare decisis*, *jurisprudence constante* functions as mere persuasive authority and does not have *de jure* recognition of binding value.[89] In other words, it does not imply that judges have a duty to decide cases in accordance with an established *jurisprudence constante,* although they may need to provide reasons if they decide to deviate.[90]

However, while judges in civil law systems are pushed by national legal instruments to render their judgments in the context of *jurisprudence constante,* it is uncertain whether similar tools exist at the level of international investment arbitration.[91] The question this paper will address is whether an investment tribunal has a legal obligation to consider *jurisprudence constante* in its rulings. The second part of this paper will analyse the structure of investment arbitration, specifically under the International Centre for

[87] Eric De Brabandere, 'Arbitral Decisions as a Source of International Investment Law' in Tarcisio Gazzini and Eric De Brabandere (eds.), *International Investment Law. The Sources of Rights and Obligations* (Leiden/Boston, Martinus Nijhoff Publishers 2012) 245.
[88] ibid 247.
[89] ibid 255.
[90] ibid 256.
[91] G Guillaume, 'The Use of Precedent by International Judges and Arbitrators' (2011) 2 Journal of International Dispute Settlement 17.

Settlement of Investment Disputes (ICSID) Convention,[92] and whether it has the necessary features in place to create an investment arbitration jurisprudence. Answering affirmative to it, the third part attempts to highlight the interconnectedness of arbitral decisions, which suggests a system of cooperation between investment tribunal. The final part presents the principle of legitimate expectations as a legal instrument that allows parties to invoke *jurisprudence constante*. The underlying argument is that investment tribunals have created a system within which parties to an investment dispute expect their arbitrators to consider decisions of other tribunals. In other words, the general principle of legitimate expectations should allow investors to invoke *jurisprudence constante* before arbitrators.

II. The requirements for and the existence of the ICSID jurisprudence

It was more than a decade ago that Elihu Lauterpacht presciently wrote of approximately 30 ICSID awards as "though their number may not appear great, their contribution to … the substance of international investment law … is of considerable importance."[93]

Currently, there are already sixteen ICSID Volumes that are touted as greatly facilitating the "development of a coherent case-law on the ICSID Convention."[94] Much like Henry de Bracton's *De Legibus,* the awards and decisions set forth in ICSID Reports have established the framework for a system of precedents.[95] Once named as "somewhat of a "Sleeping Beauty," ICSID's last decade has witnessed the emergence of what can only be described as 'jurisprudence.'[96]

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[92] Convention on the Settlement of Investment Disputes between States and Nationals of Other States (opened for signature 18 March 1965, entered into force 14 October 1966).
[93] P Jeffery, 'Precedent in Investment Treaty Arbitration A Citation Analysis of a Developing Jurisprudence' (2007) 24 Journal of International Arbitration 129, 158.
[94] C Schreuer, *The ICSID Convention: A Commentary* (1st edn, Cambridge University Press 2001) 56.
[95] David J Seipp, 'Bracton, the Year Books, and the "Transformation of Elementary Legal Ideas" in the Early Common Law' (1989) 7.01 Law and History Review 175.
[96] Jeffery (n 93).

Undeniably, there is a burgeoning corpus of precedents generated by ICSID and other investment treaty tribunals. However, to assume that there is an investment treaty jurisprudence, *ad hoc* tribunals must be capable of creating jurisprudence. As argued below, a confluence of three conditions has provided for the development of jurisprudence and a system of persuasive precedent in ICSID and other investment treaty arbitrations.

(i) The Publication and availability of investment treaty awards and decisions

Put simply, publishing a judicial decision is the first step towards creating a body of case-law.[97] As argued by Fabien Gelinas, "[t]he only conceivable way of preventing a body of case-law from developing in investment arbitration would have involved a total ban on publication."[98] This is illustrated by the absence of any indication towards jurisprudence in commercial arbitrations between private parties that are held behind closed doors. In contrast, the ICSID Convention encourages the continued publication of awards and since 1980 has been implementing a series of reforms aimed at boosting transparency, which has been partially successful.[99] An investment treaty award can become public if one or both parties agree to that effect, or if ICSID publishes excerpts of the reasoning of the award (see Rule 48(4) of the ICSID Arbitration Rules, stating that "[t]he Centre shall not publish the award without the consent of the parties. The Centre may, however, include in its publications excerpts of the legal rules

[97] Mohamed Shahabuddeen, *Precedent in the World Court* (Vol. 13, Cambridge University Press 2007).
[98] Fabien Gélinas, 'Investment Tribunals and the Commercial Arbitration Model: Mixed Procedures and Creeping Institutionalization' in Gehring Mark and Marie-Claire Cordonier Segger *Sustainable Development In World Trade Law* (Kluwer Law International 2005) 577.
[99] E Hafner-Burton and D Victor, 'Secrecy in International Investment Arbitration: An Empirical Analysis' (2016) 6 Journal of International Dispute Settlement 1.

applied by the Tribunal.")[100] Awards in commercial arbitration generally remain confidential, unless both parties agree to publish them, although the reasoning of some international awards is also published in commercial arbitration reporters. However, such publications are much less systematic than in investment treaty arbitration.[101]

(ii) An Esprit De Corps *between ICSID and other investment treaty arbitrators*

The question as to whether or not *ad hoc* tribunals with ever-changing members can truly create precedent, and a distinct jurisprudence, is not a novel one. Some argue that without a structured system of appeals and arbitrators that are viewed as legitimate producers of law, investment tribunals lack the necessary tools to create precedents.[102] On the other hand, notable investment arbitrators have argued that the strong desire among arbitrators and other relevant actors for a system of precedent, coupled with the current state of ICSID jurisprudence, resemble England's judicial system at the time of Henry de Bracton's *De Legibus*, which was shortly before the creation of the doctrine of *stare decisis*.[103] Put differently, the arbitrators' willingness coupled with the present corpus of investment awards might be sufficient for establishing the doctrine of precedent in investment arbitration since it was sufficient for English common law.

However, few others share this feeling, considering the *ad hoc* nature of the investment arbitration system. Fortunately, the investment tribunal members are no longer ever-changing due to the ICSID Convention which requires arbitrators to satisfy several criteria, such as nationality and qualifications. Thus, a study into

[100] ICSID Rules of Procedure for Arbitration Proceedings ('ICSID Arbitration Rules') (April 2006) r 45.
[101] Jeffery (n 93).
[102] M Weidemaier, 'Toward a Theory of Precedent in Arbitration' (2010) 51 William & Mary Law Review 1980.
[103] Jeffery (n 93).

ICSID practices, unsurprisingly, revealed that most of the arbitrators, whether from developing or industrial countries, have been prominent lawyers.[104] Moreover, once an arbitrator was appointed in a tribunal, it was very likely for him or her to be reappointed subsequently in another tribunal.[105]

Frequent reappointments of the same individuals ensure a certain continuity in arbitral jurisprudence. Put simply, their background, qualifications, and experience in international law and their active dialogue, both professionally and otherwise, have positively impacted the development of an *esprit de corps* amongst ICSID and other investment treaty arbitrators.[106]

(iii) A body of law predisposed to development by case-law

Despite the fact that each tribunal typically deals with different bilateral investment treaties (BITs) or multilateral investment treaties, the "substantive provisions of the treaties are, for the most part similar in form and content."[107] Furthermore, the regular insertion into IITs of such broad notions as 'investor' or 'most favoured nation' (MFN) necessitates arbitrators to embark upon interpretation.[108] This is so because it is the investment tribunals, rather than states through subsequent treaties, that concretise their meaning.[109] Thus, while each tribunal is necessarily responsible for deciding the particular dispute pending before it, based upon a particular investment agreement, any decision it renders will also draw from, and contribute to, the growing investment

[104] Ibrahim F I Shihata and Antonio R Parra, 'The Experience of the International Centre for Settlement of Investment Disputes' (1999) 2 ICSID Review 299.
[105] ibid Table C.
[106] Jeffery (n 93).
[107] Salacuse W Jeswald, 'Towards a global treaty on foreign investment: the search for a grand bargain' in Norbert Horn and Stefan Kroll, *Arbitrating Foreign Investment Disputes* (Aspen Publishers 2004) 695.
[108] ibid.
[109] ibid 699.

jurisprudence.[110] The aforementioned factors demonstrate that investment tribunals have the necessary tools to create jurisprudence. Moreover, investment law is sufficiently flexible to be able to develop in line with tribunals' decisions. The first hint towards a developing jurisprudence is found in the way that arbitrators cite previous decisions in investment treaty arbitration.

Over the twenty years since the first *ad hoc* committee's decision in *Amco*,[111] reference to and reliance on prior ICSID or other investment tribunals' decisions have greatly increased.[112] In the years following the first publicly available ICSID decision until 2001, tribunals seldom addressed the issue of 'precedent.' The *ad hoc* committee's practice of stating that there was not a "rule of *stare decisis*" in the ICSID arbitration system, and then proceeding to share in the interpretation of the prior decisions, has been repeated countless times by many tribunals.[113] The fact that the *ad hoc* committee felt it necessary to express that "it did not feel compelled to distinguish strictly between the ratio decidendi and obiter dicta," evidenced an early indication of the flawed application of a common law methodology.[114]

Nevertheless, as Christopher Schreuer observed, the increasing number of arbitrations predicated on BITs, and decisions emanating from them, has led to a marked increase of citations of ICSID decisions by ICSID tribunals.[115] Since 2001, the frequency of citation of ICSID case-law has increased exponentially, as is demonstrated in a review of decisions on jurisdiction and final

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[110] *International Thunderbird Gaming Corp. v. Mexico, Arbitral Award*, UNCITRAL, Separate Opinion of Thomas Wälde (26 January 2006) ("[I]nvestment arbitration, on the other hand, applies treaty provisions that are general; in their investment protection core content, the investment treaties (with the equivalent of the multilateral treaties now well over 3,500) express common principles and very similar, often identical language. Every interpretation that is public is likely to exercise a general effect and will be taken up by counsel and tribunals in subsequent cases.").

[111] *Amco Asia and others v. Republic of Indonesia*, ICSID Case No ARB/81/1, Annulment Decision (31 May 1986).

[112] Jeffery (n 93).

[113] *Amco* (n 111) [44].

[114] ibid [45].

[115] Schreuer (n 94).

awards between 2000 and 2006.[116] Until 1994, the highest number of ICSID decisions or awards that had been cited in any ICSID decision was two.[117] Between 2001 and 2006, the practice of citing prior ICSID decisions doubled year by year and by 2011 tribunals were referring, on average, to 15 ICSID precedents.[118] Moreover, ICSID tribunals have begun citing other international investment tribunals, a practice almost non-existent before 2001. Finally, non-investment tribunals began referring to ICSID awards, citing not only their reasoning, but also their interpretation of treaty provisions.[119] While the precise term employed varies, tribunals now routinely discuss, with varying degrees of analysis, the role played by investment jurisprudence.

(iv) Conclusion

As alluded to at the outset of this part, the current state of precedent in investment treaty arbitration can be compared with the English common law before the doctrine of binding *stare decisis*.[120] Similar to the judges during the time of Bracton, arbitrators want to know what others have done in similar situations.[121] The resemblance, however, ends there. It will ultimately be up to the community of arbitrators, and other parties to the dispute, to ensure that investment treaty precedents are used properly, and not misused or mischaracterised, in order to achieve at least some level of uniformity of decisions throughout the system.[122] Nevertheless, the current bulk of decisions from tribunals is sufficient to be called

[116] K Valerian, 'The precedential effect of international arbitral awards: Doctrinal and empirical analyses of the Commercial and Investment Arbitration' (2013) Walter de Gruyter Berlin.
[117] ibid.
[118] ibid.
[119] ibid 255.
[120] Wiener Frederick Bernays, 'A Tangled Web of Legal Mysteries That Defied Solution for More Than Seven Centuries' (1977) 2 *Int'l Sch. L. Rev.* 129.
[121] Peter Berger, 'The International Arbitrators' Application of Precedents' (1999) 2 *Journal of International Arbitration* 5.
[122] Zander Michael, *The law-making process* (Vol. 6, Cambridge University Press 2004)

jurisprudence, and thus capable of creating *jurisprudence constante* on which investors might rely.

III. Use of precedents as evidence of a system

It is hard to expect uniform and systematic usage of rules and principles of international investment law that is based upon BITs and arbitrated by one-stop tribunals, particularly when projects for truly multilateral investment treaties has had little to no success.[123] Nevertheless, we have witnessed convergence rather than divergence in the structure and content of international investment jurisprudence. Arbitral tribunals are able to translate the burgeoning corpus of international investment jurisprudence into a genuine system of international law through the methods they employ when resorting to citation. Indeed, there is a difference by which investment treaty tribunals make use of precedent and the legal impact associated with such use. Yet, they all illustrate how investment treaty jurisprudence converges, forming part of a uniform treaty-overarching regime for international investment relations. This is how investment treaty tribunals actively engage in system-building in international investment law. In ascending order of normative impact on tribunal decision-making, the use of precedent includes the following types of reasoning: (i) use of precedent as a tool of comparison and persuasion, (ii) use of precedent to clarify the interpretation of investment treaty provisions, and (iii) use of precedent to standardise the interpretation of investment treaties.

First, tribunals frequently make use of precedents as a point of reference for their own reasoning. For example, the tribunal in *AES* considered it appropriate to use precedents as a source of "comparison and inspiration."[124] In the tribunal's view, this applied both to the interpretation of law and the facts. It observed that there

[123] Schill (n 80) 23.
[124] *AES Corporation v. The Argentine Republic*, ICSID Case No ARB/02/17, Decision on Jurisdiction (26 April 2005) [23], [30].

are situations where a tribunal will face a dispute whose facts resemble those of a precedent. Such precedents could then be used for comparison or inspiration, especially when the parties to a dispute had relied on them to some degree.[125] A similar approach was taken in *Letco* where the tribunal found it "instructive to consider [prior tribunals'] interpretation."[126] The same can be observed in *CMS* where the tribunal noted that a task was rendered easier through existence of precedents with similar issues.[127] Arbitrators had even directly incorporated the reasoning of prior tribunals into their own decisions in order to "avoid discussing again question that have been amply considered."[128] The argumentative power of precedents was not disputed even in cases where the tribunal underlined its subsidiary character, as evidenced in *RosInvestCo* where the tribunal acknowledged that precedents have no binding authority but this did not preclude it from taking them into consideration, to the extent that they may be relevant to the dispute at hand.[129]

This approach has a particular appeal for making reference to awards that are based on investment treaties other than the one applicable in the case at hand because it underlines the difference in the legal basis of the earlier decisions. It nevertheless enables a tribunal to integrate the reasoning and the result of a precedent into its own decisions, building up consistency in arbitral decision-making across different cases and treaties. Reasoning by analogy, thus, reconciles the principle of non-binding precedent with the persuasive influence of prior investment awards, particularly in relation to awards rendered on the basis of different investment treaties.[130]

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[125] ibid [31].
[126] *Liberian Eastern Timber Corporation (LETCO) v Republic of Liberia,* ICSID Case No ARB/83/2, Award (31 March 1986) [346].
[127] *CMS Gas Transmission Company v The Republic of Argentine*, ICSID Case No ARB/01/8, Decision on the Argentine Republic's Request for a Continued Stay of Enforcement of the Award (Rule 54 of ICSID) (1 September 2006) [72].
[128] *Eureko B.V. v. Republic of Poland*, Partial Award (19 August 2005) [36].
[129] *RosInvest Co UK Ltd v Russian Federation*, SCC, Case No V079/2005, Final Award (12 September 2010) [22].
[130] Schill (n 80) 30.

Second, other investment treaty tribunals have used precedent as a reference point for clarifying the meaning and function of provisions in the governing investment treaty. In fact, the interpretation and application of these standards of treatment are driven more by arbitral precedent than by the texts of the applicable treaty or state practice. However, there was one exception to this in *Glamis v USA*, which noted a difference between an autonomous interpretation of fair and equitable treatment and the customary international law minimum standard. It then deduced from that difference that the customary basis of fair and equitable treatment in Article 1105(1) of the North American Free Trade Agreement (NAFTA) required the claimant to show state practice supported by *opinio juris* in order to impose restrictions on certain state conduct that would go beyond the standard required in the 1920s.[131] The primary reason for this is the terminological vagueness of these rights. Since the methods of treaty interpretation endorsed by the Vienna Convention on the Law of Treaties (VCLT) under Article 31 provide little guidance, investment treaty tribunals are often forced to assess the practice of earlier investment treaty tribunals in order to determine the normative standard to apply.[132]

The extent of precedent's impact on the interpretation and application of investor rights is best illustrated in respect of fair and equitable treatment, the normative content of which has been structured primarily through the jurisprudence of arbitral tribunals. The NAFTA award in the *Waste Management* case is representative of arbitral practice in that respect.[133] In that case, the tribunal extensively described prior investment awards applying the fair and equitable treatment standard in order to extrapolate a workable definition of that standard. After discussing earlier precedent at length, the tribunal concluded:

"Taken together, the *S.D. Myers*, *Mondev*, *ADF* and *Loewen* cases

[131] *Glamis Gold v The United States of America,* UNCITRAL, Award (8 June 2009) [598]-[616].
[132] Catharine Titi, 'The Arbitrator as a Lawmaker: Jurisgenerative Processes in Investment Arbitration' (2013) 5 The Journal of World Investment & Trade 829, 851.
[133] *Waste Management, Inc. v. The United Mexican States*, ICSID Case No ARB(AF)/00/3, Award (30 April 2004).

suggest that the minimum standard of treatment of fair and equitable treatment is infringed by conduct attributable to the State and harmful to the claimant if the conduct is arbitrary, grossly unfair, unjust or idiosyncratic, is discriminatory and exposes the claimant to sectional or racial prejudice, or involves a lack of due process leading to an outcome which offends judicial propriety – as might be the case with a manifest failure of natural justice in judicial proceedings or a complete lack of transparency and candour in an administrative process."[134]

What is noteworthy is that the tribunal interpreted fair and equitable treatment by solely relying on arbitral precedents, rather than giving its own interpretation. Furthermore, subsequent tribunals increasingly do not critically examine earlier jurisprudence and its interpretation, but apply it as if it were binding, an idea that is developed in the next paragraph.[135] Put simply, the vague language of investor rights and other provisions in IITs, highlighted by the institutional structure under the ICSID Convention, makes them functionally comparable to 'general clauses' in civil codes, such as good faith or *bonos mores*. These clauses provide judges with a certain degree of independence to ascertain and craft the normative content and the precise standard applicable to certain social situations and conduct.[136] The vagueness of the principles of investment protection is quite similar to such general clauses in that they involve a substantial delegation of law-making powers from states to the arbitrators sitting in the tribunals. Accordingly, arbitral jurisprudence plays a far more important role than states in concretising the meaning of fair and equitable treatment, as well as other clauses in investment treaties. Such use of precedent allows

[134] ibid [98].
[135] *Técnicas Medioambientales Tecmed, S.A. v. The United Mexican States*, ICSID Case No ARB (AF)/00/2 (29 May 2003) [154].
[136] Brower N Charles and Stephen W Schill, 'Is Arbitration a Threat or a Boom to the Legitimacy of International Investment Law' (2008) 9 Chi. J. Int'l L. 471.

tribunals to establish coherence at a level that overarches individual treaties.

Third, several tribunals view precedent as constituting a standard that they will only depart from upon the presentation of new facts or legal aspects.[137] Accordingly, the burden of argumentation and persuasion is shifted to the party wishing to change the existing jurisprudence, even if the tribunal acknowledges the absence of *stare decisis*.[138] The more established the precedent becomes, and the more investment treaty tribunals align themselves with a certain line of jurisprudence, the more difficult it becomes to meet that burden and to convince tribunals to adopt solutions that deviate from it. Building on this premise, investment treaty jurisprudence gravitates towards a *jurisprudence constante*. This pushes investment treaty tribunals to perceive themselves as agents of a treaty-overarching regime for the protection of foreign investment, which they feel bound to apply. The statement of the tribunal in *Saipem* may be taken as a representative expression of a position that is increasingly taking hold among arbitrators in investment cases:

‘‘The Tribunal considers that it is not bound by previous decisions. At the same time, it is of the opinion that it must pay due consideration to earlier decisions of international tribunals. It believes that, subject to compelling contrary grounds, it has a duty to adopt solutions established in a series of consistent cases. It also believes that, subject to the specifics of a given treaty and of the circumstances of the actual case, it has a duty to seek to contribute to the harmonious development of investment law and thereby to

[137] *Saipem S.A. v. Bangladesh*, ICSID Case No. ARB/05/07, Decision on Jurisdiction and Recommendation on Provisional Measures, (Mar. 21, 2007) [67]; *Duke Energy Electroquil Partners & Electroquil S.A. v. Republic of Ecuador*, Award, (18 August 2008), ICSID Case No. ARB/04/19 [117]; *Burlington Resources Inc. v. Republic of Ecuador*, Decision on Liability, (14 December 2012), ICSID Case No. ARB/08/5 (formerly Burlington Resources Inc. and others v. Republic of Ecuador and Empresa Estatal Petróleos del Ecuador (PetroEcuador)) [187].
[138] Zander (n 122).

meet the legitimate expectations of the community of States and investors towards certainty of the rule of law.''[139]

This approach was later emphasised in *International Thunderbird Gaming* where the tribunal required an extensive justification before it would decide to deviate from firmly established jurisprudence.[140]

All the more so, certain tribunals have asked parties to comment on cases that have not been addressed in their submission but which the arbitrator believes to be relevant. The tribunal in *Camuzzi,* for example, required the party that was arguing for a departure from earlier investment treaty jurisprudence to provide the tribunal with reasons for doing so.[141] It maintained that there was no reason to deviate from earlier decisions even when the facts of the cases differed in some respects.[142] This further underlines the assumption which arbitrators hold regarding a treaty- overarching regime beyond the arguments set forwards by the parties. An alternative view is advanced by scholars who argue that the absence of binding precedent in international investment law would undermine the consistency in investor-state relations and the need for legal predictability in international business transactions.[143] This line of reasoning argues that *jurisprudence constante* is a requirement "to foster consistency," especially in underdeveloped areas of the law.[144] A number of tribunals have supported this view and expressed "a duty to seek to contribute to the harmonious development of investment law and thereby to meet the legitimate expectations of the community of states and investors towards

[139] *Saipem S.p.A. v. The People's Republic of Bangladesh* [20].
[140] *International Thunderbird Gaming Corporation v. The United Mexican States*, UNCITRAL, (1 December 2005) [19].
[141] *Camuzzi International S.A. v. The Argentine Republic*, ICSID Case No ARB/03/2, Decision on Objections to Jurisdiction (11 May 2005).
[142] ibid [82].
[143] Laird Ian and Rebecca Askew, 'Finality Versus Consistency: Does Investor-State Arbitration Need an Appellate System' (2005) 7 J. App. Prac. & Process 285.
[144] Kaufmann-Kohler, Gabrielle, 'Arbitral Precedent Dream, Necessity or Excuse?' (2007) 3 Arbitration International 357.

certainty of the rule of law."[145] Unsurprisingly, it did not avoid resistance where several tribunals have solicited a more cautious approach.[146] They have highlighted the inherent subjectivity of *jurisprudence constante* in a system lacking appeal mechanisms and the dangers that it may produce.[147] Nevertheless, the idea gained popularity among arbitrators and even the Annulment Committee in *MCI* adopted a similar view towards the need to enhance legal certainty*:*

"the reporting of cases and the commentaries of scholars and practitioners are extensive and undeniably promote the consistent application of investment law… the Committee considers it appropriate to take those decisions into consideration, because their reasoning and conclusions may provide guidance to the Committee in settling similar issues arising in these annulment proceedings and help to ensure consistency and legal certainty of the ICSID annulment mechanism, thereby contributing to ensuring trust in the ICSID dispute settlement system and predictability for governments and investors.''[148]

Finally, the most crucial evidence of arbitrators' sense of authoritative investment jurisprudence is their practice – sometimes unintentional – of distinguishing *obiter dicta* from *ratio decidendi*. Since there is no binding precedent, there should not be any reason to distinguish between *ratio decidendi* and *obiter dicta,* at least at

[145] *Saipem S.p.A. v. The People's Republic of Bangladesh,* ICSID Case No ARB/05/07 (30 June 2009) [24].
[146] *ADC Affiliate Limited and ADC &ADMC Management Limitedv. The Republic of Hungary*, ICSID Case No ARB/03/16 (2 October 2006) [293] ("cautious reliance on certain principles developed in a number of those cases, as persuasive authority, may advance the body of law, which in turn may serve predictability in the interest of both investors and host States.").
[147] *SGS Société Générale de Surveillance S.A. v. Republic of the Philippines*, Decision of the Tribunal on Objections to Jurisdiction, 29 January 2004, ICSID Case No. ARB/02/6 [97].
[148] *M.C.I. Power Group L.C. and New Turbine, Inc. v. Republic of Ecuador,* ICSID Case No. ARB/03/6 (31 July 2007) [25].

the theoretical level.[149] However, references to *obiter dicta* are not infrequent and are mostly reserved for instances in which the tribunal dismisses as irrelevant the particular finding of another tribunal.[150] By implication, it is presumed that in such cases the tribunal has identified the *ratio decidendi* of the cited decision. This is rarely acknowledged and reflects "the tendency amongst international lawyers of citing dicta from judgments, unqualified by relating them to the facts and the issue; just as if judicial decisions and the comments of writers were *pari passu*."[151] For instance, in *Renta* the tribunal found alleged precedents to be of "limited normative applicability" because it did not form part of the *ratio decidendi* of the judgment and are thus merely persuasive.[152]

The determination that the reasoning of a tribunal is *obiter dicta* may be more problematic in the context of ICSID Annulment proceedings, as this determination may result in the annulment of the award for insufficiency of a tribunal's reasoning. In its review of the *CMS* Award, the *ad hoc* Committee observed that:

''Article 27 [of the Articles on State Responsibility] covers cases in which the state of necessity precludes wrongfulness under customary international law. In the present case, the Tribunal rejected Argentina's defence based on state of necessity. Thus, Article 27 was not applicable and the paragraphs relating to that Article were *obiter dicta* which could not have any bearing on the operative part of the Award." [153]

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[149] Shabtai Rosenne, *The perplexities of modern international law: general course on public international law*, (Vol. 291, Martinus Nijhoff Publishers 2002) 69.
[150] *Société Ouest Africaine des Bétons Industriels v. Senegal*, ICSID Case No ARB/82/1, Decision on Jurisdiction (1 August 1984) [4].
[151] Jennings Y Robert, 'The Caroline and McLeod Cases' [1938] American Journal of International Law 82.
[152] *Renta 4 S.V.S.A, Ahorro Corporación Emergentes F.I., Ahorro Corporación Eurofondo F.I., Rovime Inversiones SICAV S.A., Quasar de Valors SICAV S.A., Orgor de Valores SICAV S.A., GBI 9000 SICAV S.A. v. The Russian Federation*, SCC No 24/2007 (20 July 2012) [91].
[153] *CMS Gas Transmission Company v The Republic of Argentine*, ICSID Case No ARB/01/8, Decision on Annulment (25 September 2007) [145].

As a consequence, it was not clear on what grounds the Tribunal reached its decision.[154] In this instance, the Committee found that the tribunal had already decided on other grounds that Argentina had breached its international obligations and concluded that there was no manifest excess of powers or lack of reasoning in the decision of the Tribunal.[155] However, this case illustrates the reach of the distinction between *ratio decidendi* and *obiter dicta* in annulment proceedings.

The determination of what is or is not a dictum is a difficult exercise for tribunals not familiar with the inner mechanics of common law judging and are, instead, schooled in legal systems where doctrine carries less weight than in the common law. Be that as it may, the discipline required to extract the *ratio decidendi* from a decision and to then relate the extracted statements of legal principle to the facts of the case in the submissions would avoid "the practice of the casual use of citations from other awards without regard to their original contexts," as is evidenced by the usual, but also wrong, references made to the *Neer* case.[156] It shows that in investment arbitration certain tribunals have an inclination towards considering it necessary to contribute to the development of international investment law by elaborating on rules of investment law beyond what is actually necessary to settle the dispute. Such practice is clearly aimed at directing future international investment tribunals on how to deal with certain questions.

(i) The role of conflicting decisions

System-building by investment treaty tribunals cannot only be observed with respect to the use of precedent resulting in consistent arbitral case-law. Rather, the idea of the existence of a system of international investment law and arbitration can also be traced from decisions that deliberately deviate from earlier arbitral jurisprudence. Yet, instead of serving as a counterargument for the

[154] ibid [146].
[155] ibid [148].
[156] Paulsson, Jan, and Georgios Petrochilos, 'Neer-Ly Misled?' (2007) 22 Foreign Investment Law Journal 242.

thesis of an emerging *jurisprudence constante*, the way tribunals deal with precedent in such instances itself shows a belief among arbitrators that investment treaty tribunals operate within the confines of a uniform system of international investment protection.

To begin with, arbitral tribunals try to avoid an open conflict about the proper interpretation of concepts in international investment law. Whenever an arbitrator predicts a conflict with a prior award, they seek to distinguish their case from other precedents through differing facts or applicable law. Consequently, the concealment of jurisprudential conflicts might indicate tribunals' intentions to be perceived as following precedents.[157]

Moreover, even in cases of open conflict, investment treaty tribunals use argumentative strategies that presuppose the existence of a treaty-overarching framework of international investment law. Thus, investment treaty tribunals rarely argue that their deviation from earlier case-law is precipitated by the bilateral nature of investment treaties or because their function was restricted to resolving a specific dispute. Instead, they regularly deviate from earlier jurisprudence because they consider an earlier interpretation as unpersuasive from a principled perspective within the treaty-overarching framework.

Hints towards such a framework in cases of open conflict can be seen in the way that investment treaty tribunals interpret umbrella clauses that require a state to observe specific undertakings made to foreign investors. A case in point is how the tribunal in *SGS v Philippines* strongly disagreed with the tribunal in *SGS v Pakistan* regarding the correct interpretation of the umbrella clause in the Switzerland-Philippines BIT.[158] Rather than trying to avoid the conflict, the tribunal began by noting that its interpretation was in direct contradiction with the decision of the Tribunal in *SGS v Pakistan*.[159] Even though it explicitly criticised the precedent as "failing to give any clear meaning to the 'umbrella clause,' the

[157] Guillaume (n 91) 347.
[158] *SGS Société Générale de Surveillance S.A. v. Republic of the Philippines*.
[159] ibid [119].

tribunal nonetheless considered whether it should 'defer to the answers given by the *SGS v Pakistan* Tribunal' for the sake of consistency."[160] It observed, however:

"[A]lthough different tribunals constituted under the ICSID system should in general seek to act consistently with each other, in the end it must be for each tribunal to exercise its competence in accordance with the applicable law, which will by definition be different for each BIT and each Respondent State ... It must be initially for the control mechanisms provided for under the BIT and the ICSID Convention, and in the longer term for the development of a common legal opinion or jurisprudence constante, to resolve the difficult legal questions discussed by the SGS v. Pakistan Tribunal and also in the present decision.''[161]

The tribunal therefore clearly recognised that coherence in investment treaty jurisprudence was desirable, but pointed out that the mechanism for achieving such coherence could not lie in requiring subsequent tribunals to follow earlier decisions they considered as unpersuasive or even incorrect. Instead, it considered that the method to arrive at system-wide coherence should be a matter of evolution in investment treaty jurisprudence. Conflicting precedent, in that sense, is part of the system-building exercise in which investment treaty tribunals engage: it illustrates the divergent views about which direction investment treaty jurisprudence should take, rather than defiance of the existence of a system of international investment law. Similar issues appear in decisions supported by *SGS v Pakistan*, some of which supported *SGS v Philippines*. It is worth noting that they did not frame their decisions in bilateral terms.

(ii) Conclusion

Even though there is no worldwide, multi-lateral treaty that governs international investment disputes, tribunals have been creative in

[160] ibid [125].
[161] ibid [97].

employing different strategies aimed at creating a system of international investment law. They proved successful in establishing an impressive body of case-law, which a number of tribunals treated as a binding body of law. Nevertheless, the extent to which one should follow *jurisprudence constante* varies from arbitrator to arbitrator, which leaves investors in a state of flux regarding which approach a tribunal will take. The following part analyses the role of general principles of law in reducing that uncertainty.

IV. Enforcing *jurisprudence constante* through the principle of legitimate expectations

At first glance, it seems surprising that an *ad hoc* tribunal's decision should have such an impact on third parties, especially when investment treaties are drafted as to avoid such effects. The reality, however, is different and displays numerous ways in which investors and states adopt their behaviour to seemingly unrelated decisions. Arbitral precedents have become a focal point, giving rise to certain expectations: investors, states, and arbitrators expect arbitral tribunals to decide future cases whilst showing consistency with earlier cases. In other words, those affected by investment arbitration base their expectations about how investment treaties will be applied by tribunals' previous decisions. They introduce these expectations into arbitral proceedings by actively citing previous arbitral decisions. Parties to investment arbitrations therefore expect that tribunals will embed their interpretation in the discursive framework created by earlier investment treaty awards. Arbitrators, in turn, react to such expectations by striving to render consistent decisions and to develop a *jurisprudence constante*, which, while permitting divergence, imposes an argumentative burden on those arbitral tribunals that want to diverge from precedent. The tribunal in *El Paso*, for example, considered it "a reasonable assumption that international arbitral tribunals … will generally take account of the precedents established by other arbitration organs."[162] This can be contrasted with the principle of

[162] *El Paso v The Republic of Argentine,* ICSID, Case No ARB/03/15 (31 October 2011) [220].

legitimate expectation in administrative law that obliges an authority to abide with the expectations it created for other parties.

The arbitrators' willingness to consider prior tribunals' decisions could be explained by the principle of legitimate expectations, which has been invoked repeatedly in international investment arbitration. Yet, despite it being "much in vogue," tribunals have been lenient in providing a systematic framework for legitimate expectations in the context of investment treaty arbitration.[163] The present part attempts to introduce *jurisprudence constante* into national regulatory frameworks, and thus provide investors with a legal basis for precluding arbitrators from rendering decisions that unreasonably deviate from *jurisprudence constante*.

To begin we need first to define the principle of legitimate expectations. It is usually described as "the entitlement of an individual to legal protection from harm caused by a public authority resulting from a previous publicly stated position, whether that be in the form of a formal decision or in the form of a representation."[164] Numerous academics have conducted analyses of this principle all around the world.[165] In some jurisdictions, such as Germany, the principle is quite straightforward. In other jurisdictions, such as England, the principle has been constantly debated. Furthermore, there are examples of countries that have been reluctant in embracing this concept. Nevertheless, after the European Union adopted legitimate expectations as one of the principles of EU law, member states have gradually adopted a uniform interpretation of it. Thus, one could at least argue in favour of an emerging principle of legitimate expectations.

In investment arbitration, the doctrine of legitimate expectations has been consistently acknowledged and has mostly enjoyed prominence under the fair and equitable treatment

[163] Michele Potestà, 'Legitimate expectations in investment treaty law: Understanding the roots and the limits of a controversial concept' [2013] ICSID Review 65.
[164] Chester Brown, ''The Protection of Legitimate Expectations as a ''General Principle of Law'': Some Preliminary Thoughts' (2009) 6(1) Transnational Dispute Management 2.
[165] ibid 26.

standard.[166] The first tribunal to clearly spell it out was the one in *Tecmed*, which construed the fair and equitable treatment clause as requiring the contracting parties to respect the basic expectations that were taken into account by foreign investors when making investments.[167] This award has been said to provide the most far-reaching exposition of the principle of legitimate expectations as applied to fair and equitable treatment in investment law.[168] Under subsequent jurisprudence, protection of legitimate expectations rapidly came to be considered as the "dominant element" of the fair and equitable treatment standard.[169] In fact, there is no tribunal on record that has contradicted this assumption.[170]

One use of this doctrine is when investors claim that their expectations were grounded in the general legislative and regulatory framework in force when they made their investment, which the host state later changed so as to frustrate such expectations. For example, the tribunal in *LG&E* found that, by violating or taking away the guarantees embodied in the relevant laws and regulations in the gas sector, Argentina frustrated the legal framework which attracted investors in the first place, thus violating the fair and equitable treatment standard.[171] The problem that a tribunal must resolve in such cases is to decide whether the legislation in question constituted a promise to investors whose unilateral modification

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[166] *El Paso* [227] ('According to this Tribunal, the violation of a legitimate expectation should rather be protected by the fair and equitable treatment standard').

[167] *Técnicas Medioambientales Tecmed, S.A. v. The United Mexican States*, ICSID Case No ARB (AF)/00/2 (29 May 2003) [154]. Before *Tecmed*, there were other tribunals that hinted in this direction. Specifically, in both *Metalclad* and *ADF*, the Tribunals seemed to proceed on the tacit assumption that a claimant is entitled to rely on the legitimate expectations doctrine under the fair and equitable treatment standard.

[168] *Bayindir Insaat Turizm Ticaret Ve Sanayi AS v Islamic Republic of Pakistan*, ICSID Case No ARB/03/29, Award (27 August 2009) [179] ('the Tecmed case lays out a broad conception of the FET standard').

[169] *Saluka Investments BV v The Czech Republic*, UNCITRAL, Partial Award (17 March 2006) [302].

[170] Schill (n 80).

[171] *LG&E International, Inc. v. Argentine Republic,* ICSID Case No. ARB/02/1 (3 October 2006) [125].

results in breaching their legitimate expectations.[172] This approach has usually been justified on the grounds that the fair and equitable treatment standard would entail an element of stability of the regulatory framework. Lately, this principle has been set to include not only regulatory acts, but also the conduct and promises made by governments.[173] In the earliest cases, tribunals have been willing to extrapolate the principle of legitimate expectations to the state's duty to maintain a stable framework, which, as argued below, might encompass the developing jurisprudence of investment law.[174] Often, this sub-element of the standard has been highlighted by reference to an IIT preamble, which usually refers to stability as one of its goals.[175] For example, the tribunal in *Occidental Exploration* referred to the preamble of the BIT in question to conclude that the stability of national legal frameworks is an essential part of fair and equitable treatment and that the state is under an obligation not to render it unreasonably.[176] As such, protecting the expectations arising from regulatory frameworks has evolved into an accepted subcategory of investors' rights. A state could then potentially violate its obligations towards an investor if it altered or transformed the legal business environment under which the investment was made.[177]

Taking this into consideration, it is not difficult to see how *jurisprudence constante* could be a part of national legal systems.

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[172] *Total v The Argentine Republic*, Decision on Objections to Jurisdiction, ICSID Case No ARB/04/01 (25 August 2006) [99].

[173] Paparinskis M, 'Franck Charles Arif v Republic of Moldova1 Courts Behaving Nicely and What to Do About It' (2016) ICSID Review 1.

[174] Brown (n 164).

[175] *Joseph Charles Lemire v. Ukraine*, Award, ICSID Case No ARB/06/18 (28 March 2011) [264] ('[w]ords used in treaties must be interpreted through their context. The context of Article II.3 is to be found in the Preamble of the BIT, in which the contracting parties state ''that fair and equitable treatment of investment is desirable in order to maintain a stable framework for investment...'' The FET standard is thus closely tied to the notion of legitimate expectations—actions or omissions by Ukraine are contrary to the FET standard if they frustrate legitimate and reasonable expectations on which the investor relied at the time when he made the investment').

[176] *Occidental Exploration and Production Company v. The Republic of Ecuador*, LCIA, Case No UN3467 (1 July 2004) [191].

[177] *CMS v Argentine Republic* (n 127) [274], [266].

Assuming that the tribunals' precedents form at least part of the international investment system, then as soon as a state enters into an investment agreement it should start taking into consideration the developments in that area of the law.

Thus, citations by ICSID tribunals to prior arbitral awards are evidence that investment law is in a state of self-institutionalisation. The system-building is especially highlighted by tribunals' concretisation of vague substantive standards, such as fair and equitable treatment. Originated as poorly defined concepts in BITs, investment tribunals developed a line of case-law which has become the preeminent source for obtaining direction concerning the interpretation and application of investor rights. Furthermore, because the normative content of investment treaties is strikingly similar, an *ad hoc* tribunal's decisions impact not only the investment treaty in question, but also every bilateral or multilateral investment treaty that includes similar clauses. Investment jurisprudence thus functions as a mechanism that influences investor-state relations worldwide, even though they only resolve one specific dispute at a time.

The effect of arbitral precedents on national regulatory framework can also be deduced from the reactions of states to investment treaty awards rendered under treaties to which they were not parties. For example, the uncertainty in the aftermath of the *Maffezini* award has forced states to amend their investor-state agreements. On the one hand, states which agreed with the tribunal have started to voice their agreements, or include interpretative footnotes, in line with its award.[178] In the 2010 UK-Colombia BIT, for example, the United Kingdom departed from its long-established standard practice and extended the MFN treatment to ISDS.[179] On the other hand, states that disagreed with the *Maffezini* award re-calibrated their investment treaties as to include "anti-Maffezini" clauses in them.[180]

[178] S Spears, 'The Quest For Policy Space In A New Generation of International Investment Agreements' (2010) 13(4) Journal of International Economic Law 1040.
[179] Titi Catharine, 'The Arbitrator as a Lawmaker: Jurisgenerative Processes in Investment Arbitration' (2013) 14 The Journal of World Investment & Trade 829.
[180] ibid 841.

Similarly, broad interpretations of fair and equitable treatment, or the concept of indirect expropriation, have led several States to introduce more restrictive wording of the respective provisions in recent investment agreements. Since arbitral jurisprudence created two rival doctrines of indirect expropriation – the police powers doctrine and the sole effect doctrine – there is a level of unpredictability around which approach a tribunal will take. Therefore, a number of states have amended their treaties as to clarify their position on the matter.[181] Indeed, tribunals themselves have encouraged states to amend their legislation to fit the new realities of investment regimes.[182] As highlighted by the *Total* tribunal, the 'powers' as well as the 'responsibility' that BIT signatories have are ''to amend their legislation in order to adapt it to change and the emerging needs and requests of their people in the normal exercise of their prerogatives and duties.''[183] Thus, by responding through remodelling treaty provisions, states unconsciously acknowledge the impact produced by *jurisprudence constante* on their national laws.

In comparison, investment treaty jurisprudence is not infrequently breached, nor are states precluded from adopting laws contradicting *jurisprudence constante*. The expectations created by prior investment tribunals' decisions, as seen in practice, have limits. Again, this does not necessarily run against the principle of legitimate expectations. Certain tribunals have stressed that, as a matter of principle, the state's right to regulate cannot be considered frozen or restricted as a result of the existence of investment treaties, or for that matter by arbitral jurisprudence.[184] In *Saluka*, one can find repeated statements to the effect that no investor may reasonably expect that the circumstances prevailing at the time the investment is made to remain totally unchanged.[185] The circumstances could

[181] ibid.
[182] *Total v Argentine* (n 172) [75].
[183] ibid [115].
[184] Potestà (n 163).
[185] *Saluka Investments v Czech Republic*, UNCITRAL, Partial Award (17 March 2006) [305], [351].

change due to the developing *jurisprudence constante*, as well as due to the state's domestic situation. In addition, the *Parkerings* tribunal required due diligence from the investor, who must understand that circumstances could change, and thus should manage investments accordingly.[186] The Tribunal in *Impregilo* has confirmed this and stated that the legitimate expectations of foreign investors must always include the possibility of a state changing its legal framework, albeit not unreasonably.[187]

Finally, *jurisprudence constante*'s role overlaps with the aim of the legitimate expectations principle, in ensuring a stable environment for business transactions. In *Enron*, the tribunal acknowledged that an important part of fair and equitable treatment is a stable framework for the investment coupled with the protection of legitimate expectations.[188] The tribunal continued by saying that the respondent made the investment in the reliance that the regulatory framework of the state will remain relatively unchanged. [189] By "dismantling" the regulatory framework, Argentina had failed to provide a stable framework as required by the BIT, thereby acting unfairly and inequitably.[190] The power of *jurisprudence constante* to promote consistency in investment law has been outlined in part III. It is sufficient to state that there is strong consensus on the beneficial effect of *jurisprudence constante* upon the coherence of ISDS. Therefore, in addition to being invoked as part of a state's legal framework, investors could argue that it is the arbitrator's duty to promote a stable framework by resorting to arbitral precedents.

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[186] *Parkerings-Compagniet AS v. Republic of Lithuania,* Award, ICSID, Case No ARB/05/8 (11 September 2007) [333].
[187] *Impregilo S.p.A. v. Argentine Republic*, Award, ICSID Case No ARB/07/17 (21 June 2011) [291].
[188] *Enron Corporation and Ponderosa Assets, L.P. v. Argentine Republic*, Award, ICSID Case No ARB/01/3 (22 May 2007) [260].
[189] ibid [265].
[190] ibid [251], [268].

(i) Conclusion

The principle of legitimate expectations has played a major role in investment treaty jurisprudence during the last decade. From being practically ignored in the early generation of investment awards, the doctrine became the dominant element of fair and equitable treatment. A more complex issue is determining whether the sub-system created by arbitrators forms part of that framework. This part advanced various arguments in favour of this premise, highlighting states' practices and the supporting role of *jurisprudence constante*. Nevertheless, using the principle in such circumstances is subject to strict limits, which is an inevitable consequence of resorting to subjective and flexible concepts.[191] Tribunals will no doubt continue to provide clear guidance on this issue.[192] However, it is evident that case-law has already gone a long way from an early utilisation of the concept of legitimate expectations as a rhetorical and potentially boundless catchphrase, towards a more coherent and rigorous application of the doctrine, which is wary of its limitations.

IV. Conclusion

Despite the increase of international investment arbitrations, investor-state relations are being governed by a myriad of IITs. This suggests a fragmented state of the law, with different interpretation of treaty clauses depending on the sources and targets of foreign investment flows. Surprisingly, we witness convergence rather than fragmentation. What is more surprising, is that coherence is not being developed by states but by investment arbitrators, which are by design precluded from giving any impact outside of the dispute brought to their tribunals. As noted by Marc Jacob, there are two

[191] Gaillard, Emmanuel, 'Centre international pour le règlement des différends relatifs aux investissements (CIRDI). Chronique des sentences arbitrales' (2009) 1 Journal du droit international 333.

[192] Henckels Caroline, 'Proportionality and the standard of review in fair and equitable treatment claims: balancing stability and consistency with the public interest' (3rd Biennial Global Conference, Singapore, May 2012).

recurring states of mind on the value of precedents: Mystics and Ostriches.[193] The former grandiloquently peddle maudlin views of the virtues of judge-made law, elevating precedents to articles of faith.[194] The latter stick their head in the sand and dismiss the system of precedent as an illness befalling only hopeless utopians.[195] There is, however, a third category of academics who acknowledge the phenomenon of cross-referencing between investment tribunals but do not attempt to 'legitimise' it through sources of international investment law.[196] Rather, they argue that *jurisprudence constante* is a self-explanatory phenomenon.[197]

If one feels the necessity to align this paper to a certain paradigm, then Stephen Schill's multilateralisation of investment law provides the best basis.[198] The real question is not whether investment tribunals create law, as understood by formalists, but to what extent they impact the parties to investment agreements. As posited, arbitral awards form a body of case-law which creates expectations for parties to IITs. Building on this premise, one could resort back to Article 38 (1) of the ICJ and argue that those expectations form part of national frameworks, which, if frustrated, could lead to breaches of general principles of law. All things considered, it is important to recall Paulson's advice and remember "the concluding words of the "Law Applicable by International Tribunals" in Manley Hudson's *International Tribunals: Past and Future*, written in 1944, which are certainly truer today, and perhaps less likely to be dismissed as an instance of hope triumphing over experience than they were in the bitter wake of global war: "… international tribunals applying the law which regulates the conduct of States can play an important role in world affairs. More than this,

[193] Marc Jacob, 'Precedents: Lawmaking Through International Adjudication' (2012) International Judicial Lawmaking 35-68.
[194] ibid 65.
[195] ibid.
[196] Jean D'Aspremont, 'International customary investment law: story of a paradox', in E de Brabandere and T Gazzini, *Sources Of Transnational Investment Law (*Martinus Nijhoff 2012) 2011.
[197] ibid 2014.
[198] Schill (n 80).

the judgments of such tribunals tend to become important sources for the development of international law.""[199]

[199] Jan Paulsson, 'International arbitration and the generation of legal norms: treaty arbitration and international law' (2006) 3 Transnational Dispute Management 3.

The principle of freedom of contract: are the courts too interventionist?

Scott Salisbury[200]

It has been argued that in recent years the courts have become too interventionist in implying terms into a contract and that therefore the principle of freedom of contract is now lost. Since *Attorney-General of Belize v Belize Telecom Ltd*, these claims have only become more vocal. This article aims to determine whether there is any weight to these claims. It concludes that while the nature of implied terms, both terms implied in fact and terms implied by law, does slightly contravene the principle of freedom of contract, the fact that the tests are only used when necessary, either to make the contract work or as a matter of reasonableness, means that the principle of freedom of contract is not completely lost and the courts have therefore not become too interventionist.

Implied terms are defined as "a provision of a contract not agreed to by the parties in words."[201] The two main classifications are terms implied in fact, "those which are imputed from the intentions of the parties,"[202] and terms implied in law, which act as "general default rules"[203] relating to all contracts of the same type. It may be argued that the courts use of implied terms is too interventionist and therefore that the principle of freedom of contract, based on the laissez-faire belief that the courts "should interfere as little as possible with the affairs of individuals,"[204] is lost. Indeed, while this view holds some weight, it is submitted that the rationale behind terms implied in fact – its attempt to give effect to the intentions of the parties – means that while freedom of contract is partially infringed, the courts have not become too intrusive and that freedom

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[201] Jonathan Law, The Oxford Dictionary of Law (7th edn, Market House Books Ltd) 273-274.
[202] Paul Richards, Law of Contract (11th edn, Pearson 2013) 151.
[203] *Equitable Life Assurance Society v Hyman* (2002) 1 AC 408 (UKHL) (Lord Steyn).
[204] Paul Richards, Law of Contract (11th edn, Pearson 2013) 5.

of contract remains a key principle in English law. With regards to terms implied in law, the fact that freedom of contract is only interfered with so as to guarantee sufficient rights and protections for both parties[205] means that the principle of freedom of contract is not completely lost and, similarly, the courts have not intruded too heavily with parties' abilities to make their own bargains.

To some extent it can prima facie be argued that the nature of implied terms inherently contradicts freedom of contract. If the contracting parties had wanted a specific term in the contract, then it is likely they would have put it in the contract themselves. Therefore, it is not for the courts to imply a term into the contract. Bingham MR recognised that "the implication of terms is so potentially intrusive,"[206] suggesting that by implying terms the courts are breaching the notion of freedom of contract.

Conversely, it can be argued that the rationale behind the court's decision to imply terms into a contract is compatible with the principle of freedom of contract. The courts themselves have acknowledged that the ability to imply terms into a contract must be "sparingly and cautiously used,"[207] suggesting that they recognise the risk of becoming too interventionist. A term will only be implied in fact if the term was necessary to make the contract work, known as the "business efficacy" test,[208] or if the suggested provision by an "officious bystander"[209] would be agreed to by both parties. The fact that the test is one of necessity[210] highlights the respect the courts hold for freedom of contract, emphasising that the principle is not lost. Indeed, Low and Loi argue that "gap-filling is quite simply

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[205] *Crossley v Faithful & Gould Holdings Ltd.* [2004] EWCA Civ 293, [2004] 4 All E.R. 447 [33]-[46].
[206] *Philips Electronique Grand Public SA and Another v British Sky Broadcasting Limited* [1995] EMLR 472 (CA (Civ Division)) [481] (Bingham MR).
[207] *Luxor (Eastbourne) Ltd (in liquidation) and Others v Cooper* [1941] 1 All ER 33 (HL) (Lord Wright).
[208] *The Moorcock* (1889)14 PD 64.
[209] *Shirlaw v Southern Foundries (1926) Ltd* [1939] 2 K.B. 206.
[210] *Mediterranean Salvage and Towage Ltd v Seamar Trading and Commerce Inc; The Reborn* [2009] EWCA Civ 531, [2009] All ER (D) 83.

essential for contracting to work,"[211] in that parties are unable to think of every possible eventuality. Therefore, the fact that the courts allow the contract to work through implied terms, something the parties obviously want, implies that freedom of contract is not lost and that the courts are not unnecessarily interfering with bargains. Ultimately, it is this view that holds the most weight. The rationale behind implied terms means that they do not inherently contradict freedom of contract.

Additionally, following the decision in *Attorney-General of Belize*[212] *(Belize)* the question the courts must ask is "whether such a provision would spell out in express words what the instrument, read against the relevant background, would reasonably be understood to mean."[213] It should be seen that this decision remains in chord with freedom of contract. As Stuart-Smith J argued, it still needs "to be satisfied that the term is necessary or is otherwise obviously what the parties have understood or intended,"[214] and Lord Hoffman himself emphasised that the court "cannot introduce terms to make [the contract] fairer or more reasonable."[215] The fact that any term implied by the courts will still be one that the parties intended (or would have agreed to) or necessary to make the contract work ultimately infers that freedom of contract is not lost by this development in the law. Certainly this argument is given greater weight by the fact that the original tests have not been overruled. As Hooley argues "perhaps nothing has really changed at all."[216] There remains a large assumption against implying terms into a contract,[217] ultimately implying that the courts are not too intrusive.

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[211] K. F. K. Low and K.C.F. Loi, 'The Many 'Tests' for Terms Implied in Fact: Welcome Clarity' (2009)125 L.Q.R. 561, 565.
[212] *Attorney General of Belize and Others v Belize Telecom Ltd and Another* [2009] UKPC 10, [2009] All ER 1127.
[213] ibid (Lord Hoffman).
[214] *SABIC UK Petrochemicals Ltd (formerly Huntsman Petrochemicals (UK) Ltd) v Punj Lloyd Ltd* (2013) EWHC 2916 (TCC), (2013) All ER D 137 (Oct) (Stuart-Smith J).
[215] *A-G of Belize* (n 212).
[216] Richard Hooley, 'Implied Terms After Belize Telecom' (2014) 73 CLJ 315, 343.
[217] *A-G of Belize* (n 212).

In contrast, it can be argued that the objective nature of the tests set out in *Belize* means that the courts are being overly interventionist. As Davies argued, the approach taken by Lord Hoffman "suggests that the subjective intentions of a party are now irrelevant,"[218] something which would go against the principle of freedom of contract. Indeed, this view appears valid. The officious bystander test, stated by MacKinnon LJ,[219] appeared to be based on the subjective intentions of the parties, as if they were to reply "what's that"[220] the term would not be implied. This appears to be a fair and logical test. However, in *Belize*, Hoffman confirmed that the officious bystander test was "another way of saying that, although the instrument does not expressly say so that is what a reasonable person would understand it to mean."[221] Davies' view that the approach is "dangerous"[222] is an accurate one, not only in the way it contravenes freedom of contract by failing to give effect to the contracting parties intentions but also in the way it potentially allows the court to "rewrite the parties bargain."[223] Some critics would defend the decision by arguing that "the implication of terms into a contract is…a question of construction like any other,"[224] and therefore should be treated in the same way as an interpretation of contractual terms, thus suggesting that the courts are not excessively interventionist. However, this line of reasoning is arguably not valid. Indeed, the implication of terms is entirely more intrusive and therefore, as Kramer argues, "the test for implying wholly new terms into a contract…should be stricter,"[225] requiring a subjective approach. Consequently, it is submitted that the view that the courts

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[218] P.S. Davies, 'Recent Developments in the Law of Implied Terms' (2010) L.M.C.L.Q. 140, 144.
[219] *Southern Foundries (1926) Ltd and Federated Foundries Ltd v Shirlaw* [1940] 2 All ER 445 (HL) (MacKinnon LJ).
[220] *Spring v National Amalgamated Stevedores and Dockers Society* (1956) 2 All ER 221.
[221] *A-G of Belize* (n 212).
[222] Davies (n 218).
[223] *Luxor* (n 207).
[224] Lord Hoffman, 'Anthropomorphic Justice: The Reasonable Man and his Friends' (1995) 29 Law Teacher 127, 138-140.
[225] Hooley (n 216).

have become too interventionist following the decision in *Belize* is more accurate.

Furthermore, ultimately the implication of terms in fact produces no binding precedent, and therefore instead "the courts are only concerned about arriving at a just and fair result."[226] This suggests that the courts are not implying terms in an irresponsible manner. On the contrary, it can be argued that terms implied in law, with their binding nature to all relationships of that type, as highlighted by Lord Denning,[227] are too interventionist. Therefore, it can be argued that the implication of terms in law means that the principle of freedom of contract has been diluted. In *Liverpool City Council v Irwin*[228] it was decided that a term should be implied in law requiring the council to reasonably maintain the property, as a matter of fairness and justice. A term in fact could not be implied as it was not necessary to make the contract work,[229] and the council would not have agreed to it. Such a line of reasoning might provide an indication that pure contractual freedom is no more. Indeed, this view holds some weight, as it is not for the courts to rewrite the contract for the parties. On the other hand, it can be argued that whilst going against the principle of freedom of contract, the courts are not being too interventionist. By implying terms in law, the courts are simply guaranteeing a minimum standard and therefore this can be seen as a logical and fair decision. Lord Denning argued that "the freedom [of contract] was all on the side of the big concern…No freedom for the little man,"[230] emphasising that the court's decision to protect the interests of the side with less bargaining power does not represent the court being too interventionist. The fact that statutes, such as the Sale and Supply of Goods Act 1994,[231] have taken a similar step to offer a reasonable expectation for both parties adds further weight to this argument.

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[226] *Forefront Medical Technology (Pte) Ltd v Modern-Pak Pte Ltd* (2006) 1 SLR 927, (2006) SGHC 3.
[227] *Shell UK Ltd v Lostock Garages Ltd* (1977) 1 All ER 481 (Lord Denning MR).
[228] (1977) AC 239.
[229] *The Moorcock* (1889) 14 PD 64.
[230] *George Mitchell (Chesterhall) Ltd v Finney Lock Seeds Ltd* [1983] 2 All ER 737 (HL) (Lord Denning).
[231] Sale and Supply of Goods Act 1994, s (1)(1)(2).

Freedom of contract implies equality of bargaining power. However, this is not always the case. Therefore, the fact that the courts at times contradict this fundamental principle of contract law by implying terms in law in order to protect the side with less bargaining power, cannot be deemed as an affront to contractual freedom.

Overall, while the law on implied terms does slightly contradict freedom of contract, the principle is not completely lost. The strict requirement of necessity and the fact that the courts give effect to the parties' intentions for terms implied in fact ultimately highlights the courts' respect for the principle of freedom of contract and suggests that they are not too interventionist. With regards to terms implied in law, while they do heavily infringe on freedom of contract, the rationale behind them, namely the protection of parties' rights, emphasises that the courts are not interfering too heavily. Indeed, it is submitted that the courts have struck the right balance.

Should isolated human genes be patentable subject matter?

Wing Yin Chan[232]

The aim of this paper is to discuss how isolated human genes are currently regulated in various patent systems, whether they should be patentable in the first place, and the effects of them currently being patentable subject matter. Based on a review of literature, several recommendations are made as to how patent systems can potentially alleviate its present adverse effects as a monopolistic device. It is also necessary to investigate jurisdictional approaches as the legal perimeters will offer insight as to what stakeholder interests are being taken into account and prioritised. The UK, EU, USA and India approaches will be examined due to their differences in economic development and attitudes towards biopatents. In the analysis of why isolated human genes is so controversial, arguments involving legal, moral, social and economic factors held by stakeholders will be identified. The current patent systems will then be discussed with regards to whether they offer enough safeguarding and structure to adequately balance the interests of stakeholders. To achieve scientific progress and mitigate the social backlash against gene patents, it is posited that there be improvements and reforms to the system that mitigates some of the observed adverse effects on follow-on gene research.

I. Introduction

Biotechnology is one of the steadiest growing industries worldwide, achieving an average annual growth rate of 10.8% between 2009 and 2014.[233] The industry's immense impact on global healthcare has propelled it to be one of the most important industries in science. Patents are the industry's method of sustenance, and any legal

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[233] IBISWorld, 'Global Biotechnology: Market Research Report' *IBISWorld* (January 2015) <http://www.ibisworld.com/industry/global/global-biotechnology.html> accessed 12 April 2015.

developments will have a direct impact on the landscape of scientific knowledge and global healthcare – in particular, biopatents on genetic material. As every individual is a product of their genes, the legal development of biopatents on genetic material has been under scrutiny ever since the Human Genome Project.[234]

In this research paper, the relevant stakeholders and their concerns will be identified, the current legal approaches of the European Union ('EU'), United Kingdom ('UK'), United States of America ('USA') and India will be discussed, and the motives underlying their approaches will be considered. The objections against isolated human genes being a patentable subject matter will then be set out, in the context of legal, social, ethical and economic rationales, contrasting those with the justifications for them being patentable. There will be an investigation on the impact of isolated human genes being a patentable subject matter. By balancing the interests of stakeholders and rationales, this paper will arrive at the conclusion that isolated human genes should be patentable, but only if certain conditions and parameters are satisfied. If isolated human genes should be a patentable subject matter, there should be improvements or reforms to the existing patent system, to counteract the negative impact it presently wields.

II. Definitions and parameters

The definition of 'isolated human genes' used in this research paper will mean:

- Isolated nucleic acid molecules whose sequences correspond to human genes, intergenic DNA (DNA located between genes), or mutations that occur in the

[234] NIH, 'Intellectual Property and Genometrics' (National Human Genome Research Institute, 30 October 2014) <http://www.genome.gov/19016590> accessed 21 April 2015.

human body[235] (e.g. disease-related genes for diagnosis or antisense, siRNA molecules for therapy);[236] and

- Modified isolated human gene sequences (a sequence that has been altered in some way from its naturally occurring counterpart, such as a sequence altered to code for an altered protein with improved properties from the original).[237]

References to 'gene patents' or other similar expressions may also refer to:

- Methods of detecting particular sequences or mutations;[238] and
- Primers, probes, and other nucleic acid molecules useful for the detection of a particular gene, mutation, or sequence of importance.'[239]

The definition of 'patents' will involve both upstream patents (regarding genetic research)[240] and downstream patents (regarding the development of commercial products from the research),[241] unless otherwise specified.

[235] Department of Health & Human Services USA, 'Gene Patents and Licensing Practices and Their Impact on Patient Access to Genetic Tests' (Report of the Secretary's Advisory Committee on Genetics, Health, and Society) (April 2010) 15.
[236] European Patent Office, 'Patents on biotechnology European law and Practice' (brochure) (2014).
[237] The Centre for International Economics, 'Economic Analysis of the Impact of Isolated Human Gene Patents' (Final report) (May 2013) 24.
[238] Department of Health (n 235) 15.
[239] ibid.
[240] Australian Law Reform Commission, '18. Patents and the Biotech Industry: Upstream and Downstream Issues' (ALRC Report 99) <http://www.alrc.gov.au/publications/18-patents-and-biotechnology-industry/upstream-and-downstream-issues> accessed 18 March 2015.
[241] ibid.

The 'usage of gene patents' or other similar expressions may refer to diagnostic tests, research tools, gene therapy, or therapeutic problems.[242]

III. The concerns of stakeholders

To answer the premise of this research paper, it will be necessary to assess stakeholders' concerns, and subsequently to discuss how a moderate balance can be achieved between the spectrums.

Everyone is a stakeholder when human genes are involved. For the sake of comprehensibility, the stakeholders can be categorised into several (potentially overlapping) main groups.

The first group represents commercial interests and the business incentive for innovation or development; it includes patent owners, future patent owners, biotechnology organisations and investors. Patent-owners are concerned with maintaining the monopolistic benefits of their patents.[243] All those in this category will strive for recuperation for the capital costs in research development;[244] those with a more entrepreneurial bent will also aim for revenue generated by the patents.

The second group consists of researchers and research organisations. These stakeholders have been quoted to have concerns over the broad scope of patents granted over genetic material and technologies,[245] the granting of patents when there is a lack of inventiveness,[246] and the restriction of access to knowledge and technology.[247] These factors will affect the instigation and growth of research projects, and the wider backdrop of scientific progress.

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[242] Nuffield Council on Bioethics, 'The Ethics of Patenting DNA' (Discussion paper) (July 2002).
[243] ibid. [2.6].
[244] ibid. [2.3], [2.6].
[245] Australian Law Reform (n 240) [3.27].
[246] ibid.
[247] ibid [3.28].

The third group can be categorised as 'intermediates,' comprising of medical practitioners and health care systems. Intermediates are similarly worried about patent-holders and licensees abusing their monopolistic positions through charging high prices and limiting alternatives, resulting in restricted access to quality medical genetic tests[248] and therapies, undermining their ability to provide quality health care services. Costs may be further driven up by having to negotiate multiple licenses when there are overlaps of gene patents.[249]

The fourth group are 'end users,' comprising of patients, future patients and society. End users echo the opinions of intermediates, with concerns over patent-owners charging a super-competitive price, and having exclusive licensing practices that restrict access and quality to medical genetic testing and therapies, to the detriment of public health.[250]

The fifth and final group are governments and legislatures; they are responsible for balancing the interests of all the other categories, when making decisions about whether to grant statutory monopolies on genes. Governments who oversee national health care systems will have to ensure that intermediates and end users have access to affordable medical genetic products and technologies.

IV. Jurisdictional approaches

In studying how legislatures of various jurisdictions have handled genetic material in their patent systems, we can contemplate how they have balanced the interests of stakeholders and what has influenced the scale that they have established. The jurisdictions examined are a mixture of developed and developing nations; the contrast in their approaches to human gene patents demonstrates the objectives between the two dichotomies.

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[248] ibid.
[249] ibid.
[250] ibid.

(i) The EU approach

Under EU law, Directive 98/44/EC[251] Article 5(1) prohibits the simple discovery of the whole or part of a gene sequence as being patentable subject matter. This is mirrored in the European Patent Convention 2000 ('EPC') – the founding multilateral treaty of the European Patent Office and European patents, [252] involving signatories that are outside of the EU, such as Turkey and Switzerland.[253] EPC Rule 29(1) states that natural forms of gene sequences that have not undergone any sort of human intervention are not regarded as patentable inventions.[254]

Despite discoveries themselves not being patentable, EPC Rule 52(2)(a) will permit a discovery to be reviewed as a patentable invention, if "the inventor provides a description of the technical problem they are intended to solve and a technical teaching."[255]

Directive 98/44/EC Article 3(2) allows for biological material that is found in nature to be patentable, qualified on the fact that it has to have been "isolated from its natural environment or been produced through a technical process." Article 5(2) further stipulates that the biological material mentioned in Article 3(2) includes a whole or partial gene sequence, and that these gene sequences may be considered patentable inventions even if its structure is unchanged from its natural form. These principles are reiterated in the EPC Rules 27(a) and 29(2). The significance is that isolated human gene sequences can be patentable, despite having few or no structural differences between their natural form and isolated form.

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[251] Directive 98/44/EC of the European Parliament and of the Council of 6 July 1998 on the legal protection of biotechnological inventions [1998] OJ L 213/13.
[252] EPO, 'The European Patent Convention' (European Patent Office, 30 March 2015) <http://www.epo.org/law-practice/legal-texts/epc.html> accessed 21 April 2015.
[253] The Chartered Institute of Patent Attorneys, 'European patent law proposals' (The Chartered Institution of Patent Attorneys, 6 December 2011) <http://www.cipa.org.uk/pages/EuropeanPatentLawProposals> accessed 21 April 2015.
[254] European Patent Convention 2000 (n 252).
[255] ibid.

The above is qualified and extended by Directive 98/44/EC Article 9, where "the protection conferred by a patent on a product containing or consisting of genetic information shall extend to all material, save as provided in Article 5(1), in which the product is incorporated and in which the genetic information is contained and performs its function."[256]

The application of Article 9 was exemplified in *Monsanto v Cefetra,*[257] where Monsanto owned the patent to the herbicide Roundup, and wanted to patent their genetically modified plant Roundup Ready, that was engineered to be resistant to Roundup. Roundup Ready contained the genes of Roundup but it was in a non-functional form. The Court of Justice of the European Union (CJEU) applied Article 9 and found that in order for the invention containing the isolated DNA to be patentable, the isolated DNA must perform its function in the invention. Once the function has ceased to be performed, the patent protection extending to the invention ceases to exist.

(ii) The UK approach

The UK patent regime follows and is bound by EU directives and, as the UK is a signatory of the EPC, the legal principles in paragraph 4.1 would apply. In its domestic legislation, the Patents Act 1977 ('PA 1977') Schedule A2 section 3(a) parallels Directive 98/44/EC Article 5(1) and the EPC Rule 29(1), where mere discovery of the whole or part of a gene sequence is not patentable subject matter. PA 1977 Schedule A2 section 2 parallels Directive 98/44/EC Article 5(2) and the EPC Rules 27(a) and 29(2), in allowing for biological material occurring in nature, including genetic material, to be patentable when they are isolated from its natural environment or produced though a technical process. PA 1977 Schedule A2 section 9 was enacted to reflect Directive 98/44/EC Article 9.

[256] Directive 99/44/EC (n 251) Article 9.
[257] Case C-428/08 *Monsanto Technology LLC v Cefetra BV, Cefetra Feed Service BV, Cefetra Futures BV, Alfred C* [2011] Bus. L.R. 1498.

(iii) The USA approach

Under the US Patent Act 1952 (35 U.S.C.), there is a requirement of novelty (§102), patentable inventions (§101) and non-obviousness (§103) for patent applications. §101 states that:

"Whoever invents or discovers any new and useful process, machine, manufacture, or composition of matter, or any new and useful improvement [...] may obtain a patent."[258]

The interpretation for §101 was considered in *Diamond v. Chakrabarty,* [259] on the issue of whether genetically modified organisms that can survive in crude oil were patentable. The US Supreme Court allowed for the patent to be granted because the organism did not occur in nature,[260] stating that there should be a broad interpretation of §101. [261] Following *Diamond v. Chakrabarty*, isolated human genes would be patentable because isolated gene sequences do not occur in nature.

However, in the more recent case of *Association for Molecular Pathology, et al. v. Myriad Genetics, Inc., et al.*[262] (*'AMP v Myriad'*), regarding the breast cancer genes BRCA1 and BRCA2, there has been a modification of judicial approach towards whether isolated gene sequences are patentable inventions. The Supreme Court held that isolated DNA is not patentable, on the basis that its function was the same as its natural state in a gene sequence, and the genetic information it encoded was identical to what it would encode in its original state, therefore rendering an isolated DNA sequence to be a 'product of nature.' Despite the structural differences, the indistinguishable functionality in both its form and

[258] U.S. Patent Act of 1952 (35 U.S.C.) §101.
[259] *Diamond v. Chakrabarty* 447 U.S. 303 (1980).
[260] ibid [305].
[261] ibid [316]-[317].
[262] *Association for Molecular Pathology, et al. v. Myriad Genetics, Inc., et al* 569 U. S. ____ (2013).

expressions meant that mere isolation is not considered to be transformed by human efforts.

In the judgment, Myriad's claim that the severance of chemical bonds in creating the isolated DNA did not occur in nature was negated by the fact that, in their patent application, they had focused on the genetic information the genes encoded, [263] demonstrating that the focal point and value of the patent was not in the sequence's chemical or structural difference.

On the other hand, cDNA was held to be patentable because the court found that exons-only DNA sequences did not occur in nature, and were only created when the lab technician removed the introns from the original gene sequence, rendering it not a 'product of nature' (the 'product of nature' doctrine states that discovery of a natural phenomenon is not patentable as it is not an invention).[264] Human genes that are merely separated from their original gene sequence are not patentable, and will only become patentable when there is an element of human intervention after the isolation process.

(iv) The EU/UK approach compared with the USA approach

Compared to the EU/UK approach, the USA approach is both broader and narrower in its attitude towards the patentability of isolated genes.[265]

In terms of the patentability of isolated human genes, the USA approach is more stringent than the EU/UK approach. Directive 98/44/EC Articles 5 and 3(2) enable genes to be patentable even if identical to their original state after isolation. *AMP v Myriad* rejects this approach, and requires isolated gene sequences having an altered functionality or enough subsequent human interference not to be deemed naturally occurring.

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[263] ibid.

[264] John M Coney, 'Gene Patents and the Product of Nature Doctrine' [2009] 84 Chi.-Kent. L. Rev. 109, 113.

[265] Matthias Lamping and Roberto Romandini, 'Are Human Genes Patentable?' (IPKat Blog, 15 June 2013) < http://ipkitten.blogspot.co.uk/2013/06/are-human-genes-patentable.html> accessed 2 March 2015.

By contrast, the EU/UK approach is more restrictive in terms of extending patent protection to all materials containing a patented gene. Both DNA and cDNA will be subject to the purpose-bound approach in Directive 98/44/EC Article 9 (and adopted by *Monsanto v Cefetra),*[266] limiting the patent protection of an isolated human gene to the functionality claimed in its patent claim,[267] whereas the USA approach imposes no such limitations, except for inventions to satisfy a rarely mentioned (and easily satisfied) utility requirement derived from the term 'useful' in §101.[268]

The USA's current change in judicial approach may be a reflection of the fact that its federal government is the largest funder of upstream genetic research.[269] The dominance of the public sector means that most of the upstream field is not necessarily commercially motivated, generating less of a need and priority for upstream patents. The stringent approach outlines a higher degree of control over the private sector in upstream genetic research. It serves to deplete upstream patents that cover basic genetic research and sequences, inducing private sector firms to develop more sophisticated inventions in order to obtain a patent, minimising the creation of bottle-neck situations for downstream patents.[270] There are relatively fewer restrictions on downstream patents to encourage commercial innovation based on mostly state-controlled upstream patents. This model may be able to better regulate genetic research to protect the interests of researchers, intermediates and end users.

(v) The India approach

Likewise, with the EU/UK and USA approach, India's patent regime prohibits mere discoveries to be patentable inventions under the Patents Act 1970 ('PA 1970') section 3(c). PA 1970 section 3(i)

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[266] Case C-428/08 [2011] Bus. L.R. 1498.
[267] Lamping (n 265).
[268] Coney (n 264).
[269] Department of Health (n 235) 2.
[270] Andrew S. Roberson, 'The Role of DNA Patents in Genetic Test Innovation and Access' [2001] 9 Nw. J. Tech. & Intell. Prop 377, 399.

prohibits any process or products that involve the medicinal, surgical, curative, prophylactic or other treatment of human beings to increase their economic value to be unpatentable as inventions. Based on this legislation, isolated human genes will not be patentable subject matter.

Nevertheless, prior to the 2013 Guidelines,[271] there was a lack of supervision and consistency from the Indian Patent Office, resulting in patents claims that contained phrases like 'or a substantially similar sequence' or '75% similarity,' phrases which broadened the scope of the patent beyond what is ordinarily allowed.[272] Gene patent applications were granted contrary to the PA 1970, as isolated gene sequences and diagnostic methods using gene markers were accepted as patentable subject matter.[273]

The 2013 Guidelines elucidated that "the discovery of any living thing occurring in nature is not a patentable invention,"[274] including products such as "nucleic acid sequences, proteins, enzymes, compounds etc. that were directly isolated from nature," [275] complementing the USA approach towards isolated DNA.

The requirement for utility and industrial application by the PA 1970 runs parallel with both the EU/UK and USA approach. Under the India approach, an invention "must be useful and capable of industrial application to be patentable." [276] As per Directive 98/44/EC Article 5(3), there is a requirement for the industrial application of the gene sequence to be disclosed in the patent application. Article 5(3) relates back to Article 9 and *Monsanto v*

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[271] Office of the Controller General of Patents, Designs and Trade Marks, Government of India, 'Guidelines for Examination of Biotechnology Applications for Patent' (March 2013) < http://ipindia.gov.in/whats_new/biotech_Guidelines_25March2013.pdf> accessed 16 April 2015.
[272] Bhavishyavani Ravi, 'Gene Patents in India: Gauging Policy by an Analysis of the Grants made by the Indian Patent Office' [2013] 18 J. Intell. Prop. R 323, 327-328.
[273] ibid.
[274] Office of the Controller General of Patents, Designs and Trade Marks, 'Guidelines for Examination of Biotechnology Applications for Patent' (March 2013) 11.
[275] ibid.
[276] ibid 10.

Cefetra, in that the industrial application has to involve the functionality of the gene sequence, with the gene being able to perform the claimed function in the invention, in order for the invention to be under patent protection. Similarly, pursuant to PA 1970 section 2(1)(c), an invention must be "capable of industrial application." Section 64(1)(g) is akin to the USA's utility requirement, stating that if an invention is not useful, its patent application can be revoked. As with the EU approach, the patent claim should include the functionality of the gene, and the identification of any practical means of utilising that functionality.[277]

For developing countries like India, patent laws are intricately linked to economic needs.[278] Prior to its entry into the WTO in 1995, India was the key exporter of quality low-cost generic pharmaceutical products to countries with tighter pharmaceutical standards.[279] When joining the WTO meant that national patent laws had to comply with TRIPS, India seized the opportunity to strengthen protection towards the generic drug industry, [280] promoting better access to medicine locally and internationally. When compared to other jurisdictional approaches, India's approach possesses USA's stricter definition of patentable subject matter, and EU's purpose-bound approach with a somewhat relaxed definition of functionality. By building a patent regime that makes it relatively difficult to obtain patents for more simplistic inventions (like isolated human genes and active ingredients for medicines), generic drugs are allowed to be produced and exported, encouraging growth of India's biotechnology industry by sheltering it from the clutches of international pharmaceutical firms. This objective is illustrated by the PA 1970 section 3(d), where the section's intention is to impede the 'evergreening' of pharmaceutical products.[281]

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[277] ibid 11.
[278] Sunder, 'Novartis v Myriad: the Indian and US supreme courts on patents and public health' [2013] 35 EIPR 711, 713.
[279] ibid.
[280] ibid 714.
[281] ibid.

V. Issues with the patentability of isolated human genes

Jurisdictions have been under great scrutiny when establishing and implementing how their patent law regimes handle human genes patent claims. Human genes are particularly problematic amongst biotechnology research due to the interactions of three main reasons:

(a) Their dual nature as tangible matter and the intangible material that they hold;
(b) Their characteristic of being the fundamental building block of human beings, raising fears that human gene patents will give rise to ownership and control of a part of every human;[282] and
(c) The fact that patents grant monopolies.

To form a supposition on whether isolated human genes should be patentable, these three points will have to be considered in light of the social, ethical and economic arguments surrounding their patentability.

(i) The tangible and intangible dichotomy

Myriad addresses the patentability of the tangible part of human genes, claiming that they are patentable on the basis that the isolated form is physically and chemically different from their natural form.[283] They were ruled not to be patentable due to them being 'products of nature,' which begs the question of why other isolated chemicals in the human body, like adrenaline,[284] have not been deemed 'products of nature?' Human genes are distinguished from other chemicals in the human body because they consist of both tangible and intangible subject matter.

[282] Roberson (n 270) 381.
[283] *AMP v. Myriad* (n 262).
[284] *Parke-Davis & Co v HK Mulford Co.* 189 F Supp 95 (SD NY 1911).

Myriad's claim fails on the account that all who seek to patent human genes, would aim to patent the intangible part of a gene – the genetic information it encodes – rather than its chemical structure,[285] as it is the intangible aspect that is truly valuable. The intangible part of a gene – the nucleotide sequence that is expressed to formulate amino acids and proteins – is unique, and this uniqueness was not invented by anyone.[286] It is contended that there is no novelty here, leaving it to be a discovery rather than a patentable invention.

(ii) Human rights to the human gene

Human genes are unique to humans: they are the fundamental component of human beings and shape the identity of people, defining life as *homo sapiens* and as an individual. In view of this, patenting human genes for commercial profit can be akin to undermining human dignity.[287] To counterbalance these two interests, Directive 98/44/EC preamble recital 16, states that one of the aims of the directive is to protect human dignity against commercial interests:

"Whereas patent law must be applied so as to respect the fundamental principles safeguarding the dignity and integrity of the person."[288]

Furthermore, there are concerns that human gene patents reduce human beings into products, thereby eroding away respect for individual autonomy.[289] An element of human autonomy is the

[285] *AMP v. Myriad* (n 262) 15.
[286] Nuffield Council on Bioethics (n 242) [3.9].
[287] Amanda Pitcher, 'Comment: Contrary to First Impression, Genes Are Patentable Should There Be Limitations' (2002-2003) 6 J. Health Care L. & Pol'y 284, 299.
[288] Directive 98/44/EC (n 251).
[289] Australian Law Reform Commission, '3. Gene Patents: Social and Ethical Dimensions' (ALRC Report 99) <http://www.alrc.gov.au/publications/3-gene-patents/social-and-ethical-dimensions> accessed 18 March 2015.

right to privacy; this privacy consists of having 'limited access' to the individual[290] in the physical, emotional and intellectual sense. Privacy is lost when there is interference to that 'limited access,'[291] exemplified in the patenting of human body parts. However, if by the definition that "interference to the 'limited access' equates to a loss of privacy rights," then any interference, including interference for pure scientific advancement would fall under this definition. It is submitted that the definition is overly strict, and the right should be qualified on the balance of merits, as arguably no scientific advancement would lead to a worse state for humanity. By not breaching such privacy rights under any circumstances, there would be limited access to the public pool of human intellectual capacity.

(iii) Common heritage

Our genes are the common heritage of the human race, to the extent that they can be regarded as a public good. Gene patents not only affect the welfare of present and future generations, but they also correspond to our heritage from past generations. In the field of archaeology, there has been the question of rights regarding DNA extracted from ancient human artefacts.[292]

Following on from the definition of privacy rights inclusive of human autonomy, patenting of human genes would equate to a violation of humankind's collective privacy.[293] To avert the breach of collective privacy, the abolishment and prohibition of human gene patents may lead to absolute secrecy of genetic research, limiting the world's access to the knowledge of our own genes, which is arguably a way of separating ourselves from our own heritage.

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[290] Barbara Looney, 'Should genes be patented? The gene patenting controversy: Legal, ethical and policy foundations of an international agreement' (1994-1995) 26 Law & Pol'y Int'l Bus. 231, 238.
[291] ibid.
[292] Lisa M. Elliott, 'Property rights of ancient DNA: the impact of cultural importance on the ownership of genetic information' [2009] 16 IJCP 101-129.
[293] Looney (n 290) 239.

Instead of assigning commercial ownership rights to certain individuals, some scholars have argued for the human genome to be left in the public domain,[294] with humankind exercising collective autonomy and ownership enabling the knowledge to be free for all.[295] However, this does not solve the issue: open source research will still amount to a violation of humankind's collective privacy.

With human genes being a common heritage, it is arguable that any legal approach would have to abide by, and be heavily scrutinised by, the public's standard of morality. The patent systems of many jurisdictions have a public morality rule that accommodates these standards: they usually prohibit not the invention itself, but regulate the commercial exploitation of the invention.[296] An example of this is Directive 98/44/EC Article 6(1), which is mirrored in EPC Rule 53(a) and the PA 1977 section 1(3).

In the EU patent regime, there are two standards of morality that can be applied: the 'abhorrence' standard (invention is "so abhorrent that the grant of patent rights would be inconceivable") and the 'unacceptability' standard (the immoral aspect outbalances the moral aspect).[297] The 'abhorrence' standard tends to be applied to patents regarding humans. However, this is not a guarantee and hinges on the court's discretion, as there are no guidelines stating which circumstances necessitate the 'abhorrence' or 'unacceptability' standard, no sound reason for distinguishing between the two standards, nor are there criteria in applying the standards.[298]

Despite human genes being a common heritage, the fact remains that there is no 'model' human genome as everyone has a variance of Single Nucleotide Polymorphisms.[299] Humans share most of our DNA with other humans, yet we also share 98.5% of

[294] ibid 238-239.
[295] ibid.
[296] Yan Min, 'Morality - an equivocal area in the patent system' [2012] 34 EIPR 261, 262.
[297] ibid 264.
[298] ibid.
[299] Elliott (n 292) 109.

our DNA with chimpanzees.[300] The significance is that only 1.5% of what we consider as 'human genome' is actually unique to humans.[301] Both of these factors elicit doubts on the characterisation of human genes being humankind's common heritage.

(iv) Reward theory vs commoditisation of humans

The cornerstone of the patent system lies on the reward theory[302] proposed by John Stuart Mill, whereby inventors are rewarded with patents for their innovations. These patents then grant them the rights of monopoly to exclude others from their inventions. Without the reward of patents, there is the fear that inventors will be spending their time and efforts replicating successful designs, rather than using their innovations to explore new alternatives or improvements.[303] It has been shown that patents improve the likelihood of the successful commercialisation of a research subject.[304] Patents have become more than rewards for inventors' innovations; they are commercial assets that can directly and indirectly produce economic benefits, through generating royalties, reducing production costs, easing up the raising of capital, and creating a market advantage for the patent-owner.[305] The market advantage derives from a monopoly's nature in constructing barriers of entry against competitors and leveraging power.[306]

A major criticism of the reward theory in regards to human genes is the association of property rights to human genes, fashioning the commoditisation of human beings. There is the worry that individuals will be violating patents when they donate gene samples, yet the catch is that samples used in genetic research are

[300] ibid.
[301] ibid.
[302] John Stuart Mill, *Utilitarianism* (University of Chicago Press 1906).
[303] Pitcher (n 287) 286.
[304] The Center for International Economics (n 237) 99.
[305] ibid 107.
[306] ibid.

reliant on voluntary donations.[307] It has been suggested that gene patents should be awarded the condition of compulsory licensing for everyone, where the government regulates the mechanism and sets a reasonable fee.[308] With the volume of genetic research and patents in existence, such a mechanism will be unfeasible to implement considering the scale and amount that needs to be paid by all, not to mention the administration costs and time required to operate.

Treating parts of the human body as commodities should not be stretched to being essentially the same as treating humans as commodities.[309] Insulin,[310] Adrenaline[311] and other chemicals found in the human body have been commercialised, yet this was not regarded as a commoditisation of human beings. It has been argued that human genes are an anomaly because they have both tangible and intangible elements of expressing genetic material which determine a person's build. Following on from that, a patent over an intangible element can be perceived as undermining autonomy. Besides privacy rights, another aspect of autonomy is self-ownership. Scholars have disputed that patent rights are not the same as physical property rights: rights are granted over inventions that consist of (non-exhaustively) the isolation, analysing and manipulating of gene sequences, not the physical property rights over the whole or part of a human body.[312] Therefore, patenting human genes will not garter control over one's body or autonomy.[313]

Alternatively, there is the contention that genes should not be patentable for the same reasons that the sale of human organs is illegal.[314] Whilst they are both important fragments of the human body, they are distinguishable because the sale of human organs

[307] Pitcher (n 287) 299.
[308] ibid 300.
[309] Australian Law Reform Commission (n 289).
[310] NobelMedia AB, 'The Discovery of Insulin' (Nobelprize.org, February 2009) <http://www.nobelprize.org/educational/medicine/insulin/discovery-insulin.html> accessed 15 April 2015.
[311] *Parke-Davis & Co v HK Mulford Co.* 189 F Supp 95 (SD NY 1911).
[312] Australian Law Reform Commission (n 289).
[313] ibid.
[314] M Scott McBride, 'Patentability of Human Genes' [2001] 85 Marq. Law. Rev. 511, 530.

requires the deprivation of an organ from a donor, whereas the patenting of human genes does not require such a sacrifice, since a single cell has enough genes upon which to be manipulated.[315] With the minute quantities required for genetic research, there is simply no market for human genes as there is for human organs.[316]

(v) Economic justifications

The reward theory may be the basis for the patent system, but in spite of this, many researchers are not in the field for commercial interests. [317] Their interests may lie in the advancement of knowledge or bringing about a contribution to society. Patents are not the sole mechanism that can incentivise innovation; other means such as publications, reputational gains and social welfare can incentivise researchers and their willingness to make their research open source.[318] The harsh reality is that these incentives do not attract investors; thus, patents arguably have greater prominence.

The prospect of patents generates capital investment into research and development externally and internally. Abolishing gene patents will lead to a lack of funding, causing a lack of research and advancement in the field of genetics,[319] resulting in a long-term detriment to all categories of stakeholders. The prospect of patents also generates incentives for inventors to disclose their inventions. Public disclosure that fulfils the disclosure (contains an accurate description of the claim) and enablement (sufficient disclosure that a skilled person is able to perform it) requirement will enable other researchers to build on that research,[320] benefiting all stakeholders as the sharing of information hastens scientific development.[321]

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[315] ibid.
[316] ibid.
[317] Nuffield Council on Bioethics (n 242) [2.8].
[318] Department of Health (n 235) 90.
[319] ibid 23-25.
[320] ibid 26.
[321] ibid.

Gene patents are essentially monopolies, and the chief economic concern with monopolies is the price premiums imposed on consumers. Studies on patented genetic diagnostic tests demonstrate the existence of price premiums,[322] however upon broader data samples, the results were less conclusive.[323] Such findings show that patents are not the only factor that affects pricing, and perhaps some of the diagnostic tests in the studies may have required multiple genes and their patents.[324] The multiple patents would have driven up the prices of the diagnostic tests, creating the illusion of a price premium, when in fact there might not be one, once the price is spread over each gene patent that was included.[325]

Objections to the patent system rest on the assumption that a monopoly on a gene will always lead to super-competitive pricing on its related products. In actuality, patent-holders have to factor in the cross elasticity of demand for alternatives.[326] In the instance of diagnostic tests, the voluntary nature of many diagnostic tests means that the producers will have to factor in deadweight loss (where a consumer frustrates their consumption when actual price is higher than their reservation price – the highest price that they will purchase for).[327] The consequence is that patent-holders use a tiered pricing strategy, where there are different prices for different tiers, all priced under each tier's reservation price.[328] The tiered pricing strategy is a long-term tactic that avoids deadweight loss and is able to cater to nearly all consumer tiers' demands.[329]

Having a monopolistic position in a market does not automatically equate to abuse. As per EU competition rules, finding a dominant undertaking anticompetitive requires evidence that there

[322] The Center for International Economics (n 237) 116-118.
[323] ibid 119-121.
[324] ibid.
[325] ibid.
[326] Roberson (n 270) 388.
[327] ibid.
[328] ibid.
[329] ibid.

has been abuse of their dominant position in the market.[330] Having a monopoly on genes does not automatically equate to a strain on researchers, intermediates and end users, when it is more economically viable in the long-term to market it affordably.

When there is gene patenting, firms have incentives to place more advertising efforts towards raising awareness of related diseases and their health effects.[331] Operating within a monopolistic market enables firms to reap all the awareness raised: the by-product of this is an increased awareness of health concerns for at-risk individuals[332] (saving more lives with the seeking of timely medical assistance), as well as an increase in public knowledge. Conversely, it is worth bearing in mind that firms may only invest in the diseases and related products that have the most commercial value, such as diseases that are relatively common, or those associated with many related products, or those with the highest profit margins.

(vi) The monopoly effect

Besides super-competitive pricing, the monopolistic nature of gene patents can induce distortions in other areas, like the field of public knowledge. Empirical evidence shows that gene patents have an adverse effect on public knowledge, and in particular, follow-on public knowledge.

When there is an existing gene patent, researchers have the options of: (i) avoiding research on that gene, (ii) obtaining a license from the patent owner, or (iii) proceeding with their research with the threat of legal liabilities.

In one study, 47% of Australian academic scientists responded that their choice of research project was affected by

[330] EC, 'Antitrust procedures in abuse of dominance (Article 102 TFEU cases)' (European Commission, 16 August 2013) < http://ec.europa.eu/competition/antitrust/procedures_102_en.html> accessed 21 April 2015.
[331] Roberson (n 270).
[332] ibid.

existing patents.[333] In another independent study, researchers found that there were 267 patent claims related to genetic testing, attached to the 22 inherited diseases most frequently tested for in Europe.[334] Of those claims, 64% were hard or impossible to circumvent. These study findings suggest that the prevalence and spread of gene patents poses a great source of worry and inconvenience for researchers. There is a high chance of legal action if they were to proceed with their research without a thorough investigation of the patent landscape or obtaining the relevant licenses, driving many researchers to take option (i).

This inhibitory effect is demonstrated even in the case of short-term gene patent rights. When the private firm Celera conducted gene sequencing research and obtained patent rights for two years, there was a reduction of 20-30% in subsequent research and product development, despite the lack of restrictions placed on academic research.[335] The uncertainty in interpreting Celera's terms of use deterred academics from the research.[336]

In another study[337] where 1,279 gene-paper pairs (the pairing of a patent and it being published in a peer-reviewed publication) were identified, private sector patents were found to have a more negative impact, with a decline of 6 to 9% in follow-on public research, compared with only 0% to 3% for patents in the public sector.[338] Private sector patents were a bigger deterrent to subsequent research, due to the increase in patent broadness and the (actual and anticipated) aggressiveness in enforcement of private sector patent-owners.[339] It was suggested that follow-on researchers

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[333] Elizabeth Webster, Paul H Jensen, 'Do patents alter the direction of scientific inquiry? Evidence from a survey of academic scientists' Intellectual Property Research Institute of Australia (Working Paper No. 5/10) (November 2010).
[334] Department of Health (n 235) 15-16.
[335] Heidi L. Williams, 'Intellectual Property Rights and Innovation: Evidence from the Human Genome' [2013] 121 J. Polit. Econ. 1-27.
[336] ibid 13.
[337] Kenneth G Huang and Fiona E Murray, 'Does patent strategy shape the long-run supply of public knowledge? Evidence from human genetics' [2009] 52 Acad Manag J. 1193-1221.
[338] ibid 1235.
[339] ibid.

could increase the secrecy in their genetic research as a counter response to the aggressiveness; the dynamic was factored into the study in the form of forward citations.[340] Nonetheless, if knowledge is most effectively gathered when research is publicised, there is still a loss to public knowledge in the long-term.[341]

The issue of patent fragmentation poses a significant negative impact on follow-on research; it subjects subsequent researchers to the complex progression of finding, negotiating and paying for gene patents, further worsening the impact of gene patents.[342] The adverse effect of gene patents shows the greatest effect on genes most correlated to human health:[343] genes associated with cancer had a decrease of 11% in follow-on research, compared with genes not associated with cancer having a 4% drop.[344] As gene patents affect the genetic research on genes most correlated to human health, they do not only harm the accumulation of public knowledge in the field of genetics, but also result in a negative welfare impact on intermediates and end users.[345]

The negative welfare impact felt by intermediates and end users is supplemented by the barrier patents create in gaining access to genetic diagnostic tests. Patents and licences can restrict test availability, in terms of quality and accuracy, when there are exclusive licensing arrangements.[346] The exclusive license only enables one laboratory to perform a diagnostic test; intermediates and end users then have no choice of the test centre and no recourse to a second opinion test, resulting in an overall detrimental effect on health, welfare and autonomy.

[340] ibid.
[341] ibid.
[342] ibid.
[343] ibid 1237.
[344] ibid.
[345] ibid.
[346] Roberson (n 270) 386.

VI. Should isolated human genes be patentable?

(i) Balancing of interests

Directive 98/44/EC preamble recital 56 states that:

".. further work is required [...] between intellectual property rights and the relevant provisions of the TRIPs Agreement and the Convention on Biological Diversity, in particular on issues relating to […] the fair and equitable sharing of benefits arising out of the use of genetic resources."[347]

The balancing of interests between stakeholders is paramount in ensuring that there is a fair and equitable sharing of benefits arising out of the use of genetic resources, and in the particular case of gene patents. One possible method is to have a cost/benefit analysis of the 'value' of an isolated human gene patent: if the value is too low, then it would not be equitable to grant a patent; if the value is high, the patent should be granted. The major drawback with this method is that the 'value' of a gene patent is very fluid, as it is dependent on more than economic factors like efficiency (input vs output costs), economic impact (medical and science output) and economic outcomes.[348] There will always be social, ethical and political considerations as previously mentioned. The economic factors themselves are also challenging to quantify, since it requires forecasting outcomes and placing values over outputs that have yet to exist.

(ii) Clarity in the current laws

Despite the patentability of human genes facing criticism regarding human rights, common heritage and commoditisation of humans, the reality is that patents are necessary in genetic research to

[347] Directive 98/44/EC (n 251).
[348] The Center for International Economics (n 237) 106.

generate funding, and funding is vital to the sustainability of genetic research.[349] Therefore, it is not practical to prohibit isolated human genes as being patentable subject matter.

The current laws have developed a mixture of responses to their patentability between jurisdictions, depending on the emphasis placed on each stakeholder category. In patent regimes' treatments of isolated human genes, there is room for clarity in the:

(a) Scope of a patent;[350]
(b) Distinction between discovery and invention; and
(c) Public morality rule.

The ambiguity in these three attributes has resulted in uncertainty for commercial interests and academics,[351] with a trickle-down effect on intermediates and end users.

Pertaining to (b), the distinction between discovery and invention is often a blurred line. In EU legislation, there is no outright definition for human intervention, and the threshold does not quantify the amount of intervention required. In *AMP v Myriad*, the definition of human intervention is even more ambiguous, given that the Supreme Court found that isolation of DNA did not meet the threshold, yet cDNA that involved the removal of introns did. Arguably both had necessitated the efforts of a lab technician, raising the question of how much work is required to qualify as a human intervention. Additionally, if the distinction is revised (as in the USA and India), what happens to the patents already granted? The inconsistency in application would create an unfair and inequitable patent environment, undermining the support in human gene patents, as well as trust and confidence in the system.

[349] Nuffield Council on Bioethics (n 242) [2.10].
[350] Chris Dent, 'The Possibilities of a Regulatory Approach to Answer the Question: Should Genetic Inventions be Patentable?' (2012-2013) 22 J.L. Inf. & Sci. 16, 28.
[351] ibid.

In terms of the public morality rule, the EU has a standard of morality which is applied inconsistently and with no clear guidelines on criteria or which standard to apply.

The current patent regimes display discrepancies between gene patents and drug patents, with the capital costs of research and development and market approval for drug patents being much higher than for a gene diagnostic test.[352] A harmonisation of patent law standards would entail isolated human genes being patentable only at the higher levels of technological advancement and human interventions.

If isolated human genes are to be patentable, it is imperative that patent legislations provide a clear and consistent standard on the granting of patent protection, with the standard not being too low as to jeopardise the welfare of researchers, intermediates and end users, thereby maintaining an equilibrium in the balance of interests.

(iii) Gene patents with conditions

Although isolated human genes should be patentable subject matter on the basis of protecting innovation and funding, it is undeniable that the monopolies created by patents have adverse effects on follow-on research and public knowledge. It is proposed that patents on isolated human genes should be allowed only if patents have various conditions attached.

To protect long-run public knowledge, it is posited that all gene patents should have an exemption for those of purely academic research purposes, or any conditions that would counterbalance the negative impact of patents in generating public knowledge in academia.[353] Currently, a general exemption like this is contained in English law under section 60(5) of the PA 1977. A condition such as this may require clarification of the boundaries between academic and commercial purposes and the terms of use (e.g. does a professor sharing the information to graduate students count as contravening

[352] Roberson (n 270) 390-394.
[353] Huang (n 337) 1238.

the distribution terms).[354] Alternatively, patents can have mandatory conditions of issuing licensing agreements for researchers of a non-commercial purpose.

Another suggested condition is for patent-holders to only be able to grant non-exclusive licensing,[355] with the usual requirement of use or development in the license. The right to sub-license the patent could be up for negotiation between the parties, along with the right to enforce any actions upon infringement. Such a non-exclusive licensing arrangement should have a limit to license fees, royalty payments and transfer of ownership of any subsequently developed products from licensees. This condition will prevent patent-holders from having exclusivity with regards to licensing out research for the production of commercial products. This will expand opportunities for downstream patents, and more downstream patents induce competition in the market.[356] It would also serve to combat exclusivity that leads to barriers to access for intermediates and end users, diminishing social health and welfare.

It is postulated that patents whose research was heavily sponsored by governments or other public sector organisations – for example in the case of public sector patents – should be first in line for such mandatory patent conditions, thus opening a gateway towards the spread of these types of patents towards the private sector. The Intellectual Property Office of the jurisdiction in question should set the threshold for public sector sponsorship that qualifies a patent to be considered a public sector patent.

(iv) Centralised platform

To counteract the inhibitory effect on follow-on public knowledge, it is proposed that a centralised platform should be established, showing all the gene patents and its patent-holders, related licensing agreements, academic exemptions and the terms of use. Such a platform would enable researchers to better navigate their legal liabilities and increase transparency of public knowledge.

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[354] ibid.
[355] Department of Health (n 235) 17-18
[356] Roberson (n 270) 400.

(v) Open source/patent hybrid system

The final proposal is to implement a patent system, specific to biotechnological patents, which is better equipped to accommodate commercial interests and not hinder future technologies and the health care of society – a hybrid mechanism of open source and patents. The hybrid system consists of biotechnology (encompassing gene) patents, and would have two components: the 'for sharing' basic version and the 'for profit' advanced version which is patented.[357] If researchers wish to obtain a license after examining the basic version, then could then contact the patent-holder to do so. An analogy for this is having a catalogue of Ikea furniture that states products' materials, colours and overall sizes, and having the screws, bolts and materials with instructions to assemble after choosing and paying for the product.[358]

For maximum potential, the system should be applied congruently with the mandatory non-exclusive licensing arrangements, and the centralised platform of gene data and its related patents and licensing information.

The criteria for patentable subject matter would need to be altered to perhaps contain: (i) evidence of human interference, (ii) evidence of functionality, (iii) able to fulfil a certain level of information in the basic version (i.e. enough for a skilled person to understand its scientific implications), and (iv) a licensing fee for the advanced version being reasonable and proportionate to its functionality.

In effect, it will be harder to obtain patents that encompass basic technology, but easier to develop more sophisticated technologies and processes. This is because the threshold bar of inventiveness would have risen, which in the long-term would preserve the durability of the invention's patentability.[359] The system promotes a larger volume of public knowledge which intermediates and end users could easily inspect. It would be able to

[357] Sivaramjani Thambisetty, 'The learning needs of the patent system and emerging technologies - a focus on synthetic biology' [2014] 1 IPQ 13, 28.
[358] ibid 27.
[359] ibid 28.

minimise exclusionary behaviour in public knowledge, whilst simultaneously catering to commercial interests.

That being said, the proposal is not without flaws. It is hard to qualify the threshold for the amount of information in the basic version, as it would have to be sufficient for a skilled person to understand, yet not enough for the skilled person to be able to replicate on their own (otherwise it would defeat the purpose of getting a patent). It is equally hard to quantify the value of gene functionality for criterion (iv). Value is subjective: for those who are in need of the function claimed in the patent, the patent will have more value. The financial value of a patent is largely dependent on how well the licensee utilises it, and so it would be unfair to place this onus on patent candidates. Other measures of value include (non-exhaustively): the success of later stage research, the cost effectiveness of the utilisation of the invention into medicine, the role of the patent in securing investment, and its ability to encourage the development of new and useful technologies,[360] all of which are speculative and difficult to quantify.

VII. Conclusion

It is submitted that isolated human genes should be patentable subject matter such that they can attract commercial funding for continuous genetic research,[361] and that the intrinsic monopolistic nature of patents will not necessarily lead to premium pricing.

To avoid the controversial topics of human rights and common heritage, there should be more clarity in the current laws in terms of definitions and moral standards.

Alternatively, isolated human genes should only be patentable alongside mandatory conditions enforced with the patent, or perhaps within a hybrid system of open source/patents, as the monopolistic position is shown to have a harmful effect on follow-on research and public knowledge. Regardless of whether such legal reforms are implemented, there is value in establishing a centralised

[360] The Center for International Economics (n 237) 14.
[361] Nuffield Council on Bioethics (n 242) [2.10].

platform where the public can navigate existing gene patents and detailed information about licensing and usage.

An evaluation of the likely consequences of prohibiting the sale, distribution and possession of tobacco in Britain

Natasha Walker[362]

Since the Health Act 2006, smoking in enclosed work environments and public places within Britain has been prohibited. This article imagines a hypothetical scenario whereby the British government have gone one step further: prohibiting and criminalising the sale, distribution and possession of tobacco entirely. The consequences of imposing such laws will be carefully examined. Does the health of our nation demand this ban? Does the constant strain smokers place on the NHS urge us into action? Or does the fragile economy of this country depend on both the jobs and capital tobacco provides? In an attempt to broaden the parameters of this often one-dimensional argument, this article draws not only from health and economic lines of reasoning, but ventures also into the realms of criminological, social and political thought. Whether you begin firmly in one 'camp' or another, this article aims to allow readers to develop informed opinions of their own, whilst presenting a well-evaluated conclusion.

Miron deems prohibition to mean a "regime in which production, distribution, sale and possession of drugs are criminal offences."[363] For this article, a more pertinent description comes from Michalowki, based on his conclusion that prohibition is a 'process,' which transforms a lawful act into a criminal act.[364] It is this process which forms the backdrop for this article. Prohibition is, at its core, a policy aimed at making 'dangerous' acts illegal. This article will focus on the possibility of the government deeming tobacco to warrant a place within this category and its consequences. It will be argued that negative consequences, such as loss of income to government, an increase in smuggling, the emergence of a black

[362] LL.B. Candidate, The University of Manchester, School of Law.
[363] Jeffrey Miron, 'A Libertarian Perspective on Economic and Social Policy' (*Harvard University*, 2009) <www.isites.harvard.edu/fs/docs/icb.topic539489.files/Lecture_02_Drug-Prohibition.pdf> accessed 12 December 2014.
[364] Raymond Michalowski, *Order, Law and Crime: An Introduction to Criminology* (Random House 1985) 6.

market and the loss of employment, outweigh the possible positive consequences.

I. Would the government see a loss of income?

Much of this article will focus on the financial implications of prohibiting the sale, distribution and possession of tobacco. Firstly, an argument supporting the current stance on the use of tobacco, is that which emphasises the revenue tobacco brings to the country. One significant source of revenue for over 120 countries is the value added tax, colloquially referred to as 'VAT.'[365] For the layman, it is a tax levied on the price of the goods or services supplied. In the UK, the VAT rate is 20% for most products. However, on cigarettes, the VAT rate is much higher: 16.5% of the retail price plus £3.68 per pack of twenty cigarettes.[366] This increased VAT means that tobacco sales bring in around £2.6 billion to the Treasury annually.[367] Additionally, 2% of government revenue comes from other tobacco duties, predominantly excise duties,[368] which equates to a further £9.7 billion.[369] In terms of expenditure, the £12.3 billion brought in via these methods is equivalent to half of what the government allocated to spend on housing and the environment in 2014-15.[370] High rates of taxes act as a means of deterring smokers:[371] the average pack of twenty cigarettes retails at £7.98, of

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[365] Liam Ebrill, *The Modern VAT* (International Monetary Fund 2001) xi.

[366] 'Tax on Shopping and Services' (*HM Government*) <www.gov.uk/tax-on-shopping/alcohol-tobacco> accessed 12 December 2014.

[367] 'UK tobacco market summary' (*Tobacco Manufacturers' Association*) <www.the-tma.org.uk/tma-publications-research/facts-figures/uk-tobacco-market-summary/> accessed 12 December 2014.

[368] 'The economics of tobacco' (*Action on Smoking and Health*) <www.ash.org.uk/files/documents/ASH_121.pdf > accessed 12 December 2014.

[369] 'Tobacco bulletin: August 2014' (*HM Revenue & Customs*, 19 September 2014) <www.uktradeinfo.com/Statistics/Pages/TaxAndDutyBulletins.aspx> accessed 12 December 2014.

[370] Tejvan Pettinger, 'What does the government spend its money on?' (24 November 2014) <www.economicshelp.org/blog/142/economics/what-does-the-government-spend-its-money-on/> accessed 12 December 2014.

[371] Karen Slama, *Tobacco and Health* (Springer Science & Business Media 1995) 426.

which 77%, or £6.17, is tax.[372] However, some consumers are undeterred by prices, and so continue to bring in mass revenue. Although prohibition would act as a further deterrent, the loss of income to the country would undeniably be a negative consequence of criminalising tobacco.

II. Who is really paying these high importation costs?

Although beneficial to public funds, those purchasing tobacco are twice as likely to be unemployed, thus receiving income support.[373] In essence, the government is 'paying the price' for its own importation rates. Research indicates that those in low socio-economic communities are at greater risk of developing mental illness due to the "stressful exposures," which in turn supports the 'self-medication' theory,[374] which states how many addicts use tobacco as a stimulant against depression, stress and anxiety.[375] If depression rates are higher amongst those of low socio-economic status, then it is those individuals who are going to be most reliant on tobacco long after its prohibition and who will suffer the consequences. Such consequences include: the increased cost of smuggled goods, turning to crime to fund an increasingly expensive habit and the mental health implications of being unable to purchase their 'fix,' all of which will be discussed. Thus, although prohibition would be beneficial to those spending money on tobacco, those who presently use the drug as a coping mechanism could actually find themselves much worse off.

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[372] Action on Smoking and Health (n 368).
[373] 'Unemployed people twice as likely to smoke as employed people in 2012' (*Office for National Statistics*, 26 September 2013) <www.ons.gov.uk/ons/rel/ghs/opinions-and-lifestyle-survey/smoking-habits-amongst-adults--2012/sty-smoking-trends.html> accessed 12 December 2014.
[374] Craig Knott, 'General mental and physical health' (*Health and Social Care Information Centre*, 18 December 2013) <www.hscic.gov.uk/catalogue/PUB13218/HSE2012-Ch4-Gen-health.pdf> accessed 12 December 2014.
[375] Reed Robinson, *Comorbidity of Alcohol Abuse and Depression: Exploring the Self-medication Hypothesis* (ProQuest 2007) 82.

In 2011-2012, the government spent £4.91 billion on Job Seekers Allowance,[376] with each recipient receiving a maximum of £4,576 annually.[377] With a twenty-a-day smoker spending around £2,900 per year, just over 60% of their benefit allowance, on cigarettes[378] and the price having increased by around 80.2% over the last ten years,[379] it is not difficult to believe that household expenditure reached £18.7 billion on tobacco products in 2013.[380] This leads to the dilemma of assessing whether the income brought into the country via taxation, is truly of value when we consider where this income originates. The government support the unemployed, and the unemployed are those most likely to buy tobacco. Three-quarters of the purchase price of tobacco goes to the government which then redistributes it, some of which goes back to the unemployed. This is a cycle which does, indeed, pose problems. However, the income tobacco sales produce does, monetarily, add more value to the state than the negative consequences it creates for the disadvantaged within the community. Even if prohibition succeeded in removing temptation from those who are financially unstable, this positive consequence does not warrant the negative consequences that would be suffered financially by the government.

III. Would criminalisation prohibit those claiming benefits from purchasing tobacco, or merely increase the cost?

Hypothetically, if the government criminalised the sale, distribution and possession of tobacco, smuggling would inevitably occur. Smuggling is defined as "international trade through an

[376] Simon Rogers, 'UK welfare spending: how much does each benefit really cost?' (*The Guardian*, 8 January 2013) <www.theguardian.com/news/datablog/2013/jan/08/uk-benefit-welfare-spending/> accessed 12 December 2014.
[377] 'Benefits in Britain: Separating the facts from the fiction' (*The Guardian*, 6 April 2013) <http://www.theguardian.com/politics/2013/apr/06/welfare-britain-facts-myths> accessed 12 December 2014.
[378] Action on Smoking and Health (n 368).
[379] ibid.
[380] ibid.

'unauthorised route'"[381] and tobacco ranks as the most widely smuggled legal substance.[382] When prohibited items are smuggled, they often increase in value due to the additional risks, the supply and demand and the profit margin. The argument has been made, in the section prior to this, that removing the temptation of tobacco could save those who smoke much money. However, the 1920s alcohol prohibition in America, for example, does much to disprove this theory, showing that prohibition actually increased prices as drinks cost a nickel prior to the ban and up to fifty cents during prohibition.[383] Therefore, one consequence of an extensive ban on tobacco would be that those already addicted, those previously noted to be predominantly from government subsidised households, would merely end up spending an even greater percentage of their minimal income on the product, without the government receiving any importation benefit.

The 'market forces' theory states that smuggling is caused by "price differences between countries," incentivising those in high tax nations to seek cheaper goods, for personal use or to distribute and supply below market value.[384] However, there is also evidence to suggest that "general corruption" is as much to blame as increased tobacco tax for the smuggling of cigarettes.[385] Although produced in 1997 these statistics accurately depict the correlation between

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[381] Ali Khodadoost, 'Combat against Goos Smuggling & It's Relations with Neighbour States' (*Switzerland Research Park Journal*, 2013) <www.naukpublication.org/index.php/NATIONALPARK-FORSCHUNG-SCHWEIZ/article/view/275> accessed 15 December 2014.

[382] Marina Guevara, 'The world's most widely smuggled legal substance' (*International Consortium of Investigative Journalists*, 20 October 2008) <www.icij.org/project/tobacco-underground/worlds-most-widely-smuggled-legal-substance> accessed 15 December 2014.

[383] Kathleen Drowne and Patrick Huber, *The 1920's, American popular culture through history* (Greenwood Publishing Group 2004) 14.

[384] Luk Joossens and Martin Raw, 'Turning off the tap' (*Cancer Research UK*, June 2002) <www.ash.org.uk/files/documents/ASH_565.pdf> accessed 15 December 2014.

[385] Cecily Ray, Prakash Gupta and Joy de Beyer, *Research on Tobacco in India, Including Betel Quid and Areca Nut* (*The World Bank*, August 2003) <http://www.wds.worldbank.org/external/default/WDSContentServer/WDSP/IB/2004/05/26/000265513_20040526152329/Rendered/PDF/288960Ray1Research0on1whole.pdf> accessed 15 December 2014.

countries with high tax rates and those with high levels of smuggling. Countries such as Spain, with low tax rates – $1.20 per twenty cigarettes – actually had higher levels of smuggling.[386] The UK, with high tax rates – $4.35 per twenty cigarettes – actually had a comparatively low rate of tobacco smuggling.[387] This suggests that smuggling would occur out of the sheer normality of criminality in contemporary times. What they fail to ascertain is what effect prohibition, rather than an importation tax, would have on smuggling and the subsequent cost of goods. As the UK is currently classed as a low-smuggling nation, is it worth running the risk of increased smuggling by imposing a prohibition?

Smuggling may make items which are still available on the open market cheaper, as the market theory suggests.[388] When items are prohibited, however, a niche market often develops and excessive profit can then be made. The argument made at the start of this section stated that financial government gain, from tobacco, could not be used as a valid argument for the continued legality of tobacco. This is due to the fact that the financial gain came from, for the most part, those being financially subsidised by the very same government. Fundamentally the argument would promote prohibition as a means of curbing this expensive habit. Yet with smuggling rife worldwide and statistics showing that importation rates have no evident correlation with this activity, it would seem that the government are warranted to use a system which would otherwise become an underground movement from which the public would see no financial benefit. It is unfortunate that those with the least are those predominantly affected by this proposal, but the effects of prohibition are arguably likely to cost them more than the high tax rates seen at present.

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[386] Luk Joossens, 'Cigarette Smuggling in Europe: who really benefits?' (*Tobacco Control*, March 1998) <www.tobaccocontrol.bmj.com/content/7/1/66.full> accessed 15 December 2014.
[387] ibid.
[388] Joossens and Raw (n 384).

IV. If prohibition leads to smuggling, what dangers could arise?

Smuggling networks, supplying tobacco, exist all over the world. In some countries, such as Italy, they have become culturally accepted.[389] As such a prevalent activity, with "almost a third of global cigarette exports being funnelled into the illegal contraband market,"[390] it is not surprising that such occurrences have become routine. The normalisation thesis, although predominantly based on cannabis, looks into how "deviant behaviours" become accommodated into a larger grouping or society.[391] This theory would possibly show an accommodation of tobacco smuggling if prohibition were to make the sale, distribution and possession illegal. Tobacco smuggling is such a large industry worldwide, that the World Health Organisation entered a protocol into the international treaty — the Framework Convention on Tobacco Control — under Article 15, stipulating measures regarding the reduction of the supply of tobacco and illicit trade.[392] Smuggling is a detrimental consequence to the economy, but also "fuels organised crime and corruption," leading to a further negative consequence of the proposed criminalisation of tobacco: supply and distribution through a black market.[393]

There are many negative consequences to the inevitable black market which would emerge upon the prohibition of tobacco, not least the violence and crime which would ensue. The economic compulsive crime theory asserts that "dependence on expensive substance can lead users to engage in criminal acts to obtain money," which they require to fund their addiction.[394] Although this is still an evident problem prior to an existential prohibition, if

[389] Joossens (n 386) 67.
[390] ibid 66.
[391] Judith Aldridge, Fiona Measham and Lisa Willams, *Illegal Leisure Revisited: Changing patterns of Alcohol and Drug Use in Adolescents and Young Adults*, (Routledge 2013) 202.
[392] 'WHO Framework Convention on Tobacco Control' (*World Health Organization*, 2003) <www.who.int/tobacco/framework/WHO_FCTC_english.pdf> accessed 17 December 2014.
[393] Guevara (n 382) 7.
[394] 'Drug-related crime' (*European Monitoring Centre for Drugs and Drug Addiction*) <www.emcdda.europa.eu/themes/monitoring/crime> accessed 17 December 2014.

tobacco were to be criminalised and thus its price increased, engaging in crime to pay for the increased cost of smuggled tobacco would become much more prevalent. Goldstein was a proponent of another theory of black market based crime: systematic crime.[395] Criminal actions are said to stem from "drug markets and drug distribution networks." In essence, crime and violence are intrinsic to a black market and are expected to be inherent in such a deviant trade.[396]

Both theories illustrate the dangers of prohibiting such a popular substance. For most, the only knowledge of black markets and illegal smuggling they possess comes from the media, primarily films. Scarface,[397] The Godfather,[398] Goodfellas[399] and many other films depict the 'reality' of what smuggling entails. These are often reviewed using words such as "villains and traitors," "power," "bloodshed and murder," [400] showing us the "inherent paranoia of organised crime" and portraying a less than idyllic view of the world of illegal trade.[401] In modern day, however, it can be argued that "the significance of violence in the drug trade is often misunderstood and overstated" and perhaps this is true, as evidence of this kind is, of course, hard to come by.[402] However, the 2009 police findings suggest that there are over "2,800 organised criminal gangs," of which 60% were related to drug dealing.[403] Therefore, although we

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[395] Paul Goldstein, Henry Brownstein and Patrick Ryan, 'Drug-related Homicide in New York: 1984 and 1988' (1992) 38 Crime & Delinquency 462.
[396] Phillip Bean, *Drugs and Crime*, (4th edn, Routledge 2014) 47.
[397] *Scarface,* Brian De Palma, Universal Pictures, 1993.
[398] *The Godfather,* Francis Ford Coppola, Paramount Pictures, 1972.
[399] *Goodfellas,* Martin Scorsese, Warner bros, 1990.
[400] Roger Ebert, 'The Godfather' (16 March 1997) < www.rogerebert.com/reviews/great-movie-the-godfather-1972> accessed 17 December 2014.
[401] Dragan Antulov, 'Goodfellas (1990)' (*IMDB*, 5 July 2000) <www.imdb.com/reviews/252/25219.html> accessed 17 December 2014.
[402] Geoffrey Pearson and Dick Hobbs, 'Middle market drug distribution' (*Home Office Research Study*, 2001) <www.eprints.lse.ac.uk/13878/1/Middle_market_drug_distribution.pdf > accessed 17 December 2014.
[403] S O'Neill, '2,800 crime gangs ravage UK streets' (*The Times*, 25 September 1994) <www.thetimes.co.uk/tto/news/uk/crime/article1876139.ece> accessed 17 December 2014.

cannot be certain of the violence involved within these factions, we can be certain that such factions exist and on a large scale.

Regardless of the inferred brutality prohibition may or may not lead to, there is a theory suggesting that when a harsher policy on drug market violence is pursued, violence increases. This theory was conceptualised by a group of researchers, who partook in a systematic review of many studies on the topic.[404] These findings clearly show that governments respond to drug market violence by enforcing, with greater impetus, laws prohibiting the substance. This can be done, primarily, by providing greater funding to law enforcement departments.[405] It is seemingly non-sensical to consider investing more into a tobacco control policy, which a complete prohibition would require, when evidence suggests that greater control would lead to more violence. Bhutan is currently the only country to have entirely prohibited the "cultivation, harvesting, production and sale" of tobacco, yet still allows for possession so long as it is for personal use and importation payment is proven.[406] This criminalisation is not as holistic as the hypothetical one being evaluated in this article, yet still found deep opposition and, as expected, a "booming market of smuggled cigarettes" emerged.[407]

V. The UK target is for only 10% of the population to smoke by 2020; will prohibition help achieve this in place of the already restrictive policies?[408]

As seen in the Bhutan example, a tobacco prohibition is viable in terms of creating a policy, yet "pragmatically a total ban on tobacco

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[404] Dan Werb, Greg Rothewell, Gordon Guyatt, Thoma Kerr, Julio Montaner and Evan Wood, 'Effect of drug law enforcement on drug market violence: A systematic review' (2011) 22 International Journal of Drug Policy.

[405] ibid 2.

[406] 'Brief Profile of Tobacco Control in Bhutan' (*World Health Organisation*, 2010) <www.searo.who.int/tobacco/data/bhu-10.pdf> accessed 17 December 2014.

[407] David Simpson, 'Bhutan: a bellyful for the police' (2005) 14 Tobacco Control 366.

[408] 'Ministers aim to halve numbers of people' (*BBC*, 1 February 2010) <www.news.bbc.co.uk/1/hi/uk/8490490.stm> accessed 20 December 2014.

products is not an option nowadays."[409] Over the years, statistics have shown a downward trend in the number of smokers in the UK and an argument could be put forward to suggest that a positive consequence of prohibition would be to accelerate this decline. The most comprehensive statistical analysis of the decline in smokers shows a fall from 45% of the population, in the 1974 survey,[410] to 20%, at its latest 2012 findings.[411] The World Health Organisation states, in Article 5(2)(b) of the Framework Convention on Tobacco Control, that parties to the Convention will "adopt and implement effective legislation…and/or other measures…in developing appropriate policies for preventing and reducing tobacco consumption"; evidencing support for the belief that policy enforcement is responsible for the decrease in smokers.[412]

Policy plays an integral part to this question and there have, indeed, been numerous restrictions imposed over the years on those who smoke. These started as early as 1908, with the Children's Act, prohibiting the sale of tobacco to those under the age of sixteen.[413] It was more than five decades later, however, that the Royal College of Physicians' recommendations were made, raising awareness of tobacco-related diseases.[414] Almost immediately after this, the Television Act 1964 was introduced, banning the advertisement of tobacco on televisions.[415] Evidence suggests that from 1948 to

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[409] Geraint Howells, *The Tobacco Challenge: Legal Policy and Consumer Protection* (Ashgate 2013) 245.

[410] 'Key trends in smoking' (*Office for National Statistics*, 2013) <www.ons.gov.uk/ons/rel/ghs/opinions-and-lifestyle-survey/smoking-habits-amongst-adults--2012/rpt-opinions-and-lifestyle-survey---smoking-habits-amongst-adults--2012.html#tab-Key-trends-in-smoking> accessed 20 December 2014.

[411] 'Smoking among adults has declined by half since 1974' (*Office for National Statistics*, 2013) <www.ons.gov.uk/ons/rel/ghs/general-lifestyle-survey/2011/sty-smoking-report.html> accessed 20 December 2014.

[412] 'WHO Framework Convention on Tobacco Control' (*World Health Organisation*, 2003) <www.who.int/fctc/text_download/en/> accessed 20 December 2014.

[413] The Children's Act 1908.

[414] 'Smoking and Health' (*The Royal College of Physicians*, 1962) <www.rcplondon.ac.uk/sites/default/files/smoking-and-health-1962.pdf> accessed 15 December 2014.

[415] Television Act 1964.

1970, smoking prevalence was fairly constant, peaking during the mid 1960s. Correlations could then be made between the policies of increased awareness taking effect and the beginning of a decline in the 1970s.[416] Some time later, under the Tobacco Advertising and Promotion Act 2002, advertisements in the press and on billboards were similarly banned.[417] A Public Health White Paper in 2004 proposed a comprehensive ban on smoking in nearly all public places.[418] This was met with much controversy, but eventually came into force in all workplaces in 2007, under the Health Act 2006.[419] This restriction is much more invasive in the lives of smokers than any previously seen, yet is regarded by many as "a huge step forward for public health."[420] Such restrictive acts have continued since this time, including increasing the age of sale, again, to eighteen in 2007.[421] Experts on cessation in the US have attributed the downward trend in smoking to similar policy movements, such as "smoke free air laws and cigarette taxes."[422] It would thus appear that the alleged success of confining policies could support prohibitions taking this even further, as the most repressive policy of all.[423]

However, it would be remiss to think that pursuance of a restrictive policy alone can be credited as the reason for such a positive reduction in the number of smokers. Today, the public is much more aware of the health and social implications of smoking. The UK government policy of reducing smoking included, for example, the 'Stoptober' campaign, involving famous faces

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[416] 'Smoking statistics: who smokes and how much' (*Action on Smoking and Health*) <www.ash.org.uk/files/documents/ASH_106.pdf> accessed 15 December 2014.
[417] Tobacco Advertising & Promotion Act 2002.
[418] House of Commons Health Committee, The Government's Public Health White Paper (White Paper, Cm 6374, 2004).
[419] Health Act 2006.
[420] Patricia Hewitt, 'Smoke ban bill details released' (*BBC*, 27 August 2005) <www.news.bbc.co.uk/1/hi/health/4375478.stm> accessed 20 December 2014.
[421] Children and Young Persons Act 1933.
[422] Sophie Egan, 'Why Smoking Rates Are at New Lows' (*New York Times*, 25 June 2013) <www.well.blogs.nytimes.com/2013/06/25/why-smoking-rates-are-at-new-lows/?_r=0> accessed 20 December 2014.
[423] ibid.

promoting the idea of quitting for 28 days. In 2013, 250,000 people took part, of which 162,500 completed the challenge.[424] Although classifiable as a policy, this takes a libertarian approach of educating the masses about the dangers and leaving individuals to make their own choices. Indeed, the fact that these campaigns raise no 'moral panic' – "forms of exaggeration involving devil construction, blame allocation and disproportional representation" – is suggested to be because the vast majority have accepted the harm smoking does.[425] The population, as a whole, is more knowledgeable regarding the health implication involved in smoking. In 1962, the dangers were not necessarily taken seriously; in today's society, however, people deem them to be "amazingly fatalistic." [426] Prohibitive-based policies, on the other hand, are dictatorial and do little to change the mindset of the individual, but rather force them into finding alternative suppliers. As previously mentioned, besides policy-led approaches, smokers also quit due to the contemporary social implications surrounding the habit. Social control theories have been developed over time, implying that individuals subscribe to what is considered 'good' and avoid what is considered 'bad,' "because they are bonded to society."[427] Such a change in public perception leads to an equally exaggerated change in social dynamics. Undoubtedly parents feel the need not to deviate from the newly prescribed "social norms," due to the desire not to disappoint those with whom they have a bond – their spouse or their children. Many campaigns, including those from charities such as Cancer Research UK, utilise this emotive factor to achieve a higher cessation rate.[428]

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[424] 'Less smoking, more joking: Stoptober campaign launched' (*Department of Health*, 12 September 2014) <www.gov.uk/government/news/less-smoking-more-joking-stoptober-campaign-launched> accessed 20 December 2014.
[425] Sean Hier, *Moral Panic and Politics of Anxiety* (Routledge 2011) 55.
[426] Dominic Hughes, 'Smoking and health 50 years on from landmark report' (*BBC*, 6 March 2012) <www.bbc.co.uk/news/health-17264442> accessed 20 December 2014.
[427] Horst Entorf and Hannes Spengler, *Crime in Europe: Causes and Consequences* (Springer 2002) 51.
[428] 'Smoking and cancer' (*Cancer Research UK*) <www.cancerresearchuk.org/cancer-info/healthyliving/smoking-and-cancer/smoking-and-cancer> accessed 20 December 2014.

Consequentially, it is an undeniable conclusion that government policy is positively correlated with a lower incidence of UK smokers. Notwithstanding this, it is unclear that prohibition will continue this positive trend. Perhaps prohibition will increase the impact social control has and tobacco will become less normalised.[429] Yet with other factors already mentioned, it is impossible to state categorically the extent to which they also contribute to the combined decrease.

VI. The extent of the economic strain to the taxpayer

With previous policy impositions unable to prove whether the prohibition of tobacco would continue the success, one must look to an argument grounded more on acquirable statistics. The government ensures that there are initiatives in place to encourage smokers to quit. These efforts are known as "stop smoking" campaigns. A primary motivational factor in the government's desire to lower the percentage of smokers is due to the burden they place on the state. According to the ASH findings, 16 million individuals per year, over the age of 35, are admitted to hospital for reasons relating to tobacco, with a cost of around £2 billion to the taxpayer.[430] This, however, is only a small proportion of the problems caused by smokers. Other costs include tobacco-related sick-days, loss of productivity due to premature deaths, social care costs of elderly users and various other miscellaneous costs, which all equate to another £11 billion.[431] It is estimated that by spending £87.7 million per year on 'stop smoking' services, including £8.21 million on mass media campaigns and £58.1 million on

[429] Aldridge, Measham and Willams (n 391) 202.
[430] Action on Smoking and Health (n 368).
[431] ibid.

pharmacotherapies,[432] the NHS saved around £380 million.[433] Despite cumulatively saving over £220 million per year via stop smoking strategies, there is still a burden placed on the UK's much-strained resources, a burden which some believe could be alleviated by prohibition.

Although the elimination of a costly addiction seems productive, one must consider what the outcome would be for the 18.7% of the over 18 population who are current smokers.[434] A blanket ban, proscribing the sale, distribution and possession of tobacco, would result in nearly a fifth of the population being without something they desire, with immediate effect. This, inherently, has to be true of any absolute prohibition. At this point it is important to re-consider the tobacco ban in Bhutan. If the current argument dictates that smokers are currently costing the NHS too much money, then one must also consider the cost prohibition will have, with a particular focus on the need to provide cessation programmes for a large percentage of the population. Bhutan has ensured provisions are placed within the Act to create such programmes, including rehabilitation centres and counselling.[435] By 2025, with present cessation rates continuing, there will still be over 5 million smokers.[436] The cost of attempting to treat and rehabilitate these individuals seems unfeasible and pragmatically futile. With just 0.001% of the population having a heroin addiction and only 60% in treatment, the UK spent between £3,000-5,000 per addict per year, equating to a yearly total of £800

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[432] 'Statistics on Smoking: England, 2013' (*Health and Social Care Information Centre*, 15 August 2013) <www.hscic.gov.uk/catalogue/PUB11454/smok-eng-2013-rep.pdf> accessed 24 December 2014.

[433] Christine Callum, Sean Boyle and Amanda Sandford, 'Estimating the cost of smoking to the NHS in England and the impact of declining prevalence' (2010) 6 Health Economics, Policy and Law 489.

[434] 'Integrated household Survey, January to December 2013: Experimental Statistics' (Office for National Statistics, 7 October 2014) <www.ons.gov.uk/ons/dcp171778_379565.pdf> accessed 24 December 2014.

[435] Tobacco Control Act of Bhutan 2010, s 23(a).

[436] 'Harm reduction in nicotine addiction. Helping people who can't quit.' (*Royal College of Physicians*, October 2007) <http://www.sfata.org/wp-content/uploads/2013/06/Harm-Reduction-in-Nicotine-Addiction.pdf> accessed 24 December 2014.

million.[437] If that is the cost of treating merely 60% of 0.001%, the costs of having to treat a possible 20% of the country are unquantifiable. In fact, the UK already struggles to fund the mental health system.[438] This article has already assessed that many use tobacco as self-prescribed medication for mental health illness. The negative reinforcement theory suggests that substances, just like tobacco, are used to relieve some unpleasant feeling, for example sadness or anxiety.[439] Taking this away, without having a comprehensive mental health plan in place for everyone who may need it, seems like a careless move by the government. Smokers may cost the taxpayer a significant amount, but the costs may likewise increase as a consequence of prohibition.

As an aside, it is also questionable as to what individuals would turn to if mental health provisions were not adequately available. During the prohibition era, for example, smoking marijuana became popular as "a replacement for alcohol."[440] With the contemporary phenomena of online drug retailing, such as Silk Road, it is becoming even simpler to purchase drugs, which could be used to replace tobacco.[441]

VII. The tobacco industry may cost money, but it also gives back

Just as Britain benefits from the tax levied on tobacco, the industry also gives back by increasing employment. According to the Tobacco Manufacturers Association, the collapse of this industry

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[437] Jeremy Laurance, 'The Big Question: Is methadone being over prescribed as a treatment for drug addiction?' (*The Independent*, 10 December 2009) <www.independent.co.uk/life-style/health-and-families/health-news/the-big-question-is-methadone-being-overprescribed-as-a-treatment-for-drug-addiction-1837156.html> accessed 24 December 2014.

[438] Denis Campbell, 'Mental health funding changes in NHS will put lives risk, say charities' (*The Guardian*, 12 March 2014) <www.theguardian.com/society/2014/mar/12/mental-health-funding-changes-lives-risk> accessed 24 December 2014.

[439] Jose Ashford and Craig LeCroy, *Human Behaviour in the Social Environment: A Multidimensional Perspective* (4th edn, Cengage Learning 2009) 92.

[440] David Boaz, *The Crisis in Drug Prohibition*, (Cato Institute 1990) 64.

[441] Alexandra Topping and Alex Hern, 'UK buying more legal and illegal drugs online, survey finds' (*The Guardian* 14 April 2014) <www.theguardian.com/society/2014/apr/14/drugs-uk-more-legal-illegal-bought-online-survey> accessed 27 December 2014.

would affect, both directly and indirectly, over 70, 000 people in the UK.[442] Although only 6,100 are directly employed in the trade, in high value positions, there are many more who would feel the ripple effect of prohibition.[443] It is estimated that a further 33,000 distribution positions and 20,000 supply chain positions would be threatened.[444] With a median weekly income of £800 per week, compared to the UK average of £405, the industry employs some high-earning individuals whose income would be cut entirely.[445] Of course there are those who argue that the tobacco industry has been reducing employment over the years anyway due to the increased productivity of automation.[446] As such, they conclude that the negative consequences prohibition would bring to the job market would naturally occur over time. Even the vice president of the US tobacco industry has been quoted as follows: "if the industry would vanish tomorrow, most would find alternative work."[447] As an obvious proponent for the industry, this reaction evidently poses problems for those using employment as a deterrent to a prohibition initiative. When seeking support, however, the source and the context must be scrutinised. This quote was regarding the US market and made nearly 30 years ago. The government views the "record-breaking annual rise in employment" as an "important milestone"; if this is so then the government should be looking to create more positions within booming industries, rather than shutting them down.[448]

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[442] 'Tobacco Industry in the UK' (*Tobacco Manufacturers' Association*) <www.the-tma.org.uk/wp-content/uploads/2014/08/Cogent-TMA-Factsheet-UK.pdf> accessed 27 December 2014.
[443] ibid.
[444] ibid.
[445] ibid.
[446] Amanda Sandford and Clive Bates, 'Job losses in the tobacco industry: the impact of tobacco policies' (*Action on Smoking and Health*, August 1998) <www.ash.org.uk/files/documents/ASH_381.pdf> accessed 27 December 2014.
[447] ibid.
[448] 'Employment rate matched record high' (*Department for Work and Pensions*, 16 July 2014) <www.gov.uk/government/news/employment-rate-matches-record-high> accessed 27 December 2014.

VIII. Conclusion

It is clear that this argument is not one-dimensional; there are an array of reasons both for and against the prohibition of tobacco, with this article merely illustrating a subset of them. The overriding sentiment here is that the positive consequences of prohibition do not warrant the subsequent sacrifices: the income tobacco brings to the Treasury, the increased likelihood of smuggling, the consequent black market which ensues and the jobs the industry provides. In spite of the important questions raised by the arguments supporting prohibition, all have been refuted or, at least, brought into question. Both practically and pragmatically, the consequences of a prohibition on the sale, distribution and possession of tobacco would be too damaging for the United Kingdom.

A critical evaluation of the effectiveness of administrative tribunals

Reni Oluwadare[449]

"Since power is exercised neither through parliamentary speeches nor monarchical enunciations but through the routines of administration," [450] government has become increasingly bureaucratic. As such, it has become more important for administrative agencies to exercise good governance.[451] In order to ensure that the state does not become tyrannical, a number of restrictions have been put in place. A powerful check on the government's power is a tribunal. A tribunal is a statutory body that can hear and determine appeals by individuals against initial decisions by government agencies, and is therefore an accountability mechanism. However, it cannot be assumed that tribunals always satisfy their mandates, and indeed, it will be argued that more needs to be done if effective administrative justice is to be achieved.

Administrative justice is concerned with the way individuals are treated by government agencies in their dealings with the state, which requires good administration.[452] A tribunal is an avenue for redress or alternative dispute resolution (ADR) that allows individuals to receive explanations for certain decisions made. There are many tribunals that hear issues on specified areas, with the Immigration Tribunal being the busiest in 2014 in terms of case disposal.[453] As the tribunal's decisions often have life-changing implications, it is only fair that they are expected to deliver administrative justice. Reflecting this widely accepted

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[450] Max Weber, *Economy and Society: An Outline of Interpretive Sociology,* vol 3 (Guenther Roth and Claus Wittich, New York: Bedminister Press 1968) 1393.
[451] Mark Elliot and Robert Thomas, *Public Law* (OUP 2014) 347.
[452]Department for Constitutional Affairs, *Transforming public Services: Complaints, Redress and Tribunals* (Cm 6243, 2003) 3.
[453] Ministry of Justice, *Tribunals Statistics Quarterly: April to June* (11 September 2014) 12-13.

responsibility are the statistics of the cases that tribunals hear in comparison to the traditional court system: "annually, judicial review applications are numbered in the thousands, but tribunal appeals in the hundreds of thousands,"[454] signifying the correlation between ADR and the exponential growth of tribunals. In spite of this, it is not always the case that these expectations come to fruition.

Although there are some very clear advantages of having tribunals,[455] their ability to deliver effective administrative justice is questionable for many reasons. This essay will evaluate: the nature of tribunals, the reforms made to the tribunal system, the approach adopted by the tribunals, and the outcome of decisions made by the tribunals to ultimately show that the tribunal system needs to do more to ensure that effective administrative justice is achieved.

I. Nature

Historically, courts were thought to be "inaccessible, formal, expensive, slow and ideologically unsympathetic to and ignorant of public welfare and regulatory programmes"[456] which was one of the main reasons for the establishment of the tribunal system. Paul Craig[457] supposes that there are three arguments for the creation of tribunals, all of which are a turnaround from the views associated with the courts. He states that the preference for tribunals as opposed to courts stems from their benefits of speed, affordability, informality and expertise. To that end, one could argue that tribunals effectively deliver administrative justice due to the wide opportunities for citizens to seek redress. As noted by the courts in *Saleem:*[458]

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[454] Peter Cane, *Administrative Law* (5th edn, OUP 2011) 319.
[455] ibid.
[456] ibid.
[457] Paul Craig, *Administrative Law* (Sweet & Maxwell 2012) 232.
[458] *R* v *Secretary of State for the Home Department ex parte Saleem* [2000] Imm AR 529 [544] (Hale LJ).

"In this day and age a right of access to a Tribunal or other adjudicative mechanism established by the state is just as important and fundamental as a right of access to the courts. What this indicates is that all adjudicative mechanisms established by the state are credible routes in receiving dispute solutions, just as courts are. Therefore, it is important that there is equal right of access to all. Hence, it can be concluded that, tribunals, unsurprisingly, are central to the administrative justice system[459] as they provide for the opportunity for citizens to take part in the democratic process."

As the branch of the state solely responsible for the interpretation and application of the law, the judiciary is often overwhelmed with a high number of cases. The consequence of their role is that decisions need to be dealt with in a way that ensures quality, as it is their decisions that set precedents. Consequently, this can mean that the judicial branch of the state is seen as slow.

To alleviate these problems, tribunals were established to move disputes away from the courts that might be overwhelmed with other, more important cases.[460] However, it has been said that this is a breach of the rule of law. As cited by Le Sueur,[461] Lord Hewatt believed that tribunals were "at best, a necessary evil established to save courts from being overwhelmed and, at worst, a subversion of the rule of law." He also purported that "the use of administrative tribunals undermined the rule of law because these bodies were established and largely controlled, by the government departments whom individuals were in dispute."[462] Leyland and Anthony also share this opinion from the angle that "the determination of outcomes outside the normal courts [threaten] the fundamental concept of the rule of law."[463] This clearly shows that a tribunal's ability to deliver effective administrative justice has

[459] Elliot and Thomas (n 451) 616.
[460] Craig (n 457) 232; Peter Leyland and Gordon Anthony, *Textbook on Administrative Law* (7th edn, OUP 2012) 156.
[461] Andrew Le Sueur, Maurice Sunkin, and Jo Eric Khushal Murkens, *Public Law: Text, Cases, and Materials* (OUP 2013) 646.
[462] ibid.
[463] Leyland and Anthony (n 460) 156.

been considerably weakened. At this point in time, tribunals seemed increasingly under the control of the government, which rendered the scrutiny function of tribunals ineffective. It might be argued that the Tribunals, Courts and Enforcement Act 2007 (TCEA) has significantly enhanced the independence of the tribunals, but even with this in place, the tribunal system still has inherent problems.

This was a key principle espoused by the Franks report,[464] namely that Tribunals should be impartial. In addition to this, the Franks report also recommended that Tribunals be fair and open.[465] Together these principles comprise the essence of good governance. For a citizen to see its current government as legitimate, they must be advancing policies for the greater good and be seen as truly 'for the people.' As such, one can view tribunals as an "important instrument in policy implementation" as noted by Leyland and Anthony,[466] who highlight examples of legislation that led to the establishment of tribunals for the purpose of achieving its aims, such as the School Standards and Framework Act 1998. Despite policy advancement being an obvious benefit, the consequence is that the tribunal system might lose its ability to impartially and, more importantly, fairly, deliver effective administrative justice.

The use of a tribunal as the main instrument of policy implementation can also be seen as a double-edged sword.[467] The previous coalition government had a stricter stance on immigration and as a result, the 12% increase in disposed immigration cases between the period from April 2013 and June 2014 is a clear demonstration of this policy stance. Comparing the amount of cases tried in the employment tribunal in the same time period, there was a 50% decrease.[468] This is particularly strange given that the economic climate was one of very few jobs. If the fluctuation is due to policy stances, it is more difficult to ensure that tribunals are

[464] University of Oxford, *Report of Commission of Inquiry* (OUP 1966) vol 1 (Franks Report).
[465] Le Sueur, Sunkin, and Murkens (n 461) 646-647.
[466] Leyland and Anthony (n 460) 157.
[467] Tony Prosser, 'Poverty, Ideology and Legality; Supplementary Benefit Appeal Tribunals and Their Predecessors' (1977) 4 BJLS 39, 44.
[468] Ministry of Justice (n 453) 12-13.

impartial and fair. The implication of a tribunal decision is often life changing, especially in the case of immigration appeals. So to make this decision with consideration of party policies[469] over the appellant's circumstances is, in some ways, unethical, as the result of the decision might be, for example, to break up a family. In this way it is hardly possible to say that tribunals are able to deliver effective administrative justice.

II. Reforms

Because tribunals have been developed on an *ad hoc* basis, the tribunal system has developed haphazardly.[470] By way of making the tribunal system more coherent and accessible, the Leggatt Report[471] proposed a "single system with structural coherence comprising first tier and an appellate second tier of tribunals."[472] Further to that, the Leggatt Report made recommendations on the operation of this new unified tribunal system ranging from its independence to its user-friendly nature.[473] The White Paper 'Transforming Public Services' also turned the Council on Tribunals into an Administrative Justice and Tribunals Council. All of these recommendations were implemented by the TCEA 2007.[474] For example, section 1 concerns independence of tribunal judiciary. The Act identifies tribunal members as members of the judiciary. Section 3 creates two new tribunals: the first tribunal and the upper tribunal. Subsection 5 explains that the Upper Tribunal is a superior 'court of record.' The effect of making the tribunal system unified has been to reduce the amount of ministerial discretion to establish

[469] Robert Thomas, "From "Adversarial v Inquisitorial" to "Active, Enabling, and Investigative": Developments in the UK Administrative Tribunals' in Laverne Jacobs and Sasha Bagley (eds), *The Nature Of Inquisitorial Processes In Administrative Regimes: Global Perspectives* (Ashgate Publishing Limited no date) 59.
[470] Elliot and Thomas (n 451) 627.
[471] Andrew Leggatt, 'Tribunals for Users – One System, One Service' (2001) <http://www.tribunals-review.org.uk> accessed 11 March 2015.
[472] Leyland and Anthony (n 460) 162.
[473] Department for Constitutional Affairs (n 452) 20.
[474] Tribunals, Courts and Enforcement Act 2007.

tribunals when they wanted. To that end tribunals have been depoliticised in that they cannot be used as a political weapon. For this reason, one could argue that the TCEA has enabled a more effective delivery of administrative justice.

However, some people have suggested that the tribunal system is not actually any more accessible than it was before the TCEA, due to the complicated system.[475] This can be inferred from the amount of appeals made to the tribunals: "the total volume of injustice is likely to be much greater among those who accept initial decisions than among those who complain or appeal."[476] There are many reasons for the low appeal rate, such as the ignorance of one's appeal rights or the "perceived lack of independence."[477] Either way, both are factors that hinder the ability of tribunals to deliver effective administrative justice. In 2013, the Administrative Justice and Tribunals Council was abolished, thus the function of being able to keep a record of listed tribunals under review is now within the remit of the Ministry of Justice – part of the executive. This does not improve the independence or impartiality of the tribunals and as noted by Craig, its abolition has "very negative implications both symbolically and pragmatically for administrative justice."[478] It would therefore not be an exaggeration to state that regarding the delivery of administrative justice, the TCEA 2007 has grossly under-delivered.

III. Approach

The approach adopted by the UK tribunal system is the enabling or active approach. This approach enables the head of the tribunal to increase the confidence of the parties to participate in the process and compensate for an appellant's potential lack of

[475] Law Observer, 'Tribunals' <http://www.lawobserver.co.uk/tribunals_25.html> accessed 11 March 2015.
[476] Elliot and Thomas (n 451) 635.
[477] ibid.
[478] Craig (n 457) 257.

skills/knowledge.[479] This has made the need for representation less of a necessity and more of an option,[480] which has in turn enhanced the ability of tribunals to effectively deliver administrative justice. In support of this is the fact that government websites are very informative, meaning that those with access to the internet are able to inform themselves of points of contestation. Alternatively, there are legal advice centres across the country, which can give very sound advice at no cost, although the quality of such advice may be inconsistent. Furthermore, the enabling approach has given unrepresented claimants the chance to appeal against the "repeat-player."[481] There is often a misconception that anything to do with appealing government decisions involves money, which prevents a lot of people from appealing decisions.[482] Legal aid was established precisely to tackle the issue of legal fees, which in some sense has enabled those who stereotypically could not access the courts to gain redress. To an extent, it is clear that the approach of the court has certainly increased the effective delivery of administrative justice by broadening the scope of those involved with the system.

However, as noted by Thomas, the need for representation is dependent on the nature of the hearing. For example, an unrepresented appellant of an asylum appeal is likely to face a lower chance of success than in other tribunals.[483] This might be due to language barriers or the complexity of the law at hand,[484] although such a scenario is at odds with the principle of fairness espoused by the Franks report. It might narrowly be argued that an unrepresented client might gain the sympathy of the head of the tribunal but this would be rare as "tribunals must determine whether rules have been applied correctly, not determine whether justice – in terms of

[479] Elliot and Thomas (n 451) 637.
[480] Michael Adler, 'Tribunal Reform; Proportional Dispute Resolution and the Pursuit of Administrative Justice' (2006) 69 MLR 958, 980-982.
[481] Thomas (n 469) 52.
[482] Elliot and Thomas (n 451) 635.
[483] Thomas (n 469) 59.
[484] Elliot and Thomas (n 451) 635.

deservingness – has been done in the individual case."[485] A major setback to effective delivery of administrative justice is the recent cut to legal aid. While it might be proffered that these cuts have not put the tribunals out of business, these cuts would have affected a specific demographic of people[486] and thus would have decreased the accessibility of the tribunals system. In an ideal world, the active approach would be the main evidence of an effective delivery of administrative justice. In reality, the enabling approach increases the likelihood of the tribunal system to, inadvertently, strengthen social divides. However, given the fact that the government of the day is held by the Conservative party, it might be argued that such a furtherance of social divide was intended due to its opposition to state intervention.

IV. Results

So far, the discussion has been focused on the delivery of administrative justice for appellants, but administrative justice is not exclusively for the 'victim.' In fact, there has been an increase in backlash against, in particular, employment tribunals by those defending themselves in court who believe that these appellants are "opportunists and chancers and vexatious spongers" who have the advantage of the entire system being "rigged in their favour."[487] Moorhead, however, states that "more money is spent on defending employment claims than is spent bringing them."[488] Interestingly, John Cridland suggests that "the current system of employment tribunals is 'broken' and that 'everyone other than lawyers lose.'"[489]

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[485] John Baldwin, *Judging Social Security* (Oxford, Clarendon Press, 1992).

[486] Richard Moss, 'Miscarriage of fears over legal aid cut plans' (*BBC News England,* 31 May 2013) <http://www.bbc.co.uk/news/uk-england-22729956> accessed 11 March 2015.

[487]William Langley, 'Employment tribunals are legalised extortion' *The Telegraph* (London, 7 August 2011) <http://www.telegraph.co.uk/news/uknews/law-and-order/8686463/Employment-tribunals-are-legalised-extortion.html> accessed 10 March 15.

[488] Richard Moorhead, 'Employment Tribunals: Weighted Against Employers?' (*Lawyer Watch,* 5 January 2011*)* <https://lawyerwatch.wordpress.com/2011/01/05/employment-tribunals-weighted-against-employers/> accessed 11 March 2015.

[489] Adam Wagner, '"Legal Parasites feeding on small businesses" or protectors of rights?' *(UK Human Rights Blog,* 5 January 2011*)* <http://ukhumanrightsblog.com/2011/01/05/legal-parasites-feeding-on-small-businesses-or-protectors-of-rights/> accessed 11 March 2015.

In this way, the ability of the tribunal system to deliver effective administrative justice is arguably unsatisfactory and should be reconsidered in order to ensure that tribunals create fair decisions for all parties involved.

It is clear that there has been a respectable attempt by the tribunals system to ensure the effective delivery of administrative justice, but this has proven inadequate. Indeed, it has demonstrated the need for the government to create more innovative ways to ensure that tribunals can effectively deliver administrative justice.

Rawls' 'justice as fairness': should we run a state by it?

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This article discusses Rawls' theory of justice and whether it is an appealing means of running a just state. The process in which he goes about creating his desired state is evaluated and critiqued. Rawls embodies a liberal view towards his state whereby rights are protected, poverty is removed and opportunity is ascertainable by all. All such features are noble elements in a just state; however, there are two main problems with Rawlsian justice. Firstly, the process by which Rawls derives conceptions of liberty and equality is questionable. Rawls assumes that the use of the Veil of Ignorance in the Original Position always leads to one notion of justice, which is arguably not so. Secondly, Rawls fails to consider the implications of his state. His Difference Principle can be seen as counterproductive to an efficient society and detrimental to certain groups in society. This is paradoxical to his desire that justice should be fair. Improvements to the theory are addressed in an attempt to overcome Rawls' own shortcomings and to consequently achieve a more desirable theoretical framework for organising a state. This includes examining the maximum utility approach. However, regardless of any refinements made to his theory, it will never amount to a realistic guide on running a state.

I. Introduction

Rawls' theory for creating a just society appears to be an attractive guide to running a just state: it embraces a liberal view of justice and protects rights, while removing poverty from society and allowing for opportunity. This article argues that Rawls' methodology for deriving principles for a just state is questionable, positing that he fails to consider the fallibility of human nature, illustrated by the Veil of Ignorance. The Difference Principle is also examined, illustrating how such a principle can have negative effects in a supposedly just society. In response to criticism, this article will suggest refinements to Rawls' theory in order to reach a more

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desirable conception of justice. Nevertheless, this article will demonstrate that such an abstract theory is incapable of providing a practical guide for just governance.

II. Justice as Fairness

'Justice as Fairness' is Rawls' theory of justice to which institutions of a state should adhere. It is composed of the principles derived from participants situated in what Rawls terms the Original Position, a position of absolute neutrality. This is the Veil of Ignorance: the Veil rids the participants of any knowledge concerning socio-economic status, and consequently, they ought to produce objective and impartial principles of justice. These principles are therefore automatically fair, for Rawls, as he argues that such principles are what free, rational people would consider furthers their interests. He pins these down as liberty and equality. Rawls also discusses two other principles: equality of opportunity and the Difference Principle.

(i) Methodology

Rawls uses the Veil of Ignorance to demonstrate that impartial, rational and self-interested people would look to achieve a particular outcome. In order to derive principles of justice, participants are placed in the Original Position, where they will come up with an agreed consensus as to what will constitute these principles. Rawls uses the Veil to blind participants as to whom they were, and are to be, once the Veil is removed.

The Veil is supposed to nullify the effects of specific contingencies to allow them to decide impartially.[491] Rawls leaves with them only the knowledge of certain primary goods, such as rights and liberties opportunities.[492] This amounts to the Thin Theory of the Good. This given knowledge is required in order for individuals to be rational and thus arrive at his given principles of

[491] John Rawls, *A Theory of Justice* (Harvard University Press 1971) 136.
[492] ibid 79.

justice. The consensus the participants agree to, Rawls argues, ought to be one that caters to the most disadvantaged in society.

Such is the Difference Principle: the maximisation of the standing of the worst-off, as Rawls argues, ought to be chosen because participants fear the chance of themselves becoming the worst-off.

(ii) Psychology behind the Veil of Ignorance

There are psychological implications with the Veil of Ignorance. Rawls assumes all people to conclude with the same principles once behind the Veil of Ignorance. This means he assumes a particular psychological reasoning in all participants. For this to succeed, the participants must be stripped of traits allowing for diversity in order to take an entirely objective view within the Original Position.

It appears, then, that Rawls' theory requires a particular type of person behind the Veil in order to conclude with the relevant principles. An example of Rawls' psychological assumptions is that people are risk-averse, and will naturally opt for the Maximin Principle. This is such that when a person is uncertain about their future, they will choose to protect himself or herself by ensuring the best possible outcome for whoever is worst-off. Rawls assumes all people would act in accordance to the Maximin principle because he assumes all people are inherently self-interested.

On the other hand, people can be risk takers, and so may act in accordance with a Maximax Principle rather than Rawls' Maximin Principle.[493] A person can gamble on the chance that they will be the most advantaged rather than disadvantaged, ensuring maximal benefits if their risk pays off once the Veil was removed.[494] This dose of cynicism is helpful in revealing what actual human

[493] Mark Reiff, 'The Politics of Masochism' (2003) An Interdisciplinary Journal of Philosophy 29, 39.
[494] Benjamin Barber, 'Justifying Justice: Problems of Psychology, Measurement, and Politics in Rawls' (1975) The American Political Science Review 663.

behaviour might entail. Because the participants have knowledge of only a few things about society, Rawls' attempt at creating principles of justice is really the result of the social contract made by the participants. The participants are nonentities without the capacity for reflection of choice,[495] so they make decisions based on the lack of information about real society. As such, they cannot reach substantive conclusions.

Despite this, Rawls argues that the participants are not influenced by different attitudes towards risk and uncertainty.[496] Yet, in suggesting that participants will act in accordance with a Maximin approach where the parties are doing no more than following a strategy of minimal risk,[497] Rawls contradicts himself as he inherently illustrates that they do indeed adopt a risk averse approach.

Support for this claim is found within a Polish experiment conducted by researchers based on a similar 1973 American study, based on Rawls' methodology.[498] Here, the findings were contrary to Rawls' claims of the participants inevitably acting in accordance with the Maximin Principle, in unison. In this experiment, students' hypothetical incomes were undisclosed to them, and they had to make a choice out of four given principles that would govern a 'just' society. One reflected the Maximin Principle. Once the Veil was lifted, revealing their income, the results demonstrated that the most successful principle chosen was the one which maximised average income with a floor constraint,[499] rather than maximising the floor income, which would have supported Rawls' Maximin approach.

The study can be criticised on the ground that the Veil of Ignorance is supposed to be a thought experiment, not one to be implemented in reality because the Original Position can never be achieved. However, Rawls claims that the Veil is supposed to be a

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[495] Philip Kukathas and Chandran Pettit, *John Rawls' "Theory of Justice" and its Critics* (Polity Press 1990) 104-105.
[496] Rawls (n 491) 464.
[497] Barber (n 494) 665.
[498] Grzegorz Lissowsk, Tadeusz Tyszka, and Wlodzimierz Okrasa, 'Principles of Distributive Justice: Experiments in Poland and America' (1991) 35 The Journal of Conflict Resolution 98.
[499] ibid 100.

process upon which to seek a source of justice in society. If Rawls' makes assumptions about what principles people reach under the Veil, which cannot be proven otherwise, it leaves the thought experiment greatly discredited. The study's results were inconsistent with Rawls' predictions, and the fact that it was replicated cross-culturally with the same outcome means it may well be used as evidence of the invalidity of the psychological assumptions within Rawls' theory. As the researchers argued, humans cannot think about distributive justice in an abstract way. The human notion of fairness is not confined to consideration of the person worst off. Rather, human preferences and choices are determined by the average income in the society.[500]

Perhaps the reality is such that people wish not to protect the worst-off, but find a middle ground and place their interests in the chances of being average in society. Rawls claims the Original Position is not intended to explain human conduct, except in so far as it tries to account for our moral judgements.[501] Nonetheless, it is Rawls who has introduced such a particular psychology into the Original Position.

(iii) The Thin Theory of the Good is not really thin at all

Rawls reaches his principles of justice on the basis that the Original Position's participants know only of human nature, social life and conceptions of the good. The social primary goods that Rawls gives us, such as liberty, wealth and income are highly questionable. It can be argued that they are what only Rawls envisages all people take as goods: he fails to see that such goods are not universally shared. The Thin Theory of Good is clearly implicated deeply in the contingent preferences of "western liberal bourgeois life plans."[502]

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[500] ibid 116.
[501] Rawls (n 491) 120.
[502] Michael Sandel, *Liberalism and the Limits of Justice* (2nd edn, Cambridge University Press 1998) 27.

As Matsuda argues, the primary goods which Rawls gives those in the Original Position are not factual at all, but rather "weighted to derive a theory consistent with the liberal tradition [where] alternative conceptions of the nature of mankind are ignored."[503] Rawls ignores general academic consensus regarding disputes over which various aspects of human nature are culturally, biologically or historically determined.[504] Consequently, he has essentially forced into the Original Position his own western liberal presumptions about human nature.[505]

Rawls assumes all people are always rational and self-interested, which is arguably untrue. In ethnographic studies of Hawaiian culture, there is a sense of "mutual interdependency"[506] present, where there exists a shared sense of responsibility and care for people within society. As such, people live in harmony with each other unselfishly. Being much wealthier than others is considered shameful.[507] The very existence of these results defeats Rawls' claims of the human conception of the good being the practice of self-interest and the accumulation of wealth. This reinforces the view that Rawls' values are western liberal ideals, moulding the psychology of those behind the Veil, who are supposed to be detached from such dispositions. He focuses on social primary goods as a means of redistribution, but these goods are not necessarily associated with good living. For instance, Rawls is primarily concerned with income and wealth, which does not account for representative issues like disability and ill health. A capability approach considering factors such as freedom and the value of life would be useful.[508]

Alternatively, it can be argued that the Veil is too thin: it is too abstract a concept to use. Miller claims that constructing a theory

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[503] Mari Matsuda, 'Liberal Jurisprudence and Abstracted Visions of Human Nature: A Feminist Critique of Rawls' Theory of Justice' (1986) 16 New Mexico Law Review 613.
[504] ibid 626.
[505] ibid.
[506] ibid.
[507] ibid.
[508] Amartya Sen, *An Idea of Justice* (1st edn, Penguin 2010) 253-269.

of justice on the basis of choice, which is hypothetically made by individuals abstracted from society is mistaken because these abstract ciphers lack the prerequisites for developing conceptions of justice.[509] He suggests that there is not one single conception of justice, and like Matsuda, argues that Rawls builds certain preferences into the psychological temperament of his individuals, in order to produce his 'correct' principles, such as primary goods of liberty *over* material wealth and so on.

Moreover, from a pluralist liberal viewpoint, different principles of justice will be suited to different societies, rather than Rawls' modern liberal society.[510] Rawls seems to wrongly suggest that a person can have no particular desires or interest, yet still have hypothetical knowledge and feelings of desire, which seems contradictory.[511] We have seen that the Original Position does not always reach certain principles of justice, such as the Difference Principle. Consequently, the Original Position participants may not want to reach those principles. Rawls twists human nature into deriving principles he assumes every impartial person behind the Veil would want, when in fact it represents his own interpretation of justice. Such an abstract idea of justice is not particularly useful in addressing real-world inequality. Sen argues against such transcendentalism: we do not need the abstract process of the Original Position in order to derive a just society, and that we should not look at an idealised just society, but instead how to redress injustice.[512] An idealised society is not an efficient guide to running a real State.

(iv) Justice in practice

Whilst this article concurs with Rawls' view that justice *is in itself* fairness, equality of opportunity and so on, the outcome Rawls seeks is not necessarily achieved through principles such as the Difference Principle. It has the consequence of pertaining inequality, which

[509] David Miller, *Social Justice* (1st edn, Oxford University Press 1976) 341.
[510] ibid 341.
[511] Barber (n 494).
[512] Sen (n 508).

limits the attractiveness of Rawls' theory as a guide to a just society. Whilst the balance that Rawls attempts to make between capitalist inequality and a flat society seems appealing, there are detrimental implications.

The difference principle, resulting from a Maximin approach, would lead to counter-productive consequences, reflective of utilitarian concerns. Harsayni uses an example of the protection of the severely mentally and physically challenged to demonstrate the Maximin approach has wholly unacceptable moral implications.[513] He argues such persons would have to be treated at the expense of talented individuals, where state capital that could have gone towards funding higher education for the talented, instead has to be spent on maximising the welfare of the so-called bottom. This demonstrates the effects of the 'safe' Maximin approach, and shows a grave injustice.

A better alternative to the Maximin approach, reflective of Harsanyi's suggestion, is the Maximum Utility approach. [514] Although Rawls proscribes the risky Maximax, this strikes a balance as it "tells us to rank alternatives on the basis of estimates of probable gain."[515] This is commendable as it is neither pessimistic as is Maximin nor overly optimistic as a Maximax approach would be. It supports the attitude of the rational gambler. Rawls may be "skeptical of probabilistic calculations unless there is no other way out,"[516] but even in the original position participants should predict the equal chance of ending up in any social position. This balanced approach would be more favourable than the Maximin.

III. Conclusion

This paper has discussed Rawls' theory of Justice as Fairness and its problems. There is merit in his notion of justice; however, there are flaws with how Rawls derives his first principles. Whilst it may

[513] John Harsanyi, 'Can the Maximin Principe Serve as a Basis for Morality? A critique of John Rawls's Theory' (1975) 69 The American Political Science Review 594, 596.
[514] Kukathas and Pettit (n 495) 39.
[515] ibid.
[516] Rawls (n 491) 134.

be desirable at face value, he has not considered the practical implications of his theory and, crucially, whether they would be just at all.

However, whilst Rawls' theory can be improved, this paper does not argue that it is a just way to run a state. As Sen maintains, and as the crux of this article's argument has been, such a hypothetical just society does nothing to improve a real state. Rawls' Original Position is flawed and unascertainable. Ultimately, it is too far-fetched an idea to develop a guide on how a state should be run.

The law and ethics behind 'three-parent babies'

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The ground-breaking innovation of mitochondrial donation was licensed for use by the House of Lords on the 24th February 2015, signifying yet another step forward for the United Kingdom in the field of reproductive medicine. Through the techniques of Maternal Spindle Transfer (MST) and Pro-Nuclear Transfer (PNT), mitochondrial donation allows mothers who possess faulty mitochondrial DNA to produce biological offspring without running the risk of passing it on, thereby eliminating the chances of their children developing devastating mitochondrial diseases. As with most advancements in reproductive technologies, mitochondrial transfers have garnered significant international attention and debate. The resulting embryo from the procedure will contain DNA from three different individuals (the father, mother and donor), which has led to concerns about its safety, the consequences of germ-line modification and the possibility of creating 'designer babies' in the imminent future. This paper provides a comprehensive discussion on the legal and ethical issues surrounding mitochondrial donations and defends the position that the procedure has been rightfully legalised.

I. Introduction

Mitochondrial disease is a highly debilitating and fatal genetic illness passed on from mother to child. It is caused by defects or mutations in the mother's mitochondrial DNA (mtDNA) and the effects on the offspring could range from the unnoticeable to completely devastating. With the development of two mitochondrial donation techniques of Maternal Spindle Transfer (MST) and Pronuclear Transfer (PNT), these diseases can be completely avoided. However, these biomedical advancements do not come without their fair share of controversy, as had previous other reproductive technologies such as In-Vitro Fertilisation (IVF). The media has sensationalised mitochondrial transfers with their liberal

[517] LL.B. Candidate, The University of Manchester, School of Law.

use of terms such as 'three-parent babies' and 'three-person IVF,' which has been highly misleading.

This article supports the permissibility of mitochondrial transfers and will explore the ethical and legal considerations that have been the subject of much contention. Amongst the various ethical concerns, those of safety, germline modification, concept of identity and the claim that such technologies interfere with nature will be discussed. Particular attention will be paid to the slippery slope argument that arises from the concept of germline modification, and it will be argued that it is of no significant concern that designer babies will arise from permitting mitochondrial donation techniques, which are performed solely to prevent women with mutated mtDNA from passing it on to their children. However, even if designer babies were to become a reality, it should not cause any widespread moral panic because it can be regulated and the ability to eliminate 'bad' genes from the gene pool is a positive step forward, which could eventually lead to a world without disease.

The article will first provide foundational background on mitochondrial disease and the functions of mitochondria and mtDNA before considering the details of mitochondrial donation procedures (Section I). Section II will then explore the current situation in the United Kingdom following the legalisation of mitochondrial donations on the 24th February 2015, following which the legal and ethical implications of the innovation will be examined (Section III). New innovations in reproductive medicine that could eventually replace mitochondrial transfers will be discussed in Section IV.

(i) Mitochondria

It is first necessary to understand the functions of mitochondria and mitochondrial DNA, as this forms the basis of many ethical arguments.

Mitochondria are small organelles that exist in the cytoplasm of most human cells. The importance of mitochondria lies in their ability to convert nutrients to chemical energy and supply cells with *adenosine triphosphate*, a molecule that provides energy for cell communication and coordination, essentially

allowing our organs and tissues to function as they should.[518] They provide over 90% of cellular energy. For this reason, mitochondria are often referred to as the 'batteries' or 'power-generators' of cells. The more energy an organ requires to function – like the brain, heart or lungs – the higher the number of mitochondria present in those cells.

Mitochondria are the only organelles to possess their own DNA (mtDNA), which makes up approximately 0.1% of a cell and only carries 37 genes, all of which solely contribute to the functioning of the mitochondria.[519] The remaining 23,000 genes are found in each cell's nucleus, where hereditary information affecting physical and personality traits is stored. This is a noteworthy consideration when evaluating the label 'three-parent babies.'

(ii) Mitochondrial disease

Mitochondrial disease is caused by defects or mutations in mitochondrial genes. It is impossible to precisely define mitochondrial disease, as there are about 150 types of medical disorders that fall under the term.[520] There is no specific condition all patients of defective mtDNA suffer; the symptoms and severity of illness in each individual can vary drastically[521] as it hinges on various factors such as the number of cells affected by faulty mitochondria and where these cells are. However, the common experience of patients with mitochondrial disease is the ultimate functional failure of their entire body or body parts due to the lack of energy received. Turnbull provides the examples of

[518] John E. Hall, *Guyton and Hall Textbook of Medical Physiology* (Saunders Elsevier 2011) ch 2.
[519] Parliamentary Office of Science & Technology, *POSTnote: Preventing Mitochondrial Disease* (March 2013, 431).
[520] Geoff Watts and others, 'Novel techniques for the prevention of mitochondrial DNA disorders: an ethical review' (Nuffield Council on Bioethics, 2012) < http://nuffieldbioethics.org/wp-content/uploads/2014/06/Novel_techniques_for_the_prevention_of_mitochondrial_DNA_disorders_compressed.pdf> accessed 1 June 2015.
[521] ibid (n 519).

mitochondrial disease leading to heart failure for people where faulty mtDNA is saturated in the heart, and epilepsy, strokes and severe dementia for those where the unhealthy mitochondria is concentrated in their brains.[522]

Unlike nuclear genes, mitochondrial genes can only be inherited from the maternal line of reproduction, meaning that only women who are carriers of defective mitochondria run the risk of passing on highly debilitating mitochondrial diseases to their offspring, even if they exhibit little to no symptoms themselves. The Human Fertilisation and Embryology Authority (HFEA) estimates that around 1 in every 6,500 children is born with a serious mitochondrial disorder due to faults in their mtDNA.[523] It is a condition that is rare but has devastating effects: patients often experience early death or suffer from severe disabilities.[524]

There is currently no cure for mitochondrial disease, although as with most disabilities there are treatment options available which can improve the length and quality of patients' lives. These will be explored briefly before moving on to discuss the revolutionary medical advancement of mitochondrial transfers, its ethical controversies and associated legal issues.

(iii) Options

(a) Therapeutic measures

For many mitochondrial diseases there are therapeutic treatments available which provide some degree of relief to the patient. However, they are not able to treat the disease or reverse its effects.

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[522] Ian Sample, ''Three-parent babies' cure for illness raises ethical fear' (*The Guardian*, 5 June 2012) <http://www.theguardian.com/science/2012/jun/05/mitochondrial-genetic-disease-ethical-doubts> accessed 1 May 2015.

[523] Human Fertilisation and Embryology Authority, 'Mitochondrial donation: an introductory briefing note' (October 2014) < http://www.hfea.gov.uk/docs/2014-10-01_Mitochondrial_donation__an_introductory_briefing_note_-_final.pdf> accessed 15 April 2015.

[524] United Mitochondrial Disease Foundation, 'Understanding Mitochondrial Disease: Frequently Asked Questions' (no date) <http://www.umdf.org/site/pp.aspx?c=8qKOJ0MvF7LUG&b=7934639> accessed 20 April 2015.

Some examples of these measures include painkillers, mobility assistance devices and the use of nasogastric tubes, depending on which areas of the patient's body is affected.

Specific therapeutic drugs that are currently under development face the hurdle of being difficult to test clinically. This is due to the extreme variations in symptoms and specific disorders amongst patients, which make the problems difficult to pinpoint, diagnose and treat. Researchers at the University of Florida and the University of California are conducting clinical trials with dichloroacetate (DCA), a drug that aims to lower lactate levels in children with Leigh syndrome, Pearson syndrome, MELAS or MERDD, which are all mitochondrial myopathies.[525] Pavlakis and others point out that because lactate levels in the brain are higher in MELAS than other mitochondrial disorders,[526] DCA will not work as effectively. This demonstrates that not one drug can successfully treat all the affected organs in the same way, and to even recognise which parts are affected there needs to be intensive, time-consuming research invested into it. Such research grants are not awarded as readily because mitochondrial diseases are very rare and affect only a minute proportion of society, which means that progress in the development of treatment options is very slow. The United States of America has given mtDNA disease orphan drug status to incentivise pharmaceutical companies to conduct more research into this area.[527]

(b) Preventive measures

Pre-implantation genetic diagnosis (PGD)

Pre-implantation genetic diagnosis (PGD) could potentially be used by a woman that believes she has a mitochondrial defect, even if she

[525] Sharon Hesterlee, 'Mitochondrial Disease in Perspective: Symptoms, Diagnosis and Hope for the Future' (1999) Quest 6(5).

[526] Steven G. Pavlakis and others, 'Mitochondrial myopathy, encephalopathy, lactic acidosis and stroke-like episodes: a distinctive clinical syndrome' (1984) Annals of Neurology 16, 481-488.

[527] Orest Hurko, 'Drug Development for Rare Mitochondrial Disorders' (2013) Neurotherapeutics 10(2), 286-306.

does not exhibit any symptoms of the disease herself. This involves the testing of embryos to select those with the lowest number of mutated mtDNA for implantation to decrease the risk of the child developing serious mtDNA-related disorders.

PGD has its limitations. First of all, selecting the embryo that is least likely to develop mtDNA disease only reduces the risk of it, but does not eliminate the possibility. If the child is female, there is still a chance that their future offspring could fall victim to severe mtDNA-related diseases.

Also, this measure is not applicable for all women with mtDNA mutations – it can only be used where the exact mutation the mother carries is known, which is difficult to identify because there are many women without symptoms who carry mutated mtDNA. PGD is also inapplicable to women with very high levels of abnormal mtDNA and those with abnormal mtDNA in all their cells.[528] Furthermore, due to the variations of mtDNA disease, not all mitochondrial diseases arising from DNA mutations can be adequately diagnosed, meaning that the degree of prediction PGD can perform is limited.

Testing of the foetus during pregnancy (with the option of termination)

The testing of the foetus for mtDNA abnormalities is an option that women who will not benefit from PGD can consider. The testing of the amniotic fluid and placenta would occur between 18 to 21 weeks into a pregnancy. If the foetus is found to have an mtDNA defect, it would result in the parents having an option to terminate the pregnancy.

[528] Neva Haites and Robin Lovell-Badge, 'Scientific review of the safety and efficacy of methods to avoid mitochondrial disease through assisted conception: Report provided to the Human Fertilisation and Embryology Authority' (April 2011) < http://www.hfea.gov.uk/docs/2011-04-18_Mitochondria_review_-_final_report.PDF> accessed 28 March 2015.

This option is invasive and can potentially conflict with the personal beliefs of women who do not wish to terminate their pregnancy and yet struggle with the fact that their child could suffer immeasurable pain if the pregnancy was brought to term. Also, even if they do decide to continue with pregnancy, Sharon Bernardi's experience serves as a sombre warning – she had seven children with mtDNA defects so severe that they all died.[529]

In-vitro fertilisation (IVF) with donor eggs

For women who wish to conceive a healthy child and are open to having one who is not genetically linked to them, IVF with healthy donor eggs could be an option. Evan Synder, who chaired a US Food and Drug Administration (FDA) advisory panel on mitochondrial transfers, classifies this as one of the "less invasive and much more certain" [530] methods he believes parents should opt for over mitochondrial donations. While a healthy offspring is guaranteed, the downside of this method is obvious – they would not have the mother's genetic traits.

Adoption

Adopting a child is also another option strongly encouraged by advocates against mitochondrial transfers, but for the same reason as IVF with donor eggs, the desire to have a child genetically-related to them propels parents to turn to reproductive technologies as their primary option. Jackson poses the question of why these individuals hold some degree of moral responsibility for the world's abandoned children, especially since fertile couples' preferences for having their own biologically related children are not condemned.[531]

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[529] Robin Banerji, 'The woman who lost all seven children' (*BBC*, 20 September 2012) <http://www.bbc.co.uk/news/magazine-19648992> accessed 13 March 2015.
[530] Steve Connor, 'Exclusive: The three-parent baby trap - is new IVF technique safe?' (*The Independent*, 16 November 2014) <http://www.independent.co.uk/news/science/exclusive-the-three-parent-baby-trap-is-new-ivf-technique-safe-9864156.html> accessed 25 March 2015.
[531] Emily Jackson, *Regulating Reproduction: Law, Technology and Autonomy* (Hart Publishing 2011).

Other options

There have been very recent developments in the field of combating mitochondrial diseases. These will be explored in greater detail later in this article. As their safety and efficacy have yet to be proven successfully, these are not yet capable of confidently being classified as options, but they do have some potential.

(c) Mitochondrial transfers

Background

Before mitochondrial transfers, cytoplasmic transfers [532] (also known as ooplasmic transplantations) were used in the United States. Cytoplasmic transfers are similar in that they sought to resolve mitochondrial disorders in embryos that had their mothers' mutated mtDNA – in simple terms, the procedure involved the injecting of another woman's cytoplasm (which contained her healthy mitochondria) into the embryonic cell so that her healthy mitochondria could compensate for the unhealthy ones present.

An estimated 30 to 50 children were born as a result of this technique, including Alana Saarinen who is famously dubbed as "the girl with three parents."[533] The procedure faced the same ethical and legal issues as mitochondrial transfers, and was later banned by the FDA in 2002 due to fears of health and safety risks from the long-term effects of genetic manipulation. This was largely due to the findings of clinical embryologist Dr Jacques Cohen, who recorded that amongst the small sample size of seventeen babies born from cytoplasmic transfers, there were three abnormal records – two were missing an X chromosome (one was miscarried) and

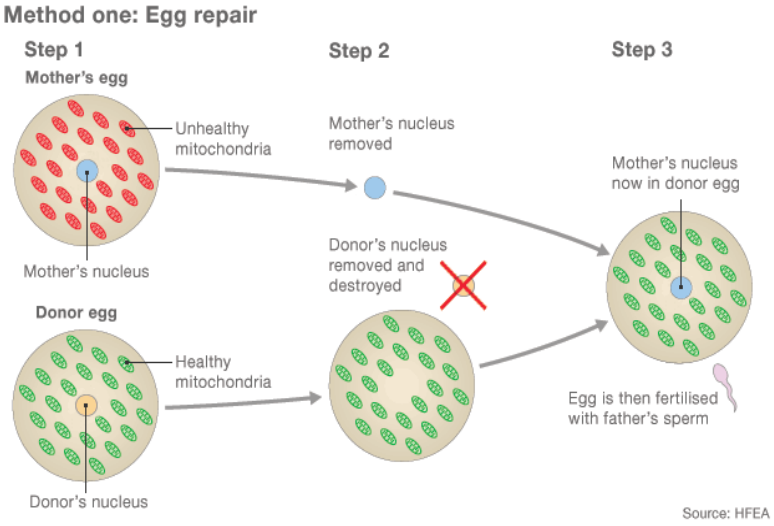
[532] Jason A. Barritt and others, 'Mitochondria in human offspring derived from ooplasmic transplantation: Brief communication' (2001) Human Reproduction 16(3), 513-516.
[533] Karen Weintraub, 'Three biological parents and a baby' (*The New York Times*, 16 December 2013) <http://well.blogs.nytimes.com/2013/12/16/three-biological-parents-and-a-baby/> accessed 26 February 2015.

another later developed signs of cognitive disorder.[534] It is clear if these were the result of the procedure or not.

Following the enactment of the Human Fertilisation and Embryology Act in 2008, researchers at the University of Newcastle developed mitochondrial donation techniques two years later. They set out two techniques used in mitochondrial transfers: maternal spindle transfer (MST) and pro-nuclear transfer (PNT).

Maternal spindle transfer (MST) / "egg repair"

This technique involves removing the nuclear DNA from the donor egg and replacing it with the mother's. This healthy egg is then fertilised and implanted in the same way that IVF is carried out.

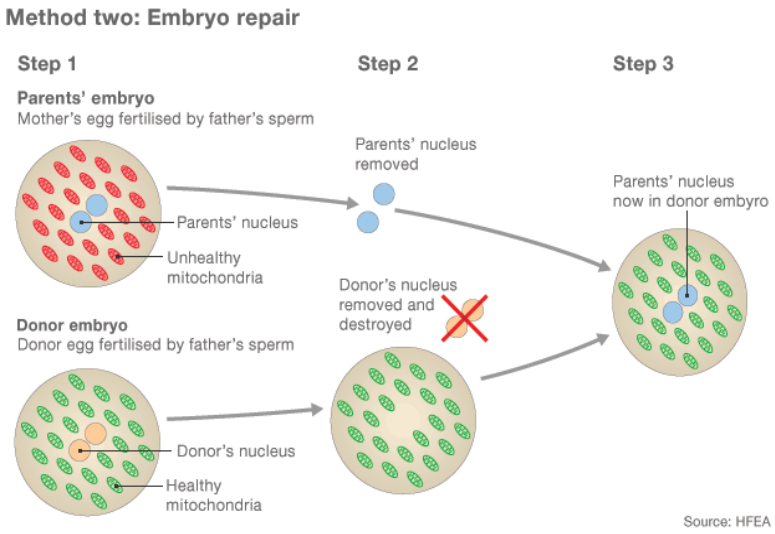


[534] Charlotte Pritchard, 'The girl with three biological parents' (*BBC*, 1 September 2014) <http://www.bbc.co.uk/news/magazine-28986843> accessed 5 March 2015.

Pro-nuclear transfer (PNT) / "embryo repair"

Pro-nuclear transfer also involves the removal of nuclear DNA from the donor egg. The nuclear DNA formed from fertilising the mother's egg with the father's sperm is then transferred to the donor cell, which is implanted into the mother.

Following animal trials, MST and PNT have been performed on human eggs and zygotes respectively, and both have led to the successful formation of blastocysts,[535] which shows that the procedures will be effective when implanted in the uterus. Both MST and PNT techniques are safer and better developed than cytoplasmic transfers because almost all of the mitochondria in the fertilised egg cell is replaced by the donor's.[536]



[535] Wellcome Trust, 'Q&A: Mitochondrial donation' (August 2014) < https://wellcome.ac.uk/sites/default/files/mitochondrial-donation-faqs-wellcome-aug14.pdf> accessed 2 March 2015.

[536] Masahito Tachibana and others, 'Mitochondrial gene replacement in primate offspring and embryonic stem cells' (2009) Nature 461(7262) 367.

II. The current situation

The United Kingdom has once again proved itself to be at the forefront of reproductive technologies and a global leader in pioneering them. It is famously known as the country where the world's first test-tube baby, Louise Brown, was conceived in 1978.[537] On the 24th February 2015, the House of Lords voted 280 to 48 to approve modifications to the law that will allow fertility clinics to apply for licenses to carry out mitochondrial transfers from as early as October 2015. These modifications were required for the technique to be used because the HFEA 2008 did not allow for a genetically modified embryo to be used in treatment for humans.[538]

In many countries such as the US and Australia, research in this area is illegal because of the ethical concerns surrounding the use of human embryos for testing and experimentation. In places where it is legal, few researchers have the capital or resources to work on the problem. This is an admirable step for the betterment of reproduction and health, and it almost seems natural that the UK should be the first to take this leap, continuing its position as a leader in the field of reproductive health.

(i) The legal framework

In England and Wales, the Human Fertilisation and Embryology Act 1990, further amended in 2008,[539] prohibits the implantation of an egg or embryo that has undergone DNA alteration. However, this is permitted, subject to parliamentary approval, for the purpose of "[preventing] the transmission of serious mitochondrial disease" under a new section 3ZA (5), which states:

"(5) Regulations may provide that –

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[537] Kate Brian, 'The amazing story of IVF: 35 years and five million babies later' (*The Guardian*, 12 July 2013) <http://www.theguardian.com/society/2013/jul/12/story-ivf-five-million-babies> accessed 2 April 2015.
[538] Human Fertilisation and Embryology Act 2008.
[539] ibid.

(a) An egg can be a permitted egg, or
(b) An embryo can be a permitted embryo, even though the egg or embryo has had applied to it in prescribed circumstances a prescribed process designed to prevent the transmission of serious mitochondrial disease."

III. The concerns

The techniques of mitochondrial transfers have been subject to three scientific reviews[540] (2011, 2013, and 2014), an ethical review[541] (2012) and a public consultation.[542]

Ethical issues concerning mtDNA transfer have also been extensively examined by the Nuffield Council on Bioethics in the UK and summarised in a report concluding that "Due to the health and social benefits to individuals and families of living free from mitochondrial disorders, … we believe that if these novel techniques are adequately proven to be acceptably safe and effective as treatments, it would be ethical for families to use them."[543]

(i) Ethical concerns

(a) Safety considerations of germline modification

Mitochondrial transfers involve a third party's healthy mtDNA transplanted into the embryo prior to implantation, which raises concerns about how this will affect future generations. The germline – the genetic material passed down through generations of people –

[540] Human Fertilisation and Embryology Authority, 'Call for evidence: Scientific review of the methods to avoid mitochondrial disease' (February 2011) < http://www.hfea.gov.uk/docs/2011-02-17_Mitochondrial_review_-_priming_document_-_call_for_evidence.pdf> accessed 23 March 2015.
[541] Geoff Watts and others (n 520).
[542] Human Fertilisation and Embryology Authority, 'HFEA launches public consultation, Medical frontiers: Debating mitochondria replacement' (September 2012) < http://www.hfea.gov.uk/7517.html> accessed 1 May 2015.
[543] Geoff Watts and others (n 520).

will be altered as each subsequent person in that line of reproduction will possess a minute percentage of the donor mtDNA.

This has garnered significant attention by scientific publications and the media because, as Frankel and Chapman put it, the technology crosses a line drawn by scientists and bioethicists by altering the genetic profile of unborn children.[544]

One of the most prominent objections against germline modification is the fear that the child's characteristics would be altered, which is not only 'unnatural,' but also possibly violates the child's right to an open future. The mainstream media has heightened concerns by labelling the mitochondrial transfer techniques as equivalent to making a 'three-parent baby.' The misleading headlines have caused moral panic, which is arguably uncalled for as, unlike nuclear DNA, mtDNA does not contain the ingredients for one's genetic makeup. As such, the offspring resulting from the technique will not inherit any genetic traits from the donor. Scientifically, this is a misconception that is easily resolved.

Critics also express concern about the potential unknown health risks this modification may lead to, and whether this alteration is a medically responsible and safe advancement to pursue. Although the HFEA has concluded that the practice is "not unsafe," many remain unconvinced. Gruber, the president of the Council of Responsible Genetics, reinstates that this is still at a highly experimental stage. He poses the question: "What negative, debilitating implications are we offering to the germ line? What are we saddling future generations with?"[545]

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[544] Mark S. Frankel and Audrey R. Chapman 'Human Inheritable Genetic Modifications: Assessing Scientific, Ethical, Religious, and Policy Issues' (American Association for the Advancement of Science, September 2000) < https://www.aaas.org/sites/default/files/migrate/uploads/germline.pdf> accessed 12 February 2015.

[545] Jeeg, 'Three Biological Parents and a Baby' (Council for Responsible Genetics, 17 December 2013) <http://www.councilforresponsiblegenetics.org/blog/post/Three-Biological-Parents-and-a-Baby.aspx> accessed 1 February 2015.

The FDA and some scientists have pointed to a range of complications that could seriously harm children conceived this way. First of all, although the mtDNA make no significant contribution to our definable characteristics, some scientists and researchers have criticised this as a simplistic way of thinking and argued that it could have other implications.[546] While mitochondria contain few genes and they are mainly for the function of the mitochondrion's themselves, mitochondrial DNA and nuclear DNA are constantly interacting with each other. Possessing the donor's mtDNA could mean that this cellular communication is disrupted for reasons of incompatibility of the biomaterials, just like how in organ transplants there needs to be specific care placed on whether the donor organ can function properly and work in cohesion with the recipient's body.[547] In an interview, Dr Sumit Parikh stated that "we know that disease can happen not just because of a breakdown in the energy factory but other problems in and around as far as the other things going on."[548]

Secondly, there is concern that even if minute, seemingly-harmless amounts of defective donor mitochondria exist in the embryo, they could be preferentially replicated throughout the cells, which could then potentially cause or aggravate the very disease the procedure is meant to prevent.[549] This, to Jenuth, Peterson, and Shoubridge, is a calculated speculation seeing as how cells have

[546] Klára Šíchová and others, 'On personality, energy metabolism and mtDNA introgression in bank voles' (2014) Animal Behaviour 92, 229-237.
[547] Martin Wilding and others, 'Mitochondrial aggregation patterns and activity in human oocytes and preimplantation embryos' (2001) Human Reproduction 16(5), 909-917.
[548] Sumit Parikh, 'Introduction to Mitochondrial Disease by Dr. Sumit Parikh MD' (*Youtube*, 31 August 2012) <https://www.youtube.com/watch?v=QC_1kE4tsXk> accessed 19 April 2015.
[549] Marcy Darnovsky and Jessica Cussins, 'Britain is on the brink of a perilous vote for 'three-parent' in-vitro fertilisation' (*Los Angeles Times*, 8 February 2015) <http://www.latimes.com/opinion/op-ed/la-oe-0209-darnovsky-children-dna-from-3-people-20150209-story.html> accessed 29 March 2015.

been known to evolve through time.[550] Ted Morrow,[551] whose research is often cited by critics of the procedure, has made it known that he thinks that mitochondrial transfers pose "a genuine safety concern."[552] In his studies of mice, changes in cognitive ability to learn and do things were observed. In his studies of fruit flies and seed beetles, there were changes in male fertility, ageing, and a range of different traits. The HFEA dismissed his findings because they were done on inbred animals, and as such are not relevant to humans. However, Morrow stands by his conclusions and criticised the Authority for their quick dismissal. To date, there has been no follow-up study with animals that are not inbred, which is perhaps a reason for critics to label the procedure as still in its experimental stages. As such, they encourage the other options for family building (discussed in Section II), which are safer and less risky to their families and to the public at large.[553]

This element of risk is perhaps the most legitimate of concerns to do with mitochondrial transfers. In February 2014, the FDA reviewed the same evidence, which was available in Britain. They concluded that the procedure was not conclusive enough and was thus not yet ready for clinical trial on humans. There is no required follow-up to study the health of any resulting children, which proves to be a further concern to what they believe could hold disastrous consequences.[554]

In response to these concerns about safety and risk, supporters have argued that the same concerns were raised when reproductive technologies like IVF were first made available, where the headlines then were similarly portraying scientists as people

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[550] Jack P. Jenuth, Alan C. Peterson, and Eric A. Shoubridge, 'Tissue-specific selection for different mtDNA genotypes in heteroplasmic mice' (1997) Nature Genetics 16(1) 93-95.
[551] Ted Morrow, 'Influence of mitochondrial DNA on personality traits – some evidence' (*Ted's blog*, 30 October 2014) <https://tedmorrow.wordpress.com/2014/10/30/influence-of-mitochondrial-dna-on-personality-traits-some-evidence/> accessed 1 February 2015.
[552] Ted Morrow, 'Safety concerns remain over three-person IVF' (*The Guardian*, 22 July 2014) <http://www.theguardian.com/science/2014/jul/22/three-person-ivf-mitochondria-dna> accessed 8 March 2015.
[553] Steve Connor (n 530).
[554] Marcy Darnovsky and Jessica Cussins (n 549).

'playing God' and creating 'genetically modified humans.' It is only through performing these procedures on humans that concrete medical progress can be made. It is what fuels research and all developments that aim to increase our quality of living, and mitochondrial transfers are an important step forward for reproductive autonomy. Brassington comments that "we don't know what effect it'll have on humans" is an argument that is against any innovation whatsoever.[555] Braude, who sat on all three consultations organised by the HFEA, agrees with this. He expresses that "in any move from science to clinical practice there is a leap of faith - it has to be done," and further says that the procedures behind mitochondrial donations have gone through significantly more scrutiny than previous assisted reproduction techniques such as IVF.[556]

Frances Flinter urges critics to look at it in a more positive light – the transfers are very likely to succeed without any health repercussions, and this could mean that faulty mtDNA will possibly be completely eliminated at some point down the family hierarchy. She poses the rhetorical question to those who question the morality of altering the germ line: "Is it ethical to try and prevent the development of a treatment that might enable the birth of a healthy baby for a couple for whom there are no other options... and that could also avoid further tragedy in future generations?"[557] The public consultation by the HFEA in 2012 supports this: the consultation, which sought public views on germline modification, reported that the general consensus was that the public was mainly relaxed about it because they felt that the benefits of the

[555] Iain Brassington, 'Should we welcome 'three-parent babies?' (*Manchester Policy Blogs*, 3 February 2015) <http://blog.policy.manchester.ac.uk/posts/2015/02/should-we-welcome-three-parent-babies/> accessed 27 February 2015.
[556] House of Commons Science and Technology Committee, *Oral evidence: Mitochondrial Donation* (HC One-off evidence session on Wednesday 22 October 2014, 730).
[557] Frances Flinter, 'Mitochondrial donation as a clinical option: A response to Ted Morrow' (*BioNews*, 29 September 2014) <http://www.bionews.org.uk/page_455952.asp> accessed 11 May 2015.

mitochondrial transfer techniques would outweigh the risks.[558] This consultation was praised in an evaluation by Sciencewise, which commended the excellent level of public engagement.[559] Some argue that this evidence of extensive public support could mean that it is unethical for the techniques not to be made available.[560]

These supporters do not deny that inheritable genetic engineering requires caution, cross-disciplinary engagement and informed public deliberation,[561] but they also hold that these precautions have been taken and fulfilled. Flinter reiterates that these techniques have been intensely scrutinised and researched for thirty years in animals, more than five years in human embryos and have been assessed by scientists, researchers and advisory panels in exhaustive detail in the various scientific reviews convened by the HFEA.[562] The Institute of Medicine in the US has been prompted by the FDA to conduct more research into this area,[563] and recently began a 19-month long review of the social policy and ethical implications behind these procedures, which will hopefully result in the same conclusions as the HFEA – these procedures are a safe step forward and should be supported so more women and families can benefit from it.

(b) Next stop: designer babies? A look at the slippery slope argument

The HFEA reported that one of the main ethical concerns raised during the public consultation was that the mitochondrial donation techniques will open the door to further germline modification to do

[558] Human Fertilisation and Embryology Authority, 'Mitochondria Replacement Consultation: Advice to Government' (March 2013) < http://www.hfea.gov.uk/docs/Mitochondria_replacement_consultation_-_advice_for_Government.pdf> accessed 2 March 2015, 16.
[559] Geoff Watts and others (n 520).
[560] Julian Savulescu, 'Bioethics: why philosophy is essential for progress' (2015) Journal of Medical Ethics 41(1) 28-33.
[561] Andy Greenfield, 'HFEA panel on mitochondrial replacement considered all submissions' (*The Guardian*, 24 July 2014) <https://www.theguardian.com/science/2014/jul/24/hfea-panel-mitochondrial-considered-all-submissions> accessed 1 March 2015.
[562] Frances Flinter (n 557).
[563] Marcy Darnovsky and Jessica Cussins (n 549).

with nuclear DNA, which contains hereditary traits which are recognisable in offspring. In this section, the slippery slope argument will be explored and rejected. Then, it will be argued that even if these concerns of eugenics were legitimate, the outcome would not be devastating for society.

The HFEA consultation identified two main strands of concern about this slippery slope argument. The first is that it might inadvertently open more doors to similar techniques for less desirable purposes, such as altering the nuclear DNA of embryos to determine their hair colour, eye colour or other characteristics before implantation. The second worry is that if modification of nuclear DNA grows to become more socially acceptable or desired, it would be harder to argue against these nuclear DNA modifications because modifications to the germline via mitochondrial donations would have been approved and accepted. Critics of the techniques believe that this recent approval could set us on a slippery slope towards designer babies. Conservative MP Fiona Bruce likens this to "opening a Pandora's box," and comments that the UK would have "approved a technique and what that technique could be used for in the future who knows."[564]

Rachel Brown comments that these opinions of designer babies are of limited help and require more reasoned arguments: they have no specific relevance to mitochondrial donation and are merely unoriginal stabs in an attempt to prevent reproductive technology from advancing – after all, she notes, these same arguments were made when IVF was first introduced. Turnbull also defends mitochondrial transfers against this argument, and says that: "We're not trying to create some characteristic that makes this person a stronger person or [someone who] will have blonde hair. We're trying to prevent disease and I think that is the only justification for doing this."[565]

The HFEA has reassured the public that the technical element of this particular concern would be addressed through

[564] Charlotte Pritchard (n 534).
[565] ibid.

careful regulation and monitoring, and such modifications would be prohibited.[566] The current law only allows an embryo with altered DNA to be implanted into a woman for the purpose of preventing serious mitochondrial disease. For an embryo with modified nuclear DNA to be implanted legally is a tremendous and unlikely step which would entail the re-writing of the primary legislation, which is a major endeavour in itself; it would require an extensive amount of new research, well-established techniques and discussions about ethical, moral, legal and regulatory concerns.

With the question 'where do we draw the line?' being of primary concern to many people, it is arguably worth considering the benefits of altering the germline for future generations. Attention will be given to medical conditions in particular as it is the most realistic potentially permissible option, but some space will also be dedicated to alteration of eugenics to improve quality of life.

In the public debate organised by the Progress Educational Trust, many participants stated that patients do not view germline modifications as a concern, but rather, the very point of the entire process – it could very likely be a positive change that will eliminate the devastating disease from their family line for good. After all, are preventing and curing diseases not the very foundations of medicine and biotech advancements? If the slippery slope of modifying genetic of our future generations means that more genetic diseases can be avoided before birth, then it may well be a slope worth sliding down. Julian Savulescu believes that we should "use the emerging knowledge from genetics to have not just healthier children, but children with better genes."[567]

Of course, this in itself raises a whole other set of ethical questions. As with the Abortion Act 1967 section 1(1)(d)[568] which allows for a termination of a pregnancy should there be a significant risk that the developing embryo will be disabled. The Disability Rights Commission, amongst many other individuals and activist groups, criticised this as severely offensive and reinforces many negative stereotypes of disability. Janet Hadley agrees with this

[566] Human Fertilisation and Embryology Authority (n 558).
[567] Julian Savulescu (n 560).
[568] Abortion Act 1967, s 1(1)(d).

view and states "there can be nothing more stigmatising surely than knowing you live with a condition which society seeks to prevent by abortion." Also well known to this controversial topic is the question of what counts as 'disabled' to qualify for the termination – when comparing a cleft palate to cystic fibrosis, which condition is more 'deserving' of an abortion?[569] Going back to the case of mitochondrial transfers and the potential for germline modification to prevent and eliminate other devastating diseases, which conditions would be 'deserving' of this medical advancement? Is there a line to be drawn when deciding between medical conditions like autism, cerebral palsy, and migraines? Should there even be a line in the case of non-cosmetic genetic modifications? It is submitted that there should not be. It is only morally right and responsible for us to prevent these diseases – all diseases – if we have the means to do so. We are already acknowledging that these are problems we would be better off without; we develop medicine, we deliver treatment and we help those who are suffering from them. It would be simpler and more efficient if we could nip these problems in the bud right when parents decide they want a child.

The more difficult complications concern things that are not medically beneficial, but socially beneficial. It is not constrained to cosmetic alterations in the nuclear DNA, but could hypothetically one day be stretched to encompass traits such as sexual orientation and intelligence. Brassington points out that the progress that has already been made in genetic science means that the prospect of genetically engineering our children is in fact, not that far-fetched.[570] James Watson, former head of the Human Genome Project, thinks that parents should be able to choose from a selection of traits that will enable their child to have a better quality of life, including their child's sexuality, as invasive as that may be.[571]

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[569] Juliet Tizzard, 'Reproductive Technology: New Ethical Dilemmas and Old Moral Prejudices' in Ellie Lee (eds), *Abortion Law and Politics Today* (OUP 2005) 191.
[570] Iain Brassington (n 555).
[571] Victoria Macdonald, 'Abort babies with gay genes, says Nobel winner' (*The Sunday Telegraph*, 16 February 1997) <http://tinyurl.galegroup.com/tinyurl/3uJsF7> accessed 1 April 2015.

Nicholas Agar, in Liberal Eugenics, rejects that this limits the future child's liberty and independence and asserts that "[enhancing] in accordance with the maximin requirement promises to expand the range of genuine life plan choices for, and therefore liberty of, a future person." [572] Taking this principle and relating it to mitochondrial transfers, even if the slippery slope does garner legitimate concern, 'designer babies' and altering the nuclear DNA of embryos may not necessarily be a bad thing – if we can eliminate undesirable characteristics from the gene pool, then it should be permissible. A parent might not have a duty to genetically engineer what they believe would become the best possible child, but having that option would be desirable.

(c) Identity

The report by the Nuffield Council on Bioethics and the HFEA consultation both raised some concerns about the effect of the procedure on the resulting child's sense of identity. The former has discussed these ethical concerns extensively and noted that 'identity' is a highly elastic term.[573] Identity can include genetic identity, encompassing the characteristics we get through our genetic make-up and how we perceive ourselves. Then there is qualitative identity, which includes our physical and personality traits. They concluded that the presence or absence of mitochondrial disorders could affect multiple layers of one's identity but that none of these were unique to the treatments. For example, in IVF with donor eggs, there are recent cases where the resulting child struggles emotionally to come to terms with the fact that she looks nothing like her birth mother and will never be able to find out who her egg donor is.[574] As no identifying information on mitochondria donors will be given under the amended legislation, commentators worry that such children will face similar issues. In the rush to raise

[572] Nicholas Agar, 'Liberal Eugenics' (1998) Public Affairs Quarterly 12(2) 137-155.
[573] Geoff Watts and others (n 520).
[574] Helen Carrol, 'Donor IVF baby who says 'I wish I'd never been born'' (*Daily Mail*, 25 June 2014) <http://www.dailymail.co.uk/femail/article-2669842/Donor-IVF-baby-says-I-wish-Id-never-born-Its-great-IVF-taboo-child-feel-never-knowing-biological-parents-For-family-answer-shattering.html> accessed 11 March 2015.

concerns about mitochondrial transfers it should also be noted that a person's identity is influenced by a plethora of factors other than their conception and their genetic link to their parents.

Bredenoord and others argue that the moral acceptability of germline modification is not dependent on whether it alters the identity of the child or not, because all germline modifications have this effect. It is, however, dependent on whether the child's right to an open future is safeguarded by these modifications. They contend that no matter whether it is the nuclear genome or the mitochondrial genome that is modified, the identity of the future child will be changed. This, however, does not mean that the distinction may not be relevant from other aspects – altering the nuclear DNA may for example be riskier, as it requires a disruption of the nuclear membrane.[575] They suggest that to prevent the resulting child from having a predetermined, specific plan of life, the only germline modifications that should be permitted (for both nuclear DNA and mtDNA) are those that broaden what they term 'general purpose means': "capacities that are useful and valuable for carrying out nearly all plans of life." They conclude that because health is *sine qua non* for many plans in life, the altering of mitochondrial DNA would establish a more open future for the resulting children and therefore be an acceptable use of germline modification.

(d) Interference with nature

We concluded that the exploration of the ethical concerns behind mitochondrial transfers was an issue that is prominent yet easily rebutted. The perception was that the techniques are unnatural, that they interfere with nature, and scientists are once again 'playing God' by mimicking nature. We have already touched briefly on this earlier and established that similar arguments were made at the time of any new revolutionary reproductive technology. However, it is worth exploring in more detail because mitochondrial donations do

[575] Annelien L. Bredenoord and others, 'Ethics of modifying the mitochondrial genome' (2011) Journal of Medical Ethics 37(2) 97.

have the distinction of having DNA from three people, something that has not been of concern before. Josephine Quintavalle believes that this quality sets it apart from other reproductive technologies like IVF because it is "not an attempt to mimic nature, but an attempt to distort nature."[576]

Braude, on the other hand, points out that having a third person's DNA in your body is "nothing particularly new." He relates it to bone marrow transplants in leukaemia patients and points out that the receiver of the bone marrow from a donor will have the latter's DNA circulating in their body.[577] However, this does not mean that the patient or donor will be related in any way. Similarly, while the resulting child will perhaps have a relationship of gratitude with their donor,[578] they will not have a biological or familial one.

(ii) Legal concerns

(a) Legal status of the donor

While women donating mitochondria would also be egg donors, only their mitochondria would be used for the procedure. Although there would be no characteristically important or identifiable genetic information passed down to them, their legal status in relation to the child has been the subject of much contention. Technically, their DNA will exist in the resulting children, no matter how small that percentage is – surely that warrants them with some rights to identification.

In a consultation by the HFEA, some participants thought that there should be no identifiable information of the donor available to the resulting child. They felt that the mitochondrial transfer techniques were similar to blood or tissue donation and not

[576] Josephine Quintavalle, 'Josephine Quintavalle Discusses Proposals for Three Parent Babies on BBC News' (*Youtube*, 28 June 2013) <https://www.youtube.com/watch?v=YgXWgNkC_rQ> accessed 21 April 2015.
[577] Charlotte Pritchard (n 534).
[578] Such as Alana Saarinen's case.

to sperm or egg donation. Health professionals have also held this view. The other group in the consultation, who believed that the child should have access to this information about the mitochondria donor, mostly linked it to their fears for any potential consequences resulting from the mitochondria transfer. As they felt that this information would be useful should something go wrong in the resulting child's genetics.[579]

After extensive consultation, the government has proposed that the children born after mitochondrial donation should have a right to access only non-identifying information about the donor.

(b) Regulation

Regulation of mitochondrial transfers has been a consideration of paramount importance throughout the stages of consultations and reviews. The draft legislation of the Human Fertilisation and Embryology (Mitochondrial Donation) Regulations 2015[580] has been supported by multiple organisations such as the Academy of Medical Sciences, the Lily Foundation, Wellcome Trust, and Genetic Alliance UK.

Regulation will be robust and strict; doctors will need to obtain a license from the HFEA in order to perform these mitochondrial transfer procedures, which will only be granted to them if it is clear that the use of the technique is safe. The process can only be done in specialised centres around Britain. The Nuffield Council on Bioethics has also recommended in a report that the parents of children who are born out of this procedure should be encouraged to commit to a long-term follow-up of their children. They also proposed that a centrally held register that contains comprehensive information about all such procedures be maintained and kept so that researchers can obtain this information.[581] They

[579] Human Fertilisation and Embryology Authority (n 558) 21-24.
[580] Human Fertilisation and Embryology (Mitochondrial Donation) Regulations 2015, SI 2015/572.
[581] Geoff Watts and others (n 594).

further recommended that all regulations for egg donors should apply to those donating their eggs for mitochondrial donation procedures. They advised that counselling should be made available and provided to all couples that wish to conceive a child using this technology.[582]

The HFEA will approve the use of mitochondrial transfers to patients on a case-by-case basis. Responding to concerns that this will be a slow and tedious process, which will become overly burdensome, some have suggested that this approval process can be relaxed with time.[583] The Nuffield Council of Bioethics has advised that decisions regarding these cases should perhaps be made by the clinicians performing the treatments, as they would be much closer to the patients and would therefore be in a better position to assess their case. However, since Britain is under global scrutiny by being the pioneers of this new technique, the HFEA will need to be strict and comprehensive with approvals and other regulations before any of these recommendations can take form. What they show, though, is that extensive and very comprehensive thought has been put into the regulatory framework, which should ensure its success. The possibility of patients from abroad wishing to seek the treatment was even discussed, when it was confirmed by Professor Dame Sally Davies that the NHS would not be subsidising the treatment for them and that they would have to pay the full cost of MST or PNT. The Secretary of State for Health also stated that NHS patients would retain priority over these overseas patients.[584]

(c) Paving the way for cloning?

Another legal concern is that the legal recognition of mitochondrial donations will mean that reproductive cloning might become a

[582] ibid 89.
[583] Department of Health: Health Science and Bioethics Division, *Mitochondrial Donation: A consultation on draft regulations to permit the use of new treatment techniques to prevent the transmission of a serious mitochondrial disease from mother to child* (February 2014) 35.
[584] Science and Technology Committee (n 556).

reality. In reproductive cloning, the entire genetic code (except for the mitochondrial DNA) is reproduced from a single body cell from an adult. It is prohibited under the Human Reproductive Cloning Act 2001,[585] but its similarities to mitochondrial transfers have prompted some to question if this will soon be permitted.[586]

In the cloning procedure, somatic cell nuclear transfer (SCNT), the nuclear DNA is extracted from the cell and inserted into an egg. After that, the newly formed cell is induced to develop into an embryo by cell division through either chemical or electrical stimulation. After several days, the embryo is implanted into the womb of the recipient and brought to term. The result of this entire process is an individual who is the complete genetic duplicate of the adult from which the nucleus was taken – the child will be a clone, a new category of life. This process has not been proven to occur in a human being but has been tested extensively on animal embryos.[587]

While there are some similarities among the two, mitochondrial transfers are unlikely to pave the way for human reproductive cloning. Conservative MP Rees-Mogg has described mitochondrial transfers as a procedure that was "effectively cloning," [588] but in the same dialogue, Jane Ellison, the Parliamentary Under-Secretary of State for Health, clarified that it was very different from cloning because "any children resulting from the use of the technique would have arisen from fertilisation and be genetically unique."[589] Because of this, the ethical issues of identity, safety and germline alteration will be magnified when concerned with reproductive cloning. There is no

[585] Human Reproductive Cloning Act 2001 (repealed).
[586] House of Commons Science and Technology Committee, *Mitochondrial donation: Correspondence received relating to the evidence hearing on 22 October 2014* (HC One-off evidence session on Wednesday 22 October 2014) 15.
[587] Center for Genetics and Society, 'Reproductive Cloning: Basic Science' (10 March 2010) <http://www.genetics-and-society.org/technologies/cloning/reproscience.html> accessed 1 May 2105.
[588] HC Deb 12 March 2014, col 166W.
[589] Louisa Petchey, 'Conservative MP says mitochondrial donation will produce 'genetically modified children'' (*BioNews*, 17 March 2014) <http://www.bionews.org.uk/page_405551.asp> accessed 29 April 2015.

strong link between mtDNA donations and reproductive cloning, and as such is not a very significant issue.

(d) New developments and their implications

This area of bioethics and law is at a very exciting stage, not just because Britain is to begin pioneering the novel technology of mitochondrial transfers, but also because several new developments are simultaneously taking place. These are worth considering because if they are eventually proven to be effective on humans, they could be a potential source of treatment for those with mutated mtDNA and perhaps even render mitochondrial donation techniques a thing of the past.

The Salk Institute for Biological Studies recently introduced a gene-editing technique that may prevent diseased mtDNA from being inherited.[590] The technique (mitoTALEN or CRISPR) involves reducing the number of mutated mitochondria by using a single injection of mRNA, which are enzymes that work to destroy the mutated genes, leaving only healthy mitochondria behind. This aims to restore the balance of healthy mitochondria in the cell, and in doing so, reduce the potential of the child in inheriting the faulty mtDNA and developing a serious mitochondrial disorder so much to the point that the disease could be completely impossible to develop – it will be "below the threshold for triggering mitochondrial diseases in humans," which is "enough to prevent the transmission of these diseases to the kids of affected mothers." It works in a way that is very similar to drugs which targets and cures diseased cells, but in this case it is targeting diseased organelles. However, for the very few patients who have an exceptionally high proportion of unhealthy mitochondria, it may not work.

The process has shown success in an animal study but has yet to be proven in humans, although the research team has made

[590] Antony Blackburn-Starza, 'Genome editing prevents mitochondrial disease in mice' (*BioNews*, 27 April 2015) <http://www.bionews.org.uk/page_519498.asp> accessed 6 May 2015.

plans to test its safety and success in surplus eggs donated by fertility patients affected by mitochondrial defects. Professor Juan Carlos Izpisua Belmonte, the senior author of the study, is confident that this technique could be "easily implemented in IVF clinics throughout the world."[591] The researchers of the study claim that this technique of tackling mitochondrial disease is "safer, simpler, and more ethical" than mitochondrial transfers, because the genetic modification does not require the mtDNA from a third party.[592] Thus, the safety concerns about mitonuclear compatibility are not relevant here. There is also no need to 'destroy' donor embryos, which in itself holds many ethical dilemmas.

Another breakthrough development is that of stem cells augmentation called, Augment,[593] which was developed and tested in OvaScience, a fertility company in Canada, where the first wave of babies born from this technique are expected to be born in summer 2015. Natasha Rajani, a fertility patient in 2014 who underwent this technique and produced a healthy child, had a section of her ovarian tissue removed in a laparoscopic surgery. After that, her egg stem cells were then identified, removed and purified to extract their healthy, mutation-free mitochondria. About three dozen women have undergone this technique and eight are currently expecting children. Dr Owen Davis, who is the president of the American Society of Reproductive Medicine, believes that this development could be "revolutionary." Like CRISPR and mitoTALEN, what sets this technique apart is that the cells come from the mother herself and no third person is required for its success, which eliminates the respective ethical and moral dilemmas surrounding DNA from a third person. OvaScience has plans to conduct research into this to obtain approval from the FDA. They plan to perform 1000 cycles with the help of Augment this year,

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[591] David McNamee, 'Breakthrough in 'editing' mitochondrial disease DNA' (*Medical News Today*, 27 April 2015) <http://www.medicalnewstoday.com/articles/293033.php> accessed 11 May 2015.
[592] ibid.
[593] Alice Park, 'Exclusive: Meet the World's First Baby Born With an Assist from Stem Cells' (*Time*, 7 May 2015) <http://time.com/3849127/baby-stem-cells-augment-ivf/> accessed 20 May 2015.

following which they will hopefully generate more data and prove its success.

If these new medical developments are proven to be safe and successful in human embryos, they will completely eradicate concerns about the 'unnatural' quality of having a third person's DNA in one's offspring and the subsequent generations to come. If these advances are as promising as we hope, should we wait a few more years for their research and study results to be published and their successes to be confirmed before taking a stand on which biotech development to implement and permit? After all, it can be argued that this is the wise stance to take when faced with multiple options. The problem is that these new technologies might not even become options; they have to undergo significant testing and research before they can even reach the stage that the techniques of mitochondrial transfers has now reached, after seven years of rigorous reviews, consultations and scrutiny. While we should hope for the success of these new developments, it would be both unnecessary and unjust to delay the process of conception for patients who wish to bear healthy children free from mitochondrial disease. Time is of the essence for women especially because they have a limited fertility window in which they can conceive. The regulations put in place by the HFEA regarding mitochondrial donations will already serve as a barrier for them because all patients wishing to seek treatment will be dealt with on a case-by-case basis, which increases the amount of time they have to wait before they can have a child using the mtDNA transfer techniques.

IV. Concluding thoughts

This article has explored the various ethical and legal concerns surrounding mitochondrial transfers and analysed how the future for reproductive technologies affecting women with mutated mitochondrial DNA could take a positive and less complicated turn with the new developments that are currently under intensive research and testing.

The ethical concerns mitochondrial transfers have raised – namely, those of safety, germline modification and its effects, notions of identity, interference with nature and the opening of doors

to designer babies, have caused critics to argue that these techniques are not worth the risk for the benefit of so few people, since the genetic disease itself is so rare. However, it is estimated that 50-60% of children being treated for mitochondrial disease have not been genetically tested for genetic defects, so it is difficult to pin down the exact numbers of those who have mutated mtDNA. The numbers are likely to be higher in reality.[594]

Prohibiting mitochondrial transfers to avoid this risk would also unfortunately "cramp creativity and inhibit medical progress."[595] Brassington argues "there are times when taking a risk is permissible, and times when it might even be desirable – and legislation would make it easier to take what might be a desirable risk." Farahany also supports this: the techniques "clearly fall on the side of ethical and permissible." Mitochondrial transfers are "not only promising, but morally preferable to leaving a woman without a choice for having her own healthy genetic children."

In the ethical considerations section, the potential benefits of designer children have also been considered, even though it has been argued that the concern of a slippery slope leading to widespread genetic modification of embryos resulting from allowing mitochondrial donations is not something to be worried about – robust and strict regulations will ensure that it does not happen.

The legal issue around donor status and identification as well as the regulation of who benefits from these procedures has also been examined through multiple consultations, reviews and dialogues, and as such, are not of sufficiently significant concern to prevent these procedures from taking place.

The new technologies that are currently under study and development, namely mitoTALEN, CRISPR and Augment, are also exciting new biotechnological ventures. Although the former two have the limitation of not being applicable to women with only mutated mtDNA present in their cells, if proven successful and safe

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[594] Geoff Watts and others (n 520).

[595] Steve Connor, 'Three-Parent Baby Pioneer Jamie Grifo: 'The Brits Will be Ahead of the World'' (*The Independent*, 16 January 2015) <http://www.geneticsandsociety.org/article.php?id=8314> accessed 2 February 2015.

in human embryos, they would prove to be a welcome alternative to those who are uncertain about undergoing mitochondrial transfers to have a child. This process of research and confirmation followed by multiple reviews of its safety will, however, not be an overnight development; it will take years, just as has been the case with the development of mitochondrial transfers.

Until then, whether or not those are better, more easily acceptable and ethical options, it is only right that mitochondrial donations are provided for the families who need it to produce healthy offspring. It would prevent early childhood death and children growing up having to suffer from devastating mitochondrial disease-related disorders. It would also give acknowledgment to the extremely laudable and rigorous scientific, ethical and legal attention poured into the techniques over the course of the past seven years, and it would support the United Kingdom as pioneers in reproductive technologies, paving the way for the rest of the world in empowering women, eliminating devastating diseases and allowing families to be formed.

'Techtopus': a critical analysis of the Silicon Valley wage-fixing scandal

Nicolette Lee[596]

This article is a case study on the Silicon-Valley wage-fixing cartel that operated until its discovery in 2009, dubbed 'Techtopus' by the media. A cartel of that size, or type, was unprecedented in white-collar criminal law. This article aims to assess its status as a white-collar crime with reference to criminology, studying its nature, offenders, and the regulatory attempts involved, with relation to established white-collar crime theories. The article notes that ambivalence towards the offenders has created the opportunity structures in place for such crime to be committed, and concludes by maintaining that this relatively unique cartel is still no less serious than mainstream white-collar criminal activity.

I. Introduction

The demand for technological innovation has guaranteed the economic growth of Silicon Valley companies; however, the same cannot be said for the Valley's employees. Recent litigation has brought to light the widespread white-collar antitrust in many of the Valley's tech companies, working to suppress the wages of their collective employees.

The practice of 'antitrust' arises when market competition is reduced under a monopoly, created through means "broadly defined to include collusion between competing firms."[597] In this case, such collusion came in the form of a cartel, that is, "an agreement among rivals not to compete and whose purpose it is to restrict output and raise the prices."[598] The agreement involved multiple companies entering into an "anti-solicitation scheme":[599]

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[596] LL.B. Candidate, The University of Manchester, School of Law.
[597] Richard A Posner, *Antitrust Law* (University of Chicago Press 2001) 1.
[598] William Breit and Kenneth E Elzinga, *The Antitrust Casebook* (Dryden Press 1982) 7.
[599] *Consolidated Amended Class Action Complaint: Demand For Jury Trial*. 4062-LHK US District Court. 2014.

"express bilateral agreements among Defendants to abstain from actively soliciting each other's employees."[600] A "gentleman's agreement"[601] guaranteed that employees were not solicited from companies on "restricted-hiring" and "do-not-cold-call"[602] lists, while regular meetings between company representatives suppressed employee wages at an agreed fixed rate.[603] The result of these dealings created the 'Techtopus,'[604] a cartel that – like its namesake – stretched to encompass the market; it suppressed competition to hire, kept "a lid on rising labor costs,"[605] and its firms stopped paying their employees a competitive wage.[606]

Chronologically, the Department of Justice's 2009 discovery of the Valley companies' collusion – involving firms such as Intel, Google, Apple, etc. – was met with a Department of Justice action in 2010,[607] and then, a class-action lawsuit by their employees in 2013.[608] Although this was eventually settled,[609] the discovery of the Techtopus' influence on the SFX animation industry in 2014 – encompassing Disney, Dreamworks, Blue Sky, etc. – created fresh litigation (albeit dismissed through the statute of limitations).[610] This essay will explore other facts where relevant below. A critical

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[600] *Order Granting Plaintiffs' Supplemental Motion For Class Certification*. 02509-LHK US District Court. 2013.
[601] ibid.
[602] *Order Granting Plaintiffs' Supplemental Motion For Class Certification: Exhibit 661*. 02509-LHK U.S. District Court. 2013.
[603] ibid.
[604] Mark Ames, 'The Techtopus: How Silicon Valleys Most Celebrated CEOs Conspired To Drive Down 100000 Tech Engineers Wages' (*PandoDaily News*, 23 January 2014) <http://pando.com/2014/01/23/the-techtopus-how-silicon-valleys-most-celebrated-ceos-conspired-to-drive-down-100000-tech-engineers-wages> accessed 23 April 2015.
[605] *Consolidated Amended Class Action Complaint: Demand For Jury Trial*. 4062-LHK U.S. District Court. 2014.
[606] ibid.
[607] *US v. Adobe Systems Inc*., et al. 01629 US District Court. 2010.
[608] *Order Granting Plaintiffs' Supplemental Motion For Class Certification*. 02509-LHK U.S. District Court. 2013.
[609] Dan Levine, 'Exclusive: Apple, Google to pay $324 million to settle conspiracy lawsuit' (*Reuters Online*, 24 April 2014) <http://www.reuters.com/article/2014/04/25/us-apple-google-lawsuit-exclusive-idUSBREA3N28Z20140425> accessed 29 March 2015.
[610] *Order Granting Defendants' Joint Motion To Dismiss*. 4062-LHK U.S. District Court. 2014.

analysis of the cartel would also have to take into account the following: how the nature of activities can be classified according to criminological theory, the offenders and their motives, and how the crimes are regulated by statutes and law. This essay seeks to use the above areas to judge the Techtopus, deciding on first, the severity of its nature as a crime, secondly, the blameworthiness of its offenders, and last, what punishment would be adequate.

II. The nature of the crime

The cartel began by the sale of Lucasfilm's computer division (Pixar) to Steve Jobs.[611] Jobs, and its president, Edward Catmull, entered into a bilateral agreement with George Lucas, so that Pixar would not "get into a bidding war" for Lucasfilm's employees.[612] Jobs then spread the agreement to his own 'Apple' and the rest of the Valley; Catmull did the same from Pixar to the animation industry.[613] The cartel resembles the classic Sutherland definition of white-collar crime as "a crime committed by a person of respectability and high social status in the course of his occupation,"[614] in its initiation by men in control of their companies, as part of their occupational duties. However, Sutherland's 'White-Collar Crime' definition is problematic in its focus on 'respectability' and 'high social status,' ambiguous concepts that need to be defined.[615] When the definition of crime is rendered an "impotent construct"[616] by its faults, it can be argued that the Techtopus' identity as a crime worthy of punishment becomes invalid.

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[611] *Order Granting Plaintiffs' Supplemental Motion For Class Certification*. 02509-LHK U.S. District Court. 2013.
[612] ibid.
[613] ibid.
[614] Edwin H Sutherland, *White Collar Crime: The Uncut Version* (Yale University Press 1949) 7.
[615] John Braithwaite, 'White collar crime' [1985] Annual Review of Sociology 1, 3.
[616] ibid.

Tappan additionally criticised Sutherland's lack of 'juristic view.' Tappan's definition required an act "in violation of the criminal law,"[617] and an offender "guilty beyond a reasonable doubt of a particular offence."[618] Met with a civil suit, and settled outside a court of law, the Techtopus' actions cannot be considered criminal by Tappan. However, Tappan's 'Crime' definition becomes problematic too, when considering how law enforcement is unfairly skewed towards white-collar offenders – be it "judicial decisions which take as much notice of who you are as they do what you have apparently done,"[619] or the "better quality legal counsel"[620] white-collar offenders can afford – as seen when the Cartel hired Dr. Kevin Murphy (well-known for his defence work for corporate offenders)[621] to discredit the plaintiffs.[622] In a "fundamental class bias in the criminal justice system,"[623] white-collar offenders are more likely to avoid Tappan's essential requirement for 'criminal prosecution,' whereas 'street crime' offenders "secure little benefit from these rules."[624] Hence, when it "comprehends only a small proportion" of 'socially dangerous people,'[625] Tappan's definition may be an unfair and exclusive standard for the cartel to follow.

Braithwaite suggests that Sutherland's less-problematic 'White-Collar Crime' definition may be "the most sensible way to proceed"[626] in looking at this case. Its few problems are corrected in

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[617] Paul W Tappan, 'Who is the Criminal?' (1947) 12 American Sociological Review 96, 96.
[618] ibid.
[619] Steven Box, *Power, crime and mystification* (Routledge 2002), 5.
[620] John M Ivancevich, Robert Konopaske and Jacqueline A Gilbert, 'Formally shaming white-collar criminals' (2008) 51 Business Horizons 401, 402.
[621] Mark Ames, 'Meet the man Silicon Valley's CEOs turn to when they want to justify screwing workers' (*PandoDaily News*, 18 February 2014) <http://pando.com/2014/02/18/meet-the-man-silicon-valleys-ceos-turn-to-when-they-want-to-justify-screwing-workers/> accessed 28 March 2014.
[622] *Order Granting Plaintiffs' Supplemental Motion For Class Certification*. 02509-LHK U.S. District Court. 2013.
[623] Braithwaite (n 615) 13.
[624] Edwin H Sutherland, 'Is 'White Collar Crime' Crime?' (1945) 10 American Sociological Review 132, 136.
[625] Donald R Taft, 'Influence of the general culture on crime' (1966) 30 Federal Probation 16, 16.
[626] Braithwaite (n 615)19.

Slapper and Tomb's refined 'Corporate Crime' definition, which widely accounts for "acts or omissions which have not been subject to any formal judicial process,"[627] and focuses on the corporate form and not just "the social characteristics of individual offenders."[628] Gobert and Punch go further, believing Sutherland "clearly meant to include"[629] Corporate Crimes in his initial definition. The multi-organisational nature of the Techtopus aligns with Slapper and Tomb's emphasis on macro-level crime, and the definition is wide enough to recognise the cartel's actions as a crime.

However, some antitrust may not be interpreted as 'Crime' at all. The Norris-La Guardia Act[630] immunises worker's unions from state intervention "in any case growing out of a labor dispute."[631] The ambiguity of the term 'labour dispute' gives this exception a problematically wide ambit, and the judgment in *United States v. Hutcheson*[632] stretched it to cover general antitrust if a union acts "in its self-interest and does not combine with non-labor groups."[633] Wage-fixing, if done as 'collective bargaining,' may be beneficial (Meade purports it can safely regulate rising wage in an economic "explosive-inflationary situation,"[634] so far "as they would increase unemployment or prevent the expansion of employment").[635] Thus, if the practice is morally permissible under circumstances, it may be mere *mala prohibita*, as opposed to *mala in se*. However, examples of Norris-Law Guardia Act immunity can be differentiated from the Techtopus: The permitted antitrust are union activities, concerned with the benefit of employees, whereas

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[627] Gary Slapper and Steve Tombs, *Corporate Crime* (Pearson Longman 1999), 18.
[628] ibid 15.
[629] James Gobert and Maurice Punch, *Rethinking Corporate Crime* (Cambridge University Press 2003), 5.
[630] 29 U.S.C. §§ 101-115, 1932.
[631] Archibald Cox, 'Labor and the Antitrust Laws: Pennington and Jewel Tea' (1966) 46 Boston University Law Review 317, 319.
[632] *United States v. Hutcheson*, 312 U.S. 219, 1941.
[633] Cox (n 631) 319.
[634] James E Meade, 'Note on the inflationary implications of the wage-fixing assumption of the Cambridge Economic Policy Group' (1981) 33 Oxford Economic Papers 28, 29.
[635] James E Meade, *Wage Fixing: Vol. 1 Stagflation* (Routledge 1982), 5.

the Techtopus benefitted nothing but the company. The leading case of *Matsushita Co., Ltd. v. Zenith Corp*[636] also defines acts as antitrust crimes so long as they "exclude the possibility that defendants acted independently,"[637] which can be easily proven alongside the criminality of the cartel.

Sutherland also recognised 'collective bargaining' by unions and organisations as beneficial – the interference of which fell under his 'Unfair Labour Practices'[638] category. However, classifying the Techtopus under categories of crime is difficult, as Sutherland does not explicitly discuss wage-fixing as a crime under 'Unfair Labour Practices'; and neither does it match Croall's classic definition of an 'Employment Offence': rather than losing life-and-limb in a breach of "occupational health and safety,"[639] the employees lost the value of their wages. However, Croall does recognise Tombs' addition of "breaches of laws dealing with unionization, conditions of work and the right to strike"[640] as falling within the ambit of 'Employment Offences.' Additionally, the definition of 'Fraud Offences,' "a false representation… made in order to gain a material advantage"[641] may incorporate the misrepresentation of lowered employee wages as fair ones, while profiting from the difference. The nature of the Techtopus indicates that it is a crime, and ought to be seen as one regardless.

III. Blameworthiness of offenders

Sutherland's Differential Association posits that criminal behaviour is a process, learnt "because of contacts with criminal patterns and isolation from non-criminal patterns."[642] At the heart of the cartel

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[636] *Matsushita Co., Ltd. v. Zenith Corp*, 475 U.S. 574, 587, 1986.
[637] *Order Denying Defendants' Individual Motions For Summary Judgment*, 02509-LHK U.S. District Court. 2013.
[638] Sutherland (n 624) 135.
[639] Hazel Croall, *Understanding White Collar Crime* (Open University Press 2001), 35.
[640] ibid 34.
[641] ibid 26.
[642] Edwin H Sutherland, *Principles of Criminology* (Lippincott 1947), 79.

was Steve Jobs, whose managerial style was notoriously aggressive: "Violate any norm of social or business interaction that stands between you and what you want."[643] Jobs regularly insulted his employees for imperfect work,[644] intimidated Palm Inc. to join the cartel (with "lawsuits alleging infringement of Apple's many patents")[645] and sued them into liquidation when they refused.[646] True to Agnew's extended Strain Theory, Job's success provided "negative affective states"[647] which would then be emulated as the crime spread[648] - Austen pointedly quotes a man who learnt the following as a 'lesson from Jobs':

"I can push my employees further than they thought possible…That approach comes with collateral damage on the people side."[649]

Strain Theory exists in individual offenders driven to crime by "failure to achieve positively valued goals, the removal of positively valued stimuli, and the presentation of negative or noxious stimuli"[650] – in the case of white-collar offenders, "feelings of financial concern,"[651] and pressure from negative stimuli, may drive an offender to achieve success through morally questionable means. In a similar manner, Job's moral nihilism could have been

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[643] Ben Austen, 'The story of Steve Jobs: An inspiration or a cautionary tale' (*Wired Magazine*, 23 July 2012) <http://www.wired.com/2012/07/ff_stevejobs/> accessed 15 April 2015.
[644] Walter Isaacson, 'The real leadership lessons of Steve Jobs' (2012) 90 *Harvard Business Review* 92.
[645] *Order Granting Plaintiffs' Supplemental Motion For Class Certification*, 02509-LHK U.S. District Court. 2013.
[646] Mark Ames, 'Steve Jobs threatened Palm's CEO, plainly and directly, court documents reveal' (*PandoDaily News*, 19 April 2014) <http://pando.com/2014/02/19/court-documents-reveal-steve-jobs-blistering-threat-to-ceo-who-wouldnt-join-wage-fixing-cartel> accessed 15 April 2015.
[647] Robert Agnew, 'Foundation for a general strain theory of crime and delinquency' (1992) 30 Criminology 47, 49.
[648] Austen (n 643).
[649] ibid.
[650] Agnew (n 647) 49.
[651] Lynn Langton and Nicole Leeper Piquero, 'Can general strain theory explain white-collar crime? A preliminary investigation of the relationship between strain and select white-collar offenses' (2007) 35 Journal of Criminal Justice 1, 11.

adopted by other managers, as a means to economic success, where his "personality was integral to his way of doing business."[652]

The needs of the company often affect the actions of the individual. Notably, Catmull justified his actions by appealing to the needs of the company:

"[S]omehow we're hurting some employees? We're not. While I have responsibility for the payroll, I have responsibility for the long term also."[653]

Any harm employees suffered was allegedly negligible, an unfortunate by-product of the 'long term' benefit generated for the cartel's companies. The classic denial of harm, and the appeal to the higher loyalties of the industry, parallel Sykes and Matza's theory of neutralisation, where the wrongfulness of the behaviour is justified by "whether or not anyone has clearly been hurt by his deviance."[654] However, it and traditional Strain and Neutralisation Theory ignores the company's effect on the individual - believing "corporate crime begins and ends with the ethical and moral lapses of executives and employees"[655] would disregard "the relationship between an individual's personality and the social structure, historical era, and immediate environment,"[656] thus making the theories ill-suited to explain an offence spanning multiple organisations and individuals.

Accordingly, the Department of Justice's investigations focused around "central figures" – Catmull, Lucas and Jobs[657] – and

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[652] Isaacson (n 644).
[653] Amid Amidi, 'Ed Catmull on Wage-Fixing' (*Cartoon Brew*, 19 November 2014) <http://www.cartoonbrew.com/artist-rights/ed-catmull-on-wage-fixing-i-dont-apologize-for-this-105855.html> accessed 1 March 2015.
[654] Gresham M Sykes and David Matza, 'Techniques of neutralization: A theory of delinquency' (1957) 22 American Sociological Review 664, 668.
[655] Geraldine Szott Moohr, 'Of bad apples and bad trees: Considering fault-based liability for the complicit corporation' (2007) 44 American Criminal Law Review 1343, 1347.
[656] David R Simon, 'White-Collar Crime, Dehumanization And Inauthenticity: Towards A Millsian Theory Of Elite Wrongdoing' (1991) 21 International Review of Modern Sociology 93, 94.
[657] Amidi (n 653).

therein lies a danger that these men were the unfortunate scapegoats of a scheme that had long since spiralled beyond their influence; and the Department of Justice had labelled them 'Bad Apples' in a bid "to restore investor confidence"[658] and show justice being done. Pinto explains the myopia in this: "if bad apples appear by the bushel in an organization, it becomes appropriate to examine the organization-level phenomena that facilitate, encourage, and sustain such behavior."[659] Langton too agrees that, in the case of antitrust such as this, criminality "might be better explained by organizational theories or some combination of macro and micro level theories,"[660] with focus on the social factors at large around the offenders.

To establish who is at fault, Pinto splits organisation offenders into 'occupational' and 'organizational' – "Organizations of Corrupt Individuals" and "Corrupt Organizations," [661] respectively. The former are committed by individual offenders, and facilitated by their occupation; the latter describes a "dominant coalition" that undertakes "coordinated corrupt actions that primarily benefit the organization."[662] The current case resembles the latter, with its focus on company benefit, and its initiation by "organizational elites." [663] More specifically, it matches Pinto's subcategory of "hypocritically corrupt organizations," organisations with "a lack of alignment… between words and deeds; between talk, actions, and organizational goals."[664] Hypocrisy is indeed a major driving force behind the cartel, presenting companies like Google and Pixar as beloved pop-culture icons while still perpetrating the wage-fixing crime.

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[658] Moohr (n 655) 1343.
[659] Jonathan Pinto, Carrie R Leana, and Frits K Pil, 'Corrupt organizations or organizations of corrupt individuals? Two types of organization-level corruption' (2008) 33 Academy of Management Review 685, 688.
[660] Langton and Piquero (n 651) 3.
[661] Pinto, Leana and Pil (n 659) 688-689.
[662] ibid 689.
[663] ibid.
[664] ibid 701.

Similarly hypocrisy exists in claiming to value individuals while overriding their judgement; Lobel, in describing Techtopus, attributes it to a superiority complex dubbed 'Winklevoss Syndrome': "a false belief that we own ideas and people"[665] – a process Pinto and Leana call object-based dehumanisation: "converting (people) into less than human categories.[666] This reduces employees to "a foot soldier in a massed army of workers."[667] Similarly, individuals working within the companies may also find their personal opinions devalued when their moralities are superseded by the company, losing their "primary locus of power and responsibility,"[668] and turning into what Punch calls amoral chameleons, where "personal morality is shelved in favour of… the corporate dictate."[669] In a cartel whose agents reportedly "responded (to a recruiter breaching the do-not-cold-call agreement) by making a 'public example' out of the recruiter and 'terminating him within the hour,'"[670] pressure is placed upon staff to jettison individual moralities in lieu of the company's own beliefs and benefits.

The cartel came as a response to a period of time when the technology industry was booming and "talented digital animation employees (had) been in high demand"[671] – between 1999 and 2004, programmers' wages rose 30-50%,[672] eBay's CEO admitted employee demand was "driving up salaries across the board,"[673] and

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[665] Orly Lobel, *Talent Wants To Be Free* (Yale University Press 2013), 127.
[666] Simon (n 656) 101.
[667] Rudolph Peritz, *Competition Policy in America* (Oxford University Press 1996), 98.
[668] Russell P Boisjoly, Ellen Foster Curtis and Eugene Mellican, 'Roger Boisjoly and the Challenger disaster: The ethical dimensions' (1989) 8 Journal of Business Ethics 217, 218.
[669] Maurice Punch, 'Suite violence: Why managers murder and corporations kill' (2000) 33 Crime, Law and Social Change 243, 271.
[670] *Order Granting Plaintiffs' Supplemental Motion For Class Certification*, 02509-LHK U.S. District Court. 2013.
[671] *US v Lucasfilm Ltd*. 02220-LHK U.S. District Court. 2010.
[672] Verne Kopytoff, 'Google blamed for jump in high-tech pay' <http://www.sfgate.com/bayarea/article/Google-blamed-for-jump-in-high-tech-pay-Rivals-2587880.php. *SF Gate*, 18/12/2005> accessed 4 April 2015.
[673] *Order Denying Defendants Individual Motions for Summary Judgement*, 02509- LHK U.S. District Court. 2014.

'cold-calling' practices in Silicon Valley gave employees "an opportunity to use competition among potential employers to increase her compensation and mobility."[674] George Lucas noted "we cannot get into a bidding war with other companies because we don't have the margins for that"[675] – a frustration that parallels Merton's Anomie Theory. Merton posits that offenders are driven to attain their goals – even if the goal is out of reach – where morality is "largely vitiated by cultural exaggeration of the success-goal,"[676] and the offender, driven to take "the technically most feasible procedure, whether legitimate or not."[677]

This is especially so in the context of Silicon Valley, and all America, in which the American Dream and its 'core elements' – valuing success, believing that everyone can succeed on their own, craving success regardless of the available opportunities to achieve it, and the 'fetishism' of money[678] – lend themselves easily to inflating the importance of success and the frustration at failing to legitimately attain it, factors necessary for Anomie. Thio criticises Merton's theory where it "oversimplifies the nature"[679] of the American Dream – anomie mistakenly applies the American Dream to "even lower-class citizenry,"[680] attempting to explain street offending.[681] However, it is the upper-classes who have the resources and "inclination to entertain high aspirations"[682] – and

[674] *Siddhartha Harrihan v Adobe Systems Inc. et al.,* U.S. Superior Court. 2011.
[675] *Order Denying Defendants Individual Motions for Summary Judgement*, 02.509- LHK U.S. District Court. 2014.
[676] Robert K Merton, 'Social structure and Anomie' [1938] American Sociological Review 672, 675.
[677] ibid 674.
[678] Andrea Schoepfer and Nicole Leeper Piquero, 'Exploring white-collar crime and the American dream: A partial test of institutional anomie theory' [2006] Journal of Criminal Justice 209, 228.
[679] Alex Thio 'A critical look at Merton's anomie theory' [1975] Pacific Sociological Review 139, 144.
[680] ibid.
[681] ibid 153.
[682] ibid.

anomie's vaguely-defined "evolving nature"[683] allows it to shift focus on the upper-class, in this case "the most recognizable names in American entertainment and technology,"[684] accounting for the criminality of its offenders.

Clinard and Yeager believe the company influences employee behaviour with more than goals – "cultural norms operating within a given corporation,"[685] and its management, also "sets (its) ethical tone."[686] An organisational sub-culture can evolve through the actions of the staff, but when "wealth and success are central goals,"[687] the culture becomes one of competition. Ermann however, "rejects the notion that elite crime is caused by corporate greed, insisting instead that white collar deviance takes place by merging normal administrative behavior with wrongdoing."[688] This can be seen in how its managers claimed the cartel as a socialisation platform:

"Chatting with (HR managers to modulate wages) each day is really becoming a fun habit… a short conference call each morning (starts) our days off right."[689]

The normalisation of the crime creates an environment where criminality is permissible. However, one cannot ignore how companies are driven by financial success – a combination of the wider company's goals and its moralities influence offenders to commit crime.

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[683] Richard Featherstone and Mathieu Deflem, 'Anomie and strain: Context and consequences of Merton's two theories' [2003] Sociological Inquiry 471, 482.
[684] *Consolidated Amended Class Action Complaint: Demand For Jury Trial*, 4062-LHK U.S. District Court. 2014.
[685] Marshall Clinard and Peter Yeager, *Corporate Crime* (Transaction Publishers 2011), 58.
[686] ibid 60.
[687] James William Coleman, 'Toward an integrated theory of white-collar crime' [1987] American Journal of Sociology 406, 416.
[688] Simon (n 656) 97.
[689] *Consolidated Amended Class Action Complaint: Demand For Jury Trial*, 4062-LHK U.S. District Court. 2014.

IV. Adequate punishment

The Department of Justice names the 1890 Sherman Act and the 1914 Clayton Act as statutes that govern the crime of antitrust. Section 1 of the Sherman Act prohibits "contracts, combinations, and conspiracies in restraint of trade";[690] under which, the cartel was "per se unlawful" [691] and "facially anticompetitive" [692] in the Department of Justice's action against it. Section 4 of the Clayton Act permits "Suits by persons injured,"[693] allowing employees to sue for damages in the event of antitrust. However, both acts are over a century old, and the Sherman Act was not made to curb wage-fixing (but rather, the charging of monopoly prices).[694] There is a risk that prosecution is not suited for punishing antitrust, and has stagnated in severity where business practices have evolved: "actual criminal penalties meted out under the Sherman Act were mild" (the average fine for antitrust never exceeded $1 million until the 1990's),[695] while the Clayton Act carries no criminal sanctions at all.[696] Similarly, though section 4 of Clayton Act authorises "any person... injured in his business or property by reason of anything forbidden in the antitrust laws" [697] to claim damages, court interpretation of the act have limited legal restitution to "consumers or competitors."[698] Employees fall outside these categories,[699] and the claimants in the first class-action suit explicitly declined the use of section 4. [700] Considering how the Department of Justice "confirmed that it will not seek to compensate employees who were

[690] Posner (n 597) 33.
[691] *US v. Adobe Systems Inc*, et al. 01629 US District Court. 2010.
[692] ibid.
[693] The Clayton Act, § 4, 15 U.S.C. § 15.
[694] Posner (n 597) 37.
[695] ibid 44-45.
[696] ibid 44.
[697] C Douglas Floyd, 'Antitrust Victims Without Antitrust Remedies: The Narrowing of Standing in Private Antitrust Actions' [1997] Minnesota Law Review 1.
[698] ibid 2.
[699] ibid 56.
[700] *Siddhartha Harrihan v Adobe Systems Inc. et al.,* U.S. Superior Court. 2011.

injured by Defendants' agreements,"[701] unless more power is given to claimants, the powers of prosecution are weak, leaving Techtopus conspirators to "continue to retain the benefits of their unlawful collusion."[702]

Other case law continues to interpret the acts with leniency. The case of *Northern Securities CO. v United States*[703] held that an anti-competitive merger was legally not a cartel,[704] and neither was it in *People v Fisher*,[705] where the judge held the "price of labor be determined by the unfettered force of competition."[706] The Sherman Act was itself narrowed in the cases of *United Mine Workers v Coronado*[707] and *Apex Hosiery v Leader*,[708] which stressed "liability had to be founded upon some direct and intentional connection between the union's activities and market restraint or control,"[709] suggesting "the normal and usual aims of collective bargaining"[710] cannot be illegal without an element of intent – a difficult factor to prove. This hesitation to prosecute may be due to disincentives like "the prospect of a lengthy court battle against a powerful opponent indicted for a complex economic transaction in which individual culpability is not easily proven," [711] or the national policy "to encourage collective bargaining on terms and conditions of employment,"[712] where "economic power must be tolerated unless abused."[713] Bork believed older antitrust laws carried a "germ of protectionism," [714] stifling employer freedom; likewise, modern

[701] ibid.
[702] ibid.
[703] *Northern Securities CO. v United States* 193 U.S. 197, 1904.
[704] Adolf A. Berle, 'The theory of enterprise entity' [1947] Columbia Law Review 343, 352.
[705] *People v Fisher,* 14 Wend 9, 28 Am. Dec. 501, 1835.
[706] Milton Handler, 'Labor and Antitrust: A Bit of History' [1971] Antitrust Law Journal 233.
[707] *United Mine Workers of America v. Coronado Coal Co.*, 259 U.S. 344, 42 S.Ct. 570, 1922.
[708] *Apex Hosiery v Leader* 310 U.S. 469, 1940.
[709] Russell A. Smith, 'Antitrust and Labor' [1955] Michigan Law Review 1123.
[710] ibid.
[711] Francis T Cullen et al 'Public support for punishing white-collar crime: Blaming the victim revisited?' [1983] Journal of Criminal Justice 489.
[712] Smith (n 709) 1120.
[713] Peritz (n 667) 60.
[714] ibid 245.

'new governance' trends value, not prosecution, but soft law and laissez-faire regulation.[715] As a result, in the name of progress, "it is reasonable to assume that Congress did not intend to allow every person tangentially affected by an antitrust violation to maintain an action."[716] But this arguably leaves us with "a political economy that places the… advantage of the rich over the needs of the average citizen,"[717] and prosecution that lacks the severity to be applicable in this case.

Regulation is handled both by the Department of Justice and the Federal Trade Commission. However, there is significant overlap[718] which may cause confusion – multiple bodies can make the crimes "seem much more complex than they really are."[719] The Department of Justice guidelines also do not explicitly recognise wage-fixing as antitrust, [720] despite recognising the cartel detrimentally "reduces ability to compete for employees and disrupts the normal price-setting mechanisms."[721] There is potential that the bodies provide insufficient regulatory force, be they inexperienced, or wilfully misleading, such as when defendants used the Croner Company Survey, providers of "the benchmark for compensation market data,"[722] "to discuss and set wage and salary ranges for their employees in secret."[723]

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[715] Nicholas Lord and Michael Levi 'Determining the adequate enforcement of white-collar and corporate crimes in Europe' [2015] The Routledge Handbook of White-Collar and Corporate Crime in Europe 39, 40.
[716] Floyd (n 697) 1.
[717] Cullen (n 711) 489.
[718] 'Federal Trade Commission: Enforcers' <https://www.ftc.gov/tips-advice/competition-guidance/guide-antitrust-laws/enforcers> accessed 1 May 2015.
[719] Slapper and Tombs (n 627) 102.
[720] 'Department of Justice: Price Fixing, Bid Rigging, and Market Allocation Schemes' <http://www.justice.gov/atr/public/guidelines/211578.htm> accessed 1 May 2015.
[721] *Consolidated Amended Class Action Complaint: Demand For Jury Trial* 4062-LHK U.S. District Court. 2014.
[722] 'The Croner Company' <http://www.croner.biz/compensation-consulting> accessed 1 May 2015.
[723] *Consolidated Amended Class Action Complaint (n 125).: Demand For Jury Trial* 4062-LHK U.S. District Court. 2014.

In deciding whether to prosecute or regulate, it is important to remember both options do not present a binary.[724] There are graduated punishment models, like Braithwaite's "responsive regulatory pyramid,"[725] which arranges sanctions in tiers according to the severity of the crime meant to be punished, saving "the more costly punitive attempts"[726] for the pyramid top, "held in reserve for the minority of cases where persuasion fails."[727] The argument is that the current breaches of antitrust do not warrant criminal sanctions yet; however, Lord and Levi note that the adequacy of any punishment is "dependent on what we know or could possibly know of levels of offending behavior"[728] and the less we understand of the crime's severity – the less helpful this model can be. Likewise, Braithwaite's insistence that the pyramid model be a 'dynamic' one,[729] does not allow the pyramid to pinpoint a proper regulatory response to the Techtopus with much accuracy.

The most commonly used[730] sanction did not come from the court, but rather, outside it, with the 2013 civil suit ending with a settlement totalling $324 million.[731] In a profit-based environment, fines and monetary sanctions can provide a heavy blow to a company and in turn act as a deterrent.[732] Posner goes even further, claiming "there is no difference in principle between the (imprisoning and fining offenders)"[733] as fines are flexible enough to "be set at whatever level imposes the same disutility on the defendant."[734] This may not be the case, as fines are usually at a

[724] Lord and Levi (n 715) 40.
[725] John Braithwaite, *Restorative Justice and Responsive Regulation* (Oxford University Press, 2002) 30.
[726] ibid.
[727] ibid 32.
[728] Lord and Levi (n 715) 53.
[729] John Braithwaite, *Restorative justice and responsive regulation* (Oxford University Press, 2002), 30.
[730] Ivancevich, Konopaske and Gilbert (n 620) 406.
[731] Levine (n 609).
[732] Ivancevich, Konopaske and Gilbert (n 620) 406.
[733] Richard A Posner, 'Optimal sentences for white-collar criminals' [1979] American Criminal Law Review 409.
[734] ibid

level that rarely impact a company – fines for antitrust were capped statutorily at $1 million as recently as 1974, only growing to $10 million in 1990[735] – and out of court, individual claimants have less bargaining power over corporations to negotiate a settlement fine, due in part to the "asymmetry in (their) financial resources."[736] Most notable is Disney with "revenues of more than $25.4 billion in 2000"[737] and Apple, worth $700 billion[738] – a fine would prove pittance to them.

Notably, the fine was paid discreetly out of court, and may not carry the same element of formal shame. When the companies have good public images, such as the animation companies having a reputation for films which "achieved world renown" [739] and "seems to embody all that is good,"[740] they have a strong reputation that they do not want damaged, and the threat of shame is a strong deterrent. Otherwise, they will continue to present themselves as pop-culture icons, which "fails to reaffirm or reinforce collective sentiments on moral boundaries"[741] However, Braithwaite argues the collective sentiments go too far. Shame may have a 'stigmatic' effect,[742] especially when a "substantial proportion of the American public prefers that white-collar criminals be punished as harshly,"[743] falling in a retributionist trap that merely "(satisfies) important emotional needs" but fails to justify the resources expended for such

[735] Posner (n 597) 44.
[736] *Order Granting Plaintiffs' Supplemental Motion For Class Certification*, 02509-LHK U.S. District Court. 2013.
[737] Janet Wasko, 'Challenging Disney Myths' [2001] Journal of Communication Inquiry 245.
[738] Alex Fitzpatrick, 'Apple Is Now Worth Over $700 Billion' (*Time Online*, 10 February 2015) <http://time.com/3704014/apple-700-billion/> accessed 30 April 2015.
[739] *Consolidated Amended Class Action Complaint: Demand For Jury Trial* 4062-LHK U.S. District Court. 2014.
[740] Janet Wasko, *Understanding Disney: The manufacture of fantasy* (John Wiley & Sons 2013).
[741] Steven Box, *Power, crime and mystification* (Routledge 2002) 16.
[742] John Braithwaite, 'Shame and criminal justice' (2000) 42 Canadian Journal of Criminology 288.
[743] Kristy Holtfreter et al, 'Public perceptions of white-collar crime and punishment' (2008) 36 Journal of Criminal Justice 57.

a punishment.[744] The ensuing public rejection may also drive the offender to do worse:

"When respectable society rejects me, I have a status problem; (and) in the market for a solution… Criminal subcultures can supply that solution."[745]

Braithwaite suggests "Reintegrative Shaming" instead: "bringing together all the stakeholders victims, offenders and their friends and loved ones, representatives of the state and the community."[746] This may prove over-sentimental, and hard to apply here, because the cartel's companies are already in touch with a public who love them, who don't know harm has been caused in the first place. Lacking victim-offender proximity, the cartel's influence on animation would have gone unnoticed had independent blogs like Pando not covered the 2013 case,[747] leaving employees "completely unaware of their status as victims"; similar to Slapper and Tomb's belief that "individuals and groups most likely to be victims of corporate crimes are those who are least able to recognize their status or act upon this recognition"[748] It is easy to maintain "the livery of virtue"[749] where the companies are largely media-based, as selective reporting contributes to the public "collective ignorance"[750] of their activities.

Hence, by exposing their wrongdoings, we remove opportunity structures, "the features of the settings that allow the crime to occur."[751] This can be done either through strengthening

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[744] John Braithwaite, 'Challenging just deserts: Punishing white-collar criminals' (1982) Journal of Criminal Law and Criminology 765.
[745] Braithwaite (n 742) 287.
[746] ibid 293.
[747] Mark Ames, 'New court filing shows stunning new evidence of wage-fixing by major Hollywood animation studios' (*PandoDaily News*, 2 December 2014) <http://pando.com/2014/12/02/new-court-filing-shows-stunning-new-evidence-of-wage-fixing-by-major-hollywood-animation-studios/> accessed 29 April 2015.
[748] Slapper and Tombs (n 627) 97, 110.
[749] Cullen (n 711).
[750] Box (n 619) 16.
[751] Michael L Benson, Tamara D Madensen and John E Eck, *White-collar crime from an opportunity perspective* (Springer 2009), 178.

employee's bargaining power, or through shame measures, the mechanism for which is already in place: "federal sentencing guidelines specifically allow judges to fashion publicity sanctions against corporations."[752] Benson suggests a lack of supervising 'controls,' and the convenience of crime, and the ability to commit it, factor into opportunity structures.[753] Coleman likewise notes opportunity alone does not cause crimes – an offender first weighs "how likely they are to get caught, how severe the punishment will be if they are, and of course how large the take"[754] – suggesting increased regulatory scrutiny, and stricter punishments may be due for the Techtopus.

V. Conclusion

Through Sutherland's definition, we have proven wage-fixing antitrust can be considered a White-Collar Crime, albeit a little-understood one, in an unchecked industry. And, while individuals may be driven to commit crime, the motives and means to commit it – dehumanisation, anomie, and more – have pervaded the industry as a whole. As a widespread entity, its study and its punishment is difficult. A good punitive measure comes in the form of shame – which reduces the cartel's opportunities for crime. This way, we can work towards a Silicon Valley where one earns what they are due – starting by blowing away the Techtopus' metaphorical cloud of ink, leaving it and its wrongdoings with nowhere left to hide.

[752] Joshua Andrix, 'Negotiated Shame: An Inquiry into the Efficacy of Settlement in Imposing Publicity Sanctions on Corporations' (2007) 28 Cardozo Law Review 1859.
[753] Benson, Madensen and Eck (n 751) 177-180.
[754] James William Coleman, 'The causes of white-collar crime and the validity of explanation in the social sciences' (2001) 1 BRA Rapport 65.

A framework for understanding the burden of proof

Joe Tomlinson[755]

Like the broader procedural law (as opposed to substantive law) it falls under the rubric of, the burden of proof is a concept left comparatively neglected by researchers.[756] Nevertheless, as many legal practitioners are likely to stress, the burden of proof (and "procedural" law more generally) often determines, or at least bears significantly upon, the ultimate result of a dispute. The question of what a burden of proof is, however, misleading in its apparent simplicity. The concept is, as the U.S. Supreme Court has put it, one of "the slipperiest members of the family of legal terms."[757] The purpose of this note is to set out, in a concise way, what burdens of proof are for and to explore the various specific elements that often constitute it.

I. Uncertainty, errors, and values

A conventional starting place for any account of the burden of proof is the uncertain conditions – *e.g.* lost documents, incomplete evidence, and the accuracy of historical recollection – in which cases necessarily arise and are fought.[758] In the process of applying substantive law (which may itself be unclear) to the specific facts of a case, the courts have to navigate through this "fog of uncertainty."[759] In such conditions, the burden of proof plays a vital role in determining precisely what the law requires to be established for a certain conclusion to be reached. As Talley has explained, it follows that in areas of high uncertainty, and particularly where the

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[755] Ph.D. Candidate, The University of Manchester, School of Law.
[756] As pointed out by Louis Kaplow, 'Burden of Proof' (2012) 121 Yale Law Journal 738.
[757] *Microsoft Corp. v. i4i Limited Partnership*, 131 S.Ct. 2238, 6 (2011); *Schaffer v. Weast*, 546 U. S. 49, 56 (2005).
[758] *e.g.* Frederick Schauer, *Thinking Like a Lawyer* (Harvard University Press, Massachusetts 2009) 219; Stepheu Wexler and Jack Effron, 'Burden of Proof and Cause of Action' (1984) 29 McGill Law Journal 469. See further: Alex Stein, *Foundation of Evidence Law* (Oxford University Press 2005) 34-36.
[759] ibid 219.

'stakes' are high, the burden of proof may be ascribed even greater importance than it would in the normal course of conduct:

"Th[e] criticality of process in general—and the BoP in particular—may be especially salient in cases where the economic stakes are high, and where the informational environment is complex, opaque, and difficult to navigate. In such situations, it is plausible that no single entity—not the jury, not the judge, not attorneys, not the parties themselves—has full and complete command of all the "facts" pertinent to a legal dispute. It is here where the burden allocation may be the most influential in catalyzing information discovery, reducing verification costs, and ultimately contributing to overall welfare policy goals."[760]

What the burden of proof is to be in any given area is, therefore, necessarily a reflection of underlying normative values.[761] Looking, briefly, at the general functioning of the burden of proof in the criminal law and civil law contexts demonstrates this.

The familiar criminal standard is proof 'beyond a reasonable doubt.' To understand this point, Schauer helpfully invites us to assign rough numbers to each standard.[762] The criminal standard may be said to require 95 percent proof. Such a high burden tolerates the idea that an error may occur and guilty defendants walk free for the sake of preventing wrongful convictions. For instance, imagine ten defendants. Each is, say, 90 percent likely to have committed a crime. Under the burden of proof operating here, all ten should walk free. However, the probabilities suggest nine are in fact guilty. The tolerance of such errors reflects the value-laden idea that Blackstone famously expressed in 1769 and that remains a familiar

[760] Eric Talley, "Law, Economics, and the Burden(s) of Proof" in Jennifer Arlen (ed.) *Research Handbook on the Economic Analysis of Tort Law* (Edward Elgar, Cheltenham 2013); This is a point evident in the discussion in, for example, Leon Lazer and John Higgitt, 'Ascertaining the Burden of Proof for an Award for Punitive Damages in New York? Consult Your Local Appellate Division' (2009) 25 Touro Law Review 725. For further discussion, see: Kaplow (n 756).
[761] Schauer (n 758) 220.
[762] Schauer (n 758) 220. The specific example used here is drawn from the same text.

refrain today: "it is better that ten guilty persons escape than one innocent suffer."[763] Thus the burden of proof here is not only configured with the purpose of convicting the guilty but also, and even more importantly, to avoid the error of inflicting undue punishment.[764]

The criminal burden can be contrasted to the equally familiar general civil standard of the 'balance of probabilities.' The number that could be assigned to this standard is much lower than the 95 percent assigned to the 'beyond a reasonable doubt' standard – Schauer sets it as 50.000001 percent but, essentially, anything over 50 percent would suffice as proof where such a standard applies. A similarly value-laden standard, this reflects the law showing less concern about a defendant being found erroneously liable than it does about a defendant being wrongly convicted of a crime.

This comparison between the general criminal and civil burdens is a somewhat crude demonstration of the dynamics operating underneath a burden of proof but the salient point is made clear by it: the deemed gravity of the potential consequences subsequent to any error inextricably informs what the burden of proof is to be. It follows, broadly speaking, that where a burden of proof is set high and the potential consequences of an erroneous finding of liability or guilt are low, the law may be at risk of criticism. The reverse also applies.

One final point regarding clarity ought to be made here. It has thus far been assumed that what a burden of proof is in any given area is clearly ascertainable. Of course, it is perfectly possible that a burden of proof in a particular area of law may simply be unclear, or that there may exist some dissonance between what the burden of proof is said to be and the decisions actually being reached.[765] Where a burden of proof is unclear, it seems to be exacerbating the

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[763] Sir William Blackstone, *Commentaries on the Laws of England* (1765-1769) 358.
[764] John Kaplan, 'Decision Theory and the Factfinding Process' (1968) 20 Stanford Law Review 1075.
[765] Mark Schweizer, 'The civil standard of proof – what is it, actually?' (July 2013, Working Paper, *Max Planck Institute for Research on Collective Goods Bonn 2013/12*).

deleterious effects and problems of the inevitable general extant uncertainty in the adjudicatory process,[766] instead of fulfilling its central function of managing it.

II. An anatomy of the burden of proof

Thus far the burden of proof has been spoken about as a unitary concept, which has been useful as it allows the core function on the burden of proof to be isolated and understood. The long-time reality is that the term 'burden of proof' often refers to a range of distinct ideas that all ultimately link to what has to be achieved to procure a certain outcome.[767] Talley suggests, for instance, that there are "at least five inter-related phenomena, which scholars, practitioners and laypeople alike tend intermittently to reorganize, redefine, contest and conflate."[768] Likewise, Schauer talks of the burden of proof and "its cousins."[769] Here, five distinct ideas that are conventionally taken as elements of the burden of proof will be examined in turn.

First, there is the standard of proof. This is what most people ultimately mean when they refer to the 'burden of proof' and it was what was being referred to for the lion's share of the above discussion. This part of the burden explains how the courts will weigh all the evidence before it, and to what extent it will tolerate uncertainties.

Second, and closely related to the standard of proof, is the burden of persuasion. This aspect of the burden of proof explains which party in the proceedings has to persuade the court that the evidence before it does or does not reach the requisite standard of proof. The standard of proof thus provides the criteria for "how far the party bearing the burden of persuasion must push the judicial fact-finder's assessment in order to prevail in her legal claim."[770]

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[766] Stein (n 758) 34-36.
[767] For early recognition of this fact, see *e.g.*: James Bradley Thayer, *A Preliminary Treatise on Evidence at the Common Law* (Little Brown and Co., Boston 1896) 355-364; Austin Abbott, 'Two Burdens of Proof' (1892) 6(3) Harvard Law Review 125.
[768] Talley (n 760), 6 (page number cited from SSRN digital version).
[769] Schauer (n 758) Ch. 12.
[770] Talley (n 760), 7 (page number cited from SSRN digital version).

A third element of the burden of proof is the burden of production, which explains which party in the proceedings has to provide the evidence needed for the court to make a decision. Where the burden of production lies in any given context can be determined by a range of factors, including both, what may loosely be called, reasons of principle (e.g. that the party who asserts ought to prove) and practicality (e.g. the party in possession of the preponderance of the relevant information ought to bear the burden of production as that party is best placed to furnish the court with the necessary evidence). The burden of production is frequently more malleable than other aspects of the burden of proof, insofar as it can shift multiple times throughout the course of a case and is regularly divided between various parties.

The fourth and fifth elements most commonly alluded to under the rubric of the burden of proof are the overlapping and often confusing notions of legal assumptions and presumptions. Legal assumptions and presumptions are a site of extensive disagreement,[771] but, for the most part, assumptions seem to relate to where a burden of persuasion initially lies in a dispute and presumptions seem to relate to how the burden of production is set. Both are, perhaps, best understood as explaining what the default position in cases will be vis-a-vis the burdens of production and persuasion. It is also common to find a distinction between assumption and presumptions which can be rebutted and those which cannot, the latter basically serving to entrench the default position provided by the assumption or presumption.

This short catalogue of the various elements that are often referred as being components of the burden of proof highlights both the complexity of burdens of proof and the contested nature of the area, something that is reflected in the literature.[772] In practice, the overall burden of proof in any given area of law is a complex[773] amalgamation[774] of different procedural configurations that, taken

[771] Talley (n 760), 9-10 (page number cited from SSRN digital version).
[772] For a more thorough overview of the literature than could possibly be accommodated here, see: Stein (n 758).
[773] See generally: Kaplow (n 756).
[774] For discussion of the severability of the components, see: Wexler and Effron (n 774) 469.

in their totality, are ultimately animated by the deemed gravity of the potential consequences subsequent to any erroneous decision.

Negotiating or gain based remedies in contract – account of profits, *Wrotham Park* and its progeny

Lesley Anderson QC[775]

I. Introduction

The conventional position is that damages for breach of contract are confined to compensating the claimant for losses that it has suffered. Damages are measured by the sum which is necessary to put the claimant in the position it would have been in but for the breach of contract. Typically, the exercise is 'expectation based' because damages are designed to put the claimant in the position it would have been in had the contract been performed. Even when the court awards damages which are 'reliance' rather than 'expectation' based, for example, damages measured by the expense or loss which the claimant has incurred in reliance on the promised performance, the rationale is the same – to compensate the claimant. On this conventional view, two consequences flow: first, the court is not concerned with the profits or gains made by the defendant as a consequence of the breach.[776] Secondly, if the claimant is unable to establish that it has suffered any loss or damage, then it will be awarded only nominal damages.

The purpose of this paper is to examine the circumstances in which a different approach to the assessment of damages might be appropriate in commercial cases and to consider the important, recent decision of the Court of Appeal in *Karen Morris-Garner and Andrea Morris-Garner v One Step (Support) Limited.*[777]

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[776] *The Solholt* [1983] Lloyd's Rep. 605, [608] and see the comment of Lord Bridge in *Ruxley Electronics & Construction Ltd v Forsyth; Laddingford Enclosures Ltd v Forsyth* [1996] AC 344, [344]: "There is no question of punishing the contract breaker."

[777] [2016] EWCA Civ 180.

II. Damages v account of profits

The position has been, and is, starkly different if the claimant is able to establish that the defendant is in a fiduciary position or that it has acted in breach of trust. The equitable duty of fidelity is such that trustees and fiduciaries must account for any profits derived from that office or position including any unauthorised profit. In that situation, the fiduciary is generally required, by an account of profits, to disgorge the entire profit made by it as a result of the breach of duty or trust. Furthermore, the law of restitution recognised that in some instances of equitable wrongdoing it was appropriate for the defendant to surrender or account for its profits. So, in addition to any equitable proprietary remedy which might exist, a principal was entitled to require an agent who took a secret commission to account for that profit.[778] A party who acts in breach of his equitable obligations of confidence may be required to account for the profits made by him.[779] An account of profits may lie for the infringement of certain intellectual property rights such as trademarks, copyrights and patents.

III. Interference with property rights

As with breaches of contract, so with tort, the general principle regarding assessment of damages is that they are to compensate for loss or injury.[780] The measure of damages is the amount of money which, as far as possible, puts the injured party in the same position as he would have been had he not been injured. However, the common law has long recognised that in certain situations, the strict application of the principle would not do justice to the parties. An

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[778] *FHR European Ventures LLP v Cedar Capital Partners LLC* [2014] UKSC 45.
[779] See the analysis by Sales J in *Vercoe v Rutland Fund Management Ltd* [2010] EWHC 424 (Ch) [340]-[343] approved in the recent decision of the Court of Appeal in *MVF 3 APS (formerly Vestergaard Frandsen A/S) and others v Bestnet Europe Ltd and others* [2016] EWCA Civ 541 [79]-[95].
[780] *Attorney General v Blake (Jonathan Cape Ltd, third party)* [2000] 4 All ER 385 [391] (Lord Nicholls).

important example concerned the invasion of property rights. So, damages against a trespasser of land or a person wrongfully detaining goods[781] are typically measured by the benefit received by the trespasser for use of the land or goods, not by reference to loss to the landowner or owner who has typically suffered no financial loss.[782] Likewise, situations involving breach of an easement such as rights of way or light. In such cases, the recoverable damages are measured by the ordinary letting value of the land or goods or, in short, by the price a reasonable person would pay for the right of user. In the words of Lord Shaw:[783]

"… wherever an abstraction or invasion of property has occurred, then, unless such abstraction or invasion were to be sanctioned by law, the law ought to yield a recompense under the category or principle … either of price or of hire."

So, by analogy with these principles applicable to the measure of damages in tort, it was always the case that if a breach of contract involved the invasion of property rights vested in the claimant, it could expect to the wrongdoer to be ordered to disgorge some part of his profits. As we have seen, these were typically cases where it was clear that the claimant has not suffered financial loss or, at least, where it was difficult to prove it. They are also, often, cases where the law would compel the observance of negative obligations by granting injunctions.

IV. *Wrotham*[784] *Park*

A leading example of these principles is the important decision of Brightman J in *Wrotham Park Estate Co v Parkside Homes Ltd*[785] which concerned three blocks of agricultural land. The middle block was known as Wrotham Park and comprised a mansion house and home farm. In 1935, the owner sold part of the land on terms

[781] For example: *Strand Electric and Engineering Co Ltd v Brisford Entertainments Ltd* [1952] 2 QB 246.
[782] Another example is the wrongful deposit of waste on another's land.
[783] In *Watson, Laidlaw & Co Ltd v Pott, Cassels and Williamson* [1914] 31 RPC 104 [119].
[784] Contrary to popular misconception pronounced "Rootham" not "Rotham".
[785] [1974] 1 WLR 798, [1974] 2 All ER 321.

whereby the purchaser covenanted that he and his successors in title would not develop the land for building purposes except in accordance with a layout plan approved by the vendor. The plan showed a permitted development comprising a number of houses and gardens at the centre of which was a triangle of unbuilt land. Parkside, the successor in title to the purchaser, began building 13 houses and garages on the triangle. Wrotham Park Estate was the successor in title to the vendor. The existence of the houses did not diminish the value of the benefited land. As Lord Nicholls later put it,[786] for various "social and economic reasons" the court refused to grant a mandatory injunction for the demolition of the houses built in breach of the restrictive covenant (which was upheld as binding the burdened land).

Instead, the Judge made an award of damages in lieu of an injunction under section 2 Lord Cairns's Act.[787] He rejected the suggestion that the claimant was entitled only to nominal damages on the grounds that the value of the Wrotham Park estate had not been diminished by breach of the layout restriction because that would mean that the defendant would be left in undisturbed possession of the fruits of their wrongdoing, a conclusion which was manifestly unjust. Proceeding by analogy with the cases of tortious invasion of property rights, he ordered Parkside to pay such a sum of money as might reasonably have been demanded by the claimant from it as a *quid pro quo* for relaxing the covenants. He assessed the damages at £2,500 being 5% of the developer's anticipated profit of £50,000.

Although *Wrotham Park* was a case of damages in lieu of an injunction, the same principles apply to damages at common law. It established the important point of principle that, in a suitable case, damages for breach of contract may be measured by the benefit gained by the wrongdoer from the breach. The defendant must make a reasonable payment in respect of that benefit and so differs from the full account of profits in the trustee and fiduciary cases.

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[786] *A-G v Blake* (n 780) [395].
[787] Chancery Amendment Act 1858.

V. *Attorney General v Blake*[788]

The seminal decision of the House of Lords in *A-G v Blake* considered both the remedy of account of profits and *Wrotham Park* type damages. The facts were unusual and extraordinary. In the words of Lord Nicholls, George Blake was "a notorious, self-confessed traitor."[789] He had been employed as a member of the security and intelligence services for 17 years from 1944 to 1961. In 1951 he became an agent for the Soviet Union and disclosed to them valuable secret information and documents gained through his employment. On 3 May 1961 he pleaded guilty to five charges of unlawfully communicating information contrary to section 1(1)(c) of the Official Secrets Act 1911 and was sentenced to 42 years' imprisonment. In 1966 Blake escaped from Wormwood Scrubs prison and fled to Moscow via Berlin. In 1989 he wrote his autobiography, dubiously titled "No Other Choice," which was secretly published in 1990 for which he was agreed to be paid £150,000 by the publisher Jonathan Cape and in respect of which he had been paid £60,000.

At first instance, the AG case rested on only one cause of action – that in writing the book and authorising its publication, Blake was in breach of fiduciary duties he owed to the Crown. That failed at trial and in the Court of Appeal and that part was not appealed. However, the Court of Appeal permitted an amendment to allow the Crown to argue that the AG was entitled to invoke the civil law in aid of the criminal law, here, the breach of the Official Secrets Act. By the time the case reached the House of Lords, focus was rather on a contractual undertaking which Blake had given not to divulge any official information gained by him as a result of his employment.

The issue was whether an account of profits was available as a remedy for breach of contract. The leading judgment was given by Lord Nicholls who concluded as follows:[790]

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[788] [2001] 4 All ER 385, [2001] 1 AC 268.
[789] ibid 388.
[790] [2001] 4 All ER 385 [397] and [2001] 1 AC 268 [284]-[285].

"My conclusion is that there seems to be no reason, in principle, why the court must in all circumstances rule out an account of profits as a remedy for breach of contract. I prefer to avoid the unhappy expression 'restitutionary damages'. Remedies are the law's response to a wrong (or, more precisely, to a cause of action). When, exceptionally, a just response to a breach of contract so requires, the court should be able to grant the discretionary remedy of requiring a defendant to account to the plaintiff for the benefits he has received from his breach of contract. In the same way as a plaintiff's interest in performance of a contract may render it just and equitable for the court to make an order for specific performance or grant an injunction, so the plaintiff's interest in performance may make it just and equitable that the defendant should retain no benefit from his breach of contract."

He then went on (in a clear reference to *Wrotham Park*):

"The state of the authorities encourages me to reach this conclusion, rather than the reverse. The law recognises that damages are not always a sufficient remedy for breach of contract. This is the foundation of the court's jurisdiction to grant the remedies of specific performance and injunction. Even when awarding damage, the law does not adhere slavishly to the concept of compensation for financially measurable loss. When the circumstances require, damages are measured by reference to the benefit obtained by the wrongdoer. This applies to interference with property rights. Recently, the like approach has been adopted to breach of contract. Further, in certain circumstances an account of profits is ordered in preference to an award of damages. Sometimes the injured party is given the choice: either compensatory damages or an account of the wrongdoer's profits. Breach of confidence is an instance of this. If confidential information is wrongfully divulged in breach of a non-disclosure agreement, it would be nothing short of sophistry to say that an account of profits may be ordered in respect of the equitable wrong but not in respect of the breach of contract which governs the relationship between the parties. With the established authorities going thus far, I consider it would be only a modest step for the law to recognise openly that, exceptionally, an account of profits may be

the most appropriate remedy for breach of contract. It is not as though this step would contradict some recognised principle applied consistently throughout the law to the grant or withholding of the remedy of an account of profits. No such principle is discernible."

And then:

"The main argument against the availability of an account of profits as a remedy for breach of contract is that the circumstances where this remedy may be granted will be uncertain. This will have an unsettling effect on commercial contracts where certainty is important. I do not think these fears are well founded. I see no reason why, in practice, the availability of the remedy of an account of profits need disturb settled expectations in the commercial or consumer world. An account of profits will be appropriate only in exceptional circumstances. Normally the remedies of damages, specific performance and injunction, coupled with the characterisation of some contractual obligation as fiduciary, will provide an adequate response to a breach of contract. It will only be in exceptional cases, where those remedies are inadequate, that any question of accounting for profits will arise. No fixed rules can be prescribed. The court will have regard to all the circumstances, including the subject matter of the contract, the purpose of the contractual provision which had been breached, the circumstances in which the breach occurred, the consequences of the breach and the circumstances in which relief is being sought. A useful general guide, although not exhaustive, is whether the plaintiff had a legitimate interest in preventing the defendant's profit-making activity and, hence, in depriving him of his profit."

The majority of the House of Lords[791] went on to find that the case before them was exceptional and Blake was ordered to account for the sums paid and due under the publishing agreement. The decision in *Blake* was important for three reasons: (i) from its review of the authorities, the House of Lords endorsed the pre-*Blake*

[791] Lords Nicholls, Goff, Browne-Wilkinson, Steyn – Lord Hobhouse dissented.

position that (a) the restitution cases on account of profits and (b) the line of authorities on invasion of property interests leading to *Wrotham Park* had been correctly decided and constituted recognised exceptions to the conventional position that damages for breach of contract were concerned with loss to the claimant not gain to the defendant, (ii) the House of Lords nevertheless extended the *Wrotham Park* principle by recognising that it was not confined to invasion of property interests and (iii) the House of Lords accepted that a full account of profits might be ordered against a defendant in breach of contract but only in exceptional circumstances.

VI. *Wrotham Park* post-*Blake*

In *Blake, Wrotham Park* had been described as a "a solitary beacon" showing that in contract as well as tort damages were not always confined to recoupment of financial loss. Since *Blake*, we have since witnessed a number of cases in which the principle has been applied. Those cases also assist us in determining just how the task of assessing damages on the *Wrotham Park* basis is to be carried out by the court. It will be remembered that the measure of damages is the sum of money "as might reasonably have been demanded …. as a quid pro quo" for the relevant encroachment. In other words, it is a sum to be reached through a hypothetical negotiation between the contract breaker and the person with the benefit of the covenant.

An early opportunity arose later the same year. In *Amec Developments Ltd v Jury's Hotel Management UK Ltd*[792] the Court was again concerned with a breach by Jury's of a restrictive covenant which had built a 265 room hotel 3.9m beyond a building line. The parties were agreed that damages assessed on the *Wrotham Park* basis were appropriate and that the exercise should be approached on the assumption that the practical gain to Jury's was the equivalent of 25 hotel rooms which, but for the encroachment, it would not have been able to build. The Judge approached the assessment by ascertaining the annual net cash flow for those rooms as a net income stream because this was the basis

[792] [2001] 82 P & CR 22.

on which the hypothetical negotiations would have proceeded. The Judge took a date before building work had started as the assumed date of the negotiations. Taking all matters into account, he made an award of £375,000 to Amec.

Experience Hendrix Plc v PPX Enterprises Inc [793] concerned the licensing by the estate of Jimmy Hendrix of the right to use his back catalogue of recordings. An agreement was reached, by way of compromise of an existing dispute, whereby PPX agreed that it would not exploit certain of the master recordings of another musician, on which Hendrix has played. PPX was in breach of that undertaking by producing artwork which suggested that Hendrix had played a major role when in fact he had been only a sideman. Experience Hendrix feared it would suffer loss of goodwill if customers bought the inferior recordings instead of his major work and, disappointed, did not go on to purchase his music but it eventually conceded that it was not able to prove any financial loss. The Court of Appeal held that the estate should be awarded damages representing the sum as might reasonably have been demanded by it as a quid pro quo for agreeing to permit the two licences entered into in breach of contract.

WWF World Wide Fund for Nature (formerly World Wildlife Fund) v World Wrestling Federation Entertainment Inc[794] concerned a dispute between the well-known wildlife charity and the, perhaps less well known, promoter of wrestling events over the use of the initials 'WWF'. Following disputed trade mark proceedings, a settlement agreement had been reached and the claimant had been successful before Jacob J in getting summary judgment on its claim for damages (but who had refused an account of profits). The case came before Peter Smith J on the assessment of damages. Amongst other things, he rejected an argument on behalf of the defendant rooted in *res judicata* or abuse of process that he could not award *Wrotham Park* type damages in light of the rejection by Jacob J of the claimant's claim for an account of profits

[793] [2003] EWCA Civ 323.
[794] [2006] EWHC 184 (Ch).

holding that they were distinct remedies. The judge affirmed that post-*Blake* the *Wrotham Park* remedy was of general application in appropriate cases for any breach of contract.[795]

Although Peter Smith J's decision in *WWF* was overturned by the Court of Appeal[796] it was on the res judicata point. The Court of Appeal held that it was an abuse of process for the claimant to pursue a claim for *Wrotham Park* damages when it could and should have pursued such a remedy as an alternative to the claim for an account of profits when it was before Jacob J. Chadwick LJ at [59] rejected the contention that an award of *Wrotham Park* damages was a gains-based or restitutionary remedy and not an award of compensatory damages. He also held at [54] that the court could award damages on the *Wrotham Park* basis even if there was no claim for an injunction.

In *Guido Van der Garde BV v Force India Formula One Team*[797] a Formula One team was in breach of an agreement under which it was obliged to permit a motor racing driver to drive a Formula One car in testing for a minimum of 5,734 km. They had permitted him to drive for only 2,004 km. The Court awarded damages assessed conventionally of $1,865,000 based on the 'lost' mileage valued at $500 per km but Stadlen J went on to observe, obiter, that the Court could award damages at common law to compensate for the benefits withheld applying *Wrotham Park* and *Attorney General v Blake.*

Pell Frischmann Engineering Ltd v Bow Valley Iran Ltd and others[798] was a decision of the Privy Council on appeal from the Court of Appeal of Jersey concerning allegations of conspiracy, deceit, breach of contract and breach of confidence arising out of a failed joint venture for the development of an offshore oilfield known as the Balal field. The court at first instance found two of the defendants liable for breach of confidence but had rejected the claims for breach of contract. On appeal, the Court of Appeal had

[795] The Judge gave useful guidance as to how the court should approach the assessment of damages, [173]-[174].
[796] [2008] 1 WLR 445.
[797] [2010] EWHC 2373.
[798] [2011] 1 WLR 2370.

found that the defendants were in breach of the express terms of certain confidentiality agreements as well as being in breach of confidence and awarded the claimant £500,000 damages as *Wrotham* Park damages. In the Privy Council, the appeal was concerned principally with the quantum of those damages.

Delivering the judgment of the Court, Lord Walker at [48] set out the following general principles in relation to *Wrotham Park* damages:

" (1) Damages (often termed 'user damage') are readily awarded at common law for the invasion of rights to tangible moveable or immoveable property (by detinue, conversion or trespass): Stoke at pp1410-1412; Experience Hendrix at paras 18 and 26.
(2) Damages are also available on a similar basis for patent infringement and breaches of other intellectual property rights of a proprietary character: Stoke[799] at p1412; General Tire and Rubber Co v Firestone Tyre and Rubber Co Ltd [1975] 1 WLR 819.
(3) Damages under Lord Cairns's Act are intended to provide compensation for the court's decision not to grant equitable relief in the form of an order for specific performance or an injunction in cases where the court has jurisdiction to entertain an application for such relief: Lord Nicholls in Blake at p.281. Most of the recent cases are concerned with invasion of property rights such as excessive user of a right of way (Bracewell v Appleby [1975] Ch 408, Jaggard). The breach of a restrictive covenant is also generally regarded as the invasion of a property right (Peter Gibson LJ in Experience Hendrix at para 56) since a restrictive covenant is akin to a negative easement. (It is therefore a little surprising that Lord Nicholls in Blake, at p283, referred to Wrotham Park as a "solitary beacon" concerned with breach of contract; that case was concerned with the breach of a restrictive covenant to which neither the plaintiff nor the defendant was a party; but the decision of the House of Lords in Blake decisively covers what they Lordships have referred to as a non-proprietary breach of contract).

[799] *Stoke on Trent City Council v W & J Wass Ltd* [1988] 1 WLR 1406.

(4) Damages under this head (termed "negotiating damages" by Neuberger LJ in Lunn Poly at para 22) represent "such a sum of money as might reasonable have been demanded by [the claimant] from [the defendant] as a quid pro quo for [permitting the continuation of the breach of covenant or other invasion of right" (Lunn Poly at para 25).
(5) Although damages under Lord Cairns's Act are awarded in lieu of an injunction it is not necessary that an injunction should actually have been claimed in the proceedings, or that there should have been any prospect, on the facts, of it being granted: Millett LJ in Jaggard at p.285 (but cf at p291); Lord Nicholls in Blake at p.282; Chadwick LJ in World Wide Fund for Nature v World Wrestling Federation Entertainment Inc [2008] 1 WLR 445, para 54. This point was not raised in argument in the appeal but it is pertinent since there was such a long delay before [the claimant] issued the order of justice commencing these proceedings."

He went on at [49] to say that the nature of the hypothetical negotiation called for in the assessment of *Wrotham Park* damages was properly described as "a negotiation between a willing buyer (the contract breaker) and a willing seller (the party claiming damages) in which the subject-matter of the negotiation is the release of the relevant contractual obligation. Not parties are to be assumed to act reasonably. The fact that one or both parties would in practice have refused to make a deal is therefore to be ignored: Wrotham Park at p.815, Jaggard at pp.282-283."

Vercoe and Pratt v Rutland Fund Management [800] concerned a breach of contract and breach of confidence by a venture capital company of the terms of a confidentiality agreement in connection with the potential acquisition of a pawn-broking business. The parties agreed that damages for breach of contract should be assessed by reference to what the venture capitalist would have paid for the claimants' consent to it using the confidential information in question and that *Wrotham Park* applied. Sales J held that assessing damages for breach of a negative contractual

[800] [2010] EWHC 424.

covenant required an assessment of the fair price for release or relaxation of the covenant having regard to (i) the likely parameters given by ordinary commercial considerations bearing on each party, (ii) any additional factors particularly affecting the just balance to be struck between the competing interests of the parties and (iii) the court's overriding obligation to ensure that an award of damages for breach of contract did not provide relief out of proportion to the real extent of the claimant's interest in proper performance judged objectively by reference to the situation presented to the court. Applying that approach, he awarded 2.5 per cent of the equity to Mr Pratt and 5 per cent to Mr Vercoe.

However, a different approach was taken in *BGC Capital Markets (Switzerland LLC) v Rees*.[801] Mr Rees was induced by a rival trader Tullet to terminate his contract with BGC without given the required notice. BGC sought, in the alternative to damages assessed by reference to its losses, *Wrotham Park* damages assessed by reference to the fee which Rees would have had to pay for release of the covenant. In short, the Judge concluded that the award of release payment damages was not available as a substitute for conventional damages to compensate the claimant because it had not suffered any loss and damage because the competitive trade of Tullet was so minimal as not to amount to competition. He rejected that *Wrotham Park* type damages should be used to award a larger sum that a conventional calculation of loss provided.

VII. Account of profits post-*Blake*

You will recall that the House of Lords in *Blake* concluded that an account of profits might be available as a remedy for breach of contract but only in exceptional circumstances. Rather unhelpfully, beyond the facts in *Blake* itself the House declined to give any indication of what might constitute exceptional circumstances.

It has already been seen that Lord Nicholls outlined the following as factors which were likely to be most relevant: (i) the subject matter of the contract, (ii) the purpose of the contractual

[801] [2011] EWHC 2009 (QB).

provision which has been breached, (iii) the circumstances in which the breach occurred, (d) the consequences of the breach and (iv) the circumstances in which relief was being sought.

In *CMS Dolphin Ltd v Simonet and Blue (GB) Ltd*[802] Lawrence Collins J was concerned with a claim by a company against a former director who had resigned and set up and diverted business to a competing advertising business. Had the judge not found that there was an effective remedy in relation to the allegations of breach of fiduciary duty as a director, he indicated that he would have been prepared to order an account of profits for the breach by the defendant of the duty of fidelity in his employment contract. Applying the guidance in *Blake*, he considered that the characterisation of the contractual obligation as fiduciary and the fact that the claimant there had a legitimate interest in preventing the profit-making activity of the defendant constituted exceptional circumstances.

In *WWF World Wide Fund for Nature (formerly World Wildlife Fund) v World Wrestling Federation Entertainment Inc*[803] Jacob J refused to permit the claimant to amend its case (which concerned the breach of the negative covenant not to use the initials 'WWF') to seek an account of profits on the grounds that the circumstances were not sufficiently exceptional within the meaning of *Blake.*

Devenish Nutrition Ltd v Sanofi-Aventis[804] concerned an alleged cartel in relation to the supply of vitamins and so was a claim in tort not contract but it neatly illustrates the relevant issues. However, it was very difficult (but not impossible) for the claimant victim of the cartel to calculate its losses because it involved an assessment of the amount of the overcharge (i.e. the difference between the amount charged and the amount that would have been charged had there been no cartel) and the proportion of it absorbed

[802] [2001] 2 BCLC 704.
[803] [2002] FSR 32. This is an earlier part of the dispute which came before Peter Smith J. in 2006.
[804] [2007] EHC 2384.

by upstream undertakings or passed on to downwards ones. The Court of Appeal (Longmore LJ dissenting) rejected that the claimant was entitled to an account of profits because they were not available for a non-proprietary tort and because damages were said to be an adequate remedy.

In *Vercoe v Rutland Fund Management*[805] an account of profits was refused.

Despite the lapse of over 15 years since *Blake* was decided, there is only one reported example of an account of profits being awarded in a breach of contract case. In *Esso Petroleum Co Ltd v Niad Ltd*[806] the defendant was the owner of a petrol station which was tied to Esso under a solus agreement. In 1996 Esso introduced a marketing scheme called 'Pricewatch' to which Niad agreed which obliged it (and others) to provide daily reports of the prices of competitors to Esso which would then make revisions to the price to be charged to consumers for fuel. In return, Niad was to receive a margin deducted from the purchase price of its fuel. Niad failed repeatedly to report prices and so Esso brought a claim for damages for breach of contract, assessed by reference to the sales alleged to have been lost as a result. Sir Andrew Morritt VC (as he then was) found that the breach was established. On damages, he accepted that damages would be an inadequate remedy because it was impossible to attribute lost sales to one of several hundred of its dealers, also bound by the scheme. The Vice-Chancellor found that Niad's obligation to implement the price reduction had been fundamental to the scheme and that Esso had a legitimate interest in preventing it profiting from its breaches and so awarded Esso an account of profits.

VIII. *Morris-Garner v One Step (Support) Limited*

The recent decision of the Court of Appeal is important for three reasons: (i) the Court conducted a thorough analysis of most, if not all, of the above line of cases on the award of *Wrotham Park* damages for breach of contract, (ii) the Court grappled with the

[805] ibid.
[806] [2001] All ER (D) 324.

particular circumstances in which it is appropriate to award *Wrotham Park* damages and (iii) the Court clarified the relevance of a claimant's ability to prove identifiable loss.

The simplified facts were that, following a trial, Karen Morris-Garner and her civil partner, Andrea Morris-Garner were found to have acted in flagrant breach of non-compete and non-solicitation covenants made in connection with the sale to One-Step of a business which provided 'supported living' services for vulnerable adults and children leaving the care system.

One-Step contended that damages were very difficult to prove and would not, on that account, provide an adequate remedy. It sought instead either an account of the profits that the Morris-Garners had made as a result of their wrongdoing (essentially, acting in competition with One-Step after the sale) or *Wrotham Park* damages. The trial judge rejected the claim for an account of profits on the grounds that the circumstances were not sufficiently exceptional, within the meaning in *Blake*, to justify that remedy. There was no appeal against that part of the judgment.

However, the judge regarded the case as a paradigm example of the type of situation which justified *Wrotham Park* damages. This was strenuously challenged on the appeal brought by the Morris-Garners. They argued that *Wrotham Park* damages could be awarded only where: (a) the claimant was unable to demonstrate identifiable financial loss, (b) to do so was necessary to avoid manifest injustice and (c) there were sufficient factors to justify the grant of an exceptional remedy.

Christopher Clarke LJ confessed at [114] to finding the question of whether the judge was right to give One-Step the option of *Wrotham Park* damages a matter of "some difficulty" and to having been initially attracted to the appellant's submissions.

On the first point, the contrary argument that lack of an identifiable financial loss was not a pre-condition to an award of negotiating damages ultimately prevailed. Christopher Clarke LJ acknowledged that Chadwick LJ in *WWF* had referred to the need to compensate a claimant in circumstances where he cannot demonstrate identifiable financial loss as being an underlying feature of a claim to both an account of profits and *Wrotham Park*

damages[807] but rejected that Chadwick LJ had been laying down that it was only in those circumstances that such an award should be made. On the contrary, it had not been necessary for him to decide that point. Longmore LJ was of a similar view concluding that Chadwick LJ's use of the phrase "identifiable financial loss" was not essential to his reasoning. King LJ agreed.

On the second and third points, the Court affirmed that the correct test was whether damages on the *Wrotham Park* basis was the just response.[808] The fact that there had been references to 'manifest injustice' in some of the previous cases, notably *Wrotham Park* itself, did not require a judge to assess whether manifest injustice would arise if *Wrotham Park* damages were not awarded. The test was not whether the case was exceptional but what does justice require.[809]

So when is an award of *Wrotham Park* damages likely to be justified? Longmore LJ at [147] endorsed the 3 important features adopted by Peter Gibson LJ in *Experience Hendrix* at [58] and added one more of his own at [151] (at least in cases concerning the sale of a business). They are:

(i) There was a deliberate breach by the defendant of its contractual obligations for its own reward;
(ii) The claimant would have difficulty in establishing financial loss therefrom;
(iii) The claimant has a legitimate interest in preventing the defendant's profit-making activity in breach of contract; and
(iv) The result of the defendant's breach of contract has been that it is doubtful that interim relief could be obtained.

It must be stressed that this is not in the nature of a checklist. As Longmore LJ made clear at [151] he was not intending, by adding the fourth feature in cases of a sale of a business, to suggest

[807] And to the decision of David Richards J as he then was in *Abbar v Saudi Economic and Development Company* [2012] EWHC 1414. He went on at [118] to conclude that, if and insofar as the judge there regarded the absence of identifiable financial loss as an absolute requirement for *Wrotham Park* damages then he was wrong. See also [146] (Longmore LJ).
[808] [119], [126] (Christopher Clarke LJ).
[809] He would in any event have regarded the facts as exceptional.

that its absence would necessarily mean that *Wrotham Park* damages must not be awarded.

IX. Conclusion

It is possible to offer some tentative conclusions: (i) The award of "gain-based" or "negotiating" damages in line with *Wrotham Park* is now a well-established alternative to damages for breach of contract assessed by reference to the claimant's loss in commercial cases, (ii) whether the claimant is able to show identifiable loss as a result of the breach is a relevant but not decisive feature of the award of this type of damages, (iii) cases where *Wrotham Park* damages have been favoured tend to involve breach of negative covenants (for example, restrictive covenants in land and wider negative covenants are designed to protect the claimant's goodwill in its customers and other non-tangible assets), (iv) the alternative remedy of an account of profits for breach of contract is more often sought than granted bearing in mind the need for exceptional circumstances established in *Blake*, (v) there are still sound legal and tactical reasons for establishing that a contract-breaker was acting in a fiduciary capacity and finally, (vi) the recent decision of the Court of Appeal in *Morris*-Garner illustrates and asserts the award of these two remedies as an important and developing aspect of commercial law and that the test for when *Wrotham Park* damages is appropriate is a flexible one.

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Royal Charter Number RC000797