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

This year's volume is dedicated to the following:

Ms. Laura Tatham,
Senior Lecturer in Property Law,
The University of Manchester,
School of Law.

Mr. Harry Woffenden,
B.A. Criminology candidate,
The University of Manchester,
School of Law.

Mr. Ahmed Aqeel Al Mudawab,
LL.B. Law candidate,
The University of Manchester,
School of Law.

They shall forever be missed by everyone
at the School of Law and the Editorial Board.

Manchester Review of Law, Crime and Ethics

Preface from the Head of the School of Law

It is unfortunate that this edition of the Manchester Review of Law, Crime and Ethics comes at a sad time for the School of Law.

One of our most esteemed colleagues, Ms Laura Tatham, passed away earlier this year. Laura was a dedicated, experienced and highly respected Property Law teacher, who was passionate about ensuring that every student reached his or her potential. Her teaching was always engaging and enjoyable, and she cared deeply both about the student experience in general and each and every individual student. Her passion and commitment shone through in the roles she undertook, and her enthusiasm and energy were remarkable.

She brought a sense of fun and good humour to daily activities and meetings, and she was endlessly supportive of students and colleagues alike. For many who knew her she was truly inspirational. The thoughts and deepest sympathies of all those in the School of Law are with her daughters, her family and her friends.

Nevertheless, I am delighted to write this preface to mark the seventh year of the publication of the Review. The Review is clearly establishing a strong reputation as a forum for broad-ranging scholarship, and it has already published a number of significant articles, covering a wide spectrum of legal debate and research. It is an important showcase for the diverse lines of research undertaken within the Law School, and it brings great credit to all involved.

I am very grateful to members of the Editorial Board for all the time and energy that they have invested to make the Review such a success, and they are to be congratulated on their achievements.

We look forward to many future volumes!

Professor Chris Thornhill
October 2018

Preface from the Editor-in-Chief

I am grateful to my predecessor, Rohan Shah, for appointing me as the Editor-in-Chief of the Manchester Review of Law, Crime and Ethics. Volume VII was both challenging and enjoyable to put together. The articles that Tanjia and I selected to be published in this review are all brilliant pieces of work. They represent the talent that is found within the University of Manchester School of Law, and we hope to see these authors' names again in future academic publications around the world.

I would like to dedicate this edition of the Manchester Review of Law, Crime and Ethics to the three beloved and gifted members of the School of Law who passed away this year. Two were students: BA Criminology candidate Harry Woffenden, and LLB Law candidate Ahmed Aqeel Al Mudawab. The third was Laura Tatham, Senior Lecturer in Property Law.

Unfortunately, I did not know Harry and Ahmed personally. However, from what their families and friends have told me, both of them were remarkable students and had personalities to match. I can only sympathise with the pain that their families and friends are going through. I wish them all the best.

As for Laura, I was fortunate enough to be taught by her for both Property Law I and Property Law II. These modules covered Equity & Trusts and Land Law, which I initially found to be challenging modules. However, Laura was a lecturer who understood exactly how to communicate even the most trivial legal concepts to her students, and as such she helped me overcome my difficulties. She always ensured that her students

walked out of her lectures and seminars with a strong grasp of all of the key pieces of information necessary to do brilliantly in the course. Not only that, but Laura also always managed to make her lectures and seminars entertaining. She knew precisely how to make her modules some of the most engaging and enjoyable in the School of Law.

The positive energy that surrounded Laura wherever she went will be impossible to replicate. Laura's family – in particular her daughters Maeve and Lily Higham – are in my thoughts, and I can only offer them my deepest condolences. I had the privilege of speaking to Maeve in preparing this Volume for publication. I am beyond grateful for all of the help that she has given me, and I am glad to have been able to tell her just how much Laura impacted my life for the better.

Despite these unfortunate times, the Editorial Board have persevered and worked hard to bring you the seventh edition of the Manchester Review of Law, Crime and Ethics. I am extremely grateful for the amount of time and effort that each one of our editors has put into making this edition as incredible of a publication as possible. If it was not for their hard work, the Manchester Review of Law, Crime and Ethics would not have the outstanding reputation that it has continuously built since its inception in 2012.

The achievements of this publication cannot be overstated. We have grown from a little-known student journal in 2012 to having our articles published on HeinOnline and the British Library in 2018. Likewise, my tenure as Editor-in-Chief has received requests from both students and academics at several institutions far beyond Manchester for their work to be published in this review. I can only imagine what the future holds for the Manchester Review of Law, Crime and Ethics.

Before I depart as Editor-in-Chief, I would like to take the opportunity to introduce my successor, Elizabeth Chloe Romanis. I look forward to witnessing how much of an extraordinary job she does with Volume VIII.

Thank you for reading!

Kevin Patel
October 2018

A Tribute to Laura Tatham

I'll never forget the passion my mum held for teaching. The student experience was at the very forefront of everything she did; how she prepared for her lectures and seminars, how much detail she would put in to all of her feedback, how much time she would give to every student not just those who were her tutees. She wanted her students to enjoy their Law degree!

As a lecturer of Land Law, she loved the fact that her specialist subjects were typically known as the most 'difficult' and 'painful to learn' within a Law degree. The challenge of inspiring students to be inspired by her 'dull' subjects was what kept her moving every day!

I am sad I never got to sit in the back of one of her lectures, I always promised her I would. She would have loved pointing me out to all her students, having often told both my sister and I of how she would use stories of our wayward behavior to get laughs in lectures and bond with her students.

I'm grateful that her memory will live on through the many students she touched during her time as a lecturer. To all her students and colleagues who attended her funeral service, reached out to us following her death or, donated in her name – thank you for letting us know how valuable she was to you all.

Maeve Higham
October 2018

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‘Out with the old, and in with the old’: Walking the Tightrope of Press Regulation

Oliver L.S. Carr[1]

To walk a tightrope requires wits, bravery, but – most crucially – balance. In light of the “systemic and illegal invasions of privacy”,[2] carried out by various UK press organisations, Press Self-Regulation must become truly independent, transparent, and strike the balance between maintaining the freedom of speech and protecting the right to individual privacy. This article will explore the turbulent history of UK Press Regulation leading to Lord Justice Leveson’s enquiry, and will critically assesses the inadequacy of the Independent Press Standards Organisation (“IPSO”) as a replacement for the Press Complaints Commission (“PCC”). It concludes that IPSO falls short of being an adequate replacement for the PCC because of its failure to uphold the fundamental proposals of the Leveson Report. The tightrope that is UK Press Self-Regulation is uncrossed, and will remain to be so until the industry becomes ‘Leveson-compliant’.

I. Introduction

UK Press Self-Regulation is ‘broken’ and in need of ‘fixing’.[3] Neither the Press Complaints Commission (“PCC”), nor its hopeful successor – The Independent Press Standards Organisation (“IPSO”) – have been capable of fulfilling the public interest in being independent, transparent, and balanced between exercising the right of free speech and upholding the right to privacy.[4] Until the recommendations of the Leveson Inquiry are fully adhered to, and statutory measures are introduced to oversee the proper self-

[1] LL.B. Candidate, The University of Manchester, School of Law.
[2] Joint Committee on Privacy and Injunctions, *Privacy and injunctions* (HC 2010–2012, HC 1443, HL Paper 273) <https://www.publications.parliament.uk/pa/jt201012/jtselect/jtprivinj/273/273.pdf> accessed 25th June 2018, 58.
[3] ibid 57.
[4] National Heritage Committee, *Privacy and Media Intrusion* (Fourth Report of Session 1992–1993) <https://www.publications.parliament.uk/pa/cm200203/cmselect/cmcumeds/458/458.pdf> accessed 26th June 2018, 6.

regulation of the press, the tightrope that is UK Press Self-Regulation will never be successfully crossed.

II. Press Regulation: a potted history

A decline in press standards may have begun as early as in 1949, when it was said that there had been a "progressive decline in the calibre of editors and in the quality of British journalism".[5] This decline appears to increase over time. More recently, we have seen the "era of tabloid exposure",[6] the Government commissioning of the Calcutt Reports, and the subsequent creation of the PCC.

The PCC was set up in 1991 in response to the first Calcutt Report,[7] which recommended replacing the Press Council with a new body that oversee a new code of practice and adjudicated on complaints alleging breaches of this code.[8] The PCC had seventeen members – ten of whom were lay members, the other seven being editors of national or regional newspapers or of magazines.[9] The body dealt with complaints regarding breaches of its Editor's Code of Practice.[10] Complaints were evaluated, at first instance, to establish if they were direct complaints lodged within two months of publication and falling within the area of 'editorially-controlled material' published in UK newspapers or magazines; thus within the remit of the PCC.[11] If the complaint remained unresolved after communication between the complainant, relevant editor, and the

[5] Hugh Tomlinson QC, 'The New UK Model of Press Regulation' *LSE Media Policy Brief 12* (March 2014) <http://www.lse.ac.uk/media@lse/documents/MPP/LSE-MPP-Policy-Brief-12-The-New-UK-Model-of-Press-Regulation.pdf> accessed 24th June 2018, 7.

[6] John Jewell, 'How Many Drinks in that 'Last Chance Saloon'? The History of Official Inquiries Into the British Press' in John Mair (ed), *After Leveson, The future for British Journalism* (Abramis academic publishing 2013) 40.

[7] Sir David Calcutt, Home Office, Report of the committee on privacy and related matters (Cm 1102, 1990) ('Calcutt Report'): <http://hansard.millbanksystems.com/commons/1990/jun/21/calcutt-report> accessed 26th June 2018.

[8] House of Lords Communications Committee: Third Report – Press Regulation: where are we now? (March 2015) <https://www.publications.parliament.uk/pa/ld201415/ldselect/ldcomuni/135/13502.htm> accessed 20th June 2018, 24.

[9] Eric Barendt et al, *Media Law: Text, Cases and Materials* (Pearson 2014) 50.

[10] ibid.

[11] ibid.

PCC, the commission would formally adjudicate on whether or not the code had been breached.[12] When found to be in breach of the code, the newspaper or magazine in question would be obliged to publish any decision made against it in full and in a manner agreed by the PCC.[13] The PCC could not award damages in favour of a complainant, or issue fines for breaches of the code – nor did they have the ability to "compel enforcement".[14] Its powers proved inadequate for the job.

The body was given 18 months from its inception to "demonstrate that non-statutory self-regulation could be made to work effectively".[15] David Mellor MP, the Minister of the Arts, lamented, "I do believe the press – the popular press – is drinking in the last chance saloon".[16] In his second report, published in January 1993,[17] Calcutt stated that the PCC was an ineffective regulator of the press – it could not command the press nor the public interest and was "set up by the industry, financed by the industry, dominated by the industry, and operating a code of practice devised by the industry, and which is over-favourable to the industry".[18] It was recommended that a statutory Press Complaints Tribunal be set up.[19] In the years following, the National Heritage Select Committee also took against the PCC. They recommended the appointment of a new statutory press ombudsman:[20] it stated that the PCC did not strike the necessary "balance" between overseeing the right of free speech and the right to privacy.[21] In 1995, the government formally responded to the matter: it would not be introducing statutory controls to regulate the press.[22]

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[12] Barendt et al (n 9) 51.
[13] ibid.
[14] ibid.
[15] House of Lords Communications Committee (n 8) 25.
[16] Bob Franklin et al, *Key Concepts in Journalism Studies* (Sage 2005) 30.
[17] Sir David Calcutt, *Review of press self-regulation* (Her Majesty's Stationary Office, Cm 2135, 1993) <http://hansard.millbanksystems.com/commons/1993/jan/25/calcutt-report> accessed 24th June 2018.
[18] Jewell (n 6) 41.
[19] House of Lords Communications Committee (n 8) 27.
[20] ibid [32].
[21] National Heritage Committee, *Privacy and Media Intrusion* (Fourth Report of Session 1992–1993) 6.
[22] House of Lords Communications Committee (n 8) 32.

The PCC's self-regulatory approach was subject to further scrutiny over time. The Culture, Media and Sport Select Committee recommended in 2003 that its code of practice be updated further[23] to reflect various technological developments such as the interception of phone calls.[24] In the same year, the Information Commissioner's Office launched an investigation into alleged breaches of the Data Protection Act. It found "evidence of systematic breaches in personal privacy that amount[ed] to an unlawful trade in confidential personal information".[25] The infamous phone hacking scandal emerged. Clive Goodman and Glenn Mulcaire, of the News of the World, were found guilty of intercepting voicemail messages of the royal family. It was later found that the practice of phone hacking had violated the privacy of more individuals in the public eye.[26] The Joint Committee on Privacy and Injunctions stated that the PCC was not equipped to deal with illegal invasions of privacy into the lives of individuals.[27]

III. The downfall of the PCC – Leveson Launched

Later that year, the Prime Minister announced the launch of the Leveson Inquiry, which would review the "culture, practices and ethics of the press"[28] and the "failure of the current system of regulation".[29] Lord Justice Leveson was to make recommendations for a "new, more effective way of regulating the press".[30]

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[23] Culture, Media and Sport Committee, *Privacy and Media Intrusion* (Fifth Report of Session 2002–2003, HC 458-I) <https://www.publications.parliament.uk/pa/cm200203/cmselect/cmcumeds/458/458.pdf> accessed 25th June 2018, 4.

[24] House of Lords Communications Committee (n 8) 34.

[25] Information Commissioner's Office, *What Price Privacy* Now? (2006) <http://conservativehome.blogs.com/files/ico-wppnow-0602.pdf> accessed 26th June 2018, 4.

[26] Nick Davies, 'Trail of hacking and deceit under nose of Tory PR chief' *The Guardian* (8 July 2009) <https://www.theguardian.com/media/2009/jul/08/murdoch-newspapers-phone-hacking> accessed 23rd June 2018.

[27] Joint Committee on Privacy and Injunctions, *Privacy and injunctions* (HC 2010–2012, HC 1443, HL Paper 273) 4.

[28] Parliament Transcript: Official Report, HC Deb, 13 July 2011 <https://www.publications.parliament.uk/pa/cm201011/cmhansrd/cm110713/debtext/110713-0001.htm> accessed 23rd June 2018, 312.

[29] ibid.

[30] Parliament Transcript: Official Report, HC Deb (n 28) 312.

The most significant factor leading to the downfall of the PCC was that it adopted a self-regulatory approach that "sought to avoid confrontation with publishers and editors".[31] In doing so, it chose to circumvent the adjudication process if at all possible.[32] And so, while in the general run of things the system worked "well enough",[33] and improvements were made "over time",[34] it comes down to this: a regulator is not effective if it does not regulate effectively.

Leveson remarked that the commission was not "actually a regulator at all",[35] demoting its role to a "complaints-handling body".[36] It often didn't even achieve this objective – towards the end of its tenure the commission was branded not as an 'effective watchdog', but a "toothless poodle".[37] There was nothing inherently wrong with the Editors' Code of Practice, and indeed, over its' 21-year tenure it had been "helpful to thousands of people".[38] However, if such a code is not enforced properly it is ineffective.. Indeed, the PCC's behaviour was not so much toothless as it was blind:[39] in 2009, when confronted with multiple examples of high-profile phone hacking, the organisation simply failed to act. The

[31] Roy Greenslade, *Submission to the Leveson Inquiry, MOD400000276* (2012) <http://webarchive.nationalarchives.gov.uk/20140122145147/http:/www.levesoninquiry.org.uk/wp-content/uploads/2012/07/Submission-by-Professor-Roy-Greenslade-of-City-University.pdf> accessed 19th June 2018, 4.
[32] ibid.
[33] ibid.
[34] ibid 5.
[35] The Leveson Inquiry: An Enquiry into the Culture, Practices and Ethics of the Press, *Executive Summary* <https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/229039/0779.pdf> accessed 22nd June 2018, 12.
[36] ibid.
[37] Martin Moore, *Did the PCC fail when it came to phone hacking?* (Media Standards Trust 2012) <http://mediastandardstrust.org/wp-content/uploads/downloads/2012/02/Did-the-PCC-fail-when-it-came-to-phone-hacking.pdf > accessed 26th June 2018, 4.
[38] Greenslade (n 31) 6.
[39] Leviathan, 'RIP the PCC: The Press Complaints Commission is another victim of the phone hacking scandal' *The Economist* (8 July 2011) <http://www.economist.com/blogs/leviathan/2011/07/rip-pcc> accessed 18th June 2018.

commission claimed there was "no evidence" for this,[40] and in doing so, it "signed its own death warrant".[41]

The Leveson Report both critiqued the actions of the PCC and suggested that the commission's failure came from within itself. He wrote that the organisation aligned with "the interests of the press",[42] suggesting that when it did investigate major issues, it sought to "head off or minimise criticism of the press".[43] The main recommendation of Leveson was the creation of a new self-regulatory body. The report suggested that this body be "underpinned by a statute",[44] which would enshrine in law that it meets certain requirements (relating to issues such as privacy of the individual), while also ensuring a legal duty to protect freedom of the press.[45] Leveson's vision entailed other fundamental elements. The Chair and board members of the body would be independent of the press:[46] there should be no serving editor on board. The membership of the body would be available to all publishers on reasonable and non-discriminatory terms.[47] The new body would establish its own code – a clear statement of the standards expected of the press.[48] The body would be funded by the media industry and it would have the power to impose sanctions of up to one million pounds upon an organisation in breach.[49] The events which followed the inquiry cannot be said to have properly adhered to Leveson's recommendations.

[40] Caroline Davies, 'PCC finds no evidence that it was misled in phone hacking inquiry' *The Guardian* (9 November 2009) <https://www.theguardian.com/media/2009/nov/09/pcc-phone-hacking-inquiry> accessed 26th June 2018.
[41] Lisa O'Carroll, 'The Future of regulation after the PCC' *The Guardian* (14 July 2011) <https://www.theguardian.com/media/2011/jul/14/regulation-pcc-newspaper> accessed 26 June 2018.
[42] The Leveson Inquiry (n 35) 12.
[43] ibid.
[44] ibid 17.
[45] ibid 14.
[46] ibid 15.
[47] ibid 16.
[48] ibid 15.
[49] Olswang, *The Leveson Report; a quick guide to the key recommendations for the media* (2012) <http://www.olswang.com/articles/2012/11/the-leveson-report-a-quick-guide-to-the-key-recommendations-for-the-media/> accessed 12th June 2018.

IV. Leveson Compromised – the Royal Charter

Parliament's response to Leveson was mixed. This conflict led to a "compromise":[50] no statute was created to regulate the press, merely a Royal Charter on self-regulation.[51] While the charter is supported by two sets of statutory provisions, these have not dealt with the core issue. Sections 34 to 42 of the Crime and Courts Act 2013 concern "costs and exemplary damages" relating to "relevant publishers".[52] Publishers who are not members of 'approved regulators' are compelled "to pay the legal costs, win or lose, for both itself and the complainant".[53] Section 96 of the Enterprise and Regulatory Reform Act 2013 deals with the amendment of a Royal Charter:[54] it cannot be altered unless changes are in accordance with its own wording – in this case, there has to agreement to do so.[55]

The Royal Charter on Self-Regulation of the Press provides for the establishment of an independent panel with the responsibility of overseeing any organisation set up to regulate the print media:[56] the 'Press Recognition Panel' (PRP). The Panel determines applications for recognition from regulators, reviews whether applications granted recognition should continue to be recognised, withdraws recognition from a regulator where appropriate, and report on any success or failure of the recognition system.[57] A press regulator must secure official recognition by satisfying 29 conditions – these are "not unduly onerous".[58] The purpose of The Panel is clear: to regulate its approved self-regulators.

[50] Hugh Tomlinson QC (n 5) 16.
[51] Royal Charter on Self-Regulation of the Press 2013 <https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/254116/Final_Royal_Charter_25_October_2013_clean__Final_.pdf> accessed 26th June 2018.
[52] ibid 15.
[53] Roy Greenslade, 'Why I reject press regulation through the royal charter' *The Guardian* (31 October 2016) <https://www.theguardian.com/media/greenslade/2016/oct/31/why-i-reject-press-regulation-through-a-royal-charter> accessed 25th June 2018.
[54] Hugh Tomlinson QC (n 5) 16.
[55] House of Lords Communications Committee (n 8) 62.
[56] ibid 68.
[57] Royal Charter on Self-Regulation of the Press 2013 (n 51) 4.
[58] Greenslade (n 53).

V. The Inadequacies of IPSO

IPSO, while not recognised by the PRP, is the industry's most prominent self-regulatory body. Its board is made up of twelve members: five represent the newspaper and magazine industry and seven are independent.[59] The Complaints Committee has a similar make-up. IPSO members include all the national press apart from The Guardian, The Independent, and Financial Times.[60] IPSO's self-regulatory approach is carried out in a similar way to that of the PCC: through an Editor's Code of Practice.[61] Its main functions are also similar to those of the PCC; they include offering a free-of-charge complaint handling service to the public, carrying out investigations into "serious and systemic" breaches of the Editors' Code of Practice, publishing annual reports, providing guidance to publishers, providing a confidential 'whistle-blowing' hotline for journalists (in accordance with Leveson), and providing an arbitration service.[62] It does not require a great deal of analysis to see that IPSO, while it might be 'approved' by a Royal Charter Panel, does not actually serve a fundamentally different role to that of the former PCC. In fact, it remains to be this: a self-regulatory body where the press' interests are at the heart of its motives, one in which they are allowed too much to "define their own terms".[63] IPSO significantly "falls short" of being Leveson-compliant.[64]

These shortcomings are demonstrated in a number of different areas. Firstly, its complaints procedure is "remarkably similar" to that of the PCC.[65] The criteria and methods of resolution

[59] House of Lords Communications Committee (n 8) 78.
[60] ibid 76.
[61] ibid.
[62] Independent Press Standards Organisation, *Regulations* <https://www.ipso.co.uk/media/1240/regulations.pdf> accessed 26th June 2018, 4.
[63] Culture, Media and Sport Committee: Submission to DCMS consultation on commencement of Section 40 of the Crime and Courts Act 2013 and Part 2 of the Leveson Inquiry, published February 2017 <http://www.parliament.uk/documents/commons-committees/culture-media-and-sport/Culture-Media-Sport-Committee-reponse-to-Government-consultation-on-press-regulation.pdf> accessed 25th June 2018, 19.
[64] ibid 9.
[65] Media Standards Trust, *The Independent Press Standards Organisation (IPSO) – An* Assessment, published November 2013 <http://mediastandardstrust.org/wp-content/uploads/downloads/2013/11/MST-IPSO-Analysis-15-11-13.pdf> accessed 22nd June 2018, 4.

are almost identical. That said, IPSO has the power to appoint an 'Investigation Panel'. The panel may suggest sanctions of up to one million pounds, subject to approval of the board.[66] This level of investigation is rare. The similarities between the two bodies are further emphasised by their Editor's Code of Practice. IPSO's code is largely based on that of the PCC.[67] Responsibility for writing the code is given to the Editor's Code of Practice Committee (as with the PCC), a sub-committee Regulatory Funding Committee (RFC).[68] This significantly contravenes another of Leveson's recommendations that the code should be the responsibility of the board.[69] Crucially, the RFC, comprised of editors running the UK's largest publishing groups, manages IPSO's financial position. The RFC's role within IPSO's arbitration process has received heavy criticism, most notably from 'Hacked Off'.[70] Leveson suggested that ordinary people should have access to justice through arbitration.[71] IPSO can only offer arbitration after due consideration and consultation, a pilot, and agreement with by the RFC.[72] IPSO has failed to deliver on yet another central element of Leveson's recommendations.

The existence of the RFC demonstrates IPSO's largest setback: the organisation cannot be seen as truly independent. IPSO is dependent on the industry at "almost every level".[73] Press interests have significant influence "and even control" over the organisation.[74] The RFC funds the organisation, controlling and collecting the membership fee and overseeing the budget.[75] It influences appointments: five members of the regulatory board must be approved by the RFC – it also determines the pay of all board

[66] House of Lords Communications Committee (n 8) 84.
[67] ibid 89.
[68] Media Standards Trust (n 65) 4.
[69] ibid 5.
[70] Kate Allen and Henry Mance, 'New UK watchdog raises fears over media regulation' *Financial Times* (25 October 2016) <https://www.ft.com/content/7d0e4244-9ac5-11e6-b8c6-568a43813464> accessed 5th July 2018.
[71] Media Standards Trust (n 65) 14.
[72] ibid 4.
[73] ibid.
[74] ibid.
[75] ibid 11.

members.[76] It influences regulations, holding a veto over changes to the regulations. The RFC also fund investigations and determines voting within IPSO. Leveson remarked that any new system had to be independent of both the press and politicians.[77] He stated that the PCC's lack of independence from the industry "lay at the heart of the failure of the system of self-regulation for the press".[78] Central to this was the dominance of the funding body, the Press Standards Board of Finance. With this in mind, one cannot say that IPSO provides sufficient divergence from the problems that led to the decline of the PCC. As recently as last month, the Culture, Media and Sport Committee reported that IPSO is "beholden to the Regulatory Funding Body".[79] IPSO needs to make "substantial progress",[80] to satisfy the recommendations of Leveson and interest of the public.

VI. What for the future of Press Regulation?

In 2016, the PRP 'officially recognised' IMPRESS (funded by Max Mosley) as an alternative press regulator to IPSO. The organisation is "independent" of newspaper groups and complies with Leveson's recommendations.[81] IMPRESS's vision is sound: "decent press standards" in the public interest, independent from publishers, politics or financial powers, where individuals who are harmed by the press can get redress without the risk of huge legal costs.[82] There is, however, a major practical problem with IMPRESS: while it currently regulates 109 publications, they are comparatively small, independent news outlets.[83] Indeed, no national newspapers are

[76] Media Standards Trust (n 65) 11.
[77] ibid 10.
[78] ibid.
[79] Culture, Media and Sport Committee (n 63) 26.
[80] Damien Collins MP, *Comments of Chairman regarding most recent report* (2017) <https://www.parliament.uk/business/committees/committees-a-z/commons-select/culture-media-and-sport-committee/news-parliament-2015/committee-response-government-consultation-press-regulation-16-17/> accessed 6th July 2018.
[81] Kate Allen and Henry Mance (n 70).
[82] IMPRESS Official Website, '*About Us*' <http://impress.press/about-us/> accessed 6th July 2018.
[83] ibid.

amongst its members.[84] Meanwhile, IPSO regulates the "overwhelming majority" of the newspaper and magazine publishers of Britain.[85] IMPRESS, as an approved "state-backed watchdog",[86] in line with the Royal Charter, is out of favour with the mainstream media. It places too much emphasis on the 'public interest' and not enough on the interests of the press. Bob Satchwell, executive director of the Society of Editors, has denounced the Royal Charter system as "half way to state control of the press".[87] This is certainly an overstatement. In fact, the current self-regulatory approach overseen by the Royal Charter does not go far enough.

VII. Conclusion

IPSO is not an adequate replacement for the PCC. While IMPRESS might have been a promising alternative, in adhering to the substandard, post-Leveson political compromise that was the Royal Charter, it has not received the backing necessary to make a real impact on press regulation. The best outcome would be a new Leveson upholding self-regulatory body, supported and funded by the industry, yet independent of publishers and politicians. The body should seek to secure press freedom, while also protecting the right of individuals to a private life, as well as ensure affordable legal support to individuals who seek redress from press harm. To achieve this, the neglected key aspect of Leveson's recommendations must be adhered to – a statute must underpin this self-regulatory body to guarantee that these provisions are made. Freedom of the press should never be disregarded,[88] but, in order to realise these outcomes, it must be somewhat compromised in such a way that the press is subject to rules and regulations that are made in the public

[84] Jasper Jackson, 'Max Mosley-funded press regulator recognised as state-backed watchdog' *The Guardian* (25 October 2016) <https://www.theguardian.com/media/2016/oct/25/impress-press-regulator-newspaper-publishers-max-moseley> accessed 5th July 2016.
[85] Roy Greenslade, 'Why the Press Recognition Panel meeting is so crucial for newspapers' *The Guardian* (9 August 2016) <https://www.theguardian.com/media/greenslade/2016/aug/09/why-the-press-recognition-panel-meeting-is-so-crucial-for-newspapers> accessed 6th July 2018.
[86] ibid.
[87] Kate Allen and Henry Mance (n 70).
[88] Culture, Media and Sport Committee (n 63) 19.

interest. This is not unreasonable. Broadcasters are regulated by Ofcom and the press should not be allowed to "define their own terms".[89] The industry must now focus on becoming Leveson-compliant;[90] only then will there be an adequate replacement for the PCC, only then will the tightrope have been crossed.

[89] Culture, Media and Sport Committee (n 63) 19.
[90] ibid.

The state as a nomenclature of convenience: in defence of individual responsibility under international criminal law

Marlon Anthony James[91]

Originally, international law was primarily concerned with the actions of states as part of the community of nations. To this end, regardless of how egregious a criminal act, individual persons were generally less responsible to international law than the state itself on whose behalf they purportedly acted. With the emergence of the international criminal regime however, for the purpose of accounting for individual criminal responsibility, there were noticeable shifts in the general state-centred ideology of international law. Although the matter of individual responsibility under the system was tested and ostensibly settled at the Nuremberg International Military Tribunal (IMT), the appropriateness of punishing individuals who supposedly acted on behalf of and in furtherance of a state's interest is still debated. From time to time, individuals who have been accused of breaches of international criminal law have sought to escape culpability on the basis that their actions were merely reflections of what the 'state' required of them. In championing a basis for individual criminal responsibility for these actions, the Nuremberg Tribunal declared that only by punishing individuals could the regime as was envisioned, be enforced. In support of the posture taken by the Nuremberg Trial, this paper argues that the state is merely a nomenclature of convenience for individuals who commit international crimes. The paper argues that it is imperative that the international criminal regime place individuals at its centre, not only for the purpose of prosecution but also for the purpose of protecting them.

Overview

International criminal law is the sub-branch of public international law regulating how criminal acts of international scope are to be identified, prosecuted and punished. The idea of a crime punishable by law was traditionally understood to be exercisable only under various national legal systems. The emergence of the notion of an

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'international crime' however, was clearly meant to be interpreted in the context of criminal actions which should fall within the remit of the international community to act against. To this extent, international criminal law is one example of the interplay between public international law and municipal laws.

Under the regime of classical international law, natural individuals had neither rights nor responsibilities separable from those of a state; they were not regarded as subjects in their own rights, but mere 'objects'.[92] This view has always stirred controversy and was rejected by some legal scholars and philosophers who argued that the law of nations, like all other laws, has individuals as its ultimate end, and so, an individual could not be treated as a mere 'thing'.[93]

Nonetheless, the predominant view was that the entire raison d'être of international law was to govern state-to-state relations; therefore, individuals by themselves lacked the *locus standi*.[94] It was thus understood that individual action under international law was the action of the state on whose behalf the individual supposedly acted. By extension, any responsibility that was incurred as a result of such action, punitive or otherwise, could not be attached to a person, but would be seen as the responsibility of the state.[95] Even where the most vicious acts were committed against others, whether by state agents or private individuals, it was to be treated as a crime under the respective domestic law.[96]

It is not difficult to appreciate why this situation became increasingly untenable to some observers in the international community. In many respects, it was the most powerful within the domestic jurisdictions, including agents of the states themselves,

[92] George Manner, 'The Object Theory of the Individual in International Law' (1952) 46(3) American Journal of International Law 428, 428–429.
[93] ibid.
[94] See for example Lassa Oppenheim's *International Law: A Treatise* (Vol 1, 2nd edn, Longmans, Green and Co. 1912) §13, 20; see also Alina Kaczorowska-Ireland, *Public International Law* (5th edn, Taylor and Francis 2015) 10.
[95] André Nollkaemper, 'Concurrence Between Individual Responsibility and State Responsibility in International Law' (2003) 52 International and Comparative Law Quarterly 615, 616–617.
[96] Andrea Bianchi, 'State Responsibility and Criminal Liability of Individuals' in Antonio Cassese (ed), *The Oxford Companion to International Criminal Justice* (Oxford University Press 2009) 17.

acting with the imprimatur of the highest authority, who were the perpetrators of these acts. Hence, human and humanitarian rights activists *inter alios*, rightly felt that there was a chance of people committing these crimes with impunity.

Consequently, when it emerged, the philosophy of international criminal law affected classical international law in at least three noticeable ways. First, whereas classical international law was state-centred, the ideology underpinning international criminal law had a more human-centred orientation. Accordingly, it was more concerned with protecting the human individual, than with maintaining the status quo of state sovereignty. It begun with a recognition that individuals were not simply objects, but, like states, were also subjects of international law, concomitantly possessing and exercising rights and duties, and were therefore both regulated and protected thereunder.[97]

Secondly, and flowing from the first point, the concept of an international crime regime to some extent whittled away the doctrine of state sovereignty, at least in principle, in order to protect the human population around the world. No longer would states be allowed to hide behind the cloak of sovereignty to commit the most odious acts against its own or any other. This was the same paradigmatic swing Maogoto referred to as 'a qualitative shift, necessitating an ethical vision in which enforcement of international norms supersedes certain state rights and prerogatives.'[98] It is no coincidence that the core international criminal acts are almost always breaches of some form of human rights or humanitarian law.

The third, and arguably most important way in which international criminal law affected classical international law was in shifting from strict state liability to holding individuals primarily responsible for their roles in the commission of these crimes. As has been shown above, it is now largely acknowledged that individuals, as subjects, like states and other entities, possess rights under international law. Since the rights of individuals exist under the regime, it follows that as autonomous international entities, they

[97] Martin Dixon, *Textbook on International Law* (Oxford University Press 2013) 147.
[98] Jackson Maogoto, 'A Giant Without Limbs: The International Criminal Court's State-Centric Cooperation Regime' (2004) 23 The University of Queensland Law Journal 102, 108.

also have concurrent duties and responsibilities, and whenever there is a breach of those duties and responsibilities, it gives rise to individual liability. Hence, rather than exacting punishment against a 'state', the regime seeks to make individuals the primary focus of international criminal wrongs by bringing prosecution against natural, tangible persons.

Against that background, this paper will seek to pursue a critical evaluation of the judiciousness of applying sanctions primarily against individuals as opposed to states for international criminal acts. In the discussion that follows, the essay supports the proposition that persons, rather than states, should principally be held accountable for international criminal wrongs. It will be argued that, by exacting punishments primarily upon persons, two key purposes are served. Firstly, individual prosecution is the clearest indicator of a dispensation of any semblance of justice, not only for victims, but also as a form of retributive justice to the guilty, which is equally important. Secondly, by holding some definite, tangible, natural person accountable, the international community sends a persuasive and unambiguous message that there will be no impunity for the commission of such crimes. This message also has the very real prospect of deterring others from such future conduct. It will be contended that unless there is clear and certain individual punishment, any attempt by the international community to mitigate such behaviour will be otiose.

Defining International Crimes

From time to time, a confusion arises between what is meant and understood by international vis-à-vis trans-national crimes. This is chiefly because many of the crimes that are trans-national, also demand the attention and action of the international community. Notwithstanding this, each is distinguishable from the other. Trans-national crimes can be described as criminal acts that in some way span the borders of more than one state.

Thus, they are either:

A. committed in more than one states or;
B. committed in one state but preparation in whole or in part took place in more than one states or;
C. committed in one state but have serious consequences within other (s) or;
D. committed in one state by an organised criminal group that operates in more than one states.[99]

One definition of international crime, on the other hand, holds that it is 'an act universally recognized as criminal, which is considered a grave matter of international concern and for some valid reason cannot be left within the exclusive jurisdiction of the state that would have control over it under ordinary circumstances….'[100] Although there is no complete fixed list of international crimes, Natarajan posits 24 such crimes within various categories as outlined in the table below.[101]

Natarajan's List of international crimes: source – Martin Dixon, *Textbook on International Law*

Category	Protection	Unlawful Act
A	Protection of international peace	1. Aggression
B	Humanitarian protection in armed conflicts	2. war crimes 3. unlawful use of weapons 4. mercenarism

[99] Mangai Natarajan (ed), *International Crime and Justice* (Cambridge University Press 2011) xxv.
[100] *US Military Tribunal Nuremberg, Tribunal V (The USA against Wilhelm List et al)* [1948] opinion and judgment at 1241.
[101] Dixon (n 97) XXVii.

C	Protection of fundamental human rights	5. Genocide 6. Crimes against humanity 7. Apartheid 8. Slavery and related crimes 9. Torture 10. Unlawful human experimentation
D	Protection against terror-violence	11. Piracy 12. Aircraft hijacking and sabotage of aircrafts 13. Force against internationally protected persons 14. Taking of civilian hostages 15. Attacks upon commercial vessels
E	Protection of social interest	16. Drug offenses 17. International traffic in obscene publications

F	Protection of cultural interests	18. Destruction and/or theft of national treasures
G	Protection of the environment	19. Environmental hazards 20. Theft of nuclear materials
H	Protections of communications	22. Interference with submarine cables
I	Protection of economic interests	23. Falsification and counterfeiting 24. Bribery of foreign public officials

Additionally, Einarsen suggested that all international crimes should meet the following five criteria:

A. The type of conduct manifestly violates a fundamental universal value or interest.
B. The type of conduct is universally regarded as punishable due to its inherent gravity.
C. The type of conduct is recognised as a matter of serious international concern.
D. The proscriptive norm is anchored in the law-creating sources of international law.

E. Criminal liability and prosecution do not require consent of any concerned state.[102]

The 1998 *Rome Statute,* which established the International Criminal Court (ICC), clarified which crimes would fall within the jurisdiction of the Court. These are considered core crimes of international law. Article 1 provides that:

> The jurisdiction of the Court shall be limited to the most serious crimes of concern to the international community as a whole. The Court has jurisdiction in accordance with this Statute with respect to the following crimes:
>
> (a) The crime of genocide;
> (b) Crimes against humanity;
> (c) War crimes;
> (d) The crime of aggression.

Mapping the Threshold of International Crimes

One of the main criterions used to determine whether or not a crime rises to the threshold of an international criminal act has to do with the gravity of such act. In effecting the act, the circumstances must give rise to characteristics that render them particularly grave.[103] Indeed, it should not be surprising that the gravity, along with the context in which the acts take place, becomes such a significant determinant, given that these are usually what distinguish them from 'ordinary' crimes and cause the community of nations to take note. In this regard, *The Rome Statute* also made it clear that it is:

[d]etermined…. for the sake of present and future generations, to establish an independent permanent International Criminal Court in relationship with the United Nations system, *with jurisdiction over the most serious*

[102] Terje Einarsen, 'New Frontiers of International Criminal Law: Towards a Concept of Universal Crimes' (2013) 1(1) Bergen Journal of Criminal Law and Criminal Justice 1, 6.
[103] William A Schabas, 'State Policy as an Element of International Crimes' (2008) 98(3) Journal of Criminal Law and Criminology 953, 979.

crimes of concern to the international community as a whole.[104]

In fact, if the actions under consideration do not appear to be sufficiently serious, the ICC is further empowered to determine that a matter is inadmissible (with regards to the Court's jurisdiction) where '[t]he case is not of sufficient gravity to justify further action by the Court.'[105]

However, it is not only establishing the crime's threshold that is important. Having established that the actions meet the gravity required through the appropriate investigation, the prosecution of the offence must be carried out in such a way that reflects the magnitude of the crime. Both the Statutes of International Criminal Tribunal for Rwanda (ICTR) and the International Criminal Tribunal for the Former Yugoslavia (ICTY) have provided that an individual tried under municipal jurisdiction for an international crime that was treated as an ordinary crime may again be tried under the relevant international tribunal.[106] The ICC has similar powers under its Statute as confirmed by both the preamble and Article 1, which speak to the Court's role being complementary to national courts. While complementarity is not fully elaborated in the *Rome Statute*, it is accepted that where state parties fail to investigate and prosecute international crimes in a manner reflecting their severity, the ICC may step in.[107]

The Correlation Between State and Individual Responsibility

The notion of international crimes was rekindled in 1919 following the end of the First World War and the drafting of The Peace of Versailles.[108] The rapid growth of international criminal law was largely accelerated by the atrocities committed by the Nazi regime leading up to and during the Second World War. After details of the Holocaust emerged, the collective conscience of the international

[104] The Rome Statute of the International Criminal Court (1998) preamble, para 9 (author's emphasis added).
[105] ibid art 17(1)(d).
[106] See respectively, Statute of ICTR, art 9(2)(a), and Statute of the ICTY, art 10(2)(a).
[107] Maogoto (n 98) 105.
[108] See The Treaty of the Peace With Germany (Treaty of Versailles) (1919), art 227.

community was shaken by its magnitude and brutality. This coupled with the unabashed aggressive posture of Germany and others towards the community of nations led to The Nuremberg International Military Tribunal (IMT) and The International Military Tribunal for the Far East (IMTFE). It was arguably these two fora more than any other that led to a lucid interpretation and application of the parameters of international criminal wrongs, particularly in relation to individual accountability as separate from state liability.

'Crimes against international law are committed by men, not by abstract entities', declared a section of the Judgement of the IMT, 'and only by punishing individuals who commit such crimes', it continued, 'can the provisions of international law be enforced'. This declaration was made in the context of a claim that the acts of aggression for which the defendants were brought before the Tribunal were essentially acts of the German State and therefore should not to be attributed to the individuals. At a time when the general philosophy underpinning international criminal responsibility was shifting, this argument did not find favour with the Tribunal and was rejected accordingly.

To be clear, there are a number of international instruments, supported by jurisprudential practice that support the doctrine of concurrent responsibility. This principle makes it clear that individual responsibility may exist in addition to, not instead of, state liability. Hence, the fact that an individual is held criminally responsible does not necessarily absolve the state from its responsibility and vice versa.[109] According to Article 25 (4) of the *Rome Statute,* '[n]o provision in this Statute relating to individual criminal responsibility shall affect the responsibility of States under international law.' A similar sentiment was echoed by the International Court of Justice (ICJ) in the matter of *Bosnia and Herzegovina v Serbia and Montenegro,*[110] while the International Law Commission's (ILC) *Articles on the Responsibility of States for*

[109] The International Bar Association's Human Rights Institute, *International Criminal Law Manual* (2010) 36; see also the matter of *Selmouni v France* (App 25803/94) [1999] ECHR 66 [87].

[110] See the *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v Serbia and Montenegro)* [2007] ICJ Rep 43 [173].

Internationally Wrongful Acts (ARSIWA) reflects the other side of the coin, i.e., it ensures that state responsibility does not absolve the individual.[111]

In some instances, the invocation of state responsibility for international criminal wrongs may become appropriate, or even desirable. The state has the primary duty to protect individuals form criminal acts, and where it fails, or worse, is itself responsible through the actions of its agents or organs, holding it responsible becomes justified. There are three obvious ways in which a state may become liable for international crimes: when it fails to take reasonable steps to prevent such crimes; when it fails to take reasonable steps to bring the perpetrators to justice; and, worst of all, when the crimes are committed by state agents, especially in an official capacity.[112]

However, the relationship between state and individual responsibility can become nebulous when the individual is a state official, particularly when the official of the offending state is to be subjected to the jurisdiction of a third state that may wish to prosecute under its municipal law. In the *Arrest Warrant Matter* (*Belgium v The Congo)*, the ICJ observed that:

> Provided that it has jurisdiction under international law, a court of one State may try a former Minister for Foreign Affairs of another State in respect of acts committed prior or subsequent to his or her period of office, as well as in respect of acts committed during that period of office *in a private capacity*.[113]

The judgement in question makes very interesting reading with regards to the criminal immunity of state officials (in this case a Minister of Foreign Affairs), which flows directly from the principle of state sovereignty under classical international law. When read in its entirety for example, it seems to suggest that, under

[111] ILC's *Articles on the Responsibility of States for Internationally Wrongful Acts* (2001), art 58.
[112] André Nollkaemper, 'State Responsibility for International Crimes: A Review of Principles of Reparation' (2009) in *Essays in Honour of Professor Kalliopi Koufa* (2009), available at <https://ssrn.com/abstract=1357320> accessed 17 April 2017.
[113] *Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v Belgium)* [2002] ICJ Rep 3 [61] (author's emphasis added).

customary international law, so long as the individual remains Foreign Minister, the official enjoys absolute immunity and inviolability from foreign jurisdiction even while she or he is in the foreign state, whether the acts were committed in a private or official capacity.[114] At the end of the official's tenure, she or he enjoys immunity for acts committed in an official capacity during the term of office.

Such uncertainty arises because states have an *erga omnes* obligation to either prosecute or extradite individuals for international criminal acts.[115] Furthermore, it is unclear whether the Court meant that (a.) any crime committed by the official during the tenure will be attributed to the state, or (b.) any crime committed by the individual, even in relation to his or her job functions will be treated as a private act. This insistence of classical international law (at least in this instance) on the primacy of state sovereignty over humanitarianism, is one example of how international criminal law has become more up-to-date and evolved than its parent. This has resulted in some ostensible discrepancies in the international legal system.[116]

The Court did proffer some cogent, well-reasoned arguments for its conclusion as to why a Foreign Minister must be given complete immunity from foreign jurisdiction.[117] However, the judgement may still be unsettling to some persons, because it appears to give the impression that individuals could commit the vilest international crimes without ever being held accountable. In an obvious attempt to allay the fears to which this situation could lead, the ICJ gave the reassurance that immunity from a foreign jurisdiction does not amount to impunity, as officials can still be prosecuted under their own domestic laws or under an international criminal tribunal with jurisdiction in the matter.[118] Article 27 of the *Rome Statute* makes it inconsequential whether the person carrying out the international criminal act is a state official or not and whether

[114] *Democratic Republic of the Congo v Belgium* (n 113) [54–55].
[115] Antonio Cassese, 'International Criminal Law' in Malcolm D Evans (ed), *International Law* (2nd edn, Oxford University Press 2006) 733.
[116] Caroline Fournet, 'When the Child Surpasses the Father – Admissible Defences in International Criminal Law' (2008) 8 International Criminal Law Review 509.
[117] *Democratic Republic of the Congo v Belgium* (n 113) [53–55].
[118] ibid para 61.

or not immunities apply to the person. Additionally, Article 29 invalidates the applicability of statute of limitation for these acts.

Notwithstanding this, a trepidation may still persist with regard to the ICJ's pronouncement, as it is not likely that such persons would be prosecuted under their states' domestic law. Equally, the international criminal tribunal that exist at this time have neither universal nor compulsory jurisdiction. Both the ICTY and ICTR have specified and limited scopes of jurisdictions.[119] While the *Rome Statute* permits a broader scope of jurisdiction, it does not confer universal nor compulsory judicial authority on the ICC. In order for the ICC to exercise its jurisdiction, the matter has to be referred to the Prosecutor either by a state party to the Convention or by the United Nations Security Council (UNSC). Otherwise, the Prosecutor may initiate an investigation *proprio motu* (of her own initiative),[120] with the authorisation of the Pre-trial Chamber. However, it should be noted that the Prosecutor cannot of her own volition, open investigation with regard to states not party to the Convention, unless the crimes were committed by nationals of state parties on the territory of a non-state party.[121]

The Case for Individual Responsibility

There are some international crimes which, considering their essence, will always appear to have been carried out by the state. A good example is the act of aggression – because it takes a great amount of resources and organisation (which an individual does not ordinarily possess) to wage a war or to posture as such. However, it is self-evident that a state is abstract – it is the political arm of a nation, made up of a group of individuals with individual or collective agendas. A state, as an incorporeal entity, does not have a mind of its own; it does not think for itself and cannot act towards its own end. Hence, one ought not to speak of a state as if it were a person. The term 'state', like many other abstract bodies – organisation, corporation, business, government, a political party,

[119] See Article 1 of both Statutes.
[120] The Rome Statute of the International Criminal Court (1998), arts 12–13.
[121] ICC Office of the Prosecutor <https://www.icc-cpi.int/about/otp?ln=en> accessed 30 April 2017.

for example – is a collective of individuals or officials. Therefore, when one speaks of a 'state' being responsible for a criminal act, the 'state' in that respect is merely a nomenclature of convenience for the individual officials who carried out the acts pursuant to their own agendas and desires. '[U]nless responsibility is imputed and attached to persons of flesh and blood,' Hersch Lauterpacht underscored, 'it rests with no one.'[122]

Accordingly, protecting perpetrators from prosecution for international criminal acts on the basis that a state is responsible is not only absurd, but also immoral, reprehensible, and a travesty of justice. It essentially undermines the very reason for the international penal regime being brought into force, and makes a mockery of the system. This stance signals to both the victims and the offenders alike, and possibly future offenders, that the worst acts can be carried out with impunity simply by invoking some linguistic gymnastics. The IMT, in recognising this inexcusably illogical position, affirmed that, far from allowing these individuals to go unpunished on such basis, it would be unjust not to hold them responsible.[123]

Fortunately, the wisdom of holding individuals primarily accountable under international criminal law has been recognised and reinforced by every international criminal instrument. From the 1919 Treaty of Versailles that followed the First World War, Articles 227–230 envisaged the prosecution of individuals for war crimes. Similarly, the judgement of the IMT is replete with language reflecting this position. One section asserted that:

> The principle of international law, which under certain circumstances, protects the representatives of a State, cannot be applied to acts which are condemned as criminal by international law. The authors of these acts cannot shelter themselves behind their official position in order to be freed from punishment in appropriate proceedings.[124]

[122] Hersch Lauterpacht, *International Law: Collected Papers* edited by E Lauterpacht (Cambridge University Press 1975) 520.
[123] *The International Military Tribunal (Nuremberg*) [1946] Judgement, 49.
[124] ibid 53.

The 1998 Rome Statute establishing the ICC has a similar provision,[125] which is further reinforced in both the ICTR and the ICTY.[126] Therefore, there can be no mistake as to whether the principle is well established under the international criminal law doctrine.

Superior Command and Superior Order

Individual responsibility is not necessarily confined to the person or persons immediately responsible for the carrying out an international criminal act. Under Articles 6 (1) and 7 (1) of the ICTR and ICTY respectively, 'a person who planned, instigated, ordered, committed or otherwise aided and abetted in the planning, preparation or execution…' of any of the crimes in question is also individually responsible. Correspondingly, Article 25 (1 – 3) of the *Rome Statute* highlights similar ways in which persons may incur responsibility. This principle inevitably encapsulates command responsibility or superior command. This ensures that senior ranking individuals within governments, armed forces and other hierarchically-structured groups are also held responsible for criminal actions they knew of, or had reason to believe their subordinates were carrying out, but failed to take reasonable steps to avert.[127] The instruments deal with the issue of individual criminal conduct quite comprehensively, so that accountability can reach beyond just the principal offender if warranted.[128]

Additionally, within the said hierarchically-structured groups, subordinates may not be able to fully exculpate themselves on the basis of their duty to follow superior orders. The defence of superior order was tested by several of the Nazi military personnel during the IMT but failed. In the *Einsatzgruppen Cas*e, the Tribunal noted that '[t]he obedience of a soldier is not the obedience of an automaton. A soldier is a reasoning agent. He does not respond, and

[125] The Rome Statute of the International Criminal Court (1998), art 25 (1–2).
[126] See respectively, Statute of the ICTR, art 6 (1–2), and Statute of the ICTY, art 7 (1–2).
[127] ibid, Statute of the ICTR, art 6(3), and Statute of the ICTY, art 7(3); see also The Rome Statute of the International Criminal Court (1998), art 28.
[128] Cassese (n 115).

is not expected to respond like a piece of machinery.'[129] The Tribunal later went on to explain that '…. An order to require obedience must relate to military duty.'[130] While Article 33 of the *Rome Statute* makes similar provisions, sub-sections (1) (a – c) seem to allow superior orders as a defence in certain circumstances. However, sub-section (2) explicitly prohibits this defence in instances where the criminal act is genocide or crimes against humanity. Hence, such statutory authorities demonstrate the responsibility of individuals who give commands and also those who receive commands to act responsibly and within the law.

Elements of International crimes

As with criminal conduct under municipal systems, international criminal law requires the two fundamental elements of a crime: *actus reus* (the guilty act) and *mens rea* (guilty mind).[131] Without these, criminal responsibility is usually not imposed on an individual. The former refers to the criminal occurrence itself, which is axiomatic; as a matter of logic, without an actual criminal occurrence, there can be no criminality. The latter is a psychological element which requires that the perpetrator of the criminal act had the mental capacity to understand what was being done. This is the blameworthy state of mind, also referred to as intent.

Obviously, *mens rea* can only be attributed to natural human individuals. The presence of *mens rea* in international criminal wrongs is important and supports the prosecution of natural persons primarily, rather than some intangible entity. The idea is that, if a rational human being intentionally calculates and commits acts on a scale that reaches the threshold of international crimes, there should be no question as to whether such individuals ought to be held responsible and punished accordingly.

Moreover, the imposition of state liability can, at times,

[129] *The Einsatzgruppen Case (United States v Ohlendorf et al)* [1948] International Military Tribunal 2, case 9, para 469.
[130] ibid.
[131] Mohamed E Badar, 'Mens Rea – Mistake of Law and Mistake of Fact in German Criminal Law: A Survey for International Criminal Tribunals' (2005) 5 Criminal Law Review 203, 204.

amount to some form of financial or economic sanction, including the suspension of foreign aid or of trade meted out to the offending state. In such an event, punishment may be pointless as it is unlikely to affect the specific persons with whom true guilt lie. In certain circumstances, these sanctions may even become counter-productive, leading to unintended consequences as the victims of the crimes – who are usually among the most economically vulnerable in society – might also suffer from these consequences. Typically, the people who are truly responsible have the means to navigate themselves safely around economic sanctions.

The Philosophical Basis for Criminal Punishment

The philosophical basis of holding individuals criminally responsible for their actions is controversial and hotly debated under both municipal and international law. However, two of the views most often posited are the argument for retribution and the argument for deterrence,[132] both of which this paper views as supportive of individual responsibility under international criminal law. While these two justifications are mainly discussed as if they are mutually exclusive and, at times, contradictory,[133] this paper is of the view that they might become interconnected.

The retributive theory is attractive to some people because it places the human individual at the apex of rationality and morality on the one hand, but also because it seems just. A human being is endowed with a truly sophisticated, highly evolved brain which provides an advantage to the level of thought process he or she possesses over that of other animals. Humans alone (as far as we know) have the ability to reason in a very complex way and make rational choices between what is right and wrong. Therefore, whenever human beings, with all their mental faculties in place, choose to carry out criminal acts, as far as those that meet the gravity of genocide, war crimes or crimes against humanity, they should be punished in a manner commensurate with the transgressions.

Individual punishment may involve suffering, which is

[132] Farooq Hassan, 'The Theoretical Basis of Punishment in International Criminal Law' (1983) 15(1) Case Western Reserve Journal of International Law 39, 48.
[133] ibid.

what makes it repulsive to some critics. And the more severe the punishment, the more it repulses. In this regard, however, the idea of punishment may become more tolerable if examined from the point of view of fairness or 'just desert.'[134] In the matter of *The United States v Bergman* (1976), Frankel, ME spoke of retributive justice that it is '…. more palatable, and probably more humanely understood, under the rubric of "deserts" or "just deserts".'[135] It is both 'an endorsement of measured retaliation and an attempt to do equity between the offender and the victim.'[136]

The 18th century German Philosopher Immanuel Kant was one of the most fervent proponents of retributive punishment.[137] However, the sage recognised that as a bi-product, punishment could also serve as a useful deterrent to future criminal conduct, which is one of the ways that retribution is tied to deterrence. In his famous *Feyerabend lectures on Natural Right*, Kant observed that 'the sovereign must punish in order to obtain security …., and even while using the law of retribution in such a way the best security is obtained.'[138] If individuals are aware that other people have been punished for their crimes, and it is highly probable that they themselves will be punished similarly, persons will more likely feel deterred from committing criminal acts themselves.

Deterrence, however, should not be the first basis for criminal punishment, if it is any basis at all, as it would appear that punishment does not always serve to deter. After all, persons are punished in varying degrees for their part in criminal conduct every day, all over the world, and yet individuals still choose to commit crimes. Hence, the argument for deterrence appears to be set on unstable grounds. Nevertheless, a society cannot simply refrain from punishing criminals just because deterrence may not result. Criminal punishment must be commensurate to the crime and must serve as a form of retribution, simply because it is just and fair to do so. After

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[134] Christopher Bennett, *The Apology Ritual: A Philosophical Theory of Punishment* (Cambridge University Press 2009) 28.
[135] *United States v Bergman*, 416 F Supp 496 (SDNY 1976) Sentencing Memorandum 496.
[136] Jerry E Norton, 'The Punishment Debate' (1967) 44(2) Chicago-Kent Law Review 83, 84.
[137] Hassan (n 132) 49.
[138] Quoted from 'Kant's Social and Political Philosophy' in Stanford Encyclopedia of Philosophy <https://plato.stanford.edu/entries/kant-social-political/#Pun> accessed 28 April 2017.

justice is served in the form of retributive punishment, it may also deter others from future criminal conduct. In this regard, the establishment of the IMT supported both doctrines of punishing the perpetrators of the Holocaust because of what they did, but also with a view that it might deter individuals from repeating such behaviour in the future.[139] If international crimes were simply attributable to a state without individual responsibility, there would be little to compel persons to exercise restraint in their conduct and deter future atrocities.

As touched upon in the previous discussion of sanctions, the kinds of punishments exacted against states can be immaterial to the individual. The ARSIWA provides that reparation by a state for an internationally wrongful act shall take the form of restitution, compensation and satisfaction,[140] while the measures that the ICC may impose 'includ[e] restitution, compensation and rehabilitation.'[141] In reality, depending on the crime in question, the attempt to repair the wrong by any of those means may be unrealisable, at least to the immediate victims, if the crime includes mass murders or genocide. In such a situation, if the primary responsibility rests with the state, there is not as strong an incentive for individuals to refrain from carrying out atrocities as much as there would be if the individual was to be punished personally. So, dozens, hundreds or maybe even thousands of human lives would have been lost without anyone being held properly accountable. It should be unconscionable for the international community to allow such grave miscarriages of justice.

The Imperative of Placing Individuals at the Centre of the International Criminal Law

In some ways, the *Rome Statute* is a step in the right direction for international criminal law. It is the first, and so far, the only permanent international criminal court, a feat which was noticeably lacking in the international community for many decades.

[139] Hassan (n 132) 50.
[140] ILC's *Articles on the Responsibility of States for Internationally Wrongful Acts* (2001), art 34.
[141] The Rome Statute of the International Criminal Court (1998), art 75(1).

Nonetheless, in what could probably be considered a shift from the general human-centred approach to international criminal law, as a compromise, the Statute expediently attempted to strike a balance between humanitarianism and state sovereignty.[142] For in the end, as Maogoto aptly reiterated, 'International law after all depends for its legitimacy on the willingness of the world's Nation-States to obey and enforce.'[143] Therefore, probably without this compromise, the ICC would never have become reality.

This concession however, led to states regaining some ground under the Statute, and concurrently to individuals *per se* yielding some. Because of this, even where grave breaches of international law take place, it is possible that no one will be answerable. For instance, if international crimes are committed against a group of people who are not recognized as a state, or not represented by any state, the guilty could continue to carry out the acts with impunity. The Statute did attempt to obviate such possibility by allowing the UNSC to authorise investigations and prosecutions. However, experience has shown that the permanent members of that body, with whom the real power lies, do not necessarily act in a principled manner – rather, their actions are dictated by what is politically expedient to each of their respective states at the time.[144]

Lessons from the Palestinian Experience

The atrocities committed in the Palestinian Territory and the attendant rigmarole which followed the attempt to have them investigated and prosecuted serves as a stark reminder that even in modern times, if the international community is not vigilant, the world is susceptible to the gravest of crimes being committed without abate. Although the issues at play in the Palestinian situation are far too complex and varied to be treated in any comprehensive way here, it is worth embarking upon a brief, general discussion to

[142] Maogoto (n 98) 104–105.
[143] Jackson Maogoto, 'International Justice Under the Shadow of Realpolitic: Revisiting the Establishment of the Ad Hoc International Criminal Tribunals' (2001) 5 Flinders Journal of Law Reform 161, 162.
[144] ibid.

reinforce the significance of placing individuals at the centre of the international criminal regime.

By way of a letter dated 21st January 2009, the Palestinian government declared its acceptance of the ICC's jurisdiction over its territory, for the purposes of identifying and prosecuting individuals who may have committed international crimes there since 2002.[145] However, their attempt to have the investigations initiated was rejected by the Court on the basis that Palestine had not met the criteria for statehood.[146] According to one view, there is no provision in the Statute to accept a declaration of the Court's jurisdiction from a non-state entity,[147] although this position has been rejected in some quarters.[148] Eventually, Palestine was allowed membership in the ICC in 2015, but not before the flaws in the system, which had arisen from the Court's initial response had been laid bare.

The situation in this specific case has always been of interest to the international community because of the history of violent confrontations between the Palestinians and Israelis, where both sides, for good reasons, have been accused of committing serious breaches of international crimes against the population of the other. Data has shown that between 2012 and 2016, over three thousand people, more than half of them civilians, were killed as a result of direct armed conflicts between the two sides.[149] This figure does not include persons who died in other circumstances indirectly related

[145] See Palestine's Declaration recognizing the Jurisdiction of the International Criminal Court, available at <https://www.icc-cpi.int/NR/rdonlyres/74EEE201-0FED-4481-95D4-C8071087102C/279777/20090122PalestinianDeclaration2.pdf> accessed 30 April 2017.

[146] See the International Criminal Court's Office of the Prosecutor note 'Situation in Palestine', available at <https://www.icc-cpi.int/nr/rdonlyres/C6162bbf-feb9-4faf-afa9-836106D2694A/284387/SituationinPalestine030412eng.pdf> accessed 30 April 2017.

[147] Malcolm Shaw, 'In the Matter of the Jurisdiction of the International Criminal Court with Regard to the Declaration of the Palestinian Authority' (2010) Supplementary Opinion, para 7.

[148] See for example Errol Mendes, 'Statehood and Palestine for the Purpose of Article 12(3) of the ICC Statute: A Contrary Perspective', available at <https://www.icc-cpi.int/NR/rdonlyres/D3C77FA6-9DEE-45B1-ACC0-B41706BB41E5/281876/OTPErrolMendesNewSTATEHOODANDPALESTINEFORTHEPURPOS.pdf> accessed 30 April 2017.

[149] *The United Nations Office for the Coordination of Humanitarian Affairs* <https://www.ochaopt.org/content/monthly-figures> accessed 30 April 2017.

to the conflict. Neither does it include persons who were injured; some of them seriously.

The experience with regard to Palestine is frightening. However, it could also be an opportunity, as it is probably one of the most compelling examples to demonstrate why international criminal law must always place individuals at the forefront of its regime for both the purposes of prosecution and protection. Under the doctrine, states should become secondary to people, unlike in classical international law. In this way, individuals would bear the brunt of prosecutions. Additionally, it would matter not whether the people affected are represented by a state or whether their state is a member of the ICC's convention. Once war crimes, crimes against humanity or genocide appear to have been committed anywhere, it should be investigated by the ICC with a view of prosecuting the guilty individuals primarily – when guilt is established.

Conclusion

Although international criminal law is a derivative of classical international law, from the outset of the international criminal doctrine, the philosophy was skewed towards placing individuals at its centre by recognising persons appropriately as subjects, not just objects of international law. Following from this philosophy, individuals were recognised as having both rights and responsibilities under the doctrine. In a number of instances since the early 20th century, those individual responsibilities have been called upon with regards to grave breaches of international criminal law. The issue of prosecuting individuals primarily, for international criminal wrongs has been recognised for decades and is still an important feature of the international community.

This paper has attempted to explore the wisdom of placing natural, tangible human beings at the centre of international criminal law for the purpose of prosecution. It has maintained that while states may also be culpable in some circumstances, the state consists of no more than a group of individuals who have their own personal aims. Hence, actions amounting to international criminal wrongs under the guise of state activities are nothing more (or less) than individuals furthering their personal aims. As such, any punishment

should first address those individual persons. The idea of individual punishment can be defended on the basis that it serves both as retribution to the guilty and as a method of deterrence. While it may be overly ambitious to expect that international criminal law will prevent atrocities from happening across the world, it can ensure that whenever and wherever these acts take place, there is no impunity.

On a broader level, the international criminal law regime should endeavour to make individuals central to its focus so that the state, statehood or statelessness become less important for it to exercise its jurisdiction to prosecute. In such an event, it would be irrelevant whether victims, perpetrators, or the territory concerned fall within a particular state or no state whatsoever. It would be a radical step which is unlikely to occur immediately, given the current global political climate. However, the conversation needs to be continued and intensified, as this is necessary to ensure that some of the most heinous international criminal wrongs witnessed in the past can no longer be committed with impunity by anyone, anywhere.

Mass Violence and Christie's Ideal Victim: A Critical Analysis

Georgios Karamanos[150]

This article is a theoretical examination of the applicability of Nils Christie's criminological notion of the 'ideal victim' in cases of mass violence and scenarios of mass victimisation. The article documents Christie's theoretical constellation and valid criticisms towards victim status and reviews modern academic discourses influenced by Christie's original theorisation which further illustrate the intricacies and complexities that arise regarding victim identity. After analysing the ways under which structural forces, such as the mass-media and politics, influence the process of victimhood, the article continues by focusing on the intertwined relationship between victim identity and institutionalised mechanisms of victimisation. Furthermore, the article documents the ways under which Christie's notion of the 'ideal victim' has been adapted in order to be incorporated in the criminological research of mass-violence. At last, by transitioning from instances of micro-level victimisation to theatres of mass-violence the article theoretically tests the applicability of 'ideal victim' theory in cases of extensive victimisation. The article concludes that the integration of concepts such as Christie's 'ideal victim' is quintessential for a criminology of mass-violence which aspires to be both theoretically informed and practically engaged with the issue of victimisation.

I. Introduction

The aim of the paper is to critically analyse the incorporation and applicability of the notion of the 'ideal victim' within the realm of mass violence. In order to do so, the paper will identify the characteristics of Christie's theory, describe its conceptualisation and examine its perspective towards the discipline of victimology. Furthermore, the concept of the 'ideal victim' as well as its construction and implications will be explored on a societal, political and cultural level. Subsequently, the investigation of some of the major concerns that critical criminologists expressed is deemed necessary, inasmuch as they enrich and further develop some of the concepts that Christie originally raised. Finally, the

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paper will proceed to suggest that Christie's notion of the 'ideal victim' perfectly describes the politically correct but deeply fragmented reality of modern societies and thus is not only applicable, but also essential, for the theoretical enhancement of a victimology that wants to comprehend mass violence and its multiple theatres of collective victimisation.

II. Identifying the 'ideal victim'

The notion of the 'ideal victim' was developed by the late professor of criminology, Nils Christie, almost four decades ago. However, his multilayered and complex discourse about the nature of victimhood remains relevant to this day. In his influential theorisation, Christie approaches victimhood from a critical perspective which aims to establish the social, structural and systemic attributes that construct the identity of the victim.[151] Consequently, he defines the 'ideal victim' as "a person or a category of individuals who upon their personal encounter with crime-- are most readily given the complete and legitimate status of being a victim"[152] and explains that this status shares similar abstract qualities with other socially constructed archetypes such as that of a 'hero' or a 'traitor'.[153]

Furthermore, Christie proceeds to identify a set of personal characteristics and external circumstances that must occur in order for an individual to receive the legitimate status of the 'ideal victim' as well as the recognition of the public consciousness.[154] Primarily, the ideal victim must be conceived as weak; her inability to defend herself due to sickness, gender or age, solidifies her vulnerability and therefore the extent of her victimhood. Secondly, the ideal victim must be carrying out a respectable project. In other words, noble intentions give context and meaning to her victimisation. In

[151] Anette Houge, Kjersti Lohne and May-Len Skilbrei, 'Gender and crime revisited: criminological gender research on international and transnational crime and crime control' (2015) 16(2) Journal of Scandinavian Studies in Criminology and Crime Prevention 160.
[152] Nils Christie, 'The Ideal Victim' in Ezzat Fattah (ed), *From Crime Policy to Victim Policy: Reorienting the Justice System* (Palgrave Macmillan 1986) 18.
[153] ibid.
[154] ibid.

addition, the ideal victim is defined by her blamelessness. External factors such as time and location of the incident of victimisation seem to have an essential role in this observation. Likewise, the internal and external characteristics of the offender contribute to the identity of the ideal victim. According to this concept, a perpetrator with perverse intentions and an intimidating physique hints to a much more violent and harmful victimisation. Finally, the victim must not have had any previous personal relationships with the offender since any immediate or intentional exposure, such as interacting with him, can compromise her 'ideal' status.[155]

Certainly, Christie's original aim was not to create a strict set of draconian principles relating to the identity of the ideal victim, but rather to interpret socially constructed narratives about victimhood, thus explaining that victimisation is a complicated and subjective phenomenon whose reproduction involves the participation of multiple stakeholders.[156] This becomes apparent when Christie,[157] inspired by feminist criminology, notices that the most essential condition that an individual or a population must meet in order to be considered an 'ideal victim' is that of the need for them to be powerful enough to claim that status. Christie's approach towards victimology does not only include the notion of time and space as crucial for the crystallisation of the victim status, but also promotes the idea that political empowerment is equally important.[158] In other words, the ideal victim "must be strong enough to be listened to, or dare to talk. But she (he) must at the very same time be weak enough not to become a threat to other important interests".[159]

In order to make his point evident, Christie presents two seemingly unconnected examples which, in reality, have a lot in common. The first is that of old ladies in medieval Europe treated

[155] Christie (n 152) 18.
[156] Jari Kuosmanen and Mikaela Starke, 'The ideal victims? Women with intellectual disability as victims of prostitution-related crime' (2015) 17(1) Scandinavian Journal of Disability Research 62.
[157] Christie (n 152).
[158] Claes Lernestedt, 'Victim and Society: Sharing Wrongs, but in Which Roles?' (2014) 8(1) Criminal Law and Philosophy 187.
[159] Christie (n 152) 21.

as witches since they personified "unwanted conditions"[160] such as strength and influence. The second is that of workers living in late modern societies who are unknowingly victimised by external factors such as class conflict. Both of these cases represent victims who cannot be considered 'ideal' since their political power is considerable but not sufficient enough and their interests are opposed to the political agenda of their time.[161] Consequently, they are victims who will never have the potential to receive a legitimate status or cultural recognition, since the violence that they experience is structural, systemic and synchronised with the geopolitical needs of their time.[162]

Through this analysis, Christie concludes that "ideal victims do not necessarily have much to do with the prevalence of real victims".[163] However, they illustrate that the normative language of societal discourse prefers victims that are powerless and subordinated; that is, victims who lack the depth and the complexity of an actual human being and embody the unrealistic archetype of complete innocence.[164] Similarly, the ideal victims through their suffering must reproduce the stereotype of the ideal offender who lacks humane characteristics and personifies complete and total evil.[165] In other words, an offender that represents the darker side of society can be easily judged about his actions and is able to create moral panic.[166] According to Christie, more often than not, the ideal victim and the ideal offender are intertwined through an oversimplified bipolar narrative of interdependence.[167]

Furthermore, Christie suggests that in a divided society like the modern one, victimisation and equality can be conceived only as inversely proportional. In exactly that type of society a claim for equality would compromise the status of the ideal victim and,

[160] Christie (n 152) 23.
[161] ibid.
[162] Joris Van Wijk, 'Who is the 'little old lady' of international crimes? Nils Christie's concept of the ideal victim reinterpreted' (2013) 19(2) International Review of Victimology 159.
[163] Christie (n 152) 27.
[164] Lernestedt (n 158).
[165] Kuosmanen and Starke (n 156).
[166] Stanley Cohen, *Folk Devils and Moral Panics: The creation of the Mods and Rockers* (3rd edn, Routledge 2002).
[167] Esther Madriz, 'Images of criminals and victims: A study on women's fear and social control' (1997) 11(3) Gender & Society 342.

accordingly, victimhood and the experience of victimisation would be diminished in the public consciousness if the ideal victim was no longer regarded as passive, innocent and dependent.[168] In contrast to this victimological paradigm of ideal victims and predatory strangers, Christie proposes a healthier social system which promotes unity, participation and integration; namely a social system in which morally absolute and politically abstract ideas about the identity of victims and criminals would no longer be applicable or efficient.[169]

III. The social, political and cultural construction of the 'ideal victim'

Christie, like most radical criminologists of his time,[170] is primarily concerned with the social construction of victims and offenders.[171] Thus, his theory and canonical model of attributes is an intense criticism towards the interplay between macro-level mechanisms such as society, the state as well as the legal system, and the reproduction of the normative narrative about the identity of victims. Essentially, Christie notes that the identity of the 'real victim' is not related with the model of the 'ideal victim', since victimisation extends to individuals and populations who experience political oppression and marginalisation. At the same time, he questions the moral presumptions of a positivistic victimology as well as the legitimacy of those who have the power to apply the label of victimhood. Importantly, Christie also focuses extensively on the significance of historical conditions and cultural contexts in order to understand victimisation.[172]

Similar preoccupations characterise the academic work of contemporary victimologists who aim to discover how social, political and cultural structures utilise 'ideal victims' for the achievement of predetermined goals and, conversely, how certain

[168] Richard Quinney, 'WHO IS THE VICTIM?' (1972) 10(3) Criminology 314.
[169] Christie (n 152).
[170] Quinney (n 168).
[171] James Dignan, *Understanding Victims and Restorative Justice* (Open University Press 2004).
[172] Christie (n 152).

systemic conditions manufacture the 'ideal victim. For example, it has been proven through multiple researches that the media will not place unwarranted emphasis on young boys and adolescents who experience victimisation, especially if they are of black or latino origin, while social services will be mostly occupied with cases of white females who perfectly personify the attributes of the 'ideal victim'.[173] Likewise, the media are expected to report significantly more cases of severe victimisation, such as homicides, which will feature primarily white individuals. Women, yet again, will be disproportionally represented and non-white minorities will be practically excluded.[174] Consequently, Gruenewald *et al* [175] conclude that representations of homicide in the media are manufactured in order to reinforce cultural expectations and norms.

Furthermore, these cultural expectations and norms seem to have an effect on law and policy making. It is common for minority groups to be not able to achieve victim status since they cannot fit the predetermined perception of the 'ideal victim' shared by the public.[176] In addition, it has been suggested that, in order for minorities such as immigrants to receive victim status, they must meet certain cultural criteria (skin color, gender and age) and be empowered by institutional structures such as the church.[177]

Feminist theory, which also influenced the work of Christie, is similarly concerned with the interconnectedness between inequality and the status of the 'ideal victim'. Especially on issues like human trafficking and prostitution, feminist victimologists have suggested that public awareness campaigns have the tendency to reproduce fragmented images of martyrs and predators; this, in itself, is ambivalent since it isolates individuals and conceals the fact

[173] Lisa O'Connor, Benjamin Weinstein and Amanda Stylianou, 'Supporting Young Men of Color as Survivors of Crime and Violence' (2017) 62(1) Social Work 83.
[174] Elizabeth Yardley, David Wilson and Morag Kennedy, '"TO ME ITS [SIC] REAL LIFE": Secondary Victims of Homicide in Newer Media' (2017) 12(3) Victims & Offenders: An International Journal of Evidence-based Research, Policy, and Practice 467.
[175] Jeff Gruenewald, Steven Chermak and Jesenia Pizarro, 'Covering Victims in the News: What Makes Minority Homicides Newsworthy?' (2013) 30(5) Justice Quarterly 755.
[176] Gail Mason, 'The symbolic purpose of hate crime law: Ideal victims and emotion' (2013) 18(1) Theoretical Criminology 75.
[177] Karina Horsti and Saara Pellander, 'Conditions of Cultural Citizenship: Intersections of Gender, Race and Age in Public Debates on Family Migration' (2015) 19(6) Citizenship Studies 751.

that human trafficking is an industry which has actual customers, a demand for labour and is structured upon an economic system which is based on exploitation.[178]

On the other hand, masculinity is culturally connected with violence. This creates the common and deeply rooted misconception that male victims do not need the attention of social workers or institutionalised support.[179] Through the same cultural assumption, young and deprived men who live in urban areas are perceived as 'ideal offenders',[180] thus being transformed into easy targets for the legitimate violence of the state.[181]

Another major concern which is shared by victimologists who have engaged with Christie's theory is the representation of victims by the media. For example, victims or survivors of terrorist attacks are often presented as heroes and garner unbridled media attention. The issue here is that, more often than not, a patriotic discourse about a collective "us" and a polar opposite of "others" is reproduced, where nationality can be translated either into ideal victimhood or an ideal offence.[182] According to Chermak,[183] the recognition of a victim by the media is based on the impact and the shock value that her victimisation may cause. The more the victim personifies Christie's 'ideal' status, the more she will solidify her newsworthiness and capture the attention of the public.[184]

Furthermore, many critical and radical victimologists,[185] have highlighted that victim status should be fundamentally

[178] Erin O'Brien, 'Human Trafficking Heroes and Villains: Representing the Problem in Anti-Trafficking Awareness Campaigns' (2016) 25(2) Social & Legal Studies 205.
[179] Christian Kullberg and Mikael Skillmark, 'Reluctant Help-Seekers and Agentic Victims – Swedish Social Workers' Talk about Young Men Victimised by Violence' (2017) 29(4) Practice: Social Work in Action 1.
[180] Michael Lynch and Paul Stretesky, *Exploring Green Criminology: Toward a Green Criminological Revolution* (Ashgate Publishing 2014).
[181] Ragnhild Sollund, 'Doing Green, Critical Criminology with an Auto-Ethnographic, Feminist Approach' (2017) 25(2) Critical Criminology 245.
[182] Will Mcgowan, 'Critical terrorism studies, victimisation, and policy relevance: compromising politics or challenging hegemony?' (2016) 9(1) Critical Studies on Terrorism 12.
[183] Gruenewald, Chermak and Pizarro (n 175).
[184] Sandra Walklate, *Imagining The Victim Of Crime* (Open University Press 2007).
[185] Taylor Ian, Paul Walton, and Jock Young, *The new criminology: For a social theory of deviance* (Routledge & Kegan Paul 1973); Gregg Barak, 'Crime, criminology, and human rights: Toward an understanding of state criminality' in Kenneth Tunnell (ed), *Political Crime in Contemporary America* (Garland 1993); David Kauzlarich, Rick Matthews and

understood and examined in political terms. For instance, one aspect of the ideal victim is that she is commonly used as a tool for claims in political debates.[186] Secondly, the label of the 'ideal victim' is often used as an excuse by agents of the state in order to exercise social control over minority groups which are culturally associated with hate crimes or extremism.[187] Thirdly, certain pressure groups, victim activists and NGO's have used the same label for the financialisation of victimhood, the attraction of funding and the endorsement of donors.[188]

In conclusion, critical voices indicate that institutionalised forms of violence and prejudice,[189] such as sexism, racism and class conflict can be embodied in predetermined narratives about the nature of victimisation as well as the identity of victims. In order to differentiate their position, radical criminologists express an admittedly broad but essential definition which describes victims as "individuals or groups of individuals who have experienced economic, cultural, or physical harm, pain, exclusion, or exploitation because of tacit or explicit state actions or policies which violate law or generally defined human rights".[190] Despite the fact that this definition mainly focuses on victims of state crimes, it is also valid and greatly useful for the purpose of applying the 'ideal victim' theory in the context of mass violence.

IV. Mass Violence and Christie's Ideal Victim

Although it has been noted that, traditionally, criminology has failed to engage adequately with issues of mass violence, certain historical and political events during the past decades have allowed criminologists to transcend the strict boundaries of their discipline

William Miller, 'Toward a Victimology of State Crime' (2001) 10(3) Critical Criminology 173.

[186] Lernestedt (n 158).

[187] Sandra Walklate, 'Reframing criminal victimization: Finding a place for vulnerability and resilience' (2011) 15(2) Theoretical Criminology 179.

[188] Cheryl Lawther, 'The Construction and Politicisation of Victimhood' in Orla Lynch and Javier Argomaniz (eds), *Victims of Terrorism: A Comparative and Interdisciplinary Study* (Routledge 2015).

[189] David Gadd, 'In the Aftermath of Violence: What Constitutes a Responsive Response?' (2015) 55(6) British Journal of Criminology 1031.

[190] Kauzlarich, Matthews and Miller (n 185) 176.

and therefore reorient their focus in international crimes.[191] Amongst this new wave of criminologists, Van Wijk was the first criminologist who attempted to interpret the notion of the 'ideal victim' from a mass violence perspective through his quintessential article about the "little old lady of international crimes".[192]

According to his theoretical model, international crimes can be described as macro level, structurally determined and systematically orchestrated types of crime, which include genocide, crimes against humanity and war crimes, as well as extensive human rights violations. Accordingly, he adopts the position that the "western world" is the stakeholder with the power to offer victim status, while at the same time considers that due to the nature of mass violence, victimisation is collective and expands to groups, populations and nations instead of individuals.[193]

His analysis of the 'ideal victim' illustrated that attributes such as weakness, project orientation and blamelessness are applicable in contexts of mass violence. However, due to the complexity of victimhood on an international scale, they cannot be considered as absolute and detrimental. For example, while weakness creates feelings of empathy and compassion for victims of international crimes, cultural, historical and geopolitical conditions also affect the perception of the international community. Similarly, due to the unique conditions experienced by victims of international crimes, both the nature of the projects they are undertaking and their blamelessness are subjective and thus open to the interpretation of those who have the power to offer victim status.[194]

Likewise, complications occur when Van Wijk[195] tries to identify the characteristics of the offender, since notions such as "big" and "bad" are not objectively applicable in theatres of mass violence. According to the criminologist, these characterisations can neither articulate the suffering of victims of international crimes nor

[191] Jon Shute, 'Moral discourse and action in relation to the corpse: integrative concepts for a criminology of mass violence' in Jean-Marc Freyfus and Elisabeth Anstett (eds), *Human remains and mass violence: Methodological approaches* (Manchester University Press 2014).
[192] Van Wijk (n 162).
[193] ibid.
[194] ibid.
[195] ibid.

can they serve as a measure of comparison for other occurrences of collective victimisation. At the same time, the notion of the unknown offender seems to be increasingly subjective since, internationally, his notoriety seems to be pivotal for the acknowledgement of the victim.

In addition, Wijk notices that on an international scale, the empowerment of victims of mass violence is primarily based on their recognition from the media, rather than the socially constructed archetypes of victimisation that Christie suggested. In other words, the power of victims in cases of mass violence is certainly reliant on the point of view adopted by the international community. As a result, Wijk suggests that, if victimisation is defined by its newsworthiness, new attributes should be incorporated into the notion of the 'ideal victim' in order to holistically examine mass victimisation.[196]

The most prominent characteristic for the acknowledgment of mass victimisation is the lack of complexity. If a conflict between offenders and victims is multilayered, the socially constructed archetype of bipolar opposites cannot be articulated. Therefore, a theatre of mass violence that depicts an unambiguous and simple image of victimisation is definitely more suited to be recognised by the media. Furthermore, it is suggested that the uniqueness of victimisation can also play a significant role. The extent of the atrocities suffered by the victims must be presented in an impactful and sensationalised way in order to provoke an emotional response from the international community. Similar to Christie, Wijk also mentions that timing is essential for the legitimacy of the claim of the victim status.[197] In practical terms, a well-timed conflict with an expiration date and the possibilities for resolution is ideal.

A fitting example of a theatre of mass violence where the 'ideal victim' theory can be applied successfully is the invasion of Czechoslovakia by the Soviet Union in 1968. In this case Czechoslovakia can certainly be conceived as 'weak' since it is commonly affiliated with other underdeveloped countries of the

[196] Van Wijk (n 162).
[197] ibid.

Eastern Bloc and is traditionally dependent on Soviet Union.[198] In addition, the Prague Spring was a period when a 'respectable project' of political reform and liberalisation was conducted.[199] Also, this 'project' had the ability to bring Czechoslovakia closer to the traditions of the rest of Europe and adapt the country to the expectations of the western world.[200] Similarly, the citizens of Czechoslovakia cannot be blamed since, during this heated period of political change, they remained calm and did not engage in provocative behaviour.[201]

Furthermore, the invasion of Czechoslovakia was a fairly objective case of victimisation without obvious complexities. On the one hand, there is a communist country which tries to transit to a more humane form of socialism and, on the other hand, an enemy with totalitarian tendencies.[202] Along with the above it is important to note that the specific theatre of mass violence as well as the victimization of Czechoslovakian citizens was current with the contemporary political climate. During the Cold War, the Soviet Union was admittedly perceived as the 'big' and 'bad' country that personified everything that western societies could not approve of.[203] The atrocities became even more evident when tanks invaded Prague and vulnerable populations such as that of students died in the process.[204] All these events led to the complete acknowledgment of the victims of Czechoslovakia by powerful stakeholders.

On the contrary, the victimisation of Kurdish populations seems to be irresolute. While, in certain instances, victim status has been given to Kurds,[205] the international community tends to face their chronic victimisation with apathy. One of the main issues of

[198] Valerie Bunce, *Subversive Institutions: the Design and the Destruction of Socialism and the State* (Cambridge University Press 1999).
[199] Kieran Williams, *The Prague Spring and its aftermath: Czechoslovak politics, 1968–1970* (Cambridge University Press 1997).
[200] ibid.
[201] Gene Sharp, *Waging Nonviolent Struggle: Twentieth Century Practice and Twenty-First Century Potential* (Porter Sargent 2005).
[202] Hannah Arendt, *The Origins of Totalitarianism* (Houghton Mifflin Harcourt 1973).
[203] Holger Nehring, ''Westernization': A new paradigm for interpreting West European history in a Cold War context' (2004) 4(2) Cold War History 175.
[204] Williams (n 199).
[205] Gov.krd, 'WHAT HAPPENED IN THE KURDISH GENOCIDE' (Gov.krd, 2011) <http://uk.gov.krd/genocide/pages/page.aspx?lngnr=12&pnr=37> accessed 10 May 2017.

this theatre of mass violence, is that the victimisation of the Kurds occurs in different places and is perpetrated by different parties.[206] Therefore, despite their constant victimisation by Turkey, Kurdish populations have been also victimised in other occasions like the Al-Anfal Campaign, the Sinjar massacre and the Syrian civil war.[207]

Conclusively, Kurdish populations generally fail to receive acknowledgement of their victim status because of exogenous factors such the complexity of the conflicts they are involved in. In other words, they are victims that are located between multiple and simultaneous conflicts.[208] In addition, the enemy that causes their victimisation is not so easily definable and the temporality of their victimhood does not necessarily correspond with the priorities of the international community.[209] All those facts lead to a situation where the victimisation of the Kurds does not seem to have a clear path towards resolution and, therefore, they are constantly considered as secondary victims of other more prominent theatres of mass violence, such as the Syrian theatre. Sadly, according to the 'ideal victim' theory, Kurdish victimisation will not achieve recognition under these circumstances because of its lack of a "selling point".[210]

A third and more interesting instance of mass violence in which the concept of the 'ideal victim' can be applied is the conflict between Israel and Palestine. In this case, what becomes evident is that the country with the most influence over international media is the one which ultimately receives the greatest amount of recognition and therefore the legitimate status of the victim.[211] More often than not, the Israeli government manages to persuade the international press as to the extent of its victimhood, while Palestinian authorities do not seem ready to present a sensualised image of extensive violence which can provoke feeling of empathy and raise awareness.[212] Therefore, while both national groups are traumatised

[206] Martin Van Bruinessen, 'Genocide of the Kurds The Widening Circle of Genocide' in Israel Charny (ed), *Genocide: a Critical Bibliographic Review Volume 3* (Institute in the Holocaust and Genocide 1994).
[207] Jamal Jalal Abdulla, *The Kurds: A Nation on the Way to Statehood* (Author House 2012).
[208] ibid.
[209] Noam Chomsky, *The New Military Humanism: Lessons from Kosovo* (Pluto Press 1999).
[210] Van Wijk (n 162).
[211] ibid.
[212] ibid.

by the aftermath of everlasting conflict, it is uncommon for Palestinian casualties to get the proper attention and recognition.[213] In other words, in a world where victimisation is socially constructed and information is currency, Israel has won the war of public relations.[214]

V. Conclusion

This paper, in order to analyse the applicability of the notion of the 'ideal victim' in contexts of mass violence, has primarily focused on Christie's original theoretical constellation and its narration of the dialogue between power structures and the construction of victim status. Furthermore, in order to bring the 'ideal victim' theory closer to theatres of mass victimisation, this paper investigated other critical voices of victimology who engaged with similar questions; namely questions regarding the interplay between victim identity and institutionalised mechanisms of victimisation such as sexism, racism and the mass media. In its last part, the paper concludes that Joris van Wijk's interpretation of the 'ideal victim' theory is one of the foremost proponents of the victimology of mass violence. His unique conceptualisation did not only amplify the fundamental concerns that Christie expressed about the social construction of victims' identity, but also incorporated some of the major issues that other critical criminologists noticed, such as the interdependence between the media, political influence and historical conditions. Finally, this paper has suggested that the main principles that Wijk elaborated on should not be considered supplementary; in fact, they are to be viewed as rudimentary for a deeper understanding of victimisation in theatres of mass violence.

[213] Gerald Cromer, 'The rhetoric of victimization: An analysis of the coverage of Intifada El-Aqsa in the Israeli press' (2005) 12(3) International Review of Victimology 235.
[214] Christine Schwobel-Patel, 'Nils Christie's 'Ideal Victim' applied: From Lions to Swarms' (Critical Legal Thinking, 5 August 2015) <http://criticallegalthinking.com/2015/08/05/nils-christies-ideal-victim-applied-from-lions-to-swarms/> accessed 10 May 2017.

Critical analysis of the proposition that it is impossible to distinguish art from pornography

Suchitra Suresh Kumar[215]

This essay explores, and disagrees, with the proposition that it is impossible to distinguish art from pornography, in considering some of the most complex theories put forth by academics in this area. The essay discusses flaws with the opposing viewpoints, and offers compelling reasoning backed by ideologies as drawn by experts in this field in concluding that, although the lines may be blurry, it is not impossible to differentiate between art and pornography.

With reference to differentiating between pornographic and artistic material, United States Supreme Court Justice Potter Stewart was famously quoted saying, "I know it when I see it."[216] Yet, the "paradox of pornography,"[217] which relates to the blurred parameters of the two concepts, has still not been completely resolved, and continues to gain prominence, with the proliferation of such works in our daily lives. For example, New York Magazine's art critic, Jerry Saltz's Facebook account was recently suspended, as what he had claimed to be posts that promoted artistic value were deemed to be pornographic. This was seen as being disruptive towards the networking site's policy for maintaining a culturally comfortable environment for all of its users.[218] Artistic work is generally held to be morally uplifting, whereas pornography is seen as degrading and destructive.[219] The society's assumption of

[215] LL.B. Candidate, The University of Manchester, School of Law.
[216] Michael Newberry, 'Drawing a Line between Pornography and Art' (The Atlas Society, 10 March 2017) <https://atlassociety.org/commentary/commentary-blog/6143-drawing-a-line-between-pornography-and-art> accessed 28 March 2017.
[217] Jesse Prinz & Van Brabandt, 'Why do Porn Films Suck' in Hans Maes and Jerrold Levinson (eds), *Art and Pornography: Philosophical Essays* (Oxford University Press 2012).
[218] E Greenhouse, 'Facebook Can't Tell the Difference Between Porn and Art' (Bloomberg Politics, 12 March 2015) <https://www.bloomberg.com/politics/articles/2015-03-12/facebook-can-t-tell-the-difference-between-art-and-porn> accessed 28 March 2017.
[219] Lily Bonesso, 'Art and Pornography' (Tate.org, 2 April 2015) <http://www.tate.org.uk/context-comment/articles/art-and-pornography> accessed 28 March 2017.

a paternalistic role in protecting its people from alleged vices,[220] such as pornography, demands that a clear distinction between art and pornography be drawn. This essay endeavours to demonstrate that this is possible, by first **(i)** defining pornography and identifying the moral function of art, **(ii)** refuting the notion that 'pornographic art' is comparable to 'political art,' and finally **(iii)** examining theorists Hans Maes' and Christy Mag Uidhir's works in this area.

(i)

In order to inspect the possibility of differentiating the two concepts, it is imperative to first consider the fundamental definitions attached to pornographic and artistic works. Pornography seemingly surrounds the idea of sexual arousal; this notion is echoed by several academics, including psychologists Phyllis and Eberhard Kronhawsen, who have expressed that the main objective of pornography is to induce erotic reaction from the receiver.[221] Other viewpoints, while not directly implying the same, do still acknowledge that sexual incitement is at least a central goal.[222]

Mari Mikkola endeavours to challenge this widely-held consensus by advancing the claim that sexual arousal is merely *a* goal, and not *the* intended ultimate result of pornography. If there are present additional aims, such as artistically driven ones, then 'pornographic art' may exist, says Mikkola.[223] She cites examples of scenarios whereby pornographic ventures are allegedly combined with other objectives, such as political agendas. Reference is made towards works of Jennifer Lyon Bell, through which Mikkola wishes to convey that, with regards to material that has other aims, such as feminism in this case, as the driving force, and an intended outcome of sexual arousal not being a "production accident," it is not possible to establish a straightforward distinction between the

[220] Paul Kearns, 'Antipathy to Art in a Recalcitrant Court' (2006) 67 Journal of the Society for Advanced Legal Studies 25.
[221] R S Randall, *Pornography and the Politics of a Self Divided* (University of California Press 1989) 69.
[222] Mari Mikkola, 'Pornography, Art and Porno-Art' in Hans Maes (ed), *Pornographic Art and the Aesthetics of Pornography* (The Palgrave Macmillan 2013) 27.
[223] ibid 28.

two (or more) objectives; they are "intertwined."[224] As a result, Mikkola draws the conclusion that it is not impossible that pornography and art coexist.

However, this anomalistic stance has its drawbacks. Mikkola herself admits that pornography must have sexual incitement as at least one of its motives and she agrees that this much is undisputable.[225] This in itself points to the utmost importance of sexual arousal being a constant pre-requisite for any work to qualify as pornography, whereas other additional qualities are not necessary. This is sufficient to establish the primacy of sexual incitement to pornography, wherefore, this essay follows the take that pornographic work is chiefly intended to incite sexual arousal of the receiver.

The interpretation of what art is, is not universally accepted. In order to derive an understanding of what the elemental purpose of artistic productions is, Hans Maes' work in this area will be considered, which seeks to compile the common differences used to identify pornographic and artistic intent, and criticises these arguments so as to establish that art and pornography are not mutually exclusive.[226] Specifically, this essay scrutinises Maes' interpretation of moral status being one of the four factors commonly used to distinguish pornography from art (the other three factors will be dealt with in the final section).

Maes explains that pornography may not be immoral solely because of its vulgar disposition,[227] just as how a coarse mannered individual is not automatically considered immoral.[228] Yet, quoting Helen Longino's description of pornography, Maes says pornography is necessarily morally void when it endorses degradation.[229][230] He also places emphasis on several other morally destructive characteristics of pornographic material,[231] specifically

[224] Mikkola (n 222) 33.
[225] ibid 29.
[226] Hans Maes, 'Who Says Pornography Can't Be Art?' in Hans Maes and Jerrold Levinson (eds), *Art and Pornography: Philosophical Essays* (Oxford University Press 2012) 18.
[227] ibid 19.
[228] J Feinberg, 'The Idea of the Obscene' (University of Kansas Press 1975).
[229] Maes (n 226) 19.
[230] Helen Longino, 'Pornography, Oppression, and Freedom' in Laura Lederer (ed), *Take Back the Night: Women on Pornography* (William Morrow 1980) 40–54.
[231] Maes (n 226) 19.

in relation to the high probability of harm occurring in the different stages of production.[232] Furthermore, pornography may be damaging as it is said to erode one's character,[233] and may pose a threat in terms of violence and degradation, especially towards women.[234] However, Maes disagrees that this is sufficient to demonstrate that art and pornography are mutually exclusive.[235] To make such a claim, one would have to prove that what is present in art is not present in pornography, and vice versa.[236] Maes elaborates that, while such differences stand true under typical circumstances, this does not fully eliminate instances whereby, on one hand, art is just as exploitative and unethical and thereby, immoral in the ways pornography has been described to be.[237] On the other hand, there do exist materials such as female friendly pornography, as opposed to mainstream pornography, that act as "a morally positive, consciousness raising force."[238]

However, Hans Maes' perspective of the moral status of art and pornography appears to be flawed; his theory identifies circumstances whereby art and pornography represent moral or immoral traits, but does not consider the underlying moral *functions* of the two concepts, or the lack thereof. Art, as termed by H.L.A Hart, has a critical moral role;[239] it is seen as an agent that stimulates accepted morality so as to prevent the stagnation of moral standards in society.[240] In this sense, pornography and art do diverge, as pornography does not share this responsibility. As mentioned earlier and in the upcoming discussions, pornography does not have such duty to facilitate morality; if something is pornographic in nature, it is grounded on the basis of sexual arousal, and only that.

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[232] Catherine MacKinnon, 'Francis Biddle's Sister: Pornography, Civil Rights and Speech' in *Feminism Unmodified: Discourses on Life and Law* (1987) (Harvard University Press) 163–197.
[233] Anne W Eaton, 'A Sensible Antiporn Feminism' (2007) 117(4) Ethics 674.
[234] Martha C Nussbaum 'Objectification' (1995) 21(4) Philosophy & Public Affairs 249.
[235] Maes (n 226) 24.
[236] ibid.
[237] ibid 25.
[238] Ellen Willis, 'Feminism, Moralism and Pornography' in Susan Dwyer (ed), *The Problem of Pornography* (Wadsworth 1995) 170–176.
[239] William C Starr, 'Law and Morality in H L A Hart's Legal Philosophy' (1984) 67(4) Marquette Law Review 673.
[240] Paul Kearns, *Freedom of Artistic Expression* (Hart Publishing 2013).

(ii)

In an effort to question the incompatibility of art and pornography, Matthew Kieren describes artistic aim as *how* a subject is put across through an artwork.[241] Given the existence of erotic art, 'pornographic art,' pornography being a more extreme form of eroticism, should prevail, says Kieren.[242] Such an assumption begs the question of how the degree of explicitness may be determined, and just how explicit a piece of erotic art has to be to qualify as 'pornographic art.'[243]

Levinson latches onto Kieren's definition of art, but eliminates the requirement of explicitness and its associated complications.[244] He states that pornographic items distract the consumer from concentrating on the subject at hand, as a result of which pornography and art are irreconcilable.[245] Levinson's vision on artistic interest focuses on *how* the subject is projected through an artwork, whereas that of pornographic items only concentrates on *what* is being represented.[246] Because pornographic and artistic interests are divergent, they may not be used in harmony, says Levinson.[247]

On the other hand, David Davies, in an attempt to establish the co-existence of pornography and art based on the presence of other forms of art, offers a different take towards Levinson's proposal. He formulates a theory of artistic regard, which includes Levinson's idea of artistic interest, on *how* a subject matter is represented, and a second layer of *what* is represented.[248] He supports his explanation with the concept of "pornographic attitude"

[241] David Davies, 'Pornography, Art, and the Intended Response of the Receiver' in Hans Maes and Jerrold Levinson (eds), *Art and Pornography: Philosophical Essays* (Oxford University Press 2012) 62.
[242] Matthew Kieran, 'Pornographic Art' (2001) 21(1) Philosophy and Literature 31.
[243] Maes (n 226) 28.
[244] Davies (n 241) 63.
[245] Jerrold Levinson 'Erotic Art and Pornographic Pictures' (2005) 29(1) Philosophy of Literature 228.
[246] Davies (n 241) 67.
[247] Levinson (n 245).
[248] Davies (n 241) 67.

as termed by Theodore Gracyk;[249] who illustrates his ideology by relying on Anthony Burgess's *A Clockwork Orange*, wherein the characters are seen to commit rape. Gracyk indicates that the intended message to be conveyed through *A Clockwork Orange* is to discourage rape by highlighting the negative character of such acts, rather than promoting such behaviour.[250] Davies asserts the true purpose of an artwork is only realised when viewed in artistic regard; he uses Yvonne Rainer's production, Room Service to show that the artist's objectives are only fulfilled when the simple realignment of furniture as displayed in her work is viewed under such a perspective Davies' interpretation of art is correct; it puts forward that this is a reason why legal instruments in several jurisdictions struggle to. formulate a test to draw a line between the two concepts, such as the American courts in *Miller v California,*[251] and the controversial proceedings against D.H. Lawrence's novel, Lady Chatterley's Lover. In both cases, the courts have been largely unsuccessful in effectively providing a clear distinction between pornography and art, as they comprise of legal perspective, but not the required artistic regard.[252]

On the contrary, this essay disagrees with David Davies' theory that 'pornographic art' may exist, just as other forms of art, such as political art, even when the two intentions, that of art, and of the non-artistic function, have separate impact on the audience; following Mikkola's illustration of how Bloody Mary, a concoction of vodka and tomato juice, which once mixed, may not be separated into its components.[253] Likewise, it is not probable that the interest of only one of the functions (art or the other), or both but at different times, will impact the audience as it is not possible for the intentions to be partitioned once combined.[254] Yet, Mikkola's aim to oppose

[249] Theodore Gracyk, 'Pornography as Representation: Aesthetic Considerations' (1987) 24(4) Journal of Aesthetic Education 103.
[250] Davies (n 241) 67.
[251] 413 US 15 (1973).
[252] J Jaskiewicz, 'Art & Pornography – A Critical Analysis' (Queen Mary Journal of Intellectual Property, 19 February 2015) <https://qmjip.wordpress.com/2015/02/19/art-pornography-a-critical-analysis/> accessed 28 March 2017.
[253] Mikkola (n 222) 40.
[254] Jerrold Levinson, 'Is Pornographic Art Comparable to Religious Art? Reply to Davies' in Hans Maes and J Levinson (eds), *Art and Pornography: Philosophical Essays* (Oxford University Press 2012) 88.

the exclusivist take on pornography and art is only valid following her version of what pornography is, which this essay has rejected. For instance, Mikkola quotes Seiriol Morgan's theory so as to highlight instances whereby pornographic works have included political motives in their presentation, such as pornographic actors being dressed as persons with authority, while engaging in sexual intercourse.[255] Yet, she fails to recognise that, even in these situations, the pornographic content is not given the label, like 'political pornography.' A combination of pornographic and artistic interest will render the piece of work as being non-pornographic; this is because, the precondition for any material to be classified as pornographic demands a primary intent of sexual arousal, which, once undermined and diluted with other connotations, artistic or not, will lose its pornographic character. Thus, an examination of the definitions and underlying direction with which pornographic and artistic works are created shows that they are, not polar opposites, but incompatible. Both concepts operate differently,[256] and hence, to say it is impossible to differentiate between pornography and art would be going too far.

(iii)

This section explores methods, namely "representational content, artistic quality, and prescribed response," used by theorists to distinguish between art and pornography, as well as examining Hans Maes' reasoning for the adequacy of said theories to accommodate atypical pornographic and artistic works, as opposed to mainstream content.[257] In particular, this essay strikes a cord with Christy Mag Uidhir's refreshingly original attitude towards the current issue.

Representational content is the notion that artwork is creative, imaginative, and "a window to the soul,"[258] whereas pornographic productions, true to their name, are graphic in nature, and do not offer much for contemplation on the part of the receiver;

[255] Mikkola (n 222) 30.
[256] Paul Kearns, *The Legal Concept of Art* (Hart Publishing 1998) 196–197.
[257] Maes (n 226).
[258] Roger Scruton, *Sexual Desire* (The Free Press 1986).

they do not represent a wider message, and are not intriguing.[259] The extremely explicit characteristic of pornography prevents the viewer from engaging in an introspective activity, while on the contrary, art, being thought provoking and compelling, does just that.[260] Whereas pornography "conceals in revealing," art "reveals in concealing."[261] Webb[262] and Steinem[263] support this view by use of etymology; while 'erotic' art is derived from the word 'eros,' which in Greek mythology refers to affection and devotion, but 'pornography' is derived from the word 'porne' in reference to prostitution, and emotionlessness.

Another point that is raised as an important distinction between art and pornography is artistic quality. This revolves around the idea of a pornographer's primary intent being sexual arousal, as a result of which, a work of porn is necessarily formulaic, in contrast to multi-dimensional artistic works, layered upon the varied intentions of its creator.[264] Finally, academics such as Jerrold Levinson have attempted to strike a distinction between art and pornography based on the prescribed response as intended by the creators of such material, by stating that art is an aesthetic experience that entails appreciation, whereas pornography, being a product of the its industry, is made primarily for consumption, thereby not necessitating innovation.[265] Hans Maes challenges these theories by stating that pornographers may have other intentions alongside sexual arousal, and artists may create their work of art with the sole intention of sexual arousal.[266] The first argument contradicts this essay's, and Maes', take on pornography, both of which are aligned with the argument that sexual arousal is not *an* intention, but *the* intention of all pornographic works. Pornographic material has sexual arousal as a pre-requisite. If this quality is

[259] Maes (n 226) 18.
[260] Luc Bovens 'Moral Luck, Photojournalism, and Pornography' (1998) 32 Journal of Value Inquiry 205.
[261] Maes (n 226) 18.
[262] P Webb, *The Erotic Arts* (Secker & Warburg 1975).
[263] Gloria Steinam, 'Erotica and Pornography: A Clear and Present Difference' in Susan Dwyer (ed), *The Problem of Pornography* (Wadsworth 1995) 29–33.
[264] Maes (n 226) 21.
[265] Gloria Steiner, 'Night Words: High Pornography and Human Privacy' in R C Rist (ed) *The Pornography Controversy* (Transaction Books 1975) 203–216.
[266] Maes (n 226) 21.

fulfilled, it is a pornographic creation, no matter how artful. On the other hand, artistic creations are, as explained above, to be viewed with artistic regard, with an interest in introspection.[267] Sexual arousal, even if intended, is a side effect, and not the basis of an artwork. "Artful pornography" is pornography, and "pornographic art" is art.[268]

At this juncture, it is vital to analyse Christy Mag Uidhir's unique and interesting outlook on the pornography-or-art debate. Uidhir maintains that, for pornography, with its ultimate goal being sexual incitement, it does not matter in what way this aim is achieved, whereas for art, even if sexual arousal is an intended outcome, it has to be attained in the prescribed manner.[269] This is in line with this essay's contention, that sexual arousal is the main objective of pornography, no matter how this is met, through immoral or moral means, with or without artistic quality. If the ultimate aim is manner inspecific, then it is pornography, and not art, which is strictly manner specific.[270] Uidhir uses the analogy of the rules of winning conditions for two different ball games. The first one whereby winning entails throwing the ball through the hoops in a specific order, and the second whereby winning depends on throwing the ball through the hoops, regardless of the order.[271] Maes noted that if the winning conditions of the first game are met, that would naturally mean that the conditions for the second game have also been satisfied.[272] However, Uidhir explains that, there cannot be two ways of winning a game; if you win the first game, you cannot have automatically won the second game; it is a completely different game.[273] This comparison is applicable to the conflict of differentiating between pornography and art. Having elements that induce sexual arousal in an artwork does not make it 'pornographic art'; they are like different ball games altogether.

[267] Alva Noe, *Strange Tools: Art and Human Nature* (Hill and Wang 2015).
[268] Alex Neill & Aaron Ridley, *Arguing About Art: Contemporary Philosophical Debates* (3rd edn, Routledge 2008) 388.
[269] Maes (n 226) 34.
[270] ibid 34.
[271] ibid 36.
[272] ibid 37.
[273] ibid 38.

All in all, using the recommendations provided within this essay, it is possible to distinguish extremely ambiguous works that seem to push the boundaries of pornography and art, such as Robert Mapplethorpe's Cincinnati exhibition in 1989, which was aimed at testing the tolerance of a society, which at that time, that was struggling with acceptance of homosexuality, and was unable to cope with widespread fears of the AIDS epidemic.[274] To conclude, sexual arousal acts as the bedrock on which pornography is constructed whereas art acts as a vehicle to facilitate moralistic standards of the society. In critical analysis of the proposition that pornography and art are inseparable, this essay advances the notion that it is possible to distinguish between the two concepts.

[274] Kalliope Lee, 'How Obscene! How James Joyce Told the Difference Between Art and Porn' *The Huffington Post* (14 June 2013) <http://www.huffingtonpost.com/kalliope-lee/how-obscene-how-james-joyce_b_3435788.html> accessed 28 March 2017.

The Potency of Politics: An Exploration of the Value of Critical Discourse Analysis in the Realm of UK Drug Policy

Fiona Long[275]

This article posits that UK drugs policy is failing and seeks to understand why, in spite of the clear failure of prohibitionist policies, such policies continue to be implemented. In doing so, it centres on the power of language and its ability to maintain the status quo; resulting in the unreserved perpetuation of prohibitionist drugs policies. Recognising the importance of language, it advocates the utility of critical discourse analysis in revealing how and why this position has become normalised. The present article adopts Fairclough's version of critical discourse analysis within the context of the recently enacted Psychoactive Substances Act 2016, an Act which places a blanket ban on all psychoactive substances. It examines how language was used within the preceding political debate to position drugs as harmful substances, thereby reinforcing dominant ideologies and subsequently maintaining a prohibitionist response. It then goes one step further and considers whether change is possible. The article concludes by urging that a more comprehensive critical discourse analysis must be undertaken in order to confront the current, unsatisfactory state of affairs.

"We live in an age in which power is predominantly exercised through the generation of consent rather than through coercion, through ideology rather than through physical force, through the inculcation of self-disciplining practices rather than through the breaking of skulls."[276]

UK drugs policy is clearly failing[277] and yet, time and time again, policymakers continue to implement the same, ineffective,

[275] MRes Criminology Candidate, The University of Manchester, School of Law.

[276] Norman Fairclough, *Critical Discourse Analysis: The Critical Study of Language* (Longman 1995) 219.

[277] Alex Stevens and Fiona Measham, 'The "Drug Policy Ratchet": Why Do Sanctions for New Psychoactive Drugs Typically Only Go Up?' (2014) 109 Addiction 1226; Julian Buchanan, 'Ending Drug Prohibition with a Hangover?' (2015) 13 British Journal of Community Justice 55; Stuart Taylor, Julian Buchanan and Tammy Ayres, 'Prohibition, Privilege and the Drug Apartheid: The Failure of Drug Policy Reform to Address the Underlying Fallacies of Drug Prohibition' (2016) 16 Criminology & Criminal Justice 452.

unscientific, prohibitionist policies.[278] This has most recently been evidenced by the enactment of the Psychoactive Substances Act 2016[279] (hereafter PSA 2016) and its blanket ban on all psychoactive substances. As the above quote suggests, language has become a powerful tool in the maintenance of the status quo; in this case, resulting in the unreserved perpetuation of prohibitionist drugs policies. Critical discourse analysis (CDA) of the policy-making process is therefore crucial in unveiling how and why this position has become normalised. [280] This essay will adopt Fairclough's[281] version of CDA to examine how language, specifically discourse, is used within political debate to position drugs as harmful substances, thereby reinforcing dominant ideologies and maintaining a prohibitionist response. Whilst it is acknowledged that the limited scope of this essay would not allow for a thorough CDA to be initiated, it will seek to advocate the utility of CDA within the sphere of drugs policy and call for a more comprehensive analysis to be undertaken.

Fairclough's Critical Discourse Analysis

Fairclough's version of CDA centres on the 'interplay between three levels of social reality: social structures, practices, and events'.[282] Fairclough perceives social practices as mediating macro-level structures and micro-level events; CDA therefore examines how individual texts (social events), through their use of discourse (social practices) can be used to maintain or challenge certain ideologies (social structures). In constructing this version of CDA, Fairclough defines two key concepts; discourse and ideology. *Discourse*, in its simplest form, refers to spoken or written communication, although for Fairclough it is a semiotic way of 'constituting and constructing

[278] Stephen Rolles, 'An Alternative to the War on Drugs' (2010) 340 British Medical Journal 127.
[279] Psychoactive Substances Act 2016.
[280] Ruth Wodak and Michael Meyer, 'Critical Discourse Analysis: History, Agenda, Theory, and Methodology' in Ruth Wodak and Michael Meyer (eds), *Methods for Critical Discourse Analysis* (2nd edn, SAGE Publications Ltd 2009).
[281] Norman Fairclough, 'Critical Discourse Analysis' in James Paul and Michael Handford (eds), *The Routledge Handbook of Discourse Analysis* (Routledge 2012).
[282] ibid 11.

the world in meaning'.[283] *Ideologies* are portrayals of aspects of the world which can assist in the enacting, sustaining or changing of social power.[284] CDA aims to demystify the symbiotic relationship between these two concepts.[285] By studying micro-level political texts, we can expose how discourse is used to maintain the macro-level ideologies which position drugs as harmful substances; ideologies which fuel UK drugs policy. It is only once we render these ideologies and the discourses used to preserve them visible, that we can challenge the status quo i.e. failing prohibitionist policies. Fairclough's[286] comprehensive CDA goes even further than a simple textual analysis and directs researchers to identify; 1) a social wrong, 2) obstacles to overcoming this social wrong, 3) whether there is a need for the social wrong and 4) possible ways past the obstacle. This framework will be applied to and in the context of the second reading of the Psychoactive Substances Bill (hereafter "the PSB Debate").[287][288]

'Focus upon a social wrong'[289]

According to Fairclough, CDA begins with the identification of a social wrong. Broadly speaking, these are aspects of 'social systems, forms or orders' which are detrimental to the welfare of individuals, yet could in theory be alleviated.[290] By starting with a social wrong as opposed to a mere research question, CDA can arguably be used to generate knowledge truly capable of provoking change; change which is clearly needed within the realm of drugs policy.

[283] Norman Fairclough, *Discourse and Social Change* (Polity Press 1992) 64.
[284] Jorge Larrain, *The Concept of Ideology* (Hutchinson 1979); Teun Van Dijk, *Ideology: A Multidisciplinary Approach* (SAGE Publications Ltd 1998).
[285] Wodak and Meyer (n 280).
[286] Fairclough (n 281).
[287] HC Deb 19 October 2015, vol 600, cols 732–783: <https://hansard.parliament.uk/Commons/2015-10-19/debates/15101929000001/PsychoactiveSubstancesBill(Lords)> accessed 1 April 2017.
[288] The second reading was selected as it contains the primary debate on the Bill's central principles within the House of Commons.
[289] Fairclough (n 281) 13.
[290] ibid 13.

The social wrong identified by this essay is the predominance of prohibitionist drugs policies[291] and their failure to tackle the problems associated with drug use. The nature of this social wrong is twofold. Firstly, British drugs policy is largely founded upon fallacy and fiction; built upon political and moral beliefs as opposed to sound scientific evidence.[292] In consequence, this has led to the arbitrary labelling of certain drugs as illegal and accordingly, certain users as criminal.[293]

Secondly, by oversimplifying the complexities associated with drug use, the current prohibitionist policies effectively exacerbate underlying problems and arguably cause more harm than the illegal drugs themselves.[294] Among other things, they have led to the emergence of an extensive and lucrative black market, the unpredictable quality of drugs within these unregulated markets, the criminalisation of users, the invention of new drugs and limited access to treatment.[295] Paradoxically, the harms associated with prohibition have been conflated with those of drug use and have ultimately led to a 'curiously self-justifying logic'.[296] Furthermore,

[291] British drugs policy is largely based upon two pieces of legislation and the amendments thereof. Firstly, the Misuse of Drugs Act 1971 (MDA 1971) outlaws the production, possession, supply or use of specified substances. These substances are placed into classifications based upon their 'danger', ranging from Class A which contains the most dangerous to Class C which contains the least; severity of punishment is dependent upon classification. Secondly, the Psychoactive Substances Act 2016 (PSA 2016) places a blanket ban on the production or supply of any substance 'capable of producing a psychoactive effect…' (section 2 (1)(a)).

[292] Philip Boland, 'British Drugs Policy: Problematizing the Distinction Between Legal and Illegal Drugs' (2008) 55 Probation Journal 171.

[293] Taylor and others (n 277); Buchanan (n 277).

[294] Bruno Frey, 'Drugs, Economics and Policy' (1997) 12 Economic Policy 388; Molly Magill and others, 'The Role of Marijuana Use in Brief Motivational Intervention With Young Adult Drinkers Treated in an Emergency Department' (2009) 70 Journal of Studies on Alcohol and Drugs 409; Julian Buchanan and Lee Young, 'The War on Drugs - a War on Drug Users?' (2000) 7 Drugs: Education, Prevention and Policy 409; Steve Rolles and others, 'The Alternative World Drugs Report: Counting the Costs of the War on Drugs' (2012) <https://www.unodc.org/documents/ungass2016/Contributions/Civil/Count-the-Costs-Initiative/AWDR-exec-summary.pdf> accessed 2 April 2017.

[295] Augustinus Cruts, 'The Social Construction of Drug-Related Death' (2000) 11 International Journal of Drug Policy 381; Boland (n 17); Molly Magill and others, 'The Role of Marijuana Use in Brief Motivational Intervention With Young Adult Drinkers Treated in an Emergency Department' (2009) 70 Journal of Studies on Alcohol and Drugs 409.

[296] Rolles (n 278) 127.

prohibition has been unsuccessful in its endeavour to reduce the production, supply and use of drugs.[297]

These failings have frequently been acknowledged, by public figures,[298] academics,[299] organisations,[300] numerous reports[301][302] and even MPs themselves.[303] Why, then, do prohibitionist policies continue to dominate the political landscape? The next section of Fairclough's CDA will shed light on this enigma.

'Identify obstacles to addressing the social wrong'[304]

This forms the crux of Fairclough's CDA and asks; what is it about the organisation of social life that impedes us from addressing the social wrong?[305] CDA is therefore not only used to understand how the social wrong has arisen but how it is rooted in the wider structuring of social life;[306] basically an exploration of the 'how' and the 'why'. Accordingly, this essay will not only examine the

[297] Global Commission on Drug Policy, 'Taking Control: Pathways to Drug Policies That Work' (2014) <https://www.globalcommissionondrugs.org/wp-content/uploads/2016/03/GCDP_2014_taking-control_EN.pdf> accessed 2 April 2017; Buchanan (n 277).

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

[299] Julian Young and Lee Buchanan, *Drugs Relapse Prevention: Giving Users a Voice* (Bootle Maritime City Challenge 1996); Jon Silverman, 'Addicted to Getting Drugs Wrong' (2010) 21 British Journalism Review 31; Taylor and others (n 277).

[300] Royal Society for Public Health, 'Taking a New Line on Drugs' (2016) <https://www.rsph.org.uk/uploads/assets/uploaded/68d93cdc-292c-4a7b-babfc0a8ee252bc0.pdf> accessed 1 April 2017.

[301] These include reports by the Police Foundation (Hugh Tilson and others, 'Preventing HIV Infection Among Injecting Drug Users in High-Risk Countries: An Assessment of the Evidence' (2007)); Home Affairs Select Committee (Don Des Jarlais and others, 'Reducing HIV Infection Among New Injecting Drug Users in the China-Vietnam Cross Border Project' (2007) 21 AIDS 109); and the UK Drug Policy Consortium (Mathers B and others, 'HIV Prevention, Treatment and Care Services for People Who Inject Drugs: A Systematic Review of Global, Regional, and National Coverage' (2010) 375 The Lancet 1014).

[302] Rolles (n 278).

[303] UK Drug Policy Commission, 'Politicians' Views on Drug Policy' (2012) <http://www.ukdpc.org.uk/wp-content/uploads/politicians-views-on-drug-policy1.pdf> accessed 31 March 2017.

[304] Fairclough (n 281) 13.

[305] ibid 14.

[306] Norman Fairclough, *Analysing Discourse: Textual Analysis for Social Research* (Routledge 2003).

contents of the PSB Debate, but seek to understand how debates of this kind are shaped by the wider socio-political context.

Socio-political context

Public policy and ideology are inextricably linked as 'policies are constrained by the way in which they represent the problem'.[307] This entails a rather circular school of thought. Prohibitionist policies position drugs as ideologically harmful substances: in consequence, there is further demand for their prohibition. The prohibition of drugs has become deeply entrenched since the ratification of three key international treaties. [308] This prohibitionist stance was supplemented by ideologies of 'drugs as malevolent agents',[309] which positioned drugs as a moral issue and drug users as deserving of punishment.

The 1980s saw a shift towards treatment-focused policies. These pragmatic policies responded to an increase in heroin use and subsequently heightened risk of HIV/AIDS.[310] This policy change was reflected in an ideological shift towards viewing 'drugs as pathogens',[311] essentially framing drug use as a disease in need of treatment. However, prohibition in the UK remained strong and was later reaffirmed by a 1998 United Nation conference brandishing the slogan 'A drug free world – we can do it' together with the UK's ten year drug strategy which claimed to be 'Tackling Drugs to Build a Better Britain'.[312] Ideologically, a merging of moral and health concerns has resulted in the dominant ideology of drugs as a threat

[307] C Bacchi, *Analysing Policy: What's the Problem Represented to Be?* (Pearson Education 2009) 13.
[308] These were; the Single Convention on Narcotic Drugs of 1961 as amended by the 1972 Protocol, Convention on Psychotropic Substances of 1971 and United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances of 1988.
[309] Kenneth Tupper, 'Drugs, Discourses and Education: A Critical Discourse Analysis of a High School Drug Education Text' (2008) 29 Discourse: Studies in the Cultural Politics of Education 223, 226.
[310] Buchanan (n 277).
[311] Tupper (n 309) 226.
[312] 'United Nations International Drug Control Program (UNDCP)' (1998) <http://www.un.org/ga/20special/> accessed 1 April 2017; 'The Government's Ten-Year Strategy for Tackling Drugs Misuse' (1998) <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/259785/3945.pdf> accessed 16 May 2018.

to society *and* a danger to health.[313] It was also around this time that the 'drug-crime link' began to emerge, a link which further reinforced the perceived threat of drugs to society.[314] This ideology shapes political debate and subsequent drugs policies, and explains the excessive focus on the harms associated with drugs.[315]

As political debate on drugs and the drugs 'problem' are socially constructed,[316] surely politicians could simply *choose* to reframe the debate and subsequently discover an alternative to prohibition?[317] However, the solution is not that simple. A recent poll revealed that although 77% of MPs surveyed agreed that current policies were ineffective, 75% also conceded that an objective debate would be difficult given the controversial nature of the topic.[318] Wodak captures the sentiment underlying these statistics by stating that 'bad policy is still good politics'.[319] In other words, MPs are reluctant to expend their political capital advocating reform which is likely to be unpopular with voters.[320] Furthermore, following the open vilification and dismissal of Professor David Nutt,[321] MPs may fear backlash as a result of speaking the truth.[322] Instead, they acquiesce in the acceptance of dominant drugs discourses at a micro-level, leading to the legitimisation of the above-mentioned macro-level ideology.

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[313] Boland (n 292).
[314] Toby Seddon, Robert Ralphs and Lisa Williams, 'Risk, Security and the 'Criminalization' of British Drug Policy' (2008) 48 British Journal of Criminology 818, 819.
[315] David Dingelstad and others, 'The Social Construction of Drug Debates' (1996) 43 Social Science and Medicine 1829.
[316] Boland (n 292); Regina Medeiros, 'Social Construction of Drugs and Crack and the Institutional Responses and Therapeutic Approaches' (2014) 23 Saúde e Sociedade 105.
[317] Caitlin Hughes and Alex Stevens, 'What Can We Learn from the Portuguese Decriminalization of Illicit Drugs?' (2010) 50 British Journal of Criminology 999.
[318] UK Drug Policy Commission (n 303).
[319] Alex Wodak, 'Drug Law Reform: When Bad Policy Is Good Politics' (2012) 380 The Lancet 1624, 1624.
[320] Boland (n 292).
[321] Professor David Nutt was the government's chief drugs adviser until he published a report which ranked 20 different drugs, including alcohol and tobacco, according to the actual levels of harm caused. For more on this report, please see David Nutt, Leslie King and Lawrence Phillips, 'Drug Harms in the UK: A Multicriteria Decision Analysis' (2010) 376 The Lancet 1558.
[322] Tammy Ayres and Yvonne Jewkes, 'The Haunting Spectacle of Crystal Meth: A Media-Created Mythology?' (2012) 8 Crime Media Culture 315.

Construction of the Problem: NPSs Threatening Young People

The pivotal PSB Debate took place on 19th October 2015 and informed the PSA 2016: a piece of legislation which not only prohibited New Psychoactive Substances (NPSs) but resulted in a blanket ban on the production and supply of *any* substance 'capable of producing a psychoactive effect'. [323][324] Several discourses have been invoked throughout this debate; from professional discourses of law, education and public health to popular discourses fuelled by media coverage. Though due to the aforementioned constraints, this essay will focus on one particularly prominent discourse; NPSs as a threat to our youth.

This debate is full of antipodal description. MPs talk of the 'catastrophic effects' of these 'horrendous substances' which are the product of an 'evil trade'. The use of adjectives to pre-modify and package nouns in this way can lead to assumptions that the effects *are* catastrophic, that the substances *are* horrific and that the trade *is* evil; propositions which are not easily challengeable.[325] Interestingly, whilst the drugs trade and NPSs themselves have been demonised, users are described as 'impressionable', 'vulnerable', and 'susceptible' to the threat posed by NPSs. In order to facilitate this innocence, young people's drug taking is either a first 'try', written off as a 'silly mistake' or seen to have happened under false pretence.[326] This contrast between the good (young people) and the bad (NPSs and the drug trade) is intensified by MPs who use language reminiscent of child grooming discourses. Vulnerable young people are described as being 'targeted' by the trade and 'lured', not only into believing that NPSs are safe, but also into 'inappropriate sexual relationships'. This powerful comparison is likely to provoke a heightened emotional reaction and further polarise the good and the bad.

[323] Psychoactive Substance Bill Second Reading (n 288) 1.
[324] Section 3 of the PSA 2016 provides for exempt substances which include drugs controlled by the MDA 1971, medicinal products, alcohol, nicotine and tobacco, caffeine and food.
[325] Jean Aitchison and Diana M Lewis, *New Media Language* (Routledge 2003).
[326] Paul Manning, 'There's No Glamour in Glue: News and the Symbolic Framing of Substance Misuse' (2006) 2 Crime Media Culture 49.

This juxtaposition has been bolstered by the use of contrasting grammatical structures. A repetition of structures in which young people 'mistakenly believe' or 'think' that NPSs are 'safe and legal' creates a sense of naivety, further supporting this image of innocence. These are placed alongside claims that NPSs 'have taken people's lives' or that they are 'are blighting the lives of those taking them'.[327] Active grammatical structures make it clear that NPSs are responsible for these deaths, whilst the auxiliary verbs 'have' and 'are' are used to express total certainty in this proposition. To adopt CDA terms, mental perception processes (what the young people thought or believed) are being contrasted with material action processes (the death and destruction caused by NPSs), representing a distinction between perception and reality; and a further contrast between good and bad.[328]

MPs seek to solidify this contrast and secure a political response based upon emotion as opposed to scientific evidence through their use of narrative. According to Alexandrescu, narrative accounts are routinely built upon a 'semantic scaffold of contrast… between youth's potential and death's disintegrating silence, with the drugs assuring the passage between the two sides'.[329] The PSB Debate follows this recipe on several occasions. For example, we have Hester; 1) a 'young, beautiful, ambitious' medical student, 2) whose life was 'taken away from her' 3) after using an NPS.[330] This is a tried and tested formula which has been used to provoke emotion so strong that it justifies the silencing of wider, meaningful debate[331]. This formula was mirrored in the media reporting of a 'medical student died after taking legal party drug'; a headline which linked Hester's potential, her death and her drug use from the outset.[332] Others have harnessed the testimony of bereaved mothers; a story so compelling that it 'has the potential to bring about

[327] Hansard (n 287).
[328] Hilary Janks, 'Critical Discourse Analysis as a Research Tool' (1997) 18 Discourse: Studies in the Cultural Politics of Education 329.
[329] Liviu Alexandrescu, 'Mephedrone, Assassin of Youth: The Rhetoric of Fear in Contemporary Drug Scares' (2014) 10 Crime Media Culture 23, 30.
[330] Hansard (n 287).
[331] ibid; Medeiros (n 316).
[332] 'Medical student died after taking legal party drug, inquest hears' (2009), *The Telegraph*, <https://www.telegraph.co.uk/news/uknews/law-and-order/5893998/Medical-student-died-after-taking-legal-party-drug-inquest-hears.html> accessed 16 May 2018.

unconstitutional effects'.[333] One bereaved mother is quoted as saying 'yes, ban these substances, especially if it reduces demand'. The uncritical acceptance of such narratives creates further obstacles to overcoming the social wrong; exacerbating the situation in two principal ways. Firstly, MPs are engaging in what Reinarman has labelled the 'routinization of caricature'[334] by portraying the worst case as the typical case; making it seem as though anybody using NPSs is destined for either death or devastation.[335] Secondly, narratives present drugs homogenously by conflating *all* types of NPS as well as drugs regulated by the MDA 1971; in consequence, homogenous presentation will lead to homogenous treatment, irrespective of their relative harms.[336]

Construction of the Solution: Prohibition as the Only Option

With the nation's youth at threat, MPs incite that we '*must* tackle the alarming rise' of NPSs and therefore '*need*' legislative change, otherwise more deaths '*will* happen' [emphasis added]. Modal auxiliaries have been used to express a high degree of certainty, strengthening this sense of urgency. Faced with an 'influx of hundreds of new products' and 'current legislative inadequacies' which render official bodies[337] unable to 'keep up', MPs advocate that the 'a blanket ban is the only way to deal with this problem'.

This 'solution', like the 'problem', is founded upon contrast, making it difficult for MPs to advance alternative views. This is particularly prominent in the use of pronouns. Calls for the blanket ban are led by Mike Penning, who states that '*we* can save lives', '*we* are taking action' and '*we* will make sure that the House protects people' [emphasis added]. The plural pronoun 'we'[338] is often used by politicians to create a sense of inclusivity, collectivity

[333] Sarah Wright, '"Ah... the Power of Mothers": Bereaved Mothers as Victim-Heroes in Media Enacted Crusades for Justice' (2016) 12 Crime Media Culture 327, 1.
[334] Craig Reinarman, 'Social Construction of Drug Scares' in Patricia Adler and Peter Adler (eds), Constructions of Deviance: Social Power, Context, and Interaction (Wadsworth Publishing Co 1994) 96.
[335] ibid.
[336] Ayres and Jewkes (n 322).
[337] The Home Office and the Advisory Council on the Misuse of Drugs.
[338] It is repeated 338 times throughout the debate.

and perhaps more importantly to distinguish 'us' from 'them'.[339] If those who support the PSB aim to protect young people and save lives, then by implication, those who oppose the PSB are on the side of the evil NPSs: distinguishing the heroes from the villains. These villains have been written off as a 'few nuances here and there', whilst their attempts to voice alternative views are quickly shot down and arguments belittled;[340] a point illustrated below.

By analysing the PSB Debate we can see both *how* the social wrong has arisen. MPs present 'inaccurate information couched in emotive and exaggerated language' to cause fear;[341] this fear then serves to initiate inappropriate and misguided policy reactions.[342] When located within the wider socio-political context, it becomes apparent *why* this is so. To use Fairclough's terminology, this essay has identified political practice and prioritizing their positions over bad politics as the main obstacle to tackling the social wrong. This stage of Fairclough's CDA illustrates just how deep-rooted this social wrong truly is.

'Consider whether the social order 'needs' the social wrong'[343]

The third stage of Fairclough's CDA asks; does the social order *need* the social wrong? This comprises of two sub-questions, each of which shall be considered. Firstly, is it possible to address the social wrong within the current social order?[344] The UK operates under a capitalist system, as do many of the countries that have already adopted alternatives to prohibition. It is therefore entirely possible

[339] Jessica Håkansson, 'The Use of Personal Pronouns in Political Speeches A Comparative Study of the Pronominal Choices of Two American Presidents' (Linnæus University 2012) <http://www.diva-portal.org/smash/get/diva2:531167/fulltext01.pdf> accessed 25 August 2018; Katarzyna Proctor and Lily I-Wen Su, 'The 1st Person Plural in Political Discourse – American Politicians in Interviews and in a Debate' (2011) 43 Journal of Pragmatics 3251.

[340] One example of this is when Caroline Lucas points out that the prevalence of NPSs has gone up in the Republic of Ireland despite a similar blanket ban being implemented. Mike Penning's response is to simply reiterate that he does 'not want any more deaths', that he is 'determined to protect the young and old' and that 'she will try to convince the House that she is right'.

[341] Boland (n 292) 181.

[342] Ayres and Jewkes (n 322).

[343] Fairclough (n 281) 13.

[344] ibid.

for the UK to adopt one of these many alternatives, which include legalisation, decriminalisation and other forms of regulation.[345]

Secondly, would those maintaining the social wrong benefit from it remaining unresolved?[346] Reinarman describes several ways in which those in power have benefitted from prohibition and its founding ideologies; from securing increased control over perceptually dangerous groups to boosting voter support.[347] In addition, by demonising drugs and creating some sort of 'chemical bogeyman', politicians are effectively able to blame drugs for a vast array of pre-existing problems.[348] Amongst these problems, Taylor *et al* have identified how drugs have been blamed for the spread of disease, traffic accidents and even child abuse.[349]

Drugs can effectively be used as a fig leaf to cover up whichever problems are endemic to society at the time.[350] NPSs are no exception to this rule. At the time of the PSB Debate, politicians were simultaneously facing a state of chaos within British prisons due to excessively high levels of violence, homicide, and self-harm.[351] These problems were largely a product of overcrowding, understaffing, and poor prison conditions.[352] Yet, certain MPs appear to be evading these deep-rooted structural issues by instead choosing to scapegoat NPSs for increases in violence and death among other things. For example, Steve Brine holds NPSs responsible for the 'high levels of debt, intimidation and violence between prisoners' as well as 'the recent rise in attacks on prison staff'.

Not only is this mechanism clearly damaging to drugs policy, but it enables politicians to avoid tackling more systemic

[345] Hughes and Stevens (n 317), Taylor and others (n 277).
[346] Fairclough (n 281).
[347] Reinarman (n 334).
[348] Craig Reinarman and Harry Levin, 'Crack in Context: Politics and Media in the Making of a Drug Scare' (1989) 16 Contemporary Drug Problems 535, 561.
[349] Taylor and others (n 277).
[350] Reinarman (n 334).
[351] The Howard League for Penal Reform, 'Breaking point: Understaffing and Overcrowding in Prisons Research Briefing' (2014) <https://howardleague.org/wp-content/uploads/2016/03/Breaking-point-10.07.2014.pdf> accessed 25 August 2018; Prison Reform Trust, 'Prison: The Facts' (2016) <http://www.prisonreformtrust.org.uk/portals/0/documents/bromley%20briefings/summer%202017%20factfile.pdf> accessed 4 April 2017.
[352] ibid.

problems. If the status quo provides those in power with an easy scapegoat in the face of profound societal issues, then it is easy to see why the improvement of policy may not be in their personal interest. Furthermore, if politicians were forced to truly address society's issues, then this in itself may challenge the social order.

'Identify possible ways past the obstacles'[353]

Stage four prompts us to consider how the obstacles identified in stage two can be overcome within the current social order.[354] How can we challenge prohibition in spite of the political practices which restrain the majority of MPs? As examined above, this prohibitionist approach has become so deeply ingrained in both discourse and practice, that it is difficult to envisage how an alternative approach may be advanced within the current political process.[355]

Within the PSB Debate, this is epitomised by the way in which alternatives to prohibition are immediately and unjustifiably dismissed. This is exemplified by Norman Lamb highlighting the dangers of prohibition whilst advocating that we should 'at least consider regulation rather than prohibition'. In doing so, he invokes both scientific evidence, as well as statistics demonstrating the negative repercussions of similar blanket bans in Poland and the Republic of Ireland. However, whilst making his speech, he is interrupted and his arguments attacked on four occasions. Interestingly, those interrupting him do not address the content of his arguments; rather their criticisms are targeted at either the Liberal Democrat's manifesto or the sources he has used. Transform's[356] findings are belittled as they are accused of being a 'pro-drug lobby group', whilst a European report is dismissed for not including the UK or the Netherlands in its comparisons. In spite of this, Rolles points to two international policy trends that have emerged in the last few decades: harm reduction and

[353] Fairclough (n 281) 13.
[354] Fairclough (n 306).
[355] Wodak (n 319); Kari Lancaster and Alison Ritter, 'Examining the Construction and Representation of Drugs as a Policy Problem in Australia's National Drug Strategy Documents 1985–2010' (2014) 25 International Journal of Drug Policy 81.
[356] Transform is a think tank, campaigning for drug reform.

decriminalisation of personal possession.[357] Whilst both present significant challenges to the status quo, Rolles notes that they have been driven by necessity;[358] of the HIV epidemic and overwhelmed criminal justice systems respectively. As such, the social wrong is still very much entwined within the fabric of our society.

For Tupper, transforming drug discourses is the critical first step towards truly improving drug policy.[359] It is only once a more neutral tone has been adopted that we can have a balanced debate and develop a more insightful policy framework.[360] Given the aforementioned constraints of the political process, Wodak believes that change is most likely to be brought about by 'pressure from civil society'.[361] This bottom-up approach to policy reform was taken in many countries in respect of the HIV/ AIDS epidemic: families and various civil society groups banded together and forced effective policy reform despite reluctant ideological climates.[362]

Conclusion

Fairclough's multi-level approach to CDA challenges researchers to examine micro-level texts and macro-level context in tandem. By approaching a social wrong (prohibitionist policies) in this way, it is possible to gain a deeper understanding of how the social wrong has arisen (through the use and repetition of certain discourses), obstacles to overcoming it (deep-rooted ideology and the constraints of political practice), how it benefits those in power (providing a scapegoat for a whole host of societal problems) and possible ways of overcoming these obstacles (pressure from civil society). This approach to CDA is pertinent to the study of drugs policy; as not only does it seek to illuminate problems with the current system, but it also urges researchers to present pragmatic solutions. Given the potentially change-provoking capabilities of Fairclough's CDA,

[357] Rolles (n 278).
[358] ibid.
[359] Tupper (n 309).
[360] Boland (n 292).
[361] Wodak (n 319) 1624.
[362] Bill Rau, 'The Politics of Civil Society in Confronting HIV/AIDS' (2006) 82(2) International Affairs (Royal Institute of International Affairs 1944–) 285.

future research must undertake a more complete analysis of political drug texts if failing policies are to be adequately addressed.

Are recent decisions concerning the withdrawal of life-staining treatments from patients in a minimally conscious state to be feared as a complete departure from the sacred principle regarding the protection of human life?

Joanna Maddocks[363]

Keown argues moral and intellectual integrity in the law requires withdrawal of treatment decisions from people in a minimally conscious state to be made according to the sanctity of life doctrine. The doctrine provides that life may never intentionally be ended by another through an act or omission.[364] Treatment can only be withdrawn when it is futile and offers 'no reasonable hope of benefit' or because the benefits are outweighed by the burdens of treatment.[365] However, legal developments, including the Mental Capacity Act 2005 and the UN Convention on the Rights of Persons with Disabilities, means that the doctrine cannot be justified as the sole means of addressing decisions about withdrawing treatment from patients in a minimally conscious state. Following the Supreme Court decision in *Aintree University Hospitals NHS Foundation Trust v James*[366] a best interests decision under the Mental Capacity Act must place the patient at the heart of the decision and considers what the patient's view and attitude to treatment would be. The adoption of an approach which considers the wishes and values of the patients has enabled the court to allow treatment withdrawal from patients in a minimally conscious state. Such decisions should not be feared as an abandonment of a sacred principle of protection of life but as positive step towards legal clarity and an assurance that lack of capacity does not become an 'off switch' for respect for patient values and beliefs.[367]

[363] LL.M. Healthcare Ethics and Law Candidate, The University of Manchester, School of Law.

[364] John Keown, 'Restoring moral and intellectual shape to the law after Bland' (1997) 113(Jul) Law Quarterly Review 481.

[365] ibid.

[366] [2013] UKSC 67, [2013] 3 WLR 1299.

[367] *Wye Valley NHS Trust v B* [2015] EWCOP 60 [11] (Peter Jackson J).

Introduction

Protection of human life has long operated as a guiding moral and legal principle in judicial decision making.[368] There are established criminal laws on murder and manslaughter which prevent the deliberate taking of human life[369] and the European Convention on Human Rights[370] affirms the right to life, which includes protection from deliberate killing. However, aside from the deliberate taking of a life against a person's will such as in the case of murder, there is no consensus on what is meant by or required for protection of life. If it is accepted that human life is a valuable good in itself then it is arguable that one should do everything possible to preserve life in all circumstances. This idea, known as vitalism, receives little academic or professional medical support because it requires life to be sustained regardless of the cost, pain or discomfort experienced by the individual. The sanctity/inviolability of life doctrine ("sanctity of life") advocated by Keown provides that life may never intentionally be ended by another through an act or omission.[371] Treatment can only be withdrawn/withheld when it is futile and offers 'no reasonable hope of benefit' or because the benefits are outweighed by the burdens of treatment.[372] I will consider whether the sanctity of life doctrine is a justifiable way of addressing decisions about treatment withdrawal from patients in a minimally conscious state ("MCS"). By examining the statutory background and recent decisions I will establish that protection of life, understood through the sanctity of life doctrine, should not operate as a sacred principle but as a rebuttable presumption. A rebuttable presumption in favour of life will strike the right balance between protecting life and ensuring that a patient's lack of capacity does not result in total disregard of their values and beliefs in withdrawal of treatment decisions.

[368] *Airedale NHS Trust v Bland* [1993] UKHL 17, [1993] AC 789 (HL).
[369] *R v Woollin* [1998] UKHL 28, [1999] AC 82 (HL); Homicide Act 1957; *R v Franklin* (1883) 15 Cox CC 163 (Courts of Assize).
[370] Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights, as amended) (ECHR) art 3.
[371] Keown (n 364).
[372] ibid.

Minimally Conscious and Vegetative States

A patient in MCS or vegetative state ("VS") has significant brain cortex damage although the brain stem remains intact. Patients can breathe and digest food but are severely disabled.[373] MCS patients have awareness of themselves and their environment and demonstrate "wakefulness" that is the ability to be awake and fall asleep and have basic reflexes such as coughing, swallowing and sucking.[374] The degree of awareness varies according to the level of brain damage.[375] VS patients will show "wakefulness" but have no awareness of themselves or their environment.[376] Whether a patient will recover from VS or MCS depends on factors including the type of injury, patient's age and length of time the condition has subsisted.[377] MCS and VS are considered permanent once they have subsisted for a period of years.[378]

Legal starting point

In *Airedale NHS Trust v Bland*[379] the House of Lords sanctioned withdrawal of artificial nutrition and hydration ("ANH") from a patient. Bland suffered brain damage in the Hillsborough disaster which left him in a permanent vegetative state ("PVS"). There was no hope of recovery or improvement in his condition. Bland's medical team and family believed treatment should be withdrawn to allow him to die with dignity. It was held that omission to act could be culpable where there was a duty to provide treatment but, in this case, the court agreed treatment should be withdrawn as it was of no therapeutic benefit. Bland had no interest in treatment, therefore, it

[373] 'Disorders Of Consciousness – NHS Choices' (*Nhs.uk*, 2017) <http://www.nhs.uk/conditions/vegetative-state/Pages/Introduction.aspx> accessed 22 April 2017.
[374] ibid.
[375] ibid.
[376] ibid.
[377] ibid.
[378] 'Disorders Of Consciousness – NHS Choices' (*Nhs.uk*, 2017) <http://www.nhs.uk/conditions/vegetative-state/Pages/Introduction.aspx> accessed 22 April 2017.
[379] [1993] UKHL 17, [1993] AC 789 (HL).

was not in his best interests to for it to continue and the doctors were not entitled to continue with the treatment.[380]

Bland is largely accepted as a compassionate result,[381] but controversy surrounds the reasoning behind the decision. Keown argues the reasoning is flawed because it focuses on the value of the patient's life rather than value of treatment. He argues withdrawal of treatment decisions should be decided according to the sanctity of life doctrine which advocates that life may never intentionally be ended by another through an act or omission. Treatment can be withdrawn/withheld, however, when it is futile and offers 'no reasonable hope of benefit' or because the benefits are outweighed by the burdens of treatment.[382] Keown's argument seems persuasive because it provides objective criteria for treatment decisions that apply regardless of people's condition or outlook. It avoids able-bodied persons making treatment decisions based on subjective assessments about the worth or value of disabled person's lives.

Heywood is critical of Keown's approach and notes questions of futility turning on whether treatment can offer any hope of benefit can be considered from different perspectives.[383] Laurie *et al* base questions of futility on the medical productivity of treatment and prefer the term 'non-productive treatment'[384] or treatment which does not provide a minimum likelihood or quality of benefit. This leaves the question of who judges the value or quality of benefit required. Heywood argues it is difficult to see value of treatment and futility as objective concepts since what may be of value to one patient may be of little/no value to another.[385] Price argues that it is difficult to point to any treatment which has no value to patients and consequently the question leads to a conclusion that treatment cannot be withdrawn under any

[380] *Airedale NHS Trust v Bland* (n 368) 829, 869, 884, 885, 897.
[381] Keown (n 364) 500, J M Finnis, 'Bland: crossing the Rubicon?' (1993) 109(Jul) Law Quarterly Review 329, 325.
[382] ibid 481, 483–485.
[383] Rob Heywood, 'Moving on from Bland: The Evolution of the Law and Minimally Conscious Patients' (2014) 22(4) Medical Law Review 548, 553.
[384] Graeme Laurie, Shawn Harmon and Gerard Porter, *Mason and McCall Smith's Law and Medical Ethics* (10th edn, Oxford University Press 2016) 518.
[385] Heywood (n 383) 553.

circumstances.[386] Keown quotes Dr. Keith Andrews view that 'tube feeding is extremely effective since it achieves all the things we intend it to'[387] which is supportive of Price's view and counters Keown's own conclusion that Bland's treatment was futile.[388]

For MCS patients futility arguments become difficult to sustain as patients have some awareness and can experience benefits from treatment. As it is not always possible to comprehend patient's awareness levels and/or extent of their positive and negative experiences[389] objective assessments of benefits and burdens can be difficult[390] although some patients will show responses to pain, distress and/or contentment.[391] In order to assess the benefit or burdens of treatment subjective assessments must be made of the patient's condition and the patient's likely feelings and response to their condition. The introduction of these subjective assessments means that sanctity of life begins to lose its moral high ground.[392]

The withdrawal of treatment for MCS patients presents challenges which the sanctity of life doctrine cannot respond to.[393] This is in part because under the sanctity of life doctrine the question of whether withdrawal of treatment is permissible turns on the intention and motivation behind the decision to continue/withdraw treatment rather than an assessment of the patient's desires and feelings.[394] The inability of sanctity of life to consider the values, wishes and feelings of the patient leaves decision makers in an impossible position where treatment can be shown to be beneficial

[386] David Price, 'Fairly Bland: an alternative view of a supposed new 'Death Ethic' and the BMA guidelines' (2001) 21 Legal Studies 618, 621, 627, 638.
[387] Keown (n 364) 492.
[388] ibid 500.
[389] This was seen in *W v M* [2011] EWHC 2443 (Fam) [142], [148], [155], [175]–[218] (in particular [215]); *United Lincolnshire Hospitals NHS Trust v N* [2014] EWCOP 16 [34]–[37] and *M v Mrs N (By her litigation friend, the Official Solicitor)* [2015] EWCOP 76 ("*M v N*") [22], [34], [35]–[44].
[390] Heywood (n 383) 554.
[391] See *W v M* (n 389).
[392] Keown (n 364) 486–487, Price (n 386) 621–625 and Heywood (n 383).
[393] Rob Heywood and Alexandra Mullock, 'The value of life in English law: revered but not sacred?' (2016) 364 Legal Studies 658; David Price, 'What shape to euthanasia after Bland? Historical, contemporary and futuristic paradigms' (2009) 125 Law Quarterly Review 142; Heywood (n 383) 551–555, Alexandra Mullock, 'Best interests and the sanctity of life after *W v M*' (2012) 39 Journal of Medical Ethics 553.
[394] John Coggon, 'Ignoring the moral and intellectual shape of the law after Bland: the unintended side-effect of a sorry compromise' (2007) 27 Legal Studies 110.

but compassion and sympathy for the patient indicate that treatment should be withdrawn and the patient allowed to die.[395] Additionally, decisions based on benefits and burdens of treatment fail to appreciate the importance of person centred care which ensures that patient's values, needs and feelings are incorporated into care plans.[396] Consequently, the law has evolved in line with academic thinking to provide a more flexible and expansive approach that allows for consideration of concepts such as dignity and autonomy.[397]

Mental Capacity Act

The Mental Capacity Act[398] (MCA) is supportive of the need for flexibility. The MCA permits treatment to be given or withheld from persons without capacity to consent when it is in their best interests.[399] Sanctity of life proponents may fear that a "best interests" decision might allow for the devaluation of people's lives by virtue of illness or disablement.[400] s.4(1) of the Act attempts to mitigate these concerns. The section provides that assumptions regarding best interests should not be made based on the person's age, appearance, condition or behaviour.[401] This provision, as Brazier and Cave highlight, prevents an assumption that a 94-year-old is better off dead[402] and arguably ensured continuation of treatment in *Abertawe Bro Morgannwg University LHB v RY*[403] which concerned application to withhold deep suctioning via a tracheostomy treatment from an elderly patient in a MCS. The

[395] See the views expressed in *W v M* (n 389) [112], [116], [119], [120] and [121]; *M v N* (n 389) 59; *United Lincolnshire Hospitals NHS Trust v N* (n 389) [30], [32], [43]; *Briggs v Briggs* [2016] EWCOP 53 [100]–[112].
[396] 'Person-Centred Care Made Simple' (2014) <http://personcentredcare.health.org.uk/sites/default/files/resources/person-centred_care_made_simple_1.pdf> accessed 9 May 2017.
[397] Heywood (n 383) 554, 555; Heywood and Mullock (n 393) 665–681, Price (n 393).
[398] Mental Capacity Act 2005.
[399] ibid ss 4 and 5.
[400] Keown (n 364) 485–486.
[401] Mental Capacity Act 2005, s 4(1).
[402] Margaret Brazier and Emma Cave, *Medicine, Patients and the Law* (6th edn, Manchester University Press 2016) 166.
[403] [2016] EWCOP 57.

patient had the capacity to feel pain. He was in poor physical health and it was estimated that the patient had about 6 months to live.[404]

The MCA, however, does not alter the position that a PVS diagnosis, supported by two doctors, automatically leads to the conclusion that it is not in the patient's best interests to sustain treatment.[405] The problem is that MCS and VS are difficult to diagnose.[406] The dangers of inaccurate diagnosis were seen in *Frenchay NHS Trust v S*[407] (decided before MCA came into effect) in which an urgent declaration was sought that a PVS patient's feeding tube should not be reinserted after it became disconnected. The declaration was granted despite a lack of opportunity to verify the medical opinion which has led to questions over whether the patient was in MCS rather than PVS.[408] Consequently, the law operated here to dismiss protection of life and allow treatment withdrawal without proper consideration of the patient's best interests. The law should require a meaningful best interest consideration regardless of whether the diagnosis is of MCS or PVS.[409]

Whilst medical diagnosis must be treated cautiously it would be irresponsible to favour protection of life simply because the permanence or nature of MCS is uncertain.[410] This could, as Ashwal and Cranford highlight, leave the MCS patient in 'a fate worse' than VS by virtue of the fact they experience pain and suffering.[411] Heywood expresses concern that judges interpret

[404] [2017] EWCOP 2 (see further discussion below).
[405] *Airedale NHS Trust v Bland* (n 368) 884–885.
[406] Joseph T Giacino and others, 'Disorders of consciousness after acquired brain injury: the state of the science' (2014) 10 Nature Reviews Neurology 99, 103; Sarah Nettleton, Jenny Kitzinger and Celia Kitzinger, 'A diagnostic illusory? The case of distinguishing between "vegetative" and "minimally conscious" states' (2014) 116 Social Science & Medicine 134.
[407] [1994] 2 All ER 403 (CA).
[408] Brazier and Cave (n 402) 596.
[409] This view is supported by Hayden J in *M v N* (n 389) [73].
[410] See for example Mark Tutton, 'Trapped 'Coma' Man: How Was He Misdiagnosed?' *CNN* (2009) <http://edition.cnn.com/2009/HEALTH/11/24/coma.man.belgium/index.html?eref=onion> accessed 1 May 2017; Helen Thomson, 'Ultrasound Brain Zap Wakes Man From Minimally Conscious State' (*New Scientist*, 2016) <https://www.newscientist.com/article/2102487-ultrasound-brain-zap-wakes-man-from-minimally-conscious-state/> accessed 1 May 2017.
[411] Stephen Ashwal and Ronald Cranford, 'The Minimally Conscious State In Children' (2002) 9 Seminars in Pediatric Neurology 19, 28–29.

increased level of consciousness as a positive factor without considering that increased consciousness enables greater awareness of pain and discomfort.[412] Advances in clinical understanding of MCS have helped alleviate uncertainty, but diagnosis remains difficult and continued work is required to ensure that life is not curtailed or sustained in the wrong circumstances.[413]

"Best interests" - subjective and expansive test?

Section 4(6) of the MCA requires the following to be taken into account in deciding a person's best interests: the person's past and present wishes and feelings; the beliefs and values that would be likely to influence his decision if he had capacity and other factors that he would be likely to consider if he were able to do so. The decision maker must, when reaching the best interests decision, consult and take into account the views of anyone named by the person to be consulted, anyone engaged in caring for the person or interested in his welfare, any donee of a lasting power of attorney and any deputy appointed for the person.[414] s.4(6) is a departure from the sanctity of life doctrine and in favour of greater flexibility. Heywood and Mullock argue flexibility enable judges to take a more sensitive approach whilst maintaining respect for the value of human life.[415] However, flexibility can be viewed as a disadvantage, which adversely affects the transparency of decisions[416] and might allow for an ill-considered disregard for the protection of life.

Section 4(5) of the MCA provides that where the determination relates to life-sustaining treatment the decision maker must not, in considering best interests, be motivated by desire to bring about the person's death. Arguably this protects against intentional killing and upholds the sanctity of life, but its impact is questionable since the law on active killing and murder remains

[412] *W v M* (n 389); Heywood (n 383) 557 (see further discussion below).
[413] Joseph T Giacino and others (n 406); Sarah Nettleton, Jenny Kitzinger and Celia Kitzinger (n 406).
[414] Mental Capacity Act 2005, s 4(7).
[415] Heywood and Mullock (n 393) 665.
[416] Richard Huxtable, 'From Twilight to Breaking Dawn? Best Interests, Autonomy, and Minimally Conscious Patients: *M v N* [2015] EWCOP 76 (Fam)' (2016) 24(4) Medical Law Review 622, 628–630.

unchanged.[417] Coggon argues the section is unworkable because it cannot operate against the reality that treatment withdrawal is a decision to allow a person to die.[418] Trying to shoehorn a 'dogged attachment'[419] to sanctity of life into best interest decisions endangers elevating protection of life to a sacrosanct position without justification.

Recent Case Law

Such dangers were seen in *W v M*,[420] which concerned an application to withdraw ANH from a 43-year-old woman who had suffered brain damage following viral encephalitis. Several years after M was diagnosed as being in PVS her family applied to court to allow withdrawal of treatment. During trail preparation it emerged that M was in a MCS. The family decided to proceed with the application.

Baker J used a balance sheet to assess M's best interests and weighed up factors including preservation of life, M's wishes and feelings, the views of M's family and carers, M experiences of pain and enjoyment of life and M's dignity and prospect for recovery.[421] Baker J identified advantages in favour of treatment withdrawal: M would be freed from pain; she would not have to endure treatment; she would be spared distress; she would be freed from the indignity of her condition; being allowed to die would accord with her family's wishes and views she expressed prior to illness; she could die with dignity and the discomfort of treatment withdrawal could be alleviated by good end of life care.[422] The advantages of continuing treatment were: M could be kept alive for ten years; she would be spared the effects of treatment withdrawal; she would continue to experience life and gain pleasure from things such as company, music and sensory stimulation; her room could be improved to add to her pleasure and she is clinically stable.[423] Baker J decided, despite M's pain and discomfort, and evidence that she

[417] Mental Capacity Act 2005, s 5(3).
[418] Coggon (n 394) 121–125.
[419] I use Coggon's terminology here; ibid 122.
[420] [2011] EWHC 2443 (Fam).
[421] ibid [219]–[242].
[422] ibid [247].
[423] ibid [248].

would not want treatment to continue that treatment should be sustained. He held preserving life was a decisive factor without explanation or justification.[424]

In *Aintree University Hospitals NHS Foundation Trust v James*[425] the Supreme Court considered an application by the Hospital Trust that it would not be in James' best interests to receive invasive treatments should his condition deteriorate. Mr James acquired an infection whilst hospitalised and developed organ failure. He was diagnosed as being in MCS. The family disagreed with the hospital's view that treatment should be discontinued as they felt Mr James was determined to live as long as possible, as demonstrated by the fact he had fought infection and previously resolved to fight cancer. Lady Hale confirmed that a best interests decision under the MCA should focus on whether it is in a patient's best interests to receive treatment rather than whether it is in the patient's best interests to withhold/withdraw it.[426]

The *James* decision adopted a holistic approach focusing on the patient as an individual.[427] The patient's welfare must be looked at in its widest sense including medical, social and psychological considerations. Best interest decisions must look at what treatment involves; the likelihood of success and outcome for the patient. The decision maker should put themselves in the place of the patient and ask what their attitude to treatment is or would likely be and consult others who are looking after the patient or interested in his welfare for their view of what the patient's attitude to treatment would be.[428] Assessments of whether treatment should be regarded as 'futile' should be considered from the patient's perspective and whether treatment is capable of achieving 'resumption of a quality of life which [the patient] would regard as worthwhile'.[429]

Applying this best interests test to MCS patients may be problematic for sanctity of life proponents since it will not be possible to ascertain how patients regard their condition or feel

[424] *W v M* (n 389) [249].
[425] [2013] UKSC 67, [2013] 3 WLR 1299.
[426] ibid [22].
[427] ibid.
[428] ibid [39].
[429] ibid [40].

about treatment. Nevertheless, from a sanctity of life perspective the outcome of the case should be unproblematic given the facts. In the Court of Protection Jackson J declined to make the declarations sought by the Trust because he was not persuaded that treatment was futile or overly burdensome.[430] When the case reached the Court of Appeal James' condition had deteriorated to the extent that he passed away shortly after the hearing. The Court granted the declarations based on James' deteriorated condition that meant the burdens outweighed the benefits of treatment.[431] The Supreme Court upheld the decision but on a different view of the scope of futility and stated that the Court of Appeal had been wrong to suggest decision makers should take an objective view of the patient's wishes and feelings based on what the reasonable patient would think since the patient's subjective views were central to the correct decision.[432]

Heywood regards the priority given to preservation of life in *W v M*[433] as running close to vitalism rather than adherence to sanctity of life. He argues the invasive and intrusive nature of ANH and the pain and discomfort suffered by M indicate that the benefits of treatment were outweighed by the burdens.[434] Therefore, the decision should not be regarded as welcome support for protection of life,[435] but an unjust disregard for the patient's feelings that, following *R (Nicklinson) v Ministry of Justice*,[436] is likely to be a breach of Article 8 European Convention of Human Rights.[437] Baker J accepted M's quality of life was one which 'many would find impossible to accept'.[438] Jackson concludes that the reality of the outcome of the case is the risk that, following loss of capacity, we

[430] *Aintree University Hospitals NHS Foundation Trust v James and Others* [2012] EWHC 3524 (COP).
[431] *Aintree University Hospitals NHS Foundation Trust v James and Others* [2013] EWCA Civ 65, [2013] Med LR 110 [37]–[38], [45].
[432] *Aintree University Hospitals NHS Foundation Trust v James* (n 425) [37], [45].
[433] [2011] EWHC 2443 (Fam) (n 389).
[434] Heywood (n 383) 557–558.
[435] Keown (n 364) 485.
[436] [2014] UKSC 38, [2015] 1 AC 657 (SC).
[437] Reflects opinions expresses by Emily Jackson, 'From 'doctor knows best' to dignity: placing adults who lack capacity at the centre of decisions about their medical treatment' (Public talk at University of Liverpool, 11 May 2017); ibid [263], [264].
[438] *W v M* (n 389) [34].

will be 'played music that makes us cry and… kept alive in part because stopping moaning when one has just had one's incontinence pads changed is said to be evidence of contentment'.[439]

Heywood and Mullock argue, if there is convincing evidence to indicate what a patient's wishes would have been then this should be a persuasive factor in the balancing exercise.[440] Huxtable points out that evidence demonstrated a consistent and settled picture of M's views, feelings and beliefs (reflective of what Coggon terms 'best desire autonomy'), which should have allowed her wishes to prevail.[441] Heywood and Mullock argue the family's evidence should have played a central role in the decision as they were the people most familiar with the patient's values and beliefs.[442] This is consistent with Lady Hale's observation that the 'purpose of the best interest test is to consider matters from the patient's point of view… insofar as it is possible to ascertain the patient's wishes and feelings, his beliefs and values or the things which were important to him, it is those which should be taken into account because they are a component in making the choice which is right for him as an individual human being'.[443] Consequently, in light of *Aintree University Hospitals NHS Foundation Trust v James* and more recent case law discussed below it seems *W v M*[444] was wrongly decided. From a protection of life perspective, it is important to acknowledge that this is not problematic since the values arising from this, namely the right to self-determination and autonomy, are concepts recognised by the sanctity of life doctrine.[445] This means it is difficult to argue that the law has departed from a sacred principle.

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[439] Emily Jackson, 'The minimally conscious state and treatment withdrawal: *W v M*' (2012) 39 Journal of Medical Ethics 559.
[440] Heywood (n 383) 557–558, Mullock (n 393) 553.
[441] Richard Huxtable, ''In a twilight world'? judging the value of life for the minimally conscious patient' (2012) 39(9) Journal of Medical Ethics 565, 567; John Coggon, 'Varied and Principled Understandings of Autonomy in English Law: Justifiable Inconsistency or Blinkered Moralism?' (2007) 15(3) Health Care Analysis 235, 240.
[442] Heywood (n 383) 559; Alexandra Mullock, 'Deciding the Fate of a Minimally Conscious Patient: An Unsatisfactory Balancing Act?: *W v M and Others* [2012] EWHC 2443 (Fam)' (2012) 20(3) Medical Law Review 460.
[443] *Aintree University Hospitals NHS Foundation Trust v James* (n 425) [45].
[444] [2011] EWHC 2443 (Fam) (n 389).
[445] Keown (n 364) 495.

Patient values, beliefs and feelings

Coggon argues consent is not an automatic reverence for choice, but rather respect for people's values. Patients who lack capacity should be divided into categories: patients who once had capacity but lost their capacity and patients whose values cannot be ascertained. Coggon argues that when consent is viewed from this perspective it does not matter that a person has not expressed a view on treatment withdrawal; a decision can be ascertained from the patient's beliefs and values.[446] Johnston *et al* argue that conceptualising patient's wishes, feelings, beliefs and values into a patient narrative could provide an in-depth and contextual approach to treatment decisions.[447] The approach is reflected in s.4(6) of the MCA and required by the UN Convention on the Rights of Persons with Disabilities (CRPD).[448] The CRPD requires states to ensure '…measures relating to the exercise of legal capacity respect the rights, will and preferences of the person…'[449]

Recent decisions have supported the view that patients' values, feelings and beliefs are a key component of best interests. In *Sheffield Teaching Hospital NHS Trust v TH and TR*[450] no decision was reached but Hayden J emphasised the strength with which the patient's (TH) wishes, beliefs and feelings should be taken into account. He praised TH's friends and family for bringing TH's character and personality into the court room[451] and said that although TH had not prepared an advance decision he had in 'many oblique and tangential ways over so many years communicated his views so uncompromisingly and indeed bluntly that none of his friends are left in any doubt what he would want in his present

[446] John Coggon, 'Mental Capacity Law, Autonomy, and Best Interests: An Argument for Conceptual and Practical Clarity in the Court of Protection' (2016) 24(3) Medical Law Review 396, 397, 399–401.
[447] Carolyn Johnston, Natalie Banner and Angela Fenwick, 'Patient narrative: an 'on-switch' for evaluating best Interests' (2016) 28(3) Journal of Social Welfare and Family Law 249.
[448] UN General Assembly, Convention on the Rights of Persons with Disabilities (adopted 24 January 2007 A/RES/61/106).
[449] ibid art 12(4).
[450] [2014] EWCOP 4.
[451] ibid [38].

situation.'[452] *M and Mrs. N v Bury Clinical Commissioning Group*[453] concerned an application by N's daughter that it was in her mother's best interests to discontinue ANH. N had Multiple Sclerosis and degenerated to the extent that she was in MCS. N's family gave evidence that she was a feisty and determined individual who found it difficult to adjust to failing health. Her looks and appearance were important to her and she would have hated the thought of life with pain and the indignity of dependency.[454] She said when her parents were suffering from dementia 'if I ever get like that shoot me!'[455] Hayden J observed that the evidence helped him understand N's 'moral imperatives and the code by which she lived her life' and to 'create a clear and compelling impression of who Mrs. N is and what her values were'.[456] Hayden J decided it was in N's best interests to withdraw treatment as this was what N would have wanted.

Briggs v Briggs[457] concerned an application by Mr. Briggs's wife who argued it was in her husband's best interests to withdraw ANH. Mr. Briggs suffered a serious brain injury in a traffic accident that left him in a MCS. Charles J took an expansive view of best interests and emphasised the importance of ascertaining the patient's attitudes and applying those findings to the relevant circumstances of the decision.[458] Charles J held that the feelings of Brigg's family were important indicators of what the patient would have wanted as these were people whose interests the patient would likely have taken account. Evidence of Brigg's views was compelling to the extent that Charles was 'sure' he would not have consented to the continuation of treatment.[459]

Writing before *Briggs*, Huxtable expressed doubt that the law had realised an approach to best interests which fully embraces the views of individuals as opposed to an arbitrary attachment to preservation of life. Huxtable highlights that Hayden J's refusal in *Re N* to use a balance sheet to assess the interests in consideration

[452] *Sheffield Teaching Hospital NHS Trust v TH and TR* (n 450) [53].
[453] *W v M* (n 389).
[454] ibid.
[455] ibid at [50]–[61].
[456] ibid at [59].
[457] [2016] EWCOP 53.
[458] ibid [69].
[459] ibid [74].

makes it difficult to identify the factors which informed his decision. Huxtable argues that the fact the application was unopposed, the intrusive nature of the treatment, the lack of potential for improvement in her quality of life, her limited life expectancy and longevity of N's illness and the persistence of her wishes were likely to have played a significant part in the decision.[460]

The outcome in Briggs may address some of these concerns. Briggs' application was opposed, his life expectancy was 9–10 years and the case was heard just over 16 months after his accident which made it difficult to see how he would adjust to his condition or respond to treatment. Furthermore, unlike *Sheffield Teaching Hospital NHS Trust v TH and TR*[461] the absence of medical assessment under optimal circumstances did not prevent a decision.[462] However, Charles J reached his decision on the basis that he was sure that Briggs would have wanted treatment withdrawn.[463] Charles J did not state how sure the court needs to be about the patient's wishes in order to displace the strong presumption in favour of preservation of life[464] and, therefore, the possibility remains, in line with concerns expressed by Huxtable, that when there is less compelling and durable evidence the patient's wishes may not prevail.[465] Charles J emphasised that best interests will not always mean that patients' wishes prevail. For example, the patient's wishes would not prevail when the patient's history shows they have made damaging decisions and if they had capacity they would be likely to do so again.[466] Consequently, the decision does not support Coggon's ideal that an overall understanding of interests is informed by the patient's views which apply regardless of whether the decision is sensible or wise.[467]

Whilst sanctity/preservation of life proponents may argue that caution upholds the value of life it also leads to a lack of clarity which means people do not know whether their values will be

[460] Huxtable (n 416) 630–631.
[461] [2014] EWCOP 4 (n 450).
[462] *Briggs v Briggs* (n 457) overview [32].
[463] ibid [74] and [119].
[464] ibid [64] and [74].
[465] Huxtable (n 416) 631.
[466] ibid [60].
[467] Coggon (n 446) 413.

determinative should they lose capacity. Coggon argues disregarding patient values creates 'an illusionary distinction between patients who have and patients who lack capacity, and provides an undue licence then to disregard the patient's own values in order to assert the pre-eminence of some externally preferred value' such as sanctity of life.[468] Jackson argues the law must be compliant with CRPD Article 12(4)[469] and that the judiciary should be required to give primacy to the views of patients lacking capacity unless the decision would cause significant harm. Even when the decision would cause significant harm the patients views should prevail when the decision reflects their deeply held values.[470] The Law Commission has recommended that the MCA be reformed to explicitly require that the wishes and feelings of the patient are ascertained so far as reasonably possible and that 'particular weight' is given to them.[471] Jackson believes this is insufficient as it gives discretion to judges who have so far failed to identify the precise value which should be accorded to patients' wishes.[472] Consequently, Mullock's argument, that the law should not allow judges to choose autonomy or sanctity of life according to their preference but obligate them to respect autonomy is persuasive.[473]

Preservation of life, a continued role?

Preservation of life continues to play an important role when the wishes of a patient are not ascertainable. In *Abertawe Bro Morgannwg University LHB v RY*[474] Hayden J felt the question of whether treatment should be sustained was delicately 'poised between what can properly be described as "burdensome" and that which is "overly burdensome"', but as he was unable to ascertain the patient's view the balance tipped in favour of supporting life.[475]

[468] Coggon (n 446) 411.
[469] UN General Assembly (n 448).
[470] Jackson (n 437).
[471] Law Commission, *Mental Capacity and Deprivation of Liberty* (Law Com No 372, 2017) Recommendation 40.
[472] Jackson (n 437); *M v N* (n 389) [28]; *Briggs v Briggs* (n 457) [58] and [74].
[473] Mullock (n 393) 554.
[474] [2017] EWCOP 2 (n 404).
[475] ibid [55].

The case is a reminder that presumptive judgements cannot be made about the value of a patient's life without a clear indication of their views, such that except in the most compelling cases a presumption must be made in favour of preserving life.

The role of the court?

A live issue at this time is the question of whether decisions regarding the withdrawal of ANH from persons in PVS or MCS must be brought before the court.[476] For families there are significant emotional, practical and financial burdens associated with the need to obtain a court decision to allow the withdrawal of ANH. In addition, the delays associated with obtaining a court order means that some patients continue to obtain treatment despite such treatment being contrary to their best interests. This was considered and acknowledged in *M v A Hospital*[477] and *NHS Trust v Y*.[478] In *M v A*, M suffered from Huntington's disease and was in a MCS. Her family and treatment team believed it was not in her best interests to receive ANH.[479] M's mother applied to court to determine 'if required' that it was in M's best interests that ANH be withdrawn and she be allowed to die. The court following a full hearing decided that it was not in M's best interests that treatment be continued.[480] The court went on to consider whether there was a legal requirement that a decision to withdraw ANH required the involvement of the court where the decision was made in accordance with relevant professional guidance. It concluded that a decision about what was in M's best interests could be made by the treating doctors following consultation with the family. The involvement of the court of protection would continue to be appropriate in case where, for example, there was disagreement between the family and treatment team or other issues but these cases would be the exception rather

[476] Court of Protection Practice Direction 9E (Applications Relating to Serious Medical Treatment); *Airedale NHS Trust v Bland* (n 368) 805.
[477] [2017] EWCOP 19.
[478] [2017] EWHC 2866 (QB), [2017] MHLO 37.
[479] *M v A Hospital* (n 477).
[480] ibid.

than the rule.[481] However, as the issue was not central to the decision such comments can only be considered obiter remarks.

NHS Trust v Y concerned an application for a declaration that court proceedings are not mandatory in respect of a decision to withdraw ANH from a patient who has a prolonged disorder of consciousness in circumstances where the clinical team and the patient's family agreed treatment is not in the patient's best interests.[482] The court granted the declaration on the basis there is no rule of principle or binding authority which requires all cases concerning the withdrawal of ANH from a person who lacks capacity be sanctioned by the court.[483] Where the clinicians have followed the MCA and good medical practice and there is no dispute with the family of the patient or others interested in his welfare, and no other doubts or concerns have been identified, there is no requirement to bring the matter before the court.[484] The declaration was resisted by the Official Solicitor as Mr Y's litigation friend. The matter was referred to the Supreme Court and the appeal was heard on 26th and 27th February 2018.[485] The judgment has been deferred but it is hoped that the decision will bring much needed clarity to the law. By removing the requirement to bring court proceeding in respect of a decision to withdraw ANH the Supreme Court has the opportunity to further endorse the pivotal role the family plays in informing best interest decisions which place the patient at the heart of the issues.

Conclusion

Decisions allowing treatment withdrawal from MCS patients in accordance with patients' wishes should not be feared as an abandonment of the sacred principle of protection of life. Rather these decisions should be seen as progress towards ensuring that a lack of capacity does not, as Jackson J observed, become an 'off

[481] *M v A Hospital* (n 477) [37].
[482] [2017] EWHC 2866 (QB), [2017] MHLO 37 (n 478).
[483] ibid [51].
[484] ibid [52].
[485] The Supreme Court, '*An NHS Trust (Respondent) v Y (By His Litigation Friend, The Official Solicitor) and Another (Appellant)* – The Supreme Court' (Supremecourt.uk, 2018) <https://www.supremecourt.uk/cases/uksc-2017-0202.html> accessed 11 June 2018.

switch' for respect of patient's values and beliefs.[486] Jackson's suggestion for law reform which would require the judiciary to give primacy to the deeply held values and views of patients lacking capacity even where their decision would cause significant harm[487] would help improve legal clarity and assist grieving families to make decisions for their loved ones. In addition, clarification that there is no requirement that court proceeding must be brought in respect of decisions for withdrawal of ANH in circumstances where the patient's family and treatment team agree treatment withdrawal is in the patients' best interests will help ensure the law and legal processes support families' in their efforts to allow their loved ones to die with peace and dignity.[488]

[486] *Wye Valley NHS Trust v B* (n 367) [11].
[487] Jackson (n 437).
[488] Celia Kitzinger and Jenny Kitzinger, 'Court applications for withdrawal of artificial nutrition and hydration from patients in a permanent vegetative state: family experiences' (2016) 42 Journal of Medical Ethics 11, 13–14.

When designing laws, should a decent legal system dismiss the consideration of all differences in treatment based on colour, while considering particular differences pertaining to class and sex?

Arun Muralikrishnan[489]

A seminal question for contemporary legal systems to consider is whether their laws should treat individuals of certain demographics differently from those belonging to others by considering the objective differences of these demographics. This paper explores the rationale for whether a decent legal system, when legislating, ought to dismiss the consideration of all differences based on three demographics; class, colour and sex. This area holds importance for the legal landscape because, for legislatures to appropriately govern a population, it is crucial that they design laws by only accounting for relevant factors. This paper differentiates itself from similar literature by focusing on a 'decent' rather than a 'basic' legal system. Firstly, this paper clarifies what characterises a 'decent' legal system. Next, by analysing each demographic, this paper explores whether this system should aim to remove all differences founded on the three demographics. It is found that this system should eliminate all colour-based discriminatory treatment, whilst retaining some scope, where justifiable, for class and sex-based discrimination. By demonstrating the resulting negative implications where all class and sex-based differences are removed, this paper seeks to fill a gap in related literature by portraying why it is important that this system only removes all colour-based differences from its consideration when legislating. This is because, unlike the unique differences inherent within class and sex, which have some relevance to warrant differential legal treatment, colour classification merely concerns skin pigmentation, which lacks any meaningful relevance towards the conduct of individuals governed by a 'decent' legal system.

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I. Introduction

The past century has presented an increasing trend of many jurisdictions introducing anti-discrimination legislation to counter unfair treatment based on particular characteristics of individuals or groups. This essay will support the thesis that, although a just legal system can be promoted by removing the majority of discrimination based on colour, a system aspiring to provide adequate levels of justice should not aim to completely eliminate discrimination based on sex and class. Rather, it ought to consider certain differences concerning these demographics that call for special treatment by the law. The body of this work will first elucidate the purpose and aims that distinguish a decent legal system from its basic format. The majority of this literature will then examine whether a 'decent' system aims to remove all forms of discrimination concerning the class, colour or sex of an individual, by scrutinising each attribute separately.

II. The purpose of a decent legal system

The 'legal system' continues to emanate as a complex concept to academically define, with no universally accepted definition concerning how states are governed.[490] Recognised theories include Austin's command theory,[491] Kelsen's focus on the grundnorm,[492] and Hart's theory of primary and secondary rules.[493] Nonetheless, academics have found legal systems to demand particularly wide constitutional frameworks concerning their structure and purposive aims.[494] Acknowledging this, a said system cannot be classified as 'legal' unless its constitution prescribes a well-defined group of intelligible subsystems that display an authoritative structure

[490] Lawrence M Friedman, *The Legal System: A Social Science Perspective* (Russell Sage Foundation 1975) 1.
[491] John Austin, *Lectures on Jurisprudence or, The Philosophy of Positive Law*, vol 1 (Robert Campbell ed, 5th edn, The Lawbook Exchange Ltd 2005) 88–90.
[492] Hans Kelsen, *Pure Theory of Law* (Max Knight tr, University of California Press 1967) 8–10.
[493] Herbert Lionel Adolphus Hart, *The Concept of Law* (Joseph Raz and Penelope Bulloch eds, 3rd edn, Oxford University Press 2012) 81.
[494] Roger J R Levesque, *Adolescence, Discrimination, and the Law* (New York University Press 2015) 197.

providing an understanding of state behaviour.[495] Therefore, a basic legal system must present its functions as transparent to those it governs.[496] This matters because for a basic system to successfully regulate social behaviour, where law embodies 'the enterprise of subjecting human conduct to the governance of rules,' an adequate scheme of enforcing said rules is imperative.[497]

It is submitted that, by adequately accounting for social, political and economic factors when its subsystems discharge their functions, a 'decent' legal system should be distinguished from its 'basic' counterpart. By accounting for these *ab extra* legislative influences, the 'complex unity'[498] of a legal framework, involving the synergistic relationship of its subsystems and the need to protect the population it governs, is furthered in a manner whereby the legal system embodies a social product.[499] Returning to the previously mentioned claim, this paper contends that it must be ensured all constituent parts of this system, such as the judiciary and legislature, demonstrate a significant, but not absolute, removal of discriminatory treatment where this is relevant to achieve the aim of promoting a sense of equality under the law for individuals. This is important because a decent legal system pursuing such a laudable aim allows for the provision of justice throughout all of its institutions to maintain its meaning as being fairly accessible to all.[500] Certainly, as Levesque maintains, a legal system that focuses on shaping its institutions to promote policies of equality, reduces any difficulty in encouraging the collective values of society, and hence 'appropriate responses to discrimination require not less but more legal involvement.'[501] Considering this, the issue of whether a decent legal framework should aim to remove all discriminatory treatment founded on class, colour and sex, requires consideration.

[495] Friedman (n 490) 10–11.
[496] Levesque (n 494).
[497] Lon Fuller, *The Morality of Law* (rev edn, Yale University Press 1977) 124.
[498] Julius Stone, *Legal System and Lawyers' Reasoning* (Stanford University Press 1964).
[499] Friedman (n 490) 1–2.
[500] John M Kelly, 'Audi Alteram Partem' (1964) 9 Natural Law Forum 103.
[501] Levesque (n 494) 243.

III. Defining class, colour and sex

Before this point at issue can be addressed, the three topics of focus require clarification. Firstly, the notion of sex is often confused with the notion of 'gender' despite their different meanings. Polster elucidates that sex refers to the biological characteristics at birth that society consider when classifying one as either male or female. Such attributes include specific pairs of sex chromosomes, sex hormones and external genitalia.[502] In contrast, 'gender' is a complex social construct referring to factors typically associated with being male or female; as such a person's 'gender identity' does not necessarily need to correspond with their sex.[503] Therefore, due to its greater accuracy, the definition propounded by Polster shall be adopted for this essay. Secondly, the term 'colour' is often used interchangeably with 'ethnicity' notwithstanding their separate definitions. The former refers to the biologically determined characteristic of skin pigmentation, whilst the latter is a social construct that characterises a group through some sense of collective identity by mixing variables, such as birthplace and skin colour.[504] In support of academic opinion, this paper will follow the position that the two should not be synonymously used.[505] Finally, as 'class' is a less contentious topic, this work will utilise its recognised meaning as referring to a hierarchy of status based on factors such as accumulation of wealth.

IV. Removing all sex related differences

Discrimination generally encompasses two forms; disparate treatment (direct) and disparate impact (indirect). In relation to sex, the former exhibits unequal treatment based directly on sex. The latter is where one party creates a situation that obliquely discriminates based on another's sex, and this cannot be legitimately

[502] Heike Polster, 'Gender Identity As a New Prohibited Ground of Discrimination' (2003) 1 New Zealand Journal of Public and International Law 157, 158–159.
[503] *Dobre v Amtrak*, 850 F Supp 284 (ED Pa 1993) 286.
[504] Kwame J McKenzie and Natasha S Crowcroft, 'Race, ethnicity, culture and science' (1994) 309 (6950) British Medical Journal 286, 287.
[505] Peter A Senior and Raj Bhopal, 'Ethnicity as a variable in epidemiological research' (1994) 309 (6950) British Medical Journal 327.

explained by the other party when given the opportunity to justify their decisions.[506] Recently, two Advocate Generals have demonstrated conflicting opinions regarding whether direct sex discrimination is justifiable. For instance, in his joined opinion concerning several cases, Advocate General Van Gerven suggested some scope for justification when founded on appropriate objective differences that 'bear an actual connection with the subject of the rules entailing unequal treatment.'[507] In contrast, Advocate General Colomer rejected this possibility in *Pedersen v others*.[508] Considering this, introducing an objective justification defence to direct sex discrimination may be undesirable as this undermines the reasoning for distinguishing the two types by allowing indirect discrimination to be justifiable where proven. Thus, removing this distinction eradicates the framework preventing sex-based stereotyping of individuals.[509] Maintaining this scheme arguably follows the public interest to an extent, as each individual has equal protection under the law against 'morally abhorrent' discrimination.[510] Accordingly, this egalitarian argument states that decent legal systems aim to entirely remove sex-based differential treatment; creating an equal environment allowing all individuals with proportionate entitlement to services.

Despite any merits of this system, this article considers that removing all sex-related differences hinders the practical success of a decent legal system. This is imperative because doing so would pursue an ideology discounting important unique differences inherent within the two sexes that are socially relevant, such as in employment. For instance, men may be superior in heavy-lifting

[506] Samuel R Lucas, *Theorizing Discrimination in an Era of Contested Prejudice* (Temple University Press 2008) 89.

[507] Joined Opinion of Advocate General Van Gerven delivered on 28 April 1993, *Michael Moroni v Collo GmbH*, Case C-109/91, *David Neath v Hugh Steeper Ltd*, Case C-110/91, *Coloroll Pension Trustees Ltd v James Richard Russell and others*, Case C-152/91 and *Gerardus Cornelis Ten Oever v Stichting Bedrijfspensioenfonds voor het Glazenwassers-en Schoonmaakbedrijf*, Case C-200/91, EU:C:1993:158, para 36.

[508] Opinion of Advocate General Colomer delivered on 10 July 1997, *Høj Pedersen and others*, C-66/96, EU:C:1997:354, para 44.

[509] Bob Hepple, 'Can direct discrimination be justified?' [1994] Equal Opportunities Review 48.

[510] Catherine Barnard, 'Gender and commercial discrimination' in Janet Dine and Bob Watt (eds), *Discrimination Law: Concepts, Limitations and Justifications* (Longman 1996) 76.

roles compared to women because their sex allows a higher average quantity of the strength-contributing hormone, testosterone. Conversely, only women are capable of pregnancy and require longer leave from work to physically recover post-pregnancy, unlike their male partners. This brings to light Kantian concerns of treating others always as an end in themselves and never only as a means, which can distinguish equal treatment from the more desirable model of treatment as an equal.[511] Essentially, this asserts that each individual possesses equal moral worth that demands respect by others and cannot relate solely to physical traits such as sex to be used merely to reach an end goal.[512] Consider this; two individuals, one who has fully functioning walking capabilities whilst the other relies on the use of two crutches to walk. If only two crutches were available for a third party to distribute, equal treatment would provide both individuals with one crutch each as this model treats each person only as means. Alternatively, treating the two as equals requires that the latter individual receives both crutches from the third party because this formulation of equality accounts for the differences between the individuals that generate their respective needs. Hence, both are treated as ends in themselves.[513]

Considering this, this paper supports the demand for justifying direct sex-related discrimination, in limited circumstances where said differences are sufficiently relevant to warrant differential treatment. Moran illustrates an interesting example of a rape crisis centre whereby only female counsellors are employed to support traumatised female victims.[514] This example is founded on instances where if records suggest female counsellors are significantly more effective than their male counterparts in this field, discriminatory employment based on sex may be justified where this maximises the output of the centre to achieve its aims. Therefore, this essay agrees with Minow's 'dilemma of difference' assertion

[511] Immanuel Kant, *Groundwork for the metaphysics of morals* (Allen W Wood tr, Yale University Press 2002) 43.
[512] Bernard Williams, 'The idea of equality' in Peter Laslett and Walter Garrison Runciman, *Philosophy, Politics and Society* (Blackwell 1972) 116.
[513] Elena Moran, 'Justifying Direct Discrimination: An Analysis of the scope for a General Justification Defence in cases of Direct Sex Discrimination' (PhD Thesis, University of London 2000) 23.
[514] ibid 162.

because this suggests where a decent legal system aims to ensure equality by neutrally considering the significance of unique sex-related differences, the respect demanded by an individual's moral worth is undermined; creating a society whereby its legal system limits potential discernment.[515] On this basis, this paper propounds that a 'decent' legal system cannot aim to ignore the consideration of all sex-based differences of those it governs.

V. Removing all colour related differences

Conceivably, there may be instances where a decent legal system should allow treatment based on colour differences; a justification based on Millian concerns of liberty, recognising that protecting individual liberty is valuable for allowing discernment within society. Mill's harm principle suggests individuals may potentially discriminate against others based on colour where this only harms themselves.[516] For instance, if a luxury restaurant only permits black customers, and a similar yet unrestricted restaurant exists next door, this may not restrain a white individual significantly as the equal alternative is available, whilst notably harming the former restaurant which loses on potential income. Despite this, Mill's harm principle fails to clarify the instances where an individual can be said to not 'harm' others.[517] This failure is concerning because where only one local luxury restaurant exists, the interests of the white population may be infringed by denying them the right to dine at this location. Therefore, it is submitted that perhaps Mill's principle is too narrow to identify harm, meaning the law should intervene to expand this concept to expound where treatment based on colour differences is inappropriate.

Unlike the potential justification of sex discrimination where circumstantially relevant, disparate treatment based on colour has limited justification scope. *Prima facie*, two individuals with identical qualifications and suitable personalities for a role are no

[515] Martha Minow, *Making all the Difference: Inclusion, Exclusion and American law* (Cornell University Press 1990) 20.
[516] John Stuart Mill, *On Liberty* (4th edn, Longmans, Green, Reader and Dyer 1869) 21–22.
[517] Bernard E Harcourt, 'The Collapse of the Harm Principle' (1999) 90(1) Journal of Criminal Law and Criminology 109, 113–115.

different in terms of appropriateness for a position, bar for their different pigmentations. It therefore could be misplaced for a decent legal system to allow employers to recruit candidates solely because they prefer one skin colour over another. Accordingly, this paper agrees with Levesque's contention that a colorblind legal system can best achieve equality by preventing unfair racial treatment. In support of his notion, this work considers positive discrimination as an ineffective measure of circumventing ethnic differences, particularly as it limits employers from selecting candidates with preferred qualifications.[518] To employ a less qualified woman of black colour over another exceptionally skilled individual, purely to fill a racial employment quota, is an absurd rationale that ultimately conflicts with an employer's best interests. Moreover, affirmative action models are based on generalisations that classify particular ethnic groups as disadvantaged compared to stereotypically advantaged groups.[519] A recent study regarding affirmative action admission policy into elite universities exemplifies this; provided a 1500 SAT score is satisfied, a black American's score is equal to 230 additional points compared to a white American.[520]

Considering this, this essay agrees with the landmark decision of *Regents of the University of California v Bakke*, which ruled admissions policies based on specific racial quotas as unconstitutional because it would be tokenistic to permit individuals into elite universities purely based on their different colour from other candidates.[521] This is far-reaching because such a quota may dishearten racial groups by suggesting their admission was based on their colour being classified as underprivileged, rather than solely on their merit.[522] As a physical characteristic that cannot be changed, baring no real relevance to university study, it would be unfair to reversely discriminate against white students who had no control over their pigmentation that society regards as more privileged than

[518] Levesque (n 494) at 237.
[519] Patricia Gurin, *Defending Diversity: Affirmative Action at the University of Michigan* (University of Michigan Press 2004) 168.
[520] Thomas J Espenshade and Chang Y Chung, 'The Opportunity Cost of Admission Preferences at Elite Universities' (2003) 86(2) Social Science Quarterly 293.
[521] 438 US 265 (1978).
[522] Steven Cahn, *Affirmative Action and the University: A Philosophical Inquiry* (Temple University Press 1995) 125.

others. However, this article concedes that where race-conscious admissions policies for elite courses may possibly favour representation of individuals from underrepresented ethnic groups, yet account for other factors equally for all individuals, this is justifiable as colour emanates as one variable.[523] Therefore, it is argued that a decent legal system should aim to remove all differences based on colour, so that more important characteristics, such as merit, are used as guiding principles within social provisions, such as in employment and higher education admissions.

VI. Removing all class differences

To some degree, a decent legal system should not remove all class-based differences as this undermines their social significance. The rationale behind the income taxation system conveys this; where legal systems impose a universal tax rate of £600 regardless of income, if X is only paid £1000 a month while Y receives £3000, it would be unfair for X to remain with a miniscule £400 compared to Y's substantial residual funds. Such residual funds could allow for greater capital to be generated by the state through imposing a proportionate taxation system that accounts for wealth. This is important because wealth determines social class, hence legal systems enforcing a taxation scheme that ignore these socioeconomic differences between classes would indeed be morally objectionable. It is possible that the higher class may be indirectly discriminated against by income-proportionate taxation systems, however such a notion is unsound as this procedure enforces the same rate on the total income of individuals within the same band. Considering this, a decent legal system should not aim to remove all differences in class.

To a greater extent, however, this paper contends that a decent legal system should aim to remove most class-related differences. This relates to Rawls' natural law theory, which attempts to define the general theory of natural justice.[524] Firstly, *audi alteram partem* (the rule of fair hearing) is undermined by

[523] *Grutter v Bollinger*, 539 US 306 (2003).
[524] John Rawls, *A Theory of Justice* (rev edn, Harvard University Press 2009).

class differences enabling higher classes to afford legal services, whilst studies convey that lower classes tend to avoid pursuing legal claims because they cannot afford legal representation to seek a fair hearing.[525] This contradicts not only the difference principle within Rawls' equality doctrine, which states that socioeconomic inequalities should be arranged so that the less advantaged receive the greatest benefit, but also the liberty principle whereby no individual has greater liberty than others.[526] Considering this, decent legal systems should enable lower class individuals to receive legal representation where they cannot afford its substantial costs, as overlooking this class-based difference permits only the affluent population to obtain effective testimony.

Moreover, entrance into grammar schools exemplifies another instance where class differences allow an unfair advantage to higher classes. As acceptance requires the passing of admissions tests, academic opinion suggests lower income students underperform because their parents cannot afford the tutoring services crucial for acquiring sufficient marks.[527] As grammar schools would typically possess superior educational resources than state schools, a decent legal system should aim to remove this class disparity to promote Rawls' notion of fair equality of opportunity. This, however, should not apply to private school admission as this is based on payment by only those who can afford its substantial fees, unlike grammar schools. Therefore, by considering Rawls' natural law theory, it is submitted that a decent legal system should aim to remove most class-related differences where this would undermine natural justice, yet also strike a balance for where it should not intervene in removing said differences.

[525] Rebecca L Sandefur, 'Access to Civil Justice and Race, Class, and Gender Inequality [2008] 34 Annual Review of Sociology 339, 346–349.
[526] Rawls (n 524) 11.
[527] Wilfred Carr and John Quicke, 'An Impossible Dream?: Comprehensive Principles and the Politics of Inequality in British Education' (1990) 48 (187) Spanish Journal of Pedagogy 429, 431.

VII. Conclusion

This paper has expounded that decent legal systems should only aim to remove all unfair treatment based on colour. This matters because said differences should bear no significant weight on provisions of decent legal systems. Conversely, it is submitted that removing all sex and class differences is a less successful argument. Rather, decent legal systems should aspire to remove *most* instances of sex and class discrimination. This notion is important because the diversity stemming from these characteristics convey compelling social importance; for a 'decent' legal system to discard this undermines their function of separating classes and sexes to begin with. To conclude, it is integral that a modern legal system, which aspires to adequately discharge its law-making functions, is able to identify where it is admissible to remove differences based on class, colour and sex when pursuing its ultimate purpose of effectively regulating community behaviour.

Resource allocation in healthcare: should people be penalised for contributing to their own health conditions?

Natalie Richardson[528]

This paper argues that patients who have contributed to their own adverse health state should not be penalised when it comes to allocation of resources in healthcare, as this approach is neither ethically justifiable in principle, nor capable of ethical implementation in practice. This approach appeals to the principle of egalitarian justice, which on the idea that inequality should be reduced as far as possible. Cohen and Le Grand argue that only disadvantage arising from factors beyond a patient's control is inequitable, therefore society is not obliged to compensate for disparities which result from an individual's voluntary choices. However, this paper argues that penalising those who have contributed to their own adverse health is not ethically justifiable according to the principle of egalitarian justice, because it does not provide a fair or effective way to hold people accountable for their health, or to reduce overall health and social care costs. Furthermore, even if this approach could be ethically justified, it is argued that a system of prioritisation or taxation which penalises people for contributing to their own ill health could not be effectively implemented in a fair and consistent way. Consequently, healthcare resources must be allocated according to a different set of principles for distribution to be considered just and fair.

I. Introduction

There is a general perception among healthcare professionals that the main, or even only, morally relevant factor in healthcare resource allocation is patient need.[529] However, in many areas of healthcare, resources are extremely limited[530] and there are simply not enough available to offer help to everyone who needs it.[531] This

[528] LL.M. Healthcare Ethics and Law Candidate, The University of Manchester, School of Law.
[529] Richard Cookson and Paul Dolan, 'Principles of justice in healthcare rationing' (2000) 26 Journal of Medical Ethics 323, 324.
[530] Ralph Shackman, 'Surgeon's Point of View' (1967) 1 British Medical Journal 623.
[531] Christopher Newdick, *Who Should We Treat? Rights, Rationing and Resources in the NHS* (2nd edn, Oxford University Press 2005) 5.

paper will consider whether the contribution patients make to their own adverse health state should be a morally relevant factor in the context of healthcare allocation.[532]

The idea of penalising those who contribute to their own adverse health state appeals to the principle of egalitarian justice, as it provides a method of addressing perceived inequalities within healthcare allocation.[533] Egalitarian justice is the principle that inequality should be reduced as far as possible,[534] e.g. that those disadvantaged by falling ill should have access to treatment in order to make up for this inequality.[535] Cohen and Le Grand argue that only disadvantage arising from factors beyond a patient's control is inequitable,[536] therefore society is not obliged to compensate for disparities which result from an individual's voluntary choices.[537] This appeals to the intuitive perception that individuals should be held accountable for their actions.[538] This paper will question whether justification and implementation of a system based on penalising these people can really comply with principles of egalitarian justice.

It should be noted that not all patients who are placed at a lower priority when healthcare resources are allocated, are necessarily being 'punished' or 'penalised'. Prioritisation must exist in some sense, due to the limited resources within the NHS,[539] and will not always amount to punishment where the resource allocation procedures are fair and consistent.[540] However, this paper will argue that prioritising based on a patient's contribution to their own adverse health state does amount to penalisation in cases where it is

[532] Ranaan Gillon, 'On giving preference to prior volunteers when allocating organs for transplantation' (1995) 21(4) Journal of Medical Ethics 195, 196.
[533] Cookson (n 529) 324.
[534] GA Cohen, 'On the currency of egalitarian justice' (1989) 99(4) Ethics 908.
[535] Dereck Parfit, *Equality or Priority?* (University of Kansas, 1991) (30th Lindley Lecture, University of Kansas 21 November 1991) <https://kuscholarworks.ku.edu/handle/1808/12405> accessed 16 December 2016, 2–4.
[536] Julian LeGrand, *Equity and Choice: An Essay in Economics and Applied Philosophy* (Harper Collins 1981) 113.
[537] Cohen (n 534) 914.
[538] AW Cappelen and OF Norheim, 'Responsibility in health care: a liberal egalitarian approach' (2005) 31 Journal of Medical Ethics 476, 478.
[539] Newdick (n 531) 623.
[540] James Childress, 'Who shall live when not all can live?' (1970) 53(4) Soundings: An Interdisciplinary Journal 339, 347, 340.

not directly linked treatment outcomes.[541] For example, if an alcoholic is placed at lower priority for treatment of liver disease because of their own contribution to their condition, but there is no evidence that this factor will reduce their capacity to benefit from treatment, this person is 'penalised'.[542]

Section 2.0 will cover the two key justifications advanced for including a patient's contribution to their own ill-health as a morally relevant factor in resource allocation. Firstly, the principle that it is right to hold people accountable for their choices which contribute to their adverse health state, will be considered.[543] This is a 'backward-looking' argument, based on the principle that the freedom to make choices also carries responsibility.[544] Secondly, consequentialist, or 'forward-looking' arguments will be considered.[545] These arguments are based on the idea that penalising patients for contributing to their own ill-health is an effective way to reduce healthcare costs and conserve resources. Closer evaluation of each of these claims shows that they are based on questionable assertions and, despite their intuitive appeal,[546] they do not fit with egalitarian principles of justice or fairness. Consequently, this paper will argue that penalising patients who have contributed to their own adverse health state cannot be ethically justified.

Furthermore, even if this principle could be ethically justified, can it be implemented 'consistently and fairly' in order to comply with principles of egalitarian justice?[547] The two main options for implementation will be considered in Section 3.0. Firstly, when prioritising access to healthcare, patients whose illness is in some way self-inflicted are placed at a lower priority. Alternatively, people who take part in activities which adversely affect their health are forced to pay an additional contribution to the healthcare budget to make up for the additional financial burden they place on the

[541] Roger Higgs, 'Human frailty should not be penalised' (1993) 306(6884) BMJ 1049.
[542] ibid.
[543] Cappelen and Norheim (n 538) 478.
[544] ibid 476.
[545] ibid.
[546] Gerald Dworkin, 'Taking Risks, Assessing Responsibility' (1981) 11(5) The Hastings Center Report 26, 31.
[547] Hugh V McLachlan, 'Smokers, virgins, equity and health care costs' (1995) 21(4) Journal of Medical Ethics 209, 211.

system.[548] Both approaches face significant difficulties in fair and consistent application of the principle that patients should be penalised for contributing to their adverse health state. Consequently, it is not realistically possible to implement either system in an ethical way.

Overall, penalising patients who have contributed to their own adverse health state when it comes to health resources is neither ethically justifiable in principle, nor capable of ethical implementation in practice. Consequently, healthcare resources must be allocated according to a different set of principles, for distribution to be considered just and fair.

II. Ethical Justifications

(i) Patient Accountability

One of the main justifications for penalising those who contribute to their own adverse health state, is that patients should be held accountable for their actions.[549] Le Grand and Cohen argue that, according to the principle of egalitarian justice, it would be fair to hold someone accountable if they have voluntarily chosen to pursue an activity which is known to cause adverse health consequences.[550] Consequently, penalising people who suffer adverse health consequences through no fault of their own would be unjust.[551] Le Grand argues that despite difficulties defining the degree to which individuals are responsible for their actions, most people agree that individuals have some degree of control over their health.[552] This paper will seek to show that the principle of penalising patients for contributing to their adverse health state is not compatible with the principle of egalitarian justice.

The argument that patients should be held accountable for their decisions relies on two problematic assertions. Firstly, that the relevant actions of patients are voluntary, and secondly that they

[548] LeGrand (n 536) 120.
[549] John Harris, 'Could we hold people responsible for their own adverse health state?' (1995) 12 Journal of Contemporary Health Law and Policy 147, 151–152.
[550] Cohen (n 534) 912–914; Le Grand (n 536) 120.
[551] Cohen (n 534) 912–914.
[552] Le Grand (n 536) 117.

directly cause the adverse health state.[553] Although this applies to intuitive ideas of justice, however when considered further these underlying assumptions are weaker and less convincing than they first appear.[554]

(a) Voluntariness

The assertion that the choices people make regarding their health are voluntary is difficult to defend. For example, there are huge 'internal and external' pressures on people to smoke,[555] and it is not plausible to view this choice independently of socio-economic factors.[556] In many ways, smokers can be described as victims of social pressure, therefore imposing responsibility in this way could amount to 'victim-blaming'.[557] As established by Cohen and Le Grand, it is unfair and unjust to hold people responsible for factors beyond their control.[558]

Furthermore, while the NHS provides many quitting services, smoking is addictive and therefore by its nature difficult to give up.[559] It must be accepted that medical profession does not have a faultless 'cure' for smoking addiction and, despite the best efforts of healthcare professionals, some individuals remain unable to quit.[560] Similarly, obesity and people's diets are heavily influenced by socio-economic factors, as well as voluntary choice.[561] Characterising smoking and obesity as simply the product of voluntary choice allows policy makers to avoid addressing underlying socio-economic factors, and issues of access to adequate

[553] McLachlan (n 547) 210.
[554] Dworkin (n 546) 31.
[555] Higgs (n 541) 1050.
[556] Richard Cookson and Paul Dolan, 'Public views on health care rationing: a group discussion study' (1999) 49(1–2) Health Policy 63.
[557] Harald Schmidt, 'Patients' charters and health responsibilities' (2007) 335(7631) BMJ 1187, 1188.
[558] Cohen (n 534) 911; Le Grand (n 536) 116.
[559] Matthew Shiu, 'Refusing to treat smokers is unethical and a dangerous precedent' (1993) 306(6884) BMJ 1048, 1048.
[560] ibid.
[561] Sabine Kleinert and Richard Horton, 'Rethinking and reframing obesity' (2015) 385(9985) The Lanxet, 2326.

treatment and support services.[562] Consequently, penalising patients for the adverse health effects of these behaviours is not defensible. Much of the literature on this subject has traditionally focussed on smoking.[563] Over the last few decades, the proportion of smokers in the UK has steadily declined, while the proportion of smokers successfully quitting has continued to increase.[564] It is therefore easier for the medical profession to view smoking as voluntary and unnecessary; something 'deviant' that others do.[565] However, many other common behaviours can have serious detrimental effects on our health, including behaviour which is more difficult to classify as 'deviant' such as overworking, extreme sports and choosing to live in polluted areas.[566]

To be just and fair, a system which penalises people for their contribution to their adverse health must apply consistently to all such actions.[567] If we accept the egalitarian principles above, we must apply them to all behaviour resulting from voluntary choice.[568] According to this logic, a newly qualified doctor who moves to an inner-city hospital to pursue a stressful career of long-hours, which allows little time for healthy eating and sufficient exercise, should be penalised for these choices as they are likely to lead to adverse health consequences. Furthermore, people who engage in extreme sports must also face the same penalties, even this behaviour is not generally considered 'unhealthy' in the same way as smoking or lack of exercise.[569] This highlights the need for objectivity here, rather than reliance on perceived 'healthy' versus 'unhealthy' behaviours.

Dworkin highlights that the concept of holding people accountable for their health is 'ambiguous', as it is a responsibility

[562] Ronald Bayer, 'Introduction: Voluntary Health Risks and Public Policy' (1981) 11(5) The Hastings Center Report 26.
[563] Cappelen and Norheim (n 538) 476–477; Le Grand (n 536); McLachlan (n 547) 209–210.
[564] Office for National Statistics (ONS), 'Statistical Bulletin: Adult smoking habits in the UK: 2016' (ONS, 15 June 2017) <https://www.ons.gov.uk/peoplepopulationandcommunity/healthandsocialcare/healthandlifeexpectancies/bulletins/adultsmokinghabitsingreatbritain/2016> accessed 1 May 2018.
[565] Higgs (n 541) 1050.
[566] Harris (n 549) 151–152.
[567] McLachlan (n 547) 211.
[568] Cohen (n 534) 911–914.
[569] Harris (n 549) 151; McLachlan (n 547) 211.

imposed on people involuntarily, by virtue of them being human, and its limits are not clearly defined.[570] For instance, it is not clear whether a person is obliged to leave their home if they live with a smoker, or to move somewhere healthier if they live in a polluted city.[571] In reality, many decisions people make, including where they live, who they live with, and the nature of their job, can contribute to ill-health.[572] Harris argues that if we apply this principle consistently, everyone must be penalised to some degree as we are all 'guilty' of something.[573] Establishing culpability requires a judgment to be made on some of the most personal choices people make.[574] It is far from clear that this is an appropriate role for the health system to undertake.[575] Furthermore, separating voluntary and involuntary factors behind these decisions is more complex than it initially appears.[576]

This shows that the intuitive appeal to the 'fairness' of holding people accountable for their decisions is not well founded, as it relies on being able to show that all relevant activities which contribute to ill-health are voluntary. In reality, this is very difficult to do reliably and consistently, which leaves opportunity for prejudice and discrimination within the system.

(b) Causal Link

According to principles of egalitarian justice, it would be unjust to penalise people unless a causal link can be established between their actions and adverse health consequences.[577] There are two main issues which highlight the complexity of this requirement. Firstly, ill-health is influenced by many different factors, including genetics and environmental factors.[578] For example, if an obese person develops heart disease, this is not enough to show a causal link, as other factors may have an equally significant impact on whether an

[570] Dworkin (n 546) 26.
[571] ibid 29.
[572] Harris (n 549) 151.
[573] ibid.
[574] Dworkin (n 546) 29–30.
[575] Newdick (n 531) 11.
[576] McLachlan (n 547) 211–212.
[577] Cappelen and Norheim (n 538) 477–478.
[578] ibid 477.

individual develops this, including genetics and environmental factors such as stress.[579] To assign responsibility for adverse health fairly, the relative causal role of voluntary and non-voluntary factors must be established.[580]

Secondly, Cappelen and Norheim argue that one of the main concerns of egalitarian justice is the elimination of the influence of 'brute luck', but they acknowledge that luck plays a huge part in whether the person develops adverse health consequences.[581] For example, only about 20% of smokers develop lung cancer,[582] therefore penalising smokers by making them a low priority for treatment if they develop the condition does not seem an equitable solution.[583] This highlights the influence of other factors, and flaws in a system which penalises those who contribute to their ill-health by lowering their priority in access to treatment.

Le Grand and Cappelen and Norheim propose that this issue can be solved by introducing a system based on taxation for the choice itself, rather than the consequences.[584] Under this system, everyone taking risks with their health would pay additional tax, which could be used to finance the treatment of those unlucky enough to suffer ill-health from the activity.[585] While this issue has potential to overcome the influence of 'brute luck' in this scenario,[586] the fact remains that in order to characterise an activity or choice as risky in the first place, a causal link of some degree must be established between the choice and the relevant health consequences.[587] While the UK already has high taxation on products such as alcohol, tobacco, and now sugary drinks, these taxes aim to deter people from these activities, rather than primarily as a means to fund resultant medical treatment.[588] However, to justify taxation as a means of holding people to account for the cost of their own healthcare, this must apply consistently to all activities which are detrimental to

[579] Dworkin (n 546) 31.
[580] ibid.
[581] Cappelen & Norheim (n 538) 478.
[582] Le Grand (n 536) 120.
[583] ibid.
[584] ibid 120–123; Cappelen & Norheim (n 538) 479.
[585] Le Grand (n 536) 123.
[586] Cappelen & Norheim (n 538) 479.
[587] ibid.
[588] ibid 477.

one's health.[589] Furthermore, there must be a clear causal link between the activity and increased cost to the NHS, not just adverse health consequences.[590] Therefore, it must be possible to distinguish the relevant voluntary factor from other non-voluntary factors,[591] in order to show the extent to which it increases health risks, and therefore the extent to which individuals should be penalised financially for undertaking this activity. Further practical issues raised by this proposal will be addressed in more detail in Section 3.2.

Overall, the argument that people should be held responsible for contributing to their own adverse health state is not compelling, as it relies on weak assertions that these actions are voluntary and that a simple causal link can reliably be established. Section 2.2 will move on to consider consequentialist justifications for penalising individuals who contribute to their own adverse health state.

(ii) Deterrence & Lack of Resources

(a) Deterrence

Another justification for holding people accountable for contributing to their own adverse health state is that this will deter people from pursuing unhealthy habits. However, it cannot be assumed that this is an effective way to improve people's health. Harris highlights that people choosing to partake in activities which are known to be harmful to their health already face a huge deterrent; the risk that they may develop a serious illness.[592] Since this serious risk is not a sufficient deterrent for many people, it seems illogical to assume that lowering healthcare priority in these situations would inevitably be effective.[593]

Furthermore, this assertion relies too heavily on the assumption that the choices people make about their health are voluntary. For example, the West Virginia Medicaid programme was reformed in 2007 to encourage patients to take greater responsibility for their

[589] McLachlan (n 547) 211.
[590] Cappelen & Norheim (n 538) 479.
[591] Dworkin (n 546) 31.
[592] Harris (n 549) 149.
[593] ibid.

health.[594] To qualify for 'enhanced' insurance coverage, one requirement states that patients will face penalties for missing appointments.[595] The intention behind this seems to be to deter patients from doing so, thereby reducing wastage of resources. However, Steinbrook highlights that this overlooks the reasons why many people missing appointments such as lack of access to adequate transport, childcare or work commitments.[596]

This is an example of 'victim-blaming', where the blame is placed on a patient for something they lacked control over, thereby detracting from the root of the problem e.g. inadequate resources and accessibility.[597] Initiatives based on deterrence do nothing to address these underlying problems, therefore they are only likely to have limited effect.[598] A system penalising people for actions contributing to their ill-health can only be justified if it targets voluntary behaviour, and there is evidence that it is likely to be effective in improving people's health and conserving resources.[599] Consequently, penalising people for contributing to their adverse health state cannot be justified on the basis that it will deter risky behaviour, and the evidence and reasoning behind this assertion is unconvincing.

(b) Limited Resources

The most convincing reason for penalising patients who contribute to their own condition is that resources are extremely limited and, in many cases, there are simply not enough to give to everyone that needs them.[600]

However, it is far from clear that penalising patients will contribute to conservation, or more efficient use, of resources. Healthcare finances must be considered in the wider context of

[594] Schmidt (n 557) 1187.
[595] Robert Steinbrook, 'Imposing Personal Responsibility for Health' (2006) 355(8) The New England Journal of Medicine 753, 754.
[596] ibid.
[597] Schmidt (n 557) 1188.
[598] ibid; Steinbrook (n 595) 754.
[599] Cohen (n 534) 916.
[600] Dworkin (n 546) 31.

social care generally, as the two are inextricably linked.[601] For example, it is an oversimplification to view behaviour such as smoking as purely a drain on public resources because of the additional costs of treatment for smoking-related diseases. On average, the life-expectancy of smokers is lower than for non-smokers, therefore the government overall saves a significant amount of money as a result of people smoking, as they take state pension for fewer years.[602] Furthermore, money is also saved within the NHS as those who die relatively young as a result of smoking do not rely on the NHS for care and treatment of ill-health associated with old age, such as dementia.[603] In addition, higher taxation is already in place on products such as tobacco and alcohol, therefore people who engage in these few dangerous behaviours are already paying more.[604] This highlights that the strain on the NHS, as a result of lack of resources, is not necessarily due to patient choices so much as deeper problems with the health and social budget itself.[605]

Moreover, while denying expensive treatments to certain payments may appear to save money in the short-term, this may be an inefficient way to save resources in the long-term. For example, Underwood and Bailey argue that it would be justifiable to deny coronary bypass surgery to smokers as they generally get poorer results and spend longer recovering in hospital, thereby denying treatment to non-smokers.[606] However, Shiu contends that, while it is not justifiable to operate on a patient when it is likely to do more harm than good, denying this treatment to smokers, or even delaying it, would not necessarily reduce costs in the long term.[607] Without the treatment, patients would continue to rely on medications, disability benefits and regular hospital visits.[608] In general, these costs are higher than the costs of operating, and by refusing or

[601] Howard Leichter, 'Public Policy and the British Experience' (1981) 11(5) The Hastings Center Report 32, 36.
[602] ibid; McLachlan (n 547) 211.
[603] Leichter (n 601) 36.
[604] Cappelen & Norheim (n 538) 477.
[605] John Harris, 'QALYfying the value of life' (1987) 13 Journal of Medical Ethics 117, 122.
[606] MJ Underwood and JS Bailey, 'Should smokers be offered coronary bypass surgery?' (1993) 306(6884) BMJ 1047, 1047.
[607] Shiu (n 559) 1049.
[608] ibid.

delaying the operation for smokers,[609] spending has not been reduced but merely transferred to a different department.[610]

Penalising patients for contributing to their own adverse health state is often justified by the argument that these patients place huge, unnecessary costs to the NHS and thereby limit resources.[611] However, looking at the wider picture of healthcare funding, this assertion is not sound, and penalising patients for their own adverse health state is not an effective solution for saving money.[612]

III. Ethical Implementation

There are two main options for implementation of a scheme which penalises people who contribute to their own ill-health. Firstly, when decisions must be made regarding allocation of specific treatments, those who contribute to their own ill-health could be placed at a lower priority than those who do not.[613] For example, if one pair of lungs becomes available, and two patients are in need of a transplant, this would justify prioritising non-smokers over smokers, all other factors being equal. The alternative is to provide equal priority to patients regarding treatment but impose a mandatory financial contribution on those who contribute to their own ill-health.[614] Le Grand and Cappelen and Norheim favour a system which imposed taxation on risky activities, as this overcomes some of the causation issues outlined in Section 2.[615]

(i) Prioritisation

A system of prioritisation must apply consistently and equally to all patients, regardless of condition or circumstances, in order to be just and fair.[616] However, implementing such a system would be difficult, as doctors lack sufficient information to make decisions on

[609] Shiu (n 559) 1049.
[610] Steinbrook (n 595) 753.
[611] McLachlan (n 547) 210–211.
[612] Underwood and Bailey (n 606) 1047; Shiu (n 559) 1049.
[613] Cappelen & Norheim (n 538) 479; Le Grand (n 536) 120.
[614] Le Grand (n 536) 120.
[615] Cappelen & Norheim (n 538) 479; Le Grand (n 536) 120.
[616] McLachlan (n 547) 211.

prioritisation,[617] and allowing them to do so may undermine the doctor-patient relationship.[618]

(a) Availability of Information

Firstly, healthcare professionals must have access to adequate, reliable information about whether each patient's condition is self-inflicted.[619] However, countries with comprehensive public health systems which provide free treatment at the point of arrival, such as the UK, are not designed with mechanisms to discriminate based on causes of ill-health.[620] This creates particular difficulty in emergency situations. As treatment is free at the point of arrival, A&E is designed to prioritise on the basis of need alone, and questions of causation will usually be raised once the patient has been sufficiently treated.[621] As a result, emergency services and hospital departments deal with many cases of self-inflicted injury such as road accident injuries, suicide attempts, and injuries from fights.[622] If the self-inflicted nature of an injury is morally relevant to prioritisation for treatment, hospital staff must have access to reliable, adequate information to make a judgment on this, before treatment can be provided.[623] It seems implausible to suggest that if several people were brought into Accident and Emergency with stab wounds, it must first be established with an acceptable degree of certainty who started the fight, and treatment of group members must be prioritised on the basis of their degree of fault. It is unlikely that the degree of self-infliction could be established at all reliably with such little time and information,[624] given that this kind of judgment is usually only made after thorough police investigation, and consequences only brought the case has been through the 'rigours of the legal system'.[625] Therefore, at least in emergency

[617] Jonathan Glover, *Causing Death and Saving Lives* (Penguin 1977) ch 17.
[618] Harris (n 549) 149.
[619] ibid 153.
[620] Mark Field and David Powell, 'Alcohol Abuse in the Soviet Union' (1981) 11(5) The Hastings Center Report 40, 40.
[621] Gillon (n 532) 196.
[622] ibid.
[623] Harris (n 549) 153.
[624] Glover (n 617) ch 17.
[625] John Harris, *The Value of Life* (Routledge & Kegan Paul 1985) 108.

situations, it seems that the current system based on medical need is the most effective means of prioritisation.

Access to reliable information is a significant problem for many types of self-inflicted injuries.[626] For example, doctors must be able to reliably distinguish between moderate and heavy drinkers, before penalising people for the adverse consequences of their alcohol intake.[627] However, doctors inevitably rely to some degree on what patients tell them, therefore if a heavy drinker underestimates or refuses to disclose the amount they of alcohol they drink, this creates an asymmetry of information between doctor and patient, which limits the ability of doctors to make a judgment.[628]

Furthermore, doctors must be sure not to make moral judgments on patients' behaviour, e.g. by treating some self-inflicted injuries as more problematic than others.[629] Leaving prioritisation to the judgment of doctors carries the risk that the system will not be applied consistently and fairly, as doctors may focus on specific behaviours more than others, e.g. that which is easiest to monitor and seems most 'deviant'.[630] This could lead to disproportionate penalisation of behaviour such as smoking and alcoholism, or 'unsafe' sex, with little consideration of other, more socially acceptable risky behaviours e.g. overworking and stress.[631] If doctors are forced to judge patients on behaviours which are often very personal, this may undermine their role as caregiver.[632]

(b) Doctor-Patient Relationship

Implementing a system to penalise patients for contributing to their own adverse health puts healthcare professionals in a 'quasi-judicial role',[633] as they must obtain information about personal aspects of patients' behaviour and effectively punish those who have contributed to their own ill-health.[634] Harris argues that this cannot

[626] Harris (n 549) 152.
[627] Dworkin (n 546) 31.
[628] Cappelen & Norheim (n 538) 478.
[629] Glover (n 617) ch 17.
[630] Higgs (n 541) 1050.
[631] Cappelen & Norheim (n 538) 478.
[632] ibid.
[633] Harris (n 625) 108.
[634] ibid; Harris (n 549) 149.

be justified, due to the 'insurmountable problem of natural justice',[635] as such a system would allow healthcare professionals to effectively punish patients without hearing or trial, without opportunity for appeal.[636] He admits that in a situation where not everyone can be 'rescued', there may be good reasons for concluding that a convicted murder is less deserving of being saved.[637]

However, given that under English law it is considered unjustifiable to execute convicts for their crimes, adding the extra penalty of refusing to save them in this scenario would be unjust as they have already been served an appropriate punishment for their actions after rigorous legal consideration.[638] It is not within the remit of healthcare professionals to add an extra penalty on unfortunate patients, without judicial inquiry.[639] This highlights the key problem with a system which prioritises people according to how far they contribute to their own ill-health; it requires healthcare professionals to make judgments with serious, potentially life-or-death, consequences, without adequate information or procedural safeguards.[640] It is difficult to defend such a system as just or fair.

Furthermore, there is the problem of 'double jeopardy'.[641] As discussed in Section 2.1, patients who actually develop adverse health consequences as a result of their behaviour already face serious consequences in the form of the illness itself.[642] Consequently, Harris argues that it is unjust to add to their misfortune and penalise them further for their lifestyle decisions.[643]

Dworkin highlights a key conflict in the doctor-patient relationship, commenting that, 'Whatever burdens it may be reasonable to impose on those who have damaged their health voluntarily, leaving them in pain and suffering cannot be appropriate.'[644] He argues that this conflicts with the role of doctors

[635] Harris (n 549).
[636] ibid 150.
[637] Harris (n 625) 109.
[638] ibid.
[639] ibid.
[640] ibid.
[641] Harris (n 549) 150.
[642] ibid 149.
[643] ibid.
[644] Dworkin (n 546) 30.

and the NHS in general to help patients, and since this is a punishment which is not even imposed on convicted violent criminals, it seems inappropriate to impose it here.[645] This is supported by Gillon, who highlights that such a system would likely do more harm than good as it would require reversal of 'an important countervailing moral tradition in medicine', that treatment is prioritised according to patient need, regardless of blameworthiness.[646] Allowing doctors to make these judgments could therefore undermine their role as caregiver and jeopardise the relationship of trust and confidence between doctor and patient which is so important in effective healthcare.[647]

Overall, a system of prioritisation on this basis cannot be justified as it is virtually impossible to implement it consistently and fairly, and could significantly undermine the doctor-patient relationship. It is argued that, despite its limitations, the current system of prioritisation based on medical need is preferable, as it requires doctors to make judgments within their area of expertise, and fits more comfortably within a doctor's role as care-giver.

(ii) Tax-Based System

Alternatively, patients who have contributed to their own adverse health state could be made to pay for the additional costs incurred by the NHS. Le Grand argues that since about 20% of smokers develop lung disease, it would be unfair to penalise these people alone through a system of prioritisation for treatment.[648] Alternatively, all smokers should be forced to pay 20% of the costs associated with treating this disease, in the form of a tax on smoking.[649] This eliminates the impact of luck,[650] and would still allow for free treatment at the point of use for the unlucky 20% who develop the disease, thereby overcoming issues of information and the role of healthcare professionals.[651] However, this system must

[645] Dworkin (n 546) 30.
[646] Gillon (n 532) 196.
[647] ibid.
[648] Le Grand (n 536) 120.
[649] ibid.
[650] Cappelen & Norheim (n 538) 479.
[651] Le Grand (n 536) 120–124.

also be capable of consistent and impartial implementation in order to be ethically defensible.[652] While it appears to overcome many of the conceptual problems discussed so far, ethical implementation of this system is likely to be problematic.

McLachlan argues that, while such a system may work in a small, private members-club, it is not realistic on a national scale.[653] To be justifiable, this system of taxation must apply to all risky activities, including drinking, unhealthy eating, sex and dangerous sports.[654] There is an almost endless list of such activities, and fair implementation of such a scheme would rely on being able to collect adequate, detailed, up-to-date information on everyone, and imposing taxes accordingly.[655]

Furthermore, activities which are easier to monitor would likely be disproportionately affected, for example it would not be difficult to increase taxation on alcohol, unhealthy foods and cigarettes.[656] In fact, these products are already subject to high taxation as a deterrent, due to the health risks associated with them[657]. However, as mentioned above, other behaviours are equally risky but much more difficult to monitor and impose taxes on, such as stress, overworking and unprotected sex.[658] A system which penalises some health risks but not others cannot claim to be just and fair according to the principles of egalitarian justice laid out by Cohen and Le Grand.[659] Cappelen and Norheim's claim that such a system of taxation is a simple solution to bring the idea of penalising patients' contributions to their own ill health in line with ideas of egalitarian justice is unconvincing and difficult to defend when considering the realities of ethical and consistent application.[660]

Consequently, a system of taxation on risky activities as a means of penalising those who contribute to their own adverse health state involves many of the same problems as a system of prioritisation,

[652] McLachlan (n 547) 211.
[653] ibid 210.
[654] ibid 211.
[655] ibid.
[656] Dworkin (n 546) 31.
[657] Cappelen & Norheim (n 538) 477.
[658] McLachlan (n 547) 210.
[659] Cohen (n 534) 908; Le Grand (n 536) 105.
[660] Cappelen & Norheim (n 538) 479.

and would be very difficult to implement consistently and fairly, without prejudice or discrimination. This approach is therefore not ethically defensible.

IV. Conclusion

Overall, it is not ethically justifiable to implement a system of healthcare allocation which penalises patients for contributing to their own adverse health state. The key arguments in favour of such a system are that people should be held accountable for their risky behaviours, and that this would deter people from such behaviour, and save money and resources overall. However, each of these is based on the assertion that these behaviours are voluntary, and that a causal link can be established between the behaviour and the adverse health consequences. Therefore, these arguments cannot be justified according to the principle of egalitarian justice, which states that people should not be penalised for adverse consequences beyond their control.

Moreover, such a system would be almost impossible to implement fairly and consistently, according to principles of egalitarian justice. Both prioritisation and taxation are liable to risks of discrimination in their application. Furthermore, prioritisation relies on doctors having sufficient information to make decisions on whether patients have contributed to their own ill-health, which is unlikely. Even if this could be shown, placing doctors in a position to judge people's behaviour and allocate resources on this basis presents problems in consistency of application, but also risks undermining the doctor-patient relationship, which is built on trust between both parties, and the doctor's role as caregiver. Therefore, a system which penalises people for contributing to their own ill-health when it comes to healthcare resources cannot be fairly implemented. Consequently, the current needs-based system is preferable, as it can be applied more fairly according to principles of egalitarian justice, and fits more comfortably within the responsibilities and expertise of healthcare professionals as 'care-givers'.

In summary, penalising those who contribute to their own adverse health state cannot be ethically justified or implemented in

a fair and ethical way. Therefore, this principle should not form the basis for a system of allocation of healthcare resources.

Are the models of establishment in England and Scotland defensible in a contemporary democracy?

Priscilla Teh Leng Suan[661]

It is perhaps a well-known fact that the British society is secularising. Over the years, the position of the Church within the State has been an increasingly popular topic for debate. This paper examines the models of establishment of the Church of England and the Church of Scotland in England and Scotland respectively, in regards to the basic principle of democracy, the underlying system of governance in the United Kingdom. This essay firstly begins with the laying down of the key terms and definitions in use, analyses the situation in England, and then that of Scotland. It concludes with the need for reform in the English model and the compatibility of the Scottish model with contemporary democracy.

As Western countries become progressively globalised, people must become more accepting of diversities in religions and cultures. In Great Britain, a healthy plurality of religions is recognised. According to various statistics, the religion with the highest numbers of identifying believers is Christianity which often leads to the mistaken view that Britain is still a Christian country. In fact, the British society is becoming increasingly secular and the number of atheists and agnostics is seeing a significant hike. According to British Social Attitudes' published data, the proportion of people who says they have no religion stands at 48%;[662] a similar research by the Scottish Social Attitudes found that 52% of the population said they were not religious.[663] These figures have therefore fuelled the ongoing debate as to whether or not the models of establishment in Britain (especially England) are defensible in a contemporary democracy.

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[662] Natcen, 'British Social Attitudes: Religious decline "comes to a halt"' (*Natcen.ac.uk*, 7 August 2016) <http://www.natcen.ac.uk/news-media/press-releases/2016/august/british-social-attitudes-religious-decline-comes-to-a-halt/> accessed 23 March 2017.

[663] Natcen, 'Scottish Social Attitudes: Is Scotland losing its faith?' (*Natcen.ac.uk*, 12 April 2016) <http://www.natcen.ac.uk/blog/is-scotland-losing-its-faith/> accessed 23 March 2017.

Many attempts have been made to define the ambiguous term 'establishment' but each result varies from the other. In the 1935 Archbishops' Commission Report, Sir Maurice Gwyer put it as follows:

'The essence of establishment appears to be a recognition of some kind by the State, but the legal consequences and implications of that recognition may vary infinitely. By recognition is here meant something more than toleration, since otherwise all Churches to which the law has accorded liberty of conscience and worship would become Established Churches; it means that the State has for some purpose of its own distinguished a particular Church from other Churches, and has conceded to it in a greater or less degree a privileged position.'[664]

His definition emphasises how the meaning of establishment should rightly differ in every country, but the crux is the distinguished or privileged position an established church would hold. This could manifest in two main ways – low establishment influence (i.e. the presence of the church in the ordinary lives of citizens such as in schools or in the form of charities), or high establishment (i.e. in governance and politics, or in the country's legal system.)[665]

'Democracy' can be generally defined as a system of government based on "the belief in freedom and equality between people," in which power is "held by elected representatives."[666] A liberal democracy entails religious freedom – "the right to choose a religion (or not religion) without interference by the government"[667] – and "assumes the importance of a sharp demarcation between State and the private sector."[668] Since it is debatable whether or not

[664] Robert Cecil of Chelwood, 'Church and State – Report of the Archbishops' Commission on the Relations between Church and State' (London, Church Assembly 1935).
[665] Wesley Carr, 'A Developing Establishment' (1999) 102(805) Theology 2.
[666] 'Democracy, n' (*Cambridge Dictionary*, Cambridge University Press 2017) <http://dictionary.cambridge.org/dictionary/english/democracy> accessed 22 March 2017.
[667] 'Freedom of religion' (*Dictionary.com*, The New Dictionary of Cultural Literacy, 3rd edn 2005) <http://www.dictionary.com/browse/freedom-of-religion> accessed 10 May 2018.
[668] Marc D Stern, *Is Religion Compatible with Liberal Democracy?* (Center for the Study of Religion in Public Life, Trinity College 2000).

the United Kingdom is a truly democratic country,[669] this essay shall critically analyse the models of establishment in England and Scotland in relation to a hypothetically perfect democracy. The main body of this essay shall be split into two parts; arguments for both sides of the contention shall be put forward for the models of establishment in England and Scotland respectively, and a reasoned conclusion will then be drawn.

The scene in England

The established church in England is the Anglican Church of England whose Supreme Governor is the British monarch. The monarch, currently Queen Elizabeth II, is also the "defender of the Protestant faith." The monarch's authority over the Church is mostly ceremonial, but it symbolises the strong connection between the Church and the State,[670] a tradition which began after the passing of the Act of Supremacy 1558.[671] The most senior bishops of the Church of England are appointed through a complicated process where the Monarch, with advice from the Prime Minister, makes the ultimate choice. Church of England legislations must be approved by the Parliament and must receive the Royal Assent, when no other church or religious community is required to do so. Twenty six Bishops of the Church sit in the mostly unelected chamber of the House of Lords and play a "full and active role in the life and work of the Upper House."[672]They are the only members who are appointed because of their religious title. Given the Church's high degree of establishment politically, legally and social-economically, and the obviously "privileged" position it holds in England, many

[669] Mark Devenney and Clare Woodford, 'Why the US and Britain are not democracies' (The Conversation, 30 January 2017) <https://theconversation.com/why-the-us-and-britain-are-not-democracies-71745> accessed 11 May 2018.
[670] The Royal Household, 'The Queen and the Church of England' (*The Royal Family*) <https://www.royal.uk/queens-relationship-churches-england-and-scotland-and-other-faiths> accessed 24 March 2017.
[671] Act of Supremacy 1558 (1 Eliz 1 c 1).
[672] The Archbishop's Council, 'Bishops in the House of Lords' (*The Church of England*, 2017) <https://www.churchofengland.org/our-views/the-church-in-parliament/bishops-in-the-house-of-lords.aspx> accessed 24 March 2017.

scholars naturally classify the Church of England as a State Church, a position which is hard to refute.[673][674]

At first glance, the model of establishment in England seems dreadfully undemocratic yet this structure has many redeeming qualities. The royal family, especially Prince Charles, is often seen advocating religious freedom. The Lord Spirituals, also recognising the importance of religious pluralism, frequently try to speak on behalf of different religious communities and "faith in general,"[675] rather than merely protecting Christianity. They have even promoted the representation of other denominations and faiths within the House of Lords, along with support from the Church of England.[676][677] Some might say that their presence in the House of Lords keep the convoluted world of politics in check with a more or less widely accepted set of moral standards.[678] As the Reverend Lucy Winkett put it, it is an implicit recognition of the "spiritual and moral dimension to life" within the polity of a nation. [679]

The current model of establishment of the Church of England acknowledges the importance of faith and religion in England. The Church is a very much ingrained and an important part of English culture and society. Thousands of Church staff and volunteers provide support for people in need, one in every four primary schools in England are Church of England schools,[680] and the Church regularly donates financial contributions to charity. In addition, baptism, marriage and burial rights recognised by both the canon law of the Church of England and the law of the State, and

[673] Edward J Eberle, *Church and State in Western Society* (Revised edn, Ashgate Publishing Ltd 2011) 2.
[674] Joan Ferrante, *Sociology: A Global Perspective* (Cengage Learning 2010) 302.
[675] Grace Davie, 'Is Europe An Exceptional Case?' (2006) 95(378–379) International Review of Mission 247.
[676] Church of England press release, 'Church calls on Government to revise House of Lords proposals', 31 January 2002.
[677] Cabinet Office, 'A House for the Future: Royal Commission on the reform of the House of Lords' (Cmd 4534, 2000) 152.
[678] The House of Lords, *Completing the Reform* (Cmd 5291, 2001) para 83.
[679] Woodhead and Lucy Winkett, 'The Duel: Should the Church of England be disestablished?' (*Prospect Magazine*, 24 March 2016) <http://www.prospectmagazine.co.uk/magazine/the-duel-should-the-church-of-england-be-disestablished> accessed 24 March 2017.
[680] The Archbishop's Council, 'Facts and Statistics' (The Church of England, 2017) <https://www.churchofengland.org/about-us/facts-stats.aspx> accessed 24 March 2017.

are still enjoyed by many parishioners today. These rights are simply a deep-rooted part of the British custom and culture and cannot be regarded as undemocratic.

However, it is undeniable that the presence of unelected Lord Spirituals in the House of Lords can be perceived as a major hindrance to diversity and democracy. The Government itself admitted that "leaders of other denominations and faiths have significant contribution to make to the second chamber."[681] It is not enough that the Bishops try to represent the voices of other religious communities, since it is impossible to truly do so when it comes to controversial topics of ethics and morality. The British Humanist Association correctly pointed out that "religious 'leaders' cannot speak for the whole population – their views are often controversial and rejected by people with equally deeply held religious or ethical convictions."[682][683] The representation of only one Christian denomination does not promote democracy in the sense of freedom and equality of people with different religious beliefs.

Furthermore, the senior bishops who sit in the House of Lords are mostly above the age of 55. This statistic alone shows how conforming and old-fashioned the structure is. Some have even harshly called attention to the fact that the bishops' "main achievements have been to win legal exemptions which allow the Church to discriminate against women and gay people."[684] Although only an average of 0.8 bishops turn up to each vote,[685] the mere existence of their seats in the Upper House is symbolic as to how sexist and discriminatory the British society still is and that the government still condones such inequality.

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[681] The House of Lords, *Completing the Reform* (Cmd 5291, 2001) para 85.

[682] British Humanist Association, 'Religious Representatives in the House of Lords' (June 2011) 7.

[683] Linda Woodhead and Lucy Winkett, 'The Duel: Should the Church of England be disestablished?' (*Prospect Magazine*, 24 March 2016) <http://www.prospectmagazine.co.uk/magazine/the-duel-should-the-church-of-england-be-disestablished> accessed 24 March 2017.

[684] Linda Woodhead and Lucy Winkett, 'The Duel: Should the Church of England be disestablished?' (*Prospect Magazine*, 24 March 2016) <http://www.prospectmagazine.co.uk/magazine/the-duel-should-the-church-of-england-be-disestablished> accessed 24 March 2017.

[685] Alex Hern, 'Do the bishops in the House of Lords actually change anything?' (*NewStatesman*, 22 November 2012) <http://www.newstatesman.com/politics/2012/11/do-bishops-house-lords-actually-change-anything> accessed 25 March 2017.

If members of the House of Lords remain appointed and unelected, the voice of other religious communities (for example, Jews, Muslims, and Sikhs) ought to be represented too. Yet due to the many practical problems that would arise, for example, "most other denominations and faiths do not have a hierarchical structure which will deliver readily identifiable representatives,"[686] many objections have been raised. Since the House of Lords' main purpose is to act as a check and balance system for the government through utilising the varied expertise and experiences of its members, it is imperative to note that having twenty six bishops who advocate similar causes due to their religion does not contribute much to the chamber's diversity. Perhaps it is time to either significantly decrease the number of Lord Spirituals, or completely remove them from the Upper House.

The monarch's public endorsement of the Church of England is also an obstacle to democracy. The editors of *Religion and Democracy in Contemporary Europe* put it as such: "the State's decision to have an official religion presupposes a religiously homogeneous society."[687] This may have been applicable in the 1500s, but as stated earlier in my essay, British society is becoming increasingly religiously diverse and secular – the Church of England's membership has "plummeted."[688] The existence of a State church would "prevent some citizens from fully identifying with public institutions."[689] Such blatant favouritism by the State would consequently encourage religious discrimination and discourage true religious freedom.

Additionally, the Church of England's low establishment influence in areas such as education may also be seen as undemocratic. There are still requirements on most schools across the United Kingdom to hold daily acts of collective Christian

[686] The House of Lords, 'Completing the Reform' (Cmd 5291, 2001) para 84.
[687] Gabriel Motzkin and Yochi Fischer, *Religion and Democracy in Contemporary Europe* (Alliance Publishing Trust 2008) 108.
[688] Linda Woodhead and Lucy Winkett, 'The Duel: Should the Church of England be disestablished?' (*Prospect Magazine*, 24 March 2016) <http://www.prospectmagazine.co.uk/magazine/the-duel-should-the-church-of-england-be-disestablished> accessed 24 March 2017.
[689] Gabriel Motzkin and Yochi Fischer, *Religion and Democracy in Contemporary Europe* (Alliance Publishing Trust 2008) 108.

worship. This not only leads to "segregation of young people" and "greater misunderstanding and tension,"[690] but is completely incompatible with a contemporary democracy which promotes freedom of religion and disapproves of division and discrimination. "Liberal democracies cannot compel the doing of religious acts or attendance at worship services."[691] Holding such acts of worship could be seen as the State's attempt to force the Christian belief onto young children, which contradicts the basic democratic principle of religious freedom. The National Secular Society said the UK is "the only Western democracy to legally impose worship in publicly funded schools,"[692] which shows how archaic the model of establishment in England is.

The scene in Scotland

The Presbyterian Church of Scotland enjoys a "lighter form of establishment"[693] than the Church of England. As Bochel and Denver put it, "the Church of Scotland cannot be regarded as 'established' in entirely the same way as the Church of England."[694] Unlike in England, the monarch is not the Supreme Governor of the Church of Scotland but merely a member. The Church of Scotland is "managed on a local level by kirk sessions, at a district level by presbyteries, and at a national level by the General Assembly,"[695] and neither the Scottish nor the Westminster Parliaments are involved in the appointment of bishops.

[690] Report of the Commission on Religion and Belief in British Public Life, 'Living with Difference' (The Woolf Institute, Cambridge, 2015) 34.
[691] Marc D Stern, *Is Religion Compatible with Liberal Democracy?* (Center for the Study of Religion in Public Life, Trinity College 2000).
[692] The Independent, 'Mandatory Christian prayers in schools 'should be axed'' (6 December 2015) <http://www.independent.co.uk/news/education/education-news/mandatory-christian-prayers-in-schools-should-be-axed-academics-say-a6762256.html> accessed 24 March 2017.
[693] C R Munro, 'Does Scotland Have an Established Church?' (1997) 4(20) Ecclesiastical Law Journal 639, 645.
[694] J M Bochel and D T Denver, 'Religion and Voting: a Critical Review and a New Analysis' (1970) 18(2) Political Studies 205, 215.
[695] The Royal Household, 'The Queen and the Church of Scotland' (*The Royal Family*) <https://www.royal.uk/queens-relationship-churches-england-and-scotland-and-other-faiths> accessed 24 March 2017.

The Church of Scotland Act 1921[696] (henceforth "the 1921 Act") recognised the Church's independence in "matters spiritual" by recognising the Articles Declaratory[697] passed by the Church's General Assembly, which are appended to the 1921 Act. It stated that no civil authority has "any right of interference with the proceedings or judgements of the Church within the sphere of its spiritual government and jurisdiction,"[698] protecting autonomy of the Church. The Church enjoys a high degree of legislative independence; legislations enacted by the General Assembly do not require approval from the State or public authorities. The Church of Scotland's courts are treated as a parallel jurisdiction and the secular courts have traditionally refused to review their decisions.

Professor Munro attempted to define the Scottish model of establishment and concluded that the Church of Scotland is an "established but free" church, saying:

'…Is it a Church legally recognised as the official Church of the State or nation and having a special position in law? I believe that it is. Yet the acknowledgment by the State in 1921 of the Church's autonomy in its own sphere was undoubtedly significant, and may perhaps be viewed as an interesting model for a 'lighter' form of 'establishment'…'[699]

Although the Church of Scotland is still seen as the "official Church" of the State, it is evident that the Scottish model of establishment enjoys considerably more autonomy than the English model, which instinctively means that the Scottish model is more democratic than the English model.

Since the passing of the 1921 Act which gave the Church of Scotland full autonomy over the running of its affairs and even legal exemption from certain Acts of Parliament concerning employment rights, the Church's link to the State can be viewed as merely

[696] Church of Scotland Act 1921 (c.29).
[697] Articles Declaratory of the Constitution of the Church of Scotland.
[698] ibid.
[699] C R Munro, 'Does Scotland Have an Established Church?' (1997) 4(20) Ecclesiastical Law Journal 639.

"symbolic, rather than political."[700] Church of Scotland ministers are not allowed to be Members of Parliament – maintaining the independence of both the State and Church. The structure of the Church itself is already far more democratic than that of the Church of England. The 'Presbyterian government' of the Church refers to the "sharing of authority" by an equal number of ministers and 'elders,' [who are] elected from the membership of the church.[701] These features of the Scottish model of establishment "have the appearance of outdated anachronisms"[702] and does not hold true political power or significance, proving that the model could be justifiable in a contemporary democracy.

However, it can be argued that the Church of Scotland still holds a somewhat "privileged" position compared to other religious communities in Scotland – which can be deemed biased and undemocratic. The same Act that acknowledges the Church's independence also identifies it as a "national church"[703] with a responsibility to provide a "parochial ministry to the people throughout the whole country."[704] The Church and Nation Committee, now the Church and Society Council, is an agent of the Church's General Assembly which actively participates in politics as a 'pressure group'. Although the 1929 Reorganisation Act[705] abolished parish councils and substantially limited the administrative influence of the Church, it still operates a territorial parish system where local ministers are responsible for everyone in their congregation's geographical area, no matter their religion or lack thereof. Since one of the important callings of the Christian religion is to humbly serve others, it is only natural that the Church

[700] Steven, Martin H M, 'The political influence of the Church of Scotland, post-devolution: public policy-making and religion in Scottish politics' (PhD thesis, University of Glasgow 2003) 37.
[701] BBC.co.uk, 'Church of Scotland' (14 July 2011) <http://www.bbc.co.uk/religion/religions/christianity/subdivisions/churchofscotland_1.shtml > accessed 25 March 2017.
[702] Steven, Martin H M, 'The political influence of the Church of Scotland, post-devolution: public policy-making and religion in Scottish politics' (PhD thesis, University of Glasgow 2003) 38.
[703] Church of Scotland Act 1921 (c.29), s 4(III).
[704] BBC.co.uk, 'Church of Scotland' (14 July 2011) <http://www.bbc.co.uk/religion/religions/christianity/subdivisions/churchofscotland_1.shtml > accessed 25 March 2017.
[705] Local Government (Scotland) Act 1929 (19 & 20 Geo 5 c. 25).

of Scotland is very much involved in the daily lives of the Scottish people, much like in England.

Nevertheless, it is hard to disagree with the conclusion which Steven Martin came to in his PhD thesis on the political influence of the Church of Scotland – that the Church actually has "very little power or influence"[706] in national politics. The "privileged" position the Church holds is reasonable given the fact that a fairly large portion of the Scottish population still identifies with the Presbyterian faith. The participation of the Church in politics and other social matters in the form of campaigns as a 'pressure group' is also unavoidable as the Christian faith is very much about people and society and not an 'introverted' one. On the whole, the Scottish model of establishment is one that is justifiable in a contemporary democracy in order to preserve culture and as an expression of religious freedom. This may, of course, change in the future if the numbers of identifying Christians in Scotland significantly decrease.

In conclusion, in light of the previous research, it is simply untrue that "the only way to ensure equal treatment not only to all religions but also to believers and non-believers" is by "[removing] all symbolic and institutional governmental ties with religion,"[707] as both the Church of England and the Church of Scotland play essential roles in society and still have a large number of followers and whose remaining followers still represent a large proportion of the population. The 'lighter' Scottish model of establishment is compatible with a contemporary democracy and may need little to no alteration. The old-fashioned English State Church model, however, should be disestablished and replaced, post haste, by one similar to the Scottish one, so as to support true democracy and equality of faith groups and people. It should be said, however, that any such changes must only be made after fair and careful

[706] Steven, Martin H M, 'The political influence of the Church of Scotland, post-devolution: public policy-making and religion in Scottish politics' (PhD thesis, University of Glasgow 2003) 66.

[707] National Secular Society, 'Disestablishment' (2017) <http://www.secularism.org.uk/disestablishment.html> accessed 25 March 2017.

evaluation, so that the restrictions imposed upon religion in the name of democracy does not in and of themselves become illiberal.[708]

[708] Marc D Stern, *Is Religion Compatible with Liberal Democracy?* (Center for the Study of Religion in Public Life, Trinity College 2000).

Pitting freedom of expression against freedom of religion: The paradoxical effect of blasphemy laws and why one should be favoured over another

Kende Szabo[709]

This paper explores the competing interests of the right to freedom of expression and the right to freedom of religion in a free society. The aim is to highlight the shortcomings of blasphemy laws and to suggest an alternative direction which the law should take to help balance freedom of expression with freedom of religion. In order to substantiate this, the author starts by emphasising the importance of free speech in a democratic society, before going on to argue that a limitation on the freedom of expression fails to tackle the root of the problem of religious intolerance. This is then followed by a section on the paradoxical effect which blasphemy laws have by often limiting religious freedom. The paper concludes that the freedom of expression should be favoured and that this is necessary in order for the two competing freedoms to co-exist. The paper identifies that the solution to the problem posed by religious intolerance requires a change of thought leading to a decrease in demand for material which promotes intolerance and offends people's religious freedoms. Banning blasphemy merely fuels the underlying motives behind it, and the only way in which such statements can be avoided is by allowing them to be voiced openly. Whilst it is accepted that the idea of a society where statements which offend religious groups are not made is idealistic, it is nevertheless one to aspire to.

In what is becoming an increasingly secular world, albeit one deeply rooted in and often seen as relentlessly grasping onto religious values, complications abound as to where the line should be drawn on issues where there is a clash of ideologies. The most prominent example of this is the problem caused by the conflict between freedom of expression and people's religious rights, and it is evident that a balance must be struck between the two. This essay favours the former and argues that insult or offence to a religious group is not enough to justify censorship in a free society in the form of

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blasphemy laws and that restrictions on the freedom of expression should be limited. This is demonstrated by reference to three points, namely that a democratic society should be built upon the notion of free speech, that suppressing voices will not make blasphemous thoughts disappear, and that blasphemy laws can often limit religious freedom. In dealing with these, the impact of globalisation and the adverse effect which blasphemy laws have on art are given particular weight. The paper then goes on to suggest an alternative solution to the problems that blasphemy laws are intended to deal with.

Free speech as a pillar of a democratic society

The definition of blasphemy under the law varies from country to country so much that perhaps the only common theme is the element of an offensive utterance aimed at something that is considered sacred by a faith group. The application of blasphemy laws and the limits to them are contingent on the culture of each country and thus it is difficult to pinpoint a universal stance on the issue.[710] On one end of the spectrum is the United States, where freedom of expression is seen as paramount and there is a very lenient attitude towards blasphemy,[711] and on the other lie countries such as Saudi Arabia, Iran and most notoriously Pakistan, where blasphemy may be punishable by death.[712] In Europe, which is the main geographical focus of this paper, the view is that blasphemy may be prosecuted if it offends the religious feelings of people and thus has serious repercussions by potentially giving rise to widespread social upheaval.[713] Although this approach is championed by some as somewhat of an Aristotelean golden mean between the right to

[710] Darara Gubo, *Blasphemy and Defamation of Religions in a Polarised World: How Religious Fundamentalism is Challenging Fundamental Human Rights* (Lexington Books 2014) 124.
[711] *Joseph Burstyn Inc v Wilson*, 343 US 495 (1952).
[712] Rebecca J Dobras, 'Is the United Nations Endorsing Human Rights Violations: An Analysis of the United Nations' Combating Defamation of Religions Resolutions and Pakistan's Blasphemy Laws' (2009) 37(2) Georgia Journal of International and Comparative Law 339, 360.
[713] Mauro Gatti, 'Blasphemy in European Law' in M Díez Bosch & J Sánchez Torrents (eds), *On Blasphemy* (Blanquerna 2015) 54.

express oneself and the protection of people's religious rights, it is contradictory to the very nature of democracy and thus flawed.[714]

Freedom of expression is undoubtedly a key feature of a free society, as it is necessary for the deliberative process in a democracy.[715] The rights to criticise, satirise, question and ridicule are fundamental to this, so much so that their absence signals the absence of freedom of expression altogether. Such a state of affairs is more reminiscent of an authoritarian regime than a socially-liberal democracy. Thus, limiting this liberty is counter-productive to the supposed aims of a politically-active, autonomous, liberal democratic society.[716]

The main counter-argument put forward by people defending blasphemy laws, based on section 10(2) of the European Convention on Human Rights, is that such limitations are necessary for the protection of morals and the protection of public safety.[717] However, free speech should not be conditional to whether it is conducive to the public good or not, or whether it is offensive or not. The very reason why there is a law allowing freedom of expression is to protect statements that may be considered offensive by some.[718] Therefore limiting this right defeats its very purpose.

Placing restrictions on the freedom of expression through blasphemy laws also gives rise to a chilling effect and creates inconsistencies within the law as certain utterances and/or actions are criminalised, whereas others of arguably equal vice are not.[719] It would arguably benefit Europe if a model closer to, but perhaps even beyond the one in the United States were adopted, in which blasphemy, along with any other form of expression would not be criminalised.

Despite this there have been voices in support of restrictions on freedom of expression, as people have argued that in the absence

[714] Rex Ahdar & Ian Leigh, *Religious Freedom in the Liberal State* (Oxford 2005) 395–396.
[715] Alexander Meiklejohn, 'The First Amendment is an Absolute' (1961) The Supreme Court Review 245, 255.
[716] Robert Post, 'Religion and Freedom of Speech: Portraits of Muhammad' (2007) 14(1) Constellations 72, 74–75.
[717] European Convention on Human Rights (ECHR), art 10(2).
[718] *Handyside v United Kingdom* (1979-80) 1 EHRR 737.
[719] Javier García Oliva, 'The Legal Protection of Believers and Beliefs in the United Kingdom' (2007) 9(1) Ecclesiastical Law Journal 66, 86.

of limits to this liberty there would on occasion be interference with people's right to the peaceful enjoyment of their lives.[720] One of the aims of the criminal law is to protect individual autonomy and to enable people to live their lives without any unwarranted interference.[721] Although this is a valid argument, a breach of one's autonomy through limiting one's right to express oneself is a far more severe violation of one's basic human rights than merely not protecting one's individual autonomy and right to peaceful enjoyment of one's life by restricting the autonomy of someone else to express themselves.[722] In essence, this creates a scenario where the lesser of two evils must be favoured. The law here should take a liberal approach rather than one rooted in legal moralism and to a lesser extent, legal paternalism and favour one's autonomy to say whatever one wants. Freedom of expression should be viewed as the most important right of all and prevail in circumstances where there is a conflict with another right.[723] It may be distasteful—abhorrent even, to make offensive and even scurrilous statements about the religious icons of a faith group, but this does not mean that it should attract criminal sanctioning. Such a view is in accordance with the minimal criminalisation principle of the criminal law, which views criminalisation as a last resort,[724] and is a more progressive approach than the interventionist one that is currently employed in most of the world.

The problem with suppressing blasphemous speech

Along with the fact that blasphemy laws are contradictory to the nature of democracy, there are also question marks over their efficiency at what they aim to do.[725] It may be contended that the criminalisation of blasphemy limits the incidence of it, thus

[720] *Otto-Preminger-Institut v Austria* (1994) 19 EHRR 34.
[721] Andrew Ashworth & Jeremy Horder, *Principles of Criminal Law* (7th edn, Oxford 2013) 52.
[722] Andrew Simester, 'Why Omissions are Special' (1995) 1(3) Legal Theory 311, 324.
[723] Kenan Malik, *From Fatwa to Jihad: The Rushdie Affair and its Legacy* (Atlantic 2009) 155.
[724] Ashworth & Horder (n 721).
[725] Caleb Holzaepfel, 'Can I Say That?: How an International Blasphemy Law Pits the Freedom of Religion Against the Freedom of Speech' (2014) 28(1) Emory International Law Review 597, 642.

consequently also limiting the chance of any offence or disruption being caused. However, although the potential criminal sentence that blasphemy carries with it may deter some people, there are two arguments against this view: (1) due to globalisation a nationwide limit is insufficient; and (2) blasphemous opinions are not completely eliminated through such legislation.

With regards to the first of these arguments, from '*The Satanic Verses*' by Salman Rushdie, through the cartoons in Jyllands-Posten, all the way to ones in Charlie Hebdo, there was a worldwide consequence rather than one limited to a nation. It is therefore clear that in the increasingly globalised world that we live in it is simply unfeasible for such matters to be kept in the domestic sphere and restricted by national blasphemy laws.[726] This means that unless a universal ban were to be imposed on blasphemy, the effectiveness of such legislation is going to be severely limited to affairs taking place within borders.[727]

As for the second point, suppressing blasphemous beliefs does not eradicate them, but merely sweeps them under the carpet by imposing a ban on them. In fact, rather than deterring it, criminalising blasphemy essentially positions it as somewhat of a 'forbidden fruit', through which those in power can be challenged, thus giving it a rebellious and liberal connotation, which is viewed as desirable by some. This is the opposite of what blasphemy laws are meant to achieve and can arguably have more serious consequences for public safety and national security by inciting tension and hatred than blasphemous statements do.[728]

It must also be noted as part of this point that most blasphemy proceedings – in the United Kingdom and the rest of Europe at least – have been brought against works of art. This is significant because works of art are not meant to be taken literally, but should be viewed with regard to the fact that they are set in an

[726] Holzaepfel (n 725) 632.
[727] ibid 632.
[728] Pew Forum on Religion and Public Life, 'Laws Against Blasphemy, Apostasy and Defamation of Religion', (2011) Rising Restrictions on Religion 69 <http://www.pewforum.org/files/2011/08/RisingRestrictions-web.pdf> accessed on 4 April 2016.

abstract world oblique to the real one.[729] Despite this, works of art have been interpreted as literal facts and/or statements rather than the way in which they were intended[730] in cases concerning blasphemy[731] and obscenity.[732] Thus not only do blasphemy laws fail to suppress blasphemy satisfactorily, but they also arguably target the wrong group of people – not those making malicious statements, but rather those who are merely channeling their inner-creativity with an intention that may not have an element of blasphemy to it at all. Since works of art attract a larger audience than mere statements made in conversation, artists are at a higher risk of having to face such proceedings. To make matters worse, the European Court of Human Rights has been unwilling to afford art protection and interfere with the decisions of contracting states on blasphemy cases involving art, as seen in *Otto-Preminger-Institut v Austria*[733] and *Wingrove v United Kingdom*.[734] As a result of this there is consequently a limit on artistic freedom by religion in jurisdictions with a blasphemy law due to the potential risks involved for artists wishing to express themselves.[735]

Blasphemy as a restriction on religious freedom

Although it may seem paradoxical due to the aim that they are supposedly trying to achieve, blasphemy laws often limit people's religious rights, in that they place one faith above all others. The limitation of rights can take place to varying degrees, from not having the same amount of protection in the eyes of the law as people of a certain denomination[736] all the way to being found guilty of blasphemy for professing a religion other than the one proscribed by the state.[737] In countries where the latter extreme is the case,

[729] Paul Kearns, *Freedom of Artistic Expression: Essays on Culture and Legal Censure* (Bloomsbury 2013) 181.
[730] ibid 29.
[731] *R v Chief Metropolitan Stipendiary Magistrate, ex p Choudhury* [1991] 1 QB 429 (CA).
[732] *R v Penguin Books Ltd* [1961] Crim LR 176 (Central Criminal Court).
[733] (1994) 19 EHRR 34.
[734] *Wingrove v United Kingdom* (1997) 24 EHRR 1.
[735] Paul Kearns, 'The Judicial Nemesis' (2012) 1 Irish Law Journal 56, 59.
[736] *Choudhury v United Kingdom* (1991) 12 HRLJ 172, EComHR.
[737] Elham Manea, 'In the Name of Culture and Religion: The Political Function of Blasphemy in Islamic States' (2016) 27(1) Islam and Christian-Muslim Relations 117, 124.

blasphemy laws are in most instances used to oppress people and to legitimise the hierarchical system in place rather than to protect the religious rights of anyone.[738] Even where that is not necessarily the case there is a fundamental breach of people's religious freedom as people may not be allowed to express their beliefs, particularly if these are in some way at odds with that of the religion of the state in question. Such blanket protections for certain religions are incongruous with the right to religious choice and freedom as they attempt to force the beliefs of one particular religion onto others by limiting people's ability to think freely and choose what religion they wish to adhere to.[739] A further issue that arises in jurisdictions with such oppressive blasphemy laws in place is that there is a risk of these being used fraudulently for the motives of personal revenge. For instance, in situations where the defendant may be falsely accusedor at least claim to be falsely accused, as in the ongoing case of Asia Bibi in Pakistan.[740]

Although such oppressive blasphemy laws are predominantly a fixture in the legal systems of certain Islamic countries and are not part of European jurisdictions anymore, there are nevertheless some restrictions on religious freedom through blasphemy laws in certain countries in Europe too. They appear in the form of a strong bias towards Christianity,[741] demonstrated by the decisions in *Choudhury v United Kingdom*[742] and *Church of Scientology v Sweden*.[743] It could perhaps be argued that Christianity is at the core of European values and beliefs and therefore it is necessary to protect it. Of course this does not mean that Christianity is immune in the eyes of the law, as seen in the case of *Dubowska and Skup v Poland*,[744] but it could be contended, albeit unsurprisingly, that Christianity receives preferential treatment over other religions.[745] In what has become an increasingly pluralistic

[738] Manea (n 737) 118.
[739] Holzaepfel (n 725) 646.
[740] ibid 612.
[741] Renata Uitz, *Freedom of Religion* (Council of Europe Publishing 2007) 158.
[742] (1991) 12 HRLJ 172, EComHR.
[743] (1979) ECC 511.
[744] (1997) 23 EHRR CD 204.
[745] Peter W Edge, *Legal Responses to Religious Difference* (Kluwer Law International 2002) 207.

continent from a cultural point of view, this has been pointed out as a key issue and has in certain instances been used as an argument against blasphemy laws that only afford protection to people of a certain denomination,[746] as was the case in the United Kingdom.[747] In fact, this biased nature of the blasphemy law in the United Kingdom played a key role in its abrogation in 2008, as it was essentially superseded by the Religious and Racial Hatred Act 2006, which seeks to afford protection from religious hatred to all faith groups rather than just the followers of the Church of England.[748]

An alternative solution

Drawing from the aforementioned points which highlight the inherent weakness of blasphemy laws, the final part of the paper aims to provide a somewhat idealistic solution to the clash between free speech and religious rights. Although this essay argues that blasphemy laws are incompatible with a democratic society, that is not to say that it undermines the importance of tackling blasphemy and religious hatred. Blasphemy in itself should be looked down upon by society, along with any other form of intolerance.[749] Although people may disagree with the existence of a deity, tolerance should be a key pillar of society and when there is an element of malice in what is said a line is being crossed. However, this tolerance is not achieved by silencing those who engage in it.[750] In fact, placing restrictions on such speech is contradictory to the principle and – as argued above – it may have the opposite effect and increase the incidences of blasphemy and violence relating to it in society.

The way that blasphemy can – and should be limited is by reaching a stage in society where people frown upon such behaviour rather than show demand for blasphemous cartoons depicting religious figures, the purpose of which is to incite religious tension.

[746] García Oliva (n 719) 71.
[747] *Choudhury v United Kingdom* (n 736).
[748] Baroness Hale, 'Secular judges and Christian law' (2015) 17(2) Ecclesiastical Law Journal 170, 173.
[749] *Whitehouse v Lemon* [1979] AC 617 (HL) 658 (Lord Scarman).
[750] Uitz (n 741) 156.

The principal way in which this could be achieved would be through an increased focus on educating people about other religions and promoting religious tolerance. A change in the way in which religious studies are taught in school, with a focus on integrating different religions into the curriculum is an example of a method by which this could be achieved. Other government initiatives, such as campaigns promoting religious tolerance and integration could also reduce the demand for blasphemous content. A more extreme method would be public ridicule of intolerant behaviour in the public sphere through social media. Finally, religious leaders should help reduce bigotry within their denominations. By combatting the vilification of the LGBT community for instance, as well as that of other religious groups, it would be easier to facilitate mutual respect between those with different views. This solution would not only help to disassociate oppression from religion and thus potentially reduce religious hatred, but it would also be a leap towards a more consistent legal approach to freedom of expression, rather than one that is limited in certain areas but not in others of a similar ilk. This is of course a rather idealistic, perhaps utopian prospect, but is nevertheless an approach that would be more appropriate than one involving censure, which has clearly failed to limit the incidence of speech regarded as offensive by some.

Conclusion

This paper has argued that blasphemy laws are incompatible with the notion of a free, democratic society due to the limitations they impose on freedom of expression and freedom of religion, and the fact that they fail to achieve their intended purpose as a deterrent. It is suggested that an alternative, liberal approach should be taken wherein the constraints on freedom of expression are abolished or significantly limited and blasphemy is not considered to be a crime, but rather as something undesirable and distasteful. Such an approach would remove the status of blasphemy as a ‘forbidden fruit’ and a sign of dissent from the status quo and would be seen as a step towards a more autonomous and tolerant society where people’s fundamental right to freedom of expression is not restricted.

A Tribute to Ahmed Aqeel Al Modaweb

This essay is published in memory of Ahmed Aqeel Al Modaweb who very sadly passed away earlier this year. Colleagues and students in the School of Law send their deepest condolences to Ahmed's family and friends for their tragic loss. Ahmed was in his second year of his LLB Law studies at the University of Manchester and his passing is felt keenly and with great sadness by colleagues and students in the School of Law. He was an exceptionally gifted student, always courteous and conscientious, and was a pleasure to teach. His written work was engaging and thought-provoking, displaying impressive skills of critical analysis. In person he was polite and respectful, with a good-humoured and personable approach, and he demonstrated a real enthusiasm for legal and political debate. His work was often cited as remarkable and outstanding and it is clear that he would have continued to excel as one of our brightest and best students. One of his Public Law tutors has noted how he stood out as someone who had a firm belief in the constitutional enshrinement of individual rights in order to safeguard the individual against the worst excesses of political corruption and abuse, and we are publishing this piece of his Public Law work in tribute.

"The Constitutional Reform Act 2005 has significantly enhanced: (i) the constitutional position of the judiciary; and (ii) the doctrine of judicial independence." Discuss.

At the core of any functional constitutional arrangement, the judiciary, absolutely and imperatively perform a fundamental idiosyncratic role towards the conservation of the rule of law – the doctrine, upon which the entire ethos of United Kingdom's justice system pivots; second to nothing but the notion of parliamentary supremacy.[751] The Constitutional Reform Act 2005 ("CRA"), in the absence of a codified constitution recognised for the first time, a statutory guarantee of the continued independence of the

[751] Albert Venn Dicey, *Introduction to the Study of the Law of the Constitution*" (ECS Wade ed, MacMillan 1959).

judiciary.[752] The Act, *inter alia*, most importantly established The Supreme Court of the United Kingdom, abolished the Appellate Committee of the House of Lords, modified the office of Lord Chancellor, and makes provisions to the appointment of the judiciary. Its enactment comes in as a clear attempt to outline and develop the legal and constitutional position of the judiciary and indirectly promote values associated with constitutionalism.[753] It is the purpose of this paper to expound on and evaluate, the objectives and effects of this revitalization; specifically, the enhancement of the judiciary's position as well as that of its independence.

At the outset, it is worth noting that in line with the UK's conception of doctrine of separation of powers, the three branches of parliament operate, at least in theory, in considerably separate realms.[754] The role of the judiciary is, quite straightforwardly, to adjudicate through interpretation and application of the law matters brought before them by persons exercising their rights of access to the courts.[755] In terms of their hierarchical rank, the judiciary has long been identified as the weakest branch of the state; and as part of the Labour party's reform program, the CRA sought to offer legal and political safeguards to protect the judiciary from such influences.[756]

The Lord Chancellor

Against that background, one significant amendment targeted by this legislation was the office of Lord Chancellor. Prior to the CRA, the position peculiarly spanned all three branches of government; the role included being speaker of the House of Lords, President of the judiciary all the while being the politically accountable member of the cabinet. Post-reform however; the office has since seen its

[752] Diana Woodhouse, 'United Kingdom The Constitutional Reform Act 2005 – defending judicial independence the English way' (2007) 5(1) International Journal of Constitutional Law 153–154.
[753] Jeffrey Jowell QC and Dawn Oliver (eds), *The changing constitution* (Oxford University Press 2007) 324–334.
[754] *R v Secretary of State for the Home Department, ex p Fire Brigades Union* [1995] UKHL 3, [1995] 2 AC 513 (HL) 567.
[755] *R (Miller) v Secretary of State for Exiting the European Union* [2016] EWHC 2768 (Admin), [2017] 1 All ER 158 [3].
[756] Mark Elliott and Robert Thomas, *Public Law* (2nd edn, Oxford University Press 2014).

powers drastically curtailed. The Lord Chancellor is no longer entitled to participate in judicial proceedings nor retain the position in the House of Lords; alternatively, post- reform Lord Chancellor's main function is to ensure that the justice system's needs are well resourced and that the judiciary can exercise their functions without undue political pressure from the executive.

Furthermore, the act provided for a statutory duty towards the observance of the rule of law and to respect the independence of the judiciary. This duty includes a special responsibility to defend the judicial decisions inside and outside government. However, it is suggested that considering the depth of the pre-reform Lord Chancellor's involvement within the judiciary; the CRA does not distinctively advance this objective. The Lord Chancellor's duty to the rule of law predates the CRA; section 1 of the statute clearly states that this constitutional role is not "adversely affected." Additionally, by virtue of fact that the pre-CRA Lord Chancellor was uniquely situated within the executive, serving as a "conduit", it is arguable that the judiciary could better convey their needs and concerns without engaging itself directly.

It is incontestable that unfounded attacks on the judiciary, specifically by parliamentarians, ought to be reprimanded using the most withering of terms. The objective of the additional guardianship obligation – offering a political safeguard – though a valiant attempt, is misplaced. All ministers as per the ministerial code of conduct have a duty towards the rule of law; it is regrettable that the Lord Chancellor's obligation in this regard is to be considered unique. The CRA in this respect is remarkably inutile,[757] even counterproductive, and may serve to distract ministers from their own responsibility to uphold that that duty.[758] Accordingly, effective advancement of this narrative is contingent upon an increased emphasis of the individual ministerial responsibility towards the rule of law. Notwithstanding the former, measures diminishing the Lord Chancellor's involvement within the judiciary do in certain respects enhance the judiciary's constitutional position.

[757] Previous Lord Chancellor Mr. Clarke has even stated that he never found that the statutory obligation was what particularly compelled him to uphold the rule of law.

[758] Parliament Constitution Committee, *The office of Lord Chancellor* (HL 2014–2015, 75) para 36.

In bringing the act to force, a fundamental concept of the unwritten constitution has been placed on a transparent legislative scheme. Consequently, this solidifies the judiciary's legal position in the broader trend towards a more codified and legal form of constitutionalism.

The Supreme Court

The most symbolic inoculation of judicial independence was manifested in part three of the CRA. The Act established the UK Supreme Court, assuming power as the highest court of the land from the Appellate Committee of the House of Lords. Headed by an important governmental figure, and whose members where sitting participants of the legislature, the Appellate Committee's continuing existence was *prima facie* a blatant breach of the separation of powers doctrine. Irrespectively, the Law Lords for all practical purposes functioned and decided cases as ordinary judges, nor did they participate, by convention, in contentious political debates.[759] The effect of which deem absurd, suggestions that Parliament and the judiciary are possible bedfellows.

Inevitably however, there existed a constant tension between the Appellate Committee's presence in the House of Lords and Article 6 of the European Convention on Human Rights (ECHR). A government consultation paper submitted the argument that Article 6 of the ECHR demands strict interpretation; matters undermining it may encompass not only direct infringements on the independence of the judiciary but matters which simply appear to have that effect as well.[760] The case for reform was therefore as Lord Norton stated quickly becoming one of a "perception of a perception."[761] It does not so appear that this perception is derived from any empirical evidence as one commentator noted "[…] there is no public opinion on this subject any more than there is on the transit of Venus."[762] In that vein, the physical separation of the

[759] Elliott and Thomas (n 756).
[760] DCA Consultation Paper CP 11/03, para 3.
[761] HL Deb 12 February 2004, vol 657, col 1269.
[762] Constitutional Reform Bill Committee, *Constitutional Reform Bill – First Report* (HL 2003–2004, 125-I) para 117.

Supreme Court from the House of Lords embellishes but does not enhance per se, the judiciary's position nor its independence. However, the fact of the matter is public opinion matters and should not be so readily sidelined. Any increase in public trust in the institutional impartiality of the judicial branch is extremely valuable in pursuance of strengthening the judiciary's perceived legitimacy amongst the people whom its cases it ultimately exists to adjudicate.

Judicial Appointments

Finally, through section 61, the CRA significantly revamped the judicial appointments system. It is vital to the justice system that judicial appointments are made on nonpartisan, merit-based selections, uninfluenced by any ulterior political motives. For that matter, the previous system, in which appointments were made by the queen acting on the advice of the prime minister or the Lord Chancellor, has proved much controversial in terms of transparency. The CRA essentially repealed what became known as the "tap on the shoulder system" with the establishment of the Judicial Appointments Commission (JAC), an independent body which now bears this responsibility in which executive involvement is nominal. The ad-hoc committee is required to make its nominations through consulting on the merits of candidates, a list of senior judicial office holders. It is worth noting that, in all appointments the process leads to a recommendation to the Lord Chancellor who may in turn ask the panel to reconsider and even reject it, but may only exercise each power once. Vesting the pivotal role in judicial appointments within the judiciary is a particularly significant step, as it introduced an element of institutional autonomy as well as a considerable degree of self-determination.

This in effect provoked concerns about a democratic deficit in the system; and has been labeled a shift from "one extreme to another."[763] It is undoubted that any legitimate exercise of power necessitates a connection between the exerciser and its source – the public sphere. The CRA's shortcomings in this regard are vividly evident, in that it not only enhances the judiciary's position but

[763] Lady Hale, evidence before the Constitution Committee, Autumn 2011.

perhaps over amplifies it to the extent of becoming a "self-perpetuating oligarchy."[764] An elegant solution is convening the panel to appropriately balance the interests of judicial, parliamentary and lay members; this ensures the independence of the judiciary while maintaining a link to the public and no specific interest can be named superior.[765]

Concluding Remarks

The institutional independence of the judiciary is essential if the rule of the law is to be of any substance. However, considering the increasingly blurred line between legal and political decision making, the justification for calibrating a balance in which accountability is not sacrificed in favor of a purer separation of powers becomes ever- more compelling. The development in the judicial role beyond the mere mechanical application of laws makes it timely to explore parallel developments in the system. In a mature democracy judicial independence while vital cannot be an absolute. The CRA's enactment has produced a profound constitutional change which though noteworthy, is not free from imperfections. It is imperative however those changes do not stray into the realm of infringing the notion that at the heart the rule of demands compliance based on legitimacy.

[764] Robert Stevens, 'Reform in haste and repent at leisure: Iolanthe, the Lord High Executioner and Brave New World' (2003) 24(1–2) Legal Studies 1.
[765] Alan Paterson OBE and Chris Paterson, 'Guarding the guardians? Towards an independent, accountable and diverse senior judiciary' (*Centre Forum*, 2012) <https://pureportal.strath.ac.uk/files-asset/14551390/guarding_the_guardians.pdf> accessed 12 March 2017.