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Foreword

Message from the General Editor

Thank you for reading the North East Law Review. I have had both a wonderful and interesting time as the General Editor this year. It has been a pleasure to consolidate my colleagues' outstanding legal articles, and I have learned a great deal along the way. I am thankful to be apart of this ambitious endeavour, and I look forward to the North East Law Review's further development. On behalf of the North East Law Review editorial board, I would like to extend gratitude to our contributors and the Newcastle University staff who have dedicated countless hours to the Review's success. My thanks go to the following, without whom this Review would not be possible: Professor Christopher Rodgers, and Simmons & Simmons for financial support, to our staff liaisons, Dr Christine Beuermann and Ms Lida Pitsillidou for their advice and support, to Mr Richard Hogg, for designing our cover and providing humour through it all, to the managing editor Mr Derek Whayman for his limitless footnoting and formatting knowledge, and lastly to Mr Jamie Errington for dedicating tireless hours, late nights, and crisis control. Thank you!

Corey Annalise Krohman

Message from the Managing Editor

It has been a real pleasure seeing the outstanding work that has come together to form this year's Review. It shows what our cohort of talented students are capable of. I hope that you too will enjoy reading this diverse range of interesting and topical analysis. I hope it will inspire many of you to develop an interest in some particular part of the law that appeals to you. Law is much broader – and deeper – than the undergraduate syllabus and often one does not see the genius of the law and gain an interest until one explores further afield. Perhaps you might not see genius. You might exclaim 'that's outrageous!' and resolve to do something about it: to discover what has gone wrong and why and to work out a better way. Perhaps you will contribute your thoughts to the Review next year.

The undertaking of producing the Review has been a considerable one: researching, writing, editing, re-writing, polishing, submitting, selecting, copy-editing, restyling, re-editing and assembly for printing are just the jobs I can think of off the top of my head at this late hour. It can only be the work of a large team coming together and shows what can be done with the combination of many disparate skills. I would therefore like to express my thanks to all our contributors, our editors, the management team and our academic and technical support, without whom production of the Review would have been quite impossible. Finally, thank you, reader, for taking an interest.

Derek Whayman

The Editorial Board would like to thank all of the staff and students from Newcastle University who have helped in the creation of this Issue. Without their support, the Law Review would not be possible. Particular thanks are owed to Mr Richard Hogg who has spent many hours designing the front cover.

For its financial support, the North East Law Review is indebted to Newcastle University Law School and Simmons & Simmons for providing funding for printing costs.

Please note that the views expressed by the contributors in this Review are not necessarily those of the Editors. Whilst every effort has been made to ensure that the information contained in this Review is correct, the Editors do not accept any responsibility for any errors or omissions, or for any resulting consequences.

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Table of Contents

<i>R v A (No 2)</i> and the Protection of Complainants' Dignity, Privacy and Sexual Freedom. <i>Olivia Barton</i>	1
Interpreting a Living Constitution <i>Rebecca Wilkinson</i>	7
We Should Reject Kristen Rundle's Argument for 'the Impossibility of an Exterminatory Legality' <i>Paramdeep Khera</i>	14
Quantity not Quality: The Failure of the Charities Act 2006 <i>Jordan Frazer</i>	22
Boko Haram and the Role played by Proscription in the UK's Counter-Terrorism Regime <i>Hollie Morgan</i>	28
Theatre as the Court Room: The British Criminal Justice System on Trial <i>Olivia Barton</i>	34
Does the Common Law Historically 'Blunder into Wisdom' in English Private Law? <i>Belina Evans</i>	42
The Difficulties in Finding a Single Theory to Fully Justify Copyright <i>Conor Shevlin</i>	49
Should the Loss of Control Defence be Maintained? <i>Ellis Kewley</i>	55
The Legal and Ethical Principles of Medical Confidentiality are Far from Absolute <i>Katrina Spooner</i>	60
The Concept of Family Law: Understanding the Relationship between Law and Families <i>Olivia Egdell-Page</i>	68

Keeping Secrets: A Critical Analysis Of The Justifications For The Doctrine Of Secret Trusts	75
<i>Ho Siu</i>	
The Cross-Border Element and the Internal Situations Rule in EU Reverse Discrimination	106
<i>Aaron Stalley</i>	
‘Thou Shalt Not Kill; But Needst Not Strive Officiously to Keep Alive’: A Study into the Debate surrounding Euthanasia and Assisted Suicide	113
<i>Lauren Coleman</i>	
Law and Foucault’s Power Relations	151
<i>Amber Miller</i>	
The Life and Death of the Super-Injunction	159
<i>Mellisa Brennand</i>	
When was the English Constitution Written?	191
<i>Amy Shields</i>	

R v A (No 2) AND THE PROTECTION OF COMPLAINANTS' DIGNITY, PRIVACY AND SEXUAL FREEDOM

Olivia Barton^{*}

Rape is a traumatic 'invasion' of bodily integrity, which accompanies a devastating abuse of sexual autonomy.¹ The trial process constitutes a further 'spectacle of degradation'.² It not only fails to adequately protect vulnerable complainants, but it has wider societal implications by perpetuating damaging 'rape myths'³ and by deterring victims from reporting rape.⁴ 'Rape-shield' legislation has long proved a source of controversy; disagreement centres upon the balance between the defendant's right to a fair trial and the complainant's privacy interests.⁵ Respecting the privacy of rape claimants by reducing the use of sexual history evidence in trials is important for preservation of their dignity. It has further ramifications for the protection of sexual freedom: the ability to say 'no' to intercourse.⁶ This article considers the improvements to complainants' protection introduced in the Youth Justice and Criminal Evidence Act (YJCEA).⁷ It will then examine whether, in an attempt to secure a 'fair trial' for the defendant, the decision taken in *R v A (No 2)* was justified.⁸ 'Fairness', it is argued, requires the probative value of any evidence admitted to outweigh both its prejudicial effects and the wider negative societal consequences of its admittance.

Prior to the YJCEA, rape-shield legislation referred only to sexual history 'with a person other than that defendant.'⁹ The YJCEA does not distinguish between evidence relating to the accused and that relating to third parties. It places a *prima*

^{*} Newcastle University LLB (Hons) Law.

¹ Helena Kennedy, *Eve was Framed* (Vintage 1993) 135.

² Sue Lees, *Ruling Passions: Sexual Violence, Reputation and the Law* (Open University Press 1977) 885.

³ Diane Birch, 'Untangling Sexual History Evidence: A Rejoinder to Professor Temkin' [2003] Crim LR 370, 371.

⁴ Liz Kelly, Jennifer Tempkin and Sue Griffiths, 'Section 41: An Evaluation of New Legislation Limiting Sexual History Evidence in Rape Trials' (Home Office Online Report 20/2006).

⁵ Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights, as amended) art 6.

⁶ Christine Boyle and Marilyn MacCrimmon, 'The Constitutionality of Bill C-49: Analyzing Sexual Assault as if Equality Really Mattered' (1998) 41 Crim LQ 198, 230.

⁷ Youth Justice and Criminal Evidence Act 1999, s 41.

⁸ [2001] UKHL 25, [2002] 1 AC 45.

⁹ Sexual Offences (Amendment) Act 1976, s 2(1).

facie ban on sexual history evidence unless the defence has leave of the court.¹⁰ The previous legislation afforded judges enormous discretion regarding evidence admission and therefore failed to reduce its use in trials.¹¹ The YJCEA aimed to ‘keep as much evidence of complainants’ sexual behaviour out of trials as possible.’¹² It requires judges to ensure that any evidence admitted is necessary to prevent an unsafe conclusion,¹³ ‘relates to a relevant issue in the case’¹⁴ and falls within a proscribed fact gateway.¹⁵ Furthermore, the purpose of admitting evidence cannot be to ‘impugn the credibility of the complainant.’¹⁶ This legislation is commendable for having ‘symbolic as well as an instrumental importance’¹⁷ by signifying that it is unacceptable to ‘put the woman on trial’¹⁸ and sending a strong message to society about the importance of upholding rape complainants’ dignity. The deliberate restriction upon judicial discretion aims to ensure that the interests of complainant and defendant are equally balanced within a tight statutory framework.¹⁹ This was intended to increase victims’ confidence in the system and lower the unacceptably high attrition rate for rape cases.²⁰ By reducing the set of circumstances in which evidence of a sexual relationship with the accused could be admitted, section 41 YJCEA aims to reduce the risk of prejudicial, inaccurate conclusions being drawn regarding the victim’s state of mind by either the jury or the judge.²¹

Shortly after section 41 was enacted, Parliament’s clearly enunciated, thoroughly researched and comprehensively debated intentions were partially eroded by the House of Lords in *R v A (No 2)*. Their Lordships held that prohibiting admission of evidence of a sexual relationship between the complainant and the accused may breach the defendant’s right to a fair trial.²² They therefore used the strong interpretive obligation under section 3 Human Rights Act 1998 (HRA) to read section 41(3)(c)²³ ‘as subject to the implied provision that evidence or questioning which is required to ensure a fair trial under article 6 of the European Convention on Human Rights should not be treated as inadmissible.’²⁴ Although Article 6²⁵ is an absolute

¹⁰ Youth Justice and Criminal Evidence Act 1999, s 41(1).

¹¹ Aileen McColgan, ‘Common Law and the Relevance of Sexual History Evidence’ (1996) 16 OJLS 275.

¹² HC Deb 24 June 1999, Official Report, Standing Committee E (Human Rights Bill) col 203.

¹³ Youth Justice and Criminal Evidence Act 1999, s 41(2)(b).

¹⁴ *ibid* s 41(3).

¹⁵ *ibid* s 41(3).

¹⁶ *ibid* s 41(4).

¹⁷ Neil Kibble, ‘The Sexual History Provisions: Charting a Course Between Inflexible Legislative Rules and Wholly Untrammelled Judicial Discretion’ [2000] Crim LR 274, 291.

¹⁸ The Heilbron Committee: Report of the Advisory Group on the Law of Rape (Cmnd 6352, 1975) 89.

¹⁹ Ian Dennis, ‘Sexual History Evidence: Evaluating Section 41’ [2006] Crim LR 869.

²⁰ Kelly and others (n 4).

²¹ *Official Report, Standing Committee E (Human Rights Bill)* (n 12); Diane Birch, ‘Rethinking Sexual History Evidence: Proposals for Fairer Trials’ [2002] Crim LR 531.

²² ECHR (n 5) art 6.

²³ Youth Justice and Criminal Evidence Act 1999.

²⁴ *R v A (No 2)* (n 8) [86] (Lord Steyn).

²⁵ ECHR (n 5) art 6.

right, proportionality is necessarily relevant to the notion of ‘fairness’. In evaluating the ‘fairness’ of the trial, their Lordships failed to adequately consider the implications of admitting sexual history evidence. Such evidence will only be fair if its probative value outweighs the harm of bringing it to court.²⁶ By failing to properly conduct this examination, and by increasing the power of the judiciary to consider the relevance of evidence, their Lordships demonstrated ‘jealous guarding of judicial discretion’ which enabled them to ‘police the sexuality of women.’²⁷ Stevenson argues that the all-male composition of the judiciary in *R v A (No 2)* was ‘internationally embarrassing and unacceptable.’²⁸ This criticism is highly apposite; McGlynn’s convincing dissenting mock-judgment illustrates the possibility that a more representative judiciary could have reached a different conclusion by properly considering the importance of the complainants’ privacy and dignity.²⁹ She attributes less significance to the probative value of sexual history evidence and thoroughly considers its prejudicial nature. Thus conceptualised, sexual history evidence is not indicative of a ‘fair trial’ and it is unnecessary to strain the meaning of section 41, as the legislation adequately protects defendants’ rights.

Their Lordships universally opine that ‘the question must always be whether there was consent to sex with this accused on this occasion and in these circumstances.’³⁰ However, having established this, Lord Steyn held that ‘as a matter of common sense, a prior sexual relationship between the complainant and the accused may ... be relevant to the issue of consent’ as ‘the mind does not usually blot out all memories.’³¹ Schwarz, however, contends that prior consensual intercourse does not demonstrate that consent took place at the time in question.³² This demonstrates the logical fallacy present within their Lordships’ reasoning (and absent from McGlynn’s judgment)³³ that the existence of previous relations may, based upon ‘common sense’, be relevant to actual consent. Justice L’Heureaux-Dubé’s dissenting judgment in *Seaboyer* illustrates the danger caused by attributing excessive probative value to a prior relationship, holding that ‘there are certain areas of inquiry where experience, common sense and logic are informed by stereotype and myth.’³⁴ The ‘myth’ in question is that, having consented to intercourse with the defendant in the past, the complainant was more likely to have consented at the time in question.³⁵ This perpetuates the view that a woman is unlikely to have been raped by a person with

²⁶ Kibble (n 17).

²⁷ Birch (n 3) 454.

²⁸ M Stevenson, ‘Bad Judgment’ *The Guardian* (London, 27 March 2001).

²⁹ Clare McGlynn, ‘*R v A (No 2)*’ in Rosemary Hunter, Clare McGlynn and Erika Rackley (eds), *Feminist Judgments: From Theory to Practice* (Hart 2010).

³⁰ *R v A (No 2)* (n 8) [54] (Lord Slynn).

³¹ *ibid* [31] (Lord Steyn).

³² H Schwarz, ‘Sex with the Accused on other occasions: The evisceration of rape shield protection’ (1994) 31 CR (4th) 232.

³³ McGlynn (n 29).

³⁴ *R v Seaboyer, R v Gayme* [1991] 2 RCS 577 (Supreme Court of Canada) [356].

³⁵ McColgan (n 11) 287.

whom she has previously consented to intercourse. As 56% of rapes are committed by partners or ex-partners,³⁶ this is inaccurate. Evidence of a previous relationship between the parties is a poor predictor of consent; Galvin's statement that 'even the most ardent reformers' understand that previous relations are of high probative value³⁷ is therefore highly flawed.

Birch argues that 'coherence'³⁸ demands that juries are not deliberately kept 'in the dark'³⁹ in rape trials, as they are trusted to process 'potentially prejudicial evidence'⁴⁰ for other offences. However, as the probative value of previous relationship sexual history evidence is low and the risk of prejudice high, it should not be used in trials unless there is evidence that juries do not over-attribute importance to it. Research reveals that 'jurors who hear evidence involving prior sex between the complainant and the accused are less likely to find the complainant credible, more likely to find her blameworthy and more likely to believe that she consented.'⁴¹ Birch's desire for a situation in which juries could be trusted with such evidence is understandable; however, Schuller and Hastings' research reveals that 'the inclusion of judicial limiting instructions does not ameliorate the prejudicial impact of such evidence.'⁴² The myth that consent to previous intercourse with the defendant increases the likelihood that the defendant consented to the encounter in question is therefore too deeply engrained within jurors' minds to be overcome by simple judicial explanation. Enlightening juries is essential, but until research proves that juries can be educated 'out of their preconceptions',⁴³ it is essential to the interests of justice that sexual history evidence is not presented to them beyond the strictly policed boundaries of section 41.

Kennedy describes the power of the law to reflect messages to society; she argues that 'in the law, mythology operates almost as powerfully as legal precedent in inhibiting change.'⁴⁴ By undermining Parliament's message in section 41 that sexual history is rarely relevant to consent, the decision in *R v A (No 2)* has allowed this myth to perpetuate. This has serious implications for sexual freedom; McGlynn asserts that admission of this evidence can 'seriously limit the circumstances in which women are able to say "no" to sexual activity with their partners or ex-partners.'⁴⁵ It therefore

³⁶ Chris Kershaw, Tracey Budd and others, *The 2000 British Crime Survey (England & Wales)* (Home Office, 2000) 159 (3).

³⁷ Harriet Galvin, 'Shielding Rape Victims in the State and Federal Courts: A Proposal for the Second Decade' (1986) 70 *Minn L Rev* 763, 807.

³⁸ Birch (n 3) 374.

³⁹ *ibid* 545.

⁴⁰ *ibid* 374.

⁴¹ C Willis and L Wrightsman, 'Effects of victim gaze behaviour and prior relationship on rape culpability attributions' (1995) 10 *J Interpers Violence* 367, 458.

⁴² Regina Schuller and Patricia Hastings, 'Complainant Sexual History Evidence: Its Impact on Mock Juror Decisions' (2002) 26 *Psychology of Women Quarterly* 252, 252.

⁴³ Birch (n 3) 375.

⁴⁴ Kennedy (n 1) 32.

⁴⁵ McGlynn (n 29).

diminishes the perceived value of consent within relationships which, Boyle and MacCrimmon perceptively contend, reinforces ‘discriminatory stereotypes which depict women as sexually accessible.’⁴⁶ Additionally, it implies that partner-rape is less serious than ‘real’ or ‘stranger’ rape. These views were voiced, worryingly, by a barrister interviewed by Temkin: he stated that ‘if somebody has been having a sexual relationship with somebody before ... juries feel the same way as I do, that it’s really not a terrible offence.’⁴⁷ This ranking of the seriousness of rape scenarios triggers an assessment as to ‘whether or not the complainant is the sort of person who should be protected by the law.’⁴⁸ Underestimating the harm of previous partner-rape victims may deter them from reporting acquaintance-rape for two reasons. Firstly, they may feel unworthy of the law’s protection; and, secondly, they may feel that their claim is unlikely to be taken seriously. Reducing these perceptions was among the commendable aims of section 41; the decision in *R v A (No 2)* significantly undermines this purpose.

Properly understood, the decision in *R v A (No 2)* should not affect admission of third party sexual history evidence under section 41(3)(c). However, a Home Office Report voiced concern that the precedent may be applied more broadly.⁴⁹ Of the legal professionals interviewed by Temkin, all the barristers, and every judge except one, believed that the decision was applied to third party sexual history evidence.⁵⁰ The admission of this evidence raises the additional rape myth that if a complainant consented to sex with numerous other parties, she is likely to have consented to sex with the defendant. In reality, its probative value is minimal. Temkin asserts that as it is normal in today’s society for women to be sexually experienced, revealing that a complainant has had numerous sexual partners does not locate her within a minority group.⁵¹ Not only is third party sexual history evidence, in situations outside section 41, therefore irrelevant to ensuring a fair trial, its use constitutes a significant encroachment into complainants’ privacy. This privacy is hugely valued by victims, who consider whether or not sexual history would be used at trial before deciding whether to report rapes, and before withdrawing allegations.⁵² A primary aim of section 41 was to reduce the unacceptably high attrition rate for rape prosecutions;⁵³ if the judiciary further undermines Parliament’s intention by permitting additional admission of sexual history evidence under section 3 HRA, the attrition rate for rape is likely to remain unacceptably high. By retaining judicial discretion, their Lordships may have created a slippery slope by which third party sexual history evidence will be

⁴⁶ Boyle and MacCrimmon (n 6) 230.

⁴⁷ Jennifer Temkin, ‘Prosecuting and Defending Rape: Perspectives from the Bar’ (2000) 27 J L Soc’y 219, 226.

⁴⁸ Birch (n 3) 460.

⁴⁹ Kelly, Tempkin and Griffiths (n 4) 19.

⁵⁰ Jennifer Temkin and Barbara Krahe, *Sexual Assault and the Justice Gap: A Question of Attitude* (Hart 2008) 150.

⁵¹ Temkin (n 47) 244.

⁵² Kelly, Tempkin and Griffiths (n 4).

⁵³ Official Report, Standing Committee E (Human Rights Bill) (n 12).

increasingly used in rape trials, contrary to Parliament's intention. It is essential that the judiciary does not further expand the principle in *R v A (No 2)* in this way; to do so would be extremely damaging to the interests of rape victims and, by deterring victims from reporting rapes, to society generally.

By restricting judicial discretion and narrowing the circumstances through which potentially prejudicial evidence can be admitted to a jury, section 41 constitutes a significant improvement to the protection of complainants' privacy interests, dignity and their sexual freedom. Reassuring rape victims that their sexual history will not be subject to irrelevant scrutiny in court would increase victims' confidence in the system, thus encouraging them to report rape. A further benefit of the legislation was to radiate the important message that consent is incident-specific, thus seeking to destabilise long-established rape myths. The decision in *R v A (No 2)* undermines Parliament's honourable intentions by increasing judicial discretion, thus allowing rape myths to play an active role in trials. The probative value of sexual history evidence is overestimated by juries and was overestimated by their Lordships in *R v A*. Its exclusion will not breach a defendant's right to a fair trial; rather its use risks distracting the jury from the matter in question: whether or not the victim consented to the specific incident. McGlynn's feminist judgment⁵⁴ convincingly illustrates how a more representative judiciary could have better examined the meaning of 'fairness' in order to preclude the admission of sexual history evidence, thus upholding Parliament's intention.

⁵⁴ McGlynn (n 29).

INTERPRETING A LIVING CONSTITUTION

Rebecca Wilkinson *

Judges should interpret the United States Constitution as evolving in light of its contemporary meaning. Central themes will be outlined, although a thorough review of the literature reveals a plethora of debate beyond the remit of this article.¹ After briefly considering the scope for interpretation, the main justification for adopting an originalist approach will be discussed and its practical difficulties identified. It will then be considered whether a living Constitution can overcome Scalia's criticisms of non-originalism before discussing three further reasons as to why this approach is preferable.

Many clauses of the Constitution are unequivocal and leave no room for interpretation.² For example, the prescribed age requirement for Senators³ requires no interpretation because its meaning cannot change.⁴ Yet some clauses are 'couched in general phraseology'.⁵ The Constitution does not provide explicit guidance on how to interpret provisions such as 'cruel and unusual'⁶ or 'unreasonable searches and seizures'.⁷ These terms are 'value-laden' and consequently various interpretations are possible.⁸

The first interpretative approach to be discussed is 'originalism'. Although some originalists advocates an interpretation in light of the framers' subjective intent,⁹ modern originalists focus on the meaning words had among the general public when the Constitution was adopted.¹⁰ The meaning of the text does not change and outweighs any future contrary understanding of the text, perhaps with the exception of precedent.¹¹ It is this original public meaning theory which will be considered.

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¹ Mitchell N Berman, 'Originalism is Bunk' (2009) 84 Northwest UL Rev 1, 6.

² Charles A Beard, 'The Living Constitution' (1936) 185 Annals Am Acad Pol & Soc Sci 29, 30.

³ United States Constitution art I § 3 cl 3.

⁴ Larry Yackle, 'In Medias Res' (2012) 92 BUL Rev 1259, 1265.

⁵ William H Rehnquist, 'The Notion of a Living Constitution' (2006) 29 Harv JL & Pub Pol'y 401, 405.

⁶ United States Constitution amend VIII.

⁷ United States Constitution amend IV.

⁸ *Thornburgh v American College of Obstetricians and Gynecologists* 476 US 747 (1986).

⁹ Robert H Bork, 'Neutral Principles and Some First Amendment Problems' (1971) 47 Ind LJ 1, 13.

¹⁰ Randy E Barnett, 'An Originalism for Nonoriginalists' (1999) 45 Loy L Rev 611, 620.

¹¹ *South Carolina v United States* 199 US 437, 448 (1905); Dennis J Goldford, *The American Constitution and the Debate over Originalism* (CUP 2005) 139; Berman (n 1) 22.

The key justification for this approach is that the role of the judiciary should be limited. Originalism emerged as a response to perceived judicial activism in cases such as *Dred Scott v Sanford*, which is generally accepted as an example of unsuccessful judicial activism by judges adopting a living Constitution approach.¹² The Reagan administration, for example, advocated an originalist approach.¹³ Although non-originalism and judicial activism are not synonymous,¹⁴ some argue that requiring interpretation according to original public meaning constrains judicial discretion and enhances predictability and consistency.¹⁵ Originalists suggest changes in public values should only be reflected in the Constitution by constitutional amendments.¹⁶ This requires careful consideration by society before setting aside the original values which the society adopting the Constitution thought desirable.¹⁷ The Constitution should not, arguably, be changed by unelected judges, because this would contravene the democratic process.¹⁸

However, this approach is infeasible in practice because it is difficult or impossible to ascertain original meaning.¹⁹ Judges are not trained to immerse themselves in the political atmosphere of the time, nor are they trained to assess masses of historical material.²⁰ Some of this material may be unreliable and would require judges to assess its validity,²¹ a task better suited to historians.²² Some material may be vague or non-existent, perhaps because the meaning of a clause that was originally not considered to be important now requires interpretation. For example, section 1 of the Fourteenth Amendment is now interpreted more than any other provision even though it received minimal attention when it was adopted.²³ If a meaning was inadequately considered at the time, it will not be easily ascertainable now.²⁴

If an original meaning can be found, it may require huge amounts of valuable court time.²⁵ Additionally, different judges could disagree about the correct historical approach, as historians do.²⁶ The result may therefore reflect a judge's political

¹² *Dred Scott v Sanford* 60 US 393 (1857); Rehnquist (n 5) 405.

¹³ Edwin Meese, 'The Attorney General's View of the Supreme Court: Toward a Jurisprudence of Original Intention' (1985) 45 PAR 701.

¹⁴ Keith E Whittington, 'Originalism: A Critical Introduction' (2013) 82 Fordham L Rev 375, 393.

¹⁵ Antonin Scalia, 'Originalism: The Lesser Evil' (1989) 57 U Cin L Rev 849, 855.

¹⁶ Rehnquist (n 5) 405.

¹⁷ Scalia (n 15) 862.

¹⁸ *ibid.*

¹⁹ *ibid* 864.

²⁰ Daniel A Farber, 'The Originalism Debate: A Guide for the Perplexed' (1989) 49 Ohio St LJ 1085, 1089.

²¹ James H Hutson, 'The Creation of the Constitution: The Integrity of the Documentary Record' (1986) 65 Tex L Rev 1, 33–34.

²² William E Nelson, 'History and Neutrality in Constitutional Adjudication' (1986) 72 Va L Rev 1237, 1250–51.

²³ United States Constitution amend XIV § 1; Farber (n 20) 1088.

²⁴ Whittington (n 14) 410.

²⁵ Scalia (n 15) 860.

²⁶ Farber (n 20) 1089, 1105.

preferences, concealed under ‘historiographic debates’.²⁷ Furthermore, under an originalist approach, due process under the Fourteenth Amendment may have a broader original meaning than under the Fifth Amendment, yet it would be absurd to interpret them differently.²⁸ If determining original meaning is infeasible, this should not be the basis for interpretation.

Although Scalia acknowledges originalism is flawed, he nevertheless accepts the approach because he alleges no agreed-upon alternative exists.²⁹ He analogises non-originalism with voting ‘non-Reagan’, which has no meaning.³⁰ It is difficult to articulate normative interpretative rules which are entirely satisfactory but this is no more necessary for judges choosing a meaning than for voters selecting a candidate.³¹ However, a living Constitution approach is a viable alternative. Although some non-originalist approaches are underpinned by fairness or justice,³² the most persuasive approach is that the Constitution should be interpreted as a living Constitution, according to its contemporary understanding rather than original meaning.³³ Although judges may still consider original meaning, they are not obliged to accord it conclusive authoritative significance.³⁴ Current values and a contemporary understanding of the Constitution outweigh original meaning.³⁵

This approach must overcome other shortcomings of non-originalism identified by Scalia. He argues it is unclear which current values should be reflected in interpretation.³⁶ Brest suggests that only values fundamental to society should be relevant.³⁷ Arguably, allowing judges to determine which values are relevant permits too much discretion and facilitates judicial personalisation of the meaning of the Constitution.³⁸ The danger, in Scalia’s view, is that non-originalism is a ‘two-way street that handles traffic both to and from individual rights’.³⁹

Scalia’s criticisms reflect a fear that judges can limit rights.⁴⁰ Rehnquist similarly highlights the danger that judges could act independently of public will to solve

²⁷ *ibid.*

²⁸ United States Constitution amend V; US Con amend XIV; Farber (n 20) 1097.

²⁹ Scalia (n 15) 863.

³⁰ *ibid* 855.

³¹ Berman (n 1) 85.

³² William Brennan, ‘The Constitution of the United States: Contemporary Ratification’ (1986) 27 S Tex LJ 433, 438; Michael Kammen, ‘“A Vehicle of Life”: The Founders’ Intentions and American Perceptions of Their Living Constitution’ (1987) 131 Proceedings of the American Philosophy Society 325, 340.

³³ Beard (n 2).

³⁴ Michael Perry, ‘The Authority of Text, Tradition and Reason: A Theory of Constitutional Interpretation’ (1985) 58 S Cal L Rev 551, 569–70.

³⁵ Paul Brest, ‘The Misconceived Quest for the Original Understanding’ (1980) 60 BUL Rev 204, 229.

³⁶ Scalia (n 15) 855.

³⁷ Brest (n 35) 227.

³⁸ Scalia (n 15) 863.

³⁹ *ibid* 856.

⁴⁰ *ibid* 863.

society's problems.⁴¹ More radically, Meese argues democracy is sacrificed under a living Constitution because judges can choose whether to apply the Constitution at all.⁴² Scalia suggests interpretation should therefore be constrained, specifically by the criterion of the original meaning of the text which is separate to a judge's own preferences.⁴³ Yet, as has been discussed, an originalist approach may still require discretion and does not inevitably prevent abuse of power.⁴⁴ Conversely, a restrictive originalist interpretation may legitimise this under the guise of following original meaning.⁴⁵

Judicial discretion does not necessarily infringe democracy. Although unelected judges should not prevent people from pursuing choices through democratic politics, judges must be powerful enough to ensure other government branches act constitutionally.⁴⁶ Ensuring that the Constitution continues to protect rights may be consistent with the overall basis of democracy.⁴⁷ On this view, so far as judges protect rather than curtail rights, an interpretation reflecting current values does not conflict with democracy.⁴⁸ Decisions curtailing rights are unlikely because an interpretation leading to unjust outcomes would be unsustainable, eventually casting doubt on the interpretative approach and perhaps the Constitution itself.⁴⁹ Constitutional checks and balances ensure any such decisions are correctable, for example by political responses, judicial appointments or protest.⁵⁰ The power of the people is ultimately superior to the judiciary.⁵¹

Judges are further restricted in their interpretation of the Constitution by the doctrine of *stare decisis*. Monaghan suggests that judges could simply disregard precedent.⁵² A frequently cited example of this is *Brown v Board of Education*,⁵³ which held racial segregation in public schools unconstitutional, apparently overturning the 'separate but equal' precedent.⁵⁴ However, on closer examination, the court had followed 'a line of precedents' which gradually eroded this doctrine, *Brown* merely being the final 'step in a progression'.⁵⁵ Although precedents may be malleable, they are not

⁴¹ Rehnquist (n 5) 406.

⁴² Edwin Meese, 'The Supreme Court of the United States: Bulwark of a Limited Constitution' (1987) 27 S Tex LJ 455, 465.

⁴³ Scalia (n 15) 864.

⁴⁴ Whittington (n 14) 393.

⁴⁵ Mark Tushnet, 'The US Constitution and the Intent of the Framers' (1987) 36 Buff L Rev 217, 226.

⁴⁶ *ibid.*

⁴⁷ Farber (n 20) 1098.

⁴⁸ *ibid.*

⁴⁹ Whittington (n 14) 401.

⁵⁰ Jack M Balkin, 'Framework Originalism and the Living Constitution' (2009) 103 Northwest UL Rev 549, 613–14.

⁵¹ Kammen (n 32) 335.

⁵² Henry P Monaghan, 'Our Perfect Constitution' (1981) 56 NYUL Rev 353, 359.

⁵³ 347 US 483 (1954).

⁵⁴ *Plessy v Ferguson* 163 US 537 (1896).

⁵⁵ *Brown* (n 53); David A Strauss, 'Do We Have a Living Constitution?' (2010) 59 Drake L Rev 973, 978.

completely ‘manipulable’ and cannot be disregarded.⁵⁶ Judges do not invoke current values arbitrarily, rather incrementally and according to precedent.

Current values are only one factor taken into account under this interpretation. Judges must adhere to the limitations of the judicial role and balance this with the need for the Constitution to evolve with social changes.⁵⁷ Judges are better qualified to do this than to conduct extensive historical enquiries required by originalism. Moreover, any interpretation must remain consistent with the text of the Constitution which cannot be contradicted.⁵⁸ This approach may be no less predictable than an originalist approach because behaviour of judges can be observed.⁵⁹ Neither approach is entirely predictable, thus an objective and mechanical interpretative approach is perhaps a ‘fable’.⁶⁰

There are three further reasons why a living Constitution approach should be adopted.

Firstly, the framers may have intended the Constitution to be a living document.⁶¹ If the original meaning of the Constitution was that original meaning would not bind future generations, originalism is ‘inherently self-contradictory’.⁶² Although much controversial historical analysis is required to accurately conclude the Constitution was understood to change over time,⁶³ this seems correct for two reasons. Firstly, the Constitution made significant compromises and it was recognised that adjustments would be required in the future.⁶⁴ Secondly, general flexible provisions were used to ensure the Constitution would endure societal change and adapt to ‘various crises of human affairs’.⁶⁵ For example, although ‘cruel and unusual punishment’ was forbidden, future interpretation must have been intended instead of permanently binding this clause to what it meant at the time.⁶⁶ This is the ‘genius’ of the Constitution.⁶⁷ Nevertheless, if a living Constitution was the framers intent, this alone does not indicate a living Constitution approach is correct.⁶⁸

A second reason for adopting this approach is that modern understanding may be superior to the original meaning.⁶⁹ The original meaning of the Constitution was associated with problems that arose at that time, which are quite different from

⁵⁶ Strauss (n 55) 983.

⁵⁷ *ibid* 977.

⁵⁸ David A Strauss, *The Living Constitution* (OUP 2010) 103.

⁵⁹ Berman (n 1) 88.

⁶⁰ *ibid* 8.

⁶¹ H Jefferson Powell, ‘The Original Understanding of Original Intent’ (1985) 98 Harv L Rev 885.

⁶² Farber (n 20) 1087.

⁶³ Kammen (n 32) 329.

⁶⁴ *ibid* 332.

⁶⁵ *McCulloch v Maryland* 17 US 316, 415 (1916) (Marshall CJ).

⁶⁶ United States Constitution amend VIII.

⁶⁷ Brennan (n 32) 438.

⁶⁸ Kammen (n 32) 329.

⁶⁹ Yackle (n 4) 1263.

today's problems.⁷⁰ People were not necessarily wiser than they are now. In fact, they 'were racist, sexist and classist'. Therefore instead of 'being bound by them', their understanding should be rejected.⁷¹ As Chief Justice Warren held in *Brown*, 'in approaching this problem we cannot turn the clock back to 1868' but instead public education should be considered in 'light of its full development and its present place in American life'.⁷² It is absurd to consult a dictionary on the meaning of 'arrest' at the time the Constitution was adopted;⁷³ judges should instead ask: 'what do the words of the text mean in our time?'⁷⁴ It is better to be ruled by the living present than a dead hand.⁷⁵

Originalist theory could rebut this criticism by suggesting the framers intended some terms to be 'living'. Corwin argues some provisions were originally intended to be moulded to 'views of contemporary society' but others were intended to be strictly given their historical meaning.⁷⁶ If so, this undermines originalism's supposed advantages of stability and constraining judicial discretion.⁷⁷ However, although this theory has force,⁷⁸ there is no persuasive evidence that the Constitution was understood as having or intending to have 'two sets of provisions'.⁷⁹

Finally, a living Constitution is preferable because it ensures the Constitution applies to contemporary society. Originalists suggest constitutional amendments could achieve the same goal more democratically.⁸⁰ Yet amendments are inadequate for this purpose, because they are rare and difficult to pass - there have only ever been twenty-seven.⁸¹

Originalism strictly applied would require constant ratification of clauses such as 'cruel and unusual punishment' to continuously reflect contemporary values.⁸² This would undermine stability and 'make the Constitution itself unworkable'.⁸³ Judicial interpretation can reach the same result much faster than a slow constitutional amendment, as demonstrated by *Brown*.⁸⁴ Furthermore, amendments may be limited. For example, the Nineteenth Amendment regarding sex discrimination guaranteed

⁷⁰ Tushnet (n 45) 221.

⁷¹ Barnett (n 10) 613.

⁷² *Brown* (n 53).

⁷³ *Atwater v City of Lago Vista* 52 US 318, 330 (2001).

⁷⁴ Brennan (n 32) 438.

⁷⁵ Murray Dry, 'Federalism and the Constitution: The Founders' Design and Contemporary Constitutional Law' (1987) 4 Constitutional Commentary 233, 234.

⁷⁶ Edward S Corwin, 'Judicial Reviews in Action' (1926) 74 U Pa L Rev 639, 659-60.

⁷⁷ Berman (n 1) 31.

⁷⁸ Monaghan (n 52) 361.

⁷⁹ *ibid* 362.

⁸⁰ Scalia (n 15).

⁸¹ United States Constitution amends I-XXVII.

⁸² United States Constitution amend VIII.

⁸³ Farber (n 20) 1095.

⁸⁴ *Brown* (n 53); Kammen (n 32) 334.

women only the right to vote.⁸⁵ Originalism is therefore ‘too static’ and ‘disregards the need to keep the Constitution up to date’.⁸⁶

Consequently, in addition to adopting new amendments as necessary, the Constitution has inevitably been interpreted as a living Constitution.⁸⁷ Because the public has relied upon this interpretation, it seems dubious to suggest the court should instead adopt an originalist approach.⁸⁸ For example, the Supreme Court adapted its interpretation of the Constitution rendering a child labour amendment unnecessary.⁸⁹ Originalism could perhaps permit judges to follow precedent, but this would be ‘an invitation to unbridled subjectivity’.⁹⁰ An arbitrary distinction would arise between past and future cases and it is unclear why social changes could not then provide further exception.⁹¹ It is therefore possible that ‘the Supreme Court has gone too far down the non-originalist path to make a return to originalism feasible’ anyway.⁹²

To conclude, although a living Constitution approach does not provide clear rules determining which current values are relevant, this does not necessarily infringe democracy. This difficulty should not be overcome by adopting an originalist approach, but instead judicial discretion should be restricted by precedent and by constitutional checks and balances. An originalist approach also risks imposing a judge’s personal preferences ‘under the guise of constitutional exegesis’.⁹³ Furthermore, an originalist approach is practically untenable. Even if original meanings were not contested, this approach should still be rejected because social changes are implemented faster and more effectively under a living Constitution. This is necessary for a durable Constitution and consequently it is this approach that has been and should continue to be adopted.

⁸⁵ United States Constitution amend XIX.

⁸⁶ Farber (n 20) 1095.

⁸⁷ Kammen (n 32) 334.

⁸⁸ Farber (n 20) 1097.

⁸⁹ *ibid.*

⁹⁰ Berman (n 1) 89.

⁹¹ Scalia (n 15) 861; Berman (n 1) 35.

⁹² Farber (n 20) 1087.

⁹³ Berman (n 1) 85.

WE SHOULD REJECT KRISTEN RUNDLE’S ARGUMENT FOR ‘THE IMPOSSIBILITY OF AN EXTERMINATORY LEGALITY’

*Paramdeep Khera**

1 INTRODUCTION

Jurisprudence is sharply divided. A dichotomy exists between those who see Nazi law as legally valid, and those who do not.¹ Broadly speaking, positivists represent the former. The law, for them, is not necessarily connected with morality, whilst natural lawyers represent the latter, purporting there to be such a connection.² This article rejects Rundle’s arguments for the ‘impossibility of an exterminatory legality’.³ Rundle claims adherence to procedural legality leads to morally sound law, allowing for human agency to prosper.⁴ This will also be rejected.

This article attempts to analyse the legality of Nazi law, supporting the idea of a separation between law and morality. Compliance with Fuller’s ‘inner morality of law’ can be adhered to for prudential reasons, denying it to be of ‘any inherent moral significance’.⁵ Further, dividing what the law is, from what it ought to be is suggested, facilitating deterrence against quietism. Such a danger occurs where citizens may accept law to be just, without a thorough examination of its attributes.⁶ Consequently, it will be demonstrated that ‘the existence of law is one thing, its merit, or demerit another’.⁷

2 FULLER: GRIST TO RUNDLE’S MILL

In light of Rundle’s claims, Hartian philosophy will be drawn upon to evaluate analysis of ‘the impossibility of an exterminatory legality’.⁸ Human agency, Rundle espouses, is afforded by Fuller’s ‘inner morality of law’.⁹ Fundamentally, congruence between official action and declared rule takes primacy. The other seven desiderata

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¹ H L A Hart, ‘Positivism and the Separation of Law and Morals’ (1958) 71 Harv L Rev 593.

² Lon Fuller, ‘Positivism and Fidelity to Law – A Reply to Professor Hart’ (1958) 71 Harv L Rev 630; Lon Fuller, *The Inner Morality of Law* (Yale University Press 1964).

³ Kristen Rundle, ‘The Impossibility of an Exterminatory Legality: Law and the Holocaust’ (2009) 59 Uni of Toronto L 65125.

⁴ *ibid*; Fuller, ‘Positivism and Fidelity to Law’ (n 2) 630; Fuller, *The Inner Morality of Law* (n 2).

⁵ Matthew Kramer, ‘The Big Bad Wolf: Legal Positivism and its Detractors’ [2004] Amer J Juris 1, 2.

⁶ Liam Murphy, ‘The Political Question of the Concept of Law’ in Law’ Jules Coleman (ed), *Hart’s Postscript: Essays on the Postscript to ‘The Concept of Law’* (OUP 2001) 380.

⁷ John Austin, *The Province of Jurisprudence Determined* (Weidenfeld & Nicolson 1861) 1845.

⁸ Rundle (n 3) 65–125; Hart (n 1); HLA Hart, *The Concept of Law* (OUP 1961).

⁹ Rundle (n 3) 106.

are not as significant for the delivery of morally sound law. That is not to say emphasis is not placed upon laws being publicly available, prospective and not requiring the impossible for conformity. Rather, congruence emphasises and respects citizen's rights and duties.¹⁰ As such, they are recognised as 'rational, autonomous agents capable of self-directed activity'.¹¹ For Rundle, this emphasises the idea of reciprocity. The law treats its addressees with respect, in a morally justifiable manner. The law's addressees respect the law.¹²

However, Rundle and Fuller fail to demonstrate that the 'inner morality of law' is synonymous with morality.¹³ Instead, the procedural requirements of legality can be seen as a form of efficacy. Hart notes that the requirements can be seen as principles of good legal craftsmanship, but questions the link to morality. An analogy strengthens the point; principles for poisoners would not be called a morality of poisoning. It simply blurs the distinction between 'efficiency for a purpose and final judgments about activities and purposes with which morality is concerned'.¹⁴ This is the problem that occurs when what the law is, becomes blurred with what the law ought to be.

Rundle's claims of reciprocity between ruled and ruling being moral are also unavailing.¹⁵ Fuller's notion of reciprocity appeals to Rundle. Here, the governing will inform the governed what rules are to be followed. If followed, the governed have assurances that rules will be applied justly to conduct.¹⁶ Thus, Rundle, like Fuller, asserts this to be a moral concept. The rule of law subsequently acknowledges and preserves the dignity of human agents capable of autonomous choice.¹⁷ Law treating citizens in a predictable and procedurally fair manner allows for citizens to know where they stand. Thus, government officials will not arbitrarily clamp down on one's undertakings, valuing the ideal of self-determination.¹⁸ This view has two defects.

Firstly, settled expectations do not necessarily enhance autonomy and agency, contrary to Fullerian ideas.¹⁹ Kramer gives an illustration of such a point.²⁰ For example, a law is enacted stating how shoelaces are to be tied in a specific way.²¹ At first, it is rarely enforced and engenders uncertainty amongst citizens about how to tie

¹⁰ Lon Fuller, 'A Reply to Critics' in Lon Fuller, *The Morality of Law* (rev edn, OUP 1969) 187.

¹¹ Rundle (n 3) 106.

¹² *ibid* 108.

¹³ *ibid* 101; Fuller, 'Positivism and Fidelity to Law' (n 2) 636.

¹⁴ Hart (n 1).

¹⁵ Rundle (n 3) 107.

¹⁶ Fuller, *The Inner Morality of Law* (n 2) 39–40.

¹⁷ *ibid*; Rundle (n 3) 107.

¹⁸ Matthew Kramer, 'Scrupulousness Without Scruples: A Critique of Lon Fuller and His Defenders' (1998) 18 OJLS 240.

¹⁹ Fuller, 'Positivism and Fidelity to Law' (n 2) 630.

²⁰ Kramer (n 18) 240.

²¹ *ibid*.

their laces, but tempts many to disregard it and tie laces as they please. However, strict enforcement of the law then occurs. Congruence between official action and enacted law may be present and uncertainty amongst citizens will now be lost, knowing conformity is necessary. Despite this, no enhancement of autonomy or agency has flown from this increased certainty.²² Rather, agency appears to be usurped. The same can be said for the Nuremberg Laws which Rundle gives the title of law. Jews knew where they stood, and a measure of order was brought to a state of disorder.²³ Yet this seems arbitrary. If human agency flows from laws subscribing to Fullerian ideals engendering certainty, then how can discriminatory law still allow for agency? A Jew's autonomy is still thwarted by unjust Nazi legislation which, prevents a Jew from marrying a non-Jew.²⁴ To add to agency being usurped, one must ponder whose agency Rundle wants to promote. If it is interpreted to apply to all citizens for the purposes of equality, then it appears odd that discriminating against Jews still merits the title of law. It is artificial to claim that certainty being engendered fosters agency.

Secondly, agency and autonomy are not only susceptible to be diminished via governmental action. If a policy of strict administration allowed for citizens to know that their government will refrain from interference with liberties, then citizens are free to act within a sphere of agency. Some may, however, lose such agency when uncertainty about the government's forbearance is removed. Apprehension of governmental interference may hinder some from subjugating others, a change to non-interference means the newly oppressed suffer a diminution of agency and autonomy. Yet, if this is to be countered by a change of policy to strict interference with citizens' lives, the victims of oppression have suffered a reduced agency.²⁵ Even though the formerly oppressed are now more certain that the government will assist by intervening, the effect is not an enhancement of autonomy or agency.

The inner morality of law and procedural legality can occur for prudential reasons and is thus not intrinsically moral.²⁶ If a regime were to abide by the Fullerian principles, one cannot know the reasons for obedience to normative propositions of procedural legality. If officials abide by Fullerian principles for prudential reasons, such conformity confers no moral worthiness. Fuller and Rundle, however, reject the idea that officials who act for purely prudential reasons will be inclined to conform to the eight Fullerian principles.²⁷ Instead, if officials adhere to Fuller's principles for the sake of wanting to gain the image of taking account of citizens' interests, their conduct will be moral, despite the conduct being prudential. However, this is flawed. For Fuller and Rundle, law is about the coordination of social, economic and political

²² *ibid.*

²³ Rundle (n 3) 101.

²⁴ The Laws for the Protection of German Blood and German Honour 1935, ss 1, 2.

²⁵ *ibid.*

²⁶ Kramer (n 5) 1.

²⁷ Rundle (n 3) 101; Fuller, 'Positivism and Fidelity to Law' (n 2) 636.

life. If an evil regime wants to affect their citizens in these vast areas, officials will need to direct the behaviour of citizens and coordinate such efforts. The regime will need to facilitate its aims by constraining its conduct in a manner very similar to compliance with Fuller's requirements.²⁸ For instance, if a group of gunmen subject people to their control, Simmonds believes that the gunmen will be unable to direct victims' behaviour unless commands similar to Fuller's principles are utilised.²⁹ While liberal democracies aim for moral ideals of having subjects understand directives, this is similar to evil gunmen intending to enact wicked goals. Such unjust actions also require victims to accede and perform specific tasks.³⁰ The need to have directives followed is essential for the effective steering of behaviour which aims to cause despicable ends.

Fullerian principles of legality have been contrasted against managerial direction, yet Fuller accepted that five of his eight desiderata are highly servable to a one way-projection of power.³¹ Against this, congruence between official action and rules, non-retroactivity and generality were seen as not applicable to a managerial setting.³² This can be challenged by using circumstances of officials in a wicked regime as an illustration. Due to governments dealing with a plethora of problems, in many circumstances, general norms need to be utilised. Likewise, expansiveness of a typical government's dominion creates likelihood that retroactive norms could be deemed useful by evil rulers. Officials may also decide a policy to be changed retrospectively. This was apparent when the Soviet Union introduced the death penalty during the 1960s for specific economic crimes.³³ Such retroactive reshaping will likely be done as little as possible to encourage congruence between laws as stated and enforced. If citizens knew that the state did not respect its own laws, citizens may not feel inclined to. As Kramer notes, 'a regime that wishes to advance its aims efficaciously will have solid prudential reasons for keeping a consistency between its laws-as-enacted and its law-as-implemented.'³⁴ Yet, the congruence is not carried out for any moral gain. Adherence to Fullerian principles is thus devoid of intrinsic moral worth.

The vastness of a legal system and number of officials that exist within it illustrate how the inner morality of law can be used for prudential purposes. Operations will usually be inefficient and impossible, without utilisation of general norms to guide officials. Fuller's precepts provide the necessary coordination. If there are large departures from Fuller's principles, various official measures may be uncoordinated and deficient. Unless organised of procedural and substantive norms, a government

²⁸ Kramer (n 18) 252.

²⁹ Nigel Simmonds, *Central Issues in Jurisprudence: Justice, Law and Rights* (Sweet & Maxwell 1986) 123.

³⁰ Kramer (n 18) 253.

³¹ Fuller, *The Inner Morality of Law* (n 2) 208.

³² *ibid* 208–209.

³³ *ibid* 202–203.

³⁴ Kramer (n 18) 255.

will be grossly inefficient.³⁵ As officials in an evil regime need to coordinate their own endeavours while achieving their aims of directing citizen behaviour, that coordination will fulfil Fullerian requirements. Thus, adherence to such requirements allows for wicked regimes to exist for prudential purposes.³⁶

3 HART AND THE PROBLEM OF 'QUIETISM'

Hartian requirements of law can be utilised to deny Rundle's claims that the death of six million Jews was not lawfully catered for. The idea being 'no necessary truth that laws reproduce or satisfy certain demands of morality' is reinforced.³⁷ This is developed upon, as 'law is not the gunman writ large situation'.³⁸ Not all laws are coercive. Some facilitate creation of contracts and other legal situations.³⁹ Hart distinguishes between having an obligation and being obliged. What explains citizens obeying the law is the fact that they believe they are under an obligation to obey. The content of law cannot be arbitrary and still aim for voluntary compliance. Thus, it is acknowledged that law must have a 'minimum content of natural law'.⁴⁰ Further, treating like cases alike also suggests a notional connection between legality and moral value.⁴¹ Neither compromise the separation thesis as a legal system which enacts 'hideously oppressive' laws can satisfy such minimum requirements.⁴² The Nazis would qualify as satisfying such a threshold.

A positive definition of law is given by Hart; there is a 'union of primary and secondary rules'.⁴³ The former relate to rules of conduct, the latter are rules addressed to officials and which set to affect the operation of primary rules.⁴⁴ The rule of recognition is a social rule which 'provides criteria by which the validity of other rules of the system is assessed'.⁴⁵ It can be viewed as a reference to which the officials of a legal system identify norms that belong to the system as rules.⁴⁶ If Nazi officials recognise the orders of the 'enterprise association', extermination becomes a lawful concept.⁴⁷

Accepting a Hartian perspective and dismissing Rundle's helps to avoid the dangers of quietism. Murphy defines quietism as a problem which occurs when citizens think that bad law is not really law; thus they will be less inclined to subject what the legal

³⁵ Simmonds (n 29) 119.

³⁶ Kramer (n 18) 249.

³⁷ Hart (n 8) 185.

³⁸ Hart (n 1) 603.

³⁹ *ibid* 604.

⁴⁰ Hart (n 8) 188.

⁴¹ Hart (n 1) 623; Shadia Drury, 'Hart's Minimum Content Theory of Natural Law' [1981] *Pol T* 9, 533–546.

⁴² Hart (n 1) 624.

⁴³ Hart, *The Concept of Law* (n 8) 85.

⁴⁴ *ibid* 79.

⁴⁵ Hart, 'Positivism and the Separation of Law and Morals' (n 1) 623.

⁴⁶ Matthew Kramer, *In Defence of Hart* (University of Cambridge Faculty of Law Research Paper No 18/2012) 5.

⁴⁷ Richard Mullender, 'Nazi Law and the Concept of Community' (2008) 58 *Uni Toronto LJ* 377, 387.

regime presents as law, to critical evaluation.⁴⁸ Kelsen builds upon this, seeing a natural law outlook leading to ‘an uncritical legitimisation of the political coercive order’.⁴⁹ The threat of quietism is heightened when one accepts the line of thinking that a legislative provision is just, due to the fact that it has passed a ‘moral test’. If citizens believe directives from the state are law as they have survived moral filtering, then it is less likely that citizens would subject law to moral evaluation. Rather, it could be assumed as just. The more that morals are infused in a legal system, so that unjust actions are seen as mistakes or not legally valid, the more accepting citizens will be of unjust directives from the legal regime.⁵⁰ Against this, Hart’s theory can acknowledge a legal regime to make mistakes, and law to be unjust. If Rundle’s conception is accepted, then a judge may apply the law that is already taken to be moral, due to the fact that it has legal validity. However, it may be devoid of moral worthiness. So long as a moral test or threshold exists, there is a danger that apparent laws will be given the benefit of the doubt and assumed to be just. Further, when official directives are seen as unjust, it will be viewed as an error on behalf of the legal system, so as to deflect and diminish scope for criticism.⁵¹

Rundle’s acceptance of pre-1939 Nazi law as legally valid facilitates an occurrence of quietism.⁵² The Nuremberg Laws, Rundle claims, respected agency and thus morality, due to the fact that they provided ‘at least a minimum structure for ordered lives’.⁵³ Space was afforded for Jews to live in an autonomous and self-directed manner. However, this is susceptible to then allowing the boundary to become blurred and artificial. Nazi actions may move from banning Jews working within the Civil Service, prohibiting inter-racial relationships, to forcing them to be completely subjugated by coercive action.⁵⁴ The view that the Nuremberg Laws were acceptable as they allowed for limited agency and thus morality means such a perspective is less critical of Nazi policy.⁵⁵ It appears arbitrary to allow for such invasions of personhood, agency, autonomy and dignity as the Nuremberg Laws catered for, to be seen as law, yet other actions not being seen as law.

4 HART, LIBERALISM AND AGENCY

Denying The Holocaust’s legal validity can be seen to limit agency as it decides what citizens should or should not accept as law. Hartian ideals allow for agency to prosper in respect of when or when not, to obey a law. This liberal aspect for citizens allows evaluation to occur and does not merely imply that a law ought to be obeyed as it is

⁴⁸ Murphy (n 6) 388.

⁴⁹ Hans Kelsen, ‘Law, State and Justice in the Pure Theory of Law’ [1948] Yale LJ 57, 383–384.

⁵⁰ Murphy (n 6) 392.

⁵¹ *ibid.*

⁵² Rundle (n 3) 89.

⁵³ *ibid.* 91.

⁵⁴ The Laws for the Protection of German Blood and German Honour 1935 (n 24).

⁵⁵ Rundle (n 3) 90.

seemingly just, or right.⁵⁶ Citizens can posit two separate questions. Firstly, is the rule a valid rule of law? Secondly, should it be obeyed? This empowers citizens to be the arbiter of validity and accordingly enhances agency.

Resistance to tyranny can be encouraged from a positivist perspective. By recognising the citizen as autonomous and capable of evaluating the appropriateness of the law and its legitimacy, a heightened sense of power is given to the citizen, over what the law dictates. Liberal citizenship can be viewed as the right to assess legality, question authority and disobey if necessary.⁵⁷ Hart's conception affords an enhancement of liberal citizenship by allowing citizens to disobey, depending on how they assess the law.⁵⁸ By enhancing liberal citizenship, the threat of tyranny can be quelled. Likewise, determining the law's validity before individual assessment minimises scope for agency.

5 FREEDOM AND 'INNER MORALITY OF LAW'

Rejecting Rundle's view can be strengthened for reasons related to freedom. Firstly, it can be questioned that when legal morality is lost, freedom for citizens is lost.⁵⁹ Legal morality involving affirmation of freedom does not illustrate that other forms of social structuring consist of its rejection.⁶⁰ Fuller argues that balance will be necessary between the inner morality of law and other external goals.⁶¹ Liberty for some may mean others are less fortunate. Respect for freedom may sometimes necessitate policies which are at odds with the rule of law. This can be seen from the 'liberal' view that freedom is caused by governmental intervention and management of an economy, which predicates forms, procedures and guarantees associated with the law.⁶² Predictability, for a social environment, may be necessary to harness autonomous agency amongst citizens. However, members of the working class may need to be able to predict employment and as such an administration that is prepared to intervene may help secure full employment.⁶³ Freedom cannot be viewed as the monopoly of ideals within the rule of law, as economic management may make state activity key to securing some form of economic liberty. As freedom may require some re-balancing for the pursuit of social goals with the aim of liberty, it would be wrong to view Fuller's inner morality of law as safeguarding freedom, as freedom may entail contrary action.

⁵⁶ Nicola Lacey, 'HLA Hart's Rule of Law: The Limits of Philosophy in Historical Perspective' [2007] *Quaderni Fiorentini* 36, 1162.

⁵⁷ *ibid* 1172; Hart (n 1) 620.

⁵⁸ Hart (n 1) 620.

⁵⁹ Fuller, *The Inner Morality of Law* (n 2) 162–63.

⁶⁰ Jeremy Waldron, 'Why Law – Efficacy, Freedom, or Fidelity?' *Law & Phil J* (1994) 13, 267.

⁶¹ Fuller, *The Inner Morality of Law* (n 2) 44–45.

⁶² Waldron (n 60) 267.

⁶³ *ibid* 268.

The inner morality of law does not link law to legal fidelity as Fuller claims it to.⁶⁴ The most important principle for Rundle is congruence between official action and rule. This, apparently, fosters reciprocity between government and citizen for fidelity to law.⁶⁵ If a social goal of economic allocation conflicts with the pursuit of congruence, a government may have to pursue the goal by other means as the drawbacks in terms of loyalty of those who are not committed to the social goal are less than the downsides of not proceeding with the social goal.⁶⁶ A government carrying out secret and retroactive legislation is unlikely to require citizen support in terms of a ‘moral obligation to obey the law’. However, it may ask for loyalty in other ways, like the pursuit of a political goal or community. Be that equality or *Volksgemeinschaft* (a people’s community). Citizens, who are committed to such goals, will be ready to meet the demands necessary to attain the goals. If there are some who are less ready, a state may need to make assurances that a predictable environment is fostered so as to ensure agency and goals of citizens are paid due respect. Reciprocity can be used for unjust and negative ends. Citizens may support the annihilation of a race of people, and others may have space left to pursue their affairs.

6 CONCLUSION

Consequently, Rundle’s claims ought to be rejected.⁶⁷ Principles of legality have been demonstrated as not being intrinsically moral, and can be used for prudential purposes.⁶⁸ Infusing law and morality runs the risk of detracting from liberty and agency. The separation of what the law is and what it ought to be however provides a preferable safeguard for citizen autonomy regarding the obedience of law. Allowing evaluation for the individual aids an avoidance of quietism, and strengthens the premise of liberal citizenship.⁶⁹

⁶⁴ Fuller, *The Inner Morality of Law* (n 2) 39–40.

⁶⁵ *ibid.*

⁶⁶ Waldron (n 60) 279.

⁶⁷ Rundle (n 3) 65–125.

⁶⁸ Kramer (n 5) 2.

⁶⁹ Murphy (n 6) 388.

QUANTITY NOT QUALITY: THE FAILURE OF THE CHARITIES ACT 2006

*Jordan Frazer**

In order for an organisation to be granted charitable status by the Charity Commission it must satisfy two requirements: its purpose must be charitable it must be the public benefit. This article concerns sections 2 and 3 of the Charities Act 2006, now sections 2–4 Charities Act 2011, and discusses their effect on what Jaconelli calls the ‘qualitative question’,¹ the charitable purpose requirement, and Jaconelli’s ‘quantitative question’,² public benefit. The position is taken that charity law must be flexible to accommodate future situations but this must be balanced against certainty as to what constitute charitable purposes and the definition of public benefit. This theme will assist the debate by suggesting the reforms are artificial and, following the Act, the law remains confused due to retention of case law and failure to define public benefit.

Section 2 concerns ‘charitable purposes’ and sought to replace Lord Macnaghten’s fourfold classification from *Commissioners for Special Purposes of Income Tax v Pemsel*. The 1891 decision provided for four ‘heads’ of charity – purposes charitable in the legal sense: i) ‘relief of poverty’; ii) ‘advancement of education’; iii) ‘advancement of religion’; and iv) ‘other purposes beneficial to the community’.³ The fourth required the purpose to fall ‘within the spirit’ of the Preamble to the 1601 Charitable Uses Act.⁴ Section 2 sets out a thirteen-fold classification of charitable purposes, but it does not contain a statutory definition of charity. Section 3 concerns ‘public benefit’ and removed a presumption of public benefit thought to exist under the first three ‘*Pemsel* heads’.

The first criticism of section 2 is that the first three purposes listed are identical to the original *Pemsel* heads: ‘prevention or relief of poverty’;⁵ ‘advancement of education’;⁶ and ‘advancement of religion’.⁷ Furthermore, the thirteenth⁸ is a ‘catch-

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¹ Joseph Jaconelli, ‘Adjudicating on Charitable Status – A reconsideration of the elements’ [2013] Conv 96, 96.

² *ibid* 97.

³ *Commissioners for Special Purposes of Income Tax v Pemsel* [1891] AC 531 (HL) 583 (Lord Macnaghten).

⁴ Charitable Uses Act 1601 (Statute of Elizabeth).

⁵ Charities Act 2006, s 2(2)(a).

⁶ *ibid* s 2(2)(b).

⁷ *ibid* s 2(2)(c).

all' head just like stage four of *Pemsel*. Talbot writes, 'this ... updates the law, but does not remove any ... current charitable purposes'.⁹ This assessment is accurate and illustrates the difficulty in ascertaining a difference between *Pemsel* and the new law.

Reluctance to provide a statutory definition raises a critical point: balancing flexibility, to ensure development, against certainty over what purposes are charitable. Certainty is needed as charities are given significant tax advantages, therefore it must be ensured this is not abused. Cain argues that this is the most important reason for regulation.¹⁰ The fact that section 2 retains the existing case law suggests that its legislators thought flexibility to be more important than certainty. In theory this mechanism allows the law to develop with the evolutionary nature of 'charity', providing for unforeseen situations that may be charitable. Consequently there are problems.

Because this case law was decided under the *Pemsel* heads and the 1601 Preamble, neither of which provide legal definitions, it was formed with what Delany calls a 'process of judicial interpretation'.¹¹ *Re Segelman* shows a generous reading of the first head and states that you may import poverty into assistance.¹² Contrastingly, *Re Gwyon* provides a narrower reading, that poor relief must be obvious within the purpose.¹³ Stronger judicial discretion can be seen under education. The judge in *Re Pinion* said of an artist's studio left to become a museum, 'I can conceive of no useful object ... in foisting on the public this mass of junk'¹⁴ and, a cause which should satisfy charitable status according to *Pemsel*, was rejected.

It was held in *Neville Estates v Madden* that the court stands neutral between religions,¹⁵ suggesting value judgments as seen in *Re Pinion* would play no part under *Pemsel*'s third head. However, requirements set out in *Re Watson*¹⁶ to prevent 'unacceptable religion' contradict *Madden* and imply that courts merely stand neutral between certain religions. Additional confusion arose when courts provided vague distinction between 'increasing knowledge' in *Re Shaw*¹⁷ and 'advancing education'

⁸ *ibid* s 2(2)(m).

⁹ A Talbot, 'The Charities Act 2006: update on commencement and implementation' [2008] PCB 318, 320.

¹⁰ C A Cain, 'When a charity gives no tax advantages' [2007] CL&PR 77.

¹¹ Hilary Biehler, 'The law relating to charitable trusts – judicial guidance and statutory intervention' [2011] DULJ 196.

¹² [1996] Ch 171 (Ch) 189 (Chadwick J).

¹³ [1930] 1 Ch 255 (Ch).

¹⁴ [1965] Ch 85 (CA) 107 (Harman LJ).

¹⁵ [1962] Ch 832 (Ch) 853 (Cross J).

¹⁶ [1973] 1 WLR 1472 (Ch).

¹⁷ [1957] 1 WLR 729 (Ch).

in *Re Hopkins*¹⁸ and the difference between ethics and religion in *South Place Ethical Society*.¹⁹

It is clear that value judgments and inconsistent interpretation of *Pemsel* are abundant in the case law. Because section 2 retains this for flexibility, it retains its problems as well as its guidance. Resultantly, section 2 preserves confusion and, because the *Pemsel* heads are transferable to the new heads of charity, this case law acts as precedent to confuse future decisions.

A third criticism is that section 2 does not remove the 1601 Preamble. Because it retains case law decided under *Pemsel*'s fourth head, where analogy to the Preamble was required, the Preamble effectively lives on within section 2. Jaconelli argues that analogy drawing 'has now been legitimated'²⁰ by section 2. The problem is, as time progresses, analogies became more creative. It was held in *Scottish Burial Reform & Cremation Society Ltd v Glasgow Corp* that crematorium maintenance in 1968 was analogous to repair of churches in 1601.²¹ This may be slightly tenuous. However, by the 1990s, analogies became less acceptable. In Canada, it was held in *Vancouver Regional FreeNet Assn v Minister of National Revenue* that repairing internet hyperlinks was analogous to 17th Century highway maintenance.²² Jaconelli suggests this is 'so unconvincing as to lead to the conclusion that the grant of charitable status ... was based on nothing more than general public utility'.²³ This decision and Jaconelli's analysis suggest the law is artificial in this area, and, because the Preamble retains relevance under section 2, analogies will have to become increasingly creative and therefore increasingly artificial, to accommodate modern organisations. Furthermore, failure to eradicate the Preamble could result in deserving organisations being rejected if no analogy can be drawn which may become more likely as society modernises. This, it could be argued, undermines flexibility within section 2.

Finally, in order for the law to develop, new cases must be brought and new decisions made. However, because the tribunal appeal process is costly and the relevant organisations are inherently not wealthy, in practise they cannot afford to bring cases. Consequently, it could be argued the law on charitable purposes is at a standstill, further undermining desired flexibility.

The debate will now move onto public benefit. Section 3 states, 'it is not to be presumed that a purpose of a particular description is for the public benefit'.²⁴ This refers to the view that public benefit was presumed under the first three *Pemsel* heads.

¹⁸ [1965] Ch 669 (Ch).

¹⁹ [1980] 1 WLR 1565 (Ch).

²⁰ Jaconelli (n 1) 102.

²¹ [1968] AC 138 (HL Sc).

²² [1996] 137 DLR (4th) 206 (Supreme Court of Canada).

²³ Jaconelli (n 1) 102.

²⁴ Charities Act 2006 s 3(2).

There is, however, no conclusive evidence to support this. Case law demonstrates that the public benefit test has two elements: i) the purpose must provide benefit to society; and ii) that benefit must be accessible to a sufficient section of society. What perhaps fuels the view that presumption existed is that the test was applied differently under each head. For example, under ‘relief of poverty’, benefit was satisfied if the purpose lifted others out of poverty as this would reduce the burden on the state. Secondly, *Re Scarisbrick* suggests accessibility was not strict. The court distinguished between relieving poverty amongst a class who happen to be connected (which would satisfy accessibility) and giving money to people who are connected who happen to be poor (which would not, as poverty is not central to accessibility).²⁵ Therefore, because benefit was satisfied if the purpose relieved poverty – which would have been proven at the charitable purpose stage – and because accessibility was lenient, it could be argued that the test was automatically satisfied under this head.

Nonetheless, *Re Compton*, under education, displaces the idea of a presumption.²⁶ This case set out the ‘personal nexus rule’, saying if the relationship between beneficiaries and the purpose of an organisation is personal, the beneficiaries will become a private class and so accessibility will not be satisfied. Non-evidence of a presumption is echoed in the extension of the rule in *Oppenheim v Tobacco Securities Trust*.²⁷ Rebuttal of the presumption is also evident under religion. The court rejected that a closed order of nuns provided benefit through prayer in *Gilmour v Coats* because it was not susceptible to proof.²⁸ These cases suggest an onus on organisations to prove public benefit.

Whilst it cannot be submitted that there definitely was no presumption neither can it be said a presumption definitely existed. On balance, the former position is more convincing. Hackney expresses that cases like *Re Scarisbrick* do not show ‘operation of a presumption’²⁹ but ‘dogmatic assumption which could not be challenged’.³⁰ It could be concluded that section 3 abolishes a presumption that never existed and as Hackney argues ‘effects no change at all’.³¹ The only possible advantage could be, as Ann Phillips suggests, a ‘change in the way charities think about the ... benefit they provide’.³²

A second criticism is that section 3 fails to define public benefit. Because no statutory definition existed pre-Act, the test developed in case law. Consequently since section

²⁵ [1951] Ch 622 (CA) 645 (Evershed MR).

²⁶ [1945] Ch 123 (CA).

²⁷ [1951] AC 297 (HL).

²⁸ [1949] AC 426 (HL).

²⁹ Jeffrey Hackney, ‘Charities and Public Benefit’ (2008) 124 LQR 347, 348.

³⁰ *ibid.*

³¹ *ibid* 347.

³² Ann Phillips, ‘Charities Must Demonstrate Public Benefit’ (Solicitors Journal 2008)

<<http://www.solicitorsjournal.com/news/private-client/charities/charities-must-demonstrate-public-benefit>> accessed 15 February 2015.

3 still provides no statutory definition, it means that the problematic case law on public benefit is retained. As discussed, the debate over presumption under the first three heads is a source of great confusion. Section 3 retains the pre-Act law except where a presumption is used. The problem is, because there is no concrete evidence to suggest a presumption ever operated, it is impossible to determine which case law this excludes.

Further confusion over the requirements of public benefit arose with the ‘class within a class rule’ from *IRC v Baddeley*³³ was extended in *Re Hobourn*.³⁴ This provided accessibility may be reasonably limited but there could be no class within that limited class. For example, in *Hobourn*, accessibility was limited to disaster victims, but further limitation to employees was disallowed. These decisions are confusing because, firstly, the idea of limiting accessibility clashes with the principle that under the fourth *Pemsel* head, benefit must be accessible to the whole community. Secondly, it introduces reasonableness criteria to accessibility, which is ambiguous and cannot be accurately defined.

The Charity Commission concluded that providing guidance in lieu of statutory definition is impossible due to inconsistent application of the test in case law. The extent of this is demonstrated in the Charity Commission’s interpretation of accessibility. Lord Wright said in *Re Resch* ‘it is not the case ... an organisation cannot be a charity because ... of expense it is only affordable to people of ... means but it cannot be limited only to the rich’.³⁵ This is ambiguous and the Commission interpreted it as although the public should not be restricted from access, people in poverty must be included. This was applied to fee-charging schools as ‘reasonableness criteria’ concluding at least 5% of income should be used for bursaries. This appears to be a bold decision from interpretation and illustrates how uncertainty in the law can detrimentally affect a particular sector. The Public Administration Select Committee suggested that having the public benefit definition within case law facilitated governments to manipulate the Commission and suggested the 2006 Act was a Labour Government attempt to abolish private schools.³⁶ The decision led to a Judicial Review, claiming that the Commission misinterpreted the law.

In *R (Independent Schools Council) v Charity Commission for England and Wales* the court clarified the benefit and accessibility elements of the test and held the Commission’s interpretation was correct but application of reasonableness criteria was wrong.³⁷ Although this clarified elements of public benefit it failed to define

³³ [1955] AC 572 (HL).

³⁴ *Re Hobourn Aero Components Ltd* [1946] Ch 86 (Ch).

³⁵ [1969] 1 AC 514 (HL).

³⁶ Public Administration Committee, *The Role of the Charity Commission and “public benefit”*: Post-legislative Scrutiny of the Charities Act 2006 – Third Report of Session, Volume 1 (HC 2013–14, 76).

³⁷ [2011] UKUT 421, [2012] Ch 214.

them. The court held there never was a presumption in the pre-Act law, but an ‘assumption’ that purposes like education intrinsically have benefit. This view concurs with Hackney’s, however it is not conclusive, as case law under education suggests proof is required. This case was an opportunity to clean up public benefit but it appears that the court dodged the issue.

In conclusion, sections 2 and 3 are unsatisfactory. Retention of case law preserves inconsistencies, the outdated Preamble lives on and cost dictates whether cases are brought to court. Consequently flexibility is undermined. Section 3 artificially abolishes a presumption that probably never existed, and no definition means problematic case law allows for political manipulation through the lack of certainty. The ongoing Scientology debate³⁸ and *ISC* case illustrate confusion following both reforms. The fact that the 2006 Act included a review provision suggests legislators were aware the Act was inadequate. It would not be ‘better’ had the Charities Act not been enacted as the previous situation was confused, but the reforms provide no meaningful change and confuse the law further. There is clear need for reform. One suggestion for reform would be to balance complete flexibility on charitable purposes against complete certainty on public benefit. Legislators should follow the Deakin Commission, abolish a list of purposes, and strictly define charity as something providing community benefit.³⁹ This would allow for development, as purposes would not have to fit into categories, whilst ensuring no abuse of the public purse with a statutory definition of public benefit.

³⁸ Charity Commission, Decision of the Charity Commissioners for England and Wales made on 17th November 1999: Application for Registration as a Charity by the Church of Scientology (England and Wales).

³⁹ Commission on the Future of the Voluntary Sector in England, *Meeting the Challenge of Change: Voluntary Action into the 21st Century* (NCVO 1996).

BOKO HARAM AND THE ROLE PLAYED BY PROSCRIPTION IN THE UK'S COUNTER-TERRORISM REGIME

Hollie Morgan *

Proscription defines the decision of the United Kingdom (UK) to ban an organisation because they are 'concerned in terrorism'.¹ Its role in the UK's counter-terrorism regime has been criticised by Brandon.² Nevertheless, as portrayed by Tony Blair 'what we are desperate to avoid is the situation where at a later point, people turn around and say 'if you'd only been vigilant as you should have been, we could have averted a terrorist attack'.³ This quote accurately reflects this article's justification for the UK's proscription of Boko Haram and its use as a counter-terrorism tactic. Firstly, support for this justification will be given, concentrating on its success as a preventative measure. However, what follows is an agreement with David Anderson, that although proscription's role can be justified, the debates surrounding Boko Haram's proscription 'threw up some broader issues with the proscription regime'.⁴ Two of these issues will be outlined: the inadequacy of the de-proscription process; and Parliament's role as a 'rubber stamp'.⁵ The recommendations to alleviate these concerns need to be accepted as proscription plays an important role in the 'war against terror' and should be used as broadly as possible.

Unquestionably, the proscription of Boko Haram was a welcome implementation. The group was proscribed under statutory instrument in July 2013 via section 3(3) of the Terrorism Act 2000, which provides the Home Secretary with this power.⁶ As highlighted by David Anderson, 'the indiscriminate mass-casualty attacks ... leave little doubt that [Boko Haram] is "concerned in terrorism" – the only test that has to be met for proscription under the Terrorism Act 2000'.⁷ In the last month, they have

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¹ Terrorism Act 2000, s 4.

² Ben Brandon, 'Terrorism, human rights and the rule of law: 120 years of the UK's legal response to terrorism' [2004] Crim LR 981.

³ Jude McCulloch and Sharon Pickering, 'Pre-Crime and Counter-Terrorism: Imagining Future Crime in the War on Terror' (2009) 49 Brit J Criminol 628, 632.

⁴ David Anderson, 'Banned!' (Independent Reviewer of Terrorism Legislation, 12 July 2013) <<https://terrorismlegislationreviewer.independent.gov.uk/banned/#more-1530>> accessed 1 February 2014.

⁵ *ibid.*

⁶ The Terrorism Act 2000 (Proscribed Organisations) (Amendment) Order, SI 2013/1746.

⁷ Terrorism Act 2000; Anderson (n 4).

been involved in an attack killing fifty-two people.⁸ Thus, Boko Haram clearly come under the head of ‘commits or participates in acts of terrorism’.⁹ Despite Boko Haram’s active role in terrorist activities, the use of proscription against this group may still be questioned as they are ‘based in Nigeria’¹⁰ and have no direct effect on the UK. Brandon criticises the use of proscription against groups such as this.¹¹ This article is in complete disagreement with Brandon’s proposition. The ability to proscribe international groups through the Terrorism Act 2000¹² justifiably broadens the net of proscription for a number of reasons. It allows proscription to be used as an ‘inexpensive tool of foreign policy’.¹³ In addition, one of the discretionary factors taken into account by the Home Secretary is ‘the need to support international partners in the fight against terrorism’¹⁴ even where they do not directly affect the UK. James Brokenshire recognises this as a reason for the proscription of Boko Haram.¹⁵ The proscription of Boko Haram was justified notwithstanding they have no direct effect on the UK.

More importantly, proscription is ‘relevant to the “prevent” element of the contest strategy’,¹⁶ which outlines that the UK will ‘stop people becoming terrorists or supporting terrorism’.¹⁷ Therefore, even if Boko Haram does not affect the UK yet, proscription should be used to prevent this from happening. Although the suicide attack on the United Nations building ‘occurred inside Nigerian borders’, the suicide bombers had ‘targeted an international, non-Nigerian entity’,¹⁸ showing that this group has the potential to spread from Nigeria. There are ‘people in this country who support what is going on in Nigeria’¹⁹ and due to the ‘sophistication of means available’,²⁰ not banning Boko Haram could allow them to use these ‘means’ to bring this violent regime to the UK. Using proscription as a preventative strategy against Boko Haram’s violent regime in the UK is therefore extremely beneficial.

⁸ ‘Nigeria “Boko Haram” attacks leave scores dead’ *BBC News* (27 January 2014) <<http://www.bbc.co.uk/news/world-africa-25916810>> accessed 28 January 2014.

⁹ Terrorism Act 2000, s 3(5)(a).

¹⁰ HC Deb 10 July 2013, vol 566, col 456.

¹¹ Brandon (n 2) 996.

¹² Terrorism Act 2000, s 121.

¹³ Anderson (n 4).

¹⁴ Explanatory Memorandum to the Terrorism Act 2000 (Proscribed Organisations) (Amendment Order) 2011 para 7.2.

¹⁵ HC Deb 10 July 2013, vol 566, col 456.

¹⁶ Clive Walker, *Blackstone’s Guide to the Anti-Terrorism Legislation* (2nd edn, OUP 2009) 33.

¹⁷ Secretary of State for the Home Department, *CONTEST: The United Kingdom’s Strategy for Countering Terrorism* (Cm 8123, 2011) para 1.12.

¹⁸ US House of Representatives Committee, *BOKO HARAM Emerging Threat to the U.S. Homeland* (30 November 2011) 2.

¹⁹ HC Deb 10 July 2013, vol 566, col 463.

²⁰ *Secretary of State for the Home Department v Rehman* [2001] UKHL 47, [2003] 1 AC 153 [16] (Lord Slynn).

Despite this, Pantucci criticises ‘prevent’ as its success cannot be measured in the short to medium term and it can fundamentally inflict on civil liberties.²¹ In response to the first argument, the success of proscription in the prevent strategy can be measured through its ability to trigger a number of offences. These include membership of the organisation, seeking financial support, participation in meetings and the wearing of uniform.²² As highlighted by Lord Carlisle, ‘prosecution for membership ... is a useful way of dealing ... with early signs of involvement in terrorism’,²³ a clear indication of its success within the prevent strategy. In contrast, Marques argues that it is not successful because the offences do not provide many convictions.²⁴ However, this is undermined by Anderson’s observation that it is impossible to evidence this because the Home Office only keeps records of the principle offence charged, of which the proscription offence may not be.²⁵ Dickson puts forward an alternative argument against Marques, stating that ‘even if some laws are difficult to apply in practice ... this is no argument for not having them on the statute book at all’.²⁶ Sottiaux agrees with this, outlining that proscription measures can have a purely ‘symbolic value’.²⁷ As outlined in *CONTEST*, ‘success in prevent will mean that: there is a reduction in support for terrorism of all kinds’.²⁸ Using proscription as a symbol to prevent people from being encouraged by terrorists’ ideas will lead to this reduction. The success of the prevent strategy and proscription’s use within it can therefore be measured on a number of grounds.

In response to the human rights argument, there is no doubt that, as argued by Gearty, this preventative measure could have a ‘large chilling effect’²⁹ on the right to freedom of association as provided by Article 11 of the European Convention on Human Rights (ECHR). However, the House of Lords have recognised that this is a qualified right to which the ‘the necessity of attacking terrorist organisations’³⁰ allows it to come within the exception of national security. In addition, as outlined in the case of *Refah Partisi (Welfare Party) v Turkey*, an association will enjoy convention protection only if the ‘means’ they use to promote a change in the law are ‘legal and democratic’.³¹ As highlighted by Sottiaux, ‘it goes without saying that bombings,

²¹ Raffaello Pantucci, ‘A contest to democracy? How the UK has responded to the current terrorist threat’ (2010) 17 *Democratization* 251.

²² Terrorism Act 2000, ss 11–13.

²³ Lord Carlisle of Berriew QC, Report on the Operation in 2009 of the Terrorism Act 2000 and of Part 1 of the Terrorism Act 2006 (TSO 2010) [62].

²⁴ Sofia Marques da Silva and C Murphy, ‘Proscription of Organisations in UK Counter-Terrorism Law’ in I Cameron (ed), *Legal Aspects of EU Sanctions* (Intersentia 2012) 8.

²⁵ David Anderson, Report of the Independent Reviewer on the operation of the Terrorism Act 2000 and Part 1 of the Terrorism Act 2006 (TSO 2013) 66.

²⁶ Brice Dickson, ‘Law versus terrorism: can law win?’ [2005] *EHRLR* 11, 16.

²⁷ Stefan Sottiaux, *Terrorism and the Limitation of Rights* (Hart 2008) 162.

²⁸ *CONTEST* (n 17) para 1.32.

²⁹ Conor Gearty, ‘Terrorism and Human Rights’ (2007) 42 *Gov’t & Oppos* 357.

³⁰ Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights, as amended) art 11(2).

³¹ (2003) 37 *EHRR* 1 para 13.

assassinations, kidnappings and other terrorist tactics cannot be regarded as legal and democratic'.³² These are methods that Boko Haram uses and therefore it cannot be argued that they should not have been proscribed on a human rights ground.

Gearty has advocated an alternative response to the human rights implications. He argues that the use of the Terrorism Act 2000 'provided the organisations proscribed with effective opportunities for appeal' which 'brought the whole scheme well within the framework of the Human Rights Act [1998]'.³³ However this argument is weak because proscription 'is in practice irreversible',³⁴ a problem acknowledged in the debates over Boko Haram.³⁵ Anderson recognises this problem in his 2012 report, highlighting that there are a number of organisations that remain on the list that should not lawfully be there because 'no recent evidence exists of their involvement in terrorism'.³⁶ Although a group can actively seek de-proscription,³⁷ as outlined by Walker, doing this would 'involve considerable courage to take a stance as a supporter and there is a risk of being labelled as a sympathi[s]er or even a terrorist'.³⁸ In addition, Dickson's contention that the Proscribed Organisations Appeals Commission (POAC) set up by section 5 of the Terrorism Act 2000 for an organisation to appeal against the decision of the Home Secretary against de-proscription, 'so far ... seems to have worked satisfactorily'³⁹ is far from true. High costs are involved in the appeal and secret evidence can be kept out of the knowledge of the applicant.⁴⁰ Moreover, the POAC only 'bites' when the 'tough hurdle' of section 5(3) Terrorism Act 2000 is not satisfied.⁴¹ Currently the only organisation to ever be successful in the POAC was that of the People's Mujahedin of Iran.⁴² As highlighted by Marques, 'it is worth recalling that the group ... were Parliamentarians – a group that is not legally, politically or socially vulnerable',⁴³ a factor evidently leading to the cases success.

Anderson put forward recommendations towards alleviating this problem by outlining that a sunset clause should be added to proscription orders, requiring Parliament to reaffirm its support for the list of proscribed organisations on a regular basis.⁴⁴ As

³² Sottiaux (n 27) 172.

³³ Conor Gearty, '11 September 2001, counter-terrorism, and the Human Rights Act' (2005) 32 J L Soc'y 18, 21.

³⁴ Anderson (n 25) para 5.17.

³⁵ HC Deb 10 July 2013, vol 566, col 464.

³⁶ Anderson (n 25) para 5.27.

³⁷ Terrorism Act 2000, s 4.

³⁸ Walker (n 16).

³⁹ Dickson (n 26) 17.

⁴⁰ da Silva and Murphy (n 24) 15.

⁴¹ Conor Gearty, *Civil Liberties* (OUP 2007) 159.

⁴² *Secretary of State for the Home Department v Lord Alton of Liverpool* [2008] EWCA Civ 443, [2008] 1 WLR 2341; Terrorism Act 2000 (Proscribed Organisations) (Amendment) Order 2008, SI 2008/1645, art 2.

⁴³ da Silva and Murphy (n 24) 16.

⁴⁴ Anderson (n 25) para 4.52; David Anderson, *First Report on the Operation of the Terrorist Asset-Freezing etc. Act 2010* (TSO 2011) para 84.

outlined by Vaz, this recommendation is ideal ‘not because we would want to de-proscribe as soon as we proscribe, but because it would be right to keep reviewing these organisations, just in case they turn out to be shell organisations’.⁴⁵ If these recommendations are accepted, this would provide more force behind an argument in favour of proscription that faces potential human rights implications.

Another problem that undermines the successful role of proscription is the inadequacy of the Parliamentary debates. Firstly, they prove problematic in that they are ‘conducted if not in a factual vacuum then in a very thin atmosphere’.⁴⁶ Vaz recognised this in the House of Commons debate over Boko Haram, where the House was provided with very little intelligence over the organisation.⁴⁷ This may have not mattered so much with a ‘prolific organisation’⁴⁸ such as Boko Haram, however ‘many of the proscribed groups are obscure’⁴⁹ and therefore it would be unfair for Parliament to decide on a proscription order against an organisation without looking at all the facts. In addition, as the claimants argued in the case of *Kurdistan Workers’ Party*,⁵⁰ the draft list is presented to Parliament with the organisation in question merged with other organisations that are under review for proscription. Muller defines this as a ‘take it or leave it list’.⁵¹ This can clearly be seen in the debate over Boko Haram, as they were discussed together with Minbar Ansar Deen.⁵² They were not discussed on their merits individually. The role of Parliament in the review process is ‘minimal’, and ‘it has never refused its consent to a proscription order’.⁵³

Anderson suggests that a Parliamentary Committee that would have access to the secret evidence upon which proscription is based, be formed in response to this problem.⁵⁴ This approach is taken in Australia.⁵⁵ The government has responded negatively towards this and it maintains that the focus will remain on ‘available open source material about the group’.⁵⁶ Nevertheless, this article agrees with Marques in seeing Anderson’s recommendations as a strong argument,⁵⁷ and submits that the recommendations should be accepted.

⁴⁵ HC Deb 10 July 2013, vol 566, col 464.

⁴⁶ Anderson (n 4).

⁴⁷ HC Deb 10 July 2013, vol 566, col 662.

⁴⁸ *ibid* col 456.

⁴⁹ Anderson (n 4).

⁵⁰ *R (Kurdistan Workers Party) v Secretary of State for the Home Department* [2002] EWHC 644, [2002] ACD 99.

⁵¹ Mark Muller QC, ‘Terrorism, Proscription and the right to resist in the age of conflict’ (2008) 20 Denning LJ 111, 125.

⁵² HC Deb 10 July 2013, vol 566, cols 455–469.

⁵³ da Silva and Murphy (n 24) 6.

⁵⁴ Anderson (n 25) para 4.52.

⁵⁵ Andrew Lynch, Nicola McGarrity and George Williams, ‘The proscription of terrorist organisations in Australia’ (2009) 37 FL Rev 1, 11–12.

⁵⁶ HM Government, *The Government Response to the Annual Report on the Operation of the Terrorism Acts in 2012 by the Independent Reviewer of Terrorism Legislation* (Cm 8745, 2013).

⁵⁷ da Silva and Murphy (n 24) 19.

Actually, due to its usefulness in prevent, the recommendations of Anderson must be accepted because proscription should be used as broadly as possible. In 2006, the power was rightly extended to allow the proscription of organisations that glorify terrorism.⁵⁸ Although Marques and Murphy have criticised the extension as it is ‘indefinitely broad’,⁵⁹ it has allowed the proscription of groups such as Muslims Against Crusades and Islam4UK in order to prevent them from influencing people who may turn to violence. In reality, this extension has not gone far enough as it has left groups like Hizb ut-Tahir still out of its scope. Hizb ut-Tahrir is a non-violent radical political organisation.⁶⁰ However, there were still calls for its proscription during the debates over Boko Haram as ‘it is one of the groups targeting universities and attempting to radicalise students’.⁶¹ In 2010, the Coalition government declared an intention to proscribe ‘any group that has recently espoused or incited violence or hatred’.⁶² This was rightly rejected, as ‘such a legislative step would be strikingly illiberal [and] extraordinarily difficult to enforce’.⁶³ Nevertheless, a debate should resurface about the extension of the power to ensure that groups like Hizb ut-Tahir are prevented from radicalising these students who may use violence, although the organisation itself does not. As outlined by Sottiaux, ‘the symbiosis between terrorist and non-violent organisations can manifest itself in many ways’.⁶⁴

In conclusion, ‘proscription is a tough but necessary power’.⁶⁵ As stated by the former Australian Prime Minister, ‘when you’re dealing with terrorism, it’s better to be safe than to be sorry’.⁶⁶ Therefore prevent should remain as the ‘core focus of the refreshed counter-terrorism strategy’.⁶⁷ As proscription is a successful way to achieve this, it should be used as widely as possible and ensure that groups like Hizb ut-Tahir as well as Boko Haram are proscribed. The problem is not the role of proscription itself but ‘the failure ... when deciding to proscribe an organisation ... not to adhere to fair proscription procedures that are accessible [and] transparent’.⁶⁸ Even if one does not accept that the power should be broadened, the recommendations made by Anderson about de-proscription and the Parliamentary debates should be, as they are severely undermining the fundamental role of proscription in the UK’s counter-terrorism regime.

⁵⁸ Terrorism Act 2000, s 3(5A); Terrorism Act 2006, s 21.

⁵⁹ da Silva and Murphy (n 24) 5.

⁶⁰ ‘Q&A: Hizb ut-Tahir’ *BBC News* (10 August 2007) <<http://news.bbc.co.uk/1/hi/4127688.stm>> accessed 8 February 2014.

⁶¹ HC Deb 10 July 2013, vol 566, col 459.

⁶² HM Government, *The Coalition: Our Programme for Government* (Cabinet Office 2010) 24.

⁶³ Lord Macdonald, *Review of Counter-Terrorism and Security Powers* (Cm 8003, 2011) 8.

⁶⁴ Sottiaux (n 27) 173.

⁶⁵ HL Deb 11 July 2013, vol 747, col 590.

⁶⁶ ‘Howard stands firm over Haneef’ *BBC News* (30 July 2007) <<http://news.bbc.co.uk/1/hi/world/asia-pacific/6921840.stm>> accessed 2 February 2014.

⁶⁷ Pantucci (n 21) 259.

⁶⁸ Muller (n 51) 129.

THEATRE AS THE COURT ROOM: THE BRITISH CRIMINAL JUSTICE SYSTEM ON TRIAL

*Olivia Barton**

A court of law functions to seek out the truth, expose lies and adjudicate upon contentious issues. This article considers whether theatre can perform a similar role. *Murmuring Judges*¹ is the second play in David Hare's trilogy in which he 'offered a panoramic and fiercely critical view of the state of the nation'² during Margaret Thatcher's Britain, through an examination of our institutions. In *Murmuring Judges* Hare examines three main elements of the Criminal Justice System and the 'individual lives and actions'³ of its participants. This article first considers the separation of the system's components and the tendency towards blame apportioning which this compartmentalisation encourages. It then considers Hare's presentation of the problems faced and perpetuated by the legal profession, the police force and the prison service in turn. Finally, this article considers Hare's portrayal of the people working 'at the coal-face'⁴ and the extent to which he invites an audience to pass judgments upon the ethics and morality of their actions.

Hare's extensive research into the nation's institutions led him to conclude that 'our Criminal Justice System was divided quite sharply into three. At the top are the lawyers ... in the middle are the police ... and at the bottom are the prisons and the prison service.'⁵ Hare further observes that the components 'don't relate to each other' and that consequently 'at the centre you have somebody who is being mashed by this process, and then you have a group of people who are only interested in their own part.'⁶ Hare exposes this 'institutional disconnection'⁷ and its deleterious consequences through the structure of *Murmuring Judges*. The play begins with Gerard, the defendant, in centre stage surrounded by a chaotic amalgamation of representatives of the various components of the Criminal Justice System. Thereafter, however, the components do not mix, with scenes largely being divided between the

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¹ David Hare, *Murmuring Judges* (revised edn, Faber 1993).

² Richard Boon, 'Keep turning up: Hare's early career' in Richard Boon (ed), *The Cambridge Companion to David Hare* (CUP 2007) 31.

³ Les Wade, 'Hare's trilogy at the National: Private moralities and the common good' in Richard Boon (ed), *The Cambridge Companion to David Hare* (CUP 2007) 65.

⁴ Richard Boon, *About Hare: The Playwright and the Work* (Faber 2003) 46.

⁵ David Hare, 'Introduction' in Lyn Hail (ed), *Asking Around: Background to the David Hare Trilogy* (Faber 1993) 88.

⁶ David Hare quoted in Hersh Zeifman, *David Hare: A Casebook* (Routledge 1994) 130.

⁷ Wade (n 3) 70.

police station, the prison and Inns of Court. The stark contrast between the various institutions is highlighted in Act 2 Scene 1 through the juxtaposition of the ‘panelled ante-room of Lincoln’s Inn’ in which ‘the best silver is on display’ with Gerard’s cell, which is at the side of the stage, illuminated by a ‘grey square of light’.⁸ The final scene illustrates the divisions within the system, which have emerged throughout the play. The stage is split into different areas: Gerard’s cell; the police station; Sir Peter’s chambers; the prison area; and Irena’s meeting. The audience is exposed to snapshots of dialogue from each area which ‘dovetail together’⁹ whilst Mozart’s *Magic Flute* dramatically crescendos in the background. The chaotic multitude of characters speaking over each other, preoccupied by their own concerns, represents the lack of communication between the system’s components. Hare’s choice of music is also significant: the *Magic Flute*, which features throughout, is itself triangular in structure, riddled with Masonic symbolism and characterised by three famous chords.

A consequence of institutional separation is that the various components blame each other for societal problems, rather than working cohesively to construct solutions. In Act 2 Scene 2 the Home Secretary complains to Cuddeford (a High Court Judge) that ‘we’ve nowhere to put all these bloody prisoners you keep sending us’; Cuddeford replies that ‘it is your problem, not ours.’¹⁰ This demonstrates the tendency towards blame apportioning within the system. Sir Peter’s suggestion that ‘it is one of the great mercies of your situation that only 3 per cent of all crimes reach the courts’¹¹ highlights the size of the problem facing the Criminal Justice System. Hare seeks to expose the ironies within the institution. Rather than blaming any particular component Hare effectively illustrates that reform on a grand scale is required if the problem is to be effectively remedied. Whilst the various institutions blame each other for systematic failings, the police, as the most publically visible component, are scapegoated most obviously, repeatedly labelled as ‘tossers’¹² and ‘bloody bastards’¹³ by the community to which they serve.

Llewelyn describes the law as an institution, which clings ‘inertly and incuriously’ to its ‘outmoded tradition.’¹⁴ Hare portrays the bar and the judiciary as relying upon archaic customs, which they use to justify a reluctance to develop, rendering them out of touch with society. Reluctance to change is exemplified in the play by the raising of one million pounds in just four days to campaign for the preservation of the specialist Bar. Critical Legal Studies scholars have accused law schools of teaching students to ‘learn and retain large numbers of rules organi[s]ed into categorical

⁸ *ibid* 50.

⁹ *ibid* 106.

¹⁰ *ibid* 57.

¹¹ *ibid* 58.

¹² *ibid* 27.

¹³ *ibid* 78.

¹⁴ Karl Llewelyn, ‘What is Wrong with so-called Legal Education’ (1935) 35 Col L Rev 651, 652.

systems;¹⁵ clinging to these rules ‘as though they had an inner logic’¹⁶ without submitting them to scrutiny. This process is evident in the banquet scene, in which Cuddeford describes ‘this slow silting of tradition ... which makes the great rock on which we do things.’¹⁷ Just as the common law relies upon the precedent of previous cases to justify decisions, Cuddeford uses tradition to defend the present state of the Bar.

Critical Legal Studies scholars contend that law schools emphasise the importance of professional conduct in preparation for the ‘hierarchical life of the bar’,¹⁸ which ‘encodes the message of legitimacy of the whole system into the smallest details of personal style ... a plethora of little ps and qs.’¹⁹ This preoccupation with formalities and failure to question the status quo is portrayed through an apparently humorous anecdote in which Irina is encouraged to change by Sir Peter on her first day after arriving in ‘a rather brilliant green dress.’²⁰ This, for Wade, ‘reveals the legal world as an archaic system of paternal privilege and protocol, whose ceremonial wigs and robes mask a fundamental want of social awareness and concern.’²¹ Irina pertinently proposes an explanation for these outmoded traditions: arguing that ‘All of this behaviour, the honours, the huge sums of money, the buildings, the absurd dressing-up. They do have a purpose. It’s anaesthetic. It’s to render you incapable of imagining life the other way round.’²² Boon argues that this ‘anaesthetic’ is ‘the essential political function’ of the law in the play.²³ By subjecting these traditions to ridicule on stage Hare exposes the sclerotic nature of the bar and bench, encouraging the audience to scrutinise their legitimacy.

Hare highlights additional problems with the Bar by exposing the elitism and prejudice, which pervade it. Gerard describes the legal professionals as ‘silver-haired, judicious, informed’ men, who ‘will go home to their wives, to wine in fine glasses and the gossip of the Bar’²⁴ whereas he regards himself as ‘the stuff of their profession.’²⁵ This illustrates the dissimilarity between the lawyers and those whom they represent. Lasswell, from a Critical Legal perspective, advocates that one with ‘the temerity to make a profession of tendering legal advice to others’ must ‘acquaint himself ... with the long-term interests of all whom he serves.’²⁶ Sir Peter has clearly

¹⁵ Duncan Kennedy, ‘Legal Education as Training for Hierarchy’ in David Kairys (ed), *The Politics of Law: A Progressive Critique* (3rd edn, Basic Books 1998) 58.

¹⁶ *ibid* 61.

¹⁷ Hare (n 1) 54.

¹⁸ *ibid* 66.

¹⁹ *ibid* 66.

²⁰ Hare (n 1) 6.

²¹ Wade (n 3) 71.

²² *ibid* 91.

²³ Boon (n 4) 46.

²⁴ Hare (n 1) 2.

²⁵ *ibid* 2.

²⁶ Harold Lasswell and Myres McDougal, ‘Legal Education and Public Policy: Professional Training in the Public Interest’ (1943) 52 *Yale LJ* 203, 211.

failed to do this; his warped perspective on society is humorously depicted through his statement that ‘the last remaining thing the British all hold in common’ is that ‘everyone listens to *Desert Island Discs*.’²⁷ At the end of the play, however, he acknowledges his separation from his clients, stating ‘we shouldn’t be ... soggily compassionate about every petty larcenist we’re hired to represent... There is a glass screen. And our clients, I’m afraid, live on one side of it. We on the other.’²⁸ In a heated exchange Irina questions Sir Peter’s ‘forensic gift for detecting the truth’²⁹ due to his biased perspective, arguing that ‘these judgments, these ‘judgments’ you make all the time, these judgments which seem to be graven in stone, they have only the status of prejudice.’³⁰ Homden argues that by challenging Sir Peter, ‘Irina breaks the rules of the personal as well as the professional game – she has shattered the glass wall dividing the legal profession from the real world and entered the gaol; she has broken down the relationship between them.’³¹ By exposing this ‘glass wall’ on stage, Hare provides a multi-dimensional lens through which to examine the legal profession. By using Irina - a newcomer to the Bar and an outsider due to her sex and skin colour - to expose Sir Peter’s prejudice, Hare suggests that those new to the profession have a sense of perspective which longstanding practitioners do not: they have not yet been anaesthetised. This is characterised in the metaphor of the ‘young roebuck ... basted in some sort of fruity, substantial gravy’,³² which symbolises the smothering effect of the legal profession upon young individuals.

Hare extends his depiction of the division between ordinary citizens and legal professionals to the judiciary. Cuddeford insists that ‘judging brings you in touch with ... Ordinary, common-as-muck individuals’;³³ this highlights the ‘us and them’ ideology which pervades the legal profession. This is further illustrated by a comparison of the discourse of Gerard and the judge at the play’s opening; whereas Gerard’s opening lines are ‘based upon phrase repetition and imagistic references’,³⁴ the judiciary’s language is ‘well-constructed, pompous and self-righteous.’³⁵ Barry, a police officer, also suggests that Gerard’s Northern Irish heritage was likely to have impacted upon his unreasonable sentence, arguing ‘they don’t know they’re prejudiced ... The judge thought, I’m being nice ... In spite of the fact that he’s Irish.’³⁶ Combined, Hare portrays the judiciary and barristers as a ‘kind of antiquated fraternity ... a professional filiation undergirded by class privilege, Oxbridge education and shared aesthetic taste.’³⁷ Critical Legal Studies scholars have argued

²⁷ Hare (n 1) 4.

²⁸ *ibid* 93.

²⁹ *ibid* 91.

³⁰ *ibid* 90.

³¹ Carol Homden, *The Plays of David Hare* (CUP 1995) 214.

³² Hare (n 1) 53.

³³ *ibid* 55.

³⁴ Homden (n 31) 209.

³⁵ *ibid*.

³⁶ Hare (n 1) 32.

³⁷ Wade (n 3) 70–71.

that law school, in which ‘the teachers are overwhelmingly white, male, and deadeningly straight and middle class in manner,’³⁸ desensitises students in preparation for professional life. Hare’s critique of the Bar and Bench may therefore have a broader significance, apportioning a degree of responsibility onto the establishments in which these professionals were educated.

The police force is comparable to the bar insofar as it also constitutes a ‘club’ whereby outsiders ‘haven’t got a cat’s chance in hell’ unless they can ‘find someone who’s interested in jacking in their membership.’³⁹ A comparison is also drawn between the police force and legal profession concerning prejudice; Barry calls Jimmy (whose real name is Abdul) ‘Abu ben Dhabi, or whatever’ describing him as ‘of the Asian persuasion.’⁴⁰ The police station scenes are typically chaotic and, despite the presence of two female officers, characterised largely by light-hearted masculine camaraderie. Barry explains to Sandra, ‘You have to give it lots of mouth. Talk about how you go over the side.’⁴¹ Sandra, who distances herself from the other officers’ camaraderie, claims to see through the façade, suggesting that ‘coppers put Proust inside their *Playboy*.’⁴² Just as the barristers’ rigid conventions are an ‘anaesthetic’,⁴³ the police’s ‘banter’ is depicted as a coping-mechanism, light relief through which the officers survive the daily reality of policing Margaret Thatcher’s Britain: constant criticism and endless bureaucracy.

Sandra describes policing as ‘largely the fine art of getting through biros’.⁴⁴ In an attempt to please the press the focus is upon crime statistics rather than acting in the public interest. Jimmy’s direct address to the audience in Act 2 Scene 3 clearly illustrates this, he explains: ‘burglaries, muggings, forget it, unless someone caught them red-handed ... you pull in seven kids. You do them for possession, let them off with a caution, and everything’s fine ... It’s public relations.’⁴⁵ Through Barry, Hare mounts a direct attack on Thatcherism, informing the audience that, ‘If you take all the crime, all of it, every single bit in money it doesn’t add up to what’s lost every year in tax evasion ... I mean, please tell me, what is the point?’⁴⁶ Hare thereby presents a police force comprised of capable officers who, rather than being left to tackle crime themselves, are beset by administrative formalities. He thus exposes policing as a futile art of public relations.

The final component of the Criminal Justice System depicted in *Murmuring Judges* is the prison service. Beckett states that ‘we get lots of visitors ... We call them

³⁸ Kennedy (n 15) 51.

³⁹ Hare (n 1) 88.

⁴⁰ *ibid* 21.

⁴¹ *ibid* 33.

⁴² *ibid* 34.

⁴³ Boon (n 4) 46.

⁴⁴ *ibid* 17.

⁴⁵ *ibid* 59.

⁴⁶ *ibid* 66.

Something-Must-Be-Dones’ and yet, despite this, ‘It’s left to us.’⁴⁷ The prison service, like the police force, is depicted as inefficient and an inappropriate solution to societal problems. The Home Secretary acknowledges that in Germany and Sweden ‘they’ve reduced all prison sentences radically ... without any effect on the criminal statistics.’⁴⁸ Furthermore, Barry recognises that Gerard ‘shouldn’t be in prison because prison doesn’t work.’⁴⁹ He proposes an alternative: dyeing offenders ‘the colour according to what they’re found to have done.’⁵⁰ Hare hereby uses humour to illustrate the weakness inherent in the penal system; whilst dyeing offenders is hardly a serious suggestion, the implication is that it is no more ludicrous than locking people up.

In addition to these general criticisms of the penal system, Hare demonstrates through Gerard the personal ramifications of imprisonment. Despite Beckett’s assurance that ‘You can make this place work for you,’⁵¹ the brutality of the regime is illustrated in Act 2 Scene 4 in which other prisoners beat Gerard. By developing the relationship between Irina and Gerard, Hare allows the audience to ‘witness Gerard’s decline, his attitude hardening against his incarceration’⁵² and thus he makes ‘an appeal to the emotions of the audience as much as to the arguments in the court of law.’⁵³ During Irina’s first visit, Gerard’s question ‘You’ve thought of me?’⁵⁴ evokes empathy; their conversation is strikingly personal and one of startlingly few uninterrupted and calm dialogues in the play. This can be starkly contrasted with their final conversation in which Gerard is far more direct, asking ‘What is it you want?’⁵⁵ His language has developed from passionate vulnerability into a blunt acceptance of his situation: when informed that his sentence has been decreased by six months he simply replies ‘All right.’⁵⁶ Furthermore, he states that he has been reading about Irish history, in which he is ‘sort of interested now.’⁵⁷ *Murmuring Judges* was written during the height of Northern Irish tensions, and thus the implication of radicalisation would have struck a chord with the play’s original audience. Gerard comprehends that ‘It’s like everyone’s saying, there’s a part you can play. All right, then. I’ll play it’;⁵⁸ the insinuation is that by stereotyping individuals as ‘criminal’ the state creates a self-fulfilling prophecy.

Although this article has focused upon the structural and widespread issues pervading various elements of the Criminal Justice System, Wade argues that *Murmuring*

⁴⁷ *ibid* 37.

⁴⁸ *ibid* 55–56.

⁴⁹ *ibid* 70.

⁵⁰ *ibid*.

⁵¹ *ibid* 13.

⁵² Homden (n 31) 213.

⁵³ *ibid*.

⁵⁴ Hare (n 1) 39.

⁵⁵ *ibid* 103.

⁵⁶ *ibid* 104.

⁵⁷ *ibid*.

⁵⁸ *ibid* 105.

Judges demonstrates ‘Hare’s fascination with individual lives and moral decisions.’⁵⁹ Hare himself states that his intention ‘was never to theori[s]e about the overall state of my three institutions’ but rather ‘to portray the lives of the people trying to survive in them.’⁶⁰ His critique of the system is therefore delivered through careful characterisation. Irina and Sandra ‘who come to the call of responsibility over expediency’⁶¹ are depicted as strong and admirable, however, neither acts upon her principles immediately. Irina is persuaded to accompany Sir Peter to the opera by Woody, who urges her to ‘make it easy for yourself.’⁶² Similarly, Sandra’s request to speak to the Chief Superintendent comes at the play’s close; Barry’s insistence that following her conscience is ‘long,’ ‘nasty’ and ‘selfish’ appears to forestall her.⁶³ Whilst Hare clearly wants the audience to admire Irina and Sandra for their ability to act upon their principles, he provides a defence for those who do not. It is the institutions themselves, which ‘seem to have abdicated their responsibility’⁶⁴ leaving those at the bottom to ‘do the dirty work.’⁶⁵ Wade describes ‘the difficult and clouded situation of acting in an ethical manner’ as the ‘key question of the play.’⁶⁶ The characters, especially the police, face an incredibly difficult task and although Barry’s ‘trick’⁶⁷ involving dynamite was undoubtedly unethical, his motive is understandable: it resulted in the arrest of ‘two lots of villains.’⁶⁸ He explains that ‘we’re dealing with scum. And we’re not being given the power we need to deal with them.’⁶⁹ Amid the ‘directives ... supervision and behavioural correction courses’⁷⁰ ‘justice is seen as a kind of abstraction.’⁷¹ By besetting the actions and behaviour of individuals against the broader institutional backdrop, their culpability is called into question and undoubtedly reduced. Rather than blaming the individuals, Hare invites the audience to ‘feel some special sympathy for those luckless people’ who are left to deal with the consequences of Conservative reforms,⁷² for ‘the guys who keep turning up.’⁷³

Hare describes theatre as ‘the unique forum in which a society can discuss itself, in a way which is infinitely more profound than journalism and more public than a novel or poetry.’⁷⁴ *Murmuring Judges* certainly raises a lot of issues, encouraging an audience to question the legitimacy of the institutions in which conservatism

⁵⁹ Wade (n 3) 67.

⁶⁰ Hare (n 5) 5.

⁶¹ Wade (n 3) 71.

⁶² Hare (n 1) 11.

⁶³ *ibid* 77.

⁶⁴ Boon (n 4) 45.

⁶⁵ David Hare, quoted in Hersh Zeifman, *David Hare: A Casebook* (Routledge 1994) 126.

⁶⁶ Wade (n 3) 71.

⁶⁷ Hare (n 1) 75.

⁶⁸ *ibid* 75.

⁶⁹ *ibid* 76.

⁷⁰ *ibid* 75.

⁷¹ Wade (n 3) 71.

⁷² Hare (n 5) 5.

⁷³ Hare (n 1) 78.

⁷⁴ George Gaston, ‘Interview: David Hare’ (1993) 45 *Theatre Journal* 213, 217.

‘masquerades as common sense.’⁷⁵ Innes describes the trilogy as ‘issue-oriented’ with ‘almost every speech presenting a position.’⁷⁶ This has inspired criticism from some. Taylor argues that ‘the play has a fair share of good jokes that point up the ironies in our Criminal Justice System ... But a great deal of it is too pat and it never deepens your thinking.’⁷⁷ Shulman similarly condemns the play’s hollow nature, stating that ‘it is disconcerting that Hare has written a play about cardboard stereotypes who speak as if they were voice-overs in a TV documentary.’⁷⁸ These ‘preposterous characters’ were also criticised by Lord Rawlinson as ‘theatrical nonsense.’⁷⁹ However, pointing out the ironies embedded in a centuries-old legal system is no light task, and Hare’s use of satirical humour exposes numerous paradoxes without simply lecturing his audience. Kim’s description of the play as ‘no simple Cade-like crack at the law’⁸⁰ is therefore pertinent. Its hollowness, although the subject of much criticism, reflects the ‘ideological vacuum’⁸¹ of Margaret Thatcher’s Britain and renders its political message especially poignant. *Murmuring Judges* is an example of theatre’s potential to encourage society to ‘take a sober account of itself, and see itself truly.’⁸² The audience of the play conduct the role of the judge or jury in a legal case, attempting to disseminate conflicting arguments in order to reach an appropriate decision.

⁷⁵ David Pattie, ‘The Common Good: The Hare Trilogy’ (1999) 42 *Modern Drama* 363, 366.

⁷⁶ Christopher Innes, *Modern British Drama: The Twentieth Century* (CUP 2002) 227.

⁷⁷ Paul Taylor, *The Independent* (London, 12 October 1991) quoted in Yoo Kim, ‘Judging British Justice: David Hare’s *Murmuring Judges*’ 305
<community.snu.ac.kr/bbs/servlet/Download?SEQ=14620> accessed 10 April 2014.

⁷⁸ Milton Shulman, ‘Review of *Murmuring Judges*’ *Evening Standard* (London, 11 October 1991) quoted in Kim (n 77) 305.

⁷⁹ Lord Rawlinson, *The Daily Telegraph* (London, 17 October 1991) quoted in Kim (n 77) 305.

⁸⁰ Kim (n 77) 308.

⁸¹ *ibid* 304.

⁸² Gaston (n 71) 217.

DOES THE COMMON LAW HISTORICALLY 'BLUNDER INTO WISDOM' IN ENGLISH PRIVATE LAW?

*Belina Evans**

In addressing the question of whether the common law has historically blundered into wisdom, this article focuses on the development of the conception of slavery and the slave trade, with particular focus on the problems incurred in jurisprudential denial of colonial accountability. History frequently glorifies Lord Mansfield with emancipating slaves in England in *Somerset v Stewart*.¹ Instead, modern scholarship on slavery and the necessity for the Abolition Act 1807² around three decades later make it apparent that this was not the case.³ Rabin argues that the eighteenth century was possessed of insufficient legal traditions for English jurists who sought to harmonise a paradoxical cohabitation of notions of liberty and slavery in the Atlantic world.⁴ Was the institution of slavery internationally in a state akin to polygamy, which was presumed illegal except where condoned by the municipal court?⁵ Could England really sustain 'too pure an Air for Slaves to breathe in' whilst her colonies and complicity in the slave trade propagated a brutality condemned by common law tradition?⁶ The aforementioned questions exemplify the discord between natural law and the traditional judicially supported private law when conceptualising exploited human labour as a commodity. Therefore it becomes apparent that the abolition of the slave trade was a common law 'blunder into wisdom'.⁷

According to Arvind, before the clarity of *Somerset's Case*,⁸ two seemingly inconsistent schools of juristic thought elucidated on the common law's understanding of the status of slaves in England. He illustrates the first with the early eighteenth century case of *Smith v Gould*,⁹ where it was held that slaves were not chattel (property) in English law. Instead, slaves in England found themselves in a

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¹ *Somerset v Stewart* [1772] KB Lofft 1, 17; 98 ER 499, 509.

² Slave Trade Act 1807 (47 Geo 3 c 36).

³ James Oldham, 'New Light on Mansfield and Slavery' (1988) 27 J Brit Stud 48.

⁴ Dana Rabin, 'In a Country of Liberty? Slavery, Villeinage and the Making of Whiteness in the Somerset Case (1772)' (2011) 72 History Workshop Journal 5.

⁵ David Brion Davis, *The Problem Of Slavery In The Age Of Revolution, 1770–1823* (Harvard University Press 2003) 471.

⁶ *Cartwright's Case* (1614) Godb 246, 78 ER 143.

⁷ Rabin (n 4).

⁸ *Somerset* (n 1).

⁹ *Smith v Gould* (1706) 2 Ld Raym 1274, 92 ER 338.

situation analogous to the status of villeinage. This was based on a notion that men could not constitute property and therefore the dominion of their masters would be significantly less than if they were the subject of chattel.¹⁰ Conversely, the second view, attributed most to the absolutist Lord Hardwicke,¹¹ held that slaves in England, as in its colonial empire, did constitute chattel, and that the owners had the unlimited power to damage or completely destroy the property, which, in this case, happened to be human.¹² Whilst incompatible on the point of the extent to which a master could brutalise his slave, both views presupposed legitimacy to the institution of slavery.¹³ After all, prevailing commercial custom treated slaves as commodities.¹⁴ Later in the eighteenth century, Blackstone argued the prevailing principle that the latter incarnation of repressive dominion was not possible on English soil contrasting it to the Caribbean where, even if at odds with natural law, it was practically possible.¹⁵ This territorial distinction of soils that could and could not bear the weight of slavery is, at best, a baseless and fictitious glorification of an English common law tradition that valued the liberty of the individual. Particularly, given that this very tradition had only a century earlier held some of its subjects (villeins) as imperfectly analogous to chattel, the rights over which could be bought and sold.¹⁶ With this in mind, if England did sustain ‘too pure an Air for Slaves to breathe in’,¹⁷ did arrival on her shores result in the slave’s emancipation? Van Cleve concisely summarises the position of the common law on the status of slaves in England:¹⁸ ‘slaves who came to England were no longer subject to chattel slavery,¹⁹ but were not fully emancipated,²⁰ they were held to a lesser but substantial form of ‘slavish servitude.’²¹

The eighteenth century saw England’s common law in a bleakly inconsistent situation. Still priding herself on the personal liberty enjoyed by her subjects under the common law,²² England condoned an austere system of slavery in her colonies and, at times, failed to distinguish where her legal system truly differed from that of the colonial empire.²³ In *Smith v Browne*,²⁴ Chief Justice Holt held that one could not bring an action of *indebitatus assumpsit* for the value of a slave in England. However, the Chief Justice advised a successful outcome would be available if the claimant

¹⁰ George Van Cleve, ‘*Somerset’s Case* and its Antecedents in Imperial Perspective’ (2006) 24 LHR 3.

¹¹ *Pearne v Lisle* (1749) Amb 75, 27 ER 47.

¹² Van Cleve (n 10).

¹³ TT Arvind, ‘Though it Shocks One Very Much: Formalism and Pragmatism in the Zong and Bancoult’ (2012) 32 OJLS 113, 116.

¹⁴ *ibid.*

¹⁵ William Blackstone, *Commentaries on the Laws of England* (facsimile edn, Clarendon 1765) (Bl Comm) 1:104–5.

¹⁶ John H Baker, *An Introduction to English Legal History* (4th edn, Butterworths 2002) 468–72, 469.

¹⁷ *Cartwright* (n 6).

¹⁸ Van Cleve (n 10).

¹⁹ *Chamberlaine v Harvey* (1696) 1 L Raym 146, 91 ER 994.

²⁰ *Cartwright* (n 6).

²¹ *Chamberlaine* (n 19).

²² Edward Fiddes, ‘Lord Mansfield and the Sommersett Case’ (1934) 50 LQR 499.

²³ *Smith v Browne* (1702) 2 Salk 666, 91 ER 566.

²⁴ *ibid.*

were to establish that the contract transpired while the slave was in Virginia, because the law in Virginia was not English common law, but instead was based on the royal prerogative. Here we see no attempt made by common law courts to extend the principles it was devising to the colonies. The royal prerogative meant that occupied territories such as the American colonies belonged to the Crown. Thus the Crown could enforce its preferred laws. However, the application of English law depended on the negotiations of the Crown and grantee.²⁵ Given the cultural, class and power structure of the colony, Africans were forcibly assimilated into cruel systems of exploitative manual labour, ostensibly incompatible with the common law of England.²⁶ Thus, distinctions of English liberty such as those made in *Browne* seem like baseless rhetoric when applied to a seemingly capriciously defined legal status of the slaves in England and the inescapable sanction of even worse treatment from Englishmen abroad.²⁷ If we look at this incompatible legal duality from the perspective of whether the common law blundered into wisdom, it would be a disservice to the intellect of Chief Justice Holt to conclude this legal hypocrisy an oversight. However, making apparent the inconsistencies between jurisdictions exposes the superficial cracks that separated England's imperial system. Drawing attention to the incongruities between the legal systems brings bubbling jurisdictional problems to the surface.²⁸ In this way we can certainly argue that the Chief Justice, particularly in his guidance, if not encouragement to manipulate the more lenient colonial royal prerogative, had politically blundered in highlighting a blatant hypocrisy in the righteous stance of the English common law's conception of the status of slaves.

It becomes apparent, given the Chief Justice's hiatus from sustaining judicial rhetoric about liberty, that common law tradition in England tended to evade true jurisprudential clarity on the international and economic nature of the slave trade. But why? In *Somerset*, Lord Mansfield more subtly echoed the geographical distinction that the power of the master over his servants 'must be regulated according to the Law of the place it is exercised'.²⁹ Whilst his Lordship's judgment has been touted as marking the gradual decline of unfree labour in the British Empire, particularly given a rhetoric that fuelled the rise of an abolitionist fire, its true common law wisdom lay in employing a precision of technical legal training and a conceptualisation of the English tradition of rule of law in a way that semantically minimised the inconsistencies that persisted through means that had, until this point, not been achieved quite as successfully. The style in which Lord Mansfield repositioned the

²⁵ Gavin Loughton, 'The Extension of English Law Following Conquest and Settlement: The Origins of the Colonies Rule' (MPhil thesis, University of Oxford 2001) 4.

²⁶ Robbie Shilliam, 'Forget English Freedom, Remember Atlantic Slavery: Common Law, Commercial Law and the Significance of Slavery for Classical Political Economy' (2012) 17 *New Political Economy* 592.

²⁷ Loughton (n 25) 4.

²⁸ Rabin (n 4).

²⁹ *Somerset* (n 1).

common law discourse over slavery considerably swayed the framework of the discussion, whilst the ruling itself held marked opacities. Van Cleve has argued that *Somerset* extended liberty when it expelled any misgiving that English law did not protect certain essential ‘rights of man’ even for African slaves in England. Such rights now encompassed a right of access to the courts to shield oneself from unlawful detention or brutality within the borders of England.³⁰ However, in truth, the Mansfield decision, by prohibiting the involuntary return of slaves to the colonies, accomplished the more stagnating result of allowing for the perpetuation of the slave trade³¹ and the economic profits of this institution, by adopting an imagined and physical remoteness so that those systems could settle in the mind’s eye with superficial English legal championing of equality before the law. *Somerset* further belies some pertinent and underlying truths about the true common law conception of the status of slaves. Rabin argues that in designating villeinage as white, hereditary and English status, the common law had relegated black, chattel slavery to imperial locations. Thus, while a division drawn between villeinage and slavery may have aided Somerset’s cause, it did not incorporate him into the English nation. Most persuasively Rabin cites what Benjamin Franklin characterised as ‘the hypocrisy of this country, which encourages such a detestable commerce by laws for promoting the Guinea trade; while it piqued itself on its virtue, love of liberty, and the equity of its courts, in setting free a single negro’.³² Thus, Lord Mansfield insidiously propagated the narrative of an empire disconnected from home, wielding the previous and continuing blunders of the common law wisely enough to ensure that Britain’s pioneering role in the slave trade could continue.

Void of any significant regulative code in common law, the legal status of slaves found its true definition in an English commercial law which had not advanced any novel legal models to deal with the trade of men, women and children for exploitative labour.³³ It is only natural, therefore, that in Lord Mansfield’s subsequent decision in *Gregson v Gilbert (The Zong)*,³⁴ the broadening of a case that involved the murder of one hundred and thirty two slaves in the Middle Passage, was not even entertained outside the realm of insurance law. The common law, until this point, had not been so blatantly confronted with the fact that its righteous distinctions on the legal status of slaves within England’s borders were at odds with the entire transatlantic slave trade. This business was an enterprise that had been built on the treatment of slaves as chattel.³⁵ This was a conception of slavery incompatible with English common law. According to Arvind, the slave trade could not have survived a ruling that found commercial custom incompatible with the principles outlined by the common law. Further, he explicitly illustrates the economic investment the northwest of England

³⁰ Van Cleve (n 10) 3.

³¹ Rabin (n 4).

³² *ibid.*

³³ *Gregson v Gilbert* (1783) 3 Doug KB 232, 99 ER 629.

³⁴ *ibid.*

³⁵ Arvind (n 13) 145.

had in the slave trade, concluding that Lord Mansfield's pragmatic consideration that the consequences of broadening the legal questions in the case could have been very detrimental to the British economy was one of the greatest determinants in narrowing scope of his reasoning to the guise of legal formalism.³⁶ We thus see that the principle of the English common law and the dominion of the royal prerogative theoretically could have put an end to the slave trade with a simple re-expression of its incongruity with chattel slavery in this case alone. Instead, his Lordship completely diverted the basis of what turned out to be a vacuous common law expression of liberty to safeguard a countervailing private law priority.³⁷

Thus far, this article has looked at the blunderings into wisdom of the common law from the perspective of the underlying presuppositions of economic objectives of slavery by English jurists. However, the closest expression of blundering into wisdom can be displayed from the simple fact that it took the observations of outsiders at the time, such as Granville Sharp, to acknowledge the irreducible humanity of the so-called cargo. Every time counsel cited murder in the *Zong* case, or it was acknowledged that these 'cargoes' could try to seize control of a ship,³⁸ personhood was inescapably implicit. This outrage was furthered by an assembly of accomplished propagandists who prepared an engrossing play with a little accuracy in its depiction of Lord Mansfield's more ambivalent judgment.³⁹ The fact that it required entirely unqualified outside observers to proceedings to appreciate the glaringly obvious humanitarian omissions of jurisprudential rhetoric truly was a blunder of the common law into wisdom.⁴⁰ Subsequently, the common law retreated to the background as Parliament began to take responsibility for governing the business of trading in humans. As Lord Mansfield has wisely alluded to in *Somerset*, questions of the international workings of the slave trade were not truly in the scope of the authority of the court of law and should be left to positive law. Through the findings of a committee of the Privy Council dispatched to investigate the slave trade, the Dolben Act 1788 was legislated.⁴¹ It had taken 200 years of British denial of her colonial legacy to regulate the trade. The modified Dolben Act 1788 contained clauses specifically prohibiting losses due to throwing overboard.⁴² Thus, notes Webster, 'we can hear the echoes of the *Zong* incident once again'.⁴³ Subsequently, the legislature began to dismantle the commercial custom insuring slave ships. Further, 1807 saw the abolition of the slave trade in England.⁴⁴ However, Lobban argues the underlying dehumanising aspects of commercial custom embedded in the common law remained,

³⁶ *ibid* 116.

³⁷ Jane Webster, 'The *Zong* in the Context of the Eighteenth-Century Slave Trade' (2007) 28 *JLH* 285.

³⁸ *Gammon v Schmoll* (1814) 5 Taunt 344, 128 ER 722.

³⁹ Oldham (n 3).

⁴⁰ Webster (n 37).

⁴¹ 28 Geo 3 c 54.

⁴² Dolben Act 1788.

⁴³ Webster (n 37) 297.

⁴⁴ Slave Trade Act 1807 (47 Geo 3 c 36).

providing us with a parallel insurance example⁴⁵ occurring nearly fifty years after the abolition of slavery in England. In this case insurance was taken out on a ship transporting Chinese indentured labourers. This insurance covered the cost of the trip. At sea, the labourers revolted, killed the ship's captain and its crew and commandeered the ship. It was subsequently held that this was a loss for which the total cost of the trip was recoverable. Thus, the common law's adherence giving way to the custom of commercial law meant 'human cargo remained insurable human cargo'.⁴⁶ Arguably, the common law, through all its blunders and evasions of recognising the dehumanisation implicit in the commodification of indentured servants, could not trip into wisdom without explicit guidance from Parliament and a more sentimental public.

It is important to note that courts of law are not tribunals set on catalysing revolutionary thought, nor is it common for sweeping judgments entirely dismissing consideration of property relations to be issued. Whilst the article has exposed a damning depiction of the role of the common law when governed by an unregulated free market system, it is important to note that the true power of the English common law courts of the eighteenth century gave voice to private concerns over public ones. The doctrine of parliamentary sovereignty presupposes constitutional issues be settled by the legislature, so it is not surprising that judges remained within the framework of the specific private law issues before them.⁴⁷ This does, however, leave jurists with some scope for the injection of some common law principle of liberty. It is worth noting, therefore, that this is just what the common law did in the eighteenth century. In the 1760s, Blackstone's commentaries recognised a liberty perpetuated by the tradition of inalienable ownership of inherited property.⁴⁸ Thus, despite the righteousness of judicial rhetoric, this was the true English common law understanding of freedom and liberty. Rupprecht argues that regarding English common law tradition following the abolition of slavery, it is important to recognise the absence of sentimentality, the manipulation of ideology, and hypnotic rhetoric that could all serve as a tool in dehumanising people as 'parcels' of cargo and likened to 'horses'.⁴⁹ Thus, we can exalt the discernment of the initial minority such as Sharp who wrote about the *Zong*, applying too heavy a weight to sentimentalism.⁵⁰ Looking at the development of the common law through such rose tinted glasses exposes us to the risk of overlooking the malign influences of alternate rhetoric which prevailed at

⁴⁵ *Naylor v Palmer* (1853) 8 Ex 739, 155 ER 1550.

⁴⁶ Michael Lobban, 'Slavery, Insurance and the Law' (2007) 28 JLH 328.

⁴⁷ Davis (n 5) 507.

⁴⁸ BI Comm (n 15) 1:104–5.

⁴⁹ Marouf Hasian Jr, 'Domesticated Abolitionism, the "Human Cargo" of the *Zong*, and the British Legal Usage of Dehumanizing Rhetoric, 1783–1807' (2012) 76 Journ Comm 517.

⁵⁰ *ibid* 509.

the time and which could have persisted had the common law not blundered into wisdom.⁵¹

Rabin provides us, perhaps, with the most illuminating conception, not only of a burgeoning empire with a common law tradition wilfully ignorant of its role in shaping a colonial legacy marked by notions of Social Darwinism, but of an institution (in this case, the British Colonial Empire), that, on a very conscious level wished not to give voice to the criminal nature of its own workings.⁵² The persistent common law tradition of the avoidance of addressing the true brutality concurrent with the slave trade or resorting to dispassionate private law terms of dehumanisation belies an interesting component of the imperial legacy – a pious shame. It appears that it requires extra-judicial activism in order to truly encourage the common law to blunder into a semblance of wisdom. Lord Mansfield, in this way, was correct in his appeal to positive law in *Somerset*. In this instance we find that it is more often the overlooked aspects of legal reasoning that truly inform the development of the law and the recurring conceptualising of exploited labour of the human body into a commodity in the common law's understanding of private law.⁵³ Even at its most constitutionally optimistic, the common law's legal comprehension of slavery was so stubbornly detached from the true brutality of the system that one pauses to wonder whether, had the economic and political burdens of rebellions and humanitarian causes not voiced the most basic contestation to the institution of slavery, the convoluted rhetoric of the jurists we have visited would still prevail in marking England's soil as one the most free.

⁵¹ *ibid* 516.

⁵² *Gregson* (n 33).

⁵³ *Naylor* (n 45).

THE DIFFICULTIES IN FINDING A SINGLE THEORY TO FULLY JUSTIFY COPYRIGHT

*Conor Shevlin**

Justifying copyright law is of crucial importance in a digital age where the piracy of songs, movies and software is commonplace and the legitimacy of copyright doctrine continues to wane.¹ Anglo-American jurisprudence, however, offers no unitary justification of copyright. Each individual theory contributes to our understanding of copyright, but each suffers some fundamental weakness prohibiting it from standing alone as a justification. It is submitted that, notwithstanding shortcomings of individual theories, the justificatory power of copyright theory is cumulative. Adopting a pluralistic approach allows us to draw on arguments offered by a number of distinct theoretical schools and build a case for justifying copyright law. An assessment of the four most prevalent theories in Anglo-American jurisprudence, as identified by Fisher, illustrates this point.²

Labour-based justifications of copyright law, influenced by Locke's theory of property, are prominent in Anglo-American jurisprudence.³ Lockean theory views property rights in the product of labour as flowing from property rights in one's body. If a person owns his body, he must own what it does: its labour. Indeed, if a person owns his body and its labour, he must also own what he joins with his labour. This general justification is limited by two provisos. Firstly, there must be 'enough and as good left in common for others' following appropriation. Secondly, the labourer should take no more than he can use.

The justificatory power of labour theory is limited by a number of problems. One such problem is practical in nature. In adjudicating upon matters of copyright, British courts have relied heavily on labour theory. As Lord Bingham asserts, 'Anyone who by his ... skill and labour creates an original work of whatever character shall, for a limited period, enjoy an exclusive right to copy that work.'⁴ This approach produces rigidity and affords excessive protectionism in copyright doctrine, evident in judicial statements like 'what is worth copying is worth protecting'.⁵ A broad application of

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¹ Christian G Stalberg, 'Towards a New Paradigm in Justifying Copyright: A Universalistic-Transcendental Approach' (2007) 18 *Fordham IP, Media and Ent LJ* 333.

² William Fisher, 'Theories of Intellectual Property' in S Munzer (ed), *New Essays in the Legal and Political Theory of Property* (CUP 2001) 168.

³ John Locke, *Two Treatises of Government, The Second Treatise* (P Laslett ed, 2nd edn, CUP 1967).

⁴ *Designer's Guild Ltd v Russell Williams (Textiles) Ltd* [2000] 1 WLR 2416, (HL) 2418.

⁵ *Ladbroke (Football) Ltd. v William Hill (Football) Ltd* [1964] 1 WLR 273 (HL) 294 (Pearce LJ).

labour theory as a justification for copyright law carries the ‘threat of copyright expansionism’.⁶

Locke-inspired labour theory suffers further problems in establishing an individual’s right to appropriated property. Lockean theory claims that labour adds ninety-nine one hundredths of an object’s value. The question begs; why should a labourer receive the full value of appropriated products and not merely the value added? After all, ‘the incentive or creative part of the labour may only be a small proportion of the product’.⁷ Indeed, in creating new works, authors inevitably build upon the work of predecessors. Yen notes the reality that ‘No one has lived an entire life on a proverbial desert island’.⁸ Creation is the result of an author’s wider experience in society. The fact that most contributors are not present to receive their fair share is not a reason to attribute the entire market value to the final contributor.⁹ Locke’s theory fails to justify ownership of the whole commodity.

Assessment of the above problem assumes a link between an individual’s labour and his appropriation of an object. This assumption is itself problematic. Nozick questions why a person should gain what he mixes with his labour, rather than lose his labour¹⁰ - spilling a can of tomato sauce into the ocean does not give one the right over the whole ocean, instead he loses his tomato sauce.¹¹ Locke attempts to address this issue through the ‘just deserts’ theory, providing that an author has a right, based partly on morality and partly on the concept of reward, to control the use of an object. Becker argues that the deserts theory implies that the benefit deserved should be proportional to the value of the product produced.¹² Proportionality, however, is a myth, ‘Equal labour ... does not generate equal results’.¹³ People are not born with equal talent. The value of labour is often affected by factors beyond an individual’s control. Drawing upon a Rawlsian conception of justice,¹⁴ Hettinger notes that ‘a person born with extraordinary talents ... deserves nothing on the basis of these characteristics’.¹⁵ Ostensibly, the only factor individuals can control, and thus the only factor that should be considered, is the amount of effort expended. However, if copyright were only to measure effort it would be in danger of protecting only the perspiring, and not the inspired, creator.¹⁶ Indeed, there is a problem in actually distinguishing effort from

⁶ Carys J Craig, ‘Locke, Labour and Limiting the Author’s Right: A Warning Against a Lockean Approach to Copyright Law’ (2002) 28 Queen’s LJ 1.

⁷ William Dibble, ‘Justifying Intellectual Property’ [1994] UCL Juris Rev 74.

⁸ Alfred Yen, *Copyright Law: Texts, Cases and Materials* (Thompson West 2008).

⁹ Edwin Hettinger, ‘Justifying Intellectual Property Rights’ (1989) 18 Philo & Pub Af 31.

¹⁰ Robert Nozick, *Anarchy, State and Utopia* (NY Basic Books 1974) 174–175.

¹¹ *ibid.*

¹² Lawrence Becker, ‘The Labor Theory of Property Acquisition’ (1976) 73 J Phil 653.

¹³ Stewart Sterk, ‘Rhetoric and Reality in Copyright Law’ (1996) 94 Michigan LR 1197.

¹⁴ John Rawls, *A Theory of Justice* (Harvard University Press 1999).

¹⁵ Hettinger (n 7).

¹⁶ M Spence, ‘Justifying Copyright’ in D McLean and K Schubert, *Dear Images: Art, Culture and Copyright* (2nd edn, Ridinghouse 2002) 388.

natural ability because the two are centrally linked.¹⁷ It would seem that, despite inherent inequity in rewarding natural talent, this cannot be avoided in practice. This notwithstanding, Lockean theory offers only a shaky solution to the problem of establishing a link between individual and object.

Economic theorists assert that without copyright those interested in using an author's work would simply copy the work instead of buying it from the author. Authors would then find their economic returns too small to justify costs of authorship. As a result, authors are discouraged from producing, thus inhibiting the flow of work into the public domain and detrimentally affecting social welfare. To remedy this 'market failure',¹⁸ copyright should be granted to authors. The optimal degree of copyright protection should be determined through maximising differences between benefits of induced creativity and costs of increased author's rights.¹⁹

While the conceptual tidiness of the economic model is seductive, it displays a number of problems, which prevent it from standing alone as a justification for copyright. For instance, an economically driven conception of copyright will produce an imbalanced system, only granting copyright where the importance of reproduction to the economic value of the work is greater than the risk of loss. In blind pursuit of economic efficiency, copyright law might refuse protection for fine-art but afford it to drawings on greetings cards and calendars.²⁰ Instead of maintaining balance, copyright law has been used to steadily expand author's rights.²¹

More worryingly, economic justifications of copyright are based on the erroneous assumption that, 'the more extensive copyright protection is, the greater the incentive to create ...'²² Authors are not solely motivated by the promise of remuneration; motives for writing are varied.²³ As Lord Camden remarked, 'It was not for gain that Bacon, Newton, Milton, Locke instructed and delighted the world'.²⁴ Such has been particularly evident recently, owing to the digital revolution and rise of the internet. Wikipedia is an example of voluntary sacrifice of unpaid time to create a free product. This behaviour is not unprecedented. Poets have for centuries had little hope of economic success, yet the writing of poetry continues.

¹⁷ Rawls (n 15) 312.

¹⁸ William M Landes and Richard A Posner, 'An Economic Analysis of Copyright Law' (1989) 18 OJLS 325.

¹⁹ *ibid.*

²⁰ Spence (n 17).

²¹ Yen (n 2).

²² William M Landes and Richard A Posner, 'Indefinitely Renewable Copyright' (2003) 70 Chicago LR 471, 474.

²³ R Hurt and R Schuchman, 'The economic rationale of copyright' (1966) 56 Amer Ec Rev 421, 425-426.

²⁴ HL Deb 22 Feb 1774, vol 17, col 1000.

Seemingly, the greatest driver of artistic progress is not external, but internal, ‘People have an intrinsic drive to create’.²⁵ It is not submitted that no one creates for money. Certain types of work, like big-budget Hollywood films, are produced with an expectation of monetary reward. Indeed, it would be naive to conclude that even those whose primary motivation is not money are indifferent to the concept.²⁶ More problematic for economic theorists reliant on incentive theory, Zimmerman highlights studies by psychologists and behavioural economists, revealing that the promise of remuneration for creative work might diminish rather than enhance the quality of that work.²⁷

An associated problem with economic theory’s emphasis on incentives is that it ignores the matter of securing a vibrant public domain for creative works. The need to protect the public domain is often forgotten. As Boyle contends, ‘too many incentives could convert the public domain into a fallow landscape of private plots’.²⁸

Lemley proposes an analysis which attempts to sidestep difficulties associated with the incentive theory by focusing on *ex post* justifications for copyright; justification of copyright as an incentive to efficiently exploit works rather than as an incentive to create works.²⁹ This position supports copyright as private property to the extent that ownership of resources facilitates optimal exploitation and avoids a tragedy of the commons through overuse.³⁰ When this theory is applied to intangible property, however, there emerges a fundamental problem with validity. A tragedy of the commons is not possible. Copyright is non-exclusive, and thus cannot be overused.³¹

Another prevalent theory in Anglo-American jurisprudence is the personality theory, which loosely derives from the Hegelian proposition that private property is acquired by joining an individual’s will to an object.³² Radin reformulates Hegel’s normative connection between property and personality, asserting that property is protected because it is part of the individual’s personality.³³ The closer the connection between personality and property, the stronger the entitlement to property rights.³⁴ Although a valuable contribution to copyright, particularly in the development of moral rights,

²⁵ Eric Johnson, ‘Intellectual Property and the Incentive Fallacy’ (2012) 39 Florida SU LR 623.

²⁶ Mihaly Csikszentmihalyi, *Creativity: Flow and the Psychology of Discovery and Innovation* (Harper Collins 1996) 37.

²⁷ Diane Zimmerman. ‘Copyrights as Incentives: Did We Just Imagine That?’ (2011) 12 Theor Inq Law 54.

²⁸ James Boyle, *Shamans, Software and Spleens: Law and the Constriction of the Information Society* (Harvard University Press 1996).

²⁹ Mark A Lemley, ‘Ex ante versus ex post justifications for intellectual property’ (2004) 71 UC LR 129, 131–132.

³⁰ *ibid* 142.

³¹ Michael A Heller and RS Eisenberg, ‘Can patents deter innovation? The anti-commons in biomedical research’ (1998) 280 SCI 698, 698–699.

³² Georg Wilhelm Friedrich Hegel, *Philosophy of Right* (OUP 1967).

³³ Margaret J Radin, ‘Property and Personhood’ (1982) 34 Stan LR 957, 965.

³⁴ *ibid* 986.

personality theory alone is not strong enough to provide justification for copyright law.

Personality theory experiences difficulty in justifying copyright once an author has revealed his work to the world. Should that work not fall outside the scope of his personhood?³⁵ Netanel submits that authors ‘have a strong interest in continuing sovereignty over their expression’.³⁶ However, surely once an author has publicly expressed his work, that work takes on a life of its own as further communication of the work does not involve the individual.³⁷ Authorial control in this context is perhaps justified where there is a threat that unauthorised use will change the meaning of the work in ways that harm the author.³⁸ However, granting authorial control - to the extent that an author may prohibit the reproduction or publication of work that is faithful to its original meaning - cannot be justified by the personality theory.

The personality theory is further inhibited by a failure to convincingly establish that a sufficient number of works constitute an embodiment of an author’s personality. It is unclear how much creative work is intended to constitute even self-expression, let alone a broader notion of personality.³⁹ Creativity is often an escape from personality rather than an incorporation of it.⁴⁰

Proponents of the democracy theory seek to formulate ‘a vision of a just and attractive culture’,⁴¹ seeing copyright as integral to securing the best form of civic society. To this end, Netanel submits that copyright contributes in two ways. Firstly, copyright serves a production function, providing incentive for creative expression on a wide array of socio-political issues thus bolstering discursive foundations for democratic culture.⁴² Secondly, copyright serves a structural function, supporting a sector of creative and communicative activity, free from reliance on, *inter alia*, the state.⁴³ Similarly, Coombe advocates greater democratic dialogue, a freer communicative sphere, and the need for a stronger public domain.⁴⁴ The idea that copyright is centrally linked to democratic governance is not new. The United States Supreme Court noted that, ‘the Framers intended copyright itself to be an engine of free expression’.⁴⁵

³⁵ Fisher (n 3).

³⁶ Neil Weinstock Netanel, ‘Copyright Alienability Restrictions and the Enhancement of Author Autonomy: A Normative Evaluation’ (1993) 24 Rutgers LJ 347, 400.

³⁷ Lloyd Weinreb, ‘Copyright for Functional Expression’ (1998) 111 Harv L Rev 1149, 1222.

³⁸ Spence (n 15).

³⁹ *ibid.*

⁴⁰ T S Eliot (Thomas Stearns), *The Sacred Wood: essays on poetry and criticism* (Faber 1997).

⁴¹ William Fisher, ‘Property and Contract on the Internet’ (1998) 73 Chicago-Kent LR 1203, 1215.

⁴² Neil Weinstock Netanel, ‘Copyright and a Democratic Civil Society’ (1996) 106 Yale LJ 283.

⁴³ *ibid.*

⁴⁴ Rosemary J Coombe, ‘Objects of Property and Subjects of Politics: Intellectual Property Laws and Democratic Dialogue’ (1991) 69 Texas LR 1853.

⁴⁵ *Harper & Row Publishing Inc v Nation Enters* 471 US 539 (1985) (USSC) 558.

The previously examined theories all exhibit base levels of neutrality and objectivity. The democracy theory, however, lacks these crucial attributes. Instead, the democracy theory seems paternalistic. Seeking to regulate behaviour on the basis of controversial theories on what is best for society undermines concepts of individuality and autonomy, which are integral in democratic society. Such is precisely the type of thing that the law should avoid.⁴⁶

In attempting to formulate a vision of a just and attractive culture, democracy theorists face a more formidable task of answering indeterminate questions pertaining to what sort of society we should try, through adjustments to copyright, to promote. Answering these questions involves many components, which have for centuries been the subject of contention among political philosophers.⁴⁷ It would be impossible to resolve controversies of this scale in the course of analyses of copyright doctrine. Inviting debate on these wider and more contentious issues will only add to the difficulties faced by copyright theorists.

It is submitted that the theories examined are indicative of Anglo-American copyright theory as a whole. Each individual theory fails to provide sufficient philosophical clarity, thus prohibiting one single theory to operate as a justification for copyright law. Instead, the justificatory value of copyright theory is in the sum of its constituent and divergent schools of thought. The search for justification, therefore, must be pluralistic in its foundations.

⁴⁶ Fisher (n 3).

⁴⁷ *ibid.*

SHOULD THE LOSS OF CONTROL DEFENCE BE MAINTAINED?

*Ellis Kewley**

1 INTRODUCTION

The loss of control defence since the ruling of *R v Clinton* is no longer serving its purpose to fundamentally protect women from aggressive males.¹ The watering down of section 55(6)(c) Coroners Justice Act 2009 (CJA) has reverted the defence of loss of control back to the pre-CJA defence of provocation; *Clinton* has reopened the possibility for possessive men to kill their partners out of jealousy. Furthermore the continuation of the requirement that there needs to be a ‘loss of control’² fundamentally restricts the availability of the defence to domestic abuse victims who kill out of fear. It is for this reason and the subversion of the will of Parliament in *Clinton* that the defence of loss of control cannot be seen to protect women from aggressive, bad tempered men.

2 VICTIMS OF DOMESTIC ABUSE

The new defence of loss of control replaces the old common law defence of provocation. The defence, located in section 54 CJA 2009, has to some extent made the defence to victims of domestic abuse, specifically those who are not diagnosed with battered wife syndrome, easier to be successful. Section 54(2) states that the loss of control defence is not concerned with whether the loss of control was sudden or temporarily; as a result it provides better protection for women. Most women suffering domestic abuse will not attack their partner on the spot – either due to physical defences or the mere fact that victims of abuse kill out of fear for their lives rather than in a fit of anger. This is a stark contrast to the old law of provocation where there had to be an immediate retaliation to the provocation. This immediate requirement in essence created a male-centric defence, which failed to protect women, as this can be seen in the case of *R v McGrail* where the defendant received a suspended sentence after kicking his alcoholic wife to death, as ‘she would have tried the patience of a saint’.³ Indeed in the same year Rajinder Bisla was given a suspended sentence for killing his ‘nagging wife’. It seems absurd that the defence could so easily apply in these scenarios yet causes injustices of *R v Ahluwalia*,⁴ *R v Thornton*,⁵ and *R v Humphreys*⁶ who suffered from years of psychological and

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¹ [2012] EWCA Crim 2, [2013] QB 1.

² Coroners and Justice Act 2009, s 54(1)(a).

³ The Times, 31 July 1991.

⁴ [1992] 4 All ER 889 (CA).

⁵ [1992] 1 All ER 306 (CA).

physical abuse from their partners but were restricted from such a defence due to their loss of control not being sudden. It is for this reason loss of control can be seen as a significant leap forward to protect abused women from their abusive husbands. Cases such as *Ahluwalia* would more likely succeed due to the provision of section 54(2), allowing for abused women to plead a defence which allows justification of their actions; they killed as a consequence of their abusive husbands, not because each had an abnormal mind.

However the defence of loss of control in relation to battered wives fails because it maintains the requirement that there must be a loss of control.⁷ This is contrary to the Law Commission report that recommended the ridding such a requirement on the basis it would be wrong to rule out her plea on the basis there was no loss of control.⁸ The requirement to lose control ignores the fact that battered women will kill out of desperation and fear – which does not easily satisfy the requirements of section 54(1)(a) – despite deserving a partial defence by meeting the other requirements. Indeed, analysing the facts of previous cases where a battered woman has killed, it can be hard to find a loss of control. In *Ahluwalia* the defendant waited until her husband was asleep to pour petrol over him. Under this narrow definition of ‘loss of control’ *Ahluwalia* could be perceived as a calculating attack, which was ruled in *Serrano* not to be a loss of control.⁹ So long as the definition of ‘loss of control’ is given a narrow interpretation, it will fail in protecting women from their abusers. However, there may be a solution. As suggested by Herring, loss of control should include loss of restraint.¹⁰ Referring back to *Ahluwalia*, it must be true that the defendant wanted to kill her husband numerous times before, but she managed to control her desire to do so, until, on that particular night, her ‘moral check’ failed.

3 GENDER STEREOTYPING

Prima facie, allowing age and sex to be considered in relation to the tolerance and self-restraint of the defendant can be seen as a positive factor as a gender neutral system creates substantive inequality. Abused women find it hard to match the masculine standards of reasonableness – the criminal law will view them as abnormal for not merely leaving their husband and abnormal for lacking a clear loss of control.¹¹ Whilst Schneider’s critique of gender neutral law is valid, it does not solve the problem that in a legal system dominated by patriarchy, it will be men who read and interpret law. Separations on the basis of gender will result in a male privileged judiciary holding a higher standard of self-restraint and tolerance for women to abide by based upon a male perception of how a woman should act – which is generally that

⁶ [1995] 4 All ER 1008 (CA).

⁷ Coroners and Justice Act 2009, s 54(1)(a).

⁸ Law Commission, *Murder Manslaughter and Infanticide* (Law Com No 304, 2006) para 5.29.

⁹ *R v Serrano* [2006] EWCA Crim 3182 (CA).

¹⁰ Jonathan Herring, *Criminal Law Text Cases and Materials* (5th edn, OUP 2012).

¹¹ Elizabeth Schneider, *Battered Women and Feminist Law-Making* (Yale University Press 2002).

women are more reserved, tolerant, and less likely to lose their temper compared to men.¹² This perception will do more harm than good in the protection of women by creating two separate standards of restraint and tolerance for men and women. It assumes that women are collectively the same; that women are ‘drones’ with the same personality traits rather than individuals who will have different characteristics. It is quite feasible that a woman may be the breadwinner or hotheaded and still be the victim of domestic violence. Her defence of loss of control will be severely damaged by separating the two standards on the basis of gender. A better solution to ensure the defence provides better protection for women would be to include gender under ‘circumstances’ rather than a separate explicit reference to gender.¹³

4 SEXUAL INFIDELITY

One of salient issues the statutory defence of loss of control rectified was that it put an end to the question of what characteristics should be relevant in assessing the gravity of provocation. It is now clear in statute that only age and sex can be considered. Whilst the drawbacks to an explicit mention of sex have already been covered, this still provides better protection for women against aggressive men than provocation. Norrie argues that the new defence of loss of control has shifted from that of compassionate excuse to that of improper justification.¹⁴ The move from an excusatory defence to a justificatory defence has created a higher standard of objectivity; it has to ensure that defendants’ actions are partially justified. The triggering act must be accepted by, in general, as a provoking insult.¹⁵ This change will protect women from decisions seen under provocation such as *R v Doughty*¹⁶ involving a crying baby as a trigger, and the previous case of a ‘nagging wife’. Charron J in Canadian case of *R v Tran* reflected on this issue:¹⁷

By incorporating an objective standard the defence of provocation is informed by social norms ... these include society’s changed view regarding marital relationships and the present reality is that a high number of them end in separation.¹⁸

The sexual infidelity provision under section 55(6)(c) has been seriously compromised by the ruling in *Clinton*. *Clinton* has, in all but name, restored the law in relation to sexual infidelity back to the principles of the old law of provocation by allowing sexual infidelity to be considered as context within the section 54(3)

¹² Neil Cob and Anna Gausden, ‘Feminism, “Typical” Women, and Losing Control’ in Alan Reed and Michael Bohlander (eds), *Loss of Control and Diminished Responsibility Domestic Comparative and International perspectives* (Ashgate 2011) 104.

¹³ Alan Norrie, ‘The Coroners and Justice Act 2009 – Partial Defences to Murder: (1) Loss of Control’ [2010] Crim LR 275, 281.

¹⁴ *ibid.*

¹⁵ John Gardner and Timothy Macklem, ‘Provocation and Pluralism’ (2001) 64 MLR 815.

¹⁶ *R v Doughty* (1986) 83 Cr App R 319 (CA).

¹⁷ *R v Tran* (2010), 261 CCC (3d) (SCC).

¹⁸ *ibid* 435.

circumstances.¹⁹ As a result women are no longer protected from males who seek to kill as a result of sexual infidelity. The decision in *Clinton* contorted the defence to allow sexual infidelity through “the backdoor”.²⁰ It is a dangerous ruling, not only in its approach towards the protection of women, but also in its legal approach. On the facts of *Clinton*, section 54(3) should not have even been considered. Loss of control is a three-stage test where all requirements have to be met. It cannot be said *Clinton* had a qualifying trigger in ‘being goaded about being suicidal’ or his worry about providing for the children as it is unlikely to prove section 55(4); that these two triggers caused circumstances of an extremely grave character and caused D to have a justifiable sense of being wronged. Indeed it is a dire separation away from the example of a qualifying trigger of a partner being raped used by the Law Commission.²¹ It seems odd that the courts have provided an approach to loss of control which does not move in the logical order of the defence layout as set out by statute. Indeed, Baker and Zhao argue that sexual infidelity was not mere context in this case, but a significant contributory factor. The sexual infidelity was so strong to such an extent it was still on the defendant’s mind when he messaged images of the victim to her lover.²²

Parliament clearly intended the defence of loss of control to no longer be available to men who kill directly, or indirectly, over sexual infidelity as can be demonstrated by the following passage:

We want to make absolutely clear that sexual infidelity on the part of the victim can *never* justify reducing a charge to manslaughter ... even if sexual infidelity is present with a range of trivial and commonplace factors.²³

Whilst the Lord Chief Justice Judge claims that he followed the will of Parliament by selectively choosing sound bites from Hansard,²⁴ in doing this he ignored official policy documents issued by the Ministry of Justice and potentially subverted the will of Parliament. As a consequence he opened up the defence again for jealous men to kill their wives as a result of sexual infidelity. Whilst it may not be a return to the ‘nagging wife’ it is nonetheless a significant step backwards.

5 CONCLUSION

The changes to the loss of control defence under *Clinton* have thus stripped back the limited provisions it had in protecting women from bad tempered males. The worrying rationalisation of domestic violence in *Clinton* that ‘sexual infidelity ... can

¹⁹ *Clinton* (n 1) [31].

²⁰ Dennis Baker and Lucy Zhao, ‘Contributory Qualifying and Non-qualifying Triggers in the Loss of Control Defence: A Wrong Turn on Sexual Infidelity’ [2012] J Crim L 254.

²¹ LC304 (n 8) para 5.74.

²² Baker and Zhao (n 20).

²³ Ministry of Justice, ‘Murder, manslaughter, Infanticide: proposals for the reform of the law’ (Consultation Paper, CP19/08, 2008) para 32.

²⁴ *Clinton* (n 1) [40]–[44].

produce a violent response and stems from a sense of betrayal, not notional rights of ownership'²⁵ produces a verdict that re-establishes the link that violence is a justificatory action to sexual infidelity. *Clinton*, alongside the requirement there be a 'loss of control', has ensured that the aim to protect women has been eroded. The defence of loss of control in its current state offers little, if any, protection to women against aggressive males. Now that the feminist provision of section 55(6)(c) is removed, it is business as normal for patriarchy.

²⁵ *ibid* [16].

THE LEGAL AND ETHICAL PRINCIPLES OF MEDICAL CONFIDENTIALITY ARE FAR FROM ABSOLUTE

*Katrina Spooner**

The title implies that if confidentiality's principles were absolute, this would ensure confidentiality had significance, however the author will demonstrate this is not so. Nevertheless the author will partly agree with the title in that the principles governing confidentiality at times do seem far from absolute, yet this article will demonstrate confidentiality is not an empty principle.

Indeed, despite medical modernisation and the increasing public demand to breach confidentiality; it has still maintained the principles of autonomy, privacy and dignity accordingly. Nevertheless, these principles cannot always be absolutely upheld in confidential situations. Exceptions are compulsory for an effective healthcare service to achieve the overall good for society. Moreover exceptions overcome inherent moral dilemmas confidentiality is faced with. Therefore, principles are balanced fairly when disclosing information in the interest of the public, against individuals' rights. Yet, although exceptions are justified, patients need to be more aware of confidentiality's dynamic purpose, to understand that the exceptions do not mean confidentiality is meaningless: the robust safeguards and continuous strengthening principles compensate for unavoidable breaches, thereby maintaining confidentiality as the *prima facie* duty owed to patients.

The Hippocratic Oath, unaltered for 3000 years,¹ describes the duty of confidentiality as 'ought never [to] divulge, holding things to be holy secrets.'² Arguably, this has led 'doctors [to be] reluctant to give up on the concept of confidentiality being an absolute requirement.'³ Though, as Thompson argues, the 'old tradition of the Hippocratic Oath is not ... justified, because the oath has not been a regular basis of medical practice through the ages.'⁴ Alternatively, doctors' 'reluctance may result ...

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¹ Ian E Thompson, 'The nature of confidentiality' [1979] *J Med Ethics* 5, 57; British Medical Association, *Medical Ethics* (BMA 1974) 1, 13.

² Carla Caldwell Stanford and Valerie J Connor, *Ethics for Health Professionals* (Jones & Barlett 2012) 61; Thompson (n 1) 57; British Medical Association, *The handbook of medical ethics* (BMA 1984) 69–70.

³ Raanan Gillon, 'Confidentiality' [1985] *Brit Med J* 219, 1635.

⁴ Thompson (n 1) 57.

from [the] lingering belief that [confidentiality] ought to be absolute.’⁵ However the Hippocratic oath itself uses the term ‘ought’⁶, ‘though ambiguous ... [it can be] taken to imply that the oath envisaged circumstances where it was permissible for information obtained in the course of a doctors activities to be ‘spoken abroad’.’⁷

Indeed, confidentiality ‘evolve[s] [as] ... standards and practices ... continue to change,’⁸ because ‘the doctor-patient relationship arises within the larger health care and public health systems that demand the disclosure of [confidential information]’.⁹ Therefore, the ‘modern methods of medical practice force us to view the ethic of [confidentiality] from a different perspective’¹⁰ and as such, an absolute principle of confidentiality seems a myth. However, exceptions need to be more openly justified to prevent patients’ unrealistic expectations of confidentiality as absolute,¹¹ yet its qualified nature does not deter the fact its principles are stringently upheld by ethics¹² and law respectively.

Undeniably, common law states when ‘confidential information comes to the knowledge of a person in circumstances where he has notice ... the information is confidential ... [and] it would be just ... [to] precluded from disclosing the information to others.’¹³ The Data Protection Act 1998¹⁴ principles add even more protection to confidentiality, ensuring the ‘processing’ of ‘sensitive data’¹⁵ is fair and lawful; by allowing disclosure only if a condition from schedule two and three are met.¹⁶ Indeed, unlawful disclosure of confidential information¹⁷ can lead a health professional to be found guilty on a wide range of laws.¹⁸ Furthermore, article 8¹⁹ gives the patients a right to ‘private life’ that includes medical records,²⁰ and therefore public bodies can also be found liable for unlawful disclosure. The European Convention on Human Rights (ECHR)²¹ says ‘the protection of medical data is of

⁵ Gillon (n 3).

⁶ *ibid.*

⁷ *ibid.*

⁸ Department Of Health, ‘Confidentiality: NHS Code of Practice’ (November 2003) para 5.

⁹ James G Hodge ‘The Legal and Ethical Fiction of ‘Pure’ Confidentiality’ (2006) 6 *American Journal of Bioethics* 21, 21.

¹⁰ Jean Vanessa McHale, *Medical confidentiality and Legal Privilege* (Routledge 1993) 71.

¹¹ Gillon (n 3).

¹² Margaret Brazier and Emma Cave, *Medicine Patients and the Law* (4th edn, Penguin 2007) 69.

¹³ *Attorney General v Guardian Newspapers* [1990] 1 AC 109 (HL) 282 (Lord Goff).

¹⁴ Data Protection Act 1998.

¹⁵ *ibid* s 2.

¹⁶ *ibid* sch 1 pt 1(1)(a), (b).

¹⁷ Lord Oliver of Aylmerton, ‘Spycatcher: Confidence, Copyright and Contempt’ (1989) 23 *Is LR* 4, 420; Quentin Loz Sze On Sc and Edwin Lee Peng Khoo, *Confidentiality in Arbitration: How far does it extend?* (Academy 2007) 109.

¹⁸ Jonathan Herring, *Medical Law and Ethics* (4th edn, OUP 2012) 223.

¹⁹ Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights, as amended) art 8.

²⁰ *Chare (nee Jullien) v France* [1991] 71 DR 141.

²¹ ECHR (n 19).

fundamental importance to a person's enjoyment of rights to respect private life.²² Therefore, there is a 'fundamental right to privacy [and] states [should] take positive steps to protect medical confidentiality.'²³

Equity is the most common remedy to patients when their confidentiality is breached.²⁴ Indeed the doctor-patient relationship can easily satisfy the principles to uphold confidentiality. First, the information is 'to the extent that it is confidential ... second the duty of confidence applies neither to useless information, nor to trivia,'²⁵ and finally if there is no 'countervailing public interest which favours disclosure.'²⁶ Whilst the latter may question the enforceability of the former principles, as *Campbell v Mirror Group Newspapers*²⁷ extended these principles to information, which has a 'reasonable expectation of privacy,'²⁸ it has therefore emphasised confidentiality to protect autonomy and dignity.²⁹ Thus 'the Human Rights Act [1998] ... [shifted] an existing relationship to the privacy of the information',³⁰ and arguably countervailing principles overriding confidentiality will be under more scrutiny as confidentiality protection is extended.

However, a breach of confidence is justifiable under article 8(2),³¹ which allows an interference with article 8(1)³² if "'necessary in a democratic society" ... and [is] no greater than is proportionate to the legitimate aim pursued.'³³ The breach needs to be 'necessary' which adds strong protection for individuals' private rights.³⁴ Therefore article 8 has strengthened the principles contained in the common law action for breach of confidence; by providing a high threshold to breach confidentiality by virtue of a countervailing public interest; as the exceptions have to be balanced against the patient's right to privacy which attaches to any medical information.³⁵

Deontologists argue confidentiality is a 'moral principle of [conferring the] respect for autonomy or ... privacy, which is seen as a fundamental moral end in itself.'³⁶ Consequentialists argue³⁷ however that confidentiality should be upheld to maintain

²² European Union Agency for Fundamental Rights, *Data Protection in the European Union: The Role of National Data Protection Authorities* (2010) 13.

²³ Marc Stauch and Kay Wheat, *Text Cases & Materials on Medical Law* (3rd edn, Routledge 2006) 204; *L v Finland* (2009) 48 EHRR 31.

²⁴ Herring (n 18) 96.

²⁵ *A-G v Guardian* (n 13) [1], [101] (Lord Goff).

²⁶ *ibid.*

²⁷ *Campbell v Mirror Group Newspapers* [2004] UKHL 22, [2004] 2 AC 457.

²⁸ *ibid* [21] (Lord Nicholls).

²⁹ *ibid* [55] (Lord Hoffmann).

³⁰ Emily Jackson, *Medical Law: Text, Cases and Materials* (3rd edn, OUP 2013) 369.

³¹ ECHR (n 19).

³² *ibid.*

³³ *Campbell* (n 27) [139].

³⁴ Herring (n 18) 229.

³⁵ Jackson (n 30).

³⁶ Gillon (n 3) 1635.

³⁷ General Medical Council (2009) *Confidentiality* London, para 6.

trust.³⁸ Without trust, individuals ‘may be deterred from revealing such information ... to receive appropriate treatment’,³⁹ ‘Thereby endangering their own health and ... that of the community.’⁴⁰ As a result, confidentiality principles are not easily overridden because ‘The existence of [confidentiality as a] broad general principle reflects the fact that there is [also] a public interest in the maintenance of confidences.’⁴¹

Therefore, controversial issues faced in confidentiality such as disclosing a patient’s HIV status to their partner or maintaining confidentiality, is an example of a moral dilemma in that both situations provide justifiable ends. Indeed the former can be justified to protect others from the disease whereas the latter upholds the respect for patient’s autonomous decisions, dignity, and privacy. Yet, the significance of particular principles enforcing confidentiality depends on external competing claims and thus compromise to confidentiality or social health care is inevitable.⁴² Ultimately, the law tends to act how the democratic society⁴³ would expect had there been no conflict.⁴⁴

Nevertheless, although the General Medical Council⁴⁵ assumes HIV disclosure is justifiable to ‘protect society ... [from] serious communicable disease’,⁴⁶ this only gives doctors a power not a duty⁴⁷ to disclosure because of stigmatisation⁴⁸ towards the patient. The courts are subsequently reluctant to hold the doctor liable for not preventing harm to a third party⁴⁹ unlike America;⁵⁰ because overriding patient dignity could paradoxically increase the risk of harm to individuals by impeding their trust to honestly disclose information.⁵¹

‘Therefore if confidentiality is not a moral end in itself what moral good does it serve?’⁵² Taking both consequentialist and deontologist theories, confidentiality can be demonstrated as a means to some ‘morally desirable end such as the general welfare, respect for people’s autonomy, privacy,⁵³ or dignity. Consequently, the principles that govern confidentiality have to be fairly balanced against the moral good of disclosing confidential information on the grounds of law, consent, and the

³⁸ *ibid.*

³⁹ *Z v Finland* [1997] ECHR 10, [1998] 25 EHRR 371.

⁴⁰ *ibid.*

⁴¹ *A-G v Guardian* (n 13) 282 (Lord Goff).

⁴² Tom L Beuchamp and James F Childress, *Principles of Biomedical Ethics* (4th edn, OUP 2001).

⁴³ M Siegler ‘Confidentiality in medicine – a decrepit concept’ (1982) 64 N Engl J Med 307, 1518–21.

⁴⁴ Beuchamp and Childress (n 42).

⁴⁵ GMC (n 37).

⁴⁶ *ibid* 36.

⁴⁷ *ibid* 34.

⁴⁸ *Z v Finland* (n 39).

⁴⁹ *Smith v Littlewoods Organisation Ltd* [1987] AC 241 (HL).

⁵⁰ *Tarasoff v Regents of the University of California* 551 P 2d 334 (Cal 1976).

⁵¹ Jackson (n 30) 386.

⁵² Gillon (n 3) 1635.

⁵³ *ibid.*

public interest.⁵⁴ Requiring consent before disclosing confidential information demonstrates a respect for patient privacy,⁵⁵ dignity,⁵⁶ and autonomy. Indeed, the principle of individual autonomy reflected in law and professional guidance⁵⁷ demonstrates a breach of confidentiality is only lawful after requiring consent from the patient.⁵⁸

However, the manifold exceptions for not obtaining consent, because of practical issues,⁵⁹ disclosure in the public interest, patient's data being anonymised,⁶⁰ or statute requirements;⁶¹ questions whether the principle of autonomy has significance? Arguably it does have significance, as requesting no consent for disclosure will only be acceptable in limited circumstances.⁶²

As the law presumes patients to be competent to make a decision,⁶³ incapable adults⁶⁴ and children⁶⁵ alike cannot be discriminated against.⁶⁶ Incapable adults and children cannot be discriminated against because they are equally entitled to a duty of confidentiality, unless it was in their best interests to disclose.⁶⁷ Therefore, an incompetent patient 'should not lessen the protection that is accorded to their rights of confidentiality.'⁶⁸ Yet, confidentiality can be justifiably overridden⁶⁹ to 'protect society from risks of serious harm.'⁷⁰ *W v Egdell* gave the following principles by virtue of the professional guidelines⁷¹ when to disclose confidential information without consent,⁷² firstly if the risk is on going⁷³ and secondly disclosure is minimum to satisfy its necessary purpose.⁷⁴ Therefore, only 'weighty countervailing public

⁵⁴ GMC (n 37) para 8.

⁵⁵ Braizer and Cave (n 12) 80.

⁵⁶ M Hartlev, 'Striking the Right Balance: Patient's Rights and Opposing Interests with Regard to Health Information' (2007) 14 European Journal of Health Law 165.

⁵⁷ GMC (n 37) para 9.

⁵⁸ *Hunter v Man* [1974] QB 767 (DC) 772.

⁵⁹ GMC (n 37) para 1.

⁶⁰ *R v Department of Health Ex p Source Informatics Ltd* [2001] QB 424 (CA).

⁶¹ Misuse of Drugs Regulations 1973, SI 1973/799; Public Health (Control of Disease) Act 1984; Abortion Act 1967.

⁶² GMC (n 37) para 37.

⁶³ Mental Capacity Act 2005, s 1(2); *R v Sullivan* [1984] AC 156 (HL) 170–71.

⁶⁴ Herring (n 18) 245.

⁶⁵ Data Protection (Subject Access Modification) (Health) Order 2000 SI 2000/413, art 5.

⁶⁶ Equality Act 2010.

⁶⁷ GMC (n 37) para 61; *F v W Berkshire HA* [1990] 2 AC 1 (HL).

⁶⁸ Herring (n 18) 245.

⁶⁹ *Z v Finland* (n 39).

⁷⁰ GMC (n 37) para 36.

⁷¹ *W v Egdell* [1990] Ch 359 (CA).

⁷² GMC (n 37) para 37.

⁷³ Hodge (n 9) 22.

⁷⁴ *Stone v South East Strategic Health Authority* [2006] EWHC 1668 (Admin), [2007] UKHRR 137; *Saha v General Medical Council* [2009] EWHC 1907 (Admin); [2009] LS Law Medical 551.

interest factors will override the *prima facie* duty of confidentiality,⁷⁵ such as child abuse⁷⁶ or murder.⁷⁷

However, less compelling reasons to breach confidentiality without consent in the public interest is for ‘medical purposes’⁷⁸ in research. Ethical principles do strive to use anonymised data,⁷⁹ because it does not cause a duty of confidence, arguably because it cannot harm patients.⁸⁰ However Herring argues this assumption of non-maleficence is contestable, because it waives individuals’ ‘moral objections to particular research’⁸¹ which, may ‘indirectly harm them.’⁸²

Undeniably, there is a fine line between the principles allowing and disallowing disclosure for research purposes. Yet, confusingly the Data Protection Act (DPA)⁸³ states for research purposes the second principle⁸⁴ of using data for specified purpose is not regarded incompatible.⁸⁵ Moreover it states confidential data can be held indefinitely for research purposes⁸⁶ contradicting its fifth principle⁸⁷ and the GMC,⁸⁸ which states information is to be disclosed for a lawful specified purpose, and not go further than necessary for that purpose. Arguably however, the harm gained to the minorities is outweighed by using the data for more effective medicine to treat overall health.⁸⁹ In the twenty first century it is recognised that ‘communal data sharing for public health and research,’⁹⁰ is inevitable; and the Wellcome Trust⁹¹ found many patients did not mind their records being used.⁹²

Nevertheless, the exception of requesting consent weakens the principle of autonomy and questions whether confidentiality is empty. Arguably it is not, as the following principles in the DPA⁹³ seem to demonstrate data controllers should request informed consent. Before disclosing information the patient is informed who accesses it,⁹⁴

⁷⁵ Jackson (n 30) 384.

⁷⁶ *Re M* [1990] Fam 211 (CA) 277.

⁷⁷ Department Of Health, ‘Confidentiality: NHS Code of Practice Supplementary Guidance: Public Interest Disclosures’ (November 2010) para 12.

⁷⁸ NHS Act 2006, s 251(1); Herring (n 18) 248.

⁷⁹ GMC (n 37) para 9.

⁸⁰ *R v Department of Health Ex p Source Informatics Ltd* [2001] QB 424 (CA).

⁸¹ Herring (n 18) 237.

⁸² *ibid.*

⁸³ Data Protection Act 1998.

⁸⁴ *ibid* pt 1(1)(2).

⁸⁵ *ibid* s 33(2).

⁸⁶ *ibid* s 33(3).

⁸⁷ *ibid* sch 1(5).

⁸⁸ GMC (n 37) para 12.

⁸⁹ *Ex p Source Informatics* (n 80).

⁹⁰ Hodge (n 9) 21.

⁹¹ Wellcome Trust, ‘Will you share your patient records?’ (13 January 2014)

<<http://blog.wellcome.ac.uk/2014/01/13/will-you-share-your-patient-records/>> accessed 17 February 2015.

⁹² Jackson (n 30) 398.

⁹³ Data Protection Act 1998.

⁹⁴ *ibid* sch 1, pt 2(3)(a)(b).

receives an explanation of any terms used,⁹⁵ and the purposes for which it is being processed.⁹⁶ Moreover, the patient can require any further information to enable processing to be fair,⁹⁷ access their records⁹⁸ and can stop the processing if it is causing unwarranted distress or harm.⁹⁹ Therefore, the data controller has to respect the data subject's decisions¹⁰⁰ to establish the principle of fairness.¹⁰¹

Furthermore, processing has to be lawful.¹⁰² Therefore 'information is to be processed in accordance with the provisions of the DPA¹⁰³ and the common law.'¹⁰⁴ Since implementation of Human Rights Act 1998¹⁰⁵ processing needs to be in compliance with patients ECHR¹⁰⁶ privacy rights.¹⁰⁷ Indeed if the data controller is not processing fairly or lawfully they will endure significant fines from the Information Commissioner,¹⁰⁸ and anyone who discloses information without the consent of the data controller will be guilty of an offence.¹⁰⁹ Therefore, the fairness principle recognises the importance of confidentiality to individuals and strives to uphold autonomy, dignity and privacy.

Nevertheless, 'how can any sense be made of what may appear to be a chaotic jumble of'¹¹⁰ principles? Certainly medicine and data holding has advanced, therefore the secretive doctor-patient relationship is not the reality. Thus, although the principles governing confidentiality are not always absolute, they work together to maintain confidentiality as a significant principle. The DPA¹¹¹ ensures fairness in disclosure¹¹² and upholds patients' autonomy to reassure their trust. The ECHR¹¹³ establishes that confidentiality will be upheld if it is reasonably expected to be, therefore maintaining

⁹⁵ *ibid* s 8(2).

⁹⁶ *ibid* sch 1, pt 2(3)(c).

⁹⁷ *ibid* sch 1, pt 2(3)(d).

⁹⁸ *ibid* ss 8, 7; Access to Medical Reports Act 1998.

⁹⁹ Data protection Act 1998, s 10.

¹⁰⁰ *ibid* s 33(1)(a), (b).

¹⁰¹ P Boyd, 'The requirements of the Data Protection Act 1998 for the processing of medical data' *J Med Ethics* (2003) 29, 34.

¹⁰² Data Protection Act 1998 sch 1; s 2.

¹⁰³ *ibid*.

¹⁰⁴ *Campbell* (n 27) 146; Confidentiality: NHS Code of Practice (n 8) para 26 et seq (Informing Patients Version 3).

¹⁰⁵ Human Rights Act 1998, s 3(1).

¹⁰⁶ ECHR (n 19) art 8.

¹⁰⁷ *Campbell* (n 27) 146.

¹⁰⁸ Dawn Monaghan, 'Data leaks in local government: where are the cracks in your system?' *The Guardian* (London, 30 October 2014) <<http://www.theguardian.com/local-government-network/2013/oct/30/data-breaches-local-government>>; Institute of Chartered Accountants in England and Wales, 'Case law: Information Commissioner uses new powers to impose large data protection fines' (1 January 2011) <<http://www.icaew.com/en/archive/library/subject-gateways/law/data-protection/legal-alert/information-commissioner-uses-new-powers-to-impose-large-data-protection-fines>> accessed 17 February 2015.

¹⁰⁹ Data Protection Act 1998, s 55.

¹¹⁰ Gillon (n 3) 1634.

¹¹¹ Data Protection Act 1998.

¹¹² Herring (n 18) 268.

¹¹³ ECHR (n 19).

patients' privacy. Lastly, ethical principles provide justifiable moral situations of disclosure, but are still striving to maintain patients' dignity and trust. Ultimately, it is proposed that exceptions need to be more openly justified to enable patients to withdraw consent more freely by virtue of autonomy.¹¹⁴

In conclusion, it has been demonstrated that confidentiality is not an empty principle. Indeed the qualifying nature of the principles is justified so they can be maintained alongside modern medicine to provide justifiable outcomes in moral dilemmas. However, this does not mean patients do not have a right to confidence at all, rather the contrary, as confidentiality has contributed to patients' 'autonomy and privacy.'¹¹⁵ There are many avenues to exhaust before a breach of confidentiality is validly upheld.¹¹⁶ The recent ECHR judgment¹¹⁷ shows confidentiality can be maintained in the twenty first century by adopting a reasonable expectation test, to allow the principles to be enforced accordingly alongside complex moral dilemma developments; therefore permitting confidentiality to operate in its own balanced, justifiably unique way.

¹¹⁴ J O'Brien and C Chantler, 'Confidentiality and the duties of care' [2003] J Med Ethics 23, 36.

¹¹⁵ Gillon (n 3) 1636.

¹¹⁶ GMC (n 37) para 9; *Egdell* (n 71); ECHR (n 19) art 8; Data Protection Act 1998, sch 1, pt 1, (1)(a), (b).

¹¹⁷ *Campbell* (n 27) [21] (Lord Nicholls).

THE CONCEPT OF FAMILY LAW: UNDERSTANDING THE RELATIONSHIP BETWEEN LAW AND FAMILIES

*Olivia Egdell-Page**

1 INTRODUCTION

Family law is a distinctive area of legal practice, creating ‘a patchwork of legal rights’¹ in relation to ‘internal problems’ within the family.² Family Law acts ‘to constrain the wrongful exercise of power and leave room for individuals to make free choices in the privileged sphere of their intimate lives’³ and it remains a vital legal protection.

The personal, everyday impact of the law in this area is unique, and as ‘there has never been such a thing as the ideal British family unit,’⁴ the variety of family formulations necessitates a wide and inclusive legal system. Its practice demands constant awareness of how policy influences the normal order of family life.⁵ This social impact is unique in that it creates ‘a paradigm example of modern law,’⁶ drawing on legal and empirical sources with a constant consideration of individual circumstances.

The intricacies of family law are best examined through the prism of its distinctive characteristics: namely why the family demands legal intervention of a different kind. This response will consider its changeability, its protective ideals and the unique role of state intervention in the family, alongside a sustained comparison to other legal disciplines.

2 THE CHANGING NATURE OF THE FAMILY

Family is a highly personal experience that is ‘infinitely variable and in a constant state of flux,’⁷ a changeability the law must accommodate. Diverse formulations of family demand different legal mechanisms to provide appropriate rights and

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¹ Jeffrey M Masson, R Bailey-Harris and RJ Probert, *Cretney: Principles of Family Law* (8th edn, Sweet & Maxwell 2008) 6.

² Rebecca Probert (ed), *Family Life and the Law: Under One Roof* (Ashgate 2007) 2.

³ John Eekelaar, *Family Law and Personal Life* (OUP 2007) 137.

⁴ Pat Thane, ‘Happy Families? History and Family Policy’ (*British Academy*, 1 November 2011 <<http://www.britac.ac.uk/policy/Happy-families.cfm>> accessed 5 February 2015).

⁵ Mark Henaghan, ‘The Normal Order of Family Law’ (2008) 28 OJLS 165, 166.

⁶ John Dewar, ‘The Normal Chaos of Family Law’ (1998) 61 MLR 467, 470.

⁷ Diana Gittins, *The family in question: changing households and familiar ideologies* (2nd edn, Macmillan 1985) 4.

regulation. The clearest way to demonstrate the changing nature of the family is through an appreciation of population trends in England and Wales:

Between 1996 and 2006 the number of married couple families fell by over 4 per cent (0.5 million). The number of cohabiting couple families increased by over 60 per cent to 2.3 million, while the number of lone mother families increased by over 11 per cent, also to 2.3 million.⁸

This reveals a ‘demographic transition’ in marital and cohabitation practices.⁹ Fewer people are marrying, and ‘the proportions of men and women in recent years married by age 25 are the lowest on record over the last 100 years.’¹⁰ However, the number of those in some form of partnership ‘is comparable to the proportions ever married by that age obtaining between the 1920s and the early 1940s in England and Wales.’¹¹ People are still cohabiting, but a relaxation of traditional living arrangements, particularly across this single decade, epitomises the distinctiveness of family law in its need to meet changing demands.

Historically, scholars have disputed the existence of such divergent family forms. Michael Anderson wrote of the ‘predictability’¹² of family life in post war Britain; generalising societal trends based on the experience ‘of one class, usually the middle class.’¹³ This assumption of homogeneity,¹⁴ however, is unfounded upon consideration of a cross-section of modern society where there has been a shift towards more ‘fluid family practices,’¹⁵ fragmenting the traditional family unit. This has been accompanied by a rise in divorce, and ‘between 1970 and 1996 the number of divorces doubled,’¹⁶ whilst in ‘2001 there were 141,135.’¹⁷ The dramatic change in the nature of the family demands legislative flexibility, and in response, ‘family law has changed from a discipline concerned with rights and responsibilities within the

⁸ Office for National Statistics, *Focus on Families* (Palgrave Macmillan 2007) 3.

⁹ Eekelaar (n 3) 22–3.

¹⁰ Chris W Smith, ‘Population Trends 145: Cohabitation and marriage in Britain since the 1970s’ (*Office for National Statistics*, Autumn 2011) 7–8 <<http://www.ons.gov.uk/ons/rel/population-trends-rd/population-trends/no--145--autumn-2011/jrd-population-trends-145.pdf>> accessed 5 February 2015.

¹¹ *ibid* 7–8.

¹² M Anderson, ‘What is new about the modern family?’ in M Drake (ed), *Time, Family and Community: Perspectives on Family and Community History* (Blackwell 1994) 81.

¹³ Tamara Hareven, ‘Recent Research on the History of the Family’ in M Drake (ed) *Time, Family and Community: Perspectives on Family and Community History* (Blackwell 1994) 38.

¹⁴ Eekelaar (n 3) 3.

¹⁵ Richard Collier and Sally Sheldon, *Fragmenting Fatherhood: A Socio-Legal Study* (Hart 2008) 5.

¹⁶ Christina Gibson, ‘Changing Family Patterns in England and Wales over the Last Fifty Years’ in Sanford Katz, John Eekelaar and Mavis McLean (eds), *Cross Currents: Family Law and Policy in the United States and England* (OUP 2000) 43.

¹⁷ Ben Wilson and Steve Smallwood, ‘Population Trends 131: The Proportion of Marriages Ending in Divorce’ (*Office for National Statistics*, Spring 2008) 28 <<http://www.ons.gov.uk/ons/rel/population-trends-rd/population-trends/no--131--spring-2008/the-proportion-of-marriages-ending-in-divorce.pdf>> accessed 5 February 2015.

intact family to one that largely focuses on the aftermath of relationship breakdown.¹⁸

A key example of this is the increase of lone parent households and the necessity for legal provision in the event of separation, e.g. contact and residence arrangements, where ‘family law is trying to hold the fragments together.’¹⁹ Ultimately, ‘the reality of relationships has to be confronted and accommodated, rather than compared with some pre-ordained ideal’²⁰ and a realistic approach alongside a consideration of the needs of the populace is necessary for a responsive family law.

The distinctiveness of family law is evident upon direct comparison to other legal disciplines. In the law of succession, for example, although the Civil Partnership Act 2004 extended traditional rights of a surviving spouse on intestacy to a civil partner,²¹ the continued application of archaic statutes in modern legal practice shows a marked difference to family law. The Wills Act 1837 is still in use whereas the Matrimonial Causes Act 1857 has since been revised in order to ensure the law remains responsive to the needs of the modern family.

This ‘on-going rewriting project’²² contradicts attempts to uniformly categorise the family unit and the laws that affect it. The functionalist approach to family law is ‘marriage focused’²³ and based on a presumption of uniformity amongst families; ‘a mechanism of enforcing social norms’²⁴ that are no longer the ‘norm’ in modern society. The increasing divorce rate and the fluidity of personal relationships has meant ‘the law of relationships became less partnership-centric as marriage became a relationship which was entered and left at will as opposed to a life form,’²⁵ leaving marriage-focused formalism redundant in modern family law.

John Eekelaar identifies family law as adjustive, protective and supportive²⁶ for families: a succinct summary of its basic function. Nonetheless, the law in reality is not so limited and Eekelaar’s three functions oversimplify the diversity of family life. The ‘reductionist’²⁷ approach of functionalism does not fit with the more realistic chaos of family law suggested by Dewar,²⁸ which ‘engages with areas of social life

¹⁸ Masson (n 1) 2.

¹⁹ Carol Smart and Bren Neale, *Family Fragments?* (Cambridge Polity 1999) 181.

²⁰ Henaghan (n 5) 173.

²¹ Civil Partnership Act 2004, s 71.

²² Martha Fineman, ‘Progress and Progression in Family Law’ (2004) *U Chi Legal F* 1, 1.

²³ John Dewar and Stephen Parker, ‘English Family Law since World War II: From Status to Chaos’ in Sanford Katz, John Eekelaar and Mavis McLean (eds), *Cross Currents: Family Law and Policy in the United States and England* (OUP 2000) 131.

²⁴ Collier and Sheldon (n 15) 24.

²⁵ Lisa Glennon, ‘Obligations between adult partners: moving from form to function?’ [2008] *International Journal of Law, Policy and the Family* 22, 24.

²⁶ John Eekelaar, *Family Law and Social Policy* (2nd edn, Weidenfeld and Nicolson 1984).

²⁷ Collier and Sheldon (n 15) 24.

²⁸ Dewar (n 6) 4.

and feeling – namely love, passion, intimacy, commitment and betrayal – that are themselves riven with contradiction or paradox.’²⁹

Yet this approach is not universally accepted, and Heneghan believes ‘the chaos theory’ distracts thinking from the development of a coherent theory of family law.³⁰ Conversely, it can be argued that family law can never be entirely coherent due to the varying situations of those subject to its provisions. To be chaotic is not a criticism, and Rob George concludes ‘this factual chaos is not a reflection of underlying theoretical chaos within the law itself. The law itself has a clear purpose, namely the regulation of power between individuals in their personal lives.’³¹ Indeed, family law is necessarily chaotic, mirroring the ever-changing nature of family life.

Variation between families leaves the creation of a uniform law impossible; however law reform has reflected this. Where ‘functionalist family law speaks directly to the technicians ... modern family law ... seeks to speak directly to the parties themselves.’³² This changing legal approach to the family responds to the needs of modern society and epitomises the changeability that distinguishes family law.

3 PROTECTION OF THE FAMILY

Arguably, all legal disciplines aim to protect professional or personal life by providing a universally enforceable code of practice, a ‘union of social rules.’³³ In this, the distinctiveness of family law could be disputed on grounds of the shared protective ideals of the law in general. Yet the emotive tone of family law maintains its uniqueness, clearly written with the family and individual interests in mind, for example, the parent-centred definition of parental responsibility under the Children Act 1989.³⁴

Family law is more approachable than other legal disciplines and exhibits a certain benevolence, which is absent from traditional doctrine.³⁵ Heneghan identifies an underlying theme of ‘welfarism’ in the law, motivated by ‘a legal duty to advance the interests of the vulnerable.’³⁶ Indeed, intervention in the family is justified by the existence of ‘power dynamics which call for state regulation to prevent the strong from exerting undue control over the weak,’³⁷ demonstrating the law’s protective function. The power imbalance is often attributed to gender roles within the family

²⁹ *ibid* 468.

³⁰ Heneghan (n 5) 165.

³¹ Rob George, *Ideas and Debates in Family Law* (Hart 2012) 19.

³² Dewar and Parker (n 23) 138.

³³ HLA Hart, *The Concept of Law* (3rd edn, OUP 2012).

³⁴ Children Act 1989, s 2.

³⁵ Carol Smart, ‘Regulating families or legitimating patriarchy? Family law in Britain’ in John Eekelaar and Mavis Maclean (eds) *A Reader on Family Law* (OUP 1994) 170.

³⁶ Heneghan (n 5) 168.

³⁷ George (n 31) 145.

and the subordination of the vulnerable parties to the dominant, which is a poignant issue for feminist commentators.

Historically, gender inequality existed in family law, particularly under the 1857 Matrimonial Causes Act with the divergent grounds for divorce for men and women. A 'husband merely had to prove simple adultery whereas a wife had to prove adultery compounded by some other marital offence such as cruelty or desertion.'³⁸ This is no longer the case, and the law has moved towards a state of gender equality in family law, for example the Guardianship Act 1973 established the equality of parental rights.³⁹

This indicates a correlation between family law and social reform. The changing nature of the family and gender roles has meant the 'oppressive impact of the law has been deflected.'⁴⁰ There has been a move away from the patriarchal authority,⁴¹ which previously left feminist commentators dissatisfied with the provision for women in favour of a more equal approach and more recently a shift towards individualism.⁴² Martha Fineman concludes that 'the legal relationship between husband and wife has been completely rewritten in gender neutral, equality aspiring terms,'⁴³ summarising the progression evident in the law today. Yet social tradition remains a barrier against complete equality and 'a lot would have to change in the day-to-day behaviour of real-life marital families in order to make the implementation of true equality possible.'⁴⁴ Arguably, this comes down to personal choice and familial arrangements. For example, the situation of a single mother is very different to a marriage where the husband is the primary caregiver. It is this subjectivity of circumstances that differentiates family law from other disciplines and demands a flexible approach that appreciates individual needs and protects familial interests regardless of personal differences.

4 FAMILY CAME BEFORE FAMILY LAW

Family law was formulated and applied retrospectively to pre-existing family units and their problems, raising questions as to how far legal regulation should go. Unlike other legal disciplines, it 'must cope with subjects who do not act as the rational reasonable men paradigmatic of other areas of law [and] regulation occurs at normative and informal levels as well as at the level of formal law.'⁴⁵ Yet the legal intervention must be balanced against the families themselves and again, this area is

³⁸ G Savage, 'The Operation of the 1857 Divorce Act, 1860–1910 a Research Note' (1983) 14 *Journal of Social History* 4, 103.

³⁹ Guardianship Act 1973, s 1.

⁴⁰ Smart (n 35) 169.

⁴¹ *ibid* 160.

⁴² Alison Diduck, 'What is family law for?' (2011) 68 *CLP* 287.

⁴³ Fineman (n 22) 7.

⁴⁴ *ibid* 9.

⁴⁵ Alison Diduck and Felicity Kaganas, *Family law, Gender and the State: Text, Cases and Materials* (3rd edn, Hart 2012) 21.

distinctive as the law is not a priority when decisions are made within the family; it is merely a backdrop or ‘shadow’⁴⁶ that comes to the fore when intervention is necessary.

This balance introduces the issue of the public/private divide, to which family law requires a distinctive approach. Many areas of legal practice inherently demand public enforcement. Criminal law, for example, pivots on the public regulation of the private life when the law is breached. Family law, by contrast, requires a more delicate approach, as the law is more regulatory than disciplinary. Its historic relevance was to the distribution of marital roles; the ‘men’s primary location in the public, rather than the domestic or private sphere.’⁴⁷ Yet the question now relates more to the issue of state intervention in light of the European Convention on Human Rights⁴⁸ and a ‘reconfiguration of gender roles.’⁴⁹

The introduction of legal regulation into the ‘privileged sphere’⁵⁰ of the family unit changed the nature of the familial relations. This has been deemed by some to be too interventionist: an invasion into the ‘sanctuary of privacy into which one can retreat to avoid state regulation,’ an area which should be subject to a more ‘*laissez-faire*’ approach.⁵¹ Yet this is not practical, and Olsen finds ‘the private family is an incoherent ideal and ... the rhetoric of non-intervention is more harmful than helpful.’⁵² Indeed, family law must bridge the public/private divide whilst adhering to overarching human rights protections and ensuring the safety of the family unit. Some degree of intervention is necessary as ‘all people are citizens with rights, and no association which they can form with one another can violate these rights.’⁵³ Such familial associations must be regulated to avoid condoning the exploitation of more vulnerable parties.

5 CONCLUSION

The meaning of family law is entirely subjective, drawn from personal experience. Individual families demand different means of legal support, and the family unit cannot be immune to legal intervention in the interests of personal safety and familial integrity. However, the law should not function to enforce desirable social norms, rather it should protect and respond to natural social progression, meeting the needs of the modern family unit, whatever form it may take. In the fulfilment of this

⁴⁶ Dewar (n 6) 473.

⁴⁷ Collier and Sheldon (n 15) 25.

⁴⁸ Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights, as amended) (ECHR) art 8.

⁴⁹ Collier and Sheldon (n 15) 206.

⁵⁰ Eekelaar (n 3) 137.

⁵¹ Frances Olsen, ‘The Family and the Market: A Study of Ideology and Legal Reform’ (1982–3) 96 Harv L Rev 1497, 1504.

⁵² Frances Olsen, ‘The Myth of State Intervention in the Family’ (1984–5) 18 U Mich JL Reform 835, 835.

⁵³ George (n 37) 17.

requirement, family law remains a distinctive discipline with its benevolent undertone and its reflection of shifting social attitudes and family practices. The family existed before the law attempted to regulate it and the family unit must remain central to further legal reform.

KEEPING SECRETS: A CRITICAL ANALYSIS OF THE JUSTIFICATIONS FOR THE DOCTRINE OF SECRET TRUSTS

*Ho Siu**

1 INTRODUCTION

Secret trusts give effect to a testator's express intentions that are not contained in the will.¹ They are a device by which the testator's intention to create a testamentary gift by way of a trust may be enforced despite non-compliance with the formalities of due execution of a will under the Wills Act 1837 (hereafter Wills Act).² Typically, secret trusts arise where a testator dies leaving a legacy to a legatee under a will on the understanding that the legatee will hold the property on trust for the benefit of beneficiaries who are not named in the will. Here, the legatee is a 'secret trustee' and the beneficiaries, 'secret beneficiaries'.

Prima facie, secret trusts operate in the face of parliamentary legislation³ giving them the 'go-by'.⁴ The underlying policy of the Wills Act formalities is the reduction of fraud, uncertainty and doubt.⁵ Compliance with the provisions signifies that there is reliable evidence of testamentary intention in the will and in its terms.⁶ Furthermore, the requirements of independent witnesses⁷ and attestation⁸ aim to minimise dangers of fraud and undue influence on the testator's decisions.⁹ The enforcement of a secret trust therefore, 'represents a departure from [the] sound policy' of the Wills Act.¹⁰ 'Where equity effectuates secrecy, it sometimes appears to create conceptual anomalies', thus, there must be a convincing explanation as to why testators are allowed to escape statutory formalities when creating secret trusts.¹¹ The

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¹ John McGhee, *Snells Equity* (32nd edn, Sweet & Maxwell 2010) para 24–023.

² s 9.

³ Statute of Frauds 1677; Wills Act 1837; Law of Property Act 1925.

⁴ *Re Pitt-Rivers* [1902] 1 Ch 403 (CA) 407.

⁵ Murali Kandasamy, 'Secret Trust: The Underlying Theories Explained' (2012) 1 Brickfields Law Review 16, 16.

⁶ John H Langbein, 'Substantial Compliance with the Wills Act' (1975) 88 Harv L Rev 489, 492.

⁷ Wills Act 1837, s 9(c).

⁸ *ibid* s 9(d)(i).

⁹ Charles I Nelson and Jeanne M Starck, 'Formalities & Formalism: A Critical Look at the Execution and of Wills' (1979) 6 Pepp L Rev 331, 348.

¹⁰ Kandasamy (n 5) 16.

¹¹ Susan Scott-Hunt and Hilary Lim, *Feminist Perspectives on Equity and Trusts* (Routledge Cavendish 2001) 65.

identification of the justification for the enforcement of secret trusts would allow an assessment of whether the courts are justified in giving effect to such ‘anomalies’.

This article explores the basis to the enforcement of secret trusts and assesses their adequacy in justifying the contravention of parliamentary legislation. The two main rationalisations, the fraud theory and the *Dehors* theory will be assessed in sections 2 and 3. The penultimate section addresses alternative theories to the enforcement of secret trusts, and the final section concludes which justification is the most adequate basis to secret trusts. However, it is first necessary to briefly explain how secret trusts operate.

1.1 *Fully and half secret trusts*

There are two types of secret trusts. Fully secret trusts arise when the legatee appears to take the property absolutely under the will, but in reality holds the property subject to the terms of the secret trust. Such trusts can also arise on intestacy. Here, the testator’s intestate successor informally agrees to hold the property that they will receive on trust for the secret beneficiary. Half secret trusts arise when the trust is evidenced on the face of the will but its terms are undisclosed.

In order to be valid both forms of secret trusts require three elements, intention of the testator to create a trust, communication of this intention to the legatee and acceptance or acquiescence by the legatee to carry out the undertaking.¹²

1.2 *The acceptance of half secret trusts*

Historically, fully secret trusts were recognised by the courts on the basis of fraud. Arguably the earliest example of secret trusts is *Thynn v Thynn* in 1684.¹³ The court’s decision to hold the son to his promise to hold his father’s property as his mother’s trustee was based on personal fraud. In *Devenish v Baines* the courts, again, enforced the informal trust agreement on the basis of fraud.¹⁴

Due to the difficulty in reconciling fraud, particularly personal fraud, with half secret trusts, the courts did not accept them until 1929 in *Blackwell v Blackwell*.¹⁵ Since the trust is evidenced in the will, it is unlikely that the trustee could fraudulently claim the property. The exception is where the trustee is the beneficiary of the residuary estate.¹⁶ Here, the trustee could claim the property through a resulting trust by relying on statutory provisions to invalidate the trust. However, such cases are rare. Therefore, Viscount Sumner questioned, why ‘over a mere matter or words, [the courts of equity should] give effect to them in one case and frustrate them in the

¹² *Ottaway v Norman* [1972] Ch 698 (Ch) 702.

¹³ (1684) 1 Vern 296, 23 ER 685.

¹⁴ (1689) Prec Ch 3, 24 ER 2.

¹⁵ [1929] AC 318 (HL).

¹⁶ *ibid* 328 (Lord Buckmaster).

other?’¹⁷ Thus in *Blackwell*¹⁸ the court accepted half secret trusts on the basis that fraud could also be committed on the ‘real beneficiaries’¹⁹ and on the testator’s promise that the trust would be carried out.²⁰ Fraud as a basis for secret trusts will be further assessed in the next section.

2 ASSESSING THE FRAUD THEORY AS A JUSTIFICATION FOR SECRET TRUSTS

Traditionally, the court’s justification for the enforcement of secret trusts was the prevention of fraud. In fully secret trusts, the fraud was the trustee’s reliance on statutory formalities to deny the trust in order to claim the trust property for himself/herself.²¹ This ‘orthodox’ view of fraud focuses on deceit and unjust enrichment by the trustee. However, following the acceptance of half secret trusts in *Blackwell* fraud was extended to include fraud on the testator’s promise and on the interests of the secret beneficiary.²² This section assesses the validity of both the orthodox and the extended view of fraud as explanations to the enforcement of secret trusts, despite non-compliance with statutory formalities.²³ However, in order to appreciate the court’s use of fraud as a justification for secret trusts it is necessary to examine the basis of the theory itself.

2.1 *The doctrine of fraud*

Historically, the doctrine of fraud was the basis to which secret trusts were enforced.²⁴ Underpinning the doctrine is the principle that equity will not permit a statute to be used as an instrument of fraud.²⁵ Trust formalities, particularly requirements of written evidence, aim to combat fraud and mendacity. Indeed, the full title of the Statute of Frauds 1677 (the predecessor to the Wills Act) was ‘An Act for the Prevention of Frauds and Perjuryes [sic]’.²⁶ The formalities aimed to impede ‘hidden oral transactions in fraud of those truly entitled’.²⁷

However, there are instances where the statutory formalities are used fraudulently. It is in these cases that equity sets them aside so as to preclude the occurrence of fraud. In *Rochevoucauld v Boustead*²⁸ it was held that the Statute of Frauds could not be used to prevent proof of fraud.²⁹ The courts held that it would be fraudulent for a person to whom land is conveyed to as a trustee to deny the trust for lack of formality and claim

¹⁷ *ibid* 335.

¹⁸ (n 15).

¹⁹ *ibid* [328] (Lord Buckmaster).

²⁰ *ibid*.

²¹ Wills Act 1837, s 9.

²² (n 15).

²³ Wills Act 1837, s 9.

²⁴ *McCormick v Grogan* (1869) LR 4 HL 82 (HL) 88.

²⁵ *Mestaer v Gillespie* (1805) 11 Ves Jr 621, 628; 34 ER 1230, 1232 (Lord Eldon).

²⁶ Statute of Frauds 1677.

²⁷ *Vandervell v IRC* [1967] 2 AC 291 (HL) 311 (Lord Upjohn).

²⁸ [1897] 1 Ch 196.

²⁹ *ibid* 201.

the land absolutely.³⁰ Claims that the oral trust was invalid due to its non-compliance with section 7³¹ (the predecessor to section 53(1)(b) which requires declarations of trusts in land to be in writing)³² were dismissed. Thus, oral evidence that alluded to the defendant's knowledge that the land was conveyed to him as a trustee was admitted.³³ The trust was upheld on the basis that the Statute of Frauds could not be used to facilitate fraud. It would be perverse to allow the defendant to rely on the plaintiff's non-compliance with formalities to claim absolutely the land, which was given to him as a trustee. Otherwise it would be inconsistent with the court's assertion that 'it will not allow the Statute of Frauds to be made into an instrument of fraud'.³⁴

In *Singh v Anand* it was held that the defendants could not rely on lack of written evidence to claim that they had a beneficial interest in the claimant's shares.³⁵ Rather, they were trustees of the shares, merely 'holders of a bare legal title'.³⁶ A contrary conclusion would have allowed the defendants to use the requirements of section 53(1)(c) as an 'engine of fraud'.³⁷ *Rochefoucauld v Boustead* was applied and Norris J held that the lack of valid assignment to the equitable interests in the shares did not convert the defendants into its beneficial owners.³⁸ The defendants could not rely on the formalities of transfer to deny the trust and keep the shares beneficially.³⁹

Pawlowski argues that the rule in *Rochefoucauld* does not circumvent section 53(1)(b).⁴⁰ Rather, it operates to prevent what would otherwise be fraudulent conduct on the part of the trustee by denying the trust.⁴¹ It merely effectuates the original trust that was created by the parties' intentions. Critchley correctly asserts that the doctrine of fraud is founded upon legal policy.⁴² It is based on the reasoning that the strict enforcement of statutory formalities may sometimes be counterproductive. For example, in circumstances where unscrupulous trustees utilise formality requirements to fraudulently deny the existence of a trust. It is objectionable that the legal system and its constituent rules should be abused in this way.⁴³ Allan argues therefore that

³⁰ *ibid.*

³¹ Statute of Frauds 1677.

³² Law of Property Act 1925.

³³ *Rochefoucauld* (n 28) 207.

³⁴ *Heard v Pilley* (1869) LR 4 Ch App 548 (CA) 553 (Giffard LJ).

³⁵ [2007] EWHC 3346.

³⁶ *ibid* [144].

³⁷ Law of Property Act 1925; *Singh* (n 35) [144].

³⁸ *Singh* (n 35) [144].

³⁹ *ibid.*

⁴⁰ Mark Pawlowski, 'Fraud, Legal Formality and Equity' (2001) 23 Liverpool L Rev 79, 81.

⁴¹ *ibid.*

⁴² Patricia Critchley, 'Instruments of fraud, testamentary dispositions, and the doctrine of secret trusts' (1999) 115 LQR 631, 647.

⁴³ *ibid.*

secret trusts are enforced to avoid perpetuating fraud through the trustee's reliance on statutory provisions.⁴⁴

2.2 *The doctrine of fraud and secret trusts*

The doctrine of fraud was clearly laid down in the case of *McCormick v Grogan* as the justification for secret trusts.⁴⁵ Lord Hatherley provided that the prevention of fraud is the 'sound foundation' to which secret trusts are enforced.⁴⁶ Lord Westbury asserts that the basis to which secret trusts are enforced is to prevent fraudulent reliance on statutory rights.⁴⁷ He further provides that where a legatee sought to do so, 'equity will fasten on the individual ... a personal obligation because he applies the Act as an instrument of fraud'.⁴⁸ 'Personal obligation' meaning that equity will require the individual to act *in personam* over the received property. The legatee becomes a trustee over the property on the basis that the courts will not allow a legatee to set up the lack of formality so as to allow him to cloak his fraud.⁴⁹

2.3 *The orthodox view of fraud*

To determine whether a secret trust should be enforced on the basis of the trustee's fraudulent conduct, it is necessary to know what constitutes fraud in this context. *McCormick* is generally regarded as providing the orthodox view that fraud in secret trusts requires personal gain by the trustee.⁵⁰ Usually the trustee would seek to unjustly enrich himself by denying the trust. Therefore, due to the testator's reliance on the legatees promise that he would hold the property on trust for another, equity enforces the secret trust to prevent the trustee from taking the property absolutely.⁵¹ Here, fraud is of a deceitful nature, it is founded on deliberate and conscious wrongdoing. *Prima facie*, Lord Westbury's judgment supports this reading of fraud, stating that in order to convert the legatee into a trustee it must be shown that the legatee had acted in *malo amino*.⁵² The legatee must have distinctly known that the testator was 'beguiled and deceived by his conduct'.⁵³

This narrow reading of fraud requires a higher standard of proof than the ordinary civil standard.⁵⁴ The courts must be persuaded by the 'clearest and most indisputable evidence'⁵⁵ that there has been 'fraudulent inducement'⁵⁶ on the part of the legatee,

⁴⁴ G W Allan, 'The Secret is Out There: Searching for the Legal Justification for the Doctrine of Secret Trusts through Analysis of the Case Law' (2011) 40 Comm L World Rev 311, 312.

⁴⁵ *McCormick* (n 24).

⁴⁶ *ibid* 88.

⁴⁷ *ibid* 97.

⁴⁸ *ibid*.

⁴⁹ Thomas Glyn Watkin, 'Cloaking a Contravention' [1981] Conv 335, 338.

⁵⁰ *McCormick* (n 24).

⁵¹ J G Fleming, 'Secret Trusts' [1947] Conv 28, 29.

⁵² *McCormick* (n 24) 97.

⁵³ *ibid* 98.

⁵⁴ *Re Snowden* [1979] Ch 528 (Ch) 536.

⁵⁵ *McCormick* (n 24) 97.

⁵⁶ *ibid* 89.

which led the testator to make a legacy in his favour. The testator does so, on reliance of the promise from the legatee that he will hold the property as a trustee. Therefore, 'fraud' in the narrow sense is based on the deceitful nature of the legatee's conduct at the time that he makes the promise to the testator.⁵⁷ It is this promise and the fact that the will was set up on the strength of it, that is significant.⁵⁸

The orthodox view of fraud therefore operates to prevent unjust enrichment and wrongdoing by the legatee. Problematically however, this reading of fraud fails to explain half secret trusts. The evidence of the trust in the will rules out any possibility of fraud from profit on the part of the trustee.⁵⁹ Rather, the trustee would hold the property on a resulting trust for the testator's estate or his statutory next of kin.⁶⁰

Pearce and Stevens argue that upon this orthodox understanding of fraud, it would be better to impose a resulting trust in favour of the trustee's estate instead of enforcing the half secret trust.⁶¹ If the purpose of secret trusts is to prevent such fraud then the imposition that a resulting trust would be sufficient to achieve this since it is unlikely that the trustee could profit by denying the trust.⁶² However, if the courts did this then it would potentially invalidate the use of half secret trusts altogether, yet clearly this is not what the courts are aiming to do when enforcing half secret trusts. Therefore, as understood in its narrow sense, the imposition of half secret trusts goes beyond what is necessary for the prevention of fraud. Thus, the orthodox reading of fraud cannot satisfactorily justify half secret trusts.

However, as discussed earlier the trustee of a half secret trust could fraudulently rely on statutory provisions to claim the property where he is also the residuary beneficiary. Oakley argues that theoretically the trustee should be able to do this, as he would be claiming in a different capacity of which the testator must have been aware.⁶³ Rather than claiming as a trustee, he would be claiming the property as the residual beneficiary.⁶⁴ Thus, fraud would occur where the trustee knows that as the residual beneficiary he would be able to benefit through the non-enforcement of the secret trust. Andrews argues therefore, that half secret trusts could be enforced to prevent this from occurring.⁶⁵ However, Andrews correctly argues these cases would be rare.⁶⁶ Therefore, normally the orthodox interpretation of fraud cannot justify half secret trusts.

⁵⁷ David R Hodge, 'Secret Trusts: The Fraud Theory Revisited' [1980] Conv 341, 343.

⁵⁸ J A Andrews, 'Creating Secret Trusts' [1963] Conv 92, 96.

⁵⁹ *ibid* 98.

⁶⁰ *Re Pugh's Wills Trust* [1976] 1 WLR 1262 (Ch).

⁶¹ R Pearce and J Stevens, *The Law of Trusts and Equitable Obligations* (5th edn, OUP 2010) 259.

⁶² Sukhninder Panesar, *Exploring Equity and Trusts* (2nd edn, Pearson 2012) 204.

⁶³ A J Oakley, *Constructive Trusts* (3rd edn, Sweet & Maxwell 1997) 246.

⁶⁴ *ibid*.

⁶⁵ Andrews (n 58) 102.

⁶⁶ *ibid*.

2.4 *The extended fraud theory*

Allan argues, that that the orthodox interpretation of Lord Westbury's judgment is incorrect.⁶⁷ Rather, when the judgment is read in full, a different interpretation of fraud emerges.⁶⁸ According to Allan, what Lord Westbury meant was that once the secret trustee has led the testator to believe that he will perform the trust by agreeing to the testator's requests, equity will insist that he fulfils his agreement.⁶⁹ Otherwise, it would be fraud on the testator's promise as he would have been 'beguiled and deceived' by a legatee who has failed to undertake what he had promised.⁷⁰ According to this interpretation therefore, where the trustee does not perform a properly communicated and accepted secret trust, he/she is committing a personal fraud on the testator and are acting *malus animus*.⁷¹ The emphasis here is to prevent the secret trustee from renegeing on his promise.⁷²

This wider understanding of fraud extends beyond unjust enrichment. Rather it focuses on ensuring that the deceased's wishes are not defeated and that the beneficiaries' intended interests are not defrauded.⁷³ Support for this view can be found in the case of *Norris v Frazer*.⁷⁴ Here, there was no evidence to suggest that the secret trustee sought fraudulent enrichment. The wife, the secret trustee, was not in a position to gain personally by denying the trust, as the annuity that the testator had arranged to be paid to the secret beneficiary was paid out of the husband's bank account.⁷⁵ Nor was there evidence of fraudulent conduct by the husband. In fact it was held by Bacon VC that his conduct had been 'frank and honourable and fair in every respect'.⁷⁶ Nevertheless, despite the lack of fraudulent enrichment, the trust was enforced. It was held that 'a more direct ... personal fraud could not be committed than for [the wife] to refuse to perform that promise which she made to the testator'.⁷⁷

Thus, the essential element to this wider concept of fraud is the need to preserve the agreement between the legatee and the testator who set up his will to reflect this promise.⁷⁸ This understanding of fraud focuses on the harm caused to the testator through the breach of a promise by the secret trustee. Furthermore, there is also an

⁶⁷ Allan (n 44) 319.

⁶⁸ *ibid* 318.

⁶⁹ *ibid*.

⁷⁰ *McCormick* (n 24) 97.

⁷¹ *ibid*.

⁷² Allan (n 44) 319.

⁷³ *Oakley* (n 63) 247.

⁷⁴ (1873) LR 15 Eq 318 (Ch).

⁷⁵ *ibid* 318.

⁷⁶ *ibid* 330.

⁷⁷ *ibid* 331.

⁷⁸ David Wilde, 'Secret and semi-secret trusts: justifying the distinctions between the two' [1995] Conv 366, 369.

emphasis on the harm caused to the beneficiaries. They are defrauded through the destruction of a beneficial interest that the testator had intended for them to receive.⁷⁹

This extensive notion of fraud is not a new development. It can be seen as early as the eighteenth century in *Reech v Kennegal*.⁸⁰ Here, Lord Hardwicke states that there is ‘fraud also upon the testator’⁸¹ where the legatee who represents that there was no need to alter the will and that the intended beneficiaries will be enriched fails to live up to this promise.⁸² In this case the secret trustee did stand to gain from denying the trust. However, this was not emphasised by Lord Hardwicke. Obviously this cannot be viewed to be a complete dismissal of personal gain by his Lordship. However, as correctly highlighted by Allan, it is significant that he instead stressed that any failure to perform the secret trust would amount to fraud.⁸³ The view that fraud also encompasses fraud upon the testator was expressed more clearly in *Re Fleetwood*⁸⁴ by Hall VC who approved and cited the Irish case of *Riordan v Banon*.⁸⁵ His Lordship provided that where the testator makes a disposition to the secret trustee on the faith of him carrying out a promise then it would be fraudulent for the trustee to refuse to perform the agreement.⁸⁶

Fraud can also be committed on the interests of the secret beneficiaries. Lord Buckmaster in *Blackwell* provided that the trustee is ‘not at liberty to suppress the evidence of the trust and thus destroy the whole object its creation, in fraud of the beneficiaries’.⁸⁷ It seems therefore that Lord Buckmaster grounds the notion of fraud upon the destruction of the beneficial interests rather than on deceit by the secret trustee or fraudulent enrichment. This view of fraud was also endorsed in by Lord Justice Scott.⁸⁸ Here, his Lordship stated that it is a mistake to suppose that impositions of secret trusts are ‘confined to cases in which the conveyance itself was fraudulently obtained’.⁸⁹

Understood in its wider form, fraud justifies the enforcement of half secret trusts. In light of this wider view of fraud, the imposition of resulting trusts as a solution to the lack of fraudulent enrichment in half secret trusts would be inappropriate.⁹⁰ This is because it would result in fraud upon the beneficiary, as the property would be directed to someone other than him or her. Their interests under the trust would be

⁷⁹ Hodge (n 57) 343.

⁸⁰ (1748) 1 Ves Sen 123, 28 ER 461.

⁸¹ *ibid* 124.

⁸² *ibid*.

⁸³ Allan (n 44) 315.

⁸⁴ (1880) 15 Ch D 594 (Ch).

⁸⁵ (1876) 10 Ir Eq Rep 649.

⁸⁶ *Re Fleetwood* (n 84) 606, 607 (Hall VC).

⁸⁷ (n 15) 329.

⁸⁸ [1948] 2 All ER 133 (CA).

⁸⁹ *ibid* 136.

⁹⁰ Pearce and Stevens (n 61) 259.

defeated through the redirection of the property.⁹¹ Furthermore, the wishes of the testator would also be defeated as he loses the ability to dispose of his property as he had originally intended.⁹²

2.5 *The problem of the 'honest trustee'*

The wider view of fraud also adequately deals with the problem of the 'honest trustee'. If the orthodox interpretation of fraud is applied, then a trustee of a fully secret trust who from the beginning proclaims the existence of the trust cannot unjustly enrich himself by virtue of his admission and the trust would not be enforced.⁹³ On the orthodox view of fraud secret trusts are enforced in order to prevent the trustee from fraudulently gaining the beneficial interest through relying on statutory provisions to defeat the trust. However, Critchley correctly notes that this is not possible where the trustee acknowledges the trust.⁹⁴ Here, the secret trust fails, as there is no fraud. The secret trust would not be enforced and the trustee would hold the property on trust for the residual legatee.⁹⁵ In contrast, had the trustee denied the trust, the fraud theory would have operated to enforce the promise and the secret beneficiary would have received his/her interests.⁹⁶ Undesirably, this may encourage some trustees (such as those connected to the secret beneficiary) to falsely deny the trust in order for the fraud theory to operate to enforce the agreement. An example of this can be found in *Muckleston v Brown*.⁹⁷ Here, the trustee sought to rely on the lack of compliance to statutory formalities in order to prevent the trust from failing under the Statute of Mortmain 1736. It can be observed that there was no selfish motive here on the part of the trustee.⁹⁸

However, if the extended reading of fraud is applied, then the honest trustee is no longer a difficulty. The trustee would hold the property on trust for the secret beneficiary in all cases. This is because it would always be fraud to deny the beneficiaries their interests under the trust, regardless of any absence of unjust enrichment through fraudulent conduct.⁹⁹ Thus the wider understanding of fraud removes the difficulty of the honest trustee who, on the application of the orthodox view, through his honesty defeats the secret trust through lack of fraudulent conduct and unjust enrichment.

⁹¹ Critchley (n 42) 649.

⁹² *ibid.*

⁹³ *ibid* 651.

⁹⁴ *ibid.*

⁹⁵ Hodge (n 79) 348.

⁹⁶ *ibid.*

⁹⁷ (1801) 6 Ves Jr 52, 31 ER 934.

⁹⁸ Critchley (n 42) 651.

⁹⁹ Hodge (n 79) 343.

2.6 *Difficulties with the extended fraud theory*

A difficulty with the extended fraud theory is that it seemingly amounts to ‘a bald assertion’¹⁰⁰ that the testator’s wishes should always be respected even when they are implemented in a manner contrary to statutory provisions. Yet, there are other instances in which the testator’s intentions cannot be put into place and the purported beneficiaries are routinely deprived of their interests, for example, in the constitution of trusts. In *Milroy v Lord* it was held that a trust would fail where the settlor fails to properly execute the transfer of the property to the trustee.¹⁰¹ Here, the courts are unwilling to enforce an improperly constituted gift because; ‘every imperfect instrument would be made effectual by being converted into a perfect trust’.¹⁰² Underlying this is the maxim that equity will not assist a volunteer nor will equity perfect an imperfect gift. Yet, here the settlor’s intentions have also been defeated due to his failure to properly constitute the trust. However despite the deprivation of his interests no argument of fraud against the testator is made. It is difficult to understand why, traditionally, the courts have taken a strict approach in the constitution of trusts whilst being willing to enforce secret trusts that directly contravene statutory provisions. Additionally, where the will itself fails due to undue execution, the intentions of the testator are similarly not effectuated. However, fraud against the testator is not argued in these circumstances to uphold the will.

Critchley correctly argues that fraud on the beneficiaries is an insufficient justification to secret trusts. This is because any formality requirement which results in rendering a disposition void due to non-compliance would effectively deprive the beneficiary of his/her interests.¹⁰³ If such a detriment to the beneficiary were sufficient to outweigh the benefits of the formalities of section 9, then the provision would hardly ever operate.¹⁰⁴ This is because the failure of the informal testamentary disposition would almost always deny the beneficiary of his/her promised interest. Thus, whilst the extended fraud theory is superficially an attractive justification to secret trusts, the focus on the harm to the beneficiary and testator are insufficient grounds on which to base the fraud.¹⁰⁵ This is because such harm would also arise every time a disposition fails for informality. Therefore, in light of the issues just discussed, the extended interpretation of fraud lacks the robustness needed to adequately support the existence of secret trusts.

It is submitted that whilst fully secret trusts can be justified on the traditional doctrine of fraudulent enrichment and deceit, half secret trusts cannot.¹⁰⁶ This is because such

¹⁰⁰ Emma Challinor, ‘Debunking the myth of secret trusts’ [2005] Conv 492, 497.

¹⁰¹ (1862) 4 De G F & J 264, 45 ER 1185.

¹⁰² *ibid* 274, 275 (Turner LJ).

¹⁰³ Critchley (n 42).

¹⁰⁴ *ibid*.

¹⁰⁵ *ibid* 648.

¹⁰⁶ Jill E Martin, *Hanbury & Martin: Modern Equity* (15th edn, Sweet & Maxwell 1997) 153.

fraud is justifiably more likely to occur where the trust is not mentioned in the will.¹⁰⁷ On the other hand, half secret trusts lack the likelihood of fraudulent enrichment occurring since the trustee is named on the will. Thus the extended fraud theory does not adequately explain fully secret and half secret trusts. Therefore, the justificatory basis for half secret trusts must be something other than fraud.

3 ASSESSING THE *DEHORS* THEORY AS A JUSTIFICATION FOR SECRET TRUSTS

As noted earlier, the traditional justification for the enforcement of secret trusts despite their contravention of statutory formalities was the prevention of fraud.¹⁰⁸ Secret trust enforcement prevented secret trustees from keeping the property by relying on statutory formalities to deny the trust.¹⁰⁹ However, the orthodox view of fraud cannot explain half secret trusts and the extended view is an insufficient basis to half secret trusts. Thus it is necessary to examine other theories. This section will assess the theory that secret trusts are enforced outside of the will as *inter vivos* trusts.

3.1 *Secret trusts are inter vivos trusts that operate 'Dehors' the will*

The modern view is that secret trusts are enforced because they operate independently to the will. They are *inter vivos* express trusts and consequently operate 'outside the will-*Dehors* the will'.¹¹⁰ Since section 9¹¹¹ applies to 'any ... testamentary disposition'¹¹² and this theory argues that secret trusts are not testamentary,¹¹³ they are therefore not subject to section 9.¹¹⁴ Subsequently, secret trusts do not give section 9¹¹⁵ 'the go-by'.¹¹⁶ Support for this can be inferred from Viscount Sumner's judgment in *Blackwell*.¹¹⁷ His Lordship stated that he could not 'see how the statute-law relating to the form of a valid will is concerned at all'.¹¹⁸ Academics who favour this theory argue that secret trusts are *inter vivos* trusts.¹¹⁹ It is the arrangement during the testator's lifetime between the testator and the legatee outside of the will that 'declares' the trust.¹²⁰ At this stage the trust is incompletely constituted.¹²¹ It becomes fully constituted when the testator dies and the property is transferred to the legatee

¹⁰⁷ *ibid.*

¹⁰⁸ Wills Act 1837, s 9.

¹⁰⁹ *ibid.*

¹¹⁰ Bryn Perrins, 'Secret Trusts: the Key to the Dehors?' [1985] Conv 248, 248.

¹¹¹ Wills Act 1837.

¹¹² *ibid* s 1.

¹¹³ Kandasamy (n 5) 16.

¹¹⁴ Wills Act 1837.

¹¹⁵ *ibid.*

¹¹⁶ *Re Pitt Rivers* (n 4) 407.

¹¹⁷ [1929] AC 235 (HL).

¹¹⁸ *ibid* 334.

¹¹⁹ Perrins (n 110) 256.

¹²⁰ Sarah Wilson, *Todd & Wilson's Textbook on Trusts* (11th edn, OUP 2013) 238.

¹²¹ Perrins (n 110) 250.

under the will.¹²² Thus, the will is merely a mechanism, which enables the transfer of property to the trustee.¹²³

The *inter vivos* argument is advantageous because unlike the fraud theory (as understood in its orthodox form) it can be applied to both fully secret and half secret trusts. Additionally, unlike the extended view of fraud, there is no need to artificially stretch the term's traditional meaning of 'deceit' and 'unjust enrichment' in order to validate half secret trusts.

3.2 *Difficulties with the inter vivos argument*

The crux of this argument is that secret trusts are *inter vivos* dispositions and are therefore not subject to section 9.¹²⁴ However, it is on this crucial point that the argument fails. The theory's primary difficulty is that it asserts that during the testator's lifetime, an incompletely constituted trust arises. However, this contradicts the general rule that in order for an effective *inter vivos* trust to arise, the trust property's legal title must be transferred to the trustee.¹²⁵ *Milroy* provides that in order to render a trust 'valid and effectual' the settlor must have done everything that ought to be done within the nature of the property to execute the transfer.¹²⁶ Yet clearly this is not the case when the trust is 'declared' in a secret trust, as the legal title is not vested in the trustee until the testator's death. Thus, by itself, the earlier agreement between the two parties cannot generate an effective *inter vivos* trust.¹²⁷ Additionally, the *inter vivos* trust described here contradicts the rule regarding express trusts in *Paul v Paul* that provides that once validly created, a settlor cannot cancel a trust nor recover the trust property.¹²⁸ However, the testator of a secret trust is able to dismantle the trust at any time before his death.¹²⁹

A possible exception to the situation above is if the property was vested in the trustee in consideration for the trustee's promise to hold it on trust. Here, the earlier agreement creates a contractual obligation rather than a trust. Thus, if the property was transferred to another, under the Contracts (Rights of Third Parties) Act 1999¹³⁰ the secret beneficiaries could enforce the contract to claim for damages¹³¹ against the trustee.¹³² Difficulties arise however if the beneficiary had also given consideration to the testator for his promise to transfer the property to the trustee by will. If after this the testator then amended his will so as to divert the property to another legatee there

¹²² *ibid.*

¹²³ *Wilson* (n 120) 238.

¹²⁴ Wills Act 1837.

¹²⁵ Alastair Hudson, *Equity and Trusts* (6th edn, Taylor and Francis 2009) 214.

¹²⁶ *Milroy* (n 101).

¹²⁷ Hudson (n 125) 322.

¹²⁸ (1882) 20 Ch D 742 (CA).

¹²⁹ Alastair Hudson and Geraint Thomas, *The Law of Trusts* (2nd edn, OUP 2010) 817.

¹³⁰ Contracts (Rights of Third Parties) Act 1999, s 1.

¹³¹ *ibid* s 1(5).

¹³² Simon Gardner, *An Introduction to the Law of Trusts* (3rd edn, OUP 2011) 95.

would be conflict as to whom the property should benefit. In this situation both of the beneficiaries would have legal rights to the property,¹³³ the secret beneficiary through his/her contractual rights and the latter beneficiary through the gift in the will. This would be problematic, as it would lead to the testator's executor being uncertain as to how to distribute the property.

Hudson argues that an alternative view to the *inter vivos* argument is that the testator had sought to declare a trust but had failed to constitute it until death.¹³⁴ Thus a gift of property that is perfected by a trust arises.¹³⁵ However, this contravenes the rule in *Milroy*¹³⁶ that a trust cannot perfect a transfer that was intended to take effect by other means.¹³⁷ It could be argued that due to the destabilisation of this rule in *Pennington v Waine*, constitution would occur where it is deemed 'unconscionable' for equity to deny the gift.¹³⁸ However, 'unconscionability' is difficult to define and lacks legal certainty. What constitutes 'unconscionable' circumstances is unclear and does not allow for predictability as to when trusts may be constituted. Furthermore a departure from the strict rule above undermines the policy objectives underlying it. The objective of the rule is to 'safe guard the position of the donor' and to protect the donor's ability to change his mind before the constituting the trust.¹³⁹ If an imperfect gift was perfected and the donor had changed his mind, it would be unfair to subsequently impose the onerous duties of trusteeship on either the donor or the elected trustee. Thus, in order to protect the donor's ability to change his mind and in the 'interests of legal certainty' there must be clear rules as to when a trust is constituted and effective.¹⁴⁰ Therefore, secret trusts cannot exist as *inter vivos* incompletely constituted trusts.

3.3 *Secret trusts as testamentary dispositions*

As concluded, secret trusts cannot be *inter vivos* trusts. Instead, it is submitted that they can be testamentary dispositions. During the testator's lifetime, testamentary dispositions are ambulatory and revocable. The former means that they have a non-binding effect until the testator's death.¹⁴¹ Thus, the beneficiaries of testamentary dispositions have no enforceable interests in them until the testator's death.¹⁴² Revocability means that the disposition only takes effect on death.¹⁴³ Due to their ambulatory nature before death a testamentary disposition can be revoked at any point

¹³³ *Beswick v Beswick* [1968] AC 58 (HL).

¹³⁴ Hudson and Thomas (n 129) 822.

¹³⁵ Hudson (n 125) 322.

¹³⁶ *Milroy* (n 101).

¹³⁷ *ibid* 274.

¹³⁸ [2002] 1 WLR 2075.

¹³⁹ *ibid* 2090.

¹⁴⁰ *ibid*.

¹⁴¹ Roger Kerridge, *Parry and Kerridge: The Law of Succession* (12th edn, Sweet & Maxwell 2009) 33.

¹⁴² *Re Smith* [2001] 1 WLR 1937 (Ch).

¹⁴³ John G Ross Martyn, Stuart Bridge and Mika Oldham, *Theobald on Wills* (16th edn, Sweet & Maxwell 2001) para 2-09.

during the testator's lifetime even if it expressly states otherwise.¹⁴⁴ Similarly, incompletely constituted *inter vivos* trusts are also revocable. However, as concluded above the acceptance of secret trusts as *inter vivos* trusts is problematic and could lead to difficult consequences.

Secret trusts are revocable. A testator could revoke a secret trust by executing another will (thereby revoking the previous will) or a codicil to divert the gift from the legatee. As a result, the property would not be vested in the legatee to hold on trust and the secret trust fails for lack of constitution.¹⁴⁵ The diversion of property means that the trust could not be carried out. Furthermore, due to a lack of constitution during the testator's lifetime, secret trusts are ambulatory. They are imposed over property that may no longer exist following the testator's death.¹⁴⁶ Despite any assurances given by the testator, the trust property could be sold to another or claimed by creditors if the testator dies in debt. Indeed, Penner correctly asserts that the legatee's expectation to receive the property under the will is a 'mere hope or *spes*'.¹⁴⁷

In conclusion, secret trusts could be testamentary dispositions. Through the use of codicils or through the execution of new wills, they are revocable. Furthermore, their effectiveness is contingent upon the trustee receiving the property. The legatee lacks any interest in the trust property during the testator's lifetime. The interest arises when the testator dies and the will transfers the property to him. Moreover, the will does not restrict the testator's rights of ownership, therefore, during his lifetime he remains free to sell or give away his property. Thus, this necessarily means that secret trusts are ambulatory.

3.4 *The problematic case of Re Gardner (No 2)*¹⁴⁸

Despite secret trusts being ambulatory and not *inter vivos* trusts, there have been decisions by the courts that suggest otherwise. *Re Gardner (No 2)* held that the secret beneficiary's interest could be passed onto her legal representative despite her predeceasing the testatrix.¹⁴⁹ Usually, a gift by will lapses where the donee predeceases the testator,¹⁵⁰ the gift normally falling into the testator's residue estate.¹⁵¹ The donee's estate can only claim the property if the donee had acquired some interest in it before the testator's death, but no such interest existed in this case.¹⁵² However, Romer J held that the gift did not lapse as the interest arose from the trust that was created before the testatrix's death.¹⁵³ In His Lordship's view, the

¹⁴⁴ *Baird v Baird* [1990] 2 AC 548 (HL); *Vynior's Case* (1609) 8 Co Rep 816, 77 ER 597.

¹⁴⁵ Mark Pawlowski and James Brown, 'Constituting Secret Trusts by Estoppel' [2004] Conv 388, 391.

¹⁴⁶ J E Penner, *The Law of Trusts* (8th edn, OUP 2012) 171.

¹⁴⁷ *ibid.*

¹⁴⁸ [1923] 2 Ch 230 (Ch).

¹⁴⁹ *ibid.*

¹⁵⁰ *Hanbury & Martin* (n 106) 174.

¹⁵¹ *Elliott v Davenport* (1705) 1 P Wms 83, 24 ER 304.

¹⁵² *Hanbury & Martin* (n 106) 174.

¹⁵³ *Re Gardner (No 2)* (n 148) 233.

testatrix's husband had effectively declared himself to be an immediate trustee of the disputed property that would come to him through the testatrix's partial intestacy.¹⁵⁴ The trust was created *inter vivos* and its terms were indicated to him during her lifetime. The will was a mechanism, which passed the property onto Mr Gardner, thereby constituting the trust. Effectively, before the testatrix's death the trust had existed as an incompletely constituted trust. An acceptance of decision in *Re Gardner (No 2)*¹⁵⁵ would mean that the trust is effective at the time that the trust was communicated and agreed. However, this is contrary to the conclusions above.

It is submitted that the decision in *Re Gardner (No 2)*¹⁵⁶ was incorrect. Martin rightly argues that there is 'no rational' theory that can justify the case's decision.¹⁵⁷ Additionally, Hayton correctly states that the earlier declaration of the trust in 1909 could not create a completely constituted trust because at the time the trust's subject matter was a '*spes*', merely future property.¹⁵⁸ Expectation or mere hope of the property cannot form the subject matter of the trust. Therefore, the beneficiaries could not have had any interest in the property until the testatrix's death in 1919. Furthermore, for a person to declare himself or herself as a trustee of future property there must be a further declaration or indication of this intention when the property is transferred.¹⁵⁹ Following his wife's death, there was no evidence that Mr Gardner did this. Whilst subsequent confirmation of a previous declaration would have been sufficient to make Mr Gardner a trustee,¹⁶⁰ the initial previous declaration by itself, was not.¹⁶¹ Therefore, the legal representative of the predeceasing beneficiary should not have acquired the interest.

It is therefore submitted that Romer J erred in his findings in this case. The secret trust is not effective until the property is vested in the legatee thereby constituting the trust.¹⁶² Therefore, until the testator's death the secret trust confers no interest to which the beneficiary or the beneficiary's estate can claim. Consequently, the decision in *Re Gardner (No 2)*¹⁶³ should be disregarded. Furthermore, due to the decision's highlighted difficulties it is submitted that the case fails to be a convincing case in support of the *Dehors* theory. Thus, the argument that secret trusts are *inter vivos* dispositions and beyond the scope of the Wills Act is incorrect and is therefore an inappropriate basis in which to ground secret trusts.

¹⁵⁴ *ibid.*

¹⁵⁵ *Gardner* (n 148).

¹⁵⁶ *ibid.*

¹⁵⁷ *Hanbury & Martin* (n 106) 173.

¹⁵⁸ David Hayton, Paul Matthews and Charles Mitchell, *Underhill & Hayton, Law of Trusts and Trustees* (18th edn, LexisNexis 2010) para 12.100.

¹⁵⁹ Hodge (n 79) 348.

¹⁶⁰ *Re Northcliffe* [1925] Ch 651 (Ch).

¹⁶¹ *Brennan v Morphet* (1908) 6 CLR 22 (HCA).

¹⁶² *Todd & Wilson* (n 120) 238.

¹⁶³ (n 148).

3.5 *The Dehors theory's 'fatal flaw'*¹⁶⁴

The *Dehors* theory is 'fatally flawed'.¹⁶⁵ The theory confuses 'outside of the will'¹⁶⁶ with 'outside of the Wills Act'.¹⁶⁷ In order to justify secret trust's non-compliance with section 9,¹⁶⁸ it needs to be shown that secret trusts are outside of the Wills Act.¹⁶⁹ The theory fails to demonstrate this. It merely shows that due to the trust being created during the testator's life time, this necessarily places it 'outside of the will' and therefore, outside of the scope of the Wills Act. However, since the Wills Act applies to all testamentary dispositions¹⁷⁰ and as concluded above it is likely that secret trusts are testamentary dispositions, being merely 'outside of the will' is insufficient as a justificatory basis.¹⁷¹

Critchley argues that the theory's flaw originated from the decision in *Cullen v. Attorney-General for Northern Ireland*.¹⁷² Here, Lord Westbury provided that where there is a secret trust, the 'title of the party claiming under the secret trust ... is a title *Dehors* the will' and that title 'cannot be correctly termed testamentary'.¹⁷³ However, this is contrary to conclusions above and it is respectfully submitted that it is more likely that secret trusts are testamentary. It appears here that his Lordship was justifying secret trusts on the basis that they are 'outside of the will' rather than being 'outside of the Wills Act'. Furthermore, the decision in *Cullen*¹⁷⁴ was made in relation to the true interpretations of certain tax statutes, it did not concern the formalities of due execution in section 9.¹⁷⁵ Therefore, the readiness in this case to deny the testamentary nature of secret trusts was in fact reasonable. Here, the judges held that the gift made by the testatrix was not a 'gift by ... will or testamentary instrument' within the meaning of the tax statutes.¹⁷⁶ Otherwise it would have meant that the legatee have could avoided paying certain tax duties by claiming that the gift was received by virtue of a testamentary disposition and therefore exempt from tax duties.¹⁷⁷ Thus, Critchley correctly argues that the *Dehors* theory's mistake was to apply the decision in *Cullen*,¹⁷⁸ which concerned the interpretation of testamentary dispositions in tax statutes to the different legal context of the Wills Act formalities.¹⁷⁹

¹⁶⁴ Critchley (n 2) 641.

¹⁶⁵ *ibid.*

¹⁶⁶ *ibid.*

¹⁶⁷ *ibid.*

¹⁶⁸ Wills Act 1837.

¹⁶⁹ *ibid.*

¹⁷⁰ *ibid* s 1.

¹⁷¹ Critchley (n 42) 641.

¹⁷² *ibid*; (1866) LR 1 HL 190 (HL).

¹⁷³ *Cullen* (n 172).

¹⁷⁴ *ibid.*

¹⁷⁵ Challinor (n 100) 495.

¹⁷⁶ *Cullen* (n 172) 194.

¹⁷⁷ *ibid* 199.

¹⁷⁸ *ibid.*

¹⁷⁹ Critchley (n 42) 641.

*Cullen*¹⁸⁰ was subsequently applied in *Re Young*.¹⁸¹ It was held by Danckwerts J that a secret trust is a trust that is created outside the will and imposed onto the legatee.¹⁸² Consequently, the legatee in this case was unaffected by section 15 of the Wills Act which provides that any gifts made in the will to an attesting witness shall be void.¹⁸³ However, the legatee was able to take under the will despite having been a witness to its execution. By coming to such a conclusion, Dankwerts J is effectively stating that by virtue of being outside the will, secret trusts are outside the scope of the Wills Act. However, in light of the discussion above, this assertion is incorrect. It would appear that his Lordship failed to recognise that secret trusts are testamentary and disregarded the applicability of section 1¹⁸⁴ which provides that the Wills Act applies to all testamentary dispositions. Otherwise he may have concluded that the beneficiary, by witnessing the will, would have forfeited his gift under the will.

Therefore, it is respectfully submitted that the error made in *Cullen*¹⁸⁵ should be recognised and that the subsequent cases that applied it should be viewed with caution. On this reasoning, it appears that the *Dehors* theory is grounded on the notion that secret trusts are merely ‘outside of the will’ and thus cannot act as a justification for the informality of secret trusts.

In conclusion, the argument that secret trusts do not contravene parliamentary legislation because they are *inter vivos* trusts that operate ‘dehors’ the will is flawed. The theory fails on two crucial points. Firstly secret trusts cannot exist as an effective *inter vivos* trust because the trust itself is not constituted until the testator’s death. Secondly, the theory incorrectly asserts that by being merely outside of the will the trust is beyond the application of the Wills Act. Thus it is submitted that the *Dehors* theory (based on the *inter vivos* argument) is an inadequate explanation to secret trusts.

4 ALTERNATIVE THEORIES TO SECRET TRUSTS

In light of the inadequacies of the fraud and *Dehors* theories, this section assesses alternative justifications for the enforcement of secret trusts despite their non-compliance with section 9.¹⁸⁶ This section argues that secret trusts are constructive trusts that arise outside of the will on the basis of unconscionability and thus do not contravene parliamentary legislation. Additionally, the suitability of the doctrine of estoppel as a potential basis for secret trusts will be considered. Finally, the last part

¹⁸⁰ *Cullen* (n 172)

¹⁸¹ [1951] Ch 344 (Ch).

¹⁸² *ibid* 350.

¹⁸³ *ibid* 351.

¹⁸⁴ Wills Act 1837.

¹⁸⁵ *Cullen* (n 172).

¹⁸⁶ Wills Act 1837.

of this section will assess Matthews argument that half secret trusts are enforced on the same basis as incorporation by reference.¹⁸⁷

4.1 *Secret trusts arise as constructive trusts on the basis of unconscionability*

It is submitted that the basis for the enforcement of secret trusts is the combination of the fraud and the *Dehors* theory. They are ‘inexorably linked’.¹⁸⁸ Secret trusts arise outside of the will and their enforcement is grounded on the basis of ‘fraud’. The premise of this argument is that in cases of ‘fraud’, the courts will be justified in imposing a constructive trust that arises *dehors* the will.¹⁸⁹ Such an imposition would effectuate the testator’s wishes, even though they were expressed in a way that is incompatible with the Wills Act.

However, a slight adjustment to this assertion is required. As correctly expressed by Hudson, ‘fraud’ should be viewed as synonymous with ‘unconscionability’.¹⁹⁰ This is in contrast to the narrow view of fraud that focuses on deceit and unjust enrichment.¹⁹¹ Here, fraud is interpreted so as to encompass all unconscionable conduct.¹⁹² Therefore, it would appear that in this context, secret trusts are enforced because not enforcing them would lead to unconscionable outcomes. It could be argued that the extended view of fraud is merely a part of ‘unconscionability’. In contrast to the orthodox view of fraud, the extended view focuses on ensuring that the testator’s wishes are not defeated and that the intended beneficiaries are not defrauded.¹⁹³ There need not be any attempt by the legatee to resile from his promise, nor is there a need for the behaviour to have already occurred.¹⁹⁴ Therefore, it appears that the mere possibility of the legatee resiling from his promise is sufficient to invoke this extended understanding of fraud. Critchley notes that the extended view of fraud focuses on ‘potential, rather than actual, wrongdoing ... the policy aim underlying [it] is thus [preventative] rather than reactive (or curative)’.¹⁹⁵ Thus, by the courts extending the meaning of fraud to encompass unconscionable conduct, they are attempting to ensure that the most ‘conscionable’ outcomes are reached and that unconscionable conduct is prevented. ‘Fraud’, can therefore be understood as any conduct or potential conduct that is ‘simply against conscience’.¹⁹⁶

¹⁸⁷ Paul Matthews, ‘The true basis of the half-secret trust’ [1979] Conv 360.

¹⁸⁸ Allan (n 44) 342.

¹⁸⁹ *ibid.*

¹⁹⁰ Hudson (n 125) 342.

¹⁹¹ Hodge (n 79) 343.

¹⁹² Paul Davies, Graham Virgo, *Maudsley and Burn’s, Equity and Trusts, Text, Cases and Materials* (7th edn, OUP 2013) 132.

¹⁹³ Oakley (n 63) 247.

¹⁹⁴ Gardner (n 132) 96.

¹⁹⁵ Critchley (n 42) 651.

¹⁹⁶ *ibid.*

4.2 *The means by which secret trusts are enforced – constructive trusts*

There exists an academic debate as to whether secret trusts are express trusts or constructive trusts.¹⁹⁷ This article argues that secret trusts are constructive trusts. However, in order to fully assess the validity of this submission, the arguments propounding secret trusts as express trusts will first be examined below.

Oakley argues that both forms of secret trusts are express trusts.¹⁹⁸ In contrast to Oakley however, Sheridan advocates a split view. He asserts that whilst fully secret trusts are constructive trusts, half secret trusts are express trusts as they appear in the will, the evidence of the trust being proof of the testator's express intention to create it.¹⁹⁹ Nevertheless, the premise of the argument that either type of secret trusts are express trusts is that the testator had clearly intended to create a trust relationship between the secret trustee and the secret beneficiary. Therefore, due to this clear intention, secret trusts are express trusts. Moffat articulates that an express trust arises as a result of the initial communication of the testator's intention to the trustee, his acceptance and the subsequent constitution of the trust through the will.²⁰⁰ Crucially, it is the testator's express intention to create a trust that underlies the argument that secret trusts are express trusts. Therefore, here, the courts are merely giving effect to what the testator had originally sought to create, but whilst doing so, had neglected to use the appropriate formalities.²⁰¹ Thus, secret trusts are express trusts that have been saved from ineffectiveness through the disapplication section 9²⁰² for reasons of 'fraud'.²⁰³ Underlying this is the maxim that equity will not allow a statute to be used as an instrument of fraud. Such 'fraud' occurring if the intended express trust was held to be ineffective upon vesting the property in the trustee, despite his promise to hold the property on trust.

The difficulty with these assertions is twofold. The principal difficulty is that the express trusts described above do not comply with the typical rules of express trusts. Firstly, whilst the testator's communication of the secret trusts can be construed as a declaration of his intention to create a trust, there is a failure to demonstrate any conformity with the typical formalities required for express trusts.²⁰⁴ For instance, trusts of land are required to be evidenced in writing.²⁰⁵ Thus, if secret trusts were to be express trusts then they would have to follow the section 9 formalities of the Wills Act²⁰⁶ or those under section 53 of the Law of Property Act 1925, but this is clearly

¹⁹⁷ Scott-Hunt and Lim (n 11) 78.

¹⁹⁸ Oakley (n 63).

¹⁹⁹ L A Sheridan, 'English and Irish secret trusts' (1951) 11 LQR 314, 324.

²⁰⁰ Graham Moffat, *Trust Law, Text and Materials* (5th edn, CUP 2009) 155.

²⁰¹ Paul Matthews, 'The words which are not there' in Charles Mitchell (ed), *Constructive and Resulting Trusts* (Hart 2010) 21.

²⁰² Wills Act 1837.

²⁰³ Gardner (n 132) 96.

²⁰⁴ Hudson (n 125) 322.

²⁰⁵ Law of Property Act 1925, s 53(1)(b).

²⁰⁶ Allan (n 44) 342.

not the case.²⁰⁷ Moreover, the core essence of secret trusts is that they are ‘something that operates in spite of the rules as to form’.²⁰⁸ Since express trusts require the fulfilment of certain formalities, the ‘informal’ nature of secret trusts makes it difficult to declare them as such. This point is best articulated by Hudson who states that, ‘to analyse secret trusts as being express trusts appears to be a busted flush precisely because no such formally validly express trust was actually created.’²⁰⁹

Secondly, an express trust cannot exist when the testator had ‘declared’ his intentions before his death because at this point the trust had not been constituted. Since no legal title is vested in the trustee until the will is effective, it has been argued that what is actually being declared is an executory trust.²¹⁰ Such a trust would take effect at a designated point in the future, the testator’s death. However, an executory trust requires the execution of a further instrument that precisely defines what the beneficial interests are.²¹¹ From this instrument the courts need to be able to ascertain both the trust and its terms.²¹² Presumably, the basis of this argument is that the will is the further instrument. Yet, these conditions are not fulfilled by the will in both fully secret and half secret trusts. With fully secret trusts there is no evidence of the trust in the will and whilst half secret trusts appear on the face of the will, its terms are completely hidden. It could be argued that written communication to the legatee could suffice as the further instrument. However, this would not explain cases where oral communication of the secret trust is accepted. Thus secret trusts are not executory trusts.

A final point is that the argument that express trusts operate *post mortem* and are *prima facie* disallowed by the Wills Act but are saved from ineffectiveness through the disapplication of section 9²¹³ is difficult to reconcile with the principle of parliamentary sovereignty.²¹⁴ Underlying the legislation’s disapplication is the maxim that equity will not allow a statute to be used as an instrument of fraud. Whilst the historical presence of this maxim is undeniable, Gardner questions the court’s right in deciding whether or not to apply an Act of Parliament on the basis of ‘fraud’.²¹⁵ The meaning of which appears to be of their own choosing and defining²¹⁶ as demonstrated by the term’s extension to facilitate the acceptance of half secret trusts. Critchley notes that just because as a matter of policy, the fraud maxim renders justifiable the informal nature of secret trusts, it does not mean that it is

²⁰⁷ *Ottaway v Norman* (n 12).

²⁰⁸ Robert Burgess, ‘The juridical nature of secret trusts’ (1972) 23 N Ir Legal Q 263.

²⁰⁹ Hudson (n 125) 322.

²¹⁰ *ibid.*

²¹¹ *Hanbury & Martin* (n 106) 71.

²¹² *Re Flavel’s Will Trusts* [1966] 1 WLR 444 (Ch) 445, 447.

²¹³ Wills Act 1837.

²¹⁴ Simon Gardner, ‘Reliance based constructive trusts’, in Charles Mitchell (ed), *Constructive and Resulting Trusts* (Hart 2010) 64.

²¹⁵ *ibid.*

²¹⁶ *ibid.*

constitutionally justifiable for the courts to create an exception to a ‘clear and mandatory statutory provision’.²¹⁷ By doing so, they are making a ‘bald assertion’ that a testator’s wishes should be respected, even when he has not implemented them in an acceptable manner.²¹⁸ Indeed, Challinor argues that the ‘very mild form of fraud’ (the extended view of fraud) which is utilised to justify equitable intervention does not justify such an imposition in the same way that *malus animus* does in the orthodox view of fraud.²¹⁹ Furthermore, it is unclear as to why in some cases the courts are willing to overlook section 9,²²⁰ but not the formalities²²¹ required for trusts of land under the Law of Property Act 1925 (which requires that such trusts must be made in writing). In *Re Baillie*, a secret trust of land was defeated by the courts because it failed to comply with the predecessor to section 53(1)(b) of the Law of Property Act 1925, section 9 of the Statute of Frauds 1677.²²²

The difficulties addressed here are best resolved by appreciating that secret trusts are constructive trusts. Rather than being express trusts that directly contravene statutory provisions, it is submitted that such trusts are imposed by operation of law and thus escape the Wills Act, because it does not apply to them. Constructive trusts, unlike express trusts, are not dispositions and escape the requirements of formality under section 53(2) Law of Property Act 1925. This would explain why the secret trust of land in *Ottaway v Norman* was upheld despite its non-compliance with section 53(1)(b).²²³ Gardner suggests that the fraud maxim is a metaphorical explanation for what actually occurs via a constructive trust.²²⁴ It could be argued that this is what Viscount Sumner means in his statement that ‘the whole topic is detached from the enforcement of the Wills Act itself’.²²⁵

It is concluded that secret trusts are constructive trusts. In contrast to express trusts they do not arise to vindicate the testator’s original intentions, rather they are imposed by the court for other reasons.²²⁶ The reasons underlying their imposition will be addressed below.

4.3 *Constructive trusts are imposed for reasons of unconscionability*

Generally, where one holds property in situations where in equity and in good conscience it should be held or enjoyed by another, one will be compelled to hold that property on trust for that other.²²⁷ The statement’s vagueness, however, has been

²¹⁷ Critchley (n 42) 653.

²¹⁸ Challinor (n 100) 497.

²¹⁹ *ibid.*

²²⁰ Wills Act 1837.

²²¹ *ibid* s 53(1).

²²² (1886) 2 TLR 660 (Ch).

²²³ (n 12); Law of Property Act 1925.

²²⁴ Gardner (n 214) 65.

²²⁵ *Blackwell* (n 118) 340.

²²⁶ Gardner (n 132) 97.

²²⁷ *Soar v Ashwell* [1893] 2 QB 390 (CA).

pragmatically developed by the courts when ascertaining the circumstances in which a constructive trust arises. For example, in recipient liability, a constructive trust arises when the recipient's knowledge of the circumstances surrounding the property makes it unconscionable for them to retain the property.²²⁸ It is submitted that 'unconscionability' also underlies the enforcement of secret trusts. Sheridan states that secret trusts are but one illustration of the 'broad principle of constructive trusts'.²²⁹ Thus, secret trusts are imposed as constructive trusts to prevent any unconscionable actions of the trustee or otherwise unconscionable outcomes.²³⁰ They are imposed because it would be unconscionable for the property to be applied in any other way.²³¹ Thus, the courts attach a trust to the conscience of the trustee.²³² As submitted above, the 'fraud' that typically triggers the imposition of constructive trusts²³³ is synonymous with 'unconscionability'.

Whilst there is a lack of unequivocal authority for the assertions above, support may be inferred from Viscount Sumner's judgment in *Blackwell*.²³⁴ His Lordship provides that a 'Court of Conscience' will not allow an individual who finds himself to be the absolute legal owner of the property to exercise his legal rights where the property was bequeathed to him upon certain motives and actions of the testator.²³⁵ His Lordship further states that such actions by the courts are 'perfectly normal exercise[s] of general equitable jurisdiction' and the facts commonly 'but not necessarily' involve some immoral and selfish conduct by the holder of the legal title.²³⁶ It is submitted that what Viscount Sumner means is that the courts impose constructive trusts to prevent the occurrence of 'fraud' but 'fraud' does not have to be characterised by the trustee's wrongful conduct. Rather than trying to prevent wrongful conduct, the courts are actually seeking to restrict any 'unconscionable' outcomes that may arise if the property was applied in any other way other than what was originally agreed.

Notably, 'unconscionability' is undefined by the courts and is left flexible so that it can be used in a wide variety of circumstances. Hopkins correctly states that 'unconscionability does not exist as a concept at large' and Parkinson notes that the 'conscience of equity must not be given a life of its own, independent of specific doctrines through which it finds expression'.²³⁷ Therefore, what is considered

²²⁸ *Bank of Credit and Commerce International (Overseas) Ltd v Akindele* [2001] Ch 437 (CA).

²²⁹ Sheridan (n 199) 324.

²³⁰ Hudson (n 125) 324.

²³¹ *Todd & Wilson* (n 120) 241.

²³² *Blackwell* (n 118) 355 (Viscount Sumner).

²³³ *Hanbury & Martin* (n 106) 74.

²³⁴ *Blackwell* (n 118).

²³⁵ *ibid* 334.

²³⁶ *ibid*.

²³⁷ Nicholas Hopkins, 'How should we respond to unconscionability? Unpacking the relationship between conscience and constructive Trust' in Martin Dixon and Gerwyn LL H Griffiths (ed), *Contemporary Perspectives on Property, Equity and Trusts Law* (OUP 2007) 4; Patrick Parkinson,

‘unconscionable’ conduct depends on the facts of each case. Problematically however, this makes it difficult to predict when a constructive trust will arise to prevent ‘unconscionable’ conduct.

4.4 *‘Unconscionability’ based on the concept of lost opportunity*

Hudson argues that the fraud theory is incorrect; rather he asserts that secret trusts are enforced on the basis of the proprietary obligation accepted by the trustee.²³⁸ Thus, what equity is in fact trying to do is enforce this proprietary obligation, not prevent the occurrence of ‘fraud’. Hudson makes two points regarding this; firstly, the proprietary obligation arises immediately on the testator’s death.²³⁹ Secondly, the obligation does not bind the trustee until the testator’s death as before this he could have altered his will so as to invalidate the secret trust.²⁴⁰

Whilst Hudson’s assertions that secret trusts are not enforced on the basis of fraud is correct (it is founded upon unconscionability of which fraud forms a part), the proclamation that the justification resides solely in a proprietary obligation is circular and flawed. To assert that ‘fraud’ is not in any way a basis to the enforcement of secret trusts is to overlook the fact that enforcement of the proprietary obligation is a consequence of fraud. The proprietary obligation exists whether or not fraud occurs, but the courts enforcement of it is triggered by the legatee fraudulently denying the trust. Hudson’s assertion, therefore, that secret trusts are ‘institutional and not remedial’²⁴¹ is unsustainable.

Whilst Hudson’s correctly recognises that secret trusts are enforced for reasons of unconscionability, his claim that it is based upon the trustee’s unconscionable actions²⁴² is unsatisfactory as it leaves half secret trusts unaccounted for. He argues that the principle underlying this is that equity will not allow the trustee to benefit unconscionably from the testator’s bequest and thus ‘controlling the conscience of the trustee is key’ in both forms of secret trusts.²⁴³ However, it is difficult to see how the trustee of a half secret trust could benefit as by the trust appearing on the will, the trustee would not be able to retain the property beneficially. Thus, whilst Hudson correctly identifies unconscionability as a basis for secret trusts, he utilises it in a way that fails to adequately account for both fully secret and half secret trusts.

‘The Conscience of Equity’ in Patrick Parkinson (ed), *The Principles of Equity* (2nd edn, Lawbook Co 2003) 29.

²³⁸ Hudson (n 125) 321.

²³⁹ *ibid.*

²⁴⁰ *ibid.*

²⁴¹ *ibid.*

²⁴² *ibid* 324.

²⁴³ *ibid* 325.

A preferable explanation is Gardner's suggestion that the unconscionable outcome that the courts are trying to prevent is that of 'lost opportunity'.²⁴⁴ Gardner argues that where one transfers property to another on reliance that the other will hold the property on trust, and there exists an ability to resile from the promise, the transferor of the property suffers a detriment.²⁴⁵ The detriment is the loss of opportunity to achieve one's objective through other means.²⁴⁶ In secret trusts, the 'lost opportunity'²⁴⁷ in which the testator suffers is the loss of alternative methods in which to provide for the beneficiary. Therefore, the imposition of the constructive trust to effectuate the secret trust is a way in which to correct the testator's reliance loss.²⁴⁸ Gardner argues that the constructive trust arises as soon as the testator, having forgone his opportunity to make other arrangements on the faith of the trustee's undertaking, makes the necessary legacy to the trustee and the property reaches the trustee's hands.²⁴⁹ The constructive trust operates to rectify the loss of opportunity that the testator suffers on reliance of the trustee's undertaking. It is for this reason that secret trusts are enforced and that the legatee is held to the undertaking that he agreed to carry out.

The advantage of the theory of lost opportunity is that it can also be applied to half secret trusts. This is because the testator still relies on the legatee's undertaking and as a result the testator still loses his opportunity to achieve the trust through other means.²⁵⁰ Therefore to ensure that the testator's wishes are carried out and in order to remedy the loss of opportunity, the secret trust is enforced. However, it is noted that whilst this is the most justifiable basis of secret trusts, there is a lack of support for it in the case law. Thus, whilst the argument itself is strong, it unlikely to be what the courts are really advocating when enforcing secret trusts.

4.5 *Estoppel*

A potential basis for secret trusts could be found in the doctrine of estoppel. Following on from Gardner's assertion that secret trusts are enforced in order to rectify reliance loss, it could be argued that there are similarities between equitable estoppel and secret trusts. Estoppel requires the making of a representation that promises a benefit and then in reliance to this, the claimant acts to his detriment.²⁵¹ Estoppel prevents the claimant's detriment from going uncompensated.²⁵² Similarly,

²⁴⁴ Gardner (n 214) 66.

²⁴⁵ Gardner (n 132) 97.

²⁴⁶ *ibid.*

²⁴⁷ Gardner (n 214) 66.

²⁴⁸ *ibid.*

²⁴⁹ *ibid.* 67.

²⁵⁰ *ibid.* 66.

²⁵¹ *Taylor Fashions Ltd v Liverpool Victoria Trustees Co Ltd* [1982] 1 QB 133 (Ch); *Re Basham (Deceased)* [1986] 1 WLR 1498 (Ch); *Wayling v Jones* (1993) 69 P & CR 170 (CA); *Gillett v Holt* [2001] Ch 210 (CA).

²⁵² Hudson (n 125) 326.

in light of Gardner's 'loss of opportunity' argument secret trusts are enforced to ensure that the testator's detriment does not remain outstanding.

Furthermore, underlying both doctrines is the concept of conscionability. In reference to proprietary estoppel, Lord Evershed states that it aims to 'not so much as to do justice as to restrain injustice, i.e. to stop the unconscionable conduct of the person against whom equity proceeded'.²⁵³ This could be applied to secret trusts. In light of Gardner's theory, it could be argued that secret trusts are enforced to restrain 'injustices' that would occur if the agreement was defeated. Such 'injustices' would be the detriment that the testator suffers through his reliance loss.

The doctrine of estoppel can be split into promissory estoppel and proprietary estoppel.²⁵⁴ The key distinction between these two is that the latter has the ability to create new proprietary rights whilst the former merely protects the claimant's existing rights.²⁵⁵ In proprietary estoppel the claimant is required to show that there has been a representation or assurance by the defendant that the claimant relied upon to his/her detriment.²⁵⁶ In *Re Basham* Edward Nugee QC explains that the claimant is required to act to his detriment upon a belief that is 'known and encouraged by another'.²⁵⁷ Subsequently, the party encouraging the belief cannot then insist upon their strict legal rights if it would be unconscionable for him to do so. It was also stated that the machinery by which proprietary rights are given through estoppel is 'similar ... to those involved in cases of secret trusts ... in which property is vested in B on the faith and understanding that it will be dealt with in a particular manner'.²⁵⁸ It is the claimant's alteration of his position on the faith of the representation that gives rise to the doctrine. However, the claimant's detriment in proprietary estoppel, whilst based on unconscionable behaviour²⁵⁹ and cannot be regarded as a 'narrow or technical concept',²⁶⁰ must be a substantial.²⁶¹ Whilst the case law demonstrates that such detriment need not be fiscal,²⁶² it appears that it would need to be shown that the testator had acted beyond that of merely setting up the appropriate legacy for the trustee.

It is submitted that secret trusts could be better enforced through promissory estoppel. This operates where one makes to another an unambiguous representation as to their future conduct and the other then alters their position in reliance upon the

²⁵³ Lord Evershed, 'Reflections on the Fusion of Law and Equity after Seventy Five Years' (1954) 70 LQR 326, 329.

²⁵⁴ *Hanbury & Martin* (n 106) 941.

²⁵⁵ *ibid* 941.

²⁵⁶ Cases cited in (n 251).

²⁵⁷ *Basham* (n 251) 1504.

²⁵⁸ *ibid*.

²⁵⁹ *Gillett* (n 251).

²⁶⁰ *Van Laetham v Brooker* [2005] EWHC 1478 [74] (Lawrence Collins J).

²⁶¹ *Hudson* (n 125) 601.

²⁶² *Pascoe v Turner* [1979] 1 WLR 431 (CA).

representation.²⁶³ The party making the representation will be unable to act inconsistently with the representation if it prejudices the other party.²⁶⁴ Because there is no creation of new rights in promissory estoppel, the detriment required is less stringent. Here, the claimant need only show that they had committed themselves to a particular course of action as a result of the representation.²⁶⁵ It could be argued that as a result of the trustee's representation the testator's provisions to create a legacy in favour of the trustee shows that they have committed themselves to a particular course of action. Additionally, in doing so, they also forego other opportunities to benefit the beneficiary.

However, there is a fatal difficulty in attempting to integrate secret trusts with the doctrine of estoppel. Unlike cases of estoppel, secret trusts necessarily involve three rather than two parties, the testator, the secret trustee and the secret beneficiary. This point was raised by Walker LJ in *Gillett v Holt*.²⁶⁶ In secret trusts it is the agreement between the testator and the trustee, not the beneficiary's moral claim that makes it unconscionable for the trustee to deviate from the agreement. The basis of the enforcement of secret trusts is founded on unconscionability upon the testator, and it is the testator who suffers the detriment. Therefore, it is difficult to perceive how the claimant could rationally claim against the trustee on the testator's detriment. Consequently, unless the personal representative or the executor of the testator could invoke the doctrine of estoppel on behalf of the testator, the theory that the basis of secret trusts can be found in the doctrine of estoppel is unworkable.

4.6 *Incorporation by reference*

Matthews argues that due to the similarities between half secret trusts and incorporation by reference, half secret trusts are enforced on the same basis as the latter.²⁶⁷ However, this position is ultimately flawed because the suggested similarities are superficial²⁶⁸ and do not outweigh the overwhelming distinctions between the two doctrines. Thus, ultimately the argument is unconvincing. Furthermore, to assert incorporation by reference as the true basis of half secret trusts overlooks the means by which such trusts arise. Nevertheless, the similarities first will be addressed.

At the most basic level, both half secret trusts and incorporation by reference require a validly executed will.²⁶⁹ Both require some reference in the will as to the informal arrangement. Whilst a fully secret trust can arise in intestacy²⁷⁰ a half secret trust by

²⁶³ *Central London Property Ltd v High Trees House Ltd* [1947] KB 130 (KB).

²⁶⁴ *Combe v Combe* [1951] 2 KB 215 (CA) 220.

²⁶⁵ *High Trees* (n 263); *WJ Alan & Co Ltd v El Nasr Export and Import Co* [1972] 2 QB 189 (QB); *Ajayi v RT Briscoe (Nigeria) Ltd* [1964] 1 WLR 1326 (PC).

²⁶⁶ *Gillett* (n 251) 228.

²⁶⁷ Paul Matthews, 'The true basis of the half-secret trust' [1979] Conv 360.

²⁶⁸ *Hanbury & Martin* (n 106) 157.

²⁶⁹ *Critchley* (n 42).

²⁷⁰ *Sellack v Harris* (1708) 2 Eq Ca Ab 46 (Virginia CA).

definition requires an effective will. Secondly,²⁷¹ the rule in half secret trusts regarding the time of communication of the trust before the date of the will²⁷² is the same as the time in which material is to be incorporated by reference into the will.²⁷³

However, in spite of these similarities there are several key differences that ultimately suggest that half secret trusts and incorporation by reference should be viewed as two separate doctrines.²⁷⁴ Firstly, in half secret trusts, the testator's wishes can be made orally. However, in cases of incorporation by reference, additional terms or amendments have to be made in a written document. Problematically, in order to assimilate the two doctrines, it would be necessary to either insist that half secret trusts communicated orally should fail or incorporation by reference has to be extended to include oral communications.

Secondly, in order for a document to be incorporated into a will the words used must not be so vague that it is incapable of being applied to a particular document. Thus, incorporation by reference requires a higher level of specificity in order to be successful.²⁷⁵ In contrast, in half secret trusts the mode of communication employed need not be specified and the inclusion of the word 'trust' on the will is sufficient to turn a fully secret trust into a half secret trust.

Finally, there is no requirement of communication of the intention to create the trust from the testator and the acceptance by the legatee in incorporation by reference. In fact it should be noted that there is no role for the legatee at all in incorporation by reference. However, these elements are essential to the creation of secret trusts. Therefore, the argument that half secret trusts are enforced on the same basis as incorporation by reference overlooks the very nature in which secret trusts arise. In conclusion, in light of the above the justification for half secret trusts cannot be found in the doctrine of incorporation by reference.

As illustrated above, the argument that secret trusts are express trusts that are saved from ineffectiveness is flawed as secret trusts fail to comply with the formalities of express trusts. Additionally, for the reasons already discussed, the doctrine of estoppel and incorporation by reference are inadequate basis in which to justify secret trusts. Therefore, Gardner's position that secret trusts are enforced as constructive trusts that arise as a result of the testator's 'loss of opportunity' is the most justifiable rationalisation to the courts enforcement of such trusts.

²⁷¹ Matthews (n 187) 361.

²⁷² *Re Keen* [1937] Ch 236 (CA).

²⁷³ *Re Jones* [1942] Ch 328 (Ch).

²⁷⁴ Critchley (n 42).

²⁷⁵ *ibid* 644.

5 CONCLUSION

As concluded earlier, individually the fraud theory and the *Dehors* theory are inadequate explanations to the enforcement of secret trusts. Whilst the former in its orthodox form satisfactorily explains the court's implementation of fully secret trusts, it cannot justify half secret trusts. Additionally, the extended definition of fraud based on fraud upon the testator's promise and harm upon the interests of the secret beneficiaries²⁷⁶ does not possess the robustness required to support secret trusts. Furthermore, the *Dehors* theory based on the assertion that secret trusts are *inter vivos* trusts and are therefore beyond the Wills Act is flawed. It confuses being 'outside of the will' with being 'outside of the Wills Act'.²⁷⁷ It wrongly asserts that since secret trusts are *inter vivos* trusts they are beyond the will and therefore beyond the scope of the Wills Act. Furthermore the assertion that the trust is created during the testator's lifetime but constituted after death²⁷⁸ is incorrect. Therefore, the *Dehors* theory as postulated by Perrins²⁷⁹ is flawed and thus cannot operate as a basis for the enforcement of secret trusts.

Therefore, this article concludes that the minority position that the enforcement of secret trusts is based upon the imposition of a constructive trust is the preferable view. Underlying this is the understanding that the Fraud and *Dehors* theory are complementary rather than competitive rationalisations.²⁸⁰ It is the occurrence of 'fraud' that triggers equity's imposition of a constructive trust to effectuate a secret trust. However, 'fraud' in this context is better understood as 'unconscionability'.²⁸¹ Furthermore, it is submitted that the constructive trust that is imposed to effectuate the secret trust can most justifiably be explained by Gardner's concept of 'lost opportunity'.²⁸² As stated previously, this is the argument that secret trusts are enforced in order to remedy the 'harm' suffered by the testator. The 'harm' is the testator's 'loss of opportunity' to make alternative arrangements to benefit the secret beneficiary due to his reliance on the legatee's promise to act as a trustee.²⁸³ The advantage of this argument is that it overcomes difficulties in defining and applying 'unconscionability' as a criterion to when secret trusts should be enforced. Whilst unconscionability may underlie the court's actions in rectifying the testator's loss, it is more straightforward for the courts to apply the concept of 'lost opportunities' than to define what circumstances are 'unconscionable'. However, it is noted that Gardner's concept could also be dangerously extended to cover situations beyond secret trusts. For example it could be applied in a situation where a testator who is not making a

²⁷⁶ Oakley (n 63) 247.

²⁷⁷ Critchley (n 42) 641.

²⁷⁸ Perrins (n 110) 250.

²⁷⁹ *ibid.*

²⁸⁰ Allan (n 42) 342.

²⁸¹ Hudson (n 125) 342.

²⁸² Gardner (n 214) 66.

²⁸³ *ibid.*

secret trust fails to comply with section 9²⁸⁴ when creating a will. Arguably, here the testator has also lost his opportunity to benefit his beneficiaries through other arrangements as typically, any discoveries of non-compliance with statutory formalities are found after the testator's death. Therefore, it is submitted that Gardner's argument should be confined to secret trusts in order to prevent testators from using it to as a mechanism to generally overcome section 9.²⁸⁵

However, the submission that Gardner's position is the preferable view is cautiously made. Whilst the argument is robust, there is a lack of clear support for it in the case law. Thus it could be argued that despite the rationalisation's strength, this is not what the courts are actually advocating when enforcing secret trusts. Indeed, Kandasamy argues that it does not matter what theory is used to explain secret trusts.²⁸⁶ Their enforcement is in fact a policy decision by the judiciary to fulfil the wishes of the testator.²⁸⁷ Therefore, it does not matter in a 'practical sense' what theory is used to explain secret trusts.²⁸⁸ However, this assertion goes too far. Since secret trusts appear to operate in the face of parliamentary legislation it is important to identify the court's reasoning for enforcing such trusts. By itself, the argument that the courts are disapplying statutory provisions just to ensure that the testator's wishes are not defeated is an insufficient reason for the disapplication of legislation.

Like Gardner, Waters argues that English courts enforce secret trusts because they 'have always been anxious to enforce the promise which the recipient made or led the transferor to believe that he had made'.²⁸⁹ Thus, secret trust enforcement is due to the courts' reluctance to defeat a promise that the testator has relied upon. However, unlike Gardner, Waters submits that the rationalisation that secret trusts are constructive trusts is made *post hoc*.²⁹⁰ The trust is labelled 'constructive' due to the courts' consistent highlighting that fraud would occur if oral evidence of the trust could not be introduced.²⁹¹ Despite fraud being the original basis for the enforcement of secret trusts, he argues that it is now a 'smoke screen' to the reality that they are enforced to maintain the trustee's promises which the testator relied upon.²⁹²

However, simply enforcing secret trusts to ensure that the testator's wishes are effectuated is an insufficient justification on its own to an apparent circumvention of statutory provisions. Thus, it is submitted that perhaps the courts enforce secret trusts in order to deal with a testator's genuine need for secrecy. Watkin regards this as the

²⁸⁴ Wills Act 1837.

²⁸⁵ *ibid.*

²⁸⁶ Kandasamy (n 5).

²⁸⁷ *ibid.*

²⁸⁸ *ibid.*

²⁸⁹ D W M Waters, *The constructive trust, the case for a new approach in English law* (Athlone Press 1964) 58.

²⁹⁰ *ibid* 70.

²⁹¹ *ibid* 60.

²⁹² *ibid.*

‘problem of secrecy’ that arises as a result of the public nature of the will once it is admitted to probate.²⁹³ He states that secret trusts are enforced because the ‘testator’s desire for secrecy was as much indulgeable as the need for evidence concerning testamentary disposition’.²⁹⁴ Support for this assertion can also be found in the case law. In *Blackwell* Viscount Sumner in addressing the motives for creating secret trusts states that, ‘A desire for secrecy is a legitimate motive for setting up a semi-secret trust’.²⁹⁵ However, not all secret trusts are created for secrecy; some testators’ make secret trusts in order to allow for flexible modification to his/her testamentary wishes without having to alter the will.²⁹⁶

However, Watkins argues that a desire for flexibility should not be indulged.²⁹⁷ To do so would effectively allow testators to evade statutory provisions by using secret trusts to accommodate frequent changes of mind. The policy behind the Wills Act formalities, Watkin contends, should not be ‘sacrificed on the altar of secrecy for the benefit of persons who have no interest in secrecy’.²⁹⁸ In fact, following his earlier statement regarding the legitimacy of the desire for secrecy, Viscount Sumner goes on to assert that ‘a desire for ... flexibility is not a motive which the law should indulge’.²⁹⁹ Therefore, it is clear that unlike the desire for secrecy, the courts do not enforce secret trusts in order to indulge a desire to be able to flexibly implement one’s testamentary wishes.

However it is submitted that the motives for the creation of secret trusts are irrelevant. Such motivations are seldom mentioned or considered the central focus in secret trust cases. Instead, it is submitted that the most justifiable explanation to the courts’ enforcement of secret trusts is based on the fatal nature of the ‘loss of opportunity’ suffered by the testator. Since this ‘harm’ follows death, the testator is inevitably unable to make alternative arrangements to effectuate his wishes. Since the testator’s executors are not in a position to create trusts on the testator’s behalf to remedy this, the court is consequently the only remaining body that is able to remedy this ‘harm’. It is for this reason that the courts compel the secret trustee to carry out the secret trust. It is the fatal nature of this loss of opportunity that distinguishes the situation between the ineffective trust of a settlor and the ineffective secret trust of a testator. The former is potentially able to make alternative arrangements to benefit the beneficiaries, whereas it is impossible for the latter to do the same.

In conclusion for the reasons discussed above, the enforcement of secret trusts is most justifiably explained by the fatal nature of the ‘loss of opportunity’ suffered by the

²⁹³ Thomas Glyn Watkin, ‘Cloaking a contravention’ [1981] Conv 335, 337.

²⁹⁴ *ibid.*

²⁹⁵ *Blackwell* (n 118) 339 (Viscount Sumner).

²⁹⁶ Rowena Meager, ‘Secret Trusts – do they have a future?’ [2003] Conv 203, 207.

²⁹⁷ Watkin (n 293) 399.

²⁹⁸ *ibid.*

²⁹⁹ *Blackwell* (n 118) 339 (Viscount Sumner).

testator. This loss occurs as a result of the testator's reliance on the legatee's promise to hold the property on trust for the secret beneficiary. The courts then enforce this promise through the imposition of a constructive trust thereby effectuating the secret trust.

THE CROSS-BORDER ELEMENT AND THE INTERNAL SITUATIONS RULE IN EU REVERSE DISCRIMINATION

*Aaron Stalley**

1 INTRODUCTION

The orthodox approach, to purely internal situations, has inspired debate as to whether purely internal situations are justifiable. Firstly, examination of cross-border elements demonstrates the linguistic frailty of the standard, and in doing so, will provide justification for the abolition of purely internal situations by highlighting the discriminatory nature. However, a consideration of physical movement and residence periods demonstrates that any attempt to reduce purely internal situations will breach the principle of conferral and simultaneously threaten national sovereignty. Following this, the effect of European Union (EU) citizenship will be contemplated. This article concludes that the express prohibition of the expansion of competence, through citizenship, has negated the opportunity for the genuine enjoyment test to affect purely internal situations. While the logic of equality and non-discrimination are reasons to abolish purely internal situations, this would ultimately undermine principles of democracy.

2 CROSS-BORDER SITUATIONS

Reverse discrimination is ‘the less favourable treatment that is suffered by persons who are in purely internal situations’;¹ purely internal situations are those that are governed by domestic law.² The EU’s limited competence, with respect to purely internal situations, dictates that matters only fall within the EU’s range of competence if a sufficient link can be established with the EU.³ The orthodox approach requires a cross-border element to establish such a link.⁴ However, judicial activism has created a broad definition of what constitutes a cross-border element, to the extent that it has ‘virtually nothing to do with borders anymore’.⁵ Case law has permitted the potential

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¹ Alina Tryfonidou, ‘Purely internal situations and reverse discrimination in a Citizens’ Europe: time to “reverse” reverse discrimination?’ in PG Xuereb (ed), *Issues In Social Policy: A New Agenda (Jean Monnet Seminar Series)* (Progress 2009).

² Case C-175/78 *R v Saunders* (1979) ECR 1129.

³ *ibid.*

⁴ *ibid.*

⁵ E Spaventa, ‘Seeing the Wood Despite the Trees? On the Scope of Union Citizenship and its Constitutional Effects’ [2008] CML 45.

future desire to cross a border;⁶ the incidental movement in the provision of services,⁷ dual nationality⁸ and the prospect of receiving services⁹ as being sufficient cross-border elements. Thus, it is clear that the distinction between purely internal situations and cross-border situations is no longer associated with physical travel.¹⁰ Rather, the distinction seems artificial and arbitrary and is evidence of a ‘competence creep’¹¹ by the EU.¹²

Cross-border elements are demonstrably satisfied in artificial and arbitrary ways. Rather than providing a meaningful threshold to determine which situations are purely internal it instead discriminates against those who cannot, financially or physically, cross borders, those who choose not to exercise their freedom of movement rights¹³ and those who do not fall within the artificial exceptions.¹⁴ *Prima facie*, the aforementioned issues arguably demonstrate a justification for eradicating the purely internal rule.

3 RESIDENCE PERIODS AND ‘SUFFICIENTLY GENUINE RESIDENCE’

Moreover, insistence upon a cross-border element creates issues of certainty with respect to what constitutes a physical crossing of a border. AG Fennely speculates that lack of conceptual clarity provides opportunity for ‘short educational exchanges or even periods as little as one day spent abroad’ to bring a situation within EU competence.¹⁵ If such logic were accepted it would be evidence of the ineffectiveness of the cross-border threshold – it would allow mere tourists to invoke EU rights. This would reduce the cross-border test to a mere formality and consequently make the discrimination toward those who do not exercise their movement rights even more potent. Therefore, this seemingly provides additional reasoning to abolish purely internal situations.

⁶ Case C-148/02 *Carlos Garcia Avello v Belgian State* [2003] ECR I-11613.

⁷ Case C-60/00 *Mary Carpenter v Secretary of State for the Home Department* [2002] ECR I-6279.

⁸ Case C-200/02 *Chen v Secretary of State for the Home Department* [2004] ECR I-9925.

⁹ Case C-274/96 *Bickel and Franz* [1998] ECR I-7637.

¹⁰ Dimitry Kochenov, ‘The Present and the Future of EU Citizenship: A Bird’s Eye View of the Legal Debate’ (2012) Jean Monnet Working Papers, NYU Law School

<<http://www.jeanmonnetprogram.org/papers/12/documents/JMWP02Kochenov.pdf>> accessed 5 February 2015.

¹¹ Competence creep is the process of incrementally extending competence so as to assert authority over an area in which competence was not originally conferred: MA Pollack, ‘Creeping Competence: The Expanding Agenda of the European Community’ [1994] *Journal of Public Policy* 2.

¹² Siofra O’Leary, ‘The Past, Present and Future of the Purely Internal Rule in EU Law’ in Michael Dougan, Niamh Nic Shuibhne and Eleanor Spaventa (eds), *Empowerment and Disempowerment of the European Citizen* (Hart 2012).

¹³ Consolidated Version of the Treaty on the Functioning of the European Union [2010] OJ 2010 C83/57 (TFEU) art 21.

¹⁴ *Tryfonidou* (n 1).

¹⁵ Case C-281/98 *Roman Angonese v Cassa di Risparmio di Bolzano SpA* [2000] ECR I-4139.

However, the European Court of Justice, in the recent case of *O v Minister voor Immigratie*, establishes that such temporary exchanges as alluded to by AG Fennely would be insufficient, instead imposing a requirement of ‘sufficiently genuine residence’.¹⁶ This reaffirmation of the permissibility of purely internal situations can be justified on the grounds of conferral and sovereignty. Article 5 of the Treaty on the European Union establishes ‘the Union shall act only within the limits of the competences conferred upon it by the Member States’.¹⁷ At no point has a treaty conferred such a right upon the EU to essentially eliminate purely internal situations. The inroads made in this direction are the result of a competence creep and are not to be mistaken for conferral. Moreover, satisfaction of the cross-border element in such artificial circumstances would dramatically diminish the range of situations regarded as purely internal, thus encroaching on matters which, following the orthodox approach, would be considered as governed by domestic law.

Conversely, it can be argued that Member State sovereignty is now shared with the EU, with the latter more authoritative than the former, thus providing the EU competence to decide the fate of the purely internal rule.¹⁸ However, sovereignty¹⁹ and eternity clauses²⁰ in the respective legislation and constitutions is evidence that the sovereignty of the Member States is still of the utmost importance. If purely internal situations are to be abolished this could be interpreted as a threat to Member State sovereignty. The political repercussions of such an interpretation would upset the ‘federal balance’ of the EU.²¹ Given that the EU strives towards harmonisation,²² it seems that political reasons would make the abolition of the purely internal rule unjustifiable.

4 EU CITIZENSHIP AND THE GENUINE ENJOYMENT TEST

The introduction of the Maastricht Treaty brought with it the notion of EU citizenship.²³ Wollenschlager claims that the introduction of EU citizenship has necessitated a ‘constitutional paradigm shift’.²⁴ The shift implies that the economic aims of the EU²⁵ are ‘no longer the dominant constitutional core’; rather, they run parallel to the rights conferred by EU citizenship, including the rights of freedom of

¹⁶ Case C-456/12 *O v Minister voor Immigratie, Integratie en Asiel* [2014] ECR 0.

¹⁷ Consolidated Version of the Treaty on European Union [2010] OJ 2010 (TEU) art 5(2).

¹⁸ TFEU (n 13) art 2(2).

¹⁹ As is seen in the UK’s European Union Act 2011, s 18.

²⁰ K Topidi and AHE Morawa, *Constitutional Evolution in Central and Eastern Europe* (Ashgate 2010) 105.

²¹ Dominik Hanf, ‘Reverse Discrimination in EU Law: Constitutional Aberration, Constitutional Necessity, or Judicial Choice?’ [2011] MJ 18.

²² TFEU (n 13) art 114.

²³ TEU (n 17) art 9.

²⁴ Ferdinand Wollenschlager, ‘A New Fundamental Freedom Beyond Market Integration: Union Citizenship and its Dynamics for Shifting the Economic Paradigm of European Integration’ [2011] ELJ 1.

²⁵ Treaty Establishing the European Economic Community [1957] OJ 1987 L169/7: ‘The Community shall adopt measures with the aim of progressively establishing the internal market’.

movement and of non-discrimination.²⁶ This is what Menendez terms the ‘civic turn’.²⁷

The civic turn introduced a freestanding link with the EU independent of cross-border movement.²⁸ To activate such a link there must be deprivation of the ‘genuine enjoyment’ of the rights conferred by citizenship.²⁹ Unlike the relative caution exercised in the incremental competence creep of cross-border movement, the genuine-enjoyment test provided a ‘considerable’ expansion of EU competence.³⁰

This competence expansion seems to again breach the principle of conferral given that there was no express conferral of authority to bring seemingly purely internal situations within the spectrum of the EU on the basis of EU citizenship. In fact, in *Uecker and Jacquet* it was expressed that ‘Citizenship of the Union ... is not intended to extend the scope *ratione materiae* of the Treaty’.³¹ On the contrary, a teleological interpretation of citizenship arguably provides the conferral required for the EU to arbitrate in cases of reverse discrimination.³² However, declaration 42 of the Lisbon Treaty expressly prohibits justification of competence expansion through teleological interpretation.³³ Thus, the principle of conferral has been breached and it is therefore not justifiable for the genuine enjoyment test to provide grounds to challenge the purely internal rule. Moreover, the court has imposed a seemingly high threshold on what amounts to deprivation of genuine enjoyment of citizenship rights, limiting its application to removal of EU citizenship³⁴ or forced residence outside of EU territory.³⁵ The Court of Justice of the European Union has therefore demonstrated a belief that the purely internal rule in some circumstances is permissible. Such a decision can be justified by reference to the earlier points made regarding conferral and sovereignty.

Additionally, the limitations of the genuine enjoyment test do not appear to be exhaustive. It appears that the outer parameters and exclusions of the test are defined

²⁶ TFEU (n 13) arts 18–21.

²⁷ Agustin Jose Menendez, ‘European Citizenship after *Martinez Sala* and *Baumbast*: Has European Law Become More Human but Less Social?’ (2009) RECON Online Working Papers <http://www.reconproject.eu/main.php/RECON_wp_0905.pdf?fileitem=50511969> accessed 19 March 2014.

²⁸ Treaty on European Union [1992] OJ 1992 C191/1.

²⁹ Case C-34/09, *Gerardo Ruiz Zambrano v Office national de l’emploi* (ONEM) [2011] All ER (D) 199 (Mar).

³⁰ *Kochenov* (n 10).

³¹ Joined cases C-64/96 and C-65/96 *Uecker and Jacquet* [1997] ECR I-3171.

³² TFEU (n 13) art 352.

³³ Declarations Annexed to the Final Act of the Intergovernmental Conference Which Adopted the Treaty of Lisbon [2012] OJ C326/1. Teleological interpretations are permitted in limited circumstances under the TFEU (n 13).

³⁴ *Zambrano* (n 29).

³⁵ *ibid.*

on a case-by-case basis, giving rise to a criticism of lack of certainty.³⁶ Taking into consideration the arguments of competence creep and breach of conferral, these ‘grey areas’ of competence are undoubtedly detrimental in determining the bounds of competence. This notion was echoed in the Laeken Declaration where the desirability of ‘more clear and transparent’ competences, ‘ensuring that there was not a creeping expansion of EU competence’, was asserted.³⁷ Considering that the expansion of competence is expressly prohibited, in addition to the creation of uncertainty that has resulted, it appears that the limitation of purely internal situations through the genuine enjoyment test is unjustifiable.

5 EQUALITY AND NON-DISCRIMINATION

It can also be argued that matters of reverse discrimination now fall within EU competence on the basis of non-discrimination and equality.³⁸ Equality is revered within the EU, particularly when it concerns the principle of non-discrimination found in article 18 TFEU. *Grzelczyk*³⁹ demonstrates the potency of the principle of equality, establishing that EU citizens in similar situations cannot be discriminated against on grounds of nationality.⁴⁰ The Lisbon Treaty⁴¹ further strengthened this claim given that the Charter of Fundamental Rights⁴² (which embodies the principle of equality and non-discrimination) acquired equivalence to a treaty.⁴³ Moreover, following the opinion of AG Poiares, equality is considered to be ‘at the heart’ of EU citizenship.⁴⁴ Accordingly, a ‘main aim’ of the EU is to ensure no discrimination occurs through the application of EU law.⁴⁵ By analogy, reverse discrimination falls within the competence of the EU, given that it is a ‘residual’ effect of the limited scope of application of EU law.⁴⁶

However, allowing equality to bring a situation into EU competence would allow other fundamental rights, such as the right to family life, within the EU’s spectrum. The effect of this would be a substantial reduction of sovereignty with regards to immigration policy, as many purely internal situations concerning immigration could be well within the EU’s spectrum of competence by reference to the right to family life. The diminishing of sovereignty potentially affects democratic legitimacy.

³⁶ See Case C-434/09 *McCarthy v Secretary of State for the Home Department* [2011] ECR 0; Case C-256/11 *Dereci* [2011] ECR I-11315.

³⁷ Laeken Declaration, 15 December 2001.

³⁸ Tryfonidou (n 1).

³⁹ Case C-184/99 *Grzelczyk* [2001] ECR I-6193.

⁴⁰ O’Leary (n 12).

⁴¹ TFEU (n 13).

⁴² Charter of Fundamental Rights of the European Union [2000] OJ 2000 C364/01.

⁴³ TEU (n 17) art 6(1).

⁴⁴ Opinion of Advocate General Poiares Maduro, Case C-524/06 *Heinz Huber v Bundesrepublik Deutschland* [2008] ECR I-9705, [18].

⁴⁵ Opinion of Advocate General Poiares Maduro, Case C-72/03 *Carbonati Apunai Srl v Comune di Carrara* [2004] ECR I-8027, para 63.

⁴⁶ Tryfonidou (n 1).

Democracy in the EU is paramount, which is evidenced in the way it functions⁴⁷ and the requirement of democracy it imposes on its current and prospective member states.⁴⁸ A fundamental principle of democracy is that ‘the sovereignty of the people [will be] expressed in the electoral appointment of the representative’.⁴⁹ All political parties adopt a stance on immigration, with some basing their entire manifesto around it.⁵⁰ If the EU allowed fundamental rights to bring seemingly purely internal situations within their competence, they would become the ultimate arbiters on all matters of immigration. This effectually means that the representative could not express the ‘sovereignty of the people’ legitimately as the EU would control matters of immigration. Additionally, this would breach the principle of subsidiarity that indicates that with matters of shared competence the decision should be taken as closely to the citizen as possible.⁵¹ If the will of the people was overruled at national level and replaced by overarching law imposed by the EU, effectively taking the decision, as far away from the citizen as possible, the principle of subsidiarity would be breached. Then, fundamental rights, as the basis of the abolition of the purely internal rule, are unjustified.

Moreover, if the CJEU were to adopt the approach of equality and non-discrimination, it would seemingly contradict their previous decision to limit the scope of application of the genuine-enjoyment test. If the CJEU wanted to abolish reverse discrimination, why would they have passed up the opportunity to do it under the genuine-enjoyment test, only then to abolish it under principles of fundamental rights? It seems illogical. Conversely, it is worth considering that the CJEU is not bound by *stare decisis*.⁵² Therefore, despite the lack of justification established above, perhaps the equality or non-discrimination line of reasoning may reappear if the EU wishes to mount a future challenge on reverse discrimination.

6 CONCLUSION

To conclude, the cross-border element requirement is demonstrably arbitrary. Rather than providing a logical and coherent distinction between what matters are within the EU’s competence, it instead discriminates against certain static citizens and creates uncertainty in defining competences. This creates a justification as to why the EU should disregard the purely internal rule. However, questioning to what extent must a citizen cross a border to be entitled to activate their citizenship rights has provided a justification for the existence of purely internal situations that outweighs the aforementioned justification for its eradication. The ‘sufficiently genuine residence’

⁴⁷ TEU (n 17) art 10: ‘The function of the Union shall be founded on representative democracy’.

⁴⁸ Treaty of European Union [1992] OJ 1992 C191/5, art F: ‘The union shall respect ... systems of government ... founded on the principles of democracy’.

⁴⁹ S Alonso, J Keane and W Merkel, *The Future of Representative Democracy* (CUP 2011).

⁵⁰ See British National Party, United Kingdom Independence Party, *Nationaldemokratische Partei Deutschlands*, *Front National* and *Vlaams Belang* for examples of parties with strong immigration incentives.

⁵¹ TEU (n 17) art 5: ‘The use of Union competences is governed by the principles of subsidiarity’.

⁵² K McAuliffe, ‘Precedent at the ECJ: The Linguistic Aspect’ [2013] *Law and Language* 15.

threshold has justified the existence of purely internal in so far as a more lenient threshold would have breached the principle of conferral whilst threatening the sovereignty of Member States; the latter potentially creating political repercussions which the EU would want to avoid. Finally, the introduction of EU citizenship does not provide justification for the removal of the purely internal rule. Citizenship, with regards to the genuine enjoyment test, has been expressly prohibited from being used to expand competence, whilst the equality/non-discrimination argument would undermine principles of democracy.

‘THOU SHALT NOT KILL; BUT NEEDST NOT STRIVE OFFICIOUSLY TO KEEP ALIVE’: A STUDY INTO THE DEBATE SURROUNDING EUTHANASIA AND ASSISTED SUICIDE

*Lauren Coleman**

1 INTRODUCTION

How can it be lawful to allow a patient to die slowly, though painlessly, over a period of weeks from lack of food but unlawful to produce his immediate death by a lethal injection, thereby saving his family from yet another ordeal to add to the tragedy that has already struck them? It is difficult to find a moral answer to that question. But it is undoubtedly the law...¹ The phenomenon of assisted dying (AD) is one of the most controversial and contentious issues concerning society today. It is literally a matter of life and death. However, this is not a recent phenomenon. It dates back to Hippocrates² and a number of philosophers, in particular Seneca, who believed suicide was a rational response to extreme physical and mental deterioration:

I shall not abandon old age, if old age preserves me intact; but if old age ... leaves me, not life, but only the breath of life, I shall rush out of a house that is crumbling and tottering.³

The debate has continued throughout the years and is a prominent issue as a result of the technological and medical advances that mean ‘patients who would previously have died can now be kept alive’.⁴ This, coupled with the fact that ‘life expectancy [has] increased dramatically over the twentieth century’,⁵ has exacerbated the situation. ‘Paradoxically, however, it has been said, “The most striking result of the success of medical technology is the very strong trend toward the combination of

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¹ *Airedale NHS Trust v Bland* [1993] AC 789 (HL).

² The Hippocratic Oath, e.g. at

<http://www.narmc.amedd.army.mil/cg/cw/Dep%20Document%20Library/The_Hippocratic_Oath.pdf> accessed 4 December 2013.

³ Seneca, 58th Letter to Lucillus in TE Page and others (eds), *Seneca: Ad Lucilium Epistulae Morales* (Heinemann 1961) 409 quoted in E Jackson, *Medical Law: Text, Cases and Materials* (3rd edn, OUP 2013) 873.

⁴ Jackson (n 3) 873.

⁵ *ibid.*

longer lives and worsening health”⁶. Therefore, ‘around 70% [of the United Kingdom’s population] will develop one or more of the diseases of old age’,⁷ meaning the distressing issues which arise will concern an increasing number of individuals and thus his/her families. Moreover, the increasing importance of patient autonomy alongside a move towards secularism has strengthened the argument in favour of AD.

Likewise a number of high profile cases⁸ have led to intense media interest regarding end of life decisions. This has resulted in large public support for the legalisation of euthanasia and assisted suicide. Therefore, ‘this issue is no longer a matter for the chattering classes; it has penetrated the soaps and it has engaged the red tops in consulting their readers about change in this area’.⁹

1.1 Objectives

This article aims to address the key issues surrounding the euthanasia and assisted suicide debate and argue in favour of the legalisation of physician AD for adults by a doctor.¹⁰ This will inevitably mean reform is needed. Consideration will be given to opponents of the decriminalisation of AD. However, it will ultimately be contended these arguments are weak and do not endure against the countervailing interests of those forced to suffer as a result of the status quo. This article will build upon research from academic journals, books and commentaries on the current law, as well as from debates in this area,¹¹ and data obtained under the Freedom of Information Act¹² from the Crown Prosecution Service.¹³

Section 2 aims to address the key legal, moral and ethical issues surrounding the AD debate. Section 3 outlines and analyses the developments of key legislation, as well as some relevant contextual information that may have influenced the progression of the debate. Section 4 considers several landmark cases and the influence they have had on the debate. This article ultimately concludes that the law surrounding both euthanasia and assisted suicide is ‘incoherent and inadequate, and, more importantly in policy

⁶ D Callahan, *The Troubled Dream of Life: In Search of a Peaceful Death* (Georgetown University Press 2000) 43–44 quoted in S McLean, *Assisted Dying: Reflections on the need for Law Reform* (Routledge Cavendish 2007) 1.

⁷ E Jackson (n 4) 873.

⁸ *Bland* (n 1); *R (Pretty) v DPP* [2002] 1 AC 800 (HL); *R (Purdy) v DPP* [2009] UKHL 45, [2010] 1 AC 345; *R (Nicklinson) v Ministry of Justice* [2013] EWCA Civ 961, [2014] 3 WLR 200; *R (Nicklinson) v Ministry of Justice* [2014] UKSC 38, [2014] 3 WLR 200. These cases will each be discussed in turn in section 4, below.

⁹ HL Deb 5 March 2014, vol 752, cols WS 131, WA 311 (Lord Warner). See also ‘Coronation Street’ (Episode 8305, ITV1 Television, 20 January 2014).

¹⁰ But see Associated Press, ‘Belgium expected to legalise euthanasia for children’ *The Guardian* (London, 12 February 2014) <<http://www.theguardian.com/world/2014/feb/12/belgium-legalise-euthanasia-children-death-pain>> accessed 18 March 2014; HL Deb 5 March 2014, vol 752, cols WS 131, WA 311 (Baroness Campbell).

¹¹ G Judge and P Saunders, ‘Assisted Dying Bill Debate 2014’ (*YouTube*, 26 March 2014) <https://www.youtube.com/watch?v=8w_JGEDdeyg&feature=youtu.be> accessed 27 February 2014.

¹² Freedom of Information Act 2000.

¹³ Email from CPS caseworker to author.

terms, unworthy of our open, ethically humane 21st century society which [reflects] individual rights'.¹⁴ And therefore reform is anxiously awaited from the second reading of Lord Falconer's Assisted Dying Bill in the summer.¹⁵ This emphasises the live nature of the debate.

1.2 Definition

As noted by Keown, 'The euthanasia debate is riddled with confusion and misunderstanding. Much of the confusion derives from a failure of participants in the debate to define their terms'.¹⁶ Such 'an unfortunate imprecision in definition [has meant] much of the debate has been frustrating and sterile'.¹⁷ Therefore, it is imperative to state at the outset the definition this article aims to discuss.¹⁸

1.2.1 Euthanasia

The term 'euthanasia' comes from the Greek words *eu* (good) and *thantos* (death).¹⁹ The Oxford English Dictionary defines the term as: 'a gentle and easy death, the bringing about of this, especially in the case of incurable and painful disease'.²⁰ The definition of euthanasia can be further subcategorised as:

- 1) 'Voluntary active euthanasia' (VAE), i.e. 'a doctor deliberately acts to kill a patient at [their] request',²¹ punishable as murder in English Common Law.
- 2) 'Passive euthanasia' which some commentators use to describe the withholding or withdrawing of life-prolonging medical treatment,²² which is considered legal in English Common Law.²³

1.2.2 Assisted Suicide

The Suicide Act 1961, section 2 states:

- (1) A person who aids, abets, counsels or procures the suicide of another, or an attempt by another to commit suicide shall be liable on conviction on indictment to imprisonment for a term not exceeding fourteen years...
- (4) ... with the consent of the Director of Public Prosecutions (DPP).

¹⁴ HL Deb 5 March 2014, vol 752, cols WS 131, WA 311 (Baroness Jay).

¹⁵ Assisted Dying HL Bill (2013–14) 24; HL Deb 5 March 2014, vol 752, cols WS 131, WA 311 (The Minister of State, Ministry of Justice, Lord Faulks): 'no date has been set for Second Reading of the Bill'.

¹⁶ J Keown, *Euthanasia, Ethics, and Public Policy, An argument against legislation* (CUP 2002) pt 1.

¹⁷ *ibid* 16.

¹⁸ 'Assisted dying' in this paper includes euthanasia and assisted suicide.

¹⁹ E Jackson (n 4) 874.

²⁰ Angus Stevenson and Maurice Waite (eds), *Concise Oxford English Dictionary* (12th edn, OUP 2011).

²¹ E Jackson (n 4) 874.

²² *ibid*.

²³ As seen in *Bland* (n 1).

The definition attracts controversy due to the fact the act of suicide is no longer a crime.²⁴ However, assisting in suicide is punishable by imprisonment of up to fourteen years at the discretion of the DPP.²⁵ The ambiguity surrounding assisted suicide has received much attention in the twenty-first century.²⁶ This led to the DPP issuing guidance²⁷ in an attempt to instil certainty in the law; however its success is questionable.²⁸ While some argue ‘The DPP’s guidelines are to be celebrated as an essential tool in providing protection to society’s most vulnerable people’,²⁹ a more persuasive argument is that ‘the effect that the guidelines have, is to encourage amateur assistance and to drive people to Switzerland ... As for deterrence, the numbers joining Dignitas (Swiss AD clinic) [are increasing. Therefore, the guidance] does not work on either basis’.³⁰ Thus, more needs to be done to ensure clarity in the law in this area.³¹

2 THE LEGAL AND MORAL ISSUES

Lord Browne-Wilkinson summarises the heart of the legal and moral issues present in the debate surrounding AD: ‘How can it be lawful to allow a patient to die slowly... but unlawful to produce his immediate death by a lethal injection’.³² This reflects how the issues of law and morality are inextricably linked on this highly controversial topic. Whilst legal positivists ‘claim there is no necessary connection between law and morality’,³³ arguably, the ‘judge’s sense of the moral answer to a question ... has been one of the great shaping forces of the common law’.³⁴

This section deals with the issue of transparency, legal hypocrisy and lack of clarity in the existing law³⁵ and how this causes moral dilemmas for friends and relatives considering assisted suicide. Deliberation into the moral issue of autonomy will follow alongside the quality of life debate. This section ultimately reflects how the law is inadequate and therefore reform is urgently needed. Public support for AD is increasing rapidly – 73% of people support a change in the law on assisted dying³⁶ –

²⁴ Suicide Act 1961, s 1.

²⁵ *ibid* s 2.

²⁶ *Pretty* (n 8); *Purdy* (n 8).

²⁷ Director of Public Prosecutions, ‘Policy for Prosecutors in Respect of Cases of Encouraging or Assisting Suicide’ (DPP AS Policy) (February 2010) <http://www.cps.gov.uk/publications/prosecution/assisted_suicide_policy.html> accessed 10 October 2013.

²⁸ See section 3, below, for further discussion on this issue.

²⁹ HL Deb 5 March 2014, vol 752, cols WS 131, WA 311 (Baroness Campbell).

³⁰ *ibid* 1415 (Lord Falconer).

³¹ This will be expanded upon in sections 2–4 below.

³² *Bland* (n 1) 885 (Lord Browne-Wilkinson).

³³ S Veitch, E Christodoulidis and L Farmer, *Jurisprudence: Themes and Concepts* (Routledge Cavendish 2007) 123.

³⁴ *McFarlane v Tayside Health Board* [2000] 2 AC 59 (HL) 977–78 (Lord Steyn). See section 4 below for a further discussion of the interplay of morality in the legal reasoning of cases.

³⁵ See section 3 below.

³⁶ A Jones, ‘Let sick Brits die like Hayley: 73% of Brits back Corrie-style suicide’ *The Sun* (London, 2014) <<http://www.thesun.co.uk/sol/homepage/news/5376736/Three-quarters-of-Brits-believe-terminally-ill-should-have-right-to-die-like-in-Corrie-Hayley-storyline.html>> accessed 19 March 2014.

and therefore in a democratic society it is imperative that the public's concerns are heard.

2.1 *Transparency and the Hypocrisy of the Status Quo*

A central concern surrounding the AD debate is the lack of transparency in the current law:

[A] major objective of the criminal law is to warn people that if they behave in a way, which it prohibits, they are liable to prosecution and punishment. People need and are entitled to be warned in advance so that, if they are of a law-abiding persuasion, they can behave accordingly.³⁷

Arguably, 'the law, as it stands, could not be clearer'.³⁸ 'Assisting a person to commit suicide is a crime in this country'.³⁹ As argued by Lord Judge CJ, 'this provision is clear and unequivocal'.⁴⁰ However, in cases regarding compassionate assistance⁴¹ the law is 'far less certain'.⁴² Therefore, as Tur recognises:

The legislative technique exhibited by the Suicide Act privileges justice over certainty because ... the citizen cannot know in advance whether or not [they will be] prosecuted ... this defect in the information available to the citizen should be addressed and corrected.⁴³

It is important to note since Tur's article DPP Keir Starmer has produced several more detailed explanations on the reasons of the decisions of cases, such as: Raymond Cutkelvin;⁴⁴ Sir Edward and Lady Downes;⁴⁵ Daniel James;⁴⁶ as well as the *Policy for Prosecutors in Respect of Cases of Encouraging or Assisting Suicide*.⁴⁷ Despite Starmer's attempts to create such guidance to restore transparency in the law, and thus certainty, such efforts have had limited success. This is because although a list of factors tending in favour and against prosecution have been produced and weighed up in several cases, emphasis is placed on the fact 'These lists ... are not exhaustive and

³⁷ *Purdy* (n 8) [59] (Baroness Hale).

³⁸ *ibid* [27].

³⁹ Suicide Act 1961, s 2(1).

⁴⁰ *R (Purdy) v DPP* [2009] EWCA Civ 92 [2].

⁴¹ Such as: *Purdy* (n 8) and *Pretty* (n 8). See section 4 below for further discussion of the cases.

⁴² *Purdy* (n 8) [27] (Lord Hope of Craighead).

⁴³ R Tur, 'Legislative technique and human rights: the sad case of assisted suicide' [2003] Crim LR 3, 9–10.

⁴⁴ K Starmer, 'The suicide of Mr Raymond Cutkelvin – decision on prosecution' (CPS, 26 June 2010) <http://www.cps.gov.uk/news/articles/the_suicide_of_mr_raymond_cutkelvin_decision_on_prosecution/index.html> accessed 10 December 2013.

⁴⁵ K Starmer, 'Statement regarding the deaths of Sir Edward and Lady Downes' (CPS, 19 March 2010) <http://www.cps.gov.uk/news/latest_news/the_death_of_sir_edward_and_lady_downes/index.html> accessed 10 October 2013.

⁴⁶ K Starmer, 'Decision On Prosecution – The Death By Suicide Of Daniel James' (CPS, 9 December 2008) <http://www.cps.gov.uk/news/articles/death_by_suicide_of_daniel_james/> accessed 10 October 2013.

⁴⁷ DPP AS Policy (n 27).

each case must be considered on its own facts'.⁴⁸ This means, while a case may be similar to one mentioned by Starmer, a different outcome may follow based on a small, yet seemingly significant change in the facts: 'one factor alone may outweigh a number of other factors'.⁴⁹ While this allows for flexibility, it is notably at the expense of certainty.

Additionally, as this list is not exhaustive, this may cause difficulty for unique cases that come before the court. Therefore, a more concerted effort to produce certainty in this area of law is indeed desirable. As the preference seems to point towards lenient sentencing, if any, the most appropriate step would be to legalise the phenomenon and concentrate on safeguarding the issue rather than justifying why it is not in the public interest to prosecute.

A common theme in the explanations for decisions in the above cases⁵⁰ is the circumvention of the law through the second stage of the Full Code test.⁵¹ In each of the cases, it is concluded by Starmer, that despite there being 'sufficient evidence to prosecute',⁵² a prosecution is either 'not needed',⁵³ 'not required',⁵⁴ or 'consent has not been given to the bringing of a prosecution'.⁵⁵ The 'remarkable leniency'⁵⁶ is demonstrated through the statistics: '13% of mercy killing cases and 15% of [VAE] cases, criminal charges are dropped or, on the advice of the [DPP], never initiated'.⁵⁷ CPS records show that 'from 1st April 2009 to 1st April 2014 there have been ninety-four cases recorded as assisted suicide/euthanasia ... and only one case of assisted attempted suicide was successfully prosecuted in October 2013'.⁵⁸

Branthwaite elaborates on this point by raising attention to the fact even where a lenient sentence is secured, 'there is no public outcry that punishment has been inadequate'.⁵⁹ This supports the argument that the majority of the public, 'Around ...

⁴⁸ *ibid.*

⁴⁹ *ibid.*

⁵⁰ *ibid* 45–47.

⁵¹ The Evidential Stage set out in The Code for Crown Prosecutors (CPS, 28 October 2013) <http://www.cps.gov.uk/publications/code_for_crown_prosecutors/codetest.html> accessed 27 October 2013.

⁵² K Starmer, 'The suicide of Mr Raymond Cutkelvin - decision on prosecution' (n 44) para 3.

⁵³ K Starmer, 'Decision On Prosecution - The Death By Suicide Of Daniel James' (n 46) para 35.

⁵⁴ K Starmer, 'The suicide of Mr Raymond Cutkelvin - decision on prosecution' (n 44) para 36.

⁵⁵ K Starmer, 'Statement regarding the deaths of Sir Edward and Lady Downes' (n 45).

⁵⁶ S McLean, *Assisted Dying: Reflections on the need for Reform* (Routledge Cavendish 2007) 141.

⁵⁷ *ibid.*

⁵⁸ Email from CPS caseworker.

⁵⁹ AM Branthwaite, 'Taking The Final Step: Changing The Law On Euthanasia And Physician AS: Time For Change' (2005) 331 *BMJ* 681, 682.

(80%)’ support legalising ‘voluntary euthanasia carried out by a doctor for a patient who has a painful ... and terminal illness’.⁶⁰

This leads to McLean’s fitting question: ‘What purpose is served by a law which technically criminalises behaviour which it then effectively ignores and forgives?’⁶¹ The hypocrisy within the law and lack of transparency leads to a severe lack of clarity and thus uncertainty. This is immensely problematic for both citizens, as well as the judges, particularly in lower courts trying to understand the confusing precedent. Hence, legalisation with more thorough safeguards is the most desirable option to create more clarity and transparency, as well as alleviating the issues of the hypocritical status quo.

To summarise:

[T]he current law is ineffective and inconsistent: not only does it fail to stop the clandestine practise of AD by some doctors but it hypocritically permits some form of medical practice, such as administering life-shortening doses of palliative drugs which are actually a form of euthanasia.⁶²

2.2 *Vitalism: Sanctity and Quality of Life*

Within this line of argument are three levels of support: vitalism; sanctity of life; and quality of life, though advocates of each condemn AD. ‘Vitalism holds that human life is an absolute moral value ... [and should] be preserved at all costs’.⁶³ Protagonists argue AD is unequivocally immoral and illegal. This adopts an immensely objective approach without much consideration for individual cases.⁶⁴ To adopt such an objective approach in an area where emotion is of such high significance seems somewhat nonsensical and thus irrational. Foot reinforces this point by explaining: ‘to save or prolong a man’s life is not always to do him a service’.⁶⁵ Further support for this is found in writings as far back as the Greek philosopher, Socrates:

[W]e can imagine forms of physical/spiritual degeneration that would make life not worth living ... Death would be a misfortune only when it deprived one of a life that is worth living, and this is, arguably, not always the case.⁶⁶

⁶⁰ A Park and E Clery, ‘Assisted dying and decision making at the end of life’ (National Centre for Social Research, London) 2 <www.natcen.ac.uk/media/3046/assisted-dying-and-decision-making.pdf> accessed 8 February 2015.

⁶¹ McLean (n 56) 144.

⁶² Keown (n 16) part 2.

⁶³ *ibid* 39.

⁶⁴ e.g. *Pretty* (n 8). See section 4 below.

⁶⁵ P Foot, ‘Euthanasia’ (1977) 6 *Philosophy and Public Affairs* 85, 88.

⁶⁶ I Soll, ‘On the purported insignificance of Death; Whistling Before the Dark?’ in Malpas and Soloman, *Death and Philosophy* (Routledge 1998) 28 quoted in S Ost, *An analytical study of the Legal, Moral, and Ethical aspects of the living phenomenon of Euthanasia* (Edwin Mellen 2003).

The fact it is recognised that it is ‘not always the case’ that a life is considered ‘worth living’ again accentuates that the dispassionate nature of vitalism is an inappropriate and unconvincing argument to unconditionally prohibit all acts of euthanasia and assisted suicide.

The second contribution to this line of argument concerns quality of life. Quality of life is described as ‘an assessment of the patient’s condition as a preliminary to gauging the worthwhileness of a proposed treatment’ and ‘assessment of the worthwhileness of a patient’s life’.⁶⁷ With regards to the worthwhileness of the treatment, it could be argued if someone is experiencing a terminal illness their treatment is essentially futile, as they have no prospect of restoring good health. So, if AD were to be granted on this basis alone there could be substantial concerns.

However, the second stage of the definition refers to the worthwhileness of a patient’s life. This duly takes a more subjective approach than that of vitalism, taking into consideration the individual. Though opponents would contest that it is too subjective and could concern issues of patient exploitation by doctors – with ulterior motives, and pressing demands for hospital funding – as well as the concern of greedy inheritance-guzzling relatives. This raises a valid apprehension, but, as has been mentioned earlier, such practices, through various loopholes, are already occurring, so surely it is better to legalise the phenomenon and deal with such issues through safeguards, rather than adopt the attitude ‘ignorance is bliss.’⁶⁸

The third and final contribution to this line of argument is the sanctity of life: the view that each life is holy and sacred, and God upholds the ultimate right to decide when to take that life. Proponents of the sanctity of life argument would agree with Dworkin that ‘The conviction ... human life is sacred, probably provides the most powerful emotional basis for resisting euthanasia’.⁶⁹ But research shows ‘Less than 11% of adults in England engage in any religious activity’.⁷⁰ Consequently, as this argument emanates from such a religious background, inferences could be drawn to suggest that in our predominantly secular society, less than 11% of adults find this a convincing argument to prohibit AD. If this is so, this seems an extremely weak argument.

To throw doubt on an already insubstantial argument, of the small minority of religious people within England, statistics from the YouGov 2013 survey show, ‘64% of religious people support a change in the law on [AD]’.⁷¹ Nonetheless, regardless of

⁶⁷ Keown (n 16) 44.

⁶⁸ T Gray, ‘Ode on a Distant Prospect of Eton College’ (1747) 99 reproduced <<http://www.thomasgray.org.uk/cgi-bin/display.cgi?text=odec>> accessed 29 October 2013.

⁶⁹ R Dworkin, *Life’s Dominion: An argument about abortion and euthanasia* (Harper Collins 1993) 195.

⁷⁰ ‘New analysis shows very few people in England engage in religious activity’ (National Secular Society, 17 October 2013) <<http://www.secularism.org.uk/news/2013/10/new-analysis-shows-very-few-people-in-england-engage-in-religious-activity>> accessed 30 October 2013 citing S Bruce and T Glendinning, ‘Future First’ (Brierley Consultancy, October 2013).

the numbers opposing AD, ‘Critics of the sanctity of life principle argue that although supporters of it are entitled to their views, they should not impose them on others who reject the view that life has inherent value’.⁷² So, in such individual cases where AD would be desirable for a patient, it is unfair that they should be deprived of that right because of the beliefs of others. Support for this can be found from the philosopher, John Stuart Mill:

[N]either one person, nor any number of persons, is warranted in saying to another human of ripe years, that he shall not do with his life for his own benefit what he chooses to do with it.⁷³

With furtherance to this issue, ‘Durkheim presented a theory of social cohesion [stating] technologically undeveloped societies [tend] to [have] a single, consensually held moral code ... In a technologically advanced society such as our own ... it is unlikely that we will find such a monolithic moral code’.⁷⁴ Because such a collective conscience, though desirable is unattainable, the most appropriate way in which to progress with the law surrounding AD would be to legalise it for those who have truly weighed it up and concluded this is the best option for them. It is by no means forced upon people so those who are opposed to it simply do not have to exercise their right.⁷⁵ This raises the issue that despite statistics displaying widespread public support for AD,⁷⁶ it is still illegal; this could lead to a lack of confidence in the law.

⁷¹ YouGov commissioned by IFDiD, ‘YouGov / University of Lancaster Survey Results’ (YouGov; Dignity in Dying 2013) <http://cdn.yougov.com/cumulus_uploads/document/mm7go89rhi/YouGov-University%20of%20Lancaster-Survey-Results-Faith-Matters-130130.pdf> accessed 26 March 2014; see also ‘Assisted Dying: Public opinion’ (Dignity in Dying) <<http://www.dignityindying.org.uk/assisted-dying/public-opinion/>> accessed 30 October 2013; ‘Religious reasons for assisted dying seminar’ (Dignity in Dying 2013) <<http://www.dignityindying.org.uk/blog/religious-reasons-for-assisted-dying-seminar/>> accessed 26 March 2014; ‘Religious Leaders Support Assisted Dying’ (Dignity in Dying 2014) <<http://www.legallaw.com>> accessed 26 March 2014; J Cartwright, ‘Religious leaders contemplate assisted dying’ (Dignity in Dying 2013) <<http://www.dignityindying.org.uk/blog/religious-leaders-contemplate-assisted-dying/>> accessed 26 March 2014; A Brown, ‘Assisted suicide poll shows support among majority of religious people’ *The Guardian* (London, 30 April 2013) <<http://www.theguardian.com/society/2013/apr/30/assisted-suicide-poll-religious>> accessed 26 March 2014; W Dahlgreen, ‘Three In Four Support Changing Assisted-Dying Law’ (YouGov 2013) <<http://yougov.co.uk/news/2013/12/16/three-four-support-changing-assisted-dying-law/>> accessed 26 March 2014; A Bahnot, ‘Assisted Dying debate of those terminally ill and in incessant pain’ (Hindu Council UK, 30 March 2014) <<http://www.hindu counciluk.org/circulars/461-assisted-dying-debate-of-those-terminally-ill-and-in-incessant-pain>> accessed 1 April 2014.

⁷² E Jackson, ‘Secularism, Sanctity and the wrongness of killing’ (2008) 3 *Biosocieties* 125, 126.

⁷³ John Stuart Mill, *On Liberty* (4th edn, Longman, Roberts, & Green Co 1869) iv.

⁷⁴ P Harris, *An Introduction to Law* (CUP 2007) 26.

⁷⁵ This relates to the point made earlier by Jackson, ‘Secularism, Sanctity and the wrongness of killing’ (n 72).

⁷⁶ Noted Sector Society (n 70).

To conclude, as noted by Lord Goff: ‘the principle of the sanctity of human life ... fundamental though it is, is not absolute’.⁷⁷ Therefore, ‘it may have to take second place to human dignity’.⁷⁸ Consequently, such a dogmatic approach⁷⁹ is not appropriate and the small amount of support surrounding the sanctity of life argument suggests it is not a valid reason to prohibit the practice of AD when regulated with sufficient safeguards. The quality of life argument lends potentially a more appropriate method of determining the futility of treatment and the appositeness of allowing AD to advance.

2.3 *Autonomy: Individual and Collective*

Another prominent issue is autonomy. Autonomy can be separated into two parts: individual and collective. Autonomy, in its simplest form, means ‘the right of self-government’.⁸⁰ Generally, with regard to AD in the UK, the law takes a paternalist approach. ‘Paternalism ... can be defined as coercive intervention to the behaviour of a person to prevent the individual from causing harm to [themselves]’.⁸¹ Such an approach is detrimental to the individual attempting to choose to prematurely end their life. But autonomy in itself is problematic and this leads to further concerns from AD’s opponents.

One of AD’s opponents’ main worries with the issue of allowing individual autonomy is that ‘Requests are likely to emanate from patients experiencing significant distress at the close of their lives, whose judgment is impaired by [pain, the] side effects of medical treatment and warped by clinical depression’.⁸² This suggests patients’ autonomous views are ever changing. Of course, the pressures of their circumstance may influence a patient. But in many cases pain, depression, etc. are terminal. Perhaps the fact patients are influenced is irrelevant because, until death, whether naturally or artificially, such pressures will continue to influence them.

Secondly, with regards to collective autonomy, ‘[AD] is undoubtedly an issue which affects society as a whole’.⁸³ Adversaries of AD argue that to legalise such practises would lead to a slippery slope: ‘By removing legal barriers to the previously “unthinkable” and permitting people to be killed, society would open up new possibilities of action’.⁸⁴ However, it could be contended that as has already been

⁷⁷ *Bland* (n 1) 863–864.

⁷⁸ *R (Burke) v General Medical Council* [2005] EWCA Civ 1003, [2006] QB 273 [61].

⁷⁹ As adopted namely by vitalism.

⁸⁰ *Concise OED* (n 20).

⁸¹ E Garzón Valdés, ‘On Justifying Legal Paternalism’ (1990) 3 *Ratio Juris* 173.

⁸² Keown (n 16) 56. See also section 3.4.5 below.

⁸³ S Ost, *An analytical study of the Legal, Moral, and Ethical aspects of the living phenomenon of Euthanasia* (Edwin Mellen 2003) 18.

⁸⁴ Select Committee, *Assisted Dying for the Terminally Ill Bill* (HL 2004–05, 86–II) 111.

mentioned, such practices are already occurring, and so regulating and safeguarding this is a more appropriate approach.⁸⁵

Ost supports the view that there is societal, collective gain from the patient being allowed to make informed decisions on their life: '[AD] through the administration of lethal treatment serves to protect society from costs that it would incur as a result of continuing to treat terminally ill patients, who wish to die'.⁸⁶ This has valuable connotations, particularly in the current economic climate in the UK. Crude though it may seem to use such a cost-benefit explanation, the fact that some patients who want to die are given unwanted and often-futile treatment, which escalates to very high figures, is illogical. This could be better spent on patients who also require treatment but more importantly, wish to live.

To concur, Habermas states 'private and public autonomy reciprocally presupposes one another in such a way that neither one may claim primacy over the other'.⁸⁷ However, they both have similar aims and objectives. For example, individual or private autonomy is beneficial to the patient. Societal or public autonomy benefits society as a whole by allowing those who need and wish to receive healthcare the opportunity to do so, whilst respecting those who do not wish to exercise such rights and instead wish to die.

2.4 Conclusion

This section addressed the complexity of the salient moral and legal issues surrounding the AD debate, thus explaining why the current law is indefensible, and why reform is vital in order to instil clarity, transparency and certainty. To reiterate, evidence shows that circumvention of the rules is occurring and so it would be more appropriate to decriminalise, regulate, and safeguard such practices to ensure the vulnerable are not exploited, rather than to take an ignorance approach.⁸⁸ Finally, it is important to note, 'The law is subject to powerful Human Rights challenges and it is likely that it will continue in the future. Given that the ethical issues raised are of such sensitivity and complexity, any changes in the law are likely to be gradual'.⁸⁹

3 DEVELOPMENT AND ANALYSIS OF LEGISLATION

The law on AD has been prevalent in society for many years. This section outlines the development of the key legislation. As the same recurring themes appear in the Parliamentary debates, a thorough analysis of the most recent Bill⁹⁰ will be discussed, though this will reflect the arguments of previous debates outlined earlier in the

⁸⁵ See section 5, below.

⁸⁶ Ost (n 83) 19.

⁸⁷ J Habermas, 'Between Facts and Norms: Contributions to a Discourse Theory of Law and Democracy' (Cambridge Polity Press) 455 quoted in Ost (n 83).

⁸⁸ These issues will be referred to in section 3, below, where a more thorough analysis of the legislation will be discussed and section 4 below where the key cases will be examined.

⁸⁹ E Jackson (n 4) 1125. There is further discussion of the reforms in section 5 below.

⁹⁰ Assisted Dying HL Bill (2013–14) 24.

section. A brief mention of contextual information, which may have influenced the progression of the debate, will also be made. This section ultimately concludes that the current legislation⁹¹ ‘is over 50 years old and is out of step with public opinion and morals’.⁹² Therefore, the phenomenon should be decriminalised and regulated scrupulously with effective safeguards.⁹³

3.1 *Historical Developments in the Law*

Concerns regarding AD date back to the Hippocratic Oath. However, despite the fact ‘the oath prohibited doctors from giving ‘a deadly drug to anybody’ few ancient physicians followed [it] faithfully’.⁹⁴ This reflects that even as early as 5 BC there was circumvention of the rules. Therefore, the Hippocratic Oath ‘can be seen as archaic and in need of reform to reflect changes in societal standards, technology, medical science and healthcare practices’.⁹⁵

Fast-forwarding to the 18th century, Sir Thomas More, a prominent Christian, recommended euthanasia in his book, *Utopia*. Here it is argued ‘if a disease is agonising without cessation, then the priests exhort this man ... to free himself from this bitter life ... or else to permit others to free him’.⁹⁶ Similarly, in the 1870s, Samuel Williams wrote the first article dealing with the concept of ‘medicalised’ euthanasia:

[I]t should be the duty of the medical attendant, whenever so desired by the patient ... to [induce a] quick and painless death; precautions being adopted to prevent any possible abuse.⁹⁷

This reflects the support for the phenomenon as early as the 18th and 19th centuries, as well as an understanding of the importance of the need for precautions to prevent any possible abuse.

3.2 *20th Century Developments*

The next significant development emerged in 1931, when Dr Killick Millard gave the Presidential Address at the Annual General Meeting of the Society of Medical Officers of Health.⁹⁸ Here, Millard advocated the legalisation of VAE in the case of terminal illness, thus provoking substantial discussion in Britain. This led to the

⁹¹ Suicide Act 1961, s 2(1).

⁹² Judge and Saunders (n 11).

⁹³ The development of the legislation will be prevalent in a discussion of the case law surrounding this area – see section 4 below.

⁹⁴ I Dowbiggin, *A Merciful End: The Euthanasia Movement in Modern America* (OUP 2003) 2.

⁹⁵ J Silverman, ‘Should doctors change the Hippocratic Oath?’ (How Stuff Works)

<<http://www.howstuffworks.com/hippocratic-oath.htm>> accessed 4 December 2013.

⁹⁶ T More, *Utopia* (Reilly 1737) 94–95. More’s book shows support for euthanasia from a religious perspective.

⁹⁷ S Williams, *Essays by Members of the Birmingham Speculative Club* (Williams & Norgate 1870) 212 (Essay VI).

⁹⁸ Dr Millard was Medical Officer of Health for Leicester from 1901–1935.

establishment of the British Voluntary Euthanasia Society (VES) in 1935.⁹⁹ The VES did not aim to build a popular movement initially but attempted to construct, according to Kemp, ‘a network of distinguished sympathisers able to influence policy at high levels’.¹⁰⁰ The fact ‘VES has around 55,000 members and supporters’¹⁰¹ reflects public support for the phenomenon.¹⁰² The following year ‘George V was injected with a fatal dose of morphine and cocaine to ensure him a painless death’,¹⁰³ though this was kept secret for the next fifty years. This reflects the issue of the rich/poor divide which emerges in the debate today.¹⁰⁴

Following the creation of the VES, Lord Ponsonby initiated the Voluntary Euthanasia Bill in 1936.¹⁰⁵ However, due to ‘cumbersome safeguards’ and arguably ‘too much formality in the sickroom’,¹⁰⁶ the Bill was rejected on its second reading 35-14. Shortly after, World War II (WWII) commenced. The discovery that ‘Hitler issued orders that doctors be commissioned to grant a mercy death to patients who were judged to be incurably sick’ amounting to ‘70,000 patients killed’¹⁰⁷ ‘made the issue unpalatable and pushed it off the public agenda’¹⁰⁸ for many years. This explains why ‘the debate became silent for a long period’ following WWII.¹⁰⁹

3.2.1 *Legal Framework*

The Homicide Act 1957 highlights the return of the issue on AD. Section 4(1) states:

It shall be manslaughter, not murder, for a person acting in pursuance of a suicide pact between him and another to kill the other or be a party to the other ... being killed by a third person.

⁹⁹ Now known as *Dignity in Dying*.

¹⁰⁰ N Kemp, *Merciful Release: A History of the British Euthanasia Movement* (Manchester University Press 2002) 83.

¹⁰¹ *ibid.*

¹⁰² This is further reflected in the YouGov statistics which will be discussed further in relation to HC Deb 27 March 2012, vol 542, cols 1363–1440.

¹⁰³ J Cartwright, ‘A History of Assisted Dying in the UK’ quoted in L Close and J Cartwright (eds), *Assisted Dying: Who makes the Final Decision?* (Peter Owen 2014).

¹⁰⁴ i.e. the financial implications for death tourism.

¹⁰⁵ Voluntary Euthanasia (Legalisation) HL Bill (1936–37).

¹⁰⁶ M Otlowski, *Voluntary Euthanasia and the Common Law* (OUP 2000) 334.

¹⁰⁷ HC Deb 27 March 2012, vol 542, col 1426.

¹⁰⁸ C Odone, ‘Assisted Suicide: How the chattering classes have got it wrong’ (Centre for Policy Studies 2010) <<http://www.cps.org.uk/publications/reports/assisted-suicide-how-the-chattering-classes-have-gotten-it-wrong/>> accessed 4 December 2013.

¹⁰⁹ D Chao, N Chan and W Chan, ‘Euthanasia Revisited’ [2001] *Family Practice* 128, 129.

This clearly establishes a criminal offence for any form of suicide pact. This was further supplemented in the Suicide Act 1961, which has been referred to as the ‘cruellest torture instrument’.¹¹⁰ Section 2(1) states:

A person, who aids, abets, counsels or procures the suicide of another, or an attempt by another to commit suicide, shall be liable on conviction on indictment to imprisonment for a term not exceeding fourteen years.¹¹¹

This statute created an unusual offence given that section 1 abrogated the criminal offence of committing suicide.¹¹² This in itself has often been the topic of debate¹¹³ regarding a change in the law on the grounds of discrimination,¹¹⁴ i.e. it is discriminatory to permit a person with capacity to commit suicide/attempt to commit suicide but prevent someone without capacity to seek a premature death. Though it has been contented whilst suicide was decriminalised,¹¹⁵ this does not give a citizen the right to commit suicide,¹¹⁶ a concept that arguably lacks clarity and coherence.

Further attempts to change the law emerged in 1969 when Lord Raglan introduced ‘a Bill to legalise voluntary euthanasia’.¹¹⁷ Despite receiving more support than the previous debate,¹¹⁸ the Bill was rejected on its second reading 61-40. This was arguably due to ‘poor drafting’ and the erroneous method of creating a ‘simplified procedure’ with ‘minimal formality’.¹¹⁹

In 1976, Baroness Wootton introduced the Incurable Patients Bill¹²⁰, which aimed ‘to protect incurable patients from avoidable suffering and to strengthen their rights’.¹²¹ The House of Lords debated on the matter; however, this was again defeated 85-23.¹²² These attempts to decriminalise the law on AD reflect a lack of willingness from the majority to accept this change.¹²³

¹¹⁰ P Toynbee, ‘The 1961 Suicide Act is an instrument of state torture’ *The Guardian* (London, 31 July 2009) <<http://www.theguardian.com/commentisfree/2009/jul/31/assisted-suicide-law-debbie-purdy>> accessed 31 March 2014.

¹¹¹ Suicide Act 1961, s 2(1).

¹¹² See debate in the early stages of enactment: HL Deb 9 March 1961, vol 229, col 537.

¹¹³ See HC EDM 16 October 2006 (2005–06) 2749; HC EDM 10 December 2008 (2008–09) 230. See also HL Deb 16 March 1961, vol 229, cols 974–90.

¹¹⁴ Human Rights Act 1998, sch 1, art 14, discussed further in section 4 below.

¹¹⁵ Suicide Act 1961, s 1.

¹¹⁶ *Pretty* (n 8) 825 (Lord Bingham).

¹¹⁷ HL Deb 25 March 1969, vol 300, col 1143 (Lord Raglan).

¹¹⁸ HL Deb 1 December 1936, vol 103, cols 465–505.

¹¹⁹ *Otlowski* (n 106) 335.

¹²⁰ Incurable Patients HL Bill (1976–77).

¹²¹ HL Deb 12 February 1976, vol 368, col 226 (Lord Wells-Pestell).

¹²² *ibid* cols 226–301.

¹²³ The reasons given by those opposed are generally of similar nature throughout the debates and a thorough examination will follow later in the section in relation to Assisted Dying HL Bill (2013–14) 55/3.

3.2.2 *Social Context*

Returning to the social contexts of the development of the public's opinion on AD the 1978 play 'Whose life is it anyway?' raises many issues regarding the right to die, bringing it back into the public agenda.¹²⁴ This was achieved through placing the issue into a more perceivable setting for the laymen of the time.

Towards the end of the 20th century came the establishment of The World Federation of Right to Die Societies (WFRDS) in 1980.¹²⁵ The WFRDS manifesto states: 'The voluntarily expressed will of individuals, should be respected by all concerned as an expression of intrinsic human rights'.¹²⁶ 'The WFRDS has come to include 51 right to die organisations from 28 countries around the world'.¹²⁷ This further reflects the public interest and support to this area of the law.

Returning to the legal framework, ten years on, Roland Boyes initiated the Voluntary Euthanasia Bill in the House of Commons (HC).¹²⁸ This Bill intended 'to permit voluntary euthanasia subject to certain conditions',¹²⁹ but was defeated 101-35 due to 'lack of Parliamentary time'.¹³⁰ This demonstrates a lack of political willingness to spend time on this area of the law despite the inclusion of safeguards to prevent the abuse of the vulnerable.¹³¹

Nonetheless, in 1993, The Lords' Select Committee on Medical Ethics¹³² was set up in light of several cases.¹³³ The Committee reviewed the law on euthanasia and concluded that the procedure should not be legalised.¹³⁴ The Select Committee made a number of recommendations, namely 'high quality palliative care should be made more widely available;¹³⁵ research into new and improved methods of pain relief; and the training of healthcare professionals'.¹³⁶ Therefore, 'Although the Select Committee unanimously rejected the legalisation ... the fact that this committee was

¹²⁴ B Clark, *Whose Life Is It Anyway?* (Heinemann 1993).

¹²⁵ Which has similar values and aims to Dignity in Dying, the other leading organisation promoting assisted dying in the UK.

¹²⁶ The World Federation of Right to Die Societies, 'Manifesto' (Tokyo 2004 / Toronto 2006) <http://www.worldrtd.net/sites/default/files/pagefile/Manifesto_0.pdf> accessed 4 December 2013.

¹²⁷ Including *The Society for Old Age Rational Suicide* which was founded in Brighton & Hove in 2009.

¹²⁸ Voluntary Euthanasia HC Bill (1990-91); HC Deb 8 May 1990, vol 172, cols 1-174.

¹²⁹ *ibid* 1 (Roland Boyes).

¹³⁰ Otlowski (n 106) 335.

¹³¹ cf the slippery slope argument.

¹³² See Select Committee, Report of the Select Committee on medical ethics (HL 1993-94, 21).

¹³³ Particularly *Bland* (n 1). See further the discussion in section 4 below.

¹³⁴ Otlowski (n 106) 336-337.

¹³⁵ See discussion of intensified focus on palliative care in relation to HC Deb 27 March 2012, vol 542, cols 1363-1440.

¹³⁶ Otlowski (n 106) 338.

established [demonstrates] an awareness [of] Parliament this is a matter of societal concern'.¹³⁷

Five years later, the European Convention of Human Rights was incorporated into English Law.¹³⁸ The key articles are: article 2;¹³⁹ article 3;¹⁴⁰ article 8;¹⁴¹ and article 14.¹⁴² Although the oxymoronic approach to article 2 – the right to die under the right to life – may seem like the most appropriate ground to challenge such cases, arguably, article 3 – the right to not be subject to inhumane or degrading treatment – is more suitable. This is due to the fact 'Article 3 ... involves an absolute prohibition',¹⁴³ whereas under article 2 'exceptions are allowed'.¹⁴⁴ Although the incorporation of the Human Rights Act 1998 into English Law has had some influence on the debate,¹⁴⁵ a more desirable approach is to adopt the stance of many other European countries and decriminalise AD.

3.3 *Recent Developments*

The debate continued into the 21st Century with Lord Joffe's Private Member's bill,¹⁴⁶ which was based on Oregon's Death with Dignity Act 1997. 'This Bill, which would have legalised both assisted suicide and voluntary euthanasia, progressed only to second reading'.¹⁴⁷ In 2004, again Lord Joffe led the debate regarding AD for the Terminally Ill Bill.¹⁴⁸ This Bill was proposed 'to [enable] a competent adult, who is suffering unbearably as a result of a terminal illness, to receive medical help to die'.¹⁴⁹ This again shows that there is increasing willingness to devote time to investigations in this area.

This led to the Select Committee on the AD being set up in April 2005, and it ultimately concluded: 'The choice is between making medically AD visible and regulated, or allowing it to continue 'underground', without any safeguards, transparency or accountability'.¹⁵⁰ The Select Committee drew upon the fact there 'is not a question of prohibition or not prohibition; it is a question of coming up with the best regulation'.¹⁵¹ By referring to the best regulation they were implying that the

¹³⁷ *ibid* 339.

¹³⁸ Human Rights Act 1998.

¹³⁹ The right to life (or indeed death).

¹⁴⁰ The right to not be subject to inhumane or degrading treatment.

¹⁴¹ The right to a private and family life.

¹⁴² The right to not be subject to discrimination.

¹⁴³ A Garwood-Gowers, J Tingle and T Lewis, *Healthcare Law: The impact of the HRA 1998* (Cavendish 2001) 291.

¹⁴⁴ *ibid*.

¹⁴⁵ As will be reflected more thoroughly in relation to the common law in section 4 below.

¹⁴⁶ Patient (Assisted Dying) Bill [HL] (2002–03) para 37.

¹⁴⁷ Odone (n 108).

¹⁴⁸ HL Deb 10 March 2004, vol 658, cols 1316–1324.

¹⁴⁹ Assisted Dying for the Terminally Ill HL Bill (2004–05) 4.

¹⁵⁰ Select Committee, *Assisted Dying for the Terminally Ill HL Bill* (n 84) 8.

¹⁵¹ *ibid* 21.

status quo is unsatisfactory given the circumvention of the law by ‘doctors’.¹⁵² The committee argued that despite the possibility for ‘safeguard error’,¹⁵³ a balanced approach must be taken. So, decriminalising appears to be the most desirable approach with strict regulatory safeguards to protect the vulnerable.

Nonetheless, later that year, Lord Joffe presented another Bill to ‘Enable an adult who has capacity and who is suffering [from] terminal illness to receive medical assistance to die’.¹⁵⁴ The Bill ‘was the subject of an eight-hour debate at Second Reading ... [but was] defeated by 148-100’.¹⁵⁵ This further reflects the divide of supporters and opponents narrowing, showing growing support for decriminalisation of the phenomenon. Three years on in 2009, Lord Falconer initiated an amendment to the Coroners and Justice (then) Bill.¹⁵⁶ This amendment ‘sought to tighten up the Suicide Act [and] lift the risk of prosecution from those taking their loved ones to a country where assisted suicide is lawful’.¹⁵⁷ Such proposals raised concerns that it ‘gave patients no safeguards against coercion or abuse, and would be difficult to detect for a doctor with no prior knowledge of the family’.¹⁵⁸ As a result of inadequate safeguards ‘The amendment was defeated by 194-141’.¹⁵⁹ However, a more sensible approach could, arguably, be to require that a doctor does have prior knowledge so as to allow the legislation to progress than to simply fail it on such an easily rectifiable ground.

3.4 *DPP Guidelines and Government Papers*

The following year, the HL requested the then DPP, Keir Starmer, to clarify his position as to the factors that are regarded as relevant for and against prosecution.¹⁶⁰ Following the commencement of the guidelines, emphasis was added to ensure it was clear ‘[the] policy does not in any way ‘decriminalise’ the offence of assisting suicide’.¹⁶¹ It was also accentuated that the policy did not amount to immunity from prosecution.¹⁶²

Later that year, the Commission on AD published an abundance of information, having researched and compiled information from various groups regarding the issue of euthanasia and assisted suicide.¹⁶³ However, as identified by Jackson, we ‘should

¹⁵² *ibid* 27.

¹⁵³ *ibid* 20.

¹⁵⁴ Assisted Dying HL Bill HL (2005–06) 36.

¹⁵⁵ Odone (n 108).

¹⁵⁶ Coroners and Justice Act 2009.

¹⁵⁷ Odone (n 108).

¹⁵⁸ *ibid*.

¹⁵⁹ *ibid*.

¹⁶⁰ *Purdy* (n 8) [55].

¹⁶¹ DPP AS Policy (n 27).

¹⁶² This particular policy was the salient feature of the debate in the Commons: HC Deb 27 March 2012, vol 542, cols 1363–1440 and will be discussed thoroughly later in this section. See also section 4 below.

¹⁶³ Law Commission on Assisted Dying, ‘The current legal status of assisted dying is inadequate and incoherent’ (Demos 2012)

not attribute too much to the Commission, as it was funded mainly by a pressure group that holds a very clear view of the existing law and how it wishes to see it changed'.¹⁶⁴ Therefore, despite the compelling arguments, which support the argument for a change in the law, a degree of caution should be applied to potentially biased research.

3.4.1 *Parliamentary Debates*

The penultimate development, the Commons' debate on Assisted Suicide,¹⁶⁵ encapsulates the issues arising in the previous debates mentioned throughout this section and will now be examined. The debate was concerned with the DPP's guidelines.¹⁶⁶ Here, the House of Commons concluded that: 'this House welcomes the DPP's Policy ... and encourages further development of specialist palliative care and hospice provision'.¹⁶⁷ The recurring themes were: the law 'ultimately ... will need to go further';¹⁶⁸ and this is a matter for 'Parliament not the courts';¹⁶⁹ controversy over 'decent palliative care';¹⁷⁰ and 'as politicians in a democracy, it is [their] job to reflect public opinion'.¹⁷¹

3.4.2 *Palliative care*

As a fundamental topic in the debate the matter of palliative care received significant discussion and an inevitable split of opinion on the matter. The crux of this split was that some MPs argued that with good palliative care terminally ill patients would not need to request a premature death.¹⁷² However, it is not necessarily the pain that is a problem for those requesting AD, as highlighted by Jim Fitzpatrick MP:

There is some pain, misery and indignity that cannot be ameliorated by palliative care, and being reduced to a vegetative state by increasing recourse to continuous sedation is not how some people want to end their lives.¹⁷³

To summarise, 'Some will argue that world-class palliative care is the answer. It will be for many, but it will not be for everyone'.¹⁷⁴ Consequently, 'Those who do not

<http://www.demos.co.uk/files/476_CoAD_FinalReport_158x240_I_web_single-NEW.pdf?1328113363> accessed 5 December 2013.

¹⁶⁴ HC Deb 27 March 2012, vol 542, col 1386.

¹⁶⁵ *ibid* cols 1363–1440.

¹⁶⁶ DPP AS Policy (n 27). An exploration of the cases surrounding this policy will be conducted in section 4 below.

¹⁶⁷ HC Debate 27 March 2012, vol 542, col 1140.

¹⁶⁸ *ibid* col 1402.

¹⁶⁹ *ibid* col 1363.

¹⁷⁰ *ibid* col 1392.

¹⁷¹ *ibid* col 1384.

¹⁷² *ibid* col 1377 (Mr Edward Garnier). See also Law Commission on Assisted Dying (n 163).

¹⁷³ HC Deb 27 March 2012, vol 542, col 1391 (Jim Fitzpatrick).

¹⁷⁴ *ibid* col 1405.

want to stay to the bitter end, and who think that they have a better option for a more dignified end, should have the right to choose'.¹⁷⁵

3.4.3 *Autonomy and prevention of premature deaths*

Another relevant factor, encapsulated by tetraplegic Melanie Reid is that: 'Knowing that I have a choice is a huge comfort to me'.¹⁷⁶ Caroline Lucas MP advanced this view by explaining 'It is precisely the knowledge that they have control over when they are able to die that allows them to live more fully and, often, for longer'.¹⁷⁷ An emotive anecdote shared by Paul Blomfield MP about his father's death highlights that without a change in the law deaths are likely to occur prematurely:

If the law had made it possible ... he would have been able to say goodbye and to die with his family around him and not alone in a carbon monoxide-filled garage. He and many more like him deserved better.¹⁷⁸

Heidi Alexander's MP contribution found support for this issue of the debate through the reflection on a posthumous letter by Geraldine McClelland who died at Dignitas in December 2011. The letter stated:

I am not sad that I will die today. I am angry that because of the cowardice of our politicians I can't die in [my home country.] If you feel anything at all when you read this letter then please turn it into a fight to change the law so that other people don't have to travel abroad to die, and that those who are unable to because they can't travel, or can't afford the fees don't have to attempt suicide at home or continue to suffer against their will.¹⁷⁹

This captures the heart of the issue here relating to premature deaths and the lack of autonomy of those suffering and further emphasises the need for a change of the law in this area. If the UK were to change the law in this area so as to guarantee a person's right to choose an earlier death it would more likely than not extend lives, not shorten them. Moreover, despite endorsing the DPP's policy, this does not tackle the issue of those who are not economically or physically able to travel abroad and for this reason a change in the law is essential.

3.4.4 *Implications for families*

All too often, the trauma experienced by families in the assistance of death, or the inability to assist in fear of prosecution, is forgotten. Firstly, it must be noted, that 'Since it was produced in 2010, 31 cases have been referred to the DPP but there have been no prosecutions'.¹⁸⁰ Initially, this sounds like a positive outcome, thus resulting

¹⁷⁵ *ibid* col 1392.

¹⁷⁶ *ibid* col 1638.

¹⁷⁷ *ibid* col 1384.

¹⁷⁸ *ibid* col 1402.

¹⁷⁹ *ibid* col 1405.

¹⁸⁰ HC Deb 27 March 2012, vol 542, col 1414. See also email from CPS caseworker.

in the belief that AD for motives of compassion by loved ones is becoming easier. To an extent it is, in terms of satisfying the law. However, the process that must occur before such satisfaction is granted is equally traumatising.

Perhaps the most notable anecdote was a contribution from Penny Mordaunt MP who referred to a diary extract from a man who lost his wife to cancer. The diary extract explains following an unsuccessful overdose attempt, the wife, in the absence of her husband:

[Taped] herself into a plastic bag and [ended] her life in [a] terrible way alone ... She should have been allowed to quietly slip away ... but she felt that option was not available and while she lay dead upstairs [he] was subjected to various police questioning sessions ... Even worse, she was subjected to a wholly unnecessary and barbaric post mortem and it was a fortnight before [the funeral could be held].¹⁸¹

So, despite not prosecuting, the policy guidelines do not alleviate families of the harrowing questioning and scrutiny they are faced with immediately after the loss of their loved one. Hence it would unquestionably be more appropriate and sympathetic simply to decriminalise the act of assisted suicide and regulate it with sufficient safeguards in order to relieve families of the threat of prosecution. Or, alternatively, one might legalise the phenomenon in terms of physician AD so as to relieve families of the duty altogether.

3.4.5 *Fear of becoming a burden*

Glyn Davies MP explains a small but significant issue recurring throughout the debates most concisely:

The normalisation of assisted suicide would lead to uncertainty about [vulnerable people's] own worth. They would see themselves as becoming a burden on society.¹⁸²

However, arguably, this issue could be overcome through strict safeguards imposed in this area to alleviate the possibility of such feelings. If AD were not such a taboo, those seeking it would have the opportunity to discuss how they feel and perhaps be reassured that such feelings are untrue. Furthermore, safeguards such as second opinions on the request for AD could alleviate and perhaps improve such instances where this is a concern, rather than further drive it underground.

¹⁸¹ HC Deb 27 March 2012, vol 542, col 1434–1435.

¹⁸² HC Deb 27 March 2012, vol 542, col 1398. See also D Martin, 'I'll vote against assisted dying, says Cameron' *Mail Online* (London, 26 March 2014) <<http://www.dailymail.co.uk/news/article-2589516/Ill-vote-against-assisted-dying-says-Cameron-PM-fears-people-unfairly-pressurised-ending-lives.html>> accessed 1 April 2014.

3.4.6 *Public opinion*

In a democratic society, it is imperative that the law of the land is reflective of the public opinion so as to prevent a lack of confidence. As stated by Emily Thornberry MP: ‘as politicians in a democracy, it is our job to reflect public opinion’.¹⁸³ If this were true, AD would be decriminalised due to the fact ‘82% [agree] that it is a “sensible and humane approach” not to prosecute someone who helps a close relative “with a clear, settled and informed” wish to die’.¹⁸⁴

It seems Richard Ottaway MP wrongly grouped the meaning of the policy with the decriminalisation of AD when he stated: ‘If there is a majority in the House in favour of this motion, we will have done the nation a service. If there is a majority against it, we will have a problem, as the DPP and 82% of the public will be saying one thing, and the people’s elected representatives another’.¹⁸⁵ Not to prosecute would be to imply that something is not a criminal offence. The ordinary citizen participating in the survey would not likely comprehend that to not prosecute would mean for the act to remain illegal but not be pursued due to lack of public interest. However, the interrogation and scrutiny of a loved one assisting in premature death as noted earlier would still occur and this is arguably similarly distressing. Therefore it could be contested that public opinion is still not fully reflected in the law and such inconsistency and lack of clarity could be problematic for ordinary citizens.

3.5 *The Need for Reform*

Although the outcome of the house seems a wholly sensible approach, there is a need for it to go further.¹⁸⁶ This reform should not be left to ‘the whim of the courts or to individual DPPs ... It is right that Parliament should decide’.¹⁸⁷ The main issue that lies within the policy guidelines is ‘there can be no immunity from prosecution before a crime is committed’.¹⁸⁸ This amounts to enormous uncertainty for those seeking to assist in a premature death. Therefore, decriminalisation with ‘a rigorous framework of regulation’¹⁸⁹ is a more desirable approach. Moreover, ‘Of course there must be safeguards and constructing them robustly will be difficult, but the challenge of the task should not put us off the need to do it’.¹⁹⁰ As noted by John Healey MP:

[D]espite the policy, we are left in a legal no-man’s land. For those looking to travel abroad to die, we have a policy of non-prosecution for

¹⁸³ HC Deb 27 March 2012, vol 542, col 1384.

¹⁸⁴ *ibid* col 1366.

¹⁸⁵ *ibid* col 1369.

¹⁸⁶ This will be further explored in the section 5 below.

¹⁸⁷ HC Deb 27 March 2012, vol 542, col 1430.

¹⁸⁸ *ibid* col 1365.

¹⁸⁹ *ibid* col 1417.

¹⁹⁰ *ibid* col 1402.

compassionate assistance but a law that still makes it a criminal offence, and that law, in circumstances in which it exists but is not enforced, is flawed.¹⁹¹

Arguably, the most appropriate approach would be to place ‘the DPP’s policy on a statutory footing’.¹⁹² Opponents of this argument would contend that ‘If we were to put things on a statutory basis, we would damage the current law, which is working so well’.¹⁹³ This arguably amounts to a very ignorant statement given the earlier discussion of the traumatic scrutiny that families are faced with.

3.6 *Ongoing developments*

Finally, the most recent and on-going attempt to decriminalise AD is reflected in the Assisted Dying Bill 2013.¹⁹⁴ The first reading of the Bill took place on 15th May 2013 and the second reading is yet to be scheduled. The Bill is designed to ‘Enable competent adults who are terminally ill to be provided at their request with specified assistance to end their own life; and for connected purposes’. There is little which can be said on this Bill given it is still in the early stages of development, but, it will be interesting to see if this is finally the turning point in the debate, which has been long-awaited by many.

3.7 *Conclusion*

Following an examination of the key legislative and contextual developments, it is clear that support for decriminalisation is growing. However, recurring opposing arguments are the reason why this change in the law has not yet occurred. However, the circumvention of the rules is already happening and the lack of clarity amounting from a criminal law, which criminalises an act, yet fails to prosecute, desperately needs resolution. Reform is needed to ensure grieving families are not subject to needless harrowing interrogation.

4 ANALYSIS OF THE CASE LAW

A fundamental aspect of the AD debate is the development of the common law. Such decisions have come from the highest courts in the land and often sit with the maximum number of judges; this reflects the significance of the matters.¹⁹⁵ This section considers several breakthrough cases. Firstly a brief summary of the facts will be outlined; secondly, the judgment will be analysed; and thirdly, the implications of the case will be discussed.

¹⁹¹ *ibid* col 1408.

¹⁹² *ibid* col 1374.

¹⁹³ *ibid* col 1398.

¹⁹⁴ Assisted Dying HL Bill (2013–14) 24.

¹⁹⁵ O Bowcott, ‘Right-to-die claims to be heard in Supreme Court’ *The Guardian* (London, 16 December 2013) <<http://www.theguardian.com/uk-news/2013/dec/16/right-to-die-assisted-suicide-incapacitated-supreme-court>> accessed 31 January 2014.

4.1 *Killing and Letting Die*

The ‘landmark case’,¹⁹⁶ *Airedale NHS Trust v Bland*, ‘[raised] for the first time in English Courts the question: in what circumstances, if any, can a doctor lawfully discontinue life sustaining treatment (including artificial nutrition and hydration-ANH) without which [the] person will die?’¹⁹⁷ This case ‘throws up the issue of the relation between moral and legal reasons,’¹⁹⁸ namely, ‘is it worse to kill than to let die?’¹⁹⁹ ‘[I]s it rational to distinguish between’ acts and omissions?²⁰⁰ And ‘is it *rational* to argue that it is in someone’s ‘best interests’ to cease to have interests?’²⁰¹ It will be argued, in accordance with Detmold,²⁰² there is a ‘necessary connection’ between the law and morality.²⁰³ This will be discussed in relation to the facts below:

In the course of the [Hillsborough] disaster, [Bland] suffered catastrophic and irreversible damage to the higher centres of the brain [leaving him in] a persistent vegetative state.²⁰⁴

Bland’s supervising doctor wished to withdraw Bland’s treatment in accordance with the wishes of his family in order to allow him to ‘end his life in dignity’.²⁰⁵ However, if he did, ‘he would face a murder charge.’²⁰⁶ ‘Airedale NHS Trust therefore applied to the court seeking declarations that they might lawfully discontinue all life-sustaining treatment ... The High Court granted the declaration [on the basis it] was in Bland’s best interests and consistent with good medical practice’.²⁰⁷ The Official solicitor then appealed on behalf of Bland, and the Court of Appeal affirmed the decision of the High Court unanimously. This was again appealed to the House of Lords who unanimously dismissed the appeal.²⁰⁸ The crux of the issues surrounding the case were: firstly, if the doctors were to remove ANH, and this was to be considered an act, this could constitute the criminal offence of murder; and secondly, if the removal of ANH was to be considered an omission, the doctor could be held liable under a civil duty of care.

The Law Lords circumvented these issues through various methods of reasoning evident in the judgment.²⁰⁹ As noted in Lord Bingham MR’s judgment, it is doubtful

¹⁹⁶ A McGee, ‘Ending the life of the act/omission dispute: causation in withholding and withdrawing life-sustaining measures’ (2011) 31 LS 467, 467.

¹⁹⁷ *Bland* (n 1) 797 (Sir Stephen Brown P).

¹⁹⁸ Veitch and others (n 33) 124.

¹⁹⁹ *ibid.*

²⁰⁰ *ibid* 125.

²⁰¹ *ibid.*

²⁰² M Detmold, *The Unity of Laws and Morality* (Routledge & Kegan Paul 1984).

²⁰³ *ibid* 127.

²⁰⁴ *Bland* (n 1) 806 (Lord Bingham MR).

²⁰⁵ J Wilson, ‘A Right to Die’ (2013) 177 CL&J 197.

²⁰⁶ *ibid.*

²⁰⁷ *ibid* 197–198.

²⁰⁸ *ibid* 198. See also *Aintree University Hospitals NHS Trust v James* [2013] EWCA Civ 65, [2013] 4 All ER 67 for a discussion concerning ‘the best interests of the patient’.

²⁰⁹ Veitch and others (n 33) 123–128.

that it has ever been an ‘object of medical care merely to prolong the life of an insensate patient with no hope of recovery.’²¹⁰ Lord Mustill however, took a more cautious approach, arguing ‘although the termination of his life is not in the best interests of [Bland], his best interests in being kept alive have also disappeared’.²¹¹ So, whilst he is ‘alive, [he] has no life at all’.²¹² Hence the justification for the removal of ANH was largely achieved in terms of considering Bland’s best interests.

The second hurdle was to decide if it was an act or an omission. Here the Law Lords held that removal of ANH might be regarded as an omission arguing that ‘artificial feeding is no different from life support by a ventilator, and can lawfully be discontinued when it no longer fulfils any therapeutic purpose’.²¹³ Therefore, ‘the omission to perform what had previously been a duty (keeping a patient alive by invasive treatment) would no longer be unlawful’.²¹⁴

To summarise, the declaration to allow withdrawal of ANH and not hold the medical team liable rested on the basis that such an undertaking was in fact an omission. As submitted by Wilson, ‘the decision seems manifestly correct’.²¹⁵ Nevertheless, McLean argues although the outcome of the case was desirable, there are notable ‘doubts surrounding the reasoning’.²¹⁶ It has been suggested that the Law Lords in this case used the process of ‘backwards reasoning’²¹⁷ whereby a judge decides that outcome they wish to reach, and then finds a line of legal reasoning which enables them to secure this result.²¹⁸ So, as argued by legal realists on the matter of rule-scepticism, ‘any syllogistic logic manifest in the final presentation of a judicial opinion can be contrasted to the logic by which the decision was actually reached’.²¹⁹

Lord Browne-Wilkinson noted the deficiencies in his own reasoning by explaining he had ‘reached [his] conclusions on narrow, legalistic grounds, which provide no satisfactory basis for the decision of cases which will arise in the future where the facts are not identical’.²²⁰ This reflects the fact ‘hard/novel’ cases²²¹ are unlikely to produce good precedent for future lower court judges and consequently uncertainty is likely to emerge. Furthermore, Lord Mustill emphasised this point by stating: ‘the

²¹⁰ *Bland* (n 1) 809.

²¹¹ *ibid* 897.

²¹² *ibid* 829 (Lord Hoffmann).

²¹³ *Bland* (n 1) 873 (Lord Goff).

²¹⁴ Wilson (n 205) 198.

²¹⁵ *ibid*.

²¹⁶ McLean (n 56) 122.

²¹⁷ J Frank, *Law and the Modern Mind* (Transaction 1930) 109.

²¹⁸ E Jackson and J Keown, *Debating Euthanasia* (Hart 2012) 26.

²¹⁹ Veitch and others (n 33) 101.

²²⁰ *Bland* (n 1) 885 (Lord Browne-Wilkinson).

²²¹ *ibid* 809 (Lord Bingham MR) – such as *Bland* (n 1).

whole matter cries out for exploration in depth by Parliament ... The rapid advance of medical technology makes this an ever more urgent task'.²²²

Lord Mustill explained the 'acute unease which [he felt] about adopting this way through the legal and ethical maze is [due to the fact], however much the terminologies may differ ... for all relevant purposes [they are] indistinguishable'.²²³ Otlowski supports this view that 'the dubious distinction'²²⁴ 'between the acts and omissions doctrine is most problematic and unsatisfactory'.²²⁵

Another issue highlighted in *Bland* is the repeated notion that 'This is not a case about euthanasia ... It is about whether, and how, the patient should be allowed to die'.²²⁶ Lord Goff advanced this position by distinguishing such cases as *R v Cox*,²²⁷ where a Doctor administered a lethal drug to actively end a patient's life, but again noted the shortcomings of his own judgment by explaining:

[T]he drawing of this distinction may lead to a charge of hypocrisy; because, if the doctor, by discontinuing treatment, is entitled to let his patient die, should it not be lawful to put him out of his misery straight away, in a more humane manner?²²⁸

Lord Goff's reasoning behind the rejection of the decriminalisation of euthanasia is that of the slippery slope argument.²²⁹ However, as contended by Wilson, 'with the right safeguards in place, injustice should not be inevitable'.²³⁰ Lord Browne-Wilkinson, in his concluding remarks, questions the reasoning of allowing the removal of ANH resulting in death, though with various justifications including a 'manipulation of the law of causation',²³¹ whilst at the same time refusing to legalise a more humane approach to death.

To conclude, many would agree the correct decision was reached in *Bland* but the (backwards) reasoning was questionable. While it is clear from the House of Lords decision 'ANH could be withdrawn from [Bland], not all of [the routes] are obviously compatible with each other',²³² This has notable implications for the law in practice, and also for the patient and their families.

²²² *ibid* 891.

²²³ *Bland* (n 1) 887.

²²⁴ *ibid* 898 (Lord Mustill).

²²⁵ Otlowski (n 106) 12.

²²⁶ *Bland* (n 1) 832 (Lord Hoffmann).

²²⁷ *R v Cox* (1992) 12 BMLR 38.

²²⁸ *Bland* (n 1) 865 (Lord Goff); see also 885 (Lord Browne-Wilkinson).

²²⁹ See section 5 below.

²³⁰ Wilson (n 205) 198.

²³¹ *Bland* (n 1) 895 (Lord Mustill).

²³² McLean (n 56) 121.

4.2 *Necessity*

The second milestone case, *Re A (Children) (Conjoined Twins: Surgical Separation)*, created another ‘unique’ situation.²³³ Whilst this case does not directly concern euthanasia or assisted suicide, it is pertinent to the moral issues surrounding life and death in the law. The facts of the case are:

Jodie and Mary are conjoined twins ... Whilst not underplaying the surgical complexities, they can be successfully separated. But the operation will kill the weaker twin, Mary ... Yet if the operation does not take place, both will die within three to six months.²³⁴

The doctors in this case sought a court order that would allow them to override the refusal of consent of the twins’ parents. This was allowed at first instance then appealed by the parents but was unanimously dismissed. The parents’ role in this case is analogous to patients in euthanasia cases such as *Bland* who lack capacity.²³⁵

4.2.1 *Best Interests*

The next obstacle was whether separation would be in the best interests of both twins. Little needs to be said regarding the stronger twin Jodie; the separation is clearly in her best interests. More controversially, it was held that Mary’s best interests were also met through the surgical separation. The fact Mary was ‘self-designated for an early death’,²³⁶ coupled with the uncertainty of the extent of her suffering led to the conclusion that to prolong her life would not be in her best interests and so the separation could be justified.²³⁷

4.2.2 *Legality of Separation*

Subsequently, the lawfulness of the separation procedure required attention. At first instance, Johnson J permitted the separation through the reasoning that it was an omission. To attempt to categorise a surgical separation procedure as an omission, in order to circumvent the criminal law regarding murder is ‘utterly fanciful’,²³⁸ and demonstrates the repercussions of unclear precedent on lower court judges.²³⁹

Therefore, one positive outcome of the appeal was that it established the separation would in fact constitute an act.²⁴⁰ However, the circumvention came in the form that although Mary’s death would be an inevitable consequence of the separation, it was neither the purpose, nor the intention, of the separation and was justified on grounds

²³³ [2001] Fam 147 (CA) 155; like *Bland* (n 1).

²³⁴ *Re A* (n 233) 155.

²³⁵ See Mental Capacity Act 2005.

²³⁶ *Re A* (n 233) 239 (Brooke LJ).

²³⁷ Analogous to the conceptualisation in *Bland* (n 1).

²³⁸ *Re A* (n 233) 189 (Ward LJ).

²³⁹ Namely *Bland* (n 1).

²⁴⁰ *Re A* (n 233) 189 (Ward LJ).

of necessity.²⁴¹ Such circumventions mean the common law is developing in a way that offers flexibility but at the expense of clear precedent, and certainty.

4.3 *The Human Rights Act and Request of Immunity*

The third ground breaking case, *R (Pretty) v DPP* 'is squarely founded on the HRA'.²⁴² This case was 'the first occasion on which the House of Lords [had] been asked to consider the question of assisted suicide by a terminally ill person'.²⁴³ This reflects the increase in support for the phenomenon, but, as noted, raises issues of precedent.²⁴⁴ The facts are:

[Pretty] suffers from motor neurone disease ... She is mentally alert and would like to bring her life to a peaceful end at a time of her choosing. But she can no longer, without help, take her own life ... she wishes to enlist the help of her husband to that end. He is willing to help, but only if he can be sure that he will not be prosecuted.²⁴⁵

Pretty attempted to show her Human Rights would be breached if she were not allowed to bring her life to a peaceful end and a time of her choice.²⁴⁶ However, it was unanimously held that 'Pretty [could not] establish any breach of any Convention right'.²⁴⁷ Furthermore, the request her husband be immune from prosecution was refused, arguably inevitably according to Freeman,²⁴⁸ on the basis it was beyond the DPP's 'power to indicate, before the commission of a particular crime, that he will or will not prosecute if it is committed'.²⁴⁹ Pretty applied for Judicial Review, which was refused, then appealed to the House of Lords,²⁵⁰ and again to the European Court of Human Rights.²⁵¹ Both appeals were unanimously dismissed. Despite notable dissatisfaction with the outcome of this case, arguably, 'The courts came to the only conclusion open to them'.²⁵²

Although much can be praised from the judgment,²⁵³ a significant shortcoming of this decision is that; 'Pretty was forced by the Courts to pay the price of protecting those

²⁴¹ *ibid* 219–240 (Brooke LJ).

²⁴² *Pretty* (n 8) (Lord Steyn) 827.

²⁴³ *ibid* 826 (Lord Steyn).

²⁴⁴ *ibid* 821 (Lord Bingham).

²⁴⁵ *ibid* 809.

²⁴⁶ Art 2, the right to life; art 3, the prohibition of torture and degrading treatment; art 8, the right to respect for private life and family; art 9, the right to freedom of thought, conscience and religion; and art 14, the prohibition of discrimination.

²⁴⁷ *Pretty* (n 8) 826 (Lord Bingham).

²⁴⁸ M Freeman, 'Denying Death Its Dominion: Thoughts On The Dianne Pretty Case' (2002) 10 *Med L Rev* 245, 245.

²⁴⁹ *Pretty* (n 8) 836 (Lord Steyn).

²⁵⁰ *ibid*.

²⁵¹ *Pretty v UK* (2002) 35 EHRR 1.

²⁵² Freeman (n 248) 270.

²⁵³ *Pretty* (n 8) 831 (Lord Steyn) i.e. the thorough discussion of the reasoning behind the prohibition of assisted suicide.

who are truly vulnerable'.²⁵⁴ Arguably, 'In refusing Pretty assistance with her suicide it seems that we treat the competent worse than we do those who lack competence'.²⁵⁵ Similarly, Freeman contends the argument, which attaches undue weight to the vulnerable members of society, is 'not convincing'.²⁵⁶

Moreover, Tur submits, the drafters of the Suicide Act 'opted for [an unacceptably wide] blanket rule outlawing assisted suicide, conscious that [it] might well expose morally undeserving individuals to prosecution'.²⁵⁷ Comparatively, as noted by Freeman, 'repeal of Suicide Act, without more, would not be rational policy-making. We would need a 'Death with Dignity Act' to fill the lacuna'.²⁵⁸ All four Lords raised this matter;²⁵⁹ therefore, fault cannot fall wholly upon the courts. Some blame must be attributed to the drafters of such a wide piece of legislation.²⁶⁰ Tur notes a further flaw in the judgment of *Pretty*; the doing of 'injustice in order to preserve certainty':²⁶¹

There is something fundamentally wrong in saying to someone like Pretty, 'morally you should be allowed assistance in ending your life, but ... the greater good of society requires that you should continue to suffer – hard cases make bad law'.²⁶²

The second part of *Pretty*'s request, her husband's immunity from prosecution, raises issues concerning a citizen's right to know. This was strongly expressed in *Silver v UK*: 'a norm cannot be regarded as 'law' unless it is formulated with sufficient precision to enable the citizen to regulate his conduct'.²⁶³ Likewise, Tur contends, though less convincingly so, 'The legislative technique exhibited by the Suicide Act privileges justice over certainty because in the absence of any policy the citizen cannot know in advance whether [they] will be prosecuted'.²⁶⁴ How can it be said that justice is privileged when cases such as *Pretty* are dismissed? Perhaps it would have been more appropriate to replace 'justice' with 'flexibility'.

To conclude, there is seemingly more consideration for the making of good, clear precedent in the minds of the Law Lords.²⁶⁵ However, as noted by Tur, there is arguably too much consideration for the vulnerable members of society and not enough contemplation of the legalisation of the phenomenon with sufficient

²⁵⁴ Tur (n 43) 12.

²⁵⁵ Freeman (n 248) 254, e.g. Anthony Bland: see *Bland* (n 1).

²⁵⁶ Freeman (n 248) 262.

²⁵⁷ Tur (n 43) 6, 9.

²⁵⁸ M Freeman, 'Death, Dying and the Human Rights Act 1998' (1999) 52 CLP 218, 237 quoted in *Pretty* (n 8) 834 (Lord Steyn).

²⁵⁹ Freeman (n 248) 264.

²⁶⁰ Suicide Act 1961, particularly s 2(1).

²⁶¹ Tur (n 43) 6.

²⁶² *ibid* 12.

²⁶³ *Silver v UK* (1983) 5 EHRR 347 quoted in Tur (n 43) 10. See also L Fuller, *The morality of the Law* (2nd edn, Yale University Press 1964) 39 ('Eight ways to fail to make a law').

²⁶⁴ Tur (n 43) 9–10.

²⁶⁵ *Pretty* (n 8) 823 (Lord Bingham).

safeguards. Finally, although the ‘legality principle asserts that criminal offences should be defined with sufficient clarity’,²⁶⁶ Pretty’s request that her husband would be immune from prosecution possibly requested too much.

4.4 *The Human Rights Act and the Right to Know*

The fourth momentous case, *R (Purdy) v DPP* ‘mirrors’²⁶⁷ the facts of *Pretty*:

[Purdy] suffers from primary progressive multiple sclerosis ... She expects that there will come a time when she will wish to end her life... But by that stage she will be unable to do this without assistance. So she will want to travel to a country where assisted suicide is lawful ... Her husband, is willing to help her to make this journey.²⁶⁸

The distinguishing factor in this case was that ‘Mrs Purdy [did] not ask that her husband be given a guarantee of immunity from prosecution’,²⁶⁹ rather she requested the DPP to publish policy guidelines which would allow her to ‘make an informed decision as to whether to ask for her husband’s assistance’.²⁷⁰ In the present case, the appeal was unanimously upheld and the DPP was ordered to produce a set of policy guidelines. This suggests an incremental development in the law surrounding assisted suicide is preferable. However, Lewis argues that the result has in fact amounted to ‘accelerated informal change’.²⁷¹ Regarding the judgment of the present case, much can be commended. Baroness Hale recognises:

[A] major objective of the criminal law is to warn people that if they behave in a way which it prohibits they are liable to prosecution and punishment. People need and are entitled to be warned in advance so that, if they are of a law-abiding persuasion, they can behave accordingly.²⁷²

Furthermore, Lord Neuberger acknowledges:

[I]n the absence of any such policy, there is simply no sufficiently clear or relevant guidance available as to how the very widely expressed discretion accorded to the DPP will be exercised.²⁷³

Nonetheless, some commentators argue the ruling in *Purdy* was ‘disappointing’,²⁷⁴ thus making ‘a surprisingly small contribution to the termination of life debate – the

²⁶⁶ J Herring, *Criminal Law. Text, Cases and Materials*, (3rd edn, OUP 2008) quoting G Williams, ‘Assisting Suicide, the Code for Crown Prosecutors and the DPP’s Discretion’ (2010) 181 *Comm L World Rev* 181, 193. See also Fuller (n 263) 39 (‘Eight ways to fail to make a law (2)’).

²⁶⁷ *Purdy* (n 8) [71] (Lord Brown).

²⁶⁸ *ibid* [17] (Lord Hope).

²⁶⁹ *ibid* [30].

²⁷⁰ *ibid* [30].

²⁷¹ P Lewis, ‘Informal legal change on assisted suicide’ (2011) 31 *LS* 119, 121.

²⁷² *Purdy* (n 8) [59].

²⁷³ *ibid* [102].

exception being, the stimulation of the DPP's paper'.²⁷⁵ Mason's critique of the judgment in *Purdy* is arguably too harsh as the DPP's guidelines,²⁷⁶ despite being imperfect, show a step in the right direction towards legalising AD. Nevertheless, that policy guidance, which 'could not conceivably be exhaustive',²⁷⁷ has been subject to discontentment.

Lewis raises several concerns regarding the guidance such as the lack of attempt 'to explain the reasons why these factors were chosen' as well as the lack of clarity on 'how the CPS will apply the policy to minor assistance by a healthcare professional caring for the victim'.²⁷⁸ However, the more worrying issue to be raised regarding the guidance is that 'By strongly discouraging medical involvement, the policy'²⁷⁹ essentially encourages 'amateur assistance'.²⁸⁰ This has numerous implications, e.g., an increase in 'death tourism'.²⁸¹

Furthermore, as noted by Lewis, with help from healthcare professionals there is 'a lower risk of botched suicides'.²⁸² By favouring the vulnerable and rejecting the argument that there would be sufficient safeguards in place to regulate AD, it leaves those equally vulnerable to have to exist in an underground manner without the protection of safeguards. This is wholly unacceptable and change is urgently required.²⁸³ In accordance with Lewis' conclusion it can be accepted:

[T]he policy is likely to result in assisted suicides which are more difficult, less successful and more stressful for the victim and [their] friends and family than would be the case if medical expertise were permitted in some form.²⁸⁴

Moreover, the rejection of written evidence of the victim's request as a requirement, on the basis that it resembles a 'regime for encouraging or assisting suicide' is particularly alarming.²⁸⁵ Rejecting such an important safeguard in fear of a slippery

²⁷⁴ J Mason, 'Unalike as Two Peas? *R (Purdy) v DPP*' [2009] 13 *Edinburgh L Rev* 298, 300.

²⁷⁵ *ibid.*

²⁷⁶ DPP AS Policy (n 27).

²⁷⁷ *Purdy* (n 8) [101] (Lord Neuberger).

²⁷⁸ Lewis (n 271) 122.

²⁷⁹ *ibid* 130.

²⁸⁰ HL Deb 5 March 2014, vol 752, cols 1411–1430 WS 131, WA 311 (Lord Falconer) at 1415.

²⁸¹ Select Committee, *Assisted Dying for the Terminally Ill HL Bill* (n 84) 247, see also J Laurance, 'Terminally ill man's journey to Switzerland to find dignity – and death' *The Independent* (London, 21 January 2003) <<http://www.independent.co.uk/news/uk/crime/terminally-ill-mans-journey--to-switzerland--to-find-dignity--and-death-602363.html>> accessed 3 April 2014.

²⁸² Lewis (n 271) 129. See also HC Debate 27 March 2012, vol 542, col 1435; HL Deb 5 March 2014, vol 752, cols WS 131, WA 311 (Baroness Jay); Dr Jacqueline Davis, 'Personal Stories: Kevin Davis' (Dignity in Dying 2014) <<http://www.dignityindying.org.uk/personal-story/kevin-davis/>> accessed 19 March 2014.

²⁸³ See section 5 below.

²⁸⁴ Lewis (n 271) 130.

²⁸⁵ *ibid* 123.

slope seems almost paradoxical and arguably requires reconsideration. This is heightened by the fact the policy does not contain ‘any restrictions based on the victim’s condition or experience [thus making the policy] more liberal in this respect than most AD regimes’.²⁸⁶ So, in attempting to protect the vulnerable, the guidance has seemingly failed and led to a policy which ‘covers a much wider group of potential victims than any existing regulatory regime’.²⁸⁷

The unwillingness of Parliament to ‘undertake formal legal change on assisted suicide’ has led to the guidance that is not without its flaws.²⁸⁸ Arguably, ‘While appreciating it may be true that the law on assisted suicide in the UK is unsatisfactory as it stands ... compelling the DPP to publish guidelines is totally unacceptable and ‘passes the buck’ on an issue which requires parliamentary engagement and consultation’.²⁸⁹ Therefore, it may be contended that whilst it is a step in the right direction, the decision is both ‘unsound and unconstitutional’;²⁹⁰ due to the fact ‘it is not for the DPP to resolve an issue which is within Parliament’s domain’.²⁹¹ This ‘is not the way in which the law can or should be changed in the UK’.²⁹² As eloquently summarised by Lewis: ‘In England and Wales, we are now in uncharted territory, with a reluctant legislature, little guidance from the courts and an opaque process of informal legal change by prosecutors’.²⁹³

Whilst the ruling ‘was clearly a victory for supporters of assisted suicide ... It left the UK in a position of uncertainty and disarray, [as] we have a Code, which, while providing openness and transparency, does not have legislative authority’.²⁹⁴ Nonetheless, this shows inclination from the courts (in the absence of willingness of Parliament) to move forward, albeit incrementally, the AD debate.²⁹⁵

4.5 *Sympathy in Life or Dignity in Death?*

Finally, the most recent and on-going case, *R (Nicklinson) v Ministry of Justice* began in the High Court and was comprised of claimants Tony Nicklinson and Martin. Nicklinson ‘suffered a stroke causing “locked-in” syndrome, leaving him almost completely paralysed and totally dependent upon others 24 hours a day’.²⁹⁶ Nicklinson brought the case in an attempt to establish a right to die. Martin, the other

²⁸⁶ *ibid* 126.

²⁸⁷ *ibid* .

²⁸⁸ *ibid* 133.

²⁸⁹ G Williams, ‘Assisting Suicide, the Code for Crown Prosecutors and the DPP’s Discretion’ (2010) 181 *Comm L World Rev* 181, 183.

²⁹⁰ J Keown, ‘Dangerous Guidance’ (2009) 159 *NLJ* 1718.

²⁹¹ Williams (n 289) 192.

²⁹² *ibid*.

²⁹³ Lewis (n 271) 134.

²⁹⁴ Williams (n 289) 202–203.

²⁹⁵ *ibid*. See also N Cartwright, ‘Commentary. 48 Years On: Is the Suicide Act Fit for Purpose?’ (2009) 17 *Med LR* 467, 476.

²⁹⁶ *R (Nicklinson) v Ministry of Justice* [2013] EWCA Civ 961, [2014] 3 *WLR* 200 [11].

claimant, ‘suffered a brain stem stroke [leaving him] totally dependent on others’.²⁹⁷ Martin, however, was primarily seeking ‘an order that the DPP should clarify his published policy’.²⁹⁸ Here the High Court at first instance refused the applications for judicial review, due to the fact:

A decision to allow their claims would have consequences far beyond the present cases. These are not things which the court should do ... these are matters for Parliament to decide.²⁹⁹

This decision led to an appeal to the Court of Appeal whereby ‘unusually Paul Lamb was added as a party to this appeal’,³⁰⁰ as was Mrs Nicklinson ‘as administratrix of the estate of her husband’.³⁰¹ In the Court of Appeal, the appeals of Mrs Nicklinson and Lamb were unanimously dismissed. As noted by Jackson,³⁰² the appellants relied on *Re A* to pursue their claim but Lord Dyson MR and Elias LJ contended *Re A* ‘is too slender a thread on which to hang such a far-reaching development of the common law’.³⁰³ Therefore, as maintained by Stark, ‘given the uncertainty surrounding the term ‘necessity’ in English criminal law [it may] be concluded that consent would have been a better basis for the applicant’s argument’.³⁰⁴

The reason for the failure on grounds of necessity is echoed in the judgment from the High Court, that ‘Parliament as the conscience of the nation is the appropriate constitutional forum, not Judges’³⁰⁵ for considering such legal change. Bowen QC argues these appeals are ‘not asking the courts to change the law, [but] merely to declare that the [Suicide] Act is incompatible with the ECHR. Such a ruling would require Parliament to legislate on the issue’.³⁰⁶ As noted by Burns, ‘The Nicklinson case underlines the reluctance of our judiciary usurping the powers and functions of Parliament in making laws’.³⁰⁷ Despite this, Martin’s claim in the Court of Appeal succeeded in his plea for further clarity on the DPP’s guidelines. Therefore, ‘the ball is now firmly in Parliament’s court’.³⁰⁸ Arguably, the ‘current regime is less safe than in other countries’.³⁰⁹ This, coupled with the fact that 81% of UK adults support medically assisted suicide’,³¹⁰ means it is hoped ‘that the Supreme Court will listen to

²⁹⁷ *ibid* [6]–[7].

²⁹⁸ *ibid* [9].

²⁹⁹ *ibid* [150] (Toulson LJ).

³⁰⁰ *ibid* [13] (Lord Dyson MR and Elias LJ).

³⁰¹ *ibid* [15].

³⁰² A Jackson, ‘Thou shalt not kill; but needst not strive officiously to keep alive: Further clarification of the Law regarding Mercy Killing, Euthanasia, and Assisted Suicide’ (2013) 77 J Crim L 468, 472.

³⁰³ *Nicklinson* (CA) (n 296) [63].

³⁰⁴ F Stark, ‘Necessity and Nicklinson’ (2013) 12 Crim LR 949, 949.

³⁰⁵ *Nicklinson* (CA) (n 296) [60] (Lord Dyson MR and Elias LJ).

³⁰⁶ Bowcott (n 195).

³⁰⁷ S Burns, ‘Public/Human Rights: The death of humanity?’ (2012) 162 NLJ 1146, 1146.

³⁰⁸ A Jackson (n 302). This is indeed the case, particularly in light of Lord Falconer’s Assisted Dying HL Bill (2013–14) 55/3. See sections 2 and 5 for further discussion on the Bill.

³⁰⁹ See Bowcott (n 195).

³¹⁰ Dahlgreen (n 71).

the large majority in this country and rule in favour of the right to a doctor-assisted death'.³¹¹

4.6 *Editor's Note on the Supreme Court Appeal of R (Nicklinson)*

Since this article was written, the Supreme Court decided and handed down judgment in *R (Nicklinson)*. The editor has thought it appropriate to add a few words to outline that decision, but not to go further and criticise the decision or offer his own opinion, for that would usurp the role of the author.

Nicklinson and Lamb had challenged the decision of the Court of Appeal that a blanket ban on assisted suicide was proportionate within their article 8 rights, but the appeal on this point was dismissed. The Supreme Court, by a majority, held that it was indeed 'institutionally appropriate' to make a declaration of incompatibility, but that it was not the right time to do so. The approach the Court takes in answering the question of proportionality takes into account matters of 'institutional competence and legitimacy' that favoured this decision.³¹² Accordingly, the Court considered that Parliament should first be given the opportunity to consider the Suicide Act 1961, s 2, in light of its judgment. However, Baroness Hale and Lord Kerr dissented on this point. Lord Kerr was of the opinion that the Court should not shy away from making a declaration just because Parliament was better placed to consider the issue.³¹³ Baroness Hale said:

I see little to be gained, and much to be lost, by refraining from making a declaration of incompatibility. Parliament is then free to cure that incompatibility ... or to do nothing. It may do nothing, either because it does not share our view that the present law is incompatible, or because, as a sovereign Parliament, it considers an incompatible law preferable to any alternative.³¹⁴

As for Martin's claim, the DPP (by now Alison Saunders) won the cross-appeal. The Court invited the DPP to review and clarify the policy, but declined to order her to amend it. While it had become apparent during the hearing that the policy might not precisely reflect her views, an order rather than an invitation would be harsh: she should not be regarded as being bound by her agreement with the Court's remarks; she should have a proper opportunity to reconsider the policy; and the contents of the order would either have to be very vague or risk inappropriately usurping the functions of the DPP or Parliament.³¹⁵

³¹¹ Bowcott (n 195).

³¹² *R (Nicklinson) v MOJ* [2014] UKSC 38, [2014] 3 WLR 200 [166]–[170].

³¹³ *ibid* [347].

³¹⁴ *ibid* [300].

³¹⁵ *ibid* [145]. See DPP AS Policy (n 27).

4.7 Conclusion

The above cases ‘raise a variety of legal and moral problems’.³¹⁶ The case law consists of a series of justifications based on wide reaching principles and doctrines, creating loopholes in the law rather than creating a statutory framework and implementing sufficient safeguards. The status quo is arguably indefensible and something must be done to prevent the law from developing in a disordered and unclear manner.

5 SUMMARY AND REFORM

This article has sought to argue ‘the current legal status of assisted [dying] is inadequate, incoherent and should not continue’.³¹⁷ The status quo, through the DPP’s Guidelines,³¹⁸ arguably condones ‘compassionate amateur assistance while prohibiting professional medical assistance which might be more skilfully gentle’.³¹⁹ Additionally, ‘the use of the Suicide Act and the law of murder to regulate a terminally ill person’s wishes at the end of life are deeply inhumane’.³²⁰ Therefore, arguably, ‘The current law is not working’.³²¹ such practices continue underground³²² ‘without transparency and accountability’,³²³ totalling to forty-four cases³²⁴ of such assistance whereby ‘Nobody has been prosecuted’.³²⁵ ‘This lack of transparency puts vulnerable people at risk’.³²⁶ Consequently:

The simple truth is that Parliament should act ... and not leave this complex legal and moral issue solely in the hands of the courts. At the very least we need an official assessment of the prosecution guidelines.³²⁷

As seen from the discussion in section 4 the development of the common law has led to much controversy and indeed confusion.³²⁸ The case law consists of various

³¹⁶ R Epstein and S Foster, ‘The Right to Die: The House of Lords Decision on Assisting Suicide’ (2009) 173 JPN 583, 593.

³¹⁷ Law Commission on Assisted Dying (n 163).

³¹⁸ DPP AS Policy (n 27).

³¹⁹ HL Deb 5 March 2014, vol 752, cols WS 131, WA 311 (Baroness Jay).

³²⁰ Select Committee, *Assisted Dying for the Terminally Ill HL Bill* (n 84) 3.

³²¹ HL Deb 5 March 2014, vol 752, cols WS 131, WA 311 (Baroness Hayter).

³²² *ibid.*

³²³ D Meier, and others, ‘Characteristics of patients requesting and receiving physician assisted death’ (2003) 163 Archives of Internal Medicine 1537; R Magnusson, *Angels of death: Exploring euthanasia underground* (Yale University Press 2002); J Kohlwe and others, ‘Physicians’ responses to patients’ requests for physician-assisted suicide’ (2001) 161 Archives of Internal Medicine 657 quoted in Select Committee, *Assisted Dying for the Terminally Ill HL Bill* (n 84) 3.

³²⁴ R Winnett and M Beckford, ‘44 assisted suicide cases since CPS guidelines published’ *The Telegraph* (London, 3 September 2011) <<http://www.telegraph.co.uk/news/uknews/law-and-order/8738415/44-assisted-suicide-cases-since-CPS-guidelines-published.html>> accessed 18 March 2014. See also email from CPS caseworker – 94 cases since April 2009.

³²⁵ Winnett and Beckford (n 324).

³²⁶ D Brock, ‘Misconceived sources of opposition to physician-assisted suicide’ (2000) 6 Psychology, Public Policy and Law 305; E Emanuel and others, ‘The practice of euthanasia and physician-assisted suicide in the United States’ (1998) 260 JAMA 507 quoted in Select Committee, *Assisted Dying for the Terminally Ill HL Bill* (n 84) 3.

³²⁷ HL Deb 5 March 2014, vol 752, cols WS 131, WA 311 (Baroness Jay).

justifications, which lead to loopholes in the law, thus meaning such practices are occurring every day. The status quo is arguably indefensible and reform is needed to ensure the law does not continue to develop in the messy, unclear fashion it has done so previously. Certainty is greatly needed not only for society as a whole but also for judges dealing with such hard cases.

This exacerbates the need for Parliament to act. However, as seen in section 3, despite growing support for both practices, such legislative development has been largely unsuccessful. A more desirable approach is to ‘have a statutory law which allows AD for mentally competent terminally ill adults in restricted and safeguarded circumstances’.³²⁹ The main argument opposing such legislation is the fear of a ‘slippery slope’ towards legalising such practices for less serious reasons.

Nonetheless, this argument is somewhat weak. There are concerns that Lord Falconer’s Assisted Dying Bill³³⁰ will result in a slippery slope which ‘will lead to a devaluing of human life and that vulnerable people will become “victims” of [the] legislation’.³³¹ This may be countered by the fact the Bill is ‘very tightly controlled’³³² with robust safeguards,³³³ and a ‘YouGov survey of 1,036 disabled people found that 79% supported a change in the law on AD’.³³⁴ Furthermore, ‘If a slippery slope was going to happen in this way, it would certainly have happened in The Netherlands – because [they] have been involved in this process for thirty years’.³³⁵ Proponents of the argument that such legislation would result in a slippery slope would likely point towards the recent change in the law in Belgium in relation to children and euthanasia.³³⁶

However, in accordance with Dr Gerlant van Berlaer regarding the issue of a ‘so-called slippery slope’: ‘there is already this practise all over the world today, the only thing that would change with this law is the way we deal with it. With legislation we

³²⁸ Particularly in relation to *Bland* (n 1) and the removal of artificial nutrition and hydration and the blurred distinction between an act and an omission as discussed in *Re A* (n 233).

³²⁹ HL Deb 5 March 2014, vol 752, cols WS 131, WA 311 (Baroness Jay); like Lord Falconer’s Assisted Dying HL Bill (2013–14) 24.

³³⁰ Assisted Dying HL Bill (2013–14) 24.

³³¹ Select Committee, *Assisted Dying for the Terminally Ill HL Bill* (n 84) 253.

³³² *ibid.*

³³³ Assisted Dying HL Bill (2013–14) 24, see specifically cl 1(1); cl 3(3)(a–c); cls 7(1)(a–c) and cl 9.

³³⁴ YouGov, ‘Assisted dying (disabled sample)’ (YouGov; Dignity in Dying 2013)

<<http://www.dignityindying.org.uk/wp-content/uploads/2013/12/DADiD-poll-2013.pdf>> accessed 19 March 2014; G Judge, ‘79% of disabled people support a change in the law on assisted dying’ (Dignity in Dying 2013) <<http://www.dignityindying.org.uk/blog/79-disabled-people-support-change-law-assisted-dying/>> accessed 19 March 2014.

³³⁵ Select Committee, *Assisted Dying for the Terminally Ill HL Bill* (n 84) 462.

³³⁶ The Real Truth, ‘Belgium Legalises Euthanasia for Children’ (2014)

<<http://realtruth.org/news/140311-009.html>> accessed 19 March 2014.

would be able to control it and this will lead to the best possible legal practice'.³³⁷ Further support for this can be found from 'researchers who have concluded that AD legislation would help ensure doctors adhere to strict safeguards and thus protect vulnerable people'.³³⁸

In short, the 'Evidence from the Netherlands and Oregon suggests that legislation will not lead to an "avalanche" of assisted deaths'.³³⁹ So, the issue we are faced with is not 'between permitting or preventing medically AD. The choice is between making medically AD visible and regulated, or allowing it to continue 'underground', without any safeguards, transparency or accountability'.³⁴⁰

This reflects that whilst there is concern that legalising the phenomenon may lead to the vulnerable being devalued, etc., allowing the practices to continue underground means that those who are equally vulnerable end up suffering slow and painful deaths, or worse, taking their own lives in various harrowing ways.³⁴¹ So, opposing legislation based on a hypothetical situation (the slippery slope argument) consequently entrenches the reality of the current situation, i.e. the underground practices, and encourages amateur participation resulting in vulnerable people continuing to suffer.

³³⁷ M Buerk, 'Moral Maze – Assisted Dying' (with Dr Gerlant van Berlaer) (*BBC Radio 4*, 12 March 2014) <<http://www.bbc.co.uk/programmes/b03xf1fg>> accessed 15 March 2013 at 25 minutes.

³³⁸ Select Committee, *Assisted Dying for the Terminally Ill HL Bill* (n 84) 3, 5 quoting, e.g. Emanuel and others (n 326); D Lee, 'Physician assisted suicide: a conservative critique of intervention' (2003) 33 *The Hastings Center Report* 17; Brock (n 326).

³³⁹ Select Committee, *Assisted Dying for the Terminally Ill HL Bill* (n 84).

³⁴⁰ *ibid* 8.

³⁴¹ Davis (n 282); Hansard (n 181).

In early 2014 three local stories featured in the media³⁴² which illustrate how the ‘outdated law ... is simply not working’.³⁴³ This heightens the urgency of the need for reform in the area. As noted above, the argument that such reform would lead down a metaphorical slippery slope towards non-voluntary euthanasia is unjustified. AD for terminally ill mentally competent adults has been legal in Oregon, USA for 16 years and since then:

- 1) There has been no abuse of the law;
- 2) The law has not been extended;
- 3) AD numbers remain low and stable.³⁴⁴

This shows that other jurisdictions, namely Oregon, have not fallen down the metaphorical slippery slope which opponents fear is inevitable. Furthermore, ‘Opponents rarely argue against the change in the law actually proposed’:

The Benelux euthanasia laws are often incorrectly cited as an example of a slippery slope. However, both the Belgians and Dutch deliberately and from the beginning created laws with the specific intention of allowing non-terminally ill people to be directly helped to die. This doesn’t confirm the slippery slope, but rather confirms that the law you enact is the law you get.³⁴⁵

Accordingly, reform is vital in the UK³⁴⁶ in order to instil clarity, transparency, and restore patient autonomy. Opponents of ‘a change in the law have every right to raise their concerns. But, they also have a responsibility to explain why some dying people

³⁴² P Hughes, ‘Great Milton suicide pact couple died in each other’s arms’ *Oxford Mail* (Oxford, 6 February 2014)

<http://www.oxfordmail.co.uk/news/10989774.Suicide_pact_couple_died_in_each_other_s_arms/> accessed 19 March 2014; M Lockley, ‘Man admits attempting to murder pal of 45 years after pleas to end his suffering’ *Birmingham Mail* (Birmingham, 2 February 2014)

<<http://www.birminghammail.co.uk/news/midlands-news/man-admits-attempting-murder-pal-6657212>> accessed 19 March 2014; ‘Mercy killing’ wife, 75, held for months in jail’ *Milton Keynes Citizen* (Milton Keynes 6 February 2014) <<http://www.miltonkeynes.co.uk/news/local/mercy-killing-wife-75-held-for-months-in-jail-1-5859719>> accessed 19 March 2014.

³⁴³ M Charouneau, ‘New year, same problem’ (Dignity in Dying 2014)

<<http://www.dignityindying.org.uk/blog/new-year-problem/>> accessed 19 March 2014. See also ‘Man spared jail for mother’s “mercy killing”’ *BBC News* (20 March 2014) <<http://www.bbc.co.uk/news/uk-england-dorset-26661578>> accessed 1 April 2014.

³⁴⁴ Oregon Public Health Division, ‘The Oregon report 2013: Safeguarded choice and control for dying adults’ (Dignity in Dying 2014) <<http://www.dignityindying.org.uk/blog/oregon-report-2013-safeguarded-choice-control-dying-adults/>> accessed 19 March 2014.

³⁴⁵ Lord Falconer, ‘Assisted dying is not voluntary euthanasia’ *The Times* (London, 23 January 2014) <<http://www.thetimes.co.uk/tto/opinion/letters/article3982960.ece>> accessed 19 March 2014.

³⁴⁶ Like Canada – see K Nursall, ‘Canada’s shifting landscape on euthanasia’ *The Star* (Toronto, 19 March 2014)

<http://www.thestar.com/news/gta/2014/03/19/canadas_shifting_landscape_on_euthanasia.html> accessed 19 March 2014. See also The Canadian Press, ‘Tory MP Steven Fletcher to introduce 2 Assisted-Suicide Bills’ (Toronto, CTV News 26 March, 2014) <<http://www.ctvnews.ca/politics/tory-mp-steven-fletcher-to-introduce-2-assisted-suicide-bills-1.1746885>> accessed 2 April 2014.

should have to suffer against their wishes'.³⁴⁷ Evidence of circumvention is occurring more frequently and support for the practice is growing;³⁴⁸ therefore, decriminalisation is more appropriate. It is hoped that Lord Falconer's Bill³⁴⁹ will reform the law in this area, but for now the debate continues...³⁵⁰

³⁴⁷ Lord Falconer (n 345).

³⁴⁸ Jones (n 36).

³⁴⁹ Assisted Dying HL Bill (2013–14) 24.

³⁵⁰ Editor's note: The author, writing before it was concluded, had hoped that the appeal of *R (Nicklinson)* would also have contributed to reform. See section 4.6 above.

LAW AND FOUCAULT'S POWER RELATIONS

*Amber Miller**

Law is integral to the successful functioning of society, organising the actions of individuals and thus producing 'social and individual goods within society'.¹ Indeed, law reduces the 'potential for conflict'² in society as it lays out rules that must be adhered to. However, for law to be enforceable, and therefore efficacious, it must have a sovereign body ensuring compliance; without this individuals would have no incentive to observe the rule of law. Blake highlights the necessity for a single sovereign body when he comments that if there were more than one sovereign in a defined territory, the outcome would most certainly be 'civil war'.³ Foucault introduces the concept of power relations to law, asserting that such relations have percolated into the individual's day-to-day life through societal and institutional relationships, entangling the individual in a web of power relationships.⁴ This article avers that law can be understood as having to do with power relations due to the laws focus on ensuring societal cohesion. However, this must be placed in context of law's origin of codifying society's moral values. Further, it will be claimed that there are universal moral limits placed on law that not even society's moral standards can override; the need for respect of an individual's inherent dignity being a notable example. The necessity of power as a mechanism to enforce such morally acceptable legislation will be discussed. The role of the sovereign in utilising power to enforce law will be explored, and the proposition that the sovereign's legitimacy derives from the will of the people shall be investigated. Schmitt's assertion that law requires 'one sole architect'⁵ with unlimited legislative power will be rebutted. Lastly, it will be averred that although power relations encompass some integral aspects of the law, as set out above, the concept fails to account for law's inherent pursuit of justice.

Since ancient Greece, law has been concerned with placing restrictions upon the conduct of individuals.⁶ Law is 'the enterprise of subjecting human conduct to the governance of rules',⁷ ensuring social cohesion and the successful ordering of society.

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¹ Brian Bix, *Jurisprudence: Theory and Context*, (6th edn, Sweet & Maxwell 2012) 109.

² Victor Tadros, 'Between Governance and Discipline: The Law and Michel Foucault' (1998) 18 OJLS 75, 87.

³ L L Blake, *Sovereignty: Power Beyond Politics* (Shepherd-Walwyn 1988) 1.

⁴ Michel Foucault, 'The Subject and Power' in Paul Rainbow and Nikolas Rose (eds), *The Essential Foucault: Selections from Essential Works of Foucault, 1954-1984* (The New Press 2003) 130.

⁵ Carl Schmitt, *Political Theology* (George Schwab tr, University of Chicago Press 2005) 47.

⁶ Hannah Arendt, 'The Great Tradition I. Law and Power' (2007) 74 Social Research 713, 716.

⁷ Lon Fuller, *Morality of Law* (Yale University Press 1969) 106.

Reflecting on this oppressive mandate, Lacombe declares that, 'law appears as simply a weapon to deceive and oppress people'.⁸ This critique is too narrow as it fails to account for the positive effects that emanate from legal rules. Without the rule of law chaos is certain, widespread injustice would be unpunished and unregulated.⁹ Laws dictating or prohibiting conduct are merely the 'written'¹⁰ and formal codification of society's pre-established norms and rules, which provide clear guidelines to individuals as to acceptable conduct. Documented guidelines allow individuals to live and act freely in accordance with the law and enjoy the benefits of the certainty it affords. If law was unpublished or secret this would contravene its very purpose of attaining societal success, as society would surely dissolve through individuals' fear of prosecution for unknown reasons. Thus, it is imperative that society has an established rule of law setting boundaries to the actions of government through codification of the norms on which society is premised.

Society cannot possibly function effectively if its laws contravene the ethical code upon which the particular society is based. As Cotterrell argues, law's legitimacy derives from its 'reflection of community morality'.¹¹ Therefore, it is asserted that law is merely a mechanism for the effective structuring of society through a tangible emanation of society's accepted morals.¹² As law is a human construction it cannot possibly be removed from the ethical standards of those it presides over as to do so would manipulate law from one of its intrinsic purposes (that of structuring society) as people will not obey a law they find morally repugnant. Societal turmoil is an almost certain consequence of laws which disrespect society's morals.¹³ As Nadler notes, for law to be valid, 'some people must ... voluntarily obey it. Threats alone will not secure obedience, for the law-giver will need the voluntary co-operation of ... members of the population'.¹⁴ Indeed, the ousting of Ukraine's President Yanukovich was in large part due to his government's curtailment of civil rights, highlighting that people would not support laws that they view as infringing rights or morals that they hold as vital to their society.¹⁵ Such action against the state by the populous emphasises that law must respect society's ethical standards in order to be legitimised and thus constitute valid law. Further emphasising this point is the argument that during the Third Reich, if the majority of the population had not agreed with the Nazi

⁸ Dany Lacombe, 'Reforming Foucault: A Critique of the Social Control Thesis' (1996) 47 *The British Journal of Sociology* 332, 336.

⁹ Valeria Kerruish, *Jurisprudence as Ideology* (Routledge 1991) 2.

¹⁰ Geoffrey Hazard Jr, 'Law, Morals, and Ethics' (1995) 19 *S Ill U L J* 447, 448.

¹¹ Roger Cotterrell, 'Common Law Approaches to the Relationship between Law and Morality' (2000) 3 *Ethical Theory and Moral Practice* 9, 12.

¹² Vincent McNamara, 'Law and Morality' (1979) 30 *The Furrow* 675, 675.

¹³ Hazard (n 10) 447, 448.

¹⁴ Jennifer Nadler, 'Hart, Fuller and the Connection between Law and Justice' (2008) 27 *Law and Philosophy* 1, 5.

¹⁵ 'Ukraine Crisis: Clashes after thousands defy protest ban' *BBC News* (19 January 2014)

<<http://www.bbc.co.uk/news/world-europe-25798320>> accessed 25 March 2014.

moral code they would have taken greater stance against the Party's abhorrent 'legal' actions as 'nothing can be done ultimately against the will of the people'.¹⁶

In addition to being bound by the ethical standards of society, law has inescapable limits that it must abide by, dictated by the inherent morals of human kind. Indeed, in ancient Rome it was recognised that law is required to be both relational to the needs of society and their respective ethical values, and also to the moral laws 'common to all mankind'.¹⁷ Such universal morals are those rights and freedoms centred on the concept of a person's 'absolute and irreplaceable'¹⁸ right to dignity. Such right arises out of human beings status as rational agents. As human dignity is the value upon which all other human rights are founded there can be no legitimate law that can override such a right, even if provided by statute.¹⁹ Such infringement would contravene laws purpose of promoting social cohesion, as disregard for a section of society's dignity results in society breaking down to an inequitable disarray of confusion, inequality, and abuse.²⁰ Further, law cannot sustain a cohesive society if it is being utilised to discriminate or legalise state-led violence against civilians as this will most certainly lead to unrest. An example of such a universal moral norm that respects human dignity is the prohibition of torture, enshrined in the United Nations Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment.²¹ Some 155 states have signed this Treaty, lending significant weight to the assertion that there are intrinsic and common ethical standards which all law must have regard to in order to be valid. State denial of being involved in or committing acts of torture, even when the evidence to the contrary is 'indisputable',²² emphasises that all states recognise that such acts contravene morality and therefore valid law.

In order for law to enforce society's morals norms, law requires power. Power is the 'capacity or ability to direct or influence the behaviour of others or the course of events'.²³ Although law relies on power as a tool to induce congruence to the settled legislative regime and rule of law, power is purely a means to 'enforce and execute the law'.²⁴ Indeed, 'power is acknowledged as revealing itself in law and can have no

¹⁶ Blake (n 3) 23.

¹⁷ Garrett Barden and Tim Murphy, 'Society as a Source of Law' (2006) 96 *Studies: An Irish Quarterly Review* 407, 412.

¹⁸ Allen Wood, 'Human Dignity, Right and the Realm of Ends' [2008] *Acta Juridica* 47, 49.

¹⁹ George Wright, 'Treating Persons as Ends in Themselves: The Legal Implications of a Kantian Principle' (2002) 36 *U Rich L Rev* 271, 275.

²⁰ Wood (n 18) 47, 49.

²¹ Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (adopted 10 December 1984, entered into force 26 June 1987) 1465 UNTS 85 (CAT) art 3.

²² Ian Cobain, 'US torture of prisoners is 'indisputable', independent report finds' *The Guardian* (London, 16 April 2013) <<http://www.theguardian.com/world/2013/apr/16/us-torture-prisoners-indisputable-report>> accessed 16 April 2014.

²³ Angus Stevenson and Maurice Waite (eds), *Concise Oxford English Dictionary* (12th edn, OUP 2011).

²⁴ Arendt (n 6) 714.

effect except in issuing rules of law',²⁵ highlighting that power is in itself an empty concept, only gaining coercive attributes once utilised for the implementation of society's norms. Thus power is a tool for the law to connect with civilians.²⁶ However, this relationship is conditional as for power to have any 'influence'²⁷ over people and their actions, the populous must support the norm being advocated or enforced by a higher legislative power. In order to be legitimate in the legal sphere, power must be bound by the same ethical constraints as law. When tyrannical regimes, such as the Third Reich, utilised power as a means to enforce morally repugnant laws, which disrespected the dignity of certain individuals, power's purpose departed from that of aiding the successful structuring of society by enforcing law, and morphed power into a tool for coercive violence.

As power is in itself a hollow notion law requires the existence of a sovereign, or sovereign body, to employ power for law's implementation. Sovereigns are merely the mechanism by which society implements their desired laws.²⁸ Their acts are 'rendered legitimate by the fact that they are authorised by their own subjects'.²⁹ A sovereign being present in the law-making process is vital as they are the instigating arm of the law, without which law's powers to ensure compliance with the rule of law would be greatly hindered as there would be no defined body to guarantee laws application. However, it has been argued that unless sovereignty is 'unlimited and uncompromised, it cannot achieve its aims'.³⁰ This statement is flawed neglecting the actuality that sovereignty's legitimacy derives from society's limited conferral of law-making power to government. Sovereignty resides 'in the people',³¹ and the legitimacy of a sovereign's law is solely reliant upon such laws conforming to society's values as well as respecting the inherent dignity of individuals.

Schmitt asserts that, 'sovereignty is the highest, legally independent, underived power'³² that does not seek its legitimacy from the continual consent of the populous, nor in its accordance with universal morals. This reasoning is erroneous as a sovereign risks becoming illegitimate if it contravenes law's inherent morality. Indeed, the importance of law reflecting accepted moral values is that they produce 'rules that can guide human conduct',³³ which must be adhered to if the sovereign 'hopes to provide anything that can be properly called law'.³⁴ It is significant that much of Schmitt's reasoning legitimising sovereign's holding absolute law-making power was to justify the autocratic structure of the Nazi state and consequently the

²⁵ Krabbe, *Die modern Staatsidee* (2nd edn, Haag 1919) 39.

²⁶ David West, *Continental Philosophy* (2nd edn, Polity Press 2010) 192.

²⁷ Felix Oppenheim, 'Power Revisited' (1978) 40 *Journal of Politics* 589, 589.

²⁸ *X Ltd v Morgan Grampian (Publishers) Ltd* [1991] 1 AC 1 (HL) 48 (Lord Bridge).

²⁹ Quentin Skinner, *Liberty Before Liberalism* (CUP 1998) 5.

³⁰ Pavlos Eleftheriadis, 'Law and Sovereignty' (2010) 29 *Law and Philosophy* 535, 537.

³¹ Blake (n 3) 9.

³² Schmitt (n 5) 17.

³³ Nadler (n 14).

³⁴ *ibid.*

crimes against humanity authorised by its sovereign Adolf Hitler.³⁵ Such context reduces the persuasiveness of Schmitt's argument as it was developed as a means to justify an illegitimate end.

Law involves, and is inextricable from, the power relation between the individual and the sovereign. Foucault describes this proposition best when he comments that, 'if we speak of the powers of laws ... it is only insofar as we suppose that certain persons exercise power over others'.³⁶ As discussed hitherto, power in the legal sphere is conditional upon it being exercised in correspondence with law's structural purpose and pursuant to this purpose; it must have regard for the individual (the one over whom power is exerted).³⁷ Sovereigns, being merely the physical embodiment of the populous' values, must have respect for the intrinsic worth of those subjects to its power.³⁸ Failure to act in accordance with this principle results in the sovereign acting *ultra vires*, as they are not acting on behalf of the people and the legal system, manifesting into a system of illegal state activity. This is quintessentially due to the nature of legal systems in which, 'the law-giver serves the legal subjects who, in turn, recognise an obligation of fidelity to the law-giver. Ruler and subject are equal; their relationship is fully reciprocal'.³⁹ There can be no valid legal system where the sovereign uses the relationship of legislative power it holds over civilians to abuse their fundamental human dignity or violate society's moral code. Utilising law against the very people its legitimacy derives from can never be considered as valid.

The United States of America's removal of detainees' legal and human rights at Guantánamo Bay is an example of a sovereign power acting illegitimately. Johns asserts that such camps are 'above all works of legal representation and classification. They are spaces where law and liberal proceduralism speak and operate in excess'.⁴⁰ Such argument is without merit as by stripping the detainees of their status as rational agents, disrespecting their autonomy and treating them as inferior or subhuman, the US government has abused and violated the law's inherent limits; such 'law' can never be valid.⁴¹ Indeed, law can never justifiably override an individual's right to dignity, rendering the person an 'object',⁴² as this goes against law's very nature and purpose. Significantly, Foucault avers that power can only be 'exercised ... over free subjects',⁴³ highlighting that relations of power enforcing law over individuals can

³⁵ Trevor Barner and Claudio Minca, 'Nazi Spatial Theory: The Dark Geographies of Carl Schmitt and Walter Christaller' (2013) 103 *Annals of the Association of American Geographers* 669, 670.

³⁶ Foucault (n 4) 135.

³⁷ *ibid* 138.

³⁸ Alessandro d'Entrèves, *Natural Law: An Introduction to Legal Philosophy* (2nd edn, Hutchinson 1970) 25.

³⁹ Nadler (n 14) 28.

⁴⁰ Fleur Johns, 'Guantanamo Bay and the Annihilation of the Exception' [2005] *EJIL* 613, 614.

⁴¹ Catherine Duprè, *Importing the Law in Post-communist Traditions: The Hungarian Constitutional Court and the Right to Human Dignity* (Hart 2003) 71.

⁴² *ibid* 70.

⁴³ Foucault (n 4) 139.

only be valid if they respect such individual's inherent dignity. Detainees in Guantánamo are not free as many are detained without access to the full case against them, detained indefinitely without trial, and have no means to appeal against their detention. The illegitimacy of Guantánamo Bay and the *ultra vires* acts of the US government has been commented upon by the Council of Europe who stated that, 'the United States Government has betrayed its own highest principles in the zeal with which it has attempted to pursue the "war on terror",⁴⁴ through acting unlawfully and cruelly in its treatment of detainees. Such international condemnation of US government action not only highlights that law has intrinsic limits in the way it can treat individuals, but also that sovereigns must respect such limits to remain legitimate and avoid degenerating towards an oppressive regime.

Thus far this article has argued broadly in congruence with Foucault's theory of power relations, asserting that the requirement that the sovereign respect the 'subject'⁴⁵ mirrors the proposition that law is inextricably concerned with morality. Indeed, power relations are undoubtedly a real and necessary aspect of the law as they greatly improve the structuring of society, providing a means for law to be enforced at all institutional and societal levels. However, a concept of law that almost singularly relates to the governance of society is insufficient in representing law's full function and purpose. Thus, it is asserted that a central flaw in the statement that law is best understood as having to do with power relations is the failure to recognise the necessity of justice in the legal system. As previously established, law is the formal emanation of society's rules and norms, however, law is also inseparable from justice; justice being the moral standard by which the 'rightness of decisions'⁴⁶ can be judged. Justice provides both an objective, in that it must be fulfilled, and a subjective, as the judiciary and legislature can mould the law in order to comply with both natural justice and society's conception of justice, requirement to the law. Lucas best illuminates the necessity of justice in law when he notes that, 'English judges ... soften the asperities of the law',⁴⁷ acknowledging that law and thus judges responsibility is 'not that of providing fodder for legal technicians but that of doing justice between individual citizens'.⁴⁸ Certainly, without justice the law would necessarily produce unfair results affronting the morals of the populous.

Indeed, Pound has gone as far as to comment that society's pursuit of justice is the driving force to changes and developments in the law.⁴⁹ This assertion is supported by reference to development of the legal doctrine of equity in England. Equity was advanced by the English judiciary as a means of preventing unjust results in cases due

⁴⁴ Council of Europe, Lawfulness of Detentions by the United States in Guantanamo Bay, Resolution 1433 (2005) para 3.

⁴⁵ Foucault (n 4) 138.

⁴⁶ A C Lloyd, 'Natural Justice' (1962) 12 *Philosophical Quarterly*, 218, 220.

⁴⁷ J R Lucas, 'Justice' (1972) 47 *Philosophy* 229, 241.

⁴⁸ *ibid.*

⁴⁹ Roscoe Pound, 'Justice According to Law' (1913) 13 *Colum L Rev* 696, 699.

to the lack of flexibility or appropriateness of statute and common law. As a consequence of the, at times, unfair nature of strict legal rules, a Court of Chancery was created to hear equitable cases; notably, in 'England the term 'equity' means ... natural justice.'⁵⁰ Thus, the law was altered in order to conform to the precept that it must pursue justice. This ideal goes beyond the strictly governmental objectives of power relations and is more in keeping with the proposition of this article, that morality and the successful functioning of society (inherent in this success is fair treatment by the law) are the superior components necessary to understanding law. Indeed, 'equity, then, started as a reaction towards justice without law and in its development became a system wherein ... the circumstances of particular cases were more attended to than the fixity of legal rules would permit.'⁵¹ This exemplifies the need for law to pursue justice beyond requirements set out in statute and power relationships as law's inherent aims will always override socially structured conceptions of the law.⁵²

Further illustration of the necessity of law being just is afforded by the negative societal results stemming from the disparate and discriminatory use of the United Kingdom's stop and search powers.⁵³ Such powers were introduced to the UK's legislative scheme in order to 'increase the capacity of law enforcement authorities to detect and deter terrorist activities in their early stages'.⁵⁴ However, these legislative powers were used disproportionately by the government and law enforcement officials who targeted ethnic minorities, particularly the Muslim community.⁵⁵ The unjust use of this power resulted in the alienation of the Muslim community in the UK, many of whom felt like 'second class citizens.'⁵⁶ When laws are unjust or applied unjustly, the hostility that results amongst affected groups may lead to the disintegration of society's structure and diminish the influence of the rule of law, exemplified by the London riots in 2011. Indeed, these riots were partly fuelled by the increased frustration of minority communities who perceived that stop and search was being unjustly applied to them on grounds of their race.⁵⁷ The chaos that ensued during the riots resulted in the temporary breakdown of the rule of law and societal cohesion.

⁵⁰ Salmond, *Jurisprudence* (7th edn, Sweet & Maxwell 1924) 9.

⁵¹ Roscoe Pound, 'The Decadence of Equity' (1905) 5 Colum L Rev 20, 22.

⁵² Mitchell Franklin, 'A New Conception of the Relation Between Law and Equity' (1951) 11 *Philosophy and Phenomenological Research* 474, 474.

⁵³ Terrorism Act 2000, s 44.

⁵⁴ Daniel Moeckli, 'Stop and Search Under the Terrorism Act 2000: A Comment on *R (Gillan) v Commissioner of Police for the Metropolis*' (2007) 70 *MLR* 659, 659.

⁵⁵ *ibid* 661.

⁵⁶ Dominic Casciani, 'Muslim anger over stop and search' *BBC News* (2 July 2004) <<http://news.bbc.co.uk/1/hi/uk/3860505.stm>> accessed 19 April 2014.

⁵⁷ Raekha Prasad, 'Reading the Riots: 'Humiliating' stop and search a key factor in anger towards police' *The Guardian* (London, 6 December 2011) <<http://www.theguardian.com/uk/2011/dec/06/stop-and-search>> accessed 19 April 2014.

The London riots illustrate that when society perceives the law to be unjust, power relations running throughout society are prone to collapse. Thus, it is too narrow to claim that law is best understood as concerning the governance of society through power relations, as this proposition negates significant aspects of law's nature, which are essential not only for law to be legitimate, but also for law to govern society successfully and with demonstrable regard for the dignity of the people it presides over. As asserted by Falk, the pursuit of justice in law is so important because it is 'concerned with law as it ought to be',⁵⁸ providing an ideal towards which society can strive in order to improve and succeed. In countering this averment, Scheuerman argues that law's 'legitimacy is essentially a question of power',⁵⁹ and thus sovereigns are not bound by any of the innate qualities of law proffered in this article. This is plainly wrong; legal power derives from the will of the people and accordingly, valid laws made by the sovereign must be an emanation of the populous' wishes and the law must respect their morality. The structuring and governance of society can only be successfully attained if law is moral, just and recognises that individuals are the agents that confer law its legitimacy. Law has principles and functions beyond the governance of power relationships.

⁵⁸ Richard Falk, 'The Domains of Law and Justice' (1975) 31 *International Journal* 1, 1.

⁵⁹ William Scheuerman, 'Carl Schmitt's Critique of Liberal Constitutionalism' (1996) 58 *Review of Politics* 299, 308.

THE LIFE AND DEATH OF THE SUPER-INJUNCTION

*Mellisa Brennand**

1 INTRODUCTION

Between 2009 and 2011 the frenzy surrounding the super-injunction reopened the debate about the right to privacy and freedom of expression. In response to *Terry (Previously 'LNS') v Persons Unknown*¹ and the *Trafigura case*,² which brought the super-injunction to public attention, concern was voiced about the perceived increase in the granting of super-injunctions and anonymised injunctions. Eady J speaking extra-judicially presented what he thought were possible grounds for granting a super-injunction: usually a celebrity is being blackmailed by someone who has (say) stolen a laptop or found some intimate photographs.³

In reality, case law suggests that instead of blackmail, the super-injunction was usually sought to prevent the publication of a kiss-and-tell story. The main problem, in relation to this area, is the lack of data on how many super-injunctions and anonymised injunctions had been granted between the year 2000 and the *Terry*⁴ case in 2010. Although case law does suggest there was an increase in anonymised injunctions. Indeed in 2010 in *Re Guardian News and Media Ltd* Lord Rodger noted, 'How deeply ingrained ... the habit of anonymisation [has] become.'⁵ The British media, perceiving a probable threat to press freedom, embarked on what will be argued was an unnecessary campaign for privacy law reform. This campaign saw judges pilloried, with Paul Dacre, the *Daily Mail* editor, accusing Eady J of 'amoral judgments.'⁶ Public and media concern sparked political concern: David Cameron voiced his unease about super-injunctions, declaring 'judges are creating a sort of privacy law';⁷ and in February 2010, the Culture, Media and Sport Select Committee came to the conclusion that a way needed to be found 'to limit the use of super-injunctions as far as is possible.'⁸ In response, in April 2010, the Government commissioned a judge led report titled *Super-Injunctions, Anonymised Injunctions*

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¹ *Terry (Previously 'LNS') v Persons Unknown* [2010] EWHC 119 (QB).

² *RJW & SJW v The Guardian newspaper & Person or Persons Unknown* [2009] EWHC 2540 (QB).

³ David Eady, 'Injunctions and the protection of privacy' [2010] CJQ 411, 426.

⁴ *Terry* (n 1).

⁵ *Re Guardian News and Media Ltd* [2010] UKSC 1, [2010] 2 AC 697 [1].

⁶ Paul Dacre, (Society of Editors conference, Bristol 9 November 2008).

⁷ Owen Bowcott, 'Privacy law should be made by MP's, not judges, says David Cameron' *The Guardian* (London, 21 April 2011).

⁸ Culture, Media and Sport Select Committee, *Press Standards, Privacy and Libel* (HC 2009-10 351) [102].

*and Open Justice.*⁹ The Committee was set the task of investigating the ‘practice and procedure,’¹⁰ in the granting of super-injunctions as well as assessing the super-injunctions, ‘impact on the principles of open justice bearing in mind section 12 of the Human Rights Act [1998]’ (HRA).¹¹

Subsequently the Committee in its report defined the super-injunction as an interim injunction which restrains a person from: (i) publishing information which concerns the applicant and is said to be confidential or private; and (ii) publicising or informing others of the existence of the order and the proceedings.¹²

The Committee concluded that once its recommendations were implemented super-injunctions ‘will only be granted in very limited situations.’¹³ In addition, it recommended that ‘data should be collected and published annually’¹⁴ on all interim non-disclosure orders. More than two years after the last super-injunction was granted, and with the recent publication of the third *Statistics on privacy injunctions*,¹⁵ the time has come to reach conclusions on the super-injunction. The objective of this study is to present an overarching view of the birth, life and death of the super-injunction. The central theme throughout will be to demonstrate that the super-injunction is an ‘unwieldy, draconian and disproportionate gagging orde[r]’¹⁶ as argued by Matthiesson.

Firstly, the background to the super-injunction will be explored. This will comprise an analysis of privacy law before the HRA, as well as looking at relative privacy orders from which the super-injunction evolved. The main purpose of this is to demonstrate why the injunction maybe an effective remedy and why in theory the super-injunction maybe necessary.

Conversely, the focus of this article will be placed on the right to privacy and the underlying rationale of protecting it. Through analysis of English case law prior to the enactment of the HRA,¹⁷ the foundations of the super-injunction will be outlined. A comparative analysis will then be carried of *Campbell v Mirror Group Newspapers Ltd*¹⁸ and *Von Hannover v Germany*,¹⁹ and it will be demonstrated that Strasbourg jurisprudence drove this area of law. Ultimately, this segment will seek to

⁹ Lord Neuberger MR, ‘Report of the Committee on Super-Injunctions: Super-Injunctions, Anonymised Injunctions and Open Justice,’ (20 May 2011).

¹⁰ *ibid* 9.

¹¹ Human Rights Act 1998.

¹² Lord Neuberger (n 9) 9.

¹³ *ibid* 2.

¹⁴ *ibid* 4.

¹⁵ Ministry of Justice, ‘Statistics on privacy injunctions June 2013 to December 2013’ (Ministry of Justice bulletin, 13 March 2014).

¹⁶ Sophie Matthiesson, ‘Who’s Afraid of the Limelight? The Trafigura and Terry Super-Injunctions, and the Subsequent Fallout’ (2010) 2 *Journal of Media Law* 153, 154.

¹⁷ Human Rights Act 1998.

¹⁸ [2004] UKHL 22, [2004] 2 AC 457.

¹⁹ [2004] EMLR 21.

demonstrate the inherent weaknesses of the super-injunction and why it does not fulfil its purpose.

In addition, this article then attempts to look at the countervailing interests of freedom of expression and press freedom. This will be demonstrated by the underlying rationale of protecting freedom of expression and press freedom, as well as analysing the protection to those freedoms that article 10 affords. Furthermore, it will consider whether ‘reputation’ should be included within the right to private life and in doing so will demonstrate the overlap between defamation and privacy rules. The focus however, will predominantly be placed on the clash between privacy and freedom of expression. Additionally, section 12 HRA²⁰ and its protection of press freedom will be analysed in an attempt to uncover the truth on the actual effect the super-injunction has on press freedom. It will come to conclusions as to whether the press and public concern, discussed above, was legitimate. Furthermore, an analysis of the fundamental principle of Open Justice will be introduced and it will be debated as to whether the super-injunction legitimately circumvent the article 6 ‘right to a fair hearing.’²¹ Zuckerman argues, ‘Court orders that do not comply with the rule of law undermine the entire democratic edifice and their own legitimacy.’²²

Finally, the focus will be placed on the death of the super-injunction and will consider whether reform is advantageous and necessary. The article concludes with a comparative analysis of how the courts have shown a change in approach to the balancing act between freedom of expression and privacy. Additionally it will be shown how this approach by the national courts has been confirmed and secured by the change in approach of the European Court of Human Rights (ECtHR).

2 THE BIRTH OF THE SUPER-INJUNCTION

The aim of this section is to present why an injunction is an effective remedy. In addition it will consider what a super-injunction is in relation to other measures relating to privacy and how it relates in practice. It will also be evaluated why the courts took the next step to create the super-injunction and what interests drove this area of law. The ‘super-injunction’ was brought to the media and public attention after *Trafigura*²³ and *Terry*.²⁴ The Committee on Super injunctions in their report credits *Trafigura* for making the term ‘well-known.’²⁵ The term ‘super-injunction’²⁶ was first used in the English courts in *Terry*. Both cases will be considered below.

²⁰ Human Rights Act 1998, s 12.

²¹ Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights, as amended) (ECHR).

²² Adrian Zuckerman, ‘Super Injunctions- curiosity-suppressant orders undermine the rule of law’ [2010] CJQ 131, 136.

²³ *RJW* (n 2).

²⁴ *Terry* (n 1).

²⁵ Report of the Committee on Super-Injunctions (n 9) para 2.1.

²⁶ *Terry* (n 1) [24].

2.1 *Breach of confidence*

In the absence of a tort of privacy, prior to the enactment of the HRA, Wacks argues, ‘breach of confidence remained the principal means by which to provide protection against the gratuitous publication of personal information.’²⁷ Sir Robert Megarry, in *Coco v AN Clark (Engineers) Ltd*, articulated the necessary elements in a cause of action for breach of confidence: (a) That the information was of a confidential nature, (b) that it was communicated in circumstances importing an obligation of confidence and (c) that there was an unauthorised use of the information.²⁸

It can be argued that breach of confidence was inadequate in protecting privacy: Nicol and Robertson described requirement (b) as ‘a serious obstacle’²⁹ to many claims. The 1991 case *Kaye v Robertson*³⁰ demonstrates the inadequacy of the protection of privacy at the time. Glidewell LJ stated that ‘in English law there is no right to privacy, and accordingly there is no right of action for breach of a person's privacy.’³¹ In this case a journalist and a photographer accessed the private hospital room of a well-known actor who was recovering from surgery. The journalist and photographer interviewed and took photographs of the actor. Even though an injunction was granted, Bingham LJ declared ‘we cannot give the plaintiff the breadth of protection which I would, for my part, wish.’³²

This demonstrates the desire of judges to be able to effectively protect privacy. The Lord Chancellor stated ‘judges are pen-poised ... to develop a right to privacy to be protected by the common law.’³³ The development of this area after the HRA will be considered below.

2.2 *The foundations of the super- injunction*

In breach of confidence cases the remedy usually sought is an injunction. Injunctions are an equitable remedy granted under section 37 Senior Courts Act 1981.³⁴ An interim injunction (of which super-injunctions are a form) prohibits disclosure of information before trial. It has been argued by Phillipson that injunctions are the ‘only satisfactory legal means of protecting privacy.’³⁵ Scott presents a contrary view stating that, ‘although damages may not be the best or the preferred option, they can still be effective.’³⁶ Conclusively, Eady J, writing extra-judicially, argues they are

²⁷ Raymond Wacks, *Privacy and Media Freedom* (OUP 2013) 128.

²⁸ [1968] FSR 415, 415 (Ch).

²⁹ Geoffrey Robertson and Andrew Nicol, *Media Law* (5th edn, 2008) [2020].

³⁰ [1991] FSR 62 (CA).

³¹ *ibid* [66] (Glidewell LJ).

³² *ibid* [70] (Bingham LJ).

³³ HL Deb 24 November 1997, Vol 583, Col 784.

³⁴ Senior Courts Act 1981, s 37.

³⁵ Gavin Phillipson, ‘Max Mosley goes to Strasbourg: Article 8, Claimant Notification and Interim Injunctions’ (2009) 1 JML & P 73, 96.

³⁶ Andrew Scott, ‘Prior Notification in Privacy Cases: A Reply to Professor Phillipson’ (2010) 2 JML & P 49, 51.

‘actually a requirement imposed by convention jurisprudence’³⁷ after the enactment of the HRA.

Article 13 of the European Convention on Human Rights provides the: ‘Right for an effective remedy.’³⁸ Indeed in *Mosley v News Group Newspapers Ltd* Eady J proposed that, in cases concerning publication of personal information, damages were not an effective remedy, as ‘once privacy has been infringed, the damage is done.’³⁹

The injunction can provide a number of different provisions; the super-injunction can be seen as a progression of these other types of order. Firstly, under the Civil Procedure Rules, CPR r 39.2(4) states that the parties or witnesses names maybe anonymised ‘if it considers non-disclosure necessary in order to protect the interests of that party or witness.’⁴⁰ The Committee on Super-Injunctions stated ‘there is nothing novel about orders of this type.’⁴¹ The problem with this order is the worry that jigsaw identification will take place. This practice involves the press, in different publications printing different information, which when put together reveals the individual’s identity. The super-injunction in theory would circumvent this problem.

A second order, with characteristics similar to some of the super-injunctions, is what the Committee on Super-injunctions describes as ‘Privacy orders.’⁴² The order under CPR r 39.2 (3) privatises a ‘hearing, or any part of it.’⁴³ CPR r 39.2 (3) lists the situations where this would be appropriate, these include if ‘(a) publicity would defeat the object of the hearing’⁴⁴ and (g) ‘the court considers this to be necessary, in the interests of justice.’⁴⁵ No concern arises around this type of order, as privatisation is only partial. Usually, once the purpose of the secrecy has been achieved, all proceedings will become public. Alternatively, concern arose in relation to the super-injunction as orders were being sought where absolute privatisation was permanent, like in *Terry*.⁴⁶

The absent super-injunction characteristic can be seen in the Non-Disclosure order. The Committee on Super-Injunctions stated this order contained ‘the super-injunction element.’⁴⁷ The Committee gave the following definition of the order stating the order prohibits: ‘the publication or disclosure of the fact of the proceedings ... for a short

³⁷ Eady (n 3) 413.

³⁸ ECHR (n 21) art 13.

³⁹ [2008] EWHC 1777, [2008] EMLR 20 [230].

⁴⁰ CPR r 39.2 (4).

⁴¹ Report of the Committee on Super-Injunctions (n 9) para 2.18.

⁴² *ibid* para 2.19.

⁴³ CPR r 39.2(3).

⁴⁴ CPR r 39.2(3)(a).

⁴⁵ CPR r 39.2(3)(g).

⁴⁶ *Terry* (n 1).

⁴⁷ Report of the Committee on Super-Injunctions (n 9) para 2.20.

period to ensure that the purpose of the order is not frustrated through publicity.’⁴⁸

Munby LJ, in the family law case *PM v KH*, justified the orders’ secrecy, stating that the absence of secrecy ‘in such circumstances [would be likely] to lead, directly or indirectly, to a denial of justice ...’⁴⁹ The underlying rationale behind granting this order being that, if the defendants found out about proceedings, they might publish key evidence themselves or remove evidence of their identification.

The previous orders made room for the birth of the super-injunction. The evolution of the injunction to become the super-injunction in certain circumstances can be said to have been solicitor driven, which can be seen in *Trafigura*⁵⁰ below. The reasoning for adding the third element, Zuckerman argues is that it counteracts the ‘Streisand effect’⁵¹ where curiosity is increased due to knowledge that material has been anonymised. Zuckerman proposes that the super-injunction is a ‘curiosity-suppressant order’⁵² as the purpose of such order is to ensure that the public gets “no whiff” of the proceedings lest people’s curiosity is excited by the forbidden publication to the point where it must be satisfied foul or fair.⁵³

2.3 *Super-injunction case study*

The following section is a case study of the two cases that brought the super-injunction to the media attention. Indeed Zuckerman argues that before *Terry*, there was ‘no jurisprudence’⁵⁴ in this area.

The 2009 *Trafigura* case involved an injunction by which Trafigura sought to prohibit *The Guardian* from publishing a confidential report (commissioned by Trafigura themselves), the Minton Report, which detailed alleged toxic waste dumping by Trafigura. The injunction was granted and drafted to the exact specifications of Trafigura’s solicitors, Carter Ruck.

Maddison J granted the interim order for several reasons. Firstly, he held the claimants were the ‘truly innocent parties’⁵⁵ as the confidential document was leaked to the press. Secondly, he emphasised that anonymity was to be for ‘seven days only.’⁵⁶ Thirdly (and controversially), he reasoned that there was ‘No sufficient public interest ... to warrant the refusal of an injunction.’⁵⁷ Conversely, Hall argues that it

⁴⁸ *ibid.*

⁴⁹ *PM v KH & Another* [2010] EWHC 870 [37], [2010] 2 FLR 1057 (Fam).

⁵⁰ *RJW* (n 2).

⁵¹ Zuckerman (n 22) 134.

⁵² *ibid* 134.

⁵³ Adrian Zuckerman, ‘Common law repelling super injunctions, limiting anonymity and banning trial by stealth’ [2011] CJQ 223, 224.

⁵⁴ Zuckerman (n 22) 135.

⁵⁵ *RJW* (n 2) 19.

⁵⁶ *ibid* 22.

⁵⁷ *ibid* 27.

‘obviously was a public interest matter.’⁵⁸ The public became aware of the case when Paul Farrelly MP tabled a question in Parliament about the case. Farrelly, giving evidence to the Joint Committee on Privacy and Injunctions (JCPI), justified his circumvention of the courts authority: there was a good public interest reason for me to tackle the injunction in the *Trafigura* case, which it did. The cry ‘freedom of expression’ is supported by many people with a cry for open justice ...⁵⁹

This raises questions about freedom of expression and whether the super-injunction, which by its nature circumvents open justice, may be justified. Both issues will be dealt with later on.

Subsequently, *Terry* was the first case in which the courts named the order sought a ‘super-injunction.’⁶⁰ Zuckerman argues this case demonstrates ‘how emboldened applicants have become and the extent of the threat to the rule of law.’⁶¹

In this case Schillings solicitors sought a super-injunction on behalf of the then England football captain, John Terry. The order sought to prohibit disclosure of: (1) the fact of a specified personal relationship (‘the Relationship’) between LNS and another person who is named (‘the other person’); (2) details of that relationship including certain specific consequences of it; (3) information leading to the identification of LNS or the other person and (4) any photographs evidencing or relating to the fact or details of these matters.⁶²

Tugendhat J, commenting on the proposed order in his judgment, states that he did not ‘recall any order that has been made with derogations as comprehensive as those sought in this case.’⁶³ He emphasised that the derogations that Schillings were asking for had previously been ordered solely in cases ‘involving national security and risk to the lives of others.’⁶⁴ Tugendhat J refused to grant the injunction. He reasoned firstly that LNS had failed to establish that he was likely to succeed at trial, which is a requirement under section 12(3) HRA;⁶⁵ secondly that he, the judge, could make no decision on public interest as no argument was put forward; thirdly that, instead of private life, ‘the nub of LNS’s complaint in this case is the protection of reputation.’⁶⁶ He found that the applicant was really concerned with the effect the publicity would have on his sponsorship deals. Furthermore, he questioned the effect the publicity

⁵⁸ Holly Hall, ‘Super injunction, What’s Your Function?’ (2013) 18 *Communication Law and Policy* 309, 322

⁵⁹ Joint Committee on Privacy and Injunctions, ‘Privacy and Injunctions, Oral & Written Evidence’, 444.

⁶⁰ *Terry* (n 1) [24].

⁶¹ Zuckerman (n 22) 136.

⁶² *Terry* (n 1) [6].

⁶³ *ibid* 21.

⁶⁴ *ibid*.

⁶⁵ Human Rights Act 1998, s 12(3).

⁶⁶ *Terry* (n 1) [95].

would have on the applicant as he noted he had a ‘very robust personality.’⁶⁷ The case was striking as there was no respondent (even though *News of the World* was listed in evidence), which meant that no one could provide a counter-argument to the action. Tugendhat J held that the ‘applicant is unlikely ever to serve the Claim Form on any respondent,’⁶⁸ which in reality would mean a ‘permanent injunction’⁶⁹ would have been created. Commenting on the case, Matthiesson declares: ‘Like *Trafigura*, Terry’s over-egged application unearthed a legally hazardous terrain.’⁷⁰

The case analysis above demonstrates how super-injunctions evolved. In *Trafigura* the super-injunction was granted for only seven days, whereas in the latter case the injunction being sought was permanent. The evolution of the super-injunction may be said to have been lawyer led, as the specifications of the order sought in both cases were composed wholly by solicitors. In *Trafigura* the order given had exactly the same specifications as the order sought. Alternately, it can be argued that judges facilitated the birth of the injunction by their development of privacy law after the HRA - development that enabled claimants to go to lawyers and ask them to apply for orders to protect their privacy. How this ability came about will be considered below.

3 PRIVACY

Previously, the birth of the super-injunction was considered. From this evaluation it was seen that the driving force behind its birth was a solicitors firm seeing a gap for such an order to be made. At this point what will be considered is why the protection of privacy is important and how the development of law in this area arose. In doing so the small number of judges who granted super-injunctions will be considered. Finally, weaknesses of the super-injunction will be proposed.

3.1 *The right to ‘privacy’*

The legal definition of privacy is ever elusive. Thomson declares, ‘Nobody seems to have any very clear idea what [privacy] is.’⁷¹ Warren and Brandeis give a vague definition of the ‘right to be let alone.’⁷² Alternatively, Posser gives the following taxonomy of privacy interests: 1. Intrusion upon the plaintiff’s seclusion or into his private affairs. 2. Public disclosure of embarrassing private facts about the plaintiff. 3. Publicity which places the plaintiff in a false light in the public eye. 4. Appropriation, for the defendant’s advantage, of the plaintiff’s name or likeness.⁷³

This demonstrates the lack of a conclusive definition. Subsequently the well-cited justification of the protection of privacy is its close relationship with autonomy. Sedley J in *Douglas v Hello* implied their interdependency, stating that privacy was a

⁶⁷ *ibid* 95.

⁶⁸ *ibid* 20.

⁶⁹ *ibid*.

⁷⁰ Matthiesson (n 16) 163.

⁷¹ Judith Jarvis Thomson, ‘The Right to Privacy’ (1975) 4 *Philosophy & Public Affairs* 295, 295.

⁷² Samuel Warren and Louis Brandeis, ‘The Right to Privacy’ (1890) 4 *Harv L Rev* 193, 193.

⁷³ William Posser, ‘Privacy’ (1960) 48 *Cal LR* 383, 389.

‘legal principle drawn from the fundamental value of personal autonomy.’⁷⁴ This interdependency can also be seen in academic commentary. For example Griffin declares, ‘Without privacy, autonomy is threatened.’⁷⁵ The underlying rationale of this argument is that, without privacy, a person cannot have independence to evolve and develop his/her own thoughts and ideas. Westin argues that privacy is vital ‘for preparation and practice in thought and conduct, without fear.’⁷⁶ In relation to its effect on autonomy, *Tugendhat and Christie* declare, ‘refusal of an interim injunction denies the claimant his autonomous right to control the dissemination of information about his private life.’⁷⁷ Alternatively it can be argued that privacy should not be protected if the claimant makes up half-truths to advance himself. In response Devine describes this as the ‘darker side of privacy’⁷⁸ but one that is a necessary evil for people to achieve ‘intimate relationships and personal autonomy.’⁷⁹ The above analysis demonstrates the importance of protecting privacy. However it can be argued that an extra-marital affair, which many super-injunctions have been granted to hide, does not progress autonomy.

3.2 *Privacy in English Law*

English law, as previously discussed, was insufficient in protecting privacy. After the enactment of the HRA, English privacy laws ‘underwent a metamorphosis’⁸⁰ as argued by Pearce. The enactment of the HRA incorporated into UK domestic law the ECHR and as Stanley declares ‘judges ... suddenly found themselves armed with a new weapon.’⁸¹ Section 2 of the Act requires the court to ‘take into account any ... judgment, decision’⁸² of the ECtHR. Furthermore, section 6 of the act provides that it is unlawful for the courts ‘to act in a way which is incompatible with a Convention right.’⁸³ The Convention rights include article 8, which provides that a state should not interfere with article 8(1) ‘the right to respect for his private life’⁸⁴ unless in the situations outlined in article 8(2) which provides that interference needs to be, ‘... in accordance with the law and is necessary in a democratic society in the interests of national security ... for the protection of health or morals, or for the protection of the rights and freedom of others.’⁸⁵ Article 8 also provides a ‘positive’ obligation on the

⁷⁴ *Douglas v Hello! Ltd (No 1)* [2001] QB 967 (CA) 1001.

⁷⁵ James Griffin, *Griffin on Human Rights* (OUP 2008) 225.

⁷⁶ Alan F Westin, *Privacy and Freedom* (1970) 34.

⁷⁷ Mark Warby, Nicole Moreham and Iain Christie (eds), *Tugendhat and Christie on the Law of Privacy and the Media* (2nd edn, OUP 2011) 1.

⁷⁸ John William Devine, ‘Privacy and Hypocrisy’ (2011) 3 *Journal of Media Law* 169, 177.

⁷⁹ *ibid* 169.

⁸⁰ Robert Pearce, ‘Privacy, Superinjunctions and Anonymity “Selling My Story Will Sort My Life Out”’ (2011) 23 *Denning LJ* 92, 122.

⁸¹ James E Stanley, ‘Max Mosley and The English Right To Privacy’ (2011) 10 *Wash I Global Stud L Rev* 641, 653.

⁸² Human Rights Act 1998, s 2.

⁸³ *ibid* s 6.

⁸⁴ ECHR (n 21) art 8.

⁸⁵ *ibid*.

state to protect individual's private lives 'against arbitrary interference'⁸⁶ as stated in *McGinley and Egan v United Kingdom*.

Mary Arden, writing extra-judicially, proposes, 'The Strasbourg jurisprudence has been used as a launch pad for new ideas.'⁸⁷ Indeed it can be argued the HRA and the incremental development of privacy law, after its enactment, facilitated the birth of the super-injunction, as it gave judges the ability to protect privacy.

One of the first cases to rely upon the HRA was *Douglas v Hello! Ltd*⁸⁸ The unanimous view of the court was that English Law should now protect privacy. Sedley LJ suggested a particularly wide approach, proposing the possibility of a new course of action, '... we have reached a point ... that the law recognises and will appropriately protect a right to personal privacy.'⁸⁹

A departure from Sedley LJ's judgment can be seen in *A v B Plc*, wherein the court suggested that the scope of breach of confidence could be extended to 'absorb'⁹⁰ the rights protected by articles 8 and 10 by giving the action 'a new strength and breadth.'⁹¹ The claimant at first instance had obtained an injunction prohibiting a newspaper from publishing details of his extra-marital affair. The Court of Appeal discharged the injunction. Woolf CJ gave the following controversial reasoning, 'a public figure is entitled to a private life. The individual, however, should recognise that because of his public position he must expect and accept that his actions will be more closely scrutinised by the media. Even trivial facts relating to a public figure can be of great interest.'⁹²

The case was distinguished six-months later in *Campbell*⁹³ where Foster argues, 'there was evidence of a shift ... courts became less tolerant of press intrusion.'⁹⁴ The case involved a newspaper article that included pictures of the claimant leaving a Narcotics Anonymous meeting. Campbell had publicly stated in the past that she did not take drugs. The House of Lords, in a 3-2 majority, held the case was an 'unjustified infringement of the claimant's right to privacy.'⁹⁵ In its judgment the Court disposed of the limiting factors of the traditional action of breach of confidence, stating that there was no 'need for an initial confidential relationship.'⁹⁶ Subsequently, Lord Nicholls stated 'the essence of the tort is better encapsulated now as misuse of private

⁸⁶ *McGinley and Egan v United Kingdom* (1999) 27 EHRR 1 para 98.

⁸⁷ Mary Arden, 'Human rights and civil wrongs: tort law under the spotlight' (2010) PL 141, 142.

⁸⁸ *Douglas* (n 74).

⁸⁹ *ibid* 968 (Sedley LJ).

⁹⁰ *A v B Plc* [2002] EWCA Civ 337, [2003] QB 195 [4].

⁹¹ *ibid* 4.

⁹² *ibid* 11(xii).

⁹³ *Campbell* (n 18).

⁹⁴ Steve Foster, 'Protecting privacy from press intrusion: redefining private life and the public right to know' [2007] Cov LJ 33, 33.

⁹⁵ *Campbell* (n 18).

⁹⁶ *ibid* 14.

information.⁹⁷ This laid the foundation for the action of misuse of private information, which enabled the Courts to protect private information more effectively.

Furthermore, the Court in *Campbell v Mirror Group Newspapers Ltd* re-evaluated Lord Woolf's evaluation of public interest. Baroness Hale could not see why if a role model has adopted a stance which all would agree is beneficial rather than detrimental to society, 'it is so important to reveal that she has feet of clay.'⁹⁸ *Campbell*⁹⁹ undoubtedly extended the law. Not only did it create a new cause of action but it also made it acceptable for people to mislead the public. Mary Arden, writing extra-judicially, states that this extension 'resulted in a restriction on the freedom of the press.'¹⁰⁰

Subsequently the ECtHR decision in *Von Hannover v Germany*¹⁰¹ radically changed English privacy law. Comparing *Campbell* and *Von Hannover*, it can be seen that the ECtHR took a wider view of 'private life.' In *Campbell*, Baroness Hale *in obiter* stated, 'readers will obviously be interested to see how she looks if ... she pops out for a bottle of milk. There is nothing essentially private about that information nor can it be expected to damage her private life.'¹⁰²

In comparison, in *Von Hannover* it was held that Princess Caroline's being on holiday with her children should be included in the term 'private life.'¹⁰³ The court reasoned that private life is wide in scope and 'includes a person's physical and psychological integrity.'¹⁰⁴ This opened the floodgates to privacy claims. As Kay argues, there are 'few grievances that cannot be accommodated to a claim of interference with this kind of interest.'¹⁰⁵ This case was also the turning point in the meaning of 'public interest.' The ECtHR stated that a publication which detailed someone's private life and had a sole purpose to 'satisfy the curiosity of a particular readership ... cannot be deemed to contribute to any debate of general interest to society.'¹⁰⁶

Subsequently, in *McKennitt v Ash*, the court took into account Strasbourg jurisprudence. Buxton LJ held, 'that *A v B plc* cannot be read as any sort of binding authority ... To find that content, therefore, we do have to look to *Von Hannover's*

⁹⁷ *ibid.*

⁹⁸ *ibid* 151.

⁹⁹ *ibid.*

¹⁰⁰ Mary Arden, 'Freedom of Expression and the Role of a Supreme Court: Some Issues Around the World' in Mary Arden (ed), *Human Rights and European Law: Building New Legal Orders* (OUP 2009) 265.

¹⁰¹ *Von Hannover* (n 19) para 76.

¹⁰² *Campbell* (n 18) [154].

¹⁰³ *Von Hannover* (n 19) para 76.

¹⁰⁴ *ibid* 50.

¹⁰⁵ Richard Kay, 'ECHR and Private Law' [2005] EHRLR 466, 477.

¹⁰⁶ *Von Hannover* (n 19) para 65.

case.’¹⁰⁷

This demonstrates that Strasbourg jurisprudence drove this area of law. Indeed it can be argued that after *Von Hannover* the domestic courts developed privacy law with a strong commitment to Strasbourg jurisprudence, and in doing so, got the balance wrong. Robertson and Nicol, commenting on the decision in *Von Hannover*, states that the ‘British courts should have ignored this stumbling Euro prose.’¹⁰⁸ They reasoned that *Von Hannover*¹⁰⁹ was ‘the worst example’¹¹⁰ of an ‘unprincipled statement ... lacking in precedent and without proper argument from media interests.’¹¹¹ Conclusively, by following *Von Hannover* and disposing of the constraints of the traditional action of breach of confidence, the English courts set the foundations for the super-injunction, these being: a wide approach to a person’s privacy; and a narrow approach to the public interest defence.

3.3 *Privacy and the super-injunction*

Bennett declares, ‘New legal rules are shaped by those who create them.’¹¹² This section will focus on the judges who sculpted the super-injunction. It will be considered how Eady J, who was the senior media judge until October 2010, and Tugendhat J, who preceded him in the role, viewed the importance of privacy. Wragg argues that the two judges’ decisions ‘suggest a broad diversity in the methodology of evaluating the worth of privacy.’¹¹³ Firstly, Wragg argues that Eady J had a ‘skeptical approach’¹¹⁴ to the public interest defence. Eady J’s approach to public interest can be seen in *CTB v News Group Newspapers Ltd*,¹¹⁵ which involved an account in *The Sun* newspaper of an alleged extra-marital affair between defendant (2) and the claimant Ryan Giggs. The claimant applied for an injunction prohibiting the publication of his identity and further details of the alleged relationship. Eady J granted the injunction. He found no suggestion ‘of any legitimate public interest in publishing such material’¹¹⁶ and declared, ‘it will rarely be the case that the privacy rights of an individual or of his family will have to yield in priority to another’s right to publish what has been described in the House of Lords as “tittle tattle ...”’¹¹⁷

Eady J further narrowed his approach to public interest in *Mosley v News Group*

¹⁰⁷ *McKennitt v Ash* [2006] EWCA Civ 1714, [2008] QB 73 [64].

¹⁰⁸ Robertson and Nicol (n 29) [2021].

¹⁰⁹ *Von Hannover* (n 19).

¹¹⁰ Robertson and Nicol (n 29) [2020].

¹¹¹ *ibid* [2020].

¹¹² Thomas Bennett, ‘Privacy, Corrective Justice and Incrementalism: Legal Imagination and the Recognition of a Privacy Tort in Ontario’ (2013) 59 McGill LJ 49, 81.

¹¹³ Paul Wragg, ‘Fickle Justice: Judicial Idiosyncrasy in UK Privacy Cases’ (2011) 10 Conn Pub Int LJ 355, 355.

¹¹⁴ *ibid* 364.

¹¹⁵ *CTB v News Group Newspapers Ltd* [2011] EWHC 1232 (QB).

¹¹⁶ *ibid* [37] (Eady J).

¹¹⁷ *ibid* [33] (Eady J).

Newspapers Ltd. Wragg argues that Eady J ‘applied a particularly strict approach.’¹¹⁸ Eady J stated in the case that there is no public interest ‘where the law is not breached.’¹¹⁹ Alternatively, Tugendhat and Christie argue that this approach is ‘a disproportionate restriction on freedom of expression.’¹²⁰ Indeed, it can be argued that Eady J was strictly following Strasbourg jurisprudence, and in doing so got the balance wrong.

Furthermore, the importance Eady J gave to protecting an individual’s privacy can be seen in the blackmail privacy case *OPQ v BJM*,¹²¹ where Eady J granted a *contra-mundum* injunction, which binds the whole world. Such a draconian sanction had formerly been granted in only a limited number of circumstances, such as in the case of the killer of James Bulger (*Venables* case),¹²² which was based on the ‘risk of serious injury or death’¹²³ concerns. The decision in *OPQ* controversially developed the existing law, as there was no threat to life and limb. Tugendhat and Christie suggest that Eady J went too far as the orders ‘would not commonly be granted in aid of a private right.’¹²⁴ Indeed it can be argued this demonstrates that judges were granting far too severe remedies.

Following his decisions, Eady J was vilified and personally attacked in the media, most notably by Paul Dacre, the *Daily Mail* editor, who stated that Eady J’s decisions were bringing in a ‘privacy law by the back door.’¹²⁵ This is obviously absurd, he was not even involved in *Campbell*¹²⁶ and it has clearly been shown through the above case analysis that Eady J’s decisions were comparable with Strasbourg jurisprudence. Eady J, speaking extra-judicially in direct response to Dacre’s attack, stated that this is not so much ‘judge made law’. It merely provides the framework within which to achieve Parliament’s intentions, as identified in the HRA 1998, and to provide some form of consistency in so doing.¹²⁷ The Culture, Media and Sport Select Committee, also responded to the claims and concluded there was ‘no evidence’¹²⁸ that Eady J had ‘departed from following the principles set out by the House of Lords of the European Court of Human Rights.’¹²⁹

By contrast, the press treated Tugendhat J as a saviour. Yet, with regard to privacy

¹¹⁸ Paul Wragg, ‘A Freedom to Criticise? Evaluating the Public Interest in Celebrity Gossip after Mosley and Terry’ (2010) 2 *Journal of Media Law* 295, 295.

¹¹⁹ *Mosley* (n 39) [128].

¹²⁰ *Tugendhat and Christie* (n 77) para 12.211.

¹²¹ *OPQ v BJM* [2011] EWHC 1059, [2011] EMLR 23 (QB).

¹²² *Venables v News Group Newspapers* [2001] Fam 430 (Fam).

¹²³ *ibid* 430.

¹²⁴ *Tugendhat and Christie* (n 77) para 13.35.

¹²⁵ Dacre (n 6).

¹²⁶ *CTB* (n 115).

¹²⁷ Eady (n 3) 417.

¹²⁸ Culture, Media and Sport Select Committee (n 8) para 76.

¹²⁹ *ibid* para 76.

blackmail cases, Tugendhat J and Eady J held similar views. In *AMM v HXW*,¹³⁰ a blackmail case, Tugendhat J granted an injunction. In reasoning, Tugendhat J emphasised that ‘to promote the public interest in preventing and punishing blackmail are both factors which weigh strongly in favour of the grant of an anonymity order.’¹³¹ Subsequently, Wragg argues that *Terry* suggests ‘greater generosity to the public interest claims of privacy invading expression.’¹³² Tugendhat J in his judgment stated, ‘I cannot decide that section 12(3) is satisfied ... having regard to the potential defence of public interest.’¹³³ This suggests that, where there is a possibility that a public interest defence could be brought, then an injunction would not be issued.

It can be argued conclusively that Dacre was incorrect in stating that privacy law was being brought in ‘by the back door.’¹³⁴ Instead it shows a strong commitment by the court to follow Strasbourg jurisprudence. In doing so the courts granted remedies that were too severe. Indeed, the demise of the super-injunction can be said in part to be due to Tugendhat’s more generous approach to public interest, which caused the courts to change approach. This will be further discussed below. In addition the demise of the super-injunction, can be attributed to its inherent weaknesses, which caused less people to seek them due to them being ineffective.

3.4 *The weakness of the Super-injunction*

Although the super-injunction in theory protects privacy absolutely, it can be argued that in practice it is ineffective due to social media, parliamentary privilege and costs.

Firstly, one of the most cited weaknesses of the super-injunction is that practically it does not work. Hughes notes the ‘difficulty of enforcing injunctions in the digital age.’¹³⁵ Similarly H and D Fenwick suggest that the activity of social media ‘generally exacerbates the existing problem of protecting private information,’¹³⁶ as modern technology can bypass the authority of the courts. An example of this occurred in May 2011, where *Twitter* accounts published the names of celebrities who had allegedly been granted super-injunctions and gagging orders. Burrell, for *The Independent*, described the situation as bringing ‘the culture of the super-injunction to its knees.’¹³⁷ Subsequently, this had a direct effect on injunctions. Jeremy Clarkson voluntarily lifted his own injunction as he claimed ‘injunctions don’t work.’¹³⁸ Conclusively, Tweed argues the identification of super-injunctions on social

¹³⁰ *AMM v HXW* [2010] EWHC 2457, (2010) 160 NLS 1425 (QB).

¹³¹ *ibid* [39] (Tugendhat J).

¹³² Wragg (n 113) 365.

¹³³ *Terry* (n 1) [125].

¹³⁴ Dacre (n 6); *CTB* (n 115).

¹³⁵ Kirsty Hughes, ‘Parliament Reports on the Law of Privacy and Injunctions’ (2012) 4 *Journal of Media Law* 17, 24.

¹³⁶ H Fenwick and D Fenwick, ‘The changing face of protection for individual privacy against the press: the Royal Charter and tort liability’ (2013) 27 *IRLCT* 241, 242.

¹³⁷ Ian Burrell, ‘A legal crisis in 140 characters’ *The Independent* (London, 10 May 2011).

¹³⁸ Michael Seamark, ‘Jeremy Clarkson lifts the gag on his ex wife’ *Daily Mail* (27 October 2011).

networking sites have ‘effectively sounded the death knell of the super-injunction.’¹³⁹

Secondly, super-injunctions are ineffective as Members of Parliament can still discuss them during Parliamentary proceedings. Article 9 Bill of Rights provides that the Freedom of Speech and Debates of Proceedings in Parliament ought not to be impeached or questioned in any court of place out of Parliament.¹⁴⁰

Under parliamentary privilege, John Hemming MP named Giggs in the House of Commons as having taken out an injunction. He stated, ‘With about 75,000 people having named Ryan Giggs on Twitter, it is obviously impracticable to imprison them.’¹⁴¹ Similarly, six days later in the House of Lords, Lord Stoneham named Sir Fred Goodwin as having ‘a super-injunction.’¹⁴² Although Hughes complains that ‘MPs showed a lack of respect’¹⁴³ for the courts and published information with ‘flagrant disregard for the privacy injunction in place,’¹⁴⁴ the alternative would be to have no parliamentary comment on such issues, which would go against one of the constitutional principles of English Law. In addition even if super-injunctions could not be discussed in Parliament there is still a chance they would be mentioned by social media. Conclusively the super-injunction does not meet its purpose, which Zuckerman argues is, to be a ‘curiosity-suppressant order,’¹⁴⁵ as social media and parliamentary privilege can circumvent the courts authority.

Thirdly, it can be argued that the super-injunction has now become accessible only to the wealthy. The Joint Committee on Privacy and Injunctions (JCPI) argued that ‘legal redress is beyond the means of most ordinary citizens.’¹⁴⁶ Therefore a situation arises where you have a remedy that is not available to everyone equally. O’Callaghan argues that ‘privacy ... does not conform to the regulative ideal of equality before the law.’¹⁴⁷ In relation to super-injunctions, it can be argued this is true. The JCPI stated that the ‘minimum cost of obtaining an interim injunction would be £15,000 to £25,000’¹⁴⁸ and that the estimated cost of *Ferdinand v MGN Ltd*¹⁴⁹ which went to trial was ‘£270,000 to £280,000,’¹⁵⁰ meaning that only the rich can afford the injunction process. This is reinforced by Mullender, who complains of an

¹³⁹ Paul Tweed, *Privacy and Libel Law: The Clash with Press Freedom* (Bloomsbury Professional 2012) 41.

¹⁴⁰ Bill of Rights 1688, art 9.

¹⁴¹ HC Deb 13 May 2011, vol. 528, col. 638.

¹⁴² HL Deb 19 May 2011, vol. 727, col 1490.

¹⁴³ Hughes (n 135) 26.

¹⁴⁴ *ibid* 26.

¹⁴⁵ Zuckerman (n 22) 134.

¹⁴⁶ Joint Committee on Privacy and Injunctions, *Privacy and Injunctions* (2010-2012, HL 273, HC 1443) para 136.

¹⁴⁷ Patrick O’Callaghan, *Refining Privacy in Tort Law* (Springer 2013) 153.

¹⁴⁸ Joint Committee on Privacy and Injunctions (n 146) para 136.

¹⁴⁹ [2011] EWHC 2454.

¹⁵⁰ Joint Committee on Privacy and Injunctions (n 146) para 136.

‘imbalance’¹⁵¹ emerging due to judges showing ‘greater concern with the privacy-related interests of celebrities and others in the media’s eye.’¹⁵² Subsequently, O’Callaghan argues that ‘English lawyers are left with a skewed understanding of privacy as a preserve for the rich and famous.’¹⁵³ This of course is extremely worrying in a democratic society. Conclusively, although privacy should be protected to an extent, the super-injunction became a mechanism for the rich to hide their affairs, not to protect their autonomy.

4 FREEDOM OF EXPRESSION

In the aforementioned section, the importance of privacy in English law was considered. From this evaluation, it was seen that the increase in privacy protection enabled the super-injunction to be born. What is considered now is the importance of privacy’s competing interest - freedom of expression - with an intense focus on the importance of press freedom. This evaluation will attempt to dispel the myths surrounding the super-injunction’s effects on press freedom. Thus, supporting the argument that the super-injunction highlighted the overlap of privacy and defamation rules, and to demonstrate the importance of open justice, which the super-injunction by its nature circumvents.

4.1 *The right to ‘Freedom of Expression’*

Griffin defines the right of freedom of expression as the ‘Freedom to state, discuss and debate anything relevant to our functioning as normative agents.’¹⁵⁴ In *R v Secretary of State for the Home Department, Ex parte Simms*,¹⁵⁵ Lord Steyn reasons why the interest should be protected. Firstly, he proposes that it promotes ‘the self-fulfilment of individuals.’¹⁵⁶ (This connection between self-fulfilment and freedom of expression is further explained by Barendt: ‘Restrictions on what we are allowed to say and write, or ... hear and read, inhibit our personality and growth.’¹⁵⁷) Secondly, Lord Steyn quotes Mill’s statement that ‘the best test of truth is the power of the thought to get itself accepted in the competition of the market.’¹⁵⁸ This rationale argues that freedom of expression causes discussion, which in turn causes a quest to separate truth from falsity. In relation to super-injunctions it can be stated that freedom of expression is needed when the celebrity has misled the public, to separate the falsity of their image with the truth. Thirdly, Lord Steyn argues that freedom of expression is important because it ‘is the lifeblood of democracy.’¹⁵⁹ Freedom of expression can be seen to be essential to a liberal democracy as it allows citizens access to a market place of ideas, which enables them to effectively participate in

¹⁵¹ Richard Mullender, ‘Privacy, Imbalance and the Legal Imagination’ (2011) 19 Tort L Rev 109, 109.

¹⁵² *ibid* 109.

¹⁵³ O’Callaghan (n 147) 155.

¹⁵⁴ Griffin (n 75) 240.

¹⁵⁵ [2000] 2 AC 115 (HL).

¹⁵⁶ *ibid* [126] (Lord Steyn).

¹⁵⁷ Eric Barendt, *Freedom of Speech* (2nd edn, OUP 2005) 13.

¹⁵⁸ *Ex p Simms* (n 155) [126] (Lord Steyn).

¹⁵⁹ *ibid*.

democracy. If the public were to be restricted in their reading and points of discussion this would have an adverse effect on their personality, beliefs and political attitudes. In application to super-injunctions granted to protect an individual's private life, this justification may be described as precarious, as there is no obvious connection to political issues in most cases. Wragg argues that the 'The idea that celebrity gossip is a form of political expression ... unconvincing.'¹⁶⁰

Alternately, in *Reynolds v Times Newspaper Ltd* it was stated that 'Matters other than those pertaining to government and politics may be just as important in the community.'¹⁶¹ Indeed it will be argued below that celebrity gossip is important as it presents what is acceptable behaviour in society. The importance of the protection of freedom of expression is confirmed in article 10. Article 10(1) provides that 'Everyone has the right to freedom of expression.'¹⁶² It is important to emphasise that the right is obviously not absolute. Barendt declares that 'the most obvious feature ... is the extensive list of circumstances in which limitations to the freedom of expression may be upheld.'¹⁶³

In *Sunday Times v United Kingdom*,¹⁶⁴ the Court listed the factors which have to be considered when deciding if a restriction of freedom of expression meets article 10(2). Firstly, to meet the conditions of article 10(2), the restriction must be 'prescribed by law.'¹⁶⁵ In *Sunday Times v United Kingdom*, the court found the term 'law' 'covers not only statute but also unwritten law.'¹⁶⁶ Secondly, the court held that the purpose of the restriction has to be 'proportionate to the legitimate aim pursued.'¹⁶⁷ Thus does the purpose of the restriction meet with one of the aims listed in article 10(2), which include 'protection of the reputation or rights of others, for preventing the disclosure of information received in confidence.'¹⁶⁸ Thirdly, for the restriction to meet with article 10(2) it has to be 'necessary in a democratic society.'¹⁶⁹ The Court held that this means it should correspond to a 'pressing social need.'¹⁷⁰ The final factor of the ECtHR's analysis was the 'margin of appreciation,'¹⁷¹ this being the amount of discretion the ECtHR gives to nation states in order for them to fulfil their duties under the ECHR. In *Handyside v The United Kingdom*, the ECtHR stated the doctrine was not an 'unlimited power.'¹⁷² From case law it is clear that the margin of appreciation given depends on the type of speech that the court is dealing with;

¹⁶⁰ Wragg (n 118) 317.

¹⁶¹ [2001] 2 AC 127, 220 (HL).

¹⁶² ECHR (n 21) art 10(1).

¹⁶³ Barendt (n 157) 65.

¹⁶⁴ (1979) 2 EHRR 245.

¹⁶⁵ ECHR (n 21) art 10(2).

¹⁶⁶ *Sunday Times* (n 164) [47].

¹⁶⁷ *ibid* [62].

¹⁶⁸ ECHR (n 21) art 10(2).

¹⁶⁹ *ibid* art 10(2).

¹⁷⁰ *Sunday Times* (n 164) [59].

¹⁷¹ *ibid* [59].

¹⁷² (1976) IEHRR 757 para 49.

Political expression is strongly protected and therefore given a much narrower margin of appreciation, as seen in *Sunday Times*, whereas a ‘wide margin of appreciation’¹⁷³ was given in *Mosley* a privacy case.

4.2 *The relationship between privacy and defamation*

Article 10(2) also includes ‘reputation,’ meaning reputation is not a convention right. For this reason Nicol and Robertson argue that “Reputation” cannot be elevated to an ECHR right of equal standing with article 10.¹⁷⁴ However, Tomlinson suggests that through the ECHR’s discretion ‘article 8 protects the ‘right to reputation’ as an aspect of private life.’¹⁷⁵ This can be seen repeatedly in ECtHR decisions, an example being *Chauvy v France*,¹⁷⁶ as well as English Law, an example being *Greene v Associated Newspapers Ltd*.¹⁷⁷ Historically, different rules have run independently for privacy and defamation. However, due to these recent developments, they have begun to overlap. Nicol and Robertson declare that reputation was ‘carelessly and illegitimately added.’¹⁷⁸ This suggests that the right as interpreted has slipped from its foundations. The consequence of this slippage is conflict between the defamation and privacy rules. In defamation, following the rule in *Bonnard v Perryman*,¹⁷⁹ an injunction will not usually be granted. Phillipson gave the rationale for the rule, stating ‘this is because damage done to reputation by initial publication can subsequently be restored.’¹⁸⁰ Consequently, with reputation being included in article 8, identical claims can be brought under privacy and defamation with strikingly different results.

Tugendhat J, in *Terry*, provided a judgment clarifying this conflict. Tugendhat J held that the claimant really wanted to ‘protect what is in substance reputation.’¹⁸¹ Subsequently, the court looked to defamation and rejected the application for a super-injunction. This demonstrates that applicants were bringing claims in misuse of private information to (as stated by Matthiesson) ‘exploit the more advantageous test.’¹⁸² The judgment could be considered a reason for the decrease in injunction claims, as people cannot as easily exploit this overlap. In addition, Matthiesson argues that, ‘Tugendhat J’s judgment demonstrates the benefit of publicly available judicial analysis.’¹⁸³ This will be analysed to a greater extent at a further stage.

¹⁷³ *Mosley v United Kingdom* (2011) 53 EHRR 30.

¹⁷⁴ Robertson and Nicol (n 29) para 2-20.

¹⁷⁵ Hugh Tomlinson, ‘Privacy and Defamation, Strasbourg blurs the boundaries’ (Inform’s Blog, 23 January 2014) <<https://inform.wordpress.com/2014/01/23/privacy-and-defamation-strasbourg-blurs-the-boundaries-hugh-tomlinson-qc/>> accessed 9 February 2015.

¹⁷⁶ (2005) 41 EHRR 29.

¹⁷⁷ [2004] EWCA Civ 1462, [2005] QB 972 [68].

¹⁷⁸ Robertson and Nicol (n 29) para 2–20.

¹⁷⁹ [1891] 2 Ch 269 (CA).

¹⁸⁰ Phillipson (n 35) 74.

¹⁸¹ *ibid* 123.

¹⁸² Matthiesson (n 16) 164.

¹⁸³ *ibid* 165.

4.3 *Press Freedom*

The super-injunction also substantially limits a sub-class of freedom of expression, press freedom. Blackstone declares, ‘to forbid [freedom of expression], is to destroy the freedom of the press.’¹⁸⁴ In the recent *Miranda case*, Laws LJ gave a distinction between the rights, stating freedom of expression ‘belongs to every individual for his own sake. But the latter is given to serve the public at large.’¹⁸⁵ Indeed, press freedom should be protected for three reasons. Firstly, the press can be described as the ‘public watchdog’¹⁸⁶ as stated in *Re Guardian*. Wragg argues of the ‘significant impediment to serious investigative journalism that super-injunctions can cause (as the Trafifigura scandal amply shows).’¹⁸⁷ This demonstrates that the super-injunction at times was stopping the press from fulfilling its watchdog role.

Secondly, it can be argued that, as stated in *Francome v Mirror Group*, the press performs an intrinsic role ‘in exposing ... anti-social behavio[u]r and hypocrisy.’¹⁸⁸ The underlying rationale being that, by the use of celebrities, the press personalises moral issues, which discourages inappropriate behaviour. Dacre comments that this ‘has been a vital element in defending the parameters of what are considered acceptable standards of social behavio[u]r.’¹⁸⁹ Conversely it can be argued that this is ineffective. Wragg declares, ‘revelations about Terry’s affairs have seemingly been of no educational benefit.’¹⁹⁰ This can be seen quite clearly in the subsequent *Ferdinand* case. However, on a broader view, Tugendhat J argues that freedom to criticise is a valuable freedom because ‘It is as a result of public discussion and debate that public opinion develops.’¹⁹¹

Furthermore, a prominent justification for press freedom is commercial viability. This is based on the rationale that, if articles of entertainment are not published, readership will decline and so will newspapers. Commercial viability is an often-cited consideration in the courts. Baroness Hale in *Campbell* states, ‘we need newspapers to sell in order to ensure that we still have newspapers at all.’¹⁹² Similarly Wolf CJ in *A v B Plc* declares, ‘if newspapers do not publish information which the public are interested in, there will be fewer newspapers published, which will not be in the public interest.’¹⁹³

¹⁸⁴ William C Sprague, *Blackstones Commentaries, Abridged Book IV* (9th edn, 1915) 463.

¹⁸⁵ *Miranda v Secretary of State for the Home Department* [2014] EWHC 255 (Admin), [2014] 1 WLR 3140 [46].

¹⁸⁶ *Re Guardian News* (n 5) 701.

¹⁸⁷ Wragg (n 118) 300.

¹⁸⁸ [1984] 1 WLR 892 (CA) 898.

¹⁸⁹ Dacre (n 6).

¹⁹⁰ Wragg (n 118) 318.

¹⁹¹ *Terry* (n 1) [104].

¹⁹² *Campbell* (n 18) [143].

¹⁹³ *A v B Plc* (n 90) [208].

Conversely, Fenwick and Phillipson comments on Woolf CJ's public interest interpretation stating that 'a cruder definition ... is hardly imaginable.'¹⁹⁴ However, it cannot be ignored that the public are interested in celebrity gossip. Wacks argues, 'the most trivial item of gossip about a celebrity seems to excite huge interest.'¹⁹⁵ Therefore, to completely limit all stories involving celebrity gossip would obviously have a detrimental effect on the number of newspapers, which would have a detrimental effect on the public interest.

Section 12 HRA gives weight to press freedom. Barendt states it was included to give 'special protection'¹⁹⁶ to the press. Section 12(3) provides, 'no such relief is to be granted so as to restrain publication before trial unless the court is satisfied that the applicant is likely to establish that publication should not be allowed.'¹⁹⁷

Section 12¹⁹⁸ was interpreted in *Cream Holdings Limited and others v Banjaree and others*, where Lord Nicholls emphasised the reason for the enactment of the provision, 'its principal purpose was to buttress the protection afforded to freedom of speech at the interlocutory stage.'¹⁹⁹ In interpreting section 12(3), the court found that the court must be satisfied that the applicant is 'more likely than not'²⁰⁰ succeed at trial. Furthermore Section 12(4) provides that 'the court must have particular regard to the importance of ... freedom of expression.'²⁰¹ In addition the section requires the court to take into account 'the extent to which the material has, or is about to, become available to the public'²⁰² and how far it is in 'the public interest for the material to be published.'²⁰³ It is important to note there is no statutory definition to public interest, which as argued in the previously, has led to drastically different approaches to the term. Furthermore, Tomlinson and Clayton argue that 'the sub-section was intended to 'tip the balance' in favour of expression.'²⁰⁴ Indeed Jack Straw MP, when discussing the section 12 in Parliament, stated that section 12 meant when there was a clash between the two rights, '[the court] must pay particular attention to the article 10 rights.'²⁰⁵ However, case law demonstrates this is not in fact the reality. In *Re S(A)*, Lord Steyn held that 'neither article has precedent over each other.'²⁰⁶

¹⁹⁴ Helen Fenwick and Gavin Phillipson, *Media Freedom under the Human Rights Act* (OUP 2006) 799.

¹⁹⁵ Wacks (n 27) 165.

¹⁹⁶ Barendt (n 157) 43.

¹⁹⁷ Human Rights Act 1998, s 12.

¹⁹⁸ *ibid* s 12(3).

¹⁹⁹ [2004] UKHL 44, [2004] 3 WLR 918 [15].

²⁰⁰ *ibid* [22].

²⁰¹ Human Rights Act 1998, s 12(4).

²⁰² *ibid* s 12(4)(a)(i).

²⁰³ *ibid* s 12(4)(a)(ii).

²⁰⁴ Richard Clayton and Hugh Tomlinson, *Privacy and Freedom of Expression* (2nd edn, OUP 2010) para 15.22.

²⁰⁵ HC Deb, 2 July 1998, Col 538.

²⁰⁶ *Re S (A Child)* [2004] UKHL 47, [2005] 1 AC 593 [17] (Lord Steyn).

4.4 *The super injunction and it's threat to press freedom*

The previous section demonstrated the importance of press freedom; this section will attempt to separate the truth from the falsity surrounding the super-injunction's effect on press freedom.

The precise number of super-injunctions granted between 2000 and 2010 is unknown but Lord Neuberger estimates the number to be 'over 200.'²⁰⁷ It is important to note that super-injunctions did not affect all press. The publishers of *The Guardian* and *The Observer*, in written evidence for the JCPI, noted that 'Privacy injunctions have not, in general,'²⁰⁸ inhibited their reporting. However, the press created what can be described as a type of frenzy in its portrayal of the super-injunction, the *Daily Mail* wrote of the 'worrying rise of the super injunction.'²⁰⁹ This led to concern being voiced regarding the over granting of super-injunctions. Hughes cites reasoning for the public perception, arguing that it was due to the 'the misleading manner in which a number of newspapers present the legal regime,'²¹⁰ an example being the way in which Eady J was presented. This was exacerbated by newspapers' incorrect reference to anonymised injunctions as super-injunctions. An example of this being The *Daily Mail* citing *CTB* as being a 'super-injunction'²¹¹ case. Alternatively it can be argued the super-injunction was a substantial threat to press freedom due to Volokh's 'slippery slope'²¹² mechanism. Volokh declares, 'slippery slopes present a real risk—not always, but often enough that we cannot lightly ignore the possibility of such slippage.'²¹³ Volokh gives a general definition of a slippery slope: where decision A, which you might find appealing, ends up materially increasing the probability that others will bring about decision B, which you oppose.²¹⁴

Similar reasoning was cited in *Re S*, where Lord Steyn refused to grant an injunction due to its wider consequences, stating, 'the process of piling exception upon exception to the principle of open justice would be encouraged and would gain in momentum.'²¹⁵

Following from this, it can be argued that the super-injunction was a real threat to press freedom as Zuckerman argues there was no 'effective appellate review, let alone

²⁰⁷ Lord Neuberger MR, 'Privacy & freedom of expression: a delicate balance' (Eton, 28 April 2010).

²⁰⁸ Joint Committee on Privacy and Injunctions (n 59) 375.

²⁰⁹ Jack Doyle 'MP launches enquiry into "worrying rise" of the superinjunction' *Daily Mail* (London, 18 April 2011).

²¹⁰ Hughes (n 135) 19.

²¹¹ Steve Doughty, 'We will not be gagged, M'lud: As Ryan Giggs is named in Parliament as cheating star after weeks of legal farce, MP's launch a defiant message' *Daily Mail* (London, 24 May 2011).

²¹² Eugene Volokh, 'The Mechanism of the Slippery Slope' (2003) 116 Harv L Rev 1026, 1038.

²¹³ *ibid.*

²¹⁴ *ibid* 1030.

²¹⁵ *Re S (A Child)* (n 35) [33].

public scrutiny,²¹⁶ so further derogations from open justice could be granted with no scrutiny.

4.5 *The principle of Open Justice*

The previous section demonstrates the importance of judgments being open to scrutiny. Article 6(1) provides that ‘Judgment shall be pronounced publicly.’²¹⁷ The super-injunction represents a substantial infringement on the principle of open justice. Matthiesson argues, ‘The inherent secrecy of super-injunctions undermines the development of a principled and transparent jurisprudence on the subject.’²¹⁸ Publicity is fundamental in the administration of justice Zuckerman argues, ‘Publicity is indispensable in a system governed by the rule of law. There is no rule of law without an effective judicial system ... the effectiveness of the judicial system ... depends on the extent to which it can command respect and confidence.’²¹⁹

In relation to the super-injunction it can be argued the public had lost respect and confidence with the judicial system thus the rule of law was in jeopardy.

Alternately, the principle of open justice is not absolute, other interests of the court can over-ride publicity: although CPR r 39 states that ‘the general rule is that a hearing is to be in public’²²⁰ CPR r 39.2 (3), (4) sets out when hearings can be held in private, including where ‘publicity would defeat the object of the hearing’²²¹ and where ‘it involves confidential information ... and publicity would damage that confidentiality.’²²²

Although it has been previously argued that injunctions are necessary at times, it can be argued that super-injunctions were being granted when they were not necessary and a secret justice was evolving. Tugendhat J implied that this secret justice was emerging, noting in *Terry*, ‘it seems that claimants’ advisers have come under the impression that extensive derogations from open justice should be routine.’²²³

Indeed it can be argued that a secret justice was emerging to hide what Baroness Hale describes as ‘trivial’²²⁴ interests. This is demonstrated by *Re (S)*,²²⁵ which involved a child who was subject to care proceedings due to his mother being charged with the murder of the child’s brother. An injunction was sought to restrict the publication of material, which would lead to identifying the child. The injunction was not granted as the court stated it should ‘be slow to extend the incursion into the right of free

²¹⁶ Zuckerman (n 22) 136.

²¹⁷ ECHR (n 21) art 6(1).

²¹⁸ Matthiesson (n 16) 154.

²¹⁹ Zuckerman (n 22) 132.

²²⁰ CPR r 39.2.

²²¹ CPR r 39.2(3)(c).

²²² *ibid.*

²²³ *Terry* (n 1) [107].

²²⁴ *Campbell* (n 18) [143].

²²⁵ [2003] EWCA Civ 963, [2004] Fam 43.

speech.²²⁶ This demonstrates that historically the courts have been unwilling to breach open justice. In *Campbell*, Baroness Hale stated that the issues at stake in the case were ‘trivial’²²⁷ and were nowhere ‘near as serious as the interests involved in *Re S*.’²²⁸ However, the same interests which Baroness Hale described as ‘trivial’²²⁹ were at the heart of the super-injunctions which undermined the fundamental principle of open justice. This suggests that the super-injunction was disproportionate in relation to the interests it was trying to protect.

Following from this, it can be argued that a super-injunction is unnecessary in most situations and anonymity can still be found through the orders discussed previously. This can be seen in *Ntuli v Donald*.²³⁰ The claimant applied for an injunction prohibiting the defendant, a woman he had previously had a relationship with, publishing details of their relationship. Eady J granted a super-injunction and continued it on its return date. An appeal was brought claiming that the injunction should be discharged and that the granting of the super-injunction was ‘inappropriate.’²³¹ The Court held that the substantive injunction would remain but discharged the ‘super element.’ Maurice Kay LJ, giving reasoning, stated that protection of the claimant’s identity could ‘be achieved by a simple anonymity order.’²³² Furthermore, he critiqued Eady J’s granting of the super-injunction, arguing ‘it would have been possible and appropriate for Eady J to have written his judgment in a publishable form.’²³³ Zuckerman, commenting on the case, states that it demonstrated that ‘we have ... come a long way from the position where the court could grant a super injunction and permanently keep the proceedings and the order out of the public view.’²³⁴ This analysis shows that the super-injunction not only goes against the rule of law but also is usually unnecessary. Furthermore, it shows that super-injunctions were being granted too readily as they were disproportionate to the interests they were trying to protect.

5 THE DEATH OF THE SUPER-INJUNCTION

As formerly established, both the English courts and the ECtHR battling to balance the competing rights of freedom of expression and the right to privacy. Foster argues that the era of the super-injunction has ‘heightened the debate.’²³⁵ It will be proposed that there are three possible responses to the problem of the super-injunction. First, a

²²⁶ *ibid* 17.

²²⁷ *Campbell* (n 18) [143].

²²⁸ *ibid*.

²²⁹ *ibid*.

²³⁰ *Ntuli v Donald* [2010] EWCA Civ 1276, [2011] 1 WLR 294.

²³¹ *ibid* 1.

²³² *ibid* 47.

²³³ *ibid* 55.

²³⁴ Zuckerman (n 53) 230.

²³⁵ Steve Foster, ‘Balancing privacy with freedom of speech: press censorship, the European Convention on Human Rights and the decision in *Mosley v United Kingdom*’ [2013] Comms L 100, 100.

privacy statute could be enacted. Second, a statutory definition of the public interest could be implemented. Third, as Pearce proposes, nothing ‘need be done.’²³⁶ There have been emerging signs that judges believe the correct balance was not achieved and that what Matthiesson describes as an ‘unwieldy, draconian and disproportionate gagging orde[r]’²³⁷ is the result. In evaluating this response, the change of approach in the domestic courts will be considered, as well as how recent ECtHR case law is helping to clarify the balancing act.

5.1 *Statutory Reform*

It has been demonstrated that a number of issues which may be addressed by statutory reform. These include confirming that privacy law has not been brought in the ‘back door’²³⁸ as Dacre suggests, which would improve public confidence. Secondly, statutory reform might address the problem that there is no legal definition of privacy. It has previously been argued that reputation has slipped from its foundations, so a definition could clarify whether or not it should be included in article 8. In addition, statutory reform could provide clarity in the definition of public interest.

5.2 *Privacy Statute*

The first possibility is the introduction of a statute defining privacy. The introduction of a statute has been discussed by many official inquiries. Eady J a member of the Calcutt Committee²³⁹ in 1990 gave reasoning of why a privacy statute was not enacted, stating ‘... no one was keen on the idea ... because it would undoubtedly have antagoni[s]ed the press.’²⁴⁰ This demonstrates the influence the media has always had over the judiciary.

The most recent committee, the JCPI, proposed the advantages of a privacy statute. Firstly, it suggested it could create ‘more certainty in the law.’²⁴¹ Secondly, ‘any defects in the current law could be corrected.’²⁴² Thirdly, a statute could respond to the claims that the law is ‘judge made’²⁴³ and give it ‘clear democratic authority.’²⁴⁴ Conversely, there is a wide spectrum of criticism in enacting a privacy statute. O’Callaghan remarks that ‘a notion of precise definition is implausible.’²⁴⁵ This is arguably due to privacy cases being so fact sensitive. David Eady, writing extra-judicially, argues, ‘it would be wholly impractical to descend to the level of micro-

²³⁶ Pearce (n 80) 130.

²³⁷ Matthiesson (n 16) 154.

²³⁸ Dacre (n 6).

²³⁹ The Calcutt Committee, *Report of the Committee on Privacy and Related Matters* (Cm 1102, 1990).

²⁴⁰ Eady (n 3) 415.

²⁴¹ Joint Committee on Privacy and Injunctions (n 6) para 35.

²⁴² *ibid* para 35.

²⁴³ *ibid* para 34.

²⁴⁴ *ibid*.

²⁴⁵ O’Callaghan (n 147) 5.

management and to anticipate every situation that is likely to come before the courts ... No legislator could possibly think them up in advance.²⁴⁶

This suggests that, if a statute were imposed, it would cause inflexibility in an area of law where flexibility is paramount. Furthermore, it can be argued that clarity would not be achieved, as every statute is open to judicial interpretation. The Government's response to the *Report on Press Standards, Privacy and Libel* declares, 'judges would inevitably still exercise wide discretion.'²⁴⁷ O'Callaghan presents a second reason as to why a definition should not be sought, stating that, because it is 'utopian in nature ... it supposes finality.'²⁴⁸ This is a line of reasoning acknowledged, by the JCPI who asserted that there is a 'risk that definitions will not keep pace with developments in society.'²⁴⁹ This suggests that, if the legal framework is too strict, the press may stop carrying out their main purpose, investigation. Alternatively, if the definition were to be too vague it might not restrict the courts at all. Both scenarios suggest that a privacy statute would have a negative impact on the public interest.

5.3 *Defining Public Interest*

A second reform possibility would be to include in the statute a public interest definition. Wragg states, 'the approach taken to the definition of 'public interest' is pivotal to determining the media's free speech claim.'²⁵⁰ As previously demonstrated, the consequences of not having a definition of public interest, this being a lack of clarity in the law. Hall argues, 'with the current flexibility and lack of statutes or strict guidelines, there is a danger the public interest will be described as "whatever the public is interested in."²⁵¹

The JCPI argued that a public interest definition 'could aid clarity.'²⁵² However the JCPI went on to discuss problems in trying to define public interest, stating it 'is no easier than defining privacy.'²⁵³ Alternatively, it can be argued that having no statutory definition of public interest is in keeping with the role of the courts in a common law system. This is arguably due to the intense focus given to the facts of a case when having to decide if something is in the public interest. *The Author of a Blog v Times Newspapers*²⁵⁴ and *David Miranda v Secretary of State for the Home Department*²⁵⁵ show the impossibility of defining public interest. In *The Author of a Blog v Times Newspapers*²⁵⁶ the claimant was a serving detective and the anonymous

²⁴⁶ Eady (n 3) 420.

²⁴⁷ The Government's Response to the Culture, Media and Sport Select Committee on Press Standards Privacy and Libel (Cm 753, April 2010) para 2.13.

²⁴⁸ O'Callaghan (n 147) 6.

²⁴⁹ Joint Committee on Privacy and Injunctions (n 146) para 36.

²⁵⁰ Wragg (n 118) 298.

²⁵¹ Hall (n 58) 332.

²⁵² Joint Committee on Privacy and Injunctions (n 146) para 47.

²⁵³ *ibid* para 42.

²⁵⁴ [2009] EWHC 1358, [2009] EMLR 22.

²⁵⁵ *Miranda* (n 185).

²⁵⁶ *The Author of a Blog* (n 254).

blog author of ‘Night Jack.’ The blog was a medium in which the claimant expressed his opinions on police matters. *The Times* newspaper found out the author’s identity and wanted to expose it. In response, the claimant requested an injunction. Eady J declined the granting of an injunction, reasoning that there was a ‘significant public element’²⁵⁷ in knowing who the author of the blog is. However, this is a hard case in relation to public interest as not only was there a public interest in revealing the identity of the author but also Eady J argued the ‘public had a right to know how police officers behave.’²⁵⁸ If the author’s name was revealed, the blog’s purpose would be frustrated, with a disadvantageous effect on the public interest. The case demonstrates the discretion judges need to apply in a case suggesting a public interest definition is disadvantageous.

In *Miranda* the public interest involved was radically different. The case involved a man who was detained at Heathrow airport for several hours under the Terrorism Act 2000.²⁵⁹ In addition some of his possessions, which included journalistic material, were taken from him. He claimed this was done unlawfully. Laws LJ set out the public interest in the case, stating a balance needed to be struck ‘between two aspects of the public interest: press freedom itself on one hand, and on the other ... national security.’²⁶⁰

Both cases show that from case to case the public interest will be radically different, suggesting the impossibility of having an effective definition. Similar reasoning can be seen in the Privacy and Injunction report, which came to the conclusion that there should not be a statutory definition of public interest ‘as the decision of where the public interest lies in a particular case is a matter of judgment.’²⁶¹

5.4 *Recent approach of the domestic courts*

The previous section proposed that statutory reform would be ineffective. Alternately in this section, using Lord Mansfield’s analogy, it will be argued that the common law in this instance is superior to an act of parliament because ‘it works itself pure by rules drawn from the fountains of justice.’²⁶² This section, in deciding whether the common law has done this, will consider if there has been a change in perception of the domestic courts and, if so, what effect that may have had on the number of super-injunctions granted. It will also be considered how the ECtHR is helping with this change in approach.

²⁵⁷ *ibid* [9] (Eady J).

²⁵⁸ *ibid* [29].

²⁵⁹ Terrorism Act 2000, sch 7(2)(1).

²⁶⁰ *Miranda* (n 185) [73].

²⁶¹ Joint Committee on Privacy and Injunctions (n 246) 54.

²⁶² *Omychund v Barker* (1744) 1 ATK 21, 33; 26 ER 15, 23 (Lord Mansfield).

5.5 *Privacy after Terry*

This section will consider English case law subsequent to *Terry*²⁶³ and whether or not Smartt was correct in suggesting that, following that decision, super-injunctions would ‘only be granted in very limited circumstances.’²⁶⁴

Terry suggests an apparent change in direction of the courts. Wragg argues that subsequent cases ‘point toward a broader definition of public interest at work in privacy/free speech dichotomy cases.’²⁶⁵ The *Ferdinand* case is an example of the change in approach of the courts when considering what is in the public interest. The claimant, who was the captain of the England football team, brought an action against the *Sunday Mirror* concerning an article they had published, detailing an alleged affair between a woman and the claimant. The applicant claimed that the article was ‘was an unjustified infringement of his right to privacy’²⁶⁶ and applied for an injunction prohibiting re-publication, which the court refused. When deciding the case, the court looked at past conduct of the applicant, in particular an interview where he stated ‘I’ve strayed in the past – but I’m going to be a family man now.’²⁶⁷ The court found that, although the claimant did have a legitimate expectation of privacy, the public interest ‘in demonstrating ... that the image was false’²⁶⁸ outweighed the right to privacy. This is similar to that of *A v B Plc*, where it was reasoned, ‘if you have courted public attention then you have less ground to object to the intrusion that follows.’²⁶⁹

This can be seen as a departure from the sceptical approach taken by Baroness Hale in *Jameel v Wall Street Journal Europe*, where she excluded ‘tittle tattle about the activities of footballers’ wives and girlfriends’²⁷⁰ as having any real public interest. Instead, Nicol J reasoned that there was a further public interest due to the claimant’s position, as many would see the claimant ‘as a role model.’²⁷¹ To conclude, the case shows a clear expansion of the public interest defence suggesting the courts are taking a wider approach to public interest. Commenting on *Terry* and *Ferdinand*, the JCPI stated that ‘the courts are now striking a better balance between’²⁷² the competing rights.

This change in approach to granting injunctions is demonstrated in the number of super-injunctions granted after *Terry*. *The Report on Super Injunctions* noted that,

²⁶³ *ibid.*

²⁶⁴ Ursula Smartt, ‘Twitter undermines superinjunctions’ (2011) 16 Comms L 135, 139.

²⁶⁵ Wragg (n 118) 296.

²⁶⁶ *ibid* 1.

²⁶⁷ *Ferdinand* (n 149) [30].

²⁶⁸ *ibid* 85.

²⁶⁹ *A v B Plc* (n 90) [208].

²⁷⁰ [2006] UKHL 44, [2007] 1 AC 359 [147].

²⁷¹ *Ferdinand* (n 149) [90].

²⁷² Joint Committee on Privacy and Injunctions (n 146) para 32.

since *Terry*, ‘only two known super-injunctions have been granted.’²⁷³ Following this, the bulletin on *Statistics on privacy injunctions* found that only one super-injunction had been granted between August and December 2011.²⁷⁴ Subsequently no super-injunctions had been granted between January 2012 and June 2013.²⁷⁵ Commenting on the data, Wilcox suggests ‘super-injunctions are almost an extinct species. ‘Non super’ privacy injunctions however remain alive and kicking.’²⁷⁶ Yet data that was published on the 13th March 2014 shows that only one injunction was applied for between June and December 2013, which was refused.²⁷⁷ This suggests that there was a general decline in the number of people seeking injunctions, including super-injunctions, as injunctions were no longer seen as effective.

Furthermore the JCPI stated *Terry*, ‘was seen by the press as the first step in redressing the lack of open justice when claimants bring privacy actions.’²⁷⁸ The analysis of *Ntuli* in the previously mentioned suggests there has been a change in approach in the way super-injunctions are granted. *DFT v TFD*,²⁷⁹ the only other super-injunction to be granted, reaffirms this change in approach and reaffirms that super-injunctions should only be granted in limited circumstances. The case was a blackmail privacy case similar in facts to *AMM v HXW*²⁸⁰ where a super-injunction was granted indefinitely. In *DFT v TFD*, a super-injunction was granted due to fear the respondent would be ‘tipped off.’²⁸¹ On the return date, Sharp J decided the injunction element should still be continued but the ‘super’ element was ‘no longer necessary.’²⁸² In reasoning, Sharp J held that the claimant’s article 8 rights were engaged and the article 10 rights of the blackmailers were ‘extremely weak.’²⁸³ The case demonstrates that the courts are now only granting the severe remedy of a super-injunction for restricted periods, in this case a mere seven days. And Smartt argues that the case provides evidence that the courts seemingly only grant super-injunctions ‘where the level of secrecy is necessary to ensure that the whole point of the order is not destroyed.’²⁸⁴

The above case analysis shows a change in approach of the courts arguably because the courts realised that their approach was not working. Alternately, it can be argued

²⁷³ Report of the Committee on Super-Injunctions (n 9) iv.

²⁷⁴ Ministry of Justice, ‘Statistics on privacy injunctions August to December 2011’ (Ministry of Justice Statistics bulletin, 15 March 2012).

²⁷⁵ Ministry of Justice, ‘Statistics on privacy injunctions January to June 2013’ (Ministry of Justice Statistics bulletin, 19 September 2013).

²⁷⁶ Nick Wilcox, ‘Last Gasp of the super injunction’ [2014] Ent LR 13, 13.

²⁷⁷ Ministry of Justice, ‘Statistics on privacy injunctions June 2013 to December 2013’ (Ministry of Justice bulletin, 13 March 2014).

²⁷⁸ Joint Committee on Privacy and Injunctions (n 146) para 21.

²⁷⁹ [2010] EWHC 2335 (QB).

²⁸⁰ *AMM* (n 130).

²⁸¹ *DFT* (n 279) [6].

²⁸² *ibid* 33.

²⁸³ *ibid* 23.

²⁸⁴ Smartt (n 264) 136.

that *Terry* is not really decisive, as much of Tugendhat J's judgment was delivered in *obiter*. Neither has there been any Supreme Court judgment. However, it can be argued that the ECtHR have also changed their approach, which has ensured that freedom of expression for information of low importance can override an individual's privacy right.

5.6 *The new approach*

Recent ECtHR decisions suggest the Court also feel that the correct balance between the two rights had not been struck by its earlier jurisprudence. In response, the ECtHR has set new guidelines on balancing the rights of freedom of expression and privacy. Jean-Paul Costa, the former President of the ECtHR, writing extra-judicially, argued that *Axel Springer v Germany*²⁸⁵ and *Von Hannover v Germany (No 2)*²⁸⁶ allowed the ECtHR to 'adjust its position'²⁸⁷ in relation to the balancing act. He reasoned that a 'compromise'²⁸⁸ needed to be found between the Domestic Court approach and the ECtHR approach. In addition, Reid claims that these two cases were seen 'as good news for the media.'²⁸⁹ This is demonstrated by *The Guardian*, who concluded from the rulings in the two cases that the 'Media interest in lives of celebrities is legitimate.'²⁹⁰

Tomlinson proposes that the change of approach can be described as the 'Axel Springer criteria.'²⁹¹ The 2012 case *Axel Springer* involved an injunction granted by the German court prohibiting re-publication of material that had been included in an article about X, a well-known actor. This concerned the conviction of X. When an action was brought the publishers 'complained about the injunction'²⁹² arguing it interfered with their right to freedom of expression. The ECtHR found, that 'there had been a violation of article 10.'²⁹³ This suggests a shift towards freedom of expression. Firstly, the Grand Chamber held that the conviction of X was of interest and that X's being a public figure 'reinforce[ed] the public's interest'²⁹⁴. Foster argues that the Court had accepted that 'an inevitable public interest in matters that cannot be classified as of great importance should be recogni[s]ed.'²⁹⁵ Secondly, the court reasoned that, since X had previously courted the press, his 'legitimate expectation'²⁹⁶

²⁸⁵ *Axel Springer v Germany* (2012) 55 EHRR 6.

²⁸⁶ *Von Hannover* (n 19).

²⁸⁷ Jean Paul Costa 'The relationship between the European Court of Human Rights and the national courts' [2013] EHRLR 264, 271.

²⁸⁸ *ibid* 271.

²⁸⁹ Elspeth Reid, 'Rebalancing privacy and freedom of expression' [2012] Edin LR 254, 254.

²⁹⁰ Owen Bowcott, 'Media interest in celebrities' lives is legitimate, European court rules' *The Guardian* (London, 7 February 2012).

²⁹¹ Tomlinson (n 175).

²⁹² *ibid* 2.

²⁹³ *Axel Springer* (n 285) [110].

²⁹⁴ *ibid* [31].

²⁹⁵ Steve Foster, 'The public interest in the private lives of public figures and European Court of Human Rights' [2012] Cov LJ 106, 112.

²⁹⁶ *Axel Springer* (n 285).

to protection of privacy was reduced. Thirdly, in considering the severity, the court found that injunctions ‘although lenient ... were capable of having an effect.’²⁹⁷ Commenting on the case, Foster argues that it had the effect of ‘reducing the expectation of privacy of well known individuals and heightening the right to reply and the public right to know.’²⁹⁸

The new approach was reaffirmed in *Von Hannover (no 2)*, a case decided on the same day as *Axel Springer*. Reid argues, ‘most notably these judgments suggest an expansive reading of the key concepts of “a debate of general interest” and “public figure.”’²⁹⁹ The case involved a newspaper article, composed of text detailing Prince Rainer of Monaco’s ill health and accompanying pictures of his daughter Princess Caroline and her family on holiday. The couple applied for an injunction prohibiting further publication. The German Federal Court of Justice identified the article as relating to an ‘event of contemporary society which the press was entitled to report.’³⁰⁰ Hence the accompanying photograph supported the ‘information being conveyed.’³⁰¹ Similarly, the Federal Constitutional Court held that ‘questions of interest to the public could be illustrated by photos showing a scene from the daily life of a political or public figure.’³⁰² Subsequently the claimants appealed to the ECtHR, alleging of the ‘inadequacy of the protection afforded by’³⁰³ the German Courts to their private life. In the first *Von Hannover*, the Court, took a very narrow approach to public interest. It regarded photographs, which had been taken solely to fulfil the curiosity of the public, as not being in the public interest. In *Von Hannover (No 2)*, the Grand Chamber found that there had been ‘no violation of article 8’³⁰⁴ as the Prince’s poor health was in the public interest. In addition, the Grand Chamber found that the photographs contributed to the article as it showed the manner in which his children reconciled their obligations of family solidarity with the legitimate needs of their private life.³⁰⁵

Reid argues the reasoning ‘seems to indicate recognition that the slenderest of threads can provide a connection to a debate of general interest.’³⁰⁶ The Court emphasised that freedom of expression helps secure the meeting of the ‘demands of pluralism, tolerance and broadmindedness’³⁰⁷ that are vital to achieve a democratic society. Jean-

²⁹⁷ *ibid* 109.

²⁹⁸ Foster (n 295) 112.

²⁹⁹ Reid (n 285) 256.

³⁰⁰ *Von Hannover* (n 19) para 38.

³⁰¹ *ibid*.

³⁰² *ibid* para 53.

³⁰³ *ibid* para 98.

³⁰⁴ *ibid* para 126.

³⁰⁵ *ibid* para 49.

³⁰⁶ Reid (n 289) 257.

³⁰⁷ *Von Hannover* (n 19) para 102.

Paul Costa, writing extra-judicially, commented that, following these cases the balance of the two rights ‘has shifted to a position more favourable to the press.’³⁰⁸

In conclusion, the above cases sufficiently suggest that there has been a shift in recent case law of both the English Courts and the ECtHR in their approach to privacy. It has been demonstrated that *Ferdinand* and *Von Hannover (No 2)* represent a shift away from *Von Hannover (No 1)*, as in both cases expression of low importance was given more importance than right to privacy. This suggests that the domestic courts are driving the ECtHR to change their view. Consequently, the common law has ‘work[ed] itself pure,’³⁰⁹ as Lord Mansfield suggested it would and the super-injunction is dead. Therefore, with relation to injunctions, statutory reform is not needed in privacy law.

6 CONCLUSION

In the context of the sometimes-conflicting rights to privacy and to freedom of expression, the super-injunction has caused much concern. This article has illustrated the life of the super-injunction from its birth, through to its relatively brief adulthood, and on towards its death. This study aimed to show that Matthiesson was correct in arguing that the super-injunction is an ‘unwieldy, draconian and disproportionate gagging orde[r].’³¹⁰

The study has shown how the courts, after the enactment of the HRA, battled to find the correct balance between privacy, freedom of expression and press freedom. For a time, the right to privacy prevailed and the super-injunction was created. The true problem of the super-injunction was in its evolution: as Phillips argues, each time one was granted, more ‘bells and whistles’³¹¹ were added. Permanent injunctions were being sought, as *Terry* demonstrated. In turn these orders derogated from the fundamental principle of ‘Open Justice’ and inevitably from the rule of law. Furthermore, as this study has shown, these derogations from Open Justice were being made for the rich, who wanted to hide their extra-marital affairs, which suggests that Matthiesson was correct in saying the super-injunction was ‘draconian and disproportionate.’³¹²

Nevertheless, the value of the super-injunction cannot be dismissed entirely. Indeed, Hall declares, ‘We should ... remain open to the practice of super-injunctions and the noble purpose they can play when wisely granted.’³¹³ Certainly it can be argued super-injunctions have merit in some situations. Borrowing *Tugendhat and Christie’s*

³⁰⁸ Costa (n 287) 271.

³⁰⁹ *Omychund* (N 262).

³¹⁰ Matthiesson (n 16) 154.

³¹¹ Joint Committee on Privacy and Injunctions (n 59).

³¹² Matthiesson (n 16) 154.

³¹³ Hall (n 58) 347.

ideology, they are useful ‘to prevent ‘tipping off.’³¹⁴ It can be proposed that, as the law stands, even if a super-injunction were to be granted for the above reasons, it would only be for a short period of time, as demonstrated in *DFT*.

It is therefore plausible to suggest that such a draconian order evolved due to judicial *hubris*. Judges found themselves with, what Stanley describes as a ‘new weapon’³¹⁵ and disregarded fundamental principles, which resulted in the granting of far too severe injunctions. Not only the birth of the super-injunction but also the granting of the *contro mundum* order in *OPQ* demonstrated this. On the other hand, it can be argued that the super-injunction came about due to judges battling with the new rights brought into law by the enactment of the HRA.

In the discussion of privacy law prior to the enactment of HRA it was shown how the common law was unable to give privacy the protection the courts wished. After the enactment of the HRA, judges strived to find the correct balance between the new Convention rights brought into domestic law, whilst still trying to stay true to the common law and fundamental principles which had been developed prior to its enactment. David Eady writing extra-judicially of the consequences of HRA for English privacy law, stating ‘Such a range of unusual situations have presented themselves for consideration by the courts, giving rise to so many different angles.’³¹⁶ Indeed, the era of the super-injunction produced a lack of consistency in the law as judges grappled with how to deal with the HRA, endeavouring both to mirror Strasbourg jurisprudence and to stay true to common law principles. Arguably, the courts got the balance wrong. Ultimately, the right balance was found ‘on a trial and error basis’³¹⁷ as recognised by David Eady writing extra-judicially. The evolution of the super-injunction can be said to be an error, a wrong door opened which has now been closed. Subsequently, the law has found the correct balance between privacy and freedom of expression, albeit fourteen years since the HRA came into force. Judges now have no need to grant super-injunctions. The disproportionate order, which caused so much controversy in its lifetime, is now effectively dead.

³¹⁴ *Tugendhat and Christie* (n 77) para 13.

³¹⁵ Stanley (n 81) 653.

³¹⁶ Eady (n 3) 421–422.

³¹⁷ *ibid* 423.

WHEN WAS THE ENGLISH CONSTITUTION WRITTEN?

*Amy Shields**

1 INTRODUCTION

‘Constitution’ ... it often strikes up an image of a singular document containing the rules and principles which encapsulate the essence of a nation’s relationship between a government and its people. However, consider an alternative where a single, codified document does not exist and yet the country still lays claim to constitutional principles. For the English, the constitution progressed over time embracing the relationship changes occurring between the Crown, Parliament and the people. Lord Macaulay, a prominent figure in English history, believed it was not possible to stick to a singular document to solidify when the constitution was written; it originated in 1688, then was subsequently amended and reformed until 1832. By writing *The History of England*, Macaulay was able to describe ‘all the transactions which took place between the 1688 Revolution which brought the Crown into harmony with Parliament and the 1832 Revolution which brought Parliament into harmony with the nation’.¹

Macaulay’s desire was to provide the English people with a dramatic history of England’s past, to show them the constitutional significance of progress that they have encountered. Macaulay, while maintaining a mind-set of a constitution based on the behaviours and relationships between the Government and the People, believed the Great Reform Bill in 1832 to be necessary as it completed the constitutional objectives which originated during the Revolution of 1688. Jann supports the claim that Macaulay ‘put the finishing touches on this tradition [continuity] in the nineteenth century by attributing England’s steady progress to the conclusive triumph of constitutional principles over regal tyranny in the Glorious Revolution’.² Therefore, following the 1688 Revolution, the Great Reform Act 1832, as a ‘constitutional’ document, became reflective of the constitutional beliefs prevalent in the time of its existence, just as the Bill of Rights or the Act of Settlement were the constitutional documents of their times. Ultimately, the position was that the English constitution was born in the 1688 Revolution and completed with the Great Reform Act of 1832.

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¹ Lord Thomas Macaulay, *The History of England* (Harmondsworth 1979) 20.

² Rosemary Jann, ‘Democratic Myths in Victorian Medievalism’ (1980) 8 *Browning Institute Studies* 129, 130.

2 A GENERAL IDEA OF CONSTITUTION

A constitution is commonly seen as ‘the set of the most important rules that regulate the relations amongst the different parts of the government of a given country and also the relations between the different parts of the government and the people of the country’.³ This understanding is what tends to draw attention to focus on a singular, codified document articulating these rules and relations. However, for Macaulay, what became important was not the single documents, but rather the events and practical experiences over times which truly encompass these regulated relations. In his speech on Parliamentary Reform, Macaulay boldly states that ‘the great cause of revolutions is this ... that while nations move onward, constitutions stand still’.⁴

Writing the *Rights of Man*, Paine states that ‘a constitution is not a thing in name only, but in fact; it has not an ideal, but a real existence’.⁵ The English Constitution was written as it was lived, not as an ideal but as an ‘existing’ organism, giving it the appearance of ‘standing still’. The ‘existing’ constitution can ‘stand still’, but only in the sense that it maintains the opinions and beliefs of the people at that particular moment in history. It appears to not make progress, but when regarded as a whole over time the constitution appears to have grown and flourished. Ultimately, the reality was that the English constitution was originally written in 1688 but required various subsequent documents to emphasise the progress amongst the people, particularly the Great Reform Act of 1832. This requirement was communicated by ‘placing the narrative of the Glorious Revolution at the centre of British history, [where] Macaulay identified the mixed system of British governance and its attendant party politics as the structuring principle of modern political life’.⁶

3 PURPOSE OF THE HISTORY OF ENGLAND

For Macaulay the Great and Glorious Revolution of 1688 was a significant constitutional moment for the history of England which needed to be documented. When writing *The History of England*, he wanted to ensure that what he presented was readable and would ‘supersede the last fashionable novel on the table of young ladies’.⁷ This fashionable novel turned out to be a welcomed and highly successful attempt at relaying significant history to the English people. Ultimately, *The History*

³ Anthony King, ‘Does the United Kingdom still have a constitution?’ (Sweet & Maxwell 2001) 1.

⁴ Thomas Babington Macaulay, *The Miscellaneous Writings and Speeches of Lord Macaulay Vol 4* (CreateSpace Independent 2014).

⁵ Thomas Paine, *The Rights of Man* (Everyman 1969) 48.

⁶ Irene Tucker, ‘International Whiggery’ (2003) 45 *Victorian Studies* 687, 694.

⁷ Macaulay (n 1) 22.

of England undisputedly communicated a clear account of ‘the progress of the constitution’.⁸

Historical writers, Macaulay includes, ‘should combine reason and imagination, they should use particular examples to identify general principles of human conduct, and they should document not just public events, but the ‘silent revolutions’ in thought and taste of which those events were only the outward signs; in its state of ideal perfection, [history] is a compound of poetry and philosophy’.⁹ Consequently, as with all dramatic stories, the past ‘is a representation constructed by the historian from his own cultural vision as well as from the various representations that contemporaries created to discern meaning for themselves’.¹⁰ Davies articulates that ‘one of the great virtues of Macaulay’s treatment of constitutional history is ... that he shows how it was influenced by and in its turn influenced the political, economic and even the social history of the time’.¹¹ Writing in 1848, Macaulay’s *History of England* was not spared this ‘representation’ as he input his personal sentiments alongside the dramatic, while complementing with researched facts. This ‘representation’ was evidenced through Macaulay’s obsession with the 1688 Revolution and in the introductory portion of his chapter on William of Orange it becomes clear that ‘William was Macaulay’s hero’.¹² However, William of Orange was not his only focus. Macaulay clearly states his purpose at the start of *The History of England*, and expresses to his audience that he would ‘trace the course of that revolution which terminated the long struggle between our sovereigns and their parliaments, and bound up together the rights of the people and the title of the reigning dynasty’.¹³ The main objective for his writing emerged through ‘his long standing conviction that literature outlasts politics and has greater influence in shaping opinion than the decisions of governments’.¹⁴

4 REVOLUTION OF 1688

Macaulay’s fascination with the 1688 Revolution centres on William of Orange. However, in order to understand the constitutional relevance, the whole story needs to be told. Lord Macaulay attempted to illustrate the key idea of unbroken progress to the English people with *The History of England* by starting with a ‘description of the state of England at the time of the accession of James II’.¹⁵ Initially, ‘when James II came to the throne in February 1685, it was widely expected that he would finally

⁸ Rosemary Jann, ‘Macaulay: History as Whig Via Media’ in Rosemary Jann, *The Art and Science of Victorian History* (Ohio State University 1985) 99.

⁹ *ibid.*

¹⁰ Kevin Sharpe, ‘Remapping early modern England: from revisionism to the culture of politics’ in *Remapping Early Modern England: The Culture of Seventeenth-Century Politics*. (CUP 2000) 3.

¹¹ Godfrey Davies, ‘The Treatment of Constitutional History in Macaulay’s History of England’ (1939)

² *Huntington Library Quarterly* 179, 179.

¹² Macaulay (n 1) 167.

¹³ *ibid* 51.

¹⁴ W Thomas, ‘Macaulay, Thomas Babington, Baron Macaulay (1800-1859)’ in *Oxford Dictionary of National Biography, online ed.* (OUP 2004) 10.

¹⁵ Davies (n 11) 179.

lead the nation into the long desired war against France'.¹⁶ However, this did not happen and as a result many began to feel disregard for the monarch. To the people of England 'the steps [James] took suggested to many that he aimed to Catholicise the nation, destroy Parliament, weaken local government, and create a centralised government backed by a standing army and allied to Catholic France'.¹⁷ Ultimately, 'in the minds of many [James II] did worse than nothing; not only did most feel he was appeasing France, many were sure that he had signed an alliance with Louis XIV'.¹⁸ Kishlansky notes that 'James' downfall came only because he allowed himself to become a pawn in the power politics of Europe'.¹⁹

Macaulay writes that 'It was a terrible moment; the King was gone; The Prince had not arrived; ... determined to draw up, subscribe, and publish a Declaration ... declaring that they were firmly attached to the religion and constitution of their country ... but that their hope had been extinguished by [James'] flight'.²⁰ Macaulay recognised that 'the overwhelming majority of the nation consisted of persons in whom love of hereditary monarchy and love of constitutional freedom were combined'.²¹ Therefore, it became understandable that while the distressed sentiments began to grow amongst the people, they gradually 'looked to William of Orange in 1688, because the "three kingdoms of England, Scotland, and Ireland" were being "reduced into the pattern of the French King in government and religion"'.²²

Originally Parliament had 'intended that the throne's vacancy would be filled by Mary as Queen ... but William "refused to be his wife's gentleman usher"'.²³ Therefore, Freeman argues that the primary 'writing' of the English Constitution originated out of the moment when 'William claimed the Crown by legal right; he received it by the formal election of the English people, and ... he professed to rule ... according to the laws of his predecessor and kinsman King Edward'.²⁴ Thus the constitution could now be 'evaluated ... by how well they suited the needs and interests of those subject to them'.²⁵

¹⁶ Steven Pincus, 'The Making of a Great Power? Universal Monarchy, Political Economy, and the Transformation of English Political Culture' (2010) 5 *The European Legacy: Toward New Paradigms* 531, 533.

¹⁷ Lois G Schwoerer, 'Propaganda in the Revolution of 1688–89' (1977) 82 *The American Historical Review* 843, 845.

¹⁸ Pincus (n 16) 533.

¹⁹ Mark Kishlansky, *A Monarchy Transformed – Britain 1603–1714* (Penguin Classics 1996) 266.

²⁰ Macaulay (n 1) 276.

²¹ Tucker (n 6) 694.

²² Delamere, *An Account of the Reasons of the Nobility and Gentry's Invitation* (Jonathan Robinson 1686) 2.

²³ Elizabeth Wicks, *The Evolution of a Constitution* (Hart 2006) 15; EN Williams, *The Eighteenth Century Constitution, 1688–1815 – Documents and Commentary* (CUP 1960) 2.

²⁴ Edward A Freeman, *The Growth of the English Constitution from the Earliest Times* (Macmillan 1876) 76.

²⁵ Jann (n 8) 73.

5 CONSTITUTIONS IN THE EYES OF MACAULAY

A notable understanding for the emergence of the constitution for the English people, as presented in *The History of England*, remains found in the 1688 Revolution, particularly when William and Mary accepted the throne. The English Constitution was borne out of the events involving James' flight and William's arrival and acceptance of the Crown; and 'never before in English history were relations between the Crown and Parliament so closely intertwined'²⁶

By looking into detail at the uniqueness of William's coronation, Ward highlights that 'the diminutive Dutch prince had sat obediently under a canopy of state ... whilst he listened to Lord Halifax read out what amounted to the conditions under which he would be allowed to assume the throne; conditions which included the iconic Declaration of Right'.²⁷ Following the obedient acknowledgement of the conditions presented with the offered Crown, it was 'recogni[s]ed that 1688 inaugurated a new era of liberty which witnessed a decline in the authority of the Crown, a rise in the power of Parliament and a growth in the freedom of the individual'.²⁸ Although William 'did not sign the Declaration of Rights ... he did speak after the Crown was offered to him of endeavouring to support the nation's religion, laws and liberties'.²⁹ It was a unique coronation and their words, as reiterated by Macaulay, put into context the monumental step towards the modern English constitution experienced today. Macaulay recounts:

William, in his own name and in that of his wife, answered that the Crown was, in their estimation, the more valuable because it was presented to them as a token of the confidence of the nation. 'We thankfully accept,' he said, 'what you have offered us.' Then, for himself, he assured them that the law of England, which he had once already vindicated, should be the rules of his conduct, that it should be his study to promote the welfare of the kingdom, and that, as to the means of doing so, he should constantly recur to the advice of the Houses, and should be disposed to trust their judgment rather than his own.³⁰

The 1688 Revolution was a marked point in English history, introducing the concept of the English Constitution, which would progress through the ages. Dickinson reiterates that 'it was the Glorious Revolution which marked the end of this dangerous

²⁶ Harry Thomas Dickinson, 'How Revolutionary was the 'Glorious Revolution' of 1688' (1988) 11 *Journal for Eighteenth-Century Studies* 125, 139.

²⁷ Ian Ward, *The English Constitution: Myths and Realities* (Hart 2004) 3.

²⁸ Dickinson (n 26) 140.

²⁹ Schwoerer (n 17) 260.

³⁰ Macaulay (n 1) 287.

attempt to enlarge the authority of the Crown³¹ while preserving ‘the essential features of England’s ancient constitution’.³²

Progressive change allowed these ancient underlying constitutional principles to be carried forward within society. For Macaulay, the Constitution was a living organism and it was this idea that as time went on, various ambitious steps were taken to ensure the Constitution remained centrefold in the hearts and minds of all Englishmen. This ambition was witnessed in a speech to Parliament where Macaulay stated, ‘The Great Charter, the assembling of the first House of Commons, the Petitions of Right, the Declaration of Right, the [Reform] Bill which is now on our table, what are they all but steps in one great progress?’³³ The Reform Bill, between 1831 and its passage in 1832 ‘raised great expectations among tens of thousands of Englishmen’.³⁴ In a further speech to Parliament, Macaulay claims that ‘the object of this bill is to correct those monstrous distortions and to bring the legal order of society into something like harmony with the natural order’.³⁵ George Macaulay Trevelyan, Macaulay’s nephew, went on to claim that the Reform Act was the point where ‘the sovereignty of the people had been established in fact, if not in law’; with the Reform Act being recorded as ‘the central political event of the nineteenth century’.³⁶ The important constitutional principles for England which evolved from the 1688 Revolution were reflected in the progressive documents which were most prevalent in society, most notably the Great Reform Act of 1832.

6 THE ENGLISH CONSTITUTIONS AS IT WAS AND WHAT IS BECAME

The History of England demonstrates Macaulay’s focus on the events of the Revolution to formulate and solidify his understanding of the concept of constitution. Macaulay stated that ‘the English had been able to affect a reform amounting to a revolution ‘by the force of reason, and under the forms of law’.³⁷ Therefore, it became clear that ‘the most important long-term consequence of the Glorious Revolution ... was a profound and fundamental alteration in the working relations of Crown and Parliament’.³⁸ In *History of England*, Macaulay states:

It was a revolution strictly defensive, and had prescription and legitimacy on its side. Here, and here only, a limited monarchy of the thirteenth century had

³¹ Dickinson (n 26) 125.

³² *ibid.*

³³ Macaulay (n 4) (Speech, July 5, 1831).

³⁴ John Phillips and Charles Wetherell, ‘The Great Reform Bill of 1832 and the Rise of Partisanship’ (1991) 63 *Journal of Modern History* 621, 621.

³⁵ David Eastwood, ‘Parliament and Locality: Representation and Responsibility in Late-Hanoverian England’ (1998) 17 *Parliamentary History* 68, 71.

³⁶ George Macaulay Trevelyan, *British History in the Nineteenth Century and After (1782-1901)* (Longmans 1966) 242.

³⁷ Jann (n 8) 80.

³⁸ Dickinson (n 26) 139.

come down unimpaired to the seventeenth century. Our parliamentary institutions were in full vigour. The main principles of our government were excellent. They were not, indeed, formally and exactly set forth in a single written instrument; but they were to be found scattered over our ancient and noble statutes; and, what was of far greater moment, they had been engraved on the hearts of Englishmen during four hundred years. That, without the consent of the representatives of the nation, no legislative act could be passed, no tax imposed, no regular soldiery kept up, that no man could be imprisoned, even for a day, by the arbitrary will of the sovereign, that no tool of power could plead the royal command as a justification for violating any right of the humblest subject, were held, both by Whigs and Tories, to be fundamental laws of the realm. A realm of which these were the fundamental laws stood in no need of a new constitution.³⁹

The Great Reform Act 1832, as a constitutional document, embraced this progress of the English people and extended the franchise to a greater number of the English population. It is evident that the constitution is progressing, because ‘when a large section of opinion becomes politically conscious it begins to demand the franchise as a right; soon the opinion prevails, as it prevailed in 1832, that an extension of the right to vote is necessary’.⁴⁰ For Macaulay, ‘the passing of the Reform Bill was our taking of the Bastille; it was the first act of our great political change; and like its French precursors, it is a sample of the character of all that will follow’.⁴¹ Wasson in support of Macaulay puts forward that ‘the Whigs intended to give the middle class a voice in the political system and believed that the elite had to be made more responsive to public opinion’.⁴² Salmon subsequently confirms that this Act, as a finality to the Great and Glorious Revolution ‘brought the agency of party into every elector’s home and ... the politics of Westminster much closer to the electorate’.⁴³ As the constitutional progress carried on ‘it became increasingly obvious in 1832 that no government could hope to rule effectively without a genuine commitment to parliamentary reform.’⁴⁴

7 REFLECTIONS OF AN ENGLISH CONSTITUTION

Following the enactment of the Great Reform Act 1832, Macaulay is quoted, saying ‘When the Reform Bill was under discussion, all our miseries vanished at once, the sun broke out, the clouds cleared away, the sky was bright, and we were the happiest people on the face of the earth!’⁴⁵ Whiggish justification of the Reform Bill suggested

³⁹ Macaulay (n 1) 290.

⁴⁰ Sir Ivor Jennings, ‘The British Constitution’ (CUP 1968) 5.

⁴¹ Westminster Review, American Edition (Leonard Scott & Co 1836) 271.

⁴² Ellis A Wasson, ‘The Spirit of Reform, 1832 and 1867’ (1980) 12 A Quarterly Journal Concerned with British Studies 164, 165.

⁴³ Philip J Salmon, *Electoral Reform at Work: Local Politics and National Parties, 1832–1841* (Boydell 2002) 40.

⁴⁴ Wicks (n 23) 75.

⁴⁵ HL Deb 1832 Vol 11 Col 454.

that the nation ‘Reform that ye may preserve’.⁴⁶ However, England as a nation was strong, and ‘seldom looked abroad for models; they have seldom troubled themselves with Utopian theories; they have not been anxious to prove that liberty is the natural right of men; they have been content to regard it as the lawful birth right of Englishmen’.⁴⁷ There was no need to seek out constitutional principles within this nation because they were already engraved on the hearts of every man.

The Revolution of 1688 did not need to be as brutal and ruthless as the revolutions experienced in America and France. Contrasted to the American Constitution, which Macaulay stated to be ‘all sail and no anchor’⁴⁸, the English constitution was evidently strong and progressing from the time of the 1688 Revolution into what it was within the Great Reform Act. The Revolution was seen as ‘an event that preserved the continuity in English political and social life’.⁴⁹ As such, the constitution became a living thing and ‘England remained a centre of calm because the English had “never lost what others are wildly and blindly seeking to regain. It is because we had a preserving revolution in the seventeenth century that we have not had a destroying revolution in the nineteenth”’.⁵⁰

8 CONCLUSIONS

Macaulay demonstrates that the English constitution is a constantly evolving entity, and thus does not maintain a single, codified document. Subsequently, Macaulay felt that ‘yet this revolution, of all revolutions was the least violent, has been of all revolutions the most beneficent ... it finally decided the question whether the popular element which had been found in the English polity, should be destroyed by monarchical element, or should be suffered to develop itself freely, and to become dominant’.⁵¹ As the constitution developed, Macaulay ultimately ‘in places treated society’s advance as simply the logical outcome; and that nations, like individuals, needed forms of government adapted to their relative stage of maturity’.⁵² The constitution of 1688 was not stationary and evolved over time; culminating into a completely mature entity at the time of the 1832 Great Reform Act. The English constitution, by not being codified into a single document, reflects the progress of the society it ‘lives’ within. Conclusively, the English constitution was created during the 1688 Revolution and completed with the passing of the Great Reform Act of 1832.

⁴⁶ Matthew Cragoe, ‘The Great Reform Act and the Modernization of British Politics: The Impact of Conservative Associations, 1835–1841’ (2008) 47 *Journal of British Studies* 581, 584.

⁴⁷ Jann (n 8) 80.

⁴⁸ Thomas Babington Macaulay, ‘Letter to HS Randall, author of a Life of Thomas Jefferson’ (May 23 1857).

⁴⁹ Schworer (n 17) 3.

⁵⁰ Jann (n 8) 81.

⁵¹ Macaulay (n 1) 293.

⁵² Jann (n 8) 74.

