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Foreword by the Editor-in-Chief

Firstly, I would like to welcome you to Volume 8, Issue 2 of the North East Law Review. This edition brings together the writings of Newcastle University students from the academic year 2020/21 and spans across a hugely diverse range of topics. In spite of the uncertainty and challenges of the time in which they were written, each article is of the highest of standards and is a testament to the hard work and dedication of the students of Newcastle University. It fills me with pride to present you with this issue and I feel immensely fortunate to have been part of such a display of talent and determination.

I would also like to take the time to thank those who made the creation of this issue possible. Firstly, thank you to our Academic Leads, Ruth Houghton and David Reader, for your excellent leadership and guidance in the two years that I have been a part of this team. Thank you also to the Editorial Team for your hard work and for juggling so skilfully your commitment to the journal alongside your academic studies. I would also like to thank all of our talented writers for their outstanding contributions to this issue and for allowing us to share such profound and powerful works. Finally, thank you to the journal's previous Editor-in-Chief, James Merryweather, and Deputy Editor-in-Chief, Collette Monahan. Your strong leadership in my previous role of editor was a great source of inspiration and I hope that I have done you justice in the continuation of this role.

Lastly, I hope that our readers are as captivated by the works of our writers as I am, and I wish each of you happy reading.

Alice Spencer

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The Editorial Board forms part of the broader project of the North East Law Review (NELR). The North East Law Review also includes the NELR Blog and the NELR podcast team.

This year the NELR blog published work by Eleanor Fox, Reet Kaur, Nicole Stockton, Josh Sheehy and Max Chau, Emnani Subhi, Joshua Butcher, Samantha Johnston, and Nadia Ashbridge.

This year the NELR podcast was hosted by Niamh Kenny and Scarlett Clarke.

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The extent to which the concepts of civic death and civic duty were used to justify voting inequalities in the UK and their relevance today

Josephine Foucher

1. Introduction

Civic death challenges the notion that 'the distribution of voting rights in the UK is an artefact of history'.[1] The suppression of voting rights has had profound effect on the suffrage of prisoners, women and non-citizens in particular. Whilst the female population are fully enfranchised, and civic duty arguments no longer stand, the consequences of civic death still remain for many, yet enforced through a new lens. This is significant, not only because of the exclusionary nature of our political processes, but due to the mistaken idea that civic death is merely an ancient concept, with little relevance outside discussions surrounding the disenfranchisement of prisoners. Academics have failed to recognise the prominence of the more contemporary form of civic death, the 'purity of the ballot box' argument that imposes the same consequences on individuals.[2] Whether the desire be to exile those deemed inferior to the rest of society, or to conserve the values and traditions that appease the majority, this article will show both have sought to silence certain political voices and ideas, and continue to do so successfully within the current political domain.

2. Civic death and civic duty: an introduction

The notion of civic death has been prevalent in the law as far back as Ancient Greek times, where those committed of a crime were deemed unworthy of possessing civil rights. This functioned primarily as a means of social control, exposing offenders to "humiliation" and "stigmatisation",[3] through what was known as the "strongest condemnation by state and society".[4] In the middle ages, those found guilty of felony or treason were subject to "attainder", a metaphorical 'taint' of one's character, resulting in the forfeiture of both land and civil rights

[1] Sean Fox, Ron Johnston and David Manley, 'If Immigrants Could Vote in the UK: A Thought Experiment with Data from the 2015 General Election' (2016) 87 The Political Quarterly 500.
[2] Robert Jago and Jane Marriott, 'Citizenship or Civic Death? Extending the Franchise to Convicted Prisoners' (2007) 5 Web Journal of Current Legal Issues 3, 6.
[3] Graeme Orr, 'Ballotless and Behind Bars: The Denial of the Franchise to Prisoners' (1998) 26 Federal Law Review 55, 66.
[4] ibid 67.

to the crown.[5] Thus, the forfeiture of these individuals' rights exemplified the idea that suffrage was contingent on 'correct' behaviour, rendering one 'dead' to society if they failed to comply.

Whilst women have been granted full suffrage today, the obstacles faced in overcoming prejudice strikes many parallels to the fight for equal franchise for the prison population. By assimilating these communities and their struggles, one can truly understand how civic death and civic duty work to isolate individuals from the political arena. Of course, the distinction must be made between ideals of civic death and civic duty, as women were not deprived of civil liberties as a result of criminality, rather as a result of a 'second-class citizenship', afforded to them purely by virtue of being female.[6]

Civic duty can be defined as 'a loyalty…for the wider state or…country', or simply demonstrating the behaviour of an idealistic, law- abiding citizen.[7] The concept of civic duty persistently underpinned policies that sought to exclude women from the political arena up until they gained full suffrage in 1928.[8]

On face value, these two concepts may appear entirely different, but in practice, are very much related. Civic death and civic duty imposed similar consequences on those who failed to meet the behavioural standards engrained in society at the time. For prisoners this 'failure' historically resulted in the removal of their assets, whether it be physical assets such as property, or intangible assets – like the ability to participate in elections. For the female population, the concept of civic duty sought to confine women to domestic spaces, far from any parliamentary involvement. Regardless of whether such failure resulted from one's own actions or simply the perception of that group, individuals were essentially treated as 'dead to society' deemed unworthy of a political voice or identity.[9]

3. Civic death and the history of prisoner disenfranchisement

[5] Joint Committee on the Draft Voting Eligibility (Prisoners) Bill, *Draft Voting Eligibility (Prisoners) Bill*, (2013-14, HL 103, HC 924) 7.
[6] Antrew Von Hirsch and Martin Wasik, 'Civil Disqualifications Attending Conviction: A Suggested Conceptual Framework' (1997) 56 Cambridge Law Journal 599, 605.
[7] Marta Orviska, John Hudson, 'Tax evasion, civic duty and the law-abiding citizen' (2002) 19 European Journal of Political Economy 83, 86.
[8] Representation of the People (Equal Franchise) Act 1928.
[9] Jennifer Turner, 'Criminals with 'Community Spirit': Practising Citizenship in the Hidden World of the Prison' (2012) 16 Space and Polity 321, 324.

Civic death has been imperative in denying prisoners suffrage throughout history. Their criminal behaviour was, and still is, used to symbolise their incapability of civic virtue, and in turn their political voice is simply deemed irrelevant. The archaic principle has even manifested within discussions seen today surrounding the famous *Hirst* decision, albeit through a different lens, but with similar effect.[10]

Prior to 1870, 'forfeiture was the defining legal effect of felony' where a person convicted of a felony or treason forfeited their land to the Crown.[11] Whilst this remained for many years, 'criminal forfeiture prompted criticisms throughout its long history',[12] both of the abuse of those who seized the land and concerns of the suffering of 'innocent parties'.[13] Thus, seeking to diminish the effects of 'this centuries-old practice',[14] The Forfeiture Act of 1870, in theory, aimed to remove the abolition of property as a consequence of a serious offence conviction.[15] Such reform would have enabled a fraction of prisoners to meet the necessary property requirements in order to vote. However, section 2 still barred felons with a sentence of more than twelve months.[16] Thus, Cheney validly questions whether the act was actually 'designed more to signal civic death' than to mitigate its effects.[17] Civic death took a prominent role, as only those who could evidence "the corollary of factors such as property…and moral worth" were able to maintain their civil right, whereas those who fell outside this bracket were subject to the loss of all liberties.[18] Consequently, "the vote was regarded not as a universal right", but a privilege for a select few.[19]

Whilst the Forfeiture Act, albeit feebly, aimed to abolish the criticised policy of forfeiture, the practical difficulties that ensued were overwhelming. Many prisoners who could demonstrate the required assets or the conviction of a lighter sentence were still unable to exercise their political voice in practice, due to an "absence of…necessary administrative arrangements".[20]

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[10] *Hirst v United Kingdom* (2006) 42 E.H.R.R 41.
[11] K.J Kesselring, 'Felony Forfeiture in England, c.1170-1870' (2009) 30 Journal of Legal History 201, 203.
[12] ibid 208.
[13] ibid 209.
[14] ibid 222.
[15] Forfeiture Act 1870
[16] Forfeiture Act 1870, s (2)
[17] Deborah Cheney, 'Prisoners as Citizens in a Democracy' (2008) 47 The Howard Journal 134.
[18] Joint Committee on the Draft Voting Eligibility (Prisoners) Bill, *Draft Voting Eligibility (Prisoners) Bill*, (2013-14, HL 103, HC 924) 8.
[19] ibid 7.
[20] *R (on the application of Chester) v Secretary of State for Justice McGeoch (AP) v The Lord President of the Council and another (Scotland)* [2013] UKSC 63, [2014] AC 271[126].

Firstly, incarceration prevented prisoners from physically attending the polls. Secondly, prisoners were prohibited from registering their home address as their place of residence,[21] but were also eventually prohibited, via statute, from registering their prison as an alternative.[22] Finally, the postal vote was not introduced until The Representation of the People Act 1948, and thus was not a viable option at the time.[23] This inevitably left prisoners with practically no choice but to remain disenfranchised, as complex legalities meant "there was, in practice … a complete bar on prisoner voting in the late nineteenth and early twentieth centuries".[24]

The Criminal Law Act 1967 had potential to undermine the ancient remnants of civic death that were at play, yet suffered similar practical difficulties.[25] Under section 1, the distinction between felonies and misdemeanours was repealed.[26] Schedule 3 of the Act removed any reference to 'felony', with the effect of modifying section 2 of the previous 1870 Act, so that only those convicted of treason were subject to its disqualifications. Consequently, The Criminal Law Act 1967 removed 'any express limitation' on prisoner voting,[27] at least for the next two years.[28]. The measures meant the majority of prisoners were no longer, in theory, subject to the loss of civil liberties based on the perceived severity of their actions. Rather, with the exception of treason, a "crime of peculiar gravity", the right to vote seemed to signify an inherent right afforded to all.[29] One could therefore presume that civic death ideals were finally being diminished. However, despite the law seemingly progressing from civic death principles, the reality for prisoners after 1967 was that, at best, they remained only partially enfranchised. The previous 'administrative restrictions',[30] namely the issue of registering a place of residence, that existed as far back as 1870, merely persisted after the Criminal Law Act 1967, and hence, the consequences of civic death persisted with it.[31]

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[21] Joint Committee on the Draft Voting Eligibility (Prisoners) Bill, *Draft Voting Eligibility (Prisoners) Bill*, (2013-14, HL 103, HC 924) 7.
[22] Representation of the People Act 1918, s 41 (5).
[23] Representation of the People Act 1948.
[24] Joint Committee on the Draft Voting Eligibility (Prisoners) Bill, *Draft Voting Eligibility (Prisoners) Bill*, (2013-14, HL 103, HC 924) 8.
[25] The Criminal Law Act 1967.
[26] ibid s 2.
[27] The Criminal Law Act 1967.
[28] Joint Committee on the Draft Voting Eligibility (Prisoners) Bill, *Draft Voting Eligibility (Prisoners) Bill*, (2013-14, HL 103, HC 924) 9.
[29] Ann Lyon, 'Treason' (*Westlaw*, 13 March 2018) <https://uk.westlaw.com/Browse/Home/WestlawUK?skipAnonymous=true&comp=wluk&__lrTS=20210130182014664&transitionType=Default&contextData=(sc.Default)/> accessed 30 January 2021.
[30] Joint Committee on the Draft Voting Eligibility (Prisoners) Bill, *Draft Voting Eligibility (Prisoners) Bill*, (2013-14, HL 103, HC 924) 9.
[31] The Criminal Law Act 1967.

4. Civic Duty and The History of Female Suffrage

Whilst of course the fundamental difference between female and prisoner disenfranchisement is that female suffrage no longer remains a matter of contention, the journey in enfranchising women in the UK has consisted of similar obstacles and objections.

Prior to 1918 there were various attempts to enfranchise women, even moderately, however they were often lacking in widespread support. For example, The Vestries Act of 1818 allowed women to vote in parish vestry elections, yet this was denied to married women, on the basis it was deemed more 'appropriate' for their husbands to vote on their behalf. [32] Whilst women had held office and were able to vote in local government elections, the Parliamentary franchise was yet to be reached, meaning suffrage for women was relatively small in scale. The Representation of the People Act 1832, known as 'The First Reform Act' or even 'The Great Reform Act', symbolised the formal exclusion of women from voting in parliamentary elections, as a voter was explicitly defined as a male person.[33] The lack of female political voice, at this time, was unfortunately commonplace, with no general consensus for legal reform until the early twentieth century.

Thus, The Representation of the People Act 1918 was widely significant, largely as it symbolised a major legislative change for female political power.[34] This was exemplified by the bill gaining a majority in the House of Commons, with 385 votes in support, as opposed to 55 votes against.[35] The bill granted the parliamentary vote to women over the age of 30, contingent upon a property qualification.[36] This had extensive effect, adding over 8 million new female voters to the political sphere.[37] Yet, women were still not equal to men in the eyes of the law. The property requirement simply added another obstacle to prospective voters.

[32] Neil Johnston, *The History of the Parliamentary Franchise* (House of Commons Library Research Briefing Research Paper 13/14, 2013) <https://commonslibrary.parliament.uk/research-briefings/rp13-14/> accessed 15 March 2021.
[33] ibid
[34] Representation of the People Act 1918.
[35] Neil Johnston, *The History of the Parliamentary Franchise* (House of Commons Library Research Briefing Research Paper 13/14, 2013) <https://commonslibrary.parliament.uk/research-briefings/rp13-14/> accessed 15 March 2021.
[36] Representation of the People Act 1918, s 4.
[37] UK Parliament, 'Women get the vote' (*UK Parliament*) <https://www.parliament.uk/about/living-heritage/transfromingsociety/electionsvoting/women vote/parliamentary-collections/collections-the-vote-and-after/representation-of-the-people-act-1918/ > accessed 15 March 2021.

Whereas the requirement for men remained at age 21,[38] the rules set in place for women symbolised efforts to ensure they did not represent a majority of the electorate, due to the rapid loss of men in the war.[39]

Consequently, the 1928 Equal Franchise Act signified more of a turning point in the fight for political equality.[40] The Act granted equal voting rights to women and men aged 21, regardless of property ownership. Undoubtedly, this represented a "huge step forward in enabling women to play a full part in politics and society", more so than the previous Act,[41] with the number of women eligible to vote in the UK increasing to 15 million.[42]

Such reform poses the question of how, and why, societal attitudes towards female suffrage changed so momentously in the early twentieth century. In many ways, the changes can be linked back to notions of civic duty. Both the suffragette movement and World War One (WW1) played a consequential role in advocating the rhetoric that a woman's role could extend beyond the simple, domestic sphere they were so often associated with. Prior to 1914, a number of significant campaigns were demanding equal franchise. Most notably, in 1903, the Women's Social and Political Union (WSPU), with a more militant style, was established by Emmeline Pankhurst and had 5,000 members at its peak. In addition, The National Union of Women's Suffrage Societies (NUWSS), founded in 1897, garnered 50,000 members .[43] The WSPU's slogan 'deeds not words' and Pankhurst's belief that women must do the work themselves enforced the idea that women were no different from men, who also performed violent 'deeds' in war and conflict, and possessed the capabilities to make sound political decisions.[44] This threatened the Conservative idea that "Female suffrage…was politically contentious because it could undermine family harmony and generate social instability'.[45] This paired with the female war effort, helped demonstrate the multifaceted nature of women, where their work in

[38] ibid
[39] ibid
[40] Representation of the People (Equal Franchise) Act 1928.
[41] Mari Takayanagi, 'Women and the Vote: The Parliamentary Path to Equal Franchise, 1918-28' (2018) 37 Parliamentary History 168, 185.
[42] UK Parliament, 'Women get the vote' (*UK Parliament*) <https://www.parliament.uk/about/living-heritage/transfromingsociety/electionsvoting/women vote/parliamentary-collections/collections-the-vote-and-after/representation-of-the-people-act-1918/ > accessed 15 March 2021.
[43] The suffragettes.org, 'Suffragism' (*TheSuffragettes.org*) <https://www.thesuffragettes.org/history/suffragsim/> accessed 15 March 2021.
[44] UK Parliament, 'Deeds not words' (*UK Parliament*) <https://www.parliament.uk/about/living-heritage/transformingsociety/electionsvoting /womenvote/overview/deedsnotwords/ > accessed 15 March 2021
[45] Ruth Rubio-Marin, 'The achievement of female suffrage in Europe: on women's citizenship' (2014) 12 International Journal of Constitutional Law 4, 16.

the public sphere did not cause harm to society, but instead helped protect it at the most vulnerable of times.

During WW1, a vast number of women took on roles predominantly occupied by men, such as farm labour or working in munitions factories, with the latter becoming "the largest single employer of women during 1918".[46] This was undeniably a huge turning point in female suffrage. In fact, many academics have concluded that this was the most significant reason underpinning the enfranchisement of females. Hence, the Representation of the People Act 1918 symbolised a "'reward' for the patriotism showed by women during the First World War".[47]

Debunking the stigma of women as passive citizens incapable of working non-domestic roles exemplified how for so long women were excluded from the vote, simply because they were deemed unable to cope with such responsibility. Rubio-Marin summarises this notion, arguing that women working in public services "rendered the fiction of women's relegation to the private sphere more difficult to sustain."[48] Hence, in order to garner recognition, women had to assimilate themselves to men in order to be deemed worthy of the vote. Once again, the vote was treated as a privilege based on certain behaviour, and thus civic duty reared its head. Again, Rubio-Marin poses a convincing argument, stating that "functional closeness to men and departure from standard gender norms were…primordial criterion for selective inclusion" in the Parliamentary franchise.[49]

In sum, civic duty had immense effect in the early twentieth century for female suffrage. It was not until women were able to demonstrate behaviour rewarded by society, or show 'loyalty' to their country, that they could be deemed worthy of equal voting rights.[50] By breaking down this concept it meant that "by the last quarter of the twentieth century at the very latest, female suffrage had simply become part of the definition of what a modern

[46] Striking Women, 'World War I: 1914-1918' (*Striking Women)* <https://www.strikingwomen.org/module/women-and-work/world-war-i-1914-1918> accessed 15 March 2021.
[47]Neil Johnston, *The History of the Parliamentary Franchise* (House of Commons Library Research Briefing Research Paper 13/14, 2013) <https://commonslibrary.parliament.uk/research-briefings/rp13-14/> accessed 15 March 2021.
[48] Ruth Rubio-Marin, 'The achievement of female suffrage in Europe: on women's citizenship' (2014) 12 International Journal of Constitutional Law 4, 20.
[49] ibid 18.
[50] Marta Orviska, John Hudson, 'Tax evasion, civic duty and the law-abiding citizen' (2002) 19 European Journal of Political Economy 83, 86.

democracy was about" and civic duty ideals were diminished.[51] Recounting the history of female suffrage is relevant to the central question of whether civic death/duty arguments have played a significant role in denying certain groups voting rights, proving it to have momentous effect in the oppression of this community.

5. 'Purity of the Ballot Box'

Civic death and civic duty have undeniably had momentous effect in the past. Nonetheless, Jago and Marriott have challenged its current significance through proposing an alternative justification for disenfranchising prisoners.[52] The commentators suggest that the denial of suffrage is actually about 'maintaining the purity of the ballot box',[53] in other words, keeping political decisions away from the hands of 'flawed characters'[54] that may advocate for 'goals…contrary to the common good'.[55]

Jago and Marriott eventually discredit this alternative argument, and fail to give it the recognition it needs. Whilst their points are credible and valid, a more comprehensive argument is appropriate. The 'purity of the ballot box' argument seeks to ostracize the political voices of many.[56] It has been used to silence prisoners, women through their fight for suffrage, and can be evidenced today in the denial of voting rights for non-citizens. All these communities faced, or still face, civic restrictions as their goals and desires are perceived as troublesome or disagreeable to those who favour traditional policies. Thus, the effects of civic death and civic duty are preserved, just under a different name.

5.1 'Purity of the Ballot Box' and Prisoner Disenfranchisement

[51] Ruth Rubio-Marin, 'The achievement of female suffrage in Europe: on women's citizenship' (2014) 12 International Journal of Constitutional Law 4, 20.
[52] Robert Jago and Jane Marriott, 'Citizenship or Civic Death? Extending the Franchise to Convicted Prisoners' (2007) 5 Web Journal of Current Legal Issues 3.
[53] ibid 6.
[54] ibid
[55] Saul Brenner, Nicholas J Caste, 'Granting the Suffrage to Felons in Prison' (2003) 34 Journal of Social Philosophy 228, 237.
[56] Robert Jago and Jane Marriott, 'Citizenship or Civic Death? Extending the Franchise to Convicted Prisoners' (2007) 5 Web Journal of Current Legal Issues 3, 6.

The ‘purity of the ballot box’ argument was first proposed when evaluating the contentions behind prisoner suffrage.[57] When focusing on the renowned *Hirst* decision, a contemporary case focusing on the disenfranchisement of prisoners in the UK, it becomes evident that the justification underscores various arguments and declarations proposed by Conservative ministers.[58]

To summarise, the *Hirst* decision saw the Grand Chamber hold that the UK’s ‘general, automatic and indiscriminate’ ban on prisoners voting violated Article 3 of Protocol 1 to the European Convention on Human Rights (ECHR),[59] the right to free elections.[60] The decision by no means advocated for the full enfranchisement of prisoners within the UK, rather a ‘blanket ban’ was simply not appropriate.[61] Nonetheless, commentators have argued that the case is more famous for the controversies that emerged after the decision, as opposed to the decision itself. Murray plausibly contests that the ECHR and succeeding UK governments have been ‘locked in an impasse’ over this very decision.[62] Successive UK governments have shown much aversion to the ECHR’s decision, with former Prime Minister David Cameron remarking that the mere thought of prisoner enfranchisement made him ‘physically sick’,[63] and Conservative Philip Davies labelling it ‘idiotic’ and ‘unjustifiable’.[64]

The antipathy of such ministers mirrors the ‘purity of the ballot box’ argument through constant references to the ‘strong views of the British public’.[65] For example, Philip Davies emotively stated that the vote for prisoners is ‘about as popular with the general public as finding a rattlesnake in a lucky dip’.[66] In particular, Alan Milburn’s criticism of the Liberal Democrat’s for their seeming preference of ‘criminals and yobs’ over ‘hardworking families who play by the rules’ is interesting to unpick.[67] The idea that those who ‘play by the rules’ have a more respectable political voice, demonstrates a desire to keep the political process ‘pure’, filtering

[57] ibid
[58] *Hirst v United Kingdom* (2006) 42 E.H.R.R 41.
[59] ibid [82].
[60] Protocol 1, Article 3, European Convention on Human Rights.
[61] *Hirst v United Kingdom* (2006) 42 E.H.R.R 41 861.
[62] CRG Murray, ‘Playing for Time: Prisoner Disenfranchisement under the ECHR after Hirst v United Kingdom’ (2011) 22 Kings Law Journal 309.
[63] HC Deb 2 November 2017, vol 630, col 1014W.
[64] ibid
[65] ibid col 1008W
[66] HC Deb 2 November 2017, vol 630, col 1013W.
[67] Politics.co.uk, ‘Controversy over prisoner voting plans’ (*Politics.co.uk,* 4 March 2005) <https://www.politics.co.uk/news/2005/03/04/controversy-over-prisoner-voting-plans/> accessed 15 March 2021.

out the opinions of those who clearly do not adhere to social rules. On further analysis, the hostility seems a clear case of party politics, where parties refrain from supporting policies that may not appeal to a majority. Murray puts forth a compelling argument that supports this notion, arguing that even a partial enfranchisement of prisoners 'could not have been squared with the Governments rhetoric on criminal justice'.[68] The idea that a tough on crime manifesto and a liberal approach to prisoner voting cannot co-exist is key in the connection of the 'purity of the ballot box' argument to the attitudes we see today.[69] It is conceivable that ministers are simply fearful of what policies 'criminals' and 'yobs' may prefer, and how this may corrupt the political sphere, more so than a desire to punish criminals for their behaviour.

Although these justifications differ, this alternative argument can simply be regarded a more contemporary form of civic death ideals. Both have the effect of isolating individuals from the political domain, whether it be through the desire to enforce a direct punishment or a conservation of societies values at the time. Civic death shuts people out, whilst keeping the ballot box 'pure' aims to keep ideas in. Thus, the same rules apply under a different rationale.

5.2 'Purity of the Ballot Box' and Female Suffrage

The 'purity of the ballot box' argument was also demonstrated throughout the fight for female voting equality.[70] Whilst the rhetoric of civic duty sought to maintain the idea that women were not fit for participation outside the private sphere, this argument, instead, focused on the possible repercussions should they participate. This stemmed from the fundamental belief of many that women were simply inferior beings, incapable of respectable political choices. In 1914, a pivotal point in the fight for suffrage, William T. Sedgwick alleged that enfranchising all women would equate to a 'degeneration and a degradation of human fibre which would turn back the hands of time a thousand years'.[71] What is interesting to note, is the idea that society had to be protected from what was imagined to be a 'degeneration' in political thought.[72] There was indeed a concern amongst many that if women were to vote, many would not favour the

[68] CRG Murray, 'Playing for Time: Prisoner Disenfranchisement under the ECHR after Hirst v United Kingdom' (2011) 22 Kings Law Journal 309, 321.
[69] Robert Jago and Jane Marriott, 'Citizenship or Civic Death? Extending the Franchise to Convicted Prisoners' (2007) 5 Web Journal of Current Legal Issues 3, 6.
[70] ibid
[71] Marina Koren, 'Why Men thought Women Weren't Made to Vote' (*The Atlantic*, 11 July 2019) <https://www.theatlantic.com/science/archive/2019/07/womens-suffrage-nineteenth-amendment-pseudoscience/593710/ > accessed 16 March 2021.
[72]ibid

war. Although the majority of suffragists in combatant countries promoted ‘preparedness, war work, and service to the state’, some were adamantly anti-war in sentiment and with this came a fear of rising support for policies that undermined the war effort.[73] Again, Rubio-Marin summarises this notion well, arguing that political parties were 'often eager to discipline what was perceived as women’s political promiscuity’ by ‘limiting their ability to step outside the bounds of party lines’.[74] Thus, the sentiment here relates to a preservation of the status-quo, in a similar way to prisoners suffrage, rather than just a desire to punish women purely for being ‘inferior’ and incapable beings. Consequently, one may suggest that it was not civic duty ideals alone that underpinned the disenfranchisement of women. Instead, civic duty and the desire to keep politics ‘pure’, in combination, formed the basis of their disenfranchisement for so many years.

5.3 ‘Purity of the Ballot Box’ and Non-Citizens

A more contemporary example of the desire to keep elections ‘pure’, can be evidenced in the debates surrounding non-citizen voting rights. Similarly to prisoner voting rights, the objections to enfranchising this community can be deemed a ploy to filter out unfavourable policies that may undermine national values and traditions. Whilst civic death does not explicitly relate to non-citizens, as they are not secluded from certain electoral processes due to criminal behaviour, the consequences of this alternative justification bears similarities to civic death. Fundamentally, many are left ‘without a voice in political decision-making in the areas where they live and work’.[75]

The case of non-citizens supports Song’s premise that ‘the boundaries of democracy are typically defined by the boundaries of nation states’.[76] The Representation of the People Act 1918, exemplifies this, explicitly stating that only British subjects were entitled to register for Parliamentary elections.[77] Since 1918, however, all qualifying citizens in the commonwealth are eligible for the Parliamentary vote.[78] Whilst this may imply far less wide scale

[73] Ruth Rubio-Marin, ‘The achievement of female suffrage in Europe: on women’s citizenship’ (2014) 12 International Journal of Constitutional Law 4, 14.
[74] ibid 13.
[75] Sarah Song, ‘Democracy and noncitizen voting rights’ (2009) 13 Citizenship Studies 607.
[76] ibid.
[77] Representation of the People Act 1918, s 9 (3).
[78] Neil Johnston, *The History of the Parliamentary Franchise* (House of Commons Library Research Briefing Research Paper 13/14, 2013) <https://commonslibrary.parliament.uk/research-briefings/rp13-14/> accessed 15 March 2021.

disenfranchisement than prisoners, for example, there is still a huge proportion of individuals facing political restriction. Immigrants in the UK who are not citizens of a Commonwealth country, or Ireland, still lack the right to vote in general elections and referendums.[79] This includes EU citizens, who had no say in the 2016 UK referendum, despite it having 'huge ramifications for their future'.[80] Whilst the leave campaign succeeded by a 'significant margin' of 1,269,501 votes, commentators have argued that this decision could 'easily have been reversed if resident EU citizens had been granted the right to vote in a referendum in which they had a clear, direct and personal interest'.[81] Thus, the ramifications of their disenfranchisement cannot be devalued.

Many are opposed to enfranchising this community, believing that 'extending the franchise to a large number of individuals whose allegiance lies in states other than the United Kingdom' would be 'not only inequitable, but also illogical'.[82] The fixation on ones 'allegiance' bears similarities to civic duty justifications once used to refuse suffrage to women, where one must demonstrate a sense of loyalty to their country in order to have a recognised political voice. Alternatively, a reference to 'allegiance' demonstrates a fear that non-citizens may vote in favour of non-British values. For instance, it is credible to believe that marginal parties that are explicitly pro-immigration in nature, such as the Liberal Democrats, could 'hold the balance of power' in 'closely fought elections', should the vote be extended.[83] This brings into question whether party politics renders it undesirable for non-citizens to vote, with the assumption that a more liberal approach to immigration will follow.

Explicitly addressing their needs would leave political parties no choice but to recognise policies and ideas that do not necessarily fit the traditional mould. Subsequently, parallels to female suffrage can be drawn, as many in power believed their enfranchisement would prompt a crumbling of traditional gender roles that subsisted in the early twentieth century. Further,

[79] Guy Aitchison, 'The next step for suffrage: give all immigrants the right to vote' (*The Conversation,* 7 February 2018) < https://theconversation.com/the-next-step-for-suffrage-give-all-immigrants-the-right-to-vote-91175> accessed 19 March 2021.
[80] ibid
[81] Sean Fox, Ron Johnston and David Manley, 'If Immigrants Could Vote in the UK: A Thought Experiment with Data from the 2015 General Election' (2016) 87 The Political Quarterly 500, 507.
[82] Migration Watch UK, 'The Right of Non-Citizens to Vote in Britain' (*Migration Watch UK,* 21 February 2008) < https://www.migrationwatchuk.org/briefing-paper/81/the-right-of-non-citizens-to-vote-in-britain> accessed 19 March 2021
[83] Sean Fox, Ron Johnston and David Manley, 'If Immigrants Could Vote in the UK: A Thought Experiment with Data from the 2015 General Election' (2016) 87 The Political Quarterly 500, 506.

Conservatives have shown consistent criticism towards enfranchising prisoners, even in a partial sense, in hopes to appease the British public and their values. Sarah Song summarises the argument persuasively, stating that it is simply easy for 'political parties, candidates and elected officials to ignore' the goals and desires of this community, and in doing so, the ballot box remains uncontaminated from ideas it frankly does not want to address.[84]

In sum, the case of non-citizens confirms that civic death is far from an ancient concept, its consequences remain, but through a different rhetoric. It is more than valid to assume that silencing this community shuts potential reform that many will oppose, and thus acts as an incentive to deny them suffrage. Whether individuals are disenfranchised due to undesirable behaviour, or their potential to advocate for undesirable policies, the end result is that these communities are 'othered', and their political voices are silenced.

6. Conclusion

To conclude, civic death and civic duty have consistently been used to justify voting inequalities throughout history. This article has shown whilst civic duty no longer oppresses the female population, civic death is not a mere phenomenon of the past; prisoners and non-citizens still endure its effects today. By charting the history of the idea, one can see how civic death continues to operate through a new rationale. Communities are ostracised simply out of fear that they will challenge traditional values, such as a more liberal approach to crime or immigration. The disparities in political power that still exist within the UK can be better assimilated by making the connection between civic death in its previous form, and how it is expressed in modern times. For this reason, its recognition is imperative.

[84] Sarah Song, 'Democracy and noncitizen voting rights' (2009) 13 Citizenship Studies 607, 614.

Regulating Technology: How Sunsets, Pirate Islands and Pandemic Lockdowns Balance Innovation and Safety

David Patrick Albert Millar

1. Introduction

Emerging technology brings innovation to society, but it also brings a duality of harm-benefit. If left 'unsupervised', technology may present a real risk to society through physical and legal harm. However, suffocating technology with regulations will prevent society from benefiting from technological innovations.

To begin with, the latest examples of innovative developments in 3D printing, self-driving technology, and online innovation have demonstrated that emerging technology can bring both benefits and harms. This may direct us to a moral argument that regulatory responses are needed in some way to prevent harm without losing sight of the long-term big picture of the benefits of these technologies. Thus, I argue that we need to regulate emerging technology and find a balance between innovation and regulation that prevents short-term harm while allowing technology to develop to the point where it can benefit society without causing danger.

Secondly, the utilitarian lens accepts the tradeoff between public safety and innovation. In striking the right balance through the utilitarian lens, policymakers have a choice between rigid and flexible regulation regimes. I consider a flexible system of regulation that responds to issues as they arise as the most desirable form of regulation. Because a flexible system can increase the efficiency of regulation. Although a rigid system has more legal certainty, a sufficient degree of certainty is also provided in a flexible system to strike the right balance. In short, a flexible approach employing the principle of governance by accident will allow regulations to adapt to new technologies while preventing this harm and allowing technology to develop.

Lastly, three flexible systems (sunset, experimental, and lockdown regulations) which utilize the principle of governance by accident will be discussed. Sunset regulation, for instance, contains clauses that indicate under what situation will the regulation be put an end to. In other words, if an innovation fails to show its sufficiently minimal harm to society, sunset regulations

can be terminated and replaced with more protective regulations, and the cycle continues until a balance is achieved between innovation and societal protection. This benefits the innovation developments, the public, and the innovators, and can minizine societal harm through an increased legal certainty. Experimental regulation allows rules to be temporarily tested before implementing in the long term. Although it can increase our knowledge of a technology and minimize abrupt amendments in law, it is associated with a decreased legal certainty in comparison with sunset regulation. In addition, a novel lockdown regulation proposes if a technology shows itself to not cause harm, the regulation will be more relaxed; and vice versa. Thus, I argue that sunset regulation should be favoured over the alternative experimental regulation when viewed through the utilitarian lens, and lockdown regulation can provide the best balance between safety and innovation.

2. We need to regulate the emerging technology

Emerging technology can bring both benefits and harm. Latest examples of which include innovative developments in 3D printing, self-driving technology, and online innovation areas. These developments open up new possibilities in creating a better future, however, they also pose risks and challenges in socio-economic, industrial, public safety, personal privacy, national security dimensions. Under such circumstances, regulatory responses to emerging technology are needed for mitigating harm and securing long-term benefits.

The first example is 3D printing. Porsche has developed a 3D printing system that utilizes laser metal fusion to turn powdered metal into a solid structure for the manufacturing of automotive pistons.[1] On the one hand, this method allows pistons to be manufactured with complex internal designs that are unparalleled by traditional manufacturing methods, resulting in the technological benefit of increased automotive performance.[2] But, on the other hand, it has also brought harm through the printing of firearms.[3] In 2019, for instance, public safety was compromised when an individual was convicted for the offence of possessing a firearm without

[1] Porsche, 'Innovative Pistons from a 3D Printer for Increased Power and Efficiency' (*Newsroom.Porsche.Com*, 13 July 2020) <https://newsroom.porsche.com/en/2020/technology/porsche-cooperation-mahle-trumpf-pistons-3d-printer-power-efficiency-911-gt2-rs-21462.html> accessed 19 February 2021

[2] Donut Media, '3D Printed Pistons are Changing the Game' (16 February 2021) 5:50 <https://www.youtube.com/watch?v=y_W8clK4mb8&t=204s&ab_channel=DonutMedia> accessed 23 March 2021

[3] R Pincus, 'My Start with 3D Printing Firearms...' (12 January 2021) <https://www.youtube.com/watch?v=5cuCe5MDsw4&ab_channel=RobPincus> accessed 23 March 2021

a license having downloaded plans for and printing a firearm.[4] This case is the 'tip of the iceberg' as these plans are readily available.[5]

The second example is self-driving technology. Within the European Union, 51% of all freight is transported by road.[6] In this regard, self-driving technology from Tesla presents the great potential of benefiting the freight industry. If the technology can reduce the number of drivers needed, the associated costs would decrease and result in savings that can be passed on to the consumer. While this will inevitably lead to employment issues, such a submission pales in comparison to the harm that self-driving technology currently brings. In 2018 a self-driving Tesla crashed into a stationary vehicle on the highway while the driver was playing a mobile game,[7] and there have been at least two fatalities associated with the technology in 2016 and 2018.[8]

The third example is online innovation. Platforms such as Amazon's MTurk allow firms to outsource data tasks virtually to an online workforce,[9] increasing the efficiency of the firm while providing additional cash flow to society. This online data can also lead to a greater understanding of society itself.[10] But this innovation, if misused, can also cause severe harm to personal privacy and national security as was the case in the Cambridge Analytica scandal,[11] named after the British Consulting firm specializing in data-analytics.[12] The data of 87 million Facebook profiles was collected without consent through the friend lists of 320,000 consenting users of a third-party app.[13] This was caused by the under-regulation of this area of technology

[4] Guernsey Press, 'Student who Made Guns with 3D Printer Jailed' (*GuernseyPress.Com,* 19 September 2019) <https://guernseypress.com/news/uk-news/2019/09/19/student-who-made-guns-with-3d-printer-jailed/> accessed 19/02/2021
[5] DEFCAD, <https://defcad.com/> accessed 23 March 2021
[6] European Commission, 'Statistical Pocketbook 2020 – EU Transport in Figures' (2020), section 2.2 performance of freight transport (tkm)
[7] J Thornhill, 'Trusting AI Too Much Can be Fatal' Financial Times (London, 3 March 2020) 10
[8] A J. Hawkins, 'Tesla Didn't Fix an Autopilot Problem for Three Years, and Now Another Person is Dead' (*TheVerge.Com,* 17 May 2019) <https://www.theverge.com/2019/5/17/18629214/tesla-autopilot-crash-death-josh-brown-jeremy-banner> accessed 23 March 2021
[9] M G. Keith, L Tay, P D. Harms, 'Systems Perspective of Amazon Mechanical Turk for Organizational Research: Review and Recommendations' (2017) 8 Article 1359 Front Psychol 2 <https://www.frontiersin.org/articles/10.3389/fpsyg.2017.01359/full> accessed 22 March 2021
[10] S D. Gosling, W Mason, 'Internet Research in Psychology' (2015) 66 Annu Rev Psychol 877, 888
[11] P Lewis, J Grierson, M Weaver, 'Cambridge Analytica Academic's Work Upset University Colleagues' The Guardian (24 March 2021) <https://www.theguardian.com/education/2018/mar/24/cambridge-analytica-academics-work-upset-university-colleagues> accessed 22 February 2021
[12] C O Schneble, B S Elger, D Shaw, 'The Cambridge Analytica Affair and Internet-mediated Research' (2018) 19(8) EMBO Rep. e46579
[13] H Afriat, S Dvir-Gvirsman, K Tsuriel, L Ivan, '"This is Capitalism. It is Not Illegal": Users' Attitudes Toward Institutional Privacy Following the Cambridge Analytica Scandal' (2021) 37(2) Inf. Soc. 115, 115

and has indeed been rectified by the introduction of the General Data Protection Rules (GDPR).[14]

These three examples showcase the duality of harm-benefit that emerging technology stands to bring. This leads to the moral argument that emerging technologies must be regulated in some way to prevent short-term harm, but also potential long-term harm that we cannot foresee. We must not, however, lose sight of the long-term big picture that these technologies have the potential to save lives.

To continue with the self-driving technology example, 96% of automotive accidents are caused by human error.[15] If the technology is developed to the point where it is no longer a danger, it stands to prevent nearly all automotive accidents. Excessively strict regulation will suffocate this innovation, while a lack of regulation will lead to harms as in the Cambridge Analytica example. In consideration of this, a balance is needed between innovation and regulation that prevents short-term harm while allowing technology to develop to the point where it can benefit society without causing danger.

3. Looking through the utilitarian lens

While we must therefore regulate technology, how we do so is dependent on societal norms and expectations which determine the lens we examine these issues through.[16] It is submitted that there are two primary lenses, pro-innovation, and pro-regulation, the former encompasses protecting technology from stifling innovation, and the latter encapsulates protecting society from the associated harms of new technology.[17]

These points exist on extreme and opposite ends of the scale of regulation and are absolute in their application. If one is favoured either technological advancement or public safety will be sacrificed. It is submitted that there is a third lens, the utilitarian lens, that allows a balance

[14] Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation) [2016] OJ L119/1
[15] B Javins, C LC, 'What Percentage of Auto Accidents are Caused by Human Error?' (*Bailey Javins & Carter,* 8 September 2020) <https://www.baileyjavinscarter.com/what-percentage-of-auto-accidents-are-caused-by-human-error/> accessed 19 March 2021
[16] L Bennett Moses, 'How to Think about Law, Regulation and Technology: Problems with 'Technology' as a Regulatory Target' (2013) 5(1) Law Innov Technol 1, 10
[17] ibid.

between these extremes to be found. This balancing point is the 'greater good' that represents a degree of regulation that gives technology enough freedom to develop, while not being so relaxed that unnecessary harm is inflicted upon society.[18] This is preferable as it will result in a minimal degree of short-term harm to society, but the tradeoff is in the long-term 'big picture' as innovation benefits society.

3.1 Flexibility vs rigidity

In striking the right balance through the utilitarian lens, policymakers have a choice between rigid and flexible regulation regimes. It is submitted that a flexible system would follow the principle of 'governance by accident' and a rigid one would follow 'anticipatory governance'.[19] Flexibility adapts to situations *as* they arise while rigidity anticipates issues before they arise. In practice, both systems have their merits. Flexible governance by accident is used by the National Transport Safety Board by investigating the cause of accidents and making recommendations to prevent them recurring,[20] and they have seen an increase in airline safety.[21] Rigid anticipatory governance is used by the US Food and Drug Administration, putting products through in-depth tests to maximize safety before it gains approval.[22] Regardless of the favoured approach, it is not for the producers, but for the policymakers, to decide on which to adopt.[23] This work will examine these two regimes in the context of both efficiency and legal certainty. Ultimately, it will be shown that a flexible regime is to be preferred.

3.1.1 A flexible system is more efficient

[18] G N Mandel, 'Regulating Emerging Technologies' (2009) 1(1) Law Innov Technol 75, 82
[19] (n 7)
[20] National Transport Safety Board, *About the National Transportation Safety Board* <https://www.ntsb.gov/about/pages/default.aspx> accessed 24 March 2021; see also National Transport Safety Board, *Fact Sheet – FAA's Response to NTSB's "Most Wanted" Safety Recommendations* (2020) <https://www.faa.gov/news/fact_sheets/news_story.cfm?newsId=11186> accessed 24 March 2021
[21] (n 7); see also J Rollins, 'Aviation Safety Continues to Improve in the US and Europe' (*LeeHamNews.Com*, 03 January 2020) <https://leehamnews.com/2020/01/03/aviation-safety-continues-to-improve-in-the-us-and-europe/> accessed 24 March 2021
[22] Drugwatch, 'FDA Approval Process' <https://www.drugwatch.com/fda/approval-process/> accessed 24 March 2021
[23] (n 7)

The arrival of new technology is often chaperoned by calls to overhaul existing legal systems to accommodate it,[24] as the rigid nature of regulation currently seen is incapable of adapting to these new situations.

Moses submits that this problem is caused by a narrow approach that targets specific technologies.[25] If the question of regulation is framed in terms of a specific technology it will be rigid in structure and narrow in scope to the specific technology. Such an approach is seen in the emerging field of nanotechnology.[26] Referring to technology that is undertaken on the nanoscale of 1 to 100 nanometers.[27] The Environmental Protection Agency in the US has regulations governing the technology,[28] and individual states have seen the need for its regulation.[29] Equally in the EU, the European Parliament has displayed an interest in regulating nanotechnology.[30] These bodies were tasked with regulating a new technology, and while they completed their task they did so in a way that only targets nanotechnology. Such an approach to overhauls will thus need to be undertaken for every technology that presents a risk to society, resulting in an inefficient use of resources when compared to a single flexible overhaul that targets all emerging technology. Furthermore, the narrow overhaul would not guarantee that the new system is better placed to facilitate and promote new technology.[31] Such an example can be found with the innovation of AirBnB. Narrow regulations around this innovation have directly hindered its potential as it does not promote the technology, merely protecting traditional hotels.[32]

[24] G N Mandel, 'Gaps, Inexperience, Inconsistencies, and Overlaps: Crisis in the Regulation of Genetically Modified Plants and Animals' (2004) 45 William Mary Law Rev 2167, 2249
[25] (n 16), 14-15
[26] G Calster, D Bowman, J D'Silva, '"Trust Me, I'm a Regulator": The (In)adequacy of EU Legislative Instruments for Three Nanotechnologies Categories' in M Goodwin, BJ Koops, R Leenes (eds), *Dimensions of technology regulation* (2010 Wolf Legal Publishers) 223 <https://pure.uvt.nl/ws/portalfiles/portal/1225627/Koops_Dimensions_of_Technology_Regulation_proof_2_april_2010v2_100526.pdf> accessed 23 February 2021
[27] National Nanotechnology Initiative, *What is Nanotechnology?* <https://www.nano.gov/nanotech-101/what/definition> accessed 24 March 2021
[28] United States Environmental Protection Agency, *Control of Nanoscale Materials under the Toxic Substances Control Act* https://www.epa.gov/reviewing-new-chemicals-under-toxic-substances-control-act-tsca/control-nanoscale-materials-under accessed 26 February 2021
[29] J DiLoreto, 'We Should Have Seen it Coming: States Regulating Nanotechnology' (*Nanotechn-Now.Com,* 7 September 2010) <http://www.nanotech-now.com/columns/?article=484> accessed 26 February 2021
[30] European Parliament Resolution of 24 April 2009 on regulatory aspects of nanomaterials, P6 TA (2009) 0328
[31] (n 18), 79
[32] G Hill, 'Do Regulations Kill Innovation?' (*Channels.TheInnovationEnterprise.Com,* 29 January 2020) <https://channels.theinnovationenterprise.com/articles/do-regulations-kill-innovation> accessed 24 March 2021

Laurie proposes that a flexible system has the goal of being able to facilitate such an overhaul.[33] While this idea is not totally incorrect, a more nuanced view is required. Flexibility should not facilitate legal overhauls every time a new technology presents itself, as this would fall foul of the abovementioned inefficiencies. The flexibility allows a single regulation to crosscut all areas of technology and remain relevant despite technological advancements through adapting to new issues presented by new technology.

Current laws surrounding regulation are often crafted in the terms of the 'misuse' of a specific technology.[34] This creates inefficient 'overlapping'[35] regulations like telephone and computer harassment laws.[36] It is more efficient to have a single harassment law based in technology.

It may be rebutted that specific regulation is validated in moral situations. For example, in the regulation of human cloning.[37] However continuing with the nanotechnology argument, this moral rebuttal for regulating specific technology lacks strength. The risks associated with nanotechnology are more closely tied to the risks surrounding the non-nano versions of nanotechnology.[38] Very specific features such as the reactivity at equilibrium when in a solvent solution may differ between nano and non-nano particles,[39] but they are not 'different in kind'.[40] The regulations in place for non-nano substances can be applied to their nano counterparts as long as the assumptions made about nanotechnology are remedied.[41] It is worth noting the mini-argument that showcases the benefits of flexibility here. Nanotechnology is developing too quickly for legislation to keep up with, and as such assumptions must be made about the associated risks. Flexibility allows the assumptions around nanotechnology to be updated, permitting regulations governing non-nano substances to apply to their nano counterparts.[42] Existing legislation can be updated to recognize that the particle size of

[33] G Laurie, S HE Harmon, F Arzuaga, 'Foresighting Futures: Law, New Technologies, and the Challenges of Regulating for Uncertainty' (2012) 4(1) Law Innov Technol 1, 25
[34] S W Brenner, '*Law in an Era of 'Smart' Technology*' (Oxford University Press, 2007) 111
[35] ibid. 112
[36] (n 16) 14
[37] (n 16) 15
[38] (n 16) 16
[39] A M Belenguer, G I Lampronti, C A Hunter, J K M Sanders, 'Solvation and Surface Effects on Polymorph Stabilities at the Nanoscale' (2016) 11(11) Chem Sci 6579, 6626; See also S Hilton*, 'How Materials Change at the Nanoscale and What this Means for Industry'* (*Nano Chemigroup,* 2021) <https://blog.nanochemigroup.cz/how-materials-change-at-the-nanoscale-and-what-this-means-for-industry/> accessed 23 April 2022
[40] (n 16) 16
[41] L Bennett Moses, 'Regulating beyond Nanotechnology. Do Nano-Specific Problems Require NanoSpecific Solutions?' (2010) IEEE International Symposium on Technology and Society 68, 69
[42] ibid.

nanotechnology can affect its mechanical properties, for example.[43] This more flexible approach leads to rigid and specific regulation becoming obsolete.[44]

While converting old systems of regulation to apply to new technology can still pose issues,[45] solving them does not require another rigid form of regulation.

3.2 A flexible system can be legally certain

A flexible system may suffer from a lack of legal certainty.

If a new technology is to be developed, the regulations surrounding it must have a sufficient degree of certainty. If not, then the cost and timeframe of development will itself be uncertain and may prevent firms from investing in the technology.[46] This raises the further point that 'certainty' can take different forms. It can be established through the total regulation of a technology, but curiously the converse is not true. Certainty will not be established where there are no regulations,[47] as innovators are aware of the fleeting nature of unregulated markets. If they enter the market, regulations will soon follow, and their form cannot be predicted. Echoing the previous point of overlapping regulations, Hagemann also notes the existence of overlapping authoritative bodies, or 'two parents, two rules'.[48] Without legal certainty two or more authoritative bodies may step in to regulate the same technology. Leading to worsening degrees of legal certainty. The certainty of flexible regulation sits somewhere between rigid regulation and no regulation, with the former having the most legal certainty and the latter having the least legal certainty. It follows then that while flexible regulation would protect both the public and innovation, it would offer less legal certainty than rigid regulation.

3.2.1 Certainty is a flexible principle

[43] Q Wu, WS Miao, YD Zhang, HJ Gao, D Hui, 'Mechanical Properties of Nanomaterials: A Review' (2020) 9(1) Nanotechnol Rev 259-273
[44] (n 16) 16
[45] ibid.
[46] R A. Hoerr, 'Regulatory Uncertainty and the Associated Business Risk for Emerging Technologies' (2011) 13(4) J Nanopart Res 1513, 1514
[47] R Hagemann, 'New Rules for New Frontiers: Regulating Emerging Technologies in an Era of Soft Law' (2018) 57(2) Washburn Law J 235, 245
[48] ibid. 246

This can however be rebutted. The principle of legal certainty goes beyond the permanency of laws and into a range of certainties required for the just application of law.[49] Stability is one such component of certainty and is defined as expecting the law to remain constant and not reformed without aim.[50] Flexible laws can be stable as they do not fall foul of this definition. Pound proposed that laws 'must be stable, and yet [they] cannot stand still'.[51] The component of stability is therefore not swayed by the changes that stem from the evolution of the *status quo,*[52] and it is fundamentally not offended by the theory of flexible systems of law.

Another component of certainty is predictability. Defined as being able to foresee the legal consequences of one's actions.[53] The fact that a total lack of predictability would be damaging[54] does not warrant the conclusion that a *degree* of unpredictability would have the same result.[55] A necessary degree of unpredictability would therefore be permittable in a flexible system of law.

Legislative changes are measured by their effects, and if they decisively change the *status quo*, the legislature should strive to protect the third component of legal certainty, that of reliability.[56] In a flexible body of law, a degree of reliability can be sustained if it does not change the fundamental nature of the *status quo*.

The core function of legal certainty as a rule of law is the protect individuals from the 'arbitrary exercise of authority'.[57] As such, it is not a guarantee that the law will always remain the same. If it were then out-of-date and irrelevant laws would prevail. Hart, in much the same vein as Pound above, declared that there must be a trade-off between legal certainty and the need for future evolution in law.[58] A flexible system of law allows this legal evolution, and the conclusion can be drawn that it does not offend the principle of legal certainty.

[49] P Loving, 'The Justice of Certainty' (1994) 73(4) Oregon Law Rev 743, 746
[50] S Ranchordás, 'Sunset Clauses and Experimental Regulations: Blessing or Curse for Legal Certainty?' (2015) 36(1) Statut Law Rev 28, 37
[51] R Pound, '*Interpretations of Legal History*' (Harvard University Press 1945) 1
[52] ibid
[53] M D Bayles, 'On Legal Reform: Legal Stability and Legislative Questions' (1977) 65(3) KY Law J 631, 638
[54] ibid.
[55] (n 53)
[56] ibid.
[57] (n 50) 38
[58] HLA Hart, '*The Concept of Law*' (Oxford University Press 1961) 130

The principle of legal certainty is a present concern, rather than a concern for the future. Stefano proposes that legal certainty is a purely 'argumentative reality' that is more concerned with impartiality than content.[59] We cannot know what the law will be in the future even if our legal system is shaped by the objective of legal certainty. Therefore, while the principle is important, a flexible system of law cannot reduce certainty further.

3.3 Rigid regulation will be more certain

Despite this, rigid regulation benefits from legal certainty in the traditional sense, without resorting to a discussion of the open texture of language.[60] Legal certainty can here be defined as being able to know in advance the legal consequences of an action.[61] The law will be predictable, foreseeable and comply with legal precedent.[62] As Ranchordás concludes, a degree of legal stability is therefore desirable.[63]

However, legal stability is not always the desired goal. Ranchordás, citing Emge, submits that in times of crisis citizens will prefer legal certainty, but in stable timeframes, citizens may prefer justice.[64] Indeed this preference may even be linked to education, suggesting that highly educated individuals appreciate the requirement for the law to adapt to the changing reality of our society.[65]

3.4 Summary: flexibility is desirable

A flexible system will therefore increase the efficiency of regulation, preventing obstacles to innovation in the form of irrelevant but still applicable regulations. While a rigid system will feature more certainty, looking through the utilitarian lens, a flexible system has a sufficient degree of certainty to prevent legal harm when balanced against the crucial benefits of increased innovation.[66]

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[59] S Bertea, 'Towards a New Paradigm of Legal Certainty' (2008) 2(1) Legisprudence 25, 37-38
[60] (n 58) 124
[61] (n 59) 29
[62] K Günther, '*The Pragmatic and Functional Indeterminacy of Law*' (2011) 12(1) Ger Law J 407, 411
[63] (n 50) 36
[64] (n 50) 37
[65] ibid.
[66] Barack Obama in John Cook's, 'Text: Obama's Innovation Speech' *(BizJournals.Com,* 26 January 2011) <https://www.bizjournals.com/seattle/blog/techflash/2011/01/full-text-obamas-innovation-speech.html> accessed 27 February 2021

4. Flexible systems

Three flexible systems are proposed: sunset, experimental, and lockdown regulations. All of which utilize the principle of governance by accident that is associated with flexibility.

4.1 Sunset

Sunset regulations are one such flexible system. They are regulations containing clauses dictating the termination of the regulation unless certain criteria are met.[67] In this sense, they are a form of regulation by accident as they respond to situations that arise from their existence. They have a limited duration and come with a review at the end of their life,[68] allowing an increase in flexibility as they can be altered or removed depending on their impact.

The starting position should be relaxed regulations that allow for innovation. This form of regulation will then protect the public by placing a burden of proof on those who wish to extend the sunset regulation to show that, for example, the public is not subject to unnecessary harm presented by technology when the clause expires, and the review occurs. The innovators wishing to use sunset regulation have a more direct connection with the technology and so are in a better position to advocate for it than policymakers. If they fail to show sufficiently minimal harm to society, sunset regulations can be terminated and more protective regulations imposed, and the cycle continues until a balance is reached between innovation and societal protection as the utilitarian lens dictates. Despite being a relatively new idea, the Dutch Council of State held that this review should only extend the duration of sunset regulation if there are 'compelling reasons' to do so.[69] As this prevents the process from being arbitrary, it allows for the balance of as much flexibility and innovation as possible while minimizing harm to society.

Sunset regulation will also minimize societal harm through maximizing legal certainty as much as possible for a flexible system of law. As noted above, there can be regulatory overlap in

[67] (n 50)
[68] ibid.
[69] Dutch Council of State, 'Voorstel van wet van de leden Vos en Stuurman betreffende het wijzigen van de Wet stimulering arbeidsdeelname minderheden (Wet verlenging Wet Samen), met memorie van toelichting' (2003) Kamerstukken II, 29 275, 4, paragraph 2 <https://www.raadvanstate.nl/@56625/w12-03-0459-iv/> accessed 24 April 2022

rules governing new technology. Sunset regulation can prevent this by ensuring that old or obsolete laws automatically expire, 'cleaning the lens' and making the true state of affairs surrounding regulation clear.[70] Indeed, the German Constitutional Court held that legislation should not be constrained by existing precedents that do not reflect modern society when governing new phenomena.[71] Furthermore, by increasing certainty investors will be more attracted to investing, leading to an increase in innovation while being able to quickly minimize harms to society.

This certainty is not matched by rigid regulation. With rigid regulation, the legislature can amend laws so long as there is the necessary political support, but sunset critics concede that this creates the 'illusion' of certainty as the reality of how often laws are amended goes unnoticed by the population.[72] As such even a 'rigid' system is subject to change and uncertainty.[73] Conversely, changes to Sunset clauses are not unexpected. Changes that are made are done after a formal review.[74] This gives an 'early warning' that is given in advance of the changes rather than the rigid system's abrupt changes.[75]

Sunset clauses can also prevent uncertainty in the future. As legal rules age, their relevance and effectiveness can diminish.[76] This process occurs as a result of the natural changes that society undergoes which in turn creates new legal issues that the original rule simply did not foresee.[77] This situation reflects the need for legal adaptation, and D'Amato submits that implementing sunset clauses into statutes would increase legal certainty.[78] Sunset clauses in this situation set an 'alarm clock' for change that prevents laws become outdated unnoticed.[79] They would ensure that old legal rules would be reviewed and adapted to be suitable for the current legal climate so long as there are grounds to do so, and in doing so they would increase legal certainty by removing old rules that are ill-suited to modern reality.

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[70] (n 50) 38
[71] German Constitutional Court, 2 BvF 1/01 (24 October 2002), Paragraphs 210–16
[72] E Dewey, 'Sundown and You Better Take Care: Why Sunset Provisions Harm the Renewable Energy Industry and Violate Tax Principles' (2011) 52(3) BCL Rev 1105, 1125
[73] George K. Yin, 'Temporary-Effect Legislation, Political Accountability and Fiscal Restraint' (2009) 81(1) NYU L Rev 174, 248
[74] (n 50) 39
[75] ibid.
[76] A D′Amato, 'Legal Uncertainty' (1983) 71(1) Cal L Rev 10, 11
[77] ibid.
[78] (n 76) 47
[79] A Kouroutakis, 'The Virtues of Sunset Clauses in Relation to Constitutional Authority' (2020) 41(1) Statut Law Rev 16, 16

4.2 Experimental

While Sunset clauses specify the date on which they expire, experimental regulation allows legislators to test rules before deciding whether to implement them permanently.[80] It creates a 'pocket' in which legally disruptive experimentation can take place,[81] and is amusingly akin to Tortuga from Disney's 'The Pirates of the Caribbean', a pirate island free from rules.

Experimental regulation can therefore generate an increased degree of knowledge about the impact of new technology as there is a wider area of discretion when compared to sunset regulation. This was the case in Germany where it was held that an experimental clause in geriatric care was necessary to create the legal room needed for these temporary tests,[82] and to obtain the information from them. In the United States, it was held that experimental regulation could be justified when used to harness new technological advancements, going as far to say that experimental regulation should only be struck down if faced with compelling legislative prohibition.[83]

Furthermore, experimental regulation can decrease the harm resulting from abrupt amendments. We exist in an 'accelerated society',[84] and laws often cannot keep pace with new issues that arise with new technology.[85] The result is a legal reality that needs constant amendment. When compared to rigid law, experimentational regulation can ease these amendments by providing a 'trial run' and learning from the results. If the experiment fails another can take place until the finished regulation can be implemented smoothly and with no adverse or unforeseen consequences.

However, experimental regulation is not as well equipped to protect legal certainty when compared to sunset regulation. The Netherlands introduced experimental legislation to reduce VAT on consumer products. The impact of the experimental legislation was greatly reduced as

[80] Y Roznai, 'Sofia Ranchordás, Constitutional Sunsets and Experimental Legislation: A Comparative Perspective (Edward Elgar, 2014)' (2016) 64(3) Am J Comp Law 790, 790
[81] M A Heldeweg, 'Experimental Legislation Concerning Technological & Governance Innovation - an Analytical Approach' (2015) 3(2) Theory Pract Legis 169, 183
[82] BVerfG, Judgment of 24 October 2002, 2 BvF 1/01, German Constitutional Court (2002), Paragraph 383
[83] *United Telegraph Workers* v *Federal Communications Commission*, 141 US App DC 190, 436 F 2D 920 (1970)
[84] R B Talisse, 'Liberal Democracy and the Social Acceleration of Time' (2005) 120(4) Political Sci Q 723, 724
[85] P Popelier, 'Five Paradoxes on Legal Certainty and the Lawmaker' (2008) 2(1) Legisprudence 47, 50

there was uncertainty in whether the change would be made permanent.[86] Sunset regulations would approach the issue with a pre-agreed set date for when the new rules would end. This would eliminate the uncertainty surrounding questions as to whether it would be made permanent.

Experimental regulation can increase the knowledge of a technology and minimize abrupt amendments. Looking through the utilitarian lens, these benefits are outweighed by the harm to society in the form of decreased legal certainty when compared to sunset regulation, and experimental legislation is fundamentally a precursor to permanent legislation.[87] Thereby making it merely a transitional form of regulation towards a more permanent solution. Considering the above-mentioned issues about rigid, permanent regulation, experimental regulation cannot be favoured over sunset regulation.

4.3 Lockdown

The favoured sunset approach can be improved upon. We are familiar with the concept of 'lockdowns' from the COVID-19 pandemic that began in 2019.[88] The most notable feature of these lockdowns was the adaptive approach they took, if cases of COVID-19 increased, so did the restriction measures and the converse is also true.[89] An analogous system of technology regulation is proposed, if a technology shows itself to cause harm, the regulations around it will become more restrictive, if the technology shows itself to not cause harm, the regulations will be more relaxed. The fundamental advantage of this 'lockdown legislation' is that it can be amended on a rolling and proactive basis, rather than waiting for the legislation to reach its end date like the sunset regulations.[90]

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[86] Commission staff working paper '*Evaluation Report on the Experimental Application of a Reduced Rate of VAT to Certain Labour-intensive Services*' COM(2003)309 final at 4.7 <https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:52003SC0622&from=MT> accessed 23/04/2022

[87] (n 81) 170

[88] World Health Organization, 'Listings of WHO's Response to COVID-19' (June 2020) <https://www.who.int/news/item/29-06-2020-covidtimeline> accessed 23 March 2021

[89] Eightieth SAGE Meeting on COVID-19, *SAGE 80 Minutes: Coronavirus (COVID-19) Response, 11 February 2021* (paragraph 8, February 2021) <https://www.gov.uk/government/publications/sage-80-minutes-coronavirus-covid-19-response-11-february-2021/sage-80-minutes-coronavirus-covid-19-response-11-february-2021> accessed 23 March 2021

[90] (n 79) 17

The proposed system for lockdown regulation is based upon the idea of 'planned adaptation',[91] as the regulations are adapted when more knowledge is gained about the technology,[92] and that this system actively encourages the discovery of knowledge about new technologies.[93] This is done through with the incentive of less restriction around the technology that is granted when there is sufficient understanding of it. The proposed framework consists of three stages. The first has the most restriction when little is known about why a new technology works or does not work, the intermediate occurs when we know that a technology works but not why, and the last with the least restriction will occur when we know how to make a technology work and why it works.[94]

It is foreseeable that situations may arise when a technology cannot progress into the next stage of regulation as the 'bar' was too high, and the regulations are themselves too strict to allow the technology to develop sufficiently. A solution to this deadlock is the use of sunset regulation. Their fixed expiry date would force the effect of regulations to be reviewed upon their ending. This would ensure the regular review of the effect of regulations on technological progress and ensure oversight of the process to best balance innovation and public safety.[95]

A second solution to the deadlock would be the innovators themselves going to the regulatory body to show their sufficient understanding of the technology. As a UK aviation example, an innovator with new aviation technology could present it to the Civil Aviation Authority (CAA) along with detailed records of their research and tests of the technology. The CAA could then make an informed decision as to whether the innovator has sufficient understanding of the technology, and whether technology is developed enough to be safe to move into the next regulatory category. The CAA already has a mechanism for applying for 'airworthiness' certificates,[96] and this proposed mechanism is an extension of this, albeit an extreme one. If the regulatory body is satisfied with their understanding, that technology could be 'fast tracked'

[91] L E McCray, K A Oye, A C Petersen, 'Planned Adaptation in Risk Regulation: an Initial Survey of US Environmental, Health, and Safety Regulation' (2010) 77(6) Technol Forecast Soc Change 951, 951
[92] J Bonnín Roca, P Vaishnav, M Granger Morgan, J Mendonça, E Fuchs, 'When Risks Cannot be Seen: Regulating Uncertainty in Emerging Technologies' (2017) 7(7) Res Policy 1215, 1225
[93] A Petersen and P Bloemen, 'Planned Adaptation in Design and Testing of Critical Infrastructure: The Case of Flood Safety in The Netherlands' (*Discovery.Ucl.Ac.Uk*, 2015) <https://discovery.ucl.ac.uk/id/eprint/1469402/2/221-225.pdf> accessed 23 March 2021
[94] (n 92) 1226
[95] ibid.
[96] Civil Aviation Authority, 'Certificates of Airworthiness' <https://www.caa.co.uk/Commercial-industry/Aircraft/Airworthiness/Certificates-and-permits/Certificates-of-airworthiness/Certificates-of-Airworthiness/> accessed 23 March 2021

onto the next stage of regulatory relaxation to allow further development with fewer restrictions.

5. Conclusion

It has been submitted that unregulated technology will result in excessive harm to society, while totally rigid regulation will suffocate innovation. The utilitarian lens must be subscribed to see the ‘big picture’ and realize that technology must have the regulatory freedom to develop its benefits to society, while at the same time minimizing physical and legal harm to society. A flexible approach employing the principle of governance by accident will allow regulations to adapt to new technology while preventing this harm and allowing technology to develop. Of the discussed flexible approaches, sunset regulation should be favoured through the necessary utilitarian tradeoff between innovation and harm. A novel approach of lockdown regulation has also been submitted as an exceptionally responsive regime that will minimize harm as much as possible while promoting innovation to the highest extent.

The Significance of *Bebb v Law Society* in its First Decade.

Morgan Rebekah Robinson

1. Introduction

There is a piecemeal approach throughout literature to attempt to understand the significance of the decision taken in *Bebb*[1], and what the significance of events that followed meant for women in the early 20th century. This piece will discuss *Bebb v Law Society* through the lenses of: societal views of women in the early 20th century; the case of *Bebb* itself; how the suffrage movement acted as a catalyst for both Gwyneth Bebb and wider society; and, whether or not social perceptions of the Sex Disqualification (Removal) Act[2] align with what it was actually able to achieve for women. The discussion of these areas pulls together previous attempts to understand the significance and legacy of Gwyneth Bebb's struggle to gain access to the legal profession in a society complicit in the oppression of women.

Bebb[3] was one of the first cases to challenge the ideal that the legal profession should remain a masculine space[4]. The justices on the case recognised the depths to which this problem extended but were limited in their capacity to deliver a paradigm shifting judgment based on the doctrines of separation of powers, rule of law and parliamentary supremacy underpinning the British constitution. Running alongside this were wider calls to bring a legislative footing to women's rights, which led to a Parliamentary recognition of the need for reform. The enactment of the Sex Disqualification (Removal) Act[5] has been championed as the key transitional piece of legislation to change the course of history for women, being viewed as an opening of a metaphorical floodgate for women's rights. But was it the omnipotent legislative feature that it has been perceived it to be? Considering the socio-political context at the time, it is clear that the Act was not the vessel for change that it was perceived to be. Gwyneth Bebb's case is illustrative in nature, in that it brings to the fore the deeply ingrained misogyny, how and why it started to be challenged, and finally why women's movements at the time were so vital to the continuance of a democratic society.

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[1] *Bebb v The Law Society* [1914] 1 Ch 286
[2] Sex Disqualification (Removal) Act 1919
[3] (n 1)
[4] Anne Logan, *Feminism and criminal justice: a historical perspective*, 1st edn (Palgrave Macmillan, 2008), p82
[5] (n 2)

2. Societal views of women in the late 19th/early 20th century

Women were viewed as objects to be seen and not heard, to provide men with a home and a family throughout the late 19th and early 20th centuries in Britain. Regardless of station, the societal norm for women was to marry and have children[6], making it inherently clear that women were an oppressed entity and were denied access to professional working life on the basis that they were the weaker sex[7], who must provide for their husband in all matters other than monetary income. Women were confined to the domestic sphere, as Pollock and Maitland put it: "as regards private rights women are on the same level as men… but public functions they have none. In the camp, at the council board, on the bench, in the jury box, there is no place for them"[8]. As esteemed academics, Pollock and Maitland raise a paradoxical issue here. It is well known that women had begun to fill some public functions prior to their writing. The Jury of Matrons had existed since the 13th century[9], a body of women who would be called upon when a woman involved in a legal dispute claimed she was pregnant[10], here their stance on women in the "jury box" having no place[11], is entirely misinformed. Their misunderstanding of professional, working women is furthered by their statement regarding the "council board"[12] is also not empirically true. Since 1869 women had been employed as civil servants in the likes of Post Offices, as they did not have to be paid as much as their male counterparts[13] which again draws questions to the statement given, as women's employment had started to gain a footing in society. This submission epitomises perceptions of feminine inferiority.

There is a westernised ideal image of women, that their primary function is to do unpaid domestic work[14]. There has been a historic undervaluing of the domestic role of the woman[15]. In that unpaid work is not recognised as work, rather it is seen as a societal expectation of what women should do[16]. This is illustrated in *Pretty,* whereby the court highlighted their view of women as: 'Some people think that… you must treat men and women on the same footing. But

[6] S. Steinbach, *Women in England 1760-1914: A Social History* (Phoenix 2013)
[7] *Pretty v Pretty* [1911] p 83
[8] Pollock and Maitland, *History of English Law*, 2nd edn, Vol I, p485
[9] First Hundred Years Timeline, < https://first100years.org.uk/the-jury-of-matrons/> accessed 16th March 2021
[10] Ibid.
[11] (n 7)
[12] Ibid.
[13] Women in the Civil Service- History, < https://www.civilservant.org.uk/women-history.html> accessed 16th March 2021
[14] Jonathan Herring, *Family Law*, 9th edn (Pearson, 2019) p17
[15] Linda McKie and Samantha Callan, *Understanding Families*, (London: Sage 2012)
[16] C. McGlynn, *The woman lawyer: making the difference*, (Butterworths 1998)

this Court has not taken, and, I hope, never will take, that view. I trust that, in dealing with these cases, it will ever be remembered that the woman is the weaker vessel: that her habits of thought and feminine weaknesses are different than those of the man.'[17] Here, it is clear that misogyny 'is a binary deeply embedded in Western belief systems'[18], and has been reinforced by law and Parliamentarians. McGlynn[19] exemplifies this, utilising Lord Finlay's 1917 speech: 'I do not believe that the active practice of a profession is compatible with the proper work of a woman which, after all, is that of a wife and a mother attending to her family.'[20] Historically, society has been split into the public and private sphere[21] and displayed a sense of threat when women began to challenge this accepted norm[22]. This will be discussed in further detail throughout the suffrage movement. This distinctive mentality becomes all too clear when we look to Auchmuty's submission that 'Harold Macmillan…went so far as to claim that Oxford before the First World War, was a woman free zone: "Ours was an entirely masculine, almost monastic society. We knew of course that there were women… But for practical purposes they did not exist"'[23] overtly implying that women were invisible to the male population of Oxford, arguably predicated on a presumption that women should not have been there at all, reinforcing the idealised public/private spheres enshrined into 20th century society.

There seems, throughout parliamentary debate, to be an overriding assumption that women were to be protected from society. However, as Fineman recognises, 'vulnerability is universal…vulnerability is constant throughout life'[24], the human condition as it stands, is an inherently vulnerable state of being, there are hundreds of threats to life every day before one creates further disabilities on the basis of sex. Throughout the 20th century, there seemed to be an aspect of forgetting what women go through before their existence was censored even further, to name a few, would be menstruation and pregnancy/childbirth[25], which can be

[17] (n 6)
[18] R. Hunter, *(De-)sexing the woman lawyer*, Gender Sexualities and law, 1st edn (Routledge 2011)
[19] (n 15)
[20] Ibid.
[21] (n 13) at p20
[22] (n 7)
[23] S Leonardi, *Dangerous by Degrees: Women at Oxford and the Somerville College Novelists,* (New Brunswick: Rutgers University Press, 1989) p.35 as discussed by Rosemary Auchmuty, in '*Whatever Happened to Miss Bebb- Bebb v the Law Society and Women's Legal History',* 31 LEGAL Stud 199 (2011)
[24] M.A. Fineman, *Vulnerability, equality and the human condition*, Gender Sexualities and law, 1st edn (Routledge 2011)
[25] Sylvia Anthony, *Women's Place in Industry and the Home,* as quoted in C Dyhouse, *Feminism and the Family in England 1880-1939* (Oxford: Basil Blackwell, 1989) p105

particularly gruesome. So, the notion that women were to be protected from public life and confined to domesticity, is entirely unfounded.

3. *Bebb v The Law Society*

Miss Bebb sought to make an example of the longstanding exclusion of women from the legal profession on the simple basis of their sex, and their perceived inferiority to men. Gwyneth Bebb graduated from Oxford University with a first in jurisprudence. She wrote to the Law Society expressing her wish to take the preliminary entrance exam and enclosed the fee within the letter. The fee was returned to her, with a letter explaining that because she was a woman, the law did not allow the Law Society to admit her for the exam[26]. At the time, Miss Bebb was a spinster, and it was widely accepted that unmarried women, prima facie, had the same legal rights as men[27]. However, her appeal seeking a mandamus, injunction or declaration that she was a "person"[28] for the purposes of the Solicitors Act 1843[29] was dismissed based on the separation of powers and parliamentary supremacy. The court ultimately declared that they would be acting ultra vires were they to give Miss Bebb what she had asked for. Although the case report is strewn with misogyny and discrimination on the basis of sex, they managed to acknowledge that this was Parliamentary matter, as the statute in question had not afforded women any new rights by directly repealing and overriding existing common and statutory laws.

However, it has been argued that these justifications were given as a way to explain a decision which had already been made by judges predisposed to a disliking of women in the profession, before the case had even been heard, with feminist writers suggesting 'We qualify in modern schools and colleges for modern requirements, and are ruled out on an antiquated law of precedent, and the opinion about sex disability expressed by a judge [Coke] who has been in his grave for three centuries!'[30]. Auchmuty suggests that 'it is just possible that, with a different approach to statutory interpretation, recourse to ideas of social progress, perhaps a differently constituted court, the case might have been decided in Miss Bebb's favour'[31], which implies

[26] (n 1)
[27] Ibid. at p287, per Lord Robert Cecil KC
[28] Solicitors Act 1843, s48
[29] Ibid.
[30] Mary Bull, 17 Jan 1914, in *Nettlefold Scrapbook*, (Women's Library, London) vol 1, p13
[31] Rosemary Auchmuty, *Whatever Happened to Miss Bebb- Bebb v the Law Society and Women's Legal History*, 31 LEGAL Stud 199 (2011) p217

that the Court of Appeal forgot about its ability to incrementally develop the common law, and change interpretations of statute which they had previously been bound by to ensure that their function as a body advocating for social progress was being fulfilled. The media at the time appeared to have perceived Miss Bebb's case as one designed to give male reluctance to work with women, some backbone. The Daily Sketch published a photograph of Miss Bebb captioned, 'Are Men Lawyers Afraid of Women's Brains?'.[32] The media frequently wrote stories regarding "Women Solicitors"[33] depicting stories of other jurisdictions where barriers to women in the legal profession such as Holland and France, had been removed.[34]

It is unsurprising to find that the Law Societies representative was Lord Robert Finlay, who had taken no issue with flaunting his misogynistic mindset, as we have previously seen. From his arguments it is obviously, painstakingly clear that the profession, at the time, was almost entirely averse to a radical shift in the sex balancing of it. He sought to use the footing of inveterate usage to suggest that the legal profession has always and should always be closed to women, using the ruling in *Hall*[35], that women have been excluded since the profession came into existence. The critical nature of this case is underpinned by Cozens-Hardy M.R. comment that the appeal 'raises a very important point as to the right of a woman'[36]. Here, it is acknowledged that women are held to an unfair disadvantage in many areas of society, even if they are a "particularly capable person"[37], they will be judged as incapable, even if they can prove otherwise with established documentation.

Women who were unmarried at the time of Miss Bebb's case were held recognised as having a need to work, as many would struggle to find husbands due to the war's casualties[38]. Miss Bebb was 'a spinster'[39], and should have been held within regard of her station based on Blackstone's notion that the married woman becomes property of her husband, and her legal existence is suspended[40]. This is presumably based on the premise, that is a woman is married, she can fulfil her 'proper work of a woman which… is that of a wife and a mother attending to

[32] *Nettlefold Scrapbook*, (Women's Library, London) vol 1 p13
[33] *Women Solicitors*, published in the Manchester Courier and Lancashire General Advertiser on Saturday 28th March 1914
[34] Ibid.
[35] *Hall v Incorporated Society of Law Agents* (1901) 3 F 1059
[36] (n 1) at p292
[37] Ibid. per Phillimore LJ, p289
[38] *Evening Mail* 9th March 1920 in the *Nettlefold Scrapbook* (Women's Library, London) vol 2, p3
[39] (n 1) at p286
[40] W. Blackstone, *Commentaries on the law of England*, (Clarendon Press 1765)

her family'[41], whilst her husband goes to earn money to provide for said family. However, there seemed to be an overwhelming underlying opinion throughout the High Court and the Court of Appeal (CA), that women were unwanted in the eyes of the people already employed by the profession. This seems to bring about a paradox as the law lords in the case acknowledge that unmarried women have worked in public functions for a while before this case came to them, that 'that decision cannot be right, for it would prevent the appointment of women as post office clerks, or factory inspectors'[42], so it seems a point of contention that they would go on to deny Miss Bebb the right to be regarded as a 'person'[43], with the same rights as a man. Here, it is very possible that Auchmuty's analysis 'that the test case had been undertaken more as a publicity exercise than with any expectation of success'[44], because 'reformers continued down the parliamentary route'[45] as the case proceeded through to the CA, is the correct stance to take, as it is clear that at the time, there was a public outcry for reform of laws regarding the rights of women, particularly with the suffrage movement being so volatile at the time. From this, we can see that it is likely that there was a reluctancy to intervene, with Parliament being called upon to incite change, and so, they found other ways regarding inveterate usage and the separation of powers to deny granting Miss Bebb what she sought. However, the message they conveyed was much more damming for women, that personhood had been denied, based on section 48[46], which stated that 'every word importing the Masculine gender only shall extend and be applied to a female as well as male'[47]. This suggested to society that women were regarded as some sort of subspecies of human, undeserving of personhood, which arguably fuelled the fires of the suffrage movement, and the media's perception of what the courts' stance on women was.

4. Was the suffrage movement a catalyst?

The women's suffrage movement is the most prominent campaign in favour of women's rights which began in 1866 with John Stewart Mill suggesting to Parliament that women have the right to vote. There seemed to be a consensus throughout Parliament that allowing women the vote would elicit an 'alternate sexual order' that male politicians found to be a horrifying

[41] (n 15)
[42] (n 1) at p288, per Phillimore LJ
[43] (n 27)
[44] (n 31)
[45] Ibid.
[46] (n 27)
[47] Ibid.

notion.[48] We can see that this is an entirely false claim in today's society, however, when the historical context women have been situated in is considered, it can warrant some merit. Hamilton underpins the motivator of 20th century women as an 'express [ion of] "resentment of the restriction of opportunity which hampered the educated woman who had to earn a living or wanted to enter a career'[49]. No woman of Miss Bebb's generation could have been untouched by this movement[50], in that their drive to become functioning members of society, was being fought for across a democratic battleground.

Women have been categorically misunderstood throughout time, being viewed as an object up for possession. This was changed by the Married Women's Property Act of 1870[51], following long-standing campaigns from women. It allowed women to control all that was theirs, inside of their marriage, without their husband taking over as owner upon said marriage. Without women's suffrage it is arguable that reforms such as this would not have existed. Through this, women began to gain some traction in Parliament through their male supporters. One such as Mr Russell Gurney, suggesting that "It is very lamentable to see to what an extent the earnings of women are often dissipated by bad husbands, and they have no protection".[52] He underpins here in his narrative, that women have been "accidentally" victimised by the legislative democracy of England and Wales, and that change is of paramount importance, so that half of the population is not unrepresented.

However, it would still be a significant block of time before women's suffrage was taken seriously. The incorporation of women's rights into existing statutory law was a tediously long and incremental process, regardless of organisations such as The National Union of Women's Suffrage Societies making the securing of women's access to the legal profession their main objectives[53]. Extremists underpinned the extent that women were willing to go to, to gain the recognition they deserved as people living in the same democracy as the male population of society. Emily Davison's death on 8th June 1913 is a pivotal historical event that brought to the fore, how desperate women were for equality[54]. Further irony is created when looking at

[48] (n 5)
[49] MA Hamilton, *Newnham: An Informal Biography* (London: Faber, 1936) p167
[50] (n 30) at p210
[51] Married Women's Property Act 1870
[52] HC Deb 18 May 1870 vol 201 cc878-92
[53] (n 4)
[54] *Death at the Derby* < https://www.historic-uk.com/HistoryUK/HistoryofEngland/Emily-Davison-Death-at-the-Derby/> accessed 18 March 2021

women's rights being unavailable where there was a 'long and eventful reign… where the ruler has been a woman'[55], which had only recently been taken over by a man. Dilke further goes on to suggest that 'Women will be naturally more and more disposed to avail themselves of an improved condition of things they have done so much to bring about'.[56] Here we see that suffrage was a penultimate catalyst, as once women had their foot in the door through the voices of men who would listen, it was only a matter of time before they pushed them wide open to award themselves with what they have striven for, for so long. This leads us neatly into the bringing of the Sex Disqualification (Removal) Act of 1919.

5. Sex Disqualification (Removal) Act 1919- SD(R)A

The SD(R)A was enacted after highly contentious debate had filled the Houses of Parliament, regarding the rights, and capabilities of women to work in a professional sphere in the same way men did, being championed as a 'sacred' year[57]. Following the First World War, the potential of women had been fully realised, as 'daughters had helped out in family law firms during the war, and then stayed on, too valuable to lose'[58]. Until this Act was brought in, women were absent from the legal sphere, and 'that absence, and the means by which women were eventually accepted into the profession, have themselves shaped the professions history'.[59] However, since the SD(R)A was brought in, it has been seen as the opening of the floodgates for women's access to professionalism. But it is submitted that this was not, and has never been the case, based on Auchmuty's notion that 'it was only the beginning; the formal entry of women ushered in a prolonged reaction of institutional sexism and discrimination'.[60] It would take many incremental steps to allow women full, unrestricted access to the professions offered to men. In discussing whether or not a bill should be brought to allow women the right to vote, and the right to access professions in the same ways as men, Lord Robert Cecil made the pioneering claim that there is no evidence to suggest that women are incapable of political judgment, and that 'when you have persons who have all those qualifications it is for you to show that those people have some special disqualification'[61] sex

[55] Mary Margaret Dilke, *Womens Suffrage* (Cambridge University Press, 1885)
[56] Ibid.
[57] Mari Takayanagi, '*Sacred year or broken reed? The Sex Disqualification (Removal) Act 1919'* (2020) 29:4 Women's History Review 563
[58] E. Skordaki, *Glass slippers and glass ceilings: women in the legal profession,* (1996) 3 International Journal of the Legal Profession 7
[59] (n 31)
[60] Ibid.
[61] HC Deb 28 March 1912 vol 36 c 659

cannot be one of those disqualifications. It was then further debated that what had opened up in recent years for women must be reflected by a statutory instrument, as societal perceptions of women had significantly shifted, following them taking on roles in public offices.

The SD(R)A meant that women were for now, at least on paper, on an equal footing to men[62]. Gwyneth Thompson was 'destined to become the first woman called to the English Bar'[63], however, she would never be called to the Bar, as she unfortunately passed away, but nonetheless, she left behind a legacy. One which would be fulfilled by women, shaping the profession into what it is today. Once the bar on women had been lifted, women began to find their way into the profession, unimpeded, and welcomed into the previously, exclusively male world. The problem was that the SD(R)A did not give women an equal footing or protection inside of the workplace. As history has shown, women have been the subject of sexual harassment and assault whilst at work.[64] The Act was incapable of changing how women were treated by men, the gates were opened in paper format only, as women were still seen as objects there for the pleasure of their male counters.

6. So, what change did Miss Bebb's case elicit?

Mrs Thompson (nee Bebb) was a highly important character in the women's suffrage movement, 'she was part of a struggle for equality that is still ongoing'[65] and although she 'disappeared from history'[66] her namesake has been significant in all feminist movements that followed suit of the initial struggle for women's equality. Following the introduction of the 1919 Act, numerous women started to be admitted into professional arenas, however, there were still some issues to be ironed out.[67] In 1922 Helena Normanton was called to the Bar at Middle Temple and became the first practising female barrister in England.[68] This was a momentous occasion for women's movements, as their toils finally started to come to fruition, with women gaining access to the higher echelons of society. It was, however, long awaited that Mrs Thompson (Bebb) would be the first female barrister, but she never did get this far.

[62] (n 1), s1
[63] (n 31) at p223
[64] *Sexual Harassment,* < https://www.safeline.org.uk/sexual-harassment-in-the-workplace-is-found-to-affect-over-half-of-uk-women/> accessed 18 March 2021
[65] (n 31)
[66] Ibid.
[67] (n 8), accessed 15th March 2021
[68] Ibid.

The change Mrs Thompson's case brought, was a pivotal part of what now allowed women to assimilate to men, and prove their value to the profession, even more than it already had been throughout the war[69]. Gwyneth Bebb and her other colleagues from Oxford began to push through the barriers they had faced, and saw their original goals being fulfilled. They demonstrated beyond doubt that women could do the work[70] and that their victory on entering professional life had been one to note, with the Lord Chancellor publicly announcing he had 'reconciled his opposition'[71] to women's access to the legal profession. Nancy Nettlefold's later statement underpins the legacy which Mrs Thompson left behind after her death, that they had both taken 'Law at Oxford and Cambridge in order to qualify themselves for the profession and prove that women were capable of tackling the law'.[72] These pioneering women undertook their legal studies, in the face of sex discrimination, knowing there was no career opportunity at the end, endeavouring to incite change countrywide, to open the legal sector to women, and bring them to fore of society.

7. Conclusion

To conclude, it is apparent that the societal perceptions of the role of women and constraints placed upon them, were deeply damaging to the ability of 'particularly capable'[73] women. There was an apparent opinion of women and their potential influence, coming from men in higher echelons of society deciding that the public sphere is the man's playing field, and women were to be left to care for children and provide a home. They were entirely averse to change, and only began to take women seriously once it was recognised that their capacity for intellect was not as far from the man's as it was thought.

Gwyneth Bebb's case is one of the most pivotal and influential cases of the 20th century, which highlighted how deep misogynistic mindsets had been allowed to embed themselves into the inner workings of society. Miss Bebb's dismissal from the Court of Appeal conveys the message that until Parliament expressly recognised that women are 'persons', they would be regarded as some sort of subspecies of human, undeserving of the title 'person' because they had never been regarded as so by legislative decree before.

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[69] (n 54)
[70] (n 31) at p221
[71] *Manchester Guardian* 9th March 1920 in the *Nettlefold Scrapbook,* (Women's Library, London) vol 2, p3
[72] *Nettlefold Scrapbook,* (Women's Library, London) vol 2, p36
[73] (n 1)

After Miss Bebb's case, it became apparent that the women's rights movements were much wider than originally perceived. The rise of women's suffrage saw societal norms challenged, and men being forced to accept that the patriarchy was not the omnipotent vessel it had historically been regarded as. *Bebb v Law Society* in conjunction with women's suffrage and other cases regarding women in the legal profession were the catalyst for change that Parliament took as their own win in changing accepted societal constraints on women. However, the enactment of the SD(R)A was not the opening of the flood gates for women that it has historically been perceived to be. It was more of a crack in the door which made things slightly more accessible for qualified women and was the first step onto a long road of change to bring women's rights to the forefront of society, where they rightly deserved to be.

Finally, Miss Bebb's case sheds light on the events which preceded her own situation. Although she was never able to see the extent to which her denial of personhood effected change, due to her tragic death[74], it is clear that her case had a momentous impact on the development of women's rights, which have fed into the freedoms we now know and enjoy. Miss Bebb's case was one of the first to underpin how deeply rooted sex discrimination had embedded itself into the workings of British society.

[74] (n 31) at p227

Section 54 Human Fertilisation and Embryology Act 2008- An international failure?

Libby Schofield

1. Introduction

Although surrogacy is a permitted practice in the UK, it is a heavily regulated one at that. This article will focus on the method of 'partial surrogacy' whereby the surrogate mother's eggs are fertilised with the sperm of the intended father, hence, the surrogate mother shares a genetic link to the resultant child.[1] Under UK law, surrogates cannot receive payment from intended parents for their services beyond reasonable expenses,[2] surrogates cannot advertise their services to potential intended parents,[3] nor can the surrogacy involve brokering or input from commercial agencies seeking to make a profit.[4] Consequently, domestic intended parents (IPs) find themselves in a position where locating a surrogate is difficult; they have limited access to information regarding the process of surrogacy, and they receive no emotional or informational support from commercial agencies with expertise in the field.[5]

It is, therefore, unsurprising that increasing numbers of IPs are opting to travel abroad to undertake surrogacy agreements in order to circumvent the onerous domestic legal requirements. Statistics show, for example, that the number of parental order (PO) applications made for international surrogacy agreements have increased from 0% in 1995 to 26% in 2011.[6] It is important to note here that such statistics inevitably do not show the true extent of international surrogacy agreements. The percentage increase of children born through international surrogacy agreements is likely to be higher than the suggested 26% as, although required to, inevitably not all intended parents will have applied for a PO once they returned to the UK with the child, either through lack of knowledge of the need to apply for one or through a purposeful evasion of the requirement.

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[1] Human fertilisation and embryology authority, 'Surrogacy ' (*Human Fertilisation and Embryology authority*, 12 Oct 2020) <https://www.hfea.gov.uk/treatments/explore-all-treatments/surrogacy/> accessed 17 November 2020

[2] Surrogacy Arrangements Act 1985, s2(1)(a)

[3] Ibid s3(1)(a)

[4] Ibid s2(1)(b)

[5] Vasanti Iadva and others, 'Cross-border and domestic surrogacy in the UK context: an exploration of practical and legal decision-making' [2018] 1(1) Human Fertility 6

[6] Marilyn Crawshaw and others, 'The changing profile of surrogacy in the UK – Implications for national and international policy and practice' [2013] 34(4) Journal of Social Welfare and Family Law 272

Since under UK law the woman who gives birth to the child (the surrogate) is regarded as the legal mother of the child,[7] in order for legal parentage to be transferred to the intended mother, the IPs must apply for a PO to be granted by the court (subject to the conditions of s54 Human Fertilisation and Embryology Act 2008).[8] This article will focus on the following three conditions within s54 HFEA 2008: the prohibition of payment to the surrogate beyond reasonable expenses,[9] the required consent of the surrogate,[10] and the 6-month time limit for the application of the PO.[11] It will subsequently be demonstrated how such restrictions have been rendered obsolete by the surrounding discourse of the need to protect child welfare placed on a statutory footing within s1(2) Adoption and Children Act 2002. As a result, S54 HFEA 2008 has been left substantively meaningless; it does nothing to prevent PO's being granted in cases of international surrogacy agreements, notwithstanding clear violations of the s54 conditions.

2. The prohibition of payment beyond reasonable expenses

Under S54(8), no payment beyond 'expenses reasonably incurred' should be given to the surrogate unless such payments have been retrospectively authorised by the court.[12] The aim of this provision seems to be rooted in preventing the concerns attached to commercial surrogacy from materialising within the UK (for example the exploitation of surrogates and the practice of 'baby buying' identified by the Brazier Report).[13] Logically then, the default position should be that if the court finds that the IPs have paid large monetary sums to the surrogate, beyond that could be considered reasonable, s54(8) should be held to have been violated and the PO should be denied. However, the nature of international surrogacy means this optimal functioning of s54(8) cannot be implemented in reality, since we must consider s54(8) against the backdrop of s1(2) Adoption and Children's Act 2002 (ACA 2002). This has the effect of making child welfare the paramount consideration for judges when deciding whether or not to grant a PO.[14]

[7] Human Fertilisation and Embryology Act 1990, s33(1)
[8] Ibid s33(2)
[9] Human Fertilisation and Embryology Act 2008, s54(8)
[10] Ibid s54(6)(a)
[11] Ibid s54(3)
[12] (n 9)
[13] Margaret Brazier and others, 'Surrogacy: review for the UK Health Ministers of current arrangements for payments and regulation' [1977] 3(6) Human Reproduction Update 625
[14] Adoption and Children's Act 2002, s1(2)

When a child is born through an international commercial agreement and has been brought back to the UK, the courts are faced with a parent-child relationship that is already an established fact;[15] the child has been in the care of the IPs for several weeks and has developed an emotional bond with them. It would be ludicrous to suppose in these circumstances a child's welfare would not be gravely damaged by the courts refusing to grant the PO and subjecting the child to a risk of statelessness (which has previously been an unfortunate consequence of the denial of a PO in the past),[16] or causing the child to be parented by individuals with no legal authority to do so. Domestic courts, therefore, have no other option other than to facilitate the child's return to the UK by retrospectively the excessive payments through retrospective approval to allow for the PO to be made, even in cases where payment has exceeded that which could be considered as covering reasonable expenses.[17] By placing child welfare as the paramount consideration in the minds of judges, s1(2) ACA 2002 has made the balancing act between the two conflicting incommensurable interests (the need to condemn payments beyond reasonable expenses and the need to protect child welfare) superficial. There will always be a heavier weight in the scales and that will be the child's welfare. It is therefore no surprise that the courts have shown an extreme willingness to use their power to retrospectively authorise large payments to surrogates- they simply do not have a choice to do otherwise.[18]

This admittedly fatalistic analysis of s54(8) seems to have judicial support in Justice Hedley's obiter in *Re X (children)* whereby a €25,000 lump sum payment to a surrogate was retrospectively authorised by the court, on the grounds of the need to protect child welfare by granting the PO.[19] Much like the analysis above, Justice Hedley himself seems to recognise the futility of balancing the two irreconcilable conflicting concepts, given that it would be "almost impossible to imagine a set of circumstances whereby the welfare of the child would not be

[15] Claire Fenton-Glynne, 'The regulation and recognition of surrogacy under English law: An overview of the case law' [2015] 27(83) Child and Family Law Quarterly 10
[16] Emma Batha, 'International surrogacy traps babies in stateless limbo' (*Reuters*, 18 Sept 2014) <https://www.reuters.com/article/us-foundation-statelessness-surrogacy-idUKKBN0HD19T20140918> accessed 11 March 2021
[17] Claire Fenton-Glynn and J Scherpe (on behalf of Cambridge Family Law), 'Surrogacy: Is the law governing surrogacy keeping pace with social change?' (2017), 4, accessible at: https://www.law.cam.ac.uk/sites/www.law.cam.ac.uk/files/images/www.family.law.cam.ac.uk/documents/cambridge_family_law_submission.pdf (accessed 31 May 2019)
[18] Claire Fenton-Glynn, 'Outsourcing ethical dilemmas: regulating international surrogacy arrangements' [2016] 24(1) Medical Law Review 4-6
[19] *Re X (Children) (Parental Order: Foreign Surrogacy)* [2008] EWHC 3030 (Fam); [2009] Fam 71

compromised by the refusal to make an order".[20] The use of the phrase 'almost impossible' is significant as it sets in motion a suggestion that no matter how great the sum of money paid to the surrogate is, it will always be retrospectively approved in light of s1(2) CAC 2002, further emphasising just how ineffective s54(8) is in practice. Again, this fatalistic conclusion seems to have been confirmed by Justice Hedley within *Re L* where he suggested a parental order can only be refused in the clearest case of policy abuse.[21] If a lump-sum payment of €25,000 does not classify as a clear case of abuse against a policy that surrogates should not be paid excessive sums of money, then it is hard to see when a payment would ever be high enough to warrant the denial of a parental order. When *Re X (A child)* and *Re L* are taken together, it then becomes abundantly clear that even where excessive payments have been made, s54(8) is unable to bestow upon the courts the power to deny the PO from being granted, given that granting the PO prima facie will always benefit the child's welfare.

A further significant element of Justice Hedley's obiter in *Re X (children)* can be found in his justification of why the retrospective payment should be authorised aside from the need to protect child welfare. Such reasons included that the IPs acted in good faith and the payments were not 'largely disproportionate' to expenses reasonably incurred.[22] Arguably, this could be construed as suggesting that if the sums paid to the surrogate were so disproportionate to expenses reasonably incurred and made in bad faith, perhaps courts would less readily retrospectively authorise them. This would at least hint at s54(8) being semi-enforceable and restore some of its legislative dignity. Yet if we consider the fact that no PO application has even been refused on the grounds of excessive payment contrary to s54(8), regardless of the motives of the IP or the actual amount of money paid,[23] it seems that even if such a test of proportionality exists, it is void of any substantive force.[24]

The uselessness of any potential test of proportionality can be seen in *Re C,* where a payment of €50,000 to a surrogate was found not to be disproportionate despite being twice the amount of the average annual Russian wage, on the basis that a similar payment had been made to a

[20] (n 19) [24] (Hedley J)
[21] *Re L (A Child) (Parental Order: Foreign Surrogacy)* [2010] EWHC 3146 (Fam); [2011] Fam 106 [10] (Hedley J)
[22] (n 19) [22] (Hedley J)
[23] Claire Fenton-Glynne, 'The regulation and recognition of surrogacy under English law: An overview of the case law' [2015] 27(83) Child and Family Law Quarterly 5
[24] (n 10)

surrogate in a neighbouring area.[25] Here, the court is avoiding an investigation into the actual proportionality of the payments themselves, and rather treating the proportionality assessment as a procedural tick box.[26] By avoiding such an investigation, courts are permitted to pass off large sum payments as somehow proportionate, even where a true proportionality assessment of the payment against reasonable expenses would likely indicate the opposite. This further supports the suggestion that s54(8) is unenforceable in relation to international surrogacy agreements, as any sum of money paid to surrogate can seemingly be passed as proportionate in order for the PO to be granted to maximise the child's welfare.

3. The 6-month time limit

Under s54(3) HFEA 2008, a PO must be applied for within 6 months of the child's birth.[27] At first it may be thought that because s54(3) is more mandatory in nature than s54(8) (in part due to the lack of subjective terms such as 'reasonable expense'), that there would be less judicial discretion to grant the PO when the requirement is not complied with. However, in reality much like s54(8), s54(3) to falls victim to the supremacy of child welfare, thereby allowing courts to grant POs even where the 6-month time limit has surpassed. For example, in *Re X (Time Limit)*, the fact that the resultant child was now 3 years old did not deter the court from granting a PO to the IPs, since the welfare of the child demanded that the PO be granted. [28]

Given the court's willingness to essentially ignores the mandatory nature of s54(3) HFEA, it raises the question of whether other mandatory provisions within s54 (such as the s54(4)(B) requirement that at least one IP be domiciled in the UK) will also be disregarded when child welfare demands that the order be made?[29] Surprisingly, the answer is probably no given that this requirement is the only provision of s54 that courts have consistently upheld.[30] It is perhaps unusual then that some mandatory requirements of s54 are seemingly immune to the effects of child welfare, while others such as s54(3) are not. However, this inconsistency can be explained in that there is no substantive purpose behind the 6-month time limit, whereas s54(4)(B) has a specific policy aim of restricting reproductive tourism.[31] A possible hypothesis could therefore

[25] *Re C (A Child) (A Parental Order)* [2013] EWHC 2413 (Fam); [2013] 5 WLUK 369
[26] (n 23)
[27] Human Fertilisation and Embryology Act 2008, s54(3)
[28] *Re X (A Child) (Parental Order: Time Limit)* [2014] EWHC 3135 (Fam); [2015] Fam 186
[29] Human Fertilisation and Embryology Act 2008, s54(4)(b)
[30] See e.g., *Re G (Surrogacy: Foreign Domicile)* [2007] EWHC 2814 (Fam); [2007] 11 WLUK 719
[31] (n 15) at p12

be whether the other mandatory provisions in s54 will be upheld in light of child welfare will depend on the strength of the public interest behind them. For example, the requirement that IPs be over the age of 18 presumably promotes a strong public interest in safeguarding children from creating a child through surrogacy that they are unequipped to deal with. It is likely that the court, therefore, would not grant a PO to the underage IPs and find alternative arrangements for the child, for example by taking the child into care. Since such a case has not come to the court's attention, this remains an untested hypothesis.

When considering why it is so important for the courts to grant a PO in order to maximise child welfare, the obiter of Justice Munby in *Re X (A child)* is telling. He suggested that the granting of a PO goes to the 'identity of a child',[32] thereby denying one could presumptively harm a child's welfare through the possibility of a potential identity crisis. If we accept this assertion that POs do in fact 'to the identity of a child', then it arguably follows that denying a PO on grounds of any of the s54 HFEA grounds could not only have troubling psychological effect on the child, but it could also be a violation of the child's Art 8 ECHR rights. Given that the concept of the right to private life has been taken to include the right of a person to develop their identity,[33] restricting a person's opportunity to do so by denying to grant a PO potentially puts the law on the wrong side of the ECHR.[34] Not only is s54(3) unenforceable in light in s1(2) ACA 2002 then, but also potentially in light of Art 8 ECHR.

4. The surrogate's consent

Under s54(6), before a PO is granted, the court must be satisfied that the surrogate has given her consent to the PO being made, after 6 weeks of birth.[35] This presents a practical difficulty in that that the nature of international surrogacy agreements means obtaining such consent is problematic. Using India as a demonstration, due to the size of the surrogacy market (estimated

[32] (n 28) [58] (Munby J)
[33] Equality and Human and Rights Commission, 'Article 8: Respect for your private and family life' (*Equality and Human and Rights Commission*, 15 Nov 2018) <https://www.equalityhumanrights.com/en/human-rights-act/article-8-respect-your-private-and-family-life> accessed 18 March 2021
[34] Claire Fenton-Glynn and J Scherpe (on behalf of Cambridge Family Law), *Surrogacy: Is the law governing surrogacy keeping pace with social change?* (2017), 6, accessible at: https://www.law.cam.ac.uk/sites/www.law.cam.ac.uk/files/images/www.family.law.cam.ac.uk/documents/cambridge_family_law_submission.pdf (last visited 31 May 2019).
[35] Human Fertilisation and Embryology Act 2008, ss54(6),(7)

to be around 400 million dollars annually generated from 3,000 clinics),[36] quick turnover rates and lack of legal regulation of surrogates meant clinics did retain surrogate's information for extended periods after birth.[37] Hence once IPs proceeded with a PO application back in the UK, it was unlikely that the surrogate's information was still available to contact her for consent. Even if the surrogate's information was still within the system, the information itself is often non-identifying, such as her last known address, again raising difficulty in locating her to acquire her consent.[38] Pair this with the historical precedent that international clinics have established of being unwilling to support a search for the surrogate's consent,[39] and the difficulty in practically satisfying s54(6) becomes clear.

Much like s54(8) and 54(3), s54(6) becomes obsolete when pitted against the need to protect child welfare. When s54(6) is read in conjunction with s54(7), it becomes essentially impossible that PO will ever be denied on the grounds of the lack of surrogate consent, given that s54(7) allows a PO application to proceed notwithstanding the lack of consent if the surrogate mother cannot be located.[40] Since the inherent nature of international surrogacy makes it likely that the surrogate will not be able to be located, the courts will commonly be in a position where child welfare demands the PO be granted under the s54(7) exception. For this reason, it is hard to see the substantive value of the s54(6) consent requirement given that it is so easily avoided by the utilisation of s54(7). For example, it could be used as an illegitimate route for IPs to circumvent the consent requirement of s54(6) by fraudulently claiming they were unable to contact the surrogate, when in reality no attempt had been made to locate her at all.

Justice Baker in *Re (D and L)* has attempted to reduce the likelihood of this adverse outcome materialising by affirming only when 'reasonable attempts' have been taken to locate the surrogate will the court dispense with the requirement of s54(6).[41] Whilst it is refreshing to see some form of judicial protection toward the conditions of s54, Justice Baker's attempt of

[36] Nita Bhalla, 'Foreigners Are Flocking To India To Rent Wombs And Grow Surrogate Babies' (*Business Insider*, Aug 7) <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC4544809/#b4-rmhp-8-111> accessed 28 September 2020
[37] Alison Bailey, 'Reconceiving Surrogacy: Toward a Reproductive Justice Account of Indian Surrogacy' [2011] 1(1) Faculty Publications - Philosophy <https://core.ac.uk/download/pdf/213860362.pdf> accessed 9 March 2021
[38] *Re D and L (Children) (Surrogacy: Parental Order)* [2012] EWHC 2631 (Fam); [2013] 1 WLR 3135
[39] ibid
[40] Human Fertilisation and Embryology Act 2008, s54(7)
[41] (n 38) [28] (Baker J)

placing a restrictive gloss on s54(7) is inadequately vague. No explanation is given as to what sort of attempts by the IPs would satisfy this reasonableness requirement, and whether this is to be judged against a subjective or objective standard. The attempted restriction is therefore largely unhelpful in practice. It is also not hard to imagine a situation where the court is willing to accept that the requirement of s54(6) can be dispensed with even though the parents have not made 'reasonable' attempt to locate the surrogate, but where child welfare demands that the PO be made given the effect of s1(2) ACA 2002. Since the current case law only raises issues of the consent requirement where at least some attempt has been made to locate the surrogate, the outcome of this hypothetical scenario is indeterminate.[42]

Assuming the surrogate can be located to give her consent, s54(6) raises a further issue in that it assumes a surrogate can give valid consent to the surrogacy itself and subsequent POs. The concept of informed consent is made up of two requirements that must both be fulfilled if s54(6) is to be satisfied: the first being that the surrogate must have sufficient information and the second being that the consent must be given voluntarily.[43] Starting with the requirement of sufficient information, it is questionable whether international surrogates fully understand what they are agreeing to, both when consenting to the surrogacy agreement and the PO.[44] Using 2011 data from India (when commercial surrogacy was permitted), female literacy rates were estimated at 59%. When this is considered in conjunction with the fact that female surrogates in India likely do not have a formal education and therefore likely do not fall within this 59%, one could surmise that there is a substantial chance that the Indian surrogates will not have been able to understand any written surrogacy agreement or PO given to them to sign.[45] Moreover, since the PO is likely to be written in English, the percentage chance of a surrogate understanding such documents reduces even further to around 3% (the number of women in Idea who can comprehend English).[46] To regard the surrogate's consent as valid notwithstanding this lack of comprehension would be to undermine the foundations of

[42] See (n 38) and *AB v CT (Parental Order: Consent of Surrogate Mother)* [2015] 0 EWHC 12 (Fam D*), C, D v E, F, A, B (by their Guardian)* [2016] EWHC 2643 (Fam D) and *Re G (Surrogacy: Foreign Domicile)* [2007] EWHC 2814 (Fam D)

[43] Stephen Wilkinson, 'Exploitation in International Paid Surrogacy Arrangements' [2016] 33(2) Journal of Applied Philosophy 132

[44] Amrita Pande, 'Commercial Surrogacy in India: Manufacturing a Perfect Mother-Worker' [2012] 34(4) Signs 976

[45] H Pelcher, 'Literacy rate in India 2011, 2015 and 2018 ' (*Statista*, 22 Jul 2020) <https://www.statista.com/statistics/271335/literacy-rate-in-india/> accessed 1 Oct 2020

[46] Sonalde Desai, Human Development in India: Challenges for a Society in Transition (OUP 2010) 85

contractual law that an agreement cannot be valid where there is no consent.[47] To uphold the integrity of the English legal system then, if a surrogate cannot understand the PO (which is a likely scenario), it must be said she can never consent to the PO application. Section 54(6) is therefore fundamentally misguided in making a generalised assumption that every surrogate is capable of giving consent to a PO application.

Moving onto the voluntariness requirement, the problem here is one linked to the problem of large sum payments made to the surrogate that have the potential to overbear her will.[48] Indian women, for example, face exclusion and discrimination in the job market;[49] they are the victims of a 72% wage gap and earn on average earning an equivalent of 1.53 USD per day.[50] When this is compared to the lucrative payment opportunities provided by surrogacy, it is undeniable that the economic allure is a major factor pushing women into surrogacy.[51] This inability of the surrogate to resist entering into surrogacy due to her lack of other economic options undermines the validity of her consent, both to the surrogacy itself and the PO.[52] Such a concern that many surrogates do not give valid consent is heightened further when looking at interviews with Indian surrogates.[53] For example, Salma (an Indian surrogate) explained "Who would choose to do this? To have a lifetime's worth of injections pumped into me… but I know I have to do this for my children's future".[54] The phrase 'who would choose this?' is particularly important as it provides weight to the argument that surrogates are not actually freely consenting to the surrogacy or the PO's, but rather are forced to in order escape extreme poverty.[55]

Critics such as Richards would argue this construction of consent is flawed through its wrongful equivocation between cases where surrogates do not consent to the surrogacy or the

[47] See for example *Felthouse v Bindley* [1862] 142 ER 1037 (CCP)
[48] Surrogacy UK (Why shouldn't we pay surrogates? Jan 229) <https://surrogacyuk.org/2020/01/29/why-shouldnt-we-pay-uk-surrogates/> accessed 5 October 2020
[49] Sreeja Jaiswal, 'Commercial Surrogacy in India: An Ethical Assessment of Existing Legal Scenario from the Perspective of Women's Autonomy and Reproductive Rights' [2012] 16(1) Gender, Technology and Development 11
[50] India Wage Report: Wage policies for decent work and inclusive growth (1 edn, International Labour Office 2018) 23
[51] (n 49)
[52] Margaret Brazier et al, 'Surrogacy: review for the UK Health Ministers of current arrangements for payments and regulation' [1997] 3(6) Human reproduction update 46 para 5.16
[53] Amrite Pande, 'Not an "angel," not a "whore": surrogates as 'Dirty' workers in India' [2009] 16(2) Indian Journal of Gender Studies 141-173
[54] Ibid 160
[55] Also see Jason Burke, 'India's surrogate mothers face new rules to restrict 'pot of gold'' *The Guardian* (Anand 20 Jul 2010) < https://www.theguardian.com/world/2010/jul/30/india-surrogate-mothers-law> accessed 5 Oct 2020

PO at all (for example where women are trafficked into the industry) and cases where *all things considered* a woman prefers to be a surrogate and receiving the financial benefits, rather than not and continuing to live in poverty.[56] Here, the argument rests on the premise that the surrogate is able to give valid consent to both the surrogacy and the PO, as she is doing what she wants most, *all things considered,* thereby exercising her autonomous choice.[57] It is undeniable that Richard's argument does carry weight, especially when analogised with a non-surrogacy context. For example, at first, a person might not like the idea of cleaning someone's toilet, but their poverty means that *all things considered* they would rather do the job and have the money than not. It would seem unjustified to say that they have not consented to the job at all. Richard's consent analysis also seems to have gained judicial support in the Californian SC, where it was agreed that surrogates are no more likely to be forced into accepting surrogacy agreements and POs by their economic necessity than they would be induced to accepting a more traditional form of undesirable employment.[58]

One thing that both Richards and the SC both seem to have ignored, however, is the concept of omissive coercion.[59] We can distinguish between situations where a person's lack of options is due to personal choice, and situations where their lack of options results from the coercion of another. The latter case is what constitutes omissive coercion and only in this context can an individual's lack of economic options vitiate consent.[60] When the concept of omissive coercion is applied to the context of surrogacy, it is plausible that a surrogate's background poverty which restricts her economic options is not morally neutral, and instead is a form of coercion that can vitiate her consent. Here the omissive coercion takes the form that if a woman does think about resisting surrogacy and accepts a lower-paying job, she will be faced with destitution.[61] This threat of destitution is the intangible coercion, and the state is the party creating this coercion through its failure to deliver upon its welfare obligations to women e.g failing to implement policies to help them attain better jobs or access to education.[62] If we accept that Indian women's background poverty is at least partially the result of coercive acts of the state, it follows that the surrogate's consent to the surrogacy agreement and subsequent

[56] Janet Radcliffe-Richards 'Consent with Inducements: The case of body parts and services' in Franklin Miller & Alan Wertheimer (eds), *The Ethics of Consent: Theory and Practice* (OUP 2009) 290
[57] ibid
[58] *Johnson v Calvert* (1993) 5 Cal 4th 84
[59] (n 37) p135-136
[60] Ibid
[61] Ibid
[62] Françoise Baylis, 'Transnational commercial contract pregnancy in India' in François Baylis & Carolyn McLeod, Family Making: Contemporary Ethical Challenges (OUP 2014) 265

POs are defective.[63] Although this is a plausible argument, it is subjective, as whether the reader views surrogates as victims of omissive coercion will depend on their more general views about what duties the state owes to the poor.

S54(6) is inundated with issues. Not only is it practically difficult to satisfy, but it can be essentially ignored when the child welfare demands the PO be made and the provision itself is based on a false presumption that a surrogate mother can give valid consent to a PO in the first place.

5. Conclusion

In light of s1(2) Adoption and Children Act 2002, which has had the effect of making child welfare the paramount consideration when deciding whether or not to grant a PO, courts are consistently forced to act in violation of the restrictions provided for in s54 HFEA. The alleged prohibition of payments beyond reasonable expenses, the requirement of the surrogate's consent, and the 6-month time limit are a story of fiction rather than substantive restraints. It seems that no violation of s54 will ever warrant the denial of a PO (not including the requirement that one IP be domiciled in the UK), and therefore until the surrogacy law within the HFEA 2008 is reformed, it seems unlikely this situation will change. If we look to the purpose behind the restrictions within s54 HFEA 2008, which were to minimise the risk of the commodification of children and the exploitation of surrogates, by consistently ignoring the restrictions within S54 light of child welfare, we risk endorsing such activities. Although this is no fault of the courts since they are faced with an impossible balancing task, the legal situation we are in is clearly unsatisfactory. It is therefore safe to conclude that s54 HFEA is an international failure indeed.

[63] (n 37)

Machine Judgement and the Law of Armed Conflict: Can Autonomous Weapons Systems Comply with the Principle of Distinction?

Emily Whitaker

1. Introduction

Autonomous weapons systems (AWS) are given a broad working definition which encompasses both existing and potential future technologies: "a weapon system that, once activated, can select and engage targets without further intervention by a human operator."[1] Built upon the 'sense-think-act' paradigm, sensors provide a level of situational awareness, artificial intelligence (AI) 'decides' how to respond to given stimuli, and effectors carry out these actions.[2] Autonomy is placed on a continuum, ranging from humans being 'in-the-loop' requiring human decision-making before firing; 'on-the-loop' with AWS making the firing decision but retaining human ability to override that decision in their supervisory role; and 'out-of-the-loop' meaning the technology is fully autonomous.[3] Given full autonomy is yet to be achieved, this paper considers AWS to be "any weapon system with autonomy in its critical functions,"[4] in this case targeting decisions including aiming, firing and using lethal force.

This article argues that AWS cannot comply with the principle of distinction within the law of armed conflict, known as International Humanitarian Law (IHL), without limits on their autonomy. Part one provides context for the debate and outlines the concept of distinction with specific focus on the 'judgement' requirement of discriminate attacks. Part two critically analyses the merits of three common arguments opposing AWS's compatibility with distinction, namely their (i) lack of situational awareness, (ii) inability to be subjective, and (iii) unpredictability/unreliability. Part three considers the limits on autonomy required to ensure compliance with the principal of distinction, such as mechanisms to keep humans 'on-the-loop' and design controls in hardware and software. However, to implement this, further international guidance is required. Despite AWS posing military advantages regarding their

[1] United States Department of Defence, 'Autonomy in Weapons Systems' (2012) Directive 3000.09, Glossary Part II, 13 < https://bit.ly/2UCP4fc > accessed 20 March 2021.
[2] Lucy Suchman, and Jutta Weber. 'Human-Machine Autonomies', in N. Bhuta, S. Beck, R. Geis, H-Y Liu, and C. Kreis (eds), *Autonomous Weapons Systems* (Cambridge University Press 2016) 9-10.
[3] Michael Press, 'Of Robots and Rules: Autonomous Weapon Systems in the Law of Armed Conflict' (2017) 48 Georgetown Journal of International Law 1337, 1342.
[4] Neil Davison, 'A Legal Perspective: Autonomous Weapon Systems Under International Humanitarian Law' in UNODA, *Perspectives on Lethal Autonomous Weapon Systems* (Occasional Papers, No.30, November 2017), 5.

objectivity and predictability in targeting decisions, their lack of situational awareness means limits on autonomy must be retained to ensure IHL compliance.

2. Autonomous Weapons and the Law

2.1 The 'Killer Robot' Debate

Within their broad context, AWS pose vast benefits within two categories, namely military advantages and moral justifications,[5] including speed, accuracy and fearlessness which affords efficiency, diminished collateral damage, and reduced necessity for human combatants.[6] These emerging technologies take the form of unmanned aircrafts, tanks, or missiles, to name just a few. However, AWS possess specific features which create challenges in complying with the existing law of armed conflict.[7] Hence, the increased use of highly automated and partly autonomous weapons in recent years has sparked concern. Between 2000-2008, the number of unmanned U.S. aircrafts rose from less than 50 to over 6,000, while the number of unmanned ground vehicles rose from less than 100 to almost 4,400 between 2001-2007.[8] As of 2020, 40 countries possess or are currently procuring armed drones.[9] Following this trajectory, experts predict fully autonomous weapons could be developed within the next 20-30 years,[10] and military spending on AI and AWS is set to reach $16-18 billion by 2025.[11] As a result, there are fears that now this "Pandora's box is opened, it will be hard to close."[12]

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[5] Amitai Etzioni and Oren Etzioni, 'Pros and Cons of Autonomous Weapons Systems' (Military Review , May-June 2017) < https://www.armyupress.army.mil/Portals/7/military-review/Archives/English/pros-and-cons-of-autonomous-weapons-systems.pdf > accessed 19 March 2021.

[6] ibid.

[7] Kenneth Anderson, Daniel Reisner and Matthew Waxman, 'Adapting the Law of Armed Conflict to Autonomous Weapon Systems' (2014) 90 International Law Studies 386, 387.

[8] Interim Report of the Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions, UN Doc. A/65/321 (23 August 2010), 12; Agnieszka Szpak, 'Legality of Use and Challenges of New Technologies in Warfare – the Use of Autonomous Weapons in Contemporary or Future Wars' (2020) 28 European Review 118, 119.

[9] Report of the Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions, 'Use of Armed Drones for Targeted Killings' UN Doc A/HRC/44/38 (15 August 2020) 4.

[10] Human Rights Watch, 'Losing Humanity: The Case against Killer Robots' (19 November 2012)< https://www.hrw.org/report/2012/11/19/losing-humanity/case-against-killer-robots > accessed 15 March 2021.

[11] Justin Haner and Denise Garcia, 'The Artificial Intelligence Arms Race: Trends and World Leaders in Autonomous Weapons Development' (2019) 10(3) Global Policy 331, 331.

[12] 'An Open Letter to the United Nations Convention on Certain Conventional Weapons' (*Future of Life Institute*, 21 August 2017) < https://futureoflife.org/autonomous-weapons-open-letter-2017 > accessed 17 March 2021.

Consequently, over 100 leading robotics experts have urged the United Nations to prevent the development of 'killer robots' in an open letter with signatories including Elon Musk.[13] The anti-autonomous weapons movement puts forward various justifications in favour of banning the systems, most notably incompatibility with legal principles. Human Rights Watch (HRW), an international non-governmental organisation, actively campaigns against 'killer robots' and argues their deployment will increase risk of death and injury to civilians due to concerns regarding the principle of distinction; they thus advocate a pre-emptive prohibition.[14] Within the context of inevitable harm in armed conflict, this paper adopts a utilitarian analysis of the ability of AWS as opposed to humans to reduce the risk of death and injury to civilians, by complying with IHL. Utility of an action is achieved "when the tendency it has to augment the happiness of the community is greater than any it has to diminish it."[15] Through this lens, it is argued that campaigns to prematurely ban AWS are misguided given the technology's *potential* superiority to humans in targeting precision.[16] However, full realisation of these military advantages is yet to be seen due to technological limits on the judgement capabilities of AWS to identify lawful targets, which poses a challenge regarding the principle of distinction.

2.2 What is the principle of distinction?

IHL embodies a set of rules restricting the effects of armed conflict by protecting those not participating in hostilities.[17] The distinction requirement in targeting law is the "bedrock principle" of IHL.[18] As codified in Article 48 of Additional Protocol I to the Geneva Convention (AP I),[19] parties to armed conflict "shall at all times distinguish between the civilian population and combatants,"[20] given Article 51 prohibits all indiscriminate attacks.[21] Lawful targets are combatants or civilians directly taking part in hostilities,[22] and objects that

[13] ibid.
[14] Human Rights Watch (n 10), 1.
[15] Jeremy Bentham, *The Principles of Morals and Legislation* (Prometheus Books 1988) 3.
[16] Drew Charters, 'Killing on Instinct: A Defence of Autonomous Weapon Systems for Offensive Combat' (2020) 4(1) Viterbi Conversations in Ethics < https://vce.usc.edu/volume-4-issue-1/killing-on-instinct-a-defense-of-autonomous-weapon-systems-for-offensive-combat/ > accessed 18 March 2021.
[17] International Committee of the Red Cross, 'What is International Humanitarian Law?' (*ICRC*, July 2004) <https://www.icrc.org/eng/assets/files/other/what_is_ihl.pdf > accessed 18 March 2021.
[18] Elvira Rosert and Frank Sauer, 'Prohibiting Autonomous Weapons: Put Dignity First' (2019) 10(3) Global Policy 370, 371.
[19] Protocol Additional to the Geneva Conventions of 12 August 1949 and relating to the Protection of Victims of International Armed Conflicts (adopted 08 June 1977, entered into force 7 December 1978) 1125 UNTS 3, Article 48.
[20] ibid.
[21] Additional Protocol I (n 19) Article 51(4).
[22] Additional Protocol I (n 19) Article 51(3).

constitute military objectives.[23] To be lawfully deployed, AWS must meet this standard of distinction.

Outlined by Winter, distinction comprises three elements: 1) observation, 2) recognition and 3) judgement.[24] Observation capacities of AI are significantly advanced, demonstrated by systems such as PatScan, a multi-sensor threat detection platform used in security worldwide, which is superior to humans in observation due to having higher resolution, speed and full recording capabilities.[25] After observing, AWS must recognise what they sense. The ability of AI to recognise military uniforms and facial recognition technology to identify specified targets facilitates distinctions to be made between combatants and civilians. The display of uniforms and weapons is the "normal and expected standard" in international armed conflict,[26] hence it may be sufficient to programme AWS to recognise enemy uniform designs, symbols and weapons.[27] Additionally, facial recognition technology has reached parity with humans.[28] This is seen in China's surveillance state which uses a database to aggregate vast amounts of data from facial recognition cameras, with the controversial ability not only to recognise specific people but to identify whether a face belongs to a certain ethnic minority without ever having seen that individual before.[29] The system's morality is beyond the scope of this paper, but its mere existence indicates the possibility for AWS to categorise faces based on physical traits alone.[30] However, the complexity of distinction arises when uniform is unavailable as an identifying feature and the identity of intended targets is unknown, requiring judgements to be made. Where AWS's observation and recognition abilities may surpass those of humans, their capability to exercise judgement remains limited.

2.3 The 'Judgement' Challenge

[23] Additional Protocol I (n 19) Article 52.
[24] Elliot Winter, 'The Compatibility of Autonomous Weapons with the Principle of Distinction in the Law of Armed Conflict' (2020) 69 International and Comparative Law Quarterly 845, 846.
[25] ibid, 859.
[26] W. Hays Parks, 'Special Forces' Wear of Non-Standard Uniforms' (2003) 4(2) Chicago Journal of International Law 493, 542.
[27] Winter (n 24), 860.
[28] ibid, 867.
[29] ibid, 863-864.
[30] John Honovich, 'Hikvision's Minority Analytics' (*IPVM*, 8 May 2018) < https://ipvm.com/reports/hikvision-minority > accessed 20 March 2021.

Judgement is required to distinguish not only between combatants and civilians, but also assess 'direct participation in hostilities' whereby civilians involving themselves in conflict become lawful targets.[31] Judgement is vital since the status of individuals depend not only on appearance, but also context.[32] As a consequence of increased urban warfare,[33] proximity of combatants and civilians in military operations has become closer due to civilians actively providing food, shelter, equipment and intelligence, rendering direct participation more likely.[34] Hence, contextual factors bear significance on status particularly given combatants in contemporary warfare often do not wear uniforms.[35] Furthermore, combatants are not always lawful targets, such as *hors de combat* whom have surrendered, are defenceless due to unconsciousness, wounds or sickness, or are in the power of an adverse party.[36] Evidence of increasing instances of combatants losing their combatant status is accompanied by a corresponding rise in "illegitimate, non-innocent, suspicious" civilians.[37] Hence, the blurring of lines delimiting combatants from civilians, lawful targets from unlawful targets, is an ever-growing challenge of modern warfare which AWS must overcome.[38]

To address these targeting concerns, in the case of *Strugar*,[39] the International Criminal Tribunal for the Former Yugoslavia (ICTY) listed extensive examples of direct and indirect participation in hostilities. However, the list is more problematic than helpful in the context of AWS, given it raises questions as to how the rule of distinction can be decrypted and applied in practice.[40] For instance, *direct* participation includes transmitting military information for "immediate use" whereas the ICTY classify participation as *indirect* if the use is not immediate.[41] Thus, the need to understand the purpose for which information is shared means 'observation' and 'recognition' alone cannot ensure compliance with the principle of

[31] Additional Protocol I (n 19) Article 51(3).
[32] Winter (n 24).
[33] ibid, 869.
[34] N. Melzer, 'The Principle of Distinction between Civilians and Combatants' in A. Clapham and P. Gaeta (eds), *The Oxford Handbook of International Law in Armed Conflict* (Oxford University Press 2014), 298.
[35] Winter (n 24), 869; Lucy A. Suchman, 'Situational Awareness and the Adherence to the Principle of Distinction as a Necessary Condition for Lawful Autonomy' in *CCW Informal Meeting of Experts on Lethal Autonomous Weapons, Geneva, Panel 'Towards a Working Definition of LAWS' (12 April 2016)*, 275.
[36] Additional Protocol I (n 19) Article 41(2).
[37] Christiane Wilke, 'Law's Enemies: Enemy Concepts in U.S. Supreme Court Decisions,' (2007) 40 Studies in Law, Politics and Society 41, 48.; Christiane Wilke, 'Civilians, Combatants and Histories of International Law' (*Critical Legal Thinking*, 28 July 2014) < https://criticallegalthinking.com/2014/07/28/civilians-combatants-histories-international-law/ > accessed 19 March 2021.
[38] Agnieszka Szpak, 'Legality of Use and Challenges of New Technologies in Warfare – the Use of Autonomous Weapons in Contemporary or Future Wars' (2020) 28 European Review 118, 122.
[39] *Prosecutor v Pavle Strugar* (Appeal Judgment), ICTY-01-42 (17 July 2008).
[40] Winter (n 24), 869-870.
[41] ibid. 869; *Strugar* (n 39).

distinction, but rather sophisticated judgement is required.[42] With 'civilian-ness' being so heavily context-dependent, Rosert and Sauer doubt its translatability into software,[43] since algorithm input would arguably require an objective definition of 'civilians'.[44] Therefore, the Campaign to Stop Killer Robots' claim that AWS would lack human judgement and the ability to understand context gains greater weight.[45] The most commonly cited arguments supporting this are: (i) AWS lack situational awareness, (ii) cannot act subjectively, and (iii) are unpredictable and hence unreliable. The merits of these arguments are analysed in the next section.

3. Can AWS exercise judgement to distinguish lawful targets?

3.1 Situational awareness

Given the distinction between lawful and unlawful targets being context-dependent, distinction presupposes capacity for situational awareness.[46] However, machine ability to exercise this level of judgement remains significantly more limited than our own.[47] Restrictions on intelligence are posed since machine coding requires unambiguous specification of conditions under which AWS should act, placing limits on their ability to assess context, whereas human combatants are able to be goal-directed in unknown, unforeseen situations.[48] Systems of machine judgement to date have required the achievement of a single objective but have not yet been capable of achieving multiple, often contradictory, objectives simultaneously.[49] Consequently, it is feasible for AWS to be situationally aware in fixed, pre-determined environments but less so in dynamic, open-ended fields of interaction inherent in armed conflict.[50] This denotes the difference between defensive AWS currently deployed such as the

[42] Winter (n 24), 870.
[43] Rosert and Sauer (n 18), 370.
[44] Lucy A. Suchman, 'Situational Awareness and the Adherence to the Principle of Distinction as a Necessary Condition for Lawful Autonomy' in *CCW Informal Meeting of Experts on Lethal Autonomous Weapons, Geneva, Panel 'Towards a Working Definition of LAWS'* (12 April 2016), 276.
[45] Campaign to Stop Killer Robots, 'Report on Activities – Convention on Conventional Weapons Annual Meeting of High Contracting Parties, United Nations, Geneva' (November 2015), 14 <https://www.stopkillerrobots.org/wp-content/uploads/2013/03/KRC_ReportCCWannual16Dec2015_uploaded-1.pdf > accessed 20 March 2021.; Press (n 3), 1344.
[46] Suchman (n 44), 273 and 278.
[47] Winter (n 24)
[48] Suchman (n 44), 273-274.
[49] Winter (n 24), 875.
[50] Suchman (n 44), 278.

Phalanx which statically detects and targets incoming missiles,[51] versus offensive weapons which actively seek targets hence would be deployed in various changeable contexts.

The standard required of machine's cognitive abilities is contentious. Szpak and Human Rights Watch argue that the ability to make context-dependent distinctions between lawful and unlawful targets is based on understanding *intent* behind targets' actions.[52] However, this misconstrues IHL by applying unrealistic criterion,[53] since even a human soldier engaging in hostilities will never know, nor is required to know, the intent of another human being.[54] Therefore, disputing the ability of AWS to be situationally aware due to their inability to meet standards greater than those applied to humans lacks weight. To apply practically unattainable requirements to AWS will stifle innovation, potentially preventing the technology from the seeing light of day. This is an undesirable outcome from a utilitarian perspective, since AWS' military benefits will not be realised, or will be less timely.

Rather, situational awareness should be judged to the human-level. Machines with cognitive abilities equal to humans are beginning to pass from the realms of science fiction into reality with the advent of 'artificial general intelligence' (AGI).[55] This advancement is well underway, supported by Muller and Bostrom's survey of AI experts who predicted this high-level machine intelligence to exist by 2075 with 90 percent certainty.[56] However, until then, the ability of AWS to exercise judgement remains restricted to operations in a limited field. Currently, the potential risks to the life and welfare of civilians due to AWS being situationally unaware outweighs their overall benefits. Therefore, it will be necessary for humans to oversee AWS to account for contextual shifts when making judgements to ensure utility can be achieved.

3.2 Subjectivity

[51] Raytheon Missiles & Defense, 'Phalanx Weapon System' (*Raytheon Missiles & Defense*) < https://www.raytheonmissilesanddefense.com/capabilities/products/phalanx-close-in-weapon-system > accessed 20 March 2021.
[52] Szpak (n 38), 122.; Human Rights Watch (n 10), 4.
[53] Marco Sassoli, 'Autonomous Weapons and International Humanitarian Law: Advantages, Open Technical Questions and Legal Issues to be Clarified' (2014) 90 International Law Studies 308, 328.
[54] ibid, 333.
[55] Winter (n 24), 870.
[56] Vincent C Muller and Nick Bostrom, 'Future Progress in Artificial Intelligence: A Survey of Expert Opinion' in VC Muller *Fundamental Issues of Artificial Intelligence* (Springer 2016) 14.

Human Rights Watch argues AWS would violate IHL because "even if the development of fully autonomous weapons with humanlike cognition became feasible, they would lack certain human qualities, such as emotion, compassion, and the ability to understand humans", hence distinguishing between targets requires subjectivity.[57] As previously discussed, AWS are unlikely to possess these human qualities for the foreseeable future, until AGI becomes reality.[58] Subjectivity is beneficial, as Docherty recognises, given the restraint human compassion has as a vital check on killing,[59] since emotional influence over soldiers may contribute to saving lives. However, this view critically fails to consider the opposite eventuality whereby emotions can prevent a soldier from making lawful targeting decisions. Significantly, "all human beings, despite intent, are biologically limited by psychology"[60] which legitimises the advantage of AWS; translating distinction into a computer program will improve objectivity.[61] Subjective determination of targets is a reflection of an unfortunate reality because this is lawfully meant to be as objective as possible.[62] Soldiers are expected to be "receptive to objective indications of the danger a person presents" which must be assessed on a case-by-case basis but does not render the task subjective.[63] Targeting decisions should be based on military facts rather than personal feelings or opinions.[64] This is supported by Sassoli's observation of the resultant unjust outcomes if a civilian were to be better protected under IHL by one soldier than by another based on that soldier's education, values, religion or ethics.[65] Therefore, the benefits posed by subjective decision-making, namely compassion as a check on the use of force, do not outweigh the risks to civilian lives posed by these emotion-driven judgements.

Furthermore, by removing human emotions from the equation, clarity of thinking could result in AWS acting more lawfully than humans on the battlefield. This view is strengthened by evidence of humans becoming fatigued, stressed and confused in combat leading to mistakes

[57] Human Rights Watch, (n 10), 29.
[58] Muller and Bostrom, (n 56).
[59] Human Rights Watch (n 10), 4.
[60] Drew Charters (n 16).
[61] ibid.
[62] Marco Sassoli, 'Can Autonomous Weapon Systems Respect the Principles of Distinction, Proportionality and Precaution?' in International Committee of the Red Cross, *Autonomous Weapon Systems: Technical, Military, Legal and Humanitarian Aspects* (Expert Meeting, Geneva, March 2014) <https://reliefweb.int/sites/reliefweb.int/files/resources/4221-002-autonomous-weapons-systems-full-report%20%281%29.pdf > accessed 19 March 2021.
[63] Sassoli, (n 53), 333-334.
[64] ibid, 334.
[65] ibid, 335.

whereas AWS would follow exactly their code thus lessening the risk of error.[66] Emotions, losing colleagues and personal self-interest are not issues for AI nor can machines become angry and seek revenge, [67] meaning clouding of judgement cannot impact decision-making. The benefit of this is illustrated by the prominence of 'Combat Stress Reaction' (CSR).[68] While emotional stress responses can result in adaptive behaviours, historically within U.S. military operations CSR has accounted for up to half of all casualties.[69] The resultant maladaptive behaviours range from mild physical and emotional reactions including fatigue, indecisiveness, and forgetfulness to severe reactions including inability to see, hear or feel, memory loss, recklessness, and hallucination.[70] Supporting research suggests neural circuits overseeing conscious self-control can fail when overloaded with stress, resulting in war crimes that soldiers would be unlikely to commit otherwise.[71] Hence, there are legal advantages to removing humans from these high-stress environments. The problematic nature of emotion, particularly combat stress, cannot be overlooked when asserting the part subjectivity should play in targeting decisions.

In a utilitarian sense, the objectivity of AWS presents scope for improving distinction. Their lack of fear enables them to be placed at greater risk, potentially self-sacrificing to identify a target.[72] Arkin's observations support this, stating that autonomous robots will act more "humanely" than humans due to not being programmed with a self-preservation instinct.[73] Not only will this protect combatants by reducing exposure to direct risk and prevent loss of life, AWS "potentially hold considerable promise for making armed conflict more discriminating."[74] Militaries can be more creative in their use of AWS to identify and engage targets, replacing humans in particularly dangerous stress-inducing situations to reduce both

[66] Headquarters Department of the Army, Washington, 'Combat and Operational Stress Control Manual for Leaders and Soldiers' (*Field Manual No.6-22.5*, 18 March 2009) <https://www.globalsecurity.org/military/library/policy/army/fm/6-22-5/fm6-22-5_2009.pdf > accessed 19 March 2021.
[67] Anderson, Reisner and Waxman (n 7), 393.
[68] Headquarters Department of the Army (n 66), 1.
[69] ibid.
[70] ibid, 7.
[71] Douglas A. Pryer, 'The Rise of the Machines: Why Increasingly 'Perfect' Weapons Help Perpetuate Our Wars and Endanger Our Nation,' (2013) 93(2) Military Review 14, 15.
[72] Press (n 3), 1358.
[73] Ronald Arkin, 'Ethical Restraint of Lethal Autonomous Robotic Systems: Requirements, Research and Implications' in International Committee of the Red Cross, *Autonomous Weapon Systems: Technical, Military, Legal and Humanitarian Aspects* (Expert Meeting, Geneva, March 2014) < https://reliefweb.int/sites/reliefweb.int/files/resources/4221-002-autonomous-weapons-systems-full-report%20%281%29.pdf > accessed 18 March 2021.
[74] Anderson, Reisner and Waxman (n 7), 411.

physical and mental injury.[75] Hence, framing AWS's lack of subjectivity as a reason for their incompatibility with IHL is flawed given the vast issues that humans' subjectivity poses in practice. Objectivity of AWS offers scope for dealing with these challenges.

3.3 Predictability

A key issue regarding judgement is ensuring AWS effectuate their operator's intentions, allowing humans to rely on technology to select and engage lawful targets in compliance with IHL.[76] Under Article 36 AP I,[77] armed forces are obliged to carry out legal reviews of new weapons to ensure their specific characteristics comply with IHL, which entails fully understanding their capacities and foreseeing their effects.[78] Therefore, lawfulness is closely linked to predictability and reliability,[79] since the greater the uncertainty, the greater the risk of IHL violation.[80] This is problematic for machine judgement. As Suchman suggests, autonomous systems are only reliable if deployed within specified and stabilised environments, which is impossible in many situations of modern combat.[81] The challenge is highlighted by Elias' definition of autonomous systems as those designed to operate in dynamic, unstructured conditions.[82] However, given some environments are more certain hence predictable than others, lawfulness of AWS will hinge on their application. Additionally, machine learning – namely, the capacity of systems to improve their own performance at a task[83] – potentially reduces predictability since humans may not always understand how or why AWS have made certain decisions.[84] However, to counter this, their autonomy can be restrained by programming

[75] Press (n 3), 1342.
[76] John Cherry and Christopher Korpela, 'Enhanced distinction: the need for more focused autonomous weapons targeting discussion at the LAWS GGE' (*Humanitarian Law & Policy*, March 2019) < https://blogs.icrc.org/law-and-policy/2019/03/28/enhanced-distinction-need-focused-autonomous-weapons-targeting/ > accessed 15 March 2021.
[77] Additional Protocol I (n 19) Article 36
[78] Davison (n 4), 9-10.
[79] ICRC, 'View of the International Committee of the Red Cross (ICRC) on Autonomous Weapon System' (2016), 3 < https://www.icrc.org/en/document/views-icrc-autonomous-weapon-system > accessed 20 March 2021.
[80] Davison (n 4), 15.
[81] Suchman (n 44), 280.
[82] Roni A. Elias 'Facing the Brave New World of Killer Robots: Adapting the Development of Autonomous Weapons Systems into the Framework of the International Law of War' (2016 3 Indonesian Journal International Law and Comparative Law 101, 104.
[83] Ryan Calo, 'Artificial Intelligence Policy: A Primer and Roadmap' (2018) 3 University of Bologna Law Review 180, 185.
[84] Anderson, Reisner and Waxman (n 7), 394.

'outer-limits' to their learning. Hence, AWS cannot do what their creators do not want them to do,[85] thus decision-making becomes more predictable *ex ante*, or more discernible *ex post.*

Furthermore, to discount AWS on predictability grounds implies human soldiers, as the alternative, can be predicted. This applies a blinkered logic. In fact, AWS have the scope to be more predictable and consistent in their behaviour than humans in many scenarios, as illustrated in the air force context whereby physical strain of high-G manoeuvres and prolonged intense concentration leaves fighter pilots prone to fatigue and exhaustion which increases human-error.[86] AWS do not have such limitations, hence reducing risk of error and increasing predictability. Within the broader context of technology, Sassoli recognises humans make more mistakes than machines have technical failures.[87] This is strengthened by events currently seen in practice, such as the occurrences of the Phalanx misfiring at incorrect targets due to human-error rather than machine malfunction.[88] Significantly, statistics show 80% of all military accidents in combat are caused by human-error,[89] which may currently be attributed to greater dependence on humans rather than AI, however the increasing use of technologies has led the U.S. Air Force to predict that, by 2030, machine capabilities will have increased to the point that humans will be the weakest component in a wide array of systems.[90] Through a utilitarian lens, it is accepted that military technology cannot be 100% predictable and will inevitably lead to civilian casualties, but there is potential for net casualty reduction when compared with human combat,[91] which is preferable under utilitarian calculus. Thus, in the context of judgement, AWS are not necessarily less predictable nor reliable than humans, but rather offer opportunity to be more discriminating due to removing human-error risks.

3.4 AWS can only comply with the principle of distinction if autonomy is limited

The analysis has shown the 'subjectivity' and 'predictability' arguments against the lawfulness of AWS do not withstand comparison to the alternative means of warfare – human combatants.

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[85] Sassoli (n 62), 41.
[86] Drew Charters (n 16).
[87] Sassoli, (n 53), 327.
[88] Press (n 3), 1341.
[89] Tony Kern, 'The War on Error: A New and Different Approach to Human Performance' in Jan U. Hagen, *How Could This Happen? Managing Errors in Organizations* (Palgrave Macmillen, 2018) 274.
[90] U.S. Air Force Chief Scientist, 'Report on Technology Horizons: A Vision for Air Force Science & Technology during 2010- 2030,' (15 May 2010), 106 < https://apps.dtic.mil/dtic/tr/fulltext/u2/a562237.pdf > accessed 20 March 2021.
[91] Drew Charters (n 16).

Hence, the utility afforded by the objectivity and predictability advantages of AWS illustrates the unfounded nature of the calls to ban autonomous weapons. However, in the absence of high-level situational awareness, the inferiority of machine judgement means human control to some capacity must be maintained and the use of AWS must be limited to environments where complex cognition is not needed. Therefore, human-machine interaction and design mechanisms limiting the autonomy of weapons ought to be implemented to ensure targeting decisions comply with the principle of distinction.

4. Ensuring Compliance with IHL

4.1 Humans 'on-the-loop'

Through human-machine interaction, with operators interfering only when necessary, compliance with IHL can be overseen. Override or shut-down capabilities in the event of robots 'gone rogue'[92] safeguard against unpredicted and undesired action. To facilitate this, the U.S. government is currently researching and developing AWS with automatic locks in case of malfunction as well as real-time status updates to allow operator intervention where malfunction is foreseen.[93] However, this is not "meaningful human control" thus is inadequate.[94] Due to AWS's lack of situational awareness, greater judgement must be exercised by humans than mere oversight. However, maintaining human control poses feasibility challenges. As technology and AI develops and improves, the likelihood of AWS's capabilities surpassing those of humans increases. An advantage of AWS is their rapidity of action,[95] due to their ability to multitask increasing response speeds.[96] This increase in tempo of military operations, in which the fastest system will win, is a result of AI's ability to assess, calculate and respond to targets significantly quicker than humans, resulting in greater precision and accuracy.[97] Full integration of AWS will likely result in modern warfare outpacing human

[92] Kjøtv Egeland, 'Lethal Autonomous Weapons Systems under International Humanitarian Law' (2016) 85(2) Nordic Journal of International Law 89, 103.
[93] Cherry and Korpela (n 76).
[94] Human Rights Watch 'Stopping Killer Robots: Country Positions on Banning Fully Autonomous Weapons and Retaining Human Control' (August 2020) < https://www.hrw.org/sites/default/files/media_2020/08/arms0820_web_0.pdf > accessed 19 March 2021.
[95] Winter (n 24), 852.
[96] Paul Scharre, 'A Security Perspective: Security Concerns and Possible Arms Control Approaches' in UNODA, *Perspectives on Lethal Autonomous Weapon Systems* (Occasional Papers, No.30, November 2017).
[97] Anderson, Reisner and Waxman (n 7), 389.

ability,[98] leaving humans in supervisory roles redundant, unable to comprehend and intervene at such high pace.[99] Hence, enforcing human judgement or oversight will limit AWS and prove counterproductive to their benefits.[100] However, until the true military potential of AWS can be unlocked through the advent of AGI, human-machine interaction is vital to ensure judgements are IHL compliant.

4.2 Design Mechanisms

Given the difficulty of exercising judgement in dynamic battlefields, controls on the parameters of use, including temporal and spatial limits on AWS operation, can be implemented at the design stage.[101] Lessons can be drawn from existing AWS, including the Phalanx missile defence systems which place limits on targets, geographical space and operation time frames.[102] System designers will always retain programming powers to stipulate their functions pursuant to specified parameters,[103] facilitating the limitation of AWS deployment to less changeable contexts where complex human judgement is not required. For instance, distinction between civilians and enemy aircraft can be judged with ease in air-to-air combat as opposed to urban environments.[104] Further, by contextualising the opposition to AWS it can be seen that concern regarding the *extent of harm* arising from error is on par, if not greater than, the *frequency* of errors, therefore AWS can be armed with lower lethal radius weapons such as machine guns which are more discriminating, rather than high lethal radius weapons such as missiles, or indirect weapons like grenades.[105] The resultant reduction in the chance of collateral damage will comply more sufficiently with the principle of distinction.

4.3 Proposed Guidance

Due to the above limits on autonomy being vital to IHL compliance, further guidance for States on implementing these is desirable. The UN's Group of Governmental Experts (GGE) have considered various possible forms of future regulation, with some delegates calling for a legally

[98] Press (n 3), 1361.
[99] ibid 1361.
[100] ibid 1361.
[101] Davison (n 4), 12.
[102] ibid 12-14.
[103] Elias (n 82), 104.
[104] Jeffrey Thurnher, 'The Law that Applies to Autonomous Weapon Systems' (2013) 17 American Society of International Law Insights 4; Anderson, Reisner and Waxman (n 7), 402.
[105] Press (n 3), 1360.

binding instrument containing prohibitions, regulations and positive obligations such as another protocol or standalone treaty.[106] However, given that IHL is fully applicable and sufficient as a legal framework,[107] a less heavy-handed approach may be appropriate. Rather, a Code of Conduct for developing these technologies comprising a declaration of applicable international law and best practices for States in complying with the principles would be advantageous.[108] This could stipulate the risk assessments and mitigation measures required in the design, development and testing of AWS to facilitate IHL compliance.[109] However, regardless of the eventual instrument's nature, for any policy option to be viable, an agreement on the required type and degree of human control is needed.[110] Human-machine interaction may take many forms at various stages of the use of a weapon, and a range of factors such as the operational context, characteristics and capabilities of weapons must be considered.[111] Yet, against a backdrop of wide international dissensus on the matter,[112] the inability of the GGE to reach agreement on the appropriate level of human control after discussions ongoing for 5 years suggests timely policy decisions could be unlikely.[113] During the 2019 session, the Group agreed to reach a consensus on their recommendations over the following two years,[114] hence it remains to be seen how it will be ensured that emerging technology complies with the principle of distinction going forward.

5. Conclusion

It has been shown that autonomous weapons have come to rival, and even surpass, humans in their ability to make judgements objectively and predictably in combat. However, regarding situational awareness, they remain inferior due to an inability to account for contextual factors in complex, dynamic environments.[115] Therefore, until high-level machine judgement arrives

[106] Group of Governmental Experts on Emerging Technologies in the Area of Lethal Autonomous Weapons System, 'Chair's Summary of the Discussion of the 2019 Group of Governmental Experts on Emerging Technologies in the Area of Lethal Autonomous Weapons Systems' UN Doc CCW/GGE/1/2019/3/Add.1, (8 November 2019), [26].
[107] ibid. [29].
[108] ibid. [27].
[109] Group of Governmental Experts on Emerging Technologies in the Area of Lethal Autonomous Weapons System, 'Report of the 2019 session of the Group of Governmental Experts on Emerging Technologies in the Area of Lethal Autonomous Weapons Systems' UN Doc CCW/GGE.1/2019/3 (23 September 2019), 13.
[110] GGE Chair's Summary (n 106), [34].
[111] GGE Report (n 109), 13.
[112] Human Rights Watch, (n 94).
[113] Winter (n 24), 853.
[114] GGE Chair's Summary (n 106), [37].
[115] Winter (n 24)

in the coming decades, [116] human control over the autonomy of weapons must be maintained to ensure compliance with the principle of distinction under IHL. Properly employed AWS are the potential future of warfare and not 'killer robots' detached from command and control.[117] If kept within appropriate bounds, these technological advancements present legitimate military advantages, with the power to ensure armed conflict is discriminating and saves lives on both sides of hostilities.[118] Therefore, rather than succumbing to the pressure to ban AWS which would stifle innovation otherwise leading to greater IHL compliance,[119] increased investment in design and regulation should be made to ensure the technology functions properly to meet the legal standard of distinction,[120] particularly given the potential for targeting in armed conflict to become more probable, reliable and objective to a standard which exceeds that of human capability.

[116] Muller and Bostrom (n 56)
[117] Cherry and Korpela (n 76).
[118] United Nations General Assembly Human Rights Council, 'Report of the Special Rapporteur on Extrajudicial, Summary, or Arbitrary Executions, Christof Heyns' UN Doc A/HRC/23/47 (9 April 2013), 6.
[119] Eric T. Jensen, 'The (Erroneous) Requirement for Human Judgment (and Error) in the Law of Armed Conflict' (2020) 96 International Law Studies 26, 53.
[120] Drew Charters (n 16).

The effectiveness of criminalising the possession of extreme pornography in the UK.

Eden Guarino

Introduction

This article examines the UK legislation criminalising the possession of extreme pornography encapsulated in sections 63-67 of the Criminal Justice and Immigration Act 2008 (CJIA). Throughout three chapters, the goal is to assess the aims underpinning the law and to evaluate how effective it has been at achieving these aims both in respect of the CJIA's conceptualisation and practical impact.

Over the last two decades, UK pornography regulation has evolved and undergone several conceptualisations. The CJIA was implemented in response to a public outcry following the murder of Jane Longhurst by Graham Coutts,[1] who had watched violent pornography in the days leading up to the murder in 2003.[2] This case created an impetus for contemporary legislation to supplement the Obscene Publication Act 1959 (OPA) to address the new problems involved with internet pornography. Starting with the initial Home Office (HO) proposal in 2005,[3] until the 2015 amendment,[4] the CJIA has underwent a series of reforms, each of which was underpinned by different aims, namely: direct harm, obscenity, and cultural harm. There have also been recent changes to the UK's pornography regulation regime more generally, with the definition of OPA-obscenity changing in 2019 to centre consent;[5] and the publication of the 2019 Online Harms White Paper (OHWP) which proposes a supplementary scheme to the CJIA/OPA regime, for regulating pornography in the UK.[6]

Although the goals behind each of the Act's iterations are reasonably straightforward to identify, a comprehensive, chronological examination of the Act's development including the

[1] Home Office/Scottish Executive, *Consultation on the Possession of Extreme Pornographic Material* (2005) 1 (HO 2005 Consultation Paper); Julian Petley, 'Pornography, Panopticism and the Criminal Justice and Immigration Act 2008' (2009) 3 Sociology Compass 417, 428.
[2] *R v Coutts* [2006] UKHL 39; [2006] 1 WLR 2154 [7].
[3] HO 2005 Consultation Paper (n 1).
[4] Criminal Justice and Courts Act 2015 (c.2), s 37(2)(c) (2015 Amendment).
[5] Crown Prosecution Service, Obscene Publications Guidance, <https://www.cps.gov.uk/legal-guidance/obscene-publications> accessed 02 February 2021 (CPS OPA Guidance).
[6] The Secretary of State for Digital, Culture, Media & Sport and the Secretary of State for the Home Department, *Online Harms White Paper* (CP 57, April 2019) (OHWP).

2019 OPA-obscenity redefinition (with attention given to how this is likely to impact the CJIA) has yet to be undertaken. Without such an examination, grasping Parliament's current intentions remains a challenge because of the CJIA's drafting, with some of its provisions conflicting and undermining each other as a result of residual content being leftover following each of the Act's iterations. Accordingly, this article will undertake this analysis so that the current aim can be identified, followed by an evaluation of the Act's effectiveness. It will also provide recommendations on how to bring UK pornography regulation in line with international conceptualisations of the harm associated with pornography.

To achieve these research objectives, this article will be split into three parts. Part 1 will outline the legal and societal context in which the CJIA was introduced by briefly examining the OPA and its perceived shortcomings, as well as Longhurst's murder and the media coverage surrounding it. Following this, it will scrutinise each stage of the CJIA's evolution and the aim that drove it, starting with the 2005 HO consultation paper, and ending with the 2019 redefinition of OPA-obscenity, to attempt to identify the current aims underpinning the Act.

Part 2's purpose is to evaluate how effective the CJIA is at achieving the aim identified in Part 1. To evaluate whether the CJIA has been effectively conceptualised, it will engage with some of the main criticisms of the Act, including that: it is irrational to single pornography out for legislation; its targeting of realistic simulations of extreme acts is unprincipled; and the Act is overinclusive and underinclusive. It will also consider the CJIA's practical impact with regards to policing extreme pornography in England and Wales.

Finally, Part 3 will propose recommendations on how to achieve the CJIA's aim more effectively by looking at international conceptualisations of the harm associated with pornography. To do this, Part 3 will compare the OPA/CJIA regime to recommendations made by the Parliamentary Assembly of the Council of Europe (PACE) regarding the regulation of extreme and violent pornography, as well as assess the extent to which the OHWP might fix any of the current regime's shortcomings. It will also look to New Zealand and Iceland for lessons on how to effectively reform education to support the Act's aims.

Part 1: What does the CJIA aim to achieve?

This section will consider the aims behind the CJIA. To do this, it will begin by considering the OPA, which was the only legislation in place regulating pornography at the time of Longhurst's murder in 2003. This murder led to a public outcry for new legislation which was better suited to the challenges posed by extreme internet pornography.[7] This will establish that the contextual background of the CJIA's inception was founded on concerns for women's safety.

This section will next investigate the ever-evolving aims underpinning the CJIA. This will entail a chronological review of the Act's development, starting with the 2005 and 2006 HO Consultation Papers, and the 2007 'Evidence of Harm to Adults Relating to Exposure to Extreme Pornographic Material: A Rapid Evidence Assessment' (REA), which primarily focused on combating direct harm.[8] This will be followed by considering the 2008 iteration of the CJIA and its apparent underlying obscenity-based driver. The section will next focus on the work of McGlynn and Rackley that advocated for legislative change from the perspective of cultural harm, culminating with the 2015 amendment.[9] It will also consider the Crown Prosecution Service (CPS) 2019 guidelines on the OPA which redefined obscenity through a consent lens and will provide analysis on how this might affect the CJIA.[10] The purpose of this examination is to scrutinise each of these aims and establish what the Act currently aims to achieve.

1.1 2003: the OPA and Jane Longhurst's murder, concerns for women's safety

The CJIA was enacted in response to a public outcry, following Longhurst's death, that the OPA was ill-equipped to deal with challenges posed by internet pornography. Accordingly, the OPA must be considered so that the context around the CJIA's inception, and its initial aims, can be properly analysed.

[7] Clare McGlynn and Erika Rackley, 'Striking a Balance: arguments for the criminal regulation of extreme pornography' [2007] Crim L R 677, 680.
[8] HO 2005 Consultation Paper (n 1) 11; Catherine Itzin, Ann Taket, and Liz Kelly, *The Evidence of harm to adults relating to exposure to extreme pornographic material: a rapid evidence assessment (REA)* (Ministry of Justice Research Series 11/07, 2007) (REA).
[9] Clare McGlynn and Erika Rackley, 'Criminalising Extreme Pornography: a lost opportunity' (2009) 4 Crim L R 245; 2015 Amendment (n 4).
[10] CPS OPA Guidance (n 5).

The OPA criminalises the 'publication of obscene matter' and carries with it the penalty on conviction of an unlimited fine and/or imprisonment of up to five years.[11] It encompasses obscene publications in general, with pornography being only one form of content under its purview. Obscene publications for the purpose of the OPA are those that 'tend to deprave and corrupt persons' who encounter them.[12] According to CPS guidelines, obscenity for the purposes of this Act does not necessarily correspond to the word's dictionary definition—'repulsive, filthy, loathsome, or lewd'—rather it must meet the higher standard of tending to deprave or corrupt audiences.[13] One of the main drawbacks of the OPA, is that it targets producers and distributers of obscene material,[14] leaving internet pornography, accessible in the UK but produced or platformed overseas, beyond its reach.[15]

Coutts' murder of Longhurst galvanised support for legislative reform.[16] Coutts infamously watched violent pornography in the days leading up to the attack.[17] The press coverage of this case capitalised on this fact, propagating the belief that Coutts, and others like him, have their 'perversions' normalised through the consumption of violent pornography, eventually inspiring them to act out their dangerous fantasies.[18] This narrative is exemplified in a Daily Mail article stating that 'it could have happened only in the high-tech age, committed by someone whose murderous fantasies were fuelled by appalling images freely available on the Internet'.[19] Similarly, as recently as 2019, the Sun described Coutts as a 'sex killer obsessed with extreme porn'.[20] This assumes a causal connection between viewing extreme pornography and committing sexual offences, fuelling public fear around the lack of regulation around extreme pornography. The campaign calling for such regulation to protect women like Longhurst, gained recognition from HO Minister Croaker, who expressed concerns that the internet makes extreme pornography 'easily available', and UK controls (the OPA) easily circumvented.[21]

[11] The Obscene Publications Act 1959, s 2(1)(b).
[12] The Obscene Publications Act 1959, s 1(1).
[13] CPS OPA Guidance (n 5).
[14] The Obscene Publications Act 1959, s 1(3).
[15] HO 2005 Consultation Paper (n 1) 22.
[16] ibid, 1.
[17] *Coutts* (n 2) [7].
[18] Feona Attwood and Clarissa Smith 'Extreme Concern: Regulating "Dangerous Pictures" in the United Kingdom' (2010) 37 Journal of Law and Society 171, 173-174.
[19] H Weathers, 'My sister was murdered by a man obsessed with violent internet porn. So why won't anyone help me to close these websites down?' *Daily Mail* (London 30 September 2004).
[20] Stian Alexander, 'Monster's Transfer: Sex killer obsessed with extreme porn celebrates dream move to Scots prison where he longs to see "snow-topped mountains"' The Sun (24 March 2019).
[21] 'Victory for Victim's mum in crackdown on web sex violence' *Daily Mail* (30 August 2006).

Sensationalised press coverage of the Coutts case emphasised a link between watching extreme pornography and committing sexual offences, as well as highlighting the OPA's inability to regulate non-UK content. This provided support for new laws directed at extreme pornography that restrict consumer behaviour, to protect women from falling victim to crimes at the hands of extreme pornography viewers, leading to the subsequent public consultation.

1.2 2005-2007: the HO Consultation Papers and the REA, preventing direct harm

This section will examine the public consultation proposing a new offence, following the Coutts case, and its stated aims. It will also examine some of the offence's evidential difficulties which led to the HO commissioning the REA in 2007, to prove the existence of direct harm.

Due to the OPA's failure to control supply, the 2005 proposed offence, later streamlined in the 2006 Summary of Responses Paper, demonstrated a shift in focus onto regulating consumers.[22] Consequently, the HO proposed criminalising the possession of pornography featuring: '(i) serious violence; (ii) intercourse or oral sex with an animal; and (iii) sexual interference with a human corpse'.[23]

The 2005 paper explicitly set out that this proposal was driven by two aims, both of which can be categorised as combatting direct harm. The first, relatively uncontroversial aim, was to 'protect those participating in the creation of this material … whether or not they notionally or genuinely consent to taking part'.[24] The second aim was to 'protect society, particularly children, from exposure to such material … which may encourage interest in violent or aberrant sexual activity'.[25] This second aim is seemingly based on the notion that those who watch extreme pornography may be triggered into committing a sexual offence—not unlike the notion promoted by the media coverage of Longhurst's murder. Direct harm, in this context, relates to the idea that harm to performers, and viewers' development of an interest in committing sexual assault are inherent to extreme pornography.

[22] HO 2005 Consultation Paper (n 1); Home Office, *Consultation on the Possession of Extreme Pornographic Material: Summary of responses and next steps* (2006) (HO 2006 Consultation).
[23] HO 2006 Consultation (n 22) 7.
[24] HO 2005 Consultation Paper (n 1) 2.
[25] HO 2005 Consultation Paper (n 1) 2.

However, the second aim was controversial because there is no conclusive evidence substantiating the link between consumption of extreme pornography and increased likelihood of committing sexual assault.[26] The 2006 Paper highlighted that some of the respondents stated that legislating in pursuit of this aim would be contrary to the Government's commitment to evidence-based policymaking.[27]

Whether it was because of this lack of evidence, or in attempt to shield themselves from further criticism, the HO commissioned the REA to 'examine the possibility of a relationship between exposure to extreme pornographic material and subsequent commission of sexual and violent offences'.[28] The REA's findings are based on 5 correlational meta-analyses conducted between the years 1995 and 2006, covering 124 studies.[29] The REA addressed three questions.[30] The first question examined the effect which viewing extreme pornography has on adult viewers.[31] The harmful effects identified included an 'increased risk of developing pro-rape attitudes, beliefs and behaviours and committing sexual offences'.[32] Concerning the second question, whether watching pornography 'causes or contributes to sexual offending', the REA reported that men with a predisposition for violence, or a 'history' of committing sexual or violent crimes, are more vulnerable to the influence of extreme pornography.[33] The REA was unable to answer the final question, whether evidence of harm to the performers involved in the production of extreme pornography existed, being unable to find 'formal research studies' on this.[34] Interestingly, this means that the REA substantiated the Government's second (more contested) aim of protecting society, and not the first aim of protecting those involved in pornography's production. Regardless, this allowed the Government to proceed with their now evidence-based plans.

Although the REA found a correlation between extreme pornography consumption and committing sexual offences, it is unconvincing to claim that it provides definitive proof of this link. In truth, the REA suffers from a plethora of weaknesses, including the fact that: it

[26] Christopher J. Ferguson and Richard D. Hartley, 'The pleasure is momentary…the expense damnable? The influence of pornography on rape and sexual assault' (2009) Aggression and Violent Behaviour 14(5) 323, 325.
[27] HO 2006 Consultation (n 22) 12.
[28] REA (n 8) iii.
[29] ibid, iii.
[30] ibid, iii.
[31] ibid, iii.
[32] ibid, iii.
[33] ibid, iii.
[34] ibid, iii.

examined material which did not fit the definition of extremity proposed by the Government;[35] it was based on 'largely discredited' research;[36] and it relied on American psychological and sociological findings without undergoing sufficient translation into a British context.[37] Additionally, many of the studies on which it relied were conducted before the existence of internet pornography.[38] This is ironic because the CJIA was originally proposed to handle the challenges associated with regulating internet pornography.[39] Moreover, unlike its predecessor, internet pornography is free, easily accessible, and creates an environment where extreme pornography can accidentally be stumbled upon (by adults and children alike). Finally, the REA itself acknowledged that its findings do not apply exclusively to extreme pornographic material, but to pornography in general.[40] It therefore bears asking why the Government chose only to criminalise possession of extreme pornography in attempt to combat direct harm, and not all pornography.

The focus of the 2005/2006 proposals related to protecting women (both pornography performers and members of the public) from becoming victims of crimes as a direct consequence of extreme pornography. This aim of combatting direct harm initially lacked evidential basis and the subsequent REA does little to dispel doubts over whether a link exists between watching extreme pornography and committing sexual offences because of its weaknesses.

1.3 2008: the emergence of the CJIA's obscenity framework

The CJIA came into force in 2008 following the 2005/2006 HO proposals. 2008 marked the emergence of an obscenity framework.[41] Accordingly, this section will: examine the CJIA through the lens of obscenity; explore how this change was justified by the Government; and provide a critique of the framework itself.

[35] Attwood and Smith (n 18) 176.
[36] Anne Carline, 'Criminal Justice, extreme pornography and prostitution: Protecting women or promoting morality?' (2011) 14(3) Sexualities 312, 321.
[37] ibid, 321.
[38] ibid, 321.
[39] HO 2005 Consultation Paper (n 1) 1.
[40] REA (n 8) iii.
[41] Criminal Justice and Immigration Act 2008, s 63(5A)(b); Fiona Vera-Gray, 'Rape porn, Cultural Harm, and the Law' (2020) in the International Encyclopaedia of Gender, Media and Communication, 2.

To discuss the obscenity driver for this step in the legislative process, the CJIA itself must first be looked at. An extreme image for the purpose of the CJIA needs to portray an act which: 'threatens a person's life; results, or is likely to result, in serious injury to a person's anus, breasts or genitals; involves sexual interference with a human corpse; involves performing an act of intercourse or oral sex with an animal (dead or alive)'.[42] For possession of such an image to be illegal it must portray any of these acts in an 'explicit and realistic way'.[43] Although obscenity was already referenced in the 2006 paper,[44] this notion became more central in 2008, with the CJIA stating that pornography must be 'grossly offensive, disgusting, or otherwise of an obscene nature' to be extreme,[45] definitively placing the CJIA within an obscenity framework.[46]

This reversion by the Government, from combatting direct harm back to censoring obscene content, was presented as a mere clarification intended to bring the CJIA in line with the OPA, so that the same material was caught by both Acts.[47] However, the definition of obscenity differs between the statutes.[48] The CPS guidance on the CJIA expressly states that it relies solely on the ordinary dictionary meaning of obscenity,[49] unlike the OPA's 'deprave or corrupt' requirement.[50] What is especially concerning about this, is that the threshold for prosecution is thereby higher for producers and distributors than for consumers.

This discrepancy makes it seem doubtful that the obscenity framework was promoted to achieve alignment between pornography provisions. According to McGlynn and Rackley, the Government, when faced with liberal arguments around sexual freedom and interference with private life, reverted to obscenity-based rationalisations.[51] This might be because such reasoning more readily galvanises the cultural majority than concerns about gender-based violence (GBV). Unsurprisingly, therefore, disgust-based arguments were 'clearly audible'

[42]Criminal Justice and Immigration Act 2008, s 63(7).
[43] ibid, s 63(7).
[44] HO 2006 Consultation Paper (n 22) 6.
[45] Criminal Justice and Immigration Act 2008, s 63(5A)(b).
[46] Vera-Gray (n 41) 2.
[47] H.L. Deb 3 March 2008, Vol 699, Col 894.
[48] Clare McGlynn and Hannah Bows, 'Possessing Extreme Pornography: Policing, Prosecutions and the Need for Reform' (2019) Vol 83(6) JCL 476-477.
[49] Crown Prosecution Service, Extreme Pornography, <https://www.cps.gov.uk/legal-guidance/extreme-pornography> accessed 31 March 2021 (CPS Extreme Pornography Guidance).
[50] The Obscene Publications Act 1959, s 1(1).
[51] McGlynn and Rackley, 'Criminalising Extreme Pornography (n 9) 245.

during the legislative process.[52] The HO's abandonment of the direct harm aim in favour of the safer, more conservative obscenity framing of the problem, has unfortunately left the UK with legislation that is a 'pale imitation' of the original HO proposals.[53] This marks a shift away from promoting women's safety towards disgust-based, censorious rationales.

Obscenity is a problematic metric because of its normative character—it is both a product and is productive of its 'particular sociohistorical context'—which is generally intertwined with a 'traditional, conservative approach to sex and sexuality'.[54] The concern is that the Government is relying on a community standard to measure what is obscene. This is usually set by the narrative of powerful majority,[55] which, in the UK, is owned by the white, heterosexual male.[56] As such, the yardstick against which *acceptable* pornography will be measured, is likely to be white, heteronormative, and centred around male pleasure, at the exclusion of not only minority sexualities like the BDSM community, but also minority groups more generally, whose sexuality may not fit with that of the majority.[57] This may result in the inadvertent criminalisation of members of these minorities.

This shift back to criminalisation that relies on obscenity-based reasoning is concerning. The Government's framing of this change as a mere clarification to align provisions on pornography is unconvincing and has created problems such as setting a lower threshold for criminalisation on consumers than producers. Reframing the offence in this way limits its ability to protect women from GBV and has created an environment in which sexual (and other) minorities might be criminalised.

1.4 2015: the amendment endorsing McGlynn and Rackley's cultural harm

This section will: define cultural harm; investigate the process that it underwent in Parliament before it was endorsed as the new official underlying aim of the CJIA; and analyse the concept itself in more detail.

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[52] Clare McGlynn and Ian Ward, 'Pornography, Pragmatism and Proscription' (2009) 36(3) Journal of Law and Society 327, 329, e.g. H.C. Deb 8 October 2007, Vol 464, Col 113.
[53] McGlynn and Rackley, 'Criminalising Extreme Pornography (n 9) 245.
[54] Vera-Gray (n 41) 1.
[55] Kimberlé Williams, 'Beyond race and misogyny: Black feminism and 2 Live Crew' in Mari J Matsuda (eds), *Words that Wound* (Westview Press, 1993).
[56] Fiona Vera-Gray and Clare McGlynn, 'Regulating pornography: developments in evidence, theory and law' in *Handbook on Gender, Sexuality and the Law* (2020) 472.
[57] ibid, 476.

The 2015 amendment to the CJIA criminalised the possession of pornography featuring any form of non-consensual penetration with a penis, any other body part, or object (rape pornography).[58] This amendment can largely be attributed to the work of McGlynn and Rackley.[59] In 2009, in direct response to the CJIA, McGlynn and Rackley criticised the Government for demonstrating a 'profound lack of understanding about pornography, its harms and the need for clarity in the criminal law'.[60] They explain that the best 'justifying action' for criminalising the possession of extreme pornography is 'cultural harm'.[61] They conceptualise pornography's cultural harms as its contribution to a 'culture and set of attitudes … in which rape and sexual violence are less likely to be recognised … investigated or prosecuted' and where rape myths are more difficult to challenge.[62] Rape pornography not being included in the initial version of the CJIA seems to be a glaring oversight from this perception of harm.

As early as 2009, McGlynn and Rackley's cultural harm began gaining political currency. For instance, in 2009, the Scottish Parliament Justice Committee Report on Extreme Pornography sought clarification as to whether obscenity is defined 'in terms of the cultural harm that pornography can cause', due to questions raised by McGlynn.[63] Similarly, in 2013 parliamentary debates on child abuse, Johnson argued that in order to prevent rape and child abuse, the rape pornography industry, which stages simulations of such events involving adult actors, must first be tackled.[64] Johnson specifically quoted McGlynn when making this argument stating that: 'it is undeniable that the proliferation and tolerance of such images and the messages they convey contribute to a cultural climate where sexual violence is condoned'.[65] This culminated with the 2015 amendment being directly attributed to McGlynn and Rackley and their definition of cultural harm by the Joint Committee on Human Rights.[66] They quoted McGlynn and Rackley's work in their explanation of the cultural harm associated with pornography as creating: 'an environment where sexual violence is condoned and treated as entertainment' and 'promotes the myth that women enjoy being coerced into sex and enjoy

[58] Criminal Justice and Immigration Act 2008, s63(7A).
[59] Joint Committee on Human Rights, *Legislative Scrutiny: (1) Criminal Justice and Courts Bill and (2) Deregulation Bill - Human Rights Joint Committee* (2013-14, HL 189, HC 1293) (JCHR) [1.42].
[60] McGlynn and Rackley, 'Criminalising Extreme Pornography (n 9) 260.
[61] ibid, 257.
[62] Vera-Gray and McGlynn (n 56) 469.
[63] Scottish Parliament Justice Committee Report on Extreme Pornography, Stage 1 Report on the Criminal Justice and Licensing (Scotland) Bill (18th Report, 2009 Session 3).
[64] H.C. Deb 12 June 2013, vol 564, col 405.
[65] ibid.
[66] JCHR (n 59) [1.42].

violent, non-consensual sexual activity.[67] As a result, since the 2015 amendment, cultural harm has been used to justify the criminalisation of extreme pornography.

Significantly, the effect of this trivialisation and eroticisation of rape extends beyond those who directly consume extreme pornographic content. McGlynn and Vera-Grey argue that cultural harm 'denies the simplistic link' that someone viewing pornography may be triggered into committing an offence.[68] Instead, it takes a much broader view on rape pornography's contribution to rape culture.[69] Arguably, cultural harm is a refinement of the second aim of the 2005 proposal; rather than protecting society (particularly children) from cultivating an 'interest in violent or aberrant sexual activity', [70] women and children are being protected by preventing sexist attitudes from taking hold in society, which may lead to a culture that is insensitive to rape and sexual abuse. By focussing on the prevention of cultural harm (a form of indirect harm), Parliament circumvents the evidentiary difficulties associated with direct harm, whilst remaining in the vicinity of what they originally sought to legislate against. This might explain why Parliament was relatively receptive and willing to endorse the concept.

Despite McGlynn and Rackley's political impact, there are some issues with their definition of cultural harm. For example, Palmer has criticised it for being 'poorly defined' and 'lacking evidence' making it difficult to critically engage with, leaving academics with the options of simply accepting it, or outright dismissing it.[71] This is not entirely unfair. In terms of academic writing, there is little expansion on the concept of cultural harm itself. However, a much larger wealth of information exists in the evidence McGlynn has provided the Scottish and UK Parliaments with, when advising them on how to reform the CJIA in light of cultural harm. It would have been beneficial, and would increase accessibility, if this information were also published in academic sources. Moreover, if cultural harm has, since 2015, become the aim of the CJIA, it raises the question of what other 'deviant forms of sexuality', like bestiality and necrophilia, have to do with protecting women.[72]

[67] ibid, [1.43].
[68] Vera-Gray and McGlynn (n 56) 474.
[69] ibid, 474.
[70] HO 2005 Consultation Paper (n 1) 2.
[71] Tanya Palmer, 'Rape pornography, cultural harm and criminalisation' (2018) 69 NILQ 37, 39.
[72] Tara Beattie, 'Case Analysis Pryanishnikov v Russia (App. No.25047/05), judgment of 10 September 2019, Setting the Foundations for Human Rights Discourse on Pornography' (2019) 6 EHRLR 654, 660.

Unfortunately, the Government's commitment to cultural harm is undermined by the persistence of the obscenity framework.[73] This means that the prosecution will need to prove that the defendant possessed rape pornography, and that it was obscene. It remains unclear if this is simply a relic from the CJIA's initial drafting or if the obscenity framework was kept intentionally. Regardless, these conflicting aims create uncertainty as to what the CJIA is meant to proscribe, and maintains a situation in which obscene but non-culturally harmful material can be prosecuted, and where culturally harmful non-obscene material can escape prosecution.

The 2015 cultural harm aim is a positive refocussing back onto protecting women. In fact, it appears to be a refinement of the 2005 proposal's second aim. However, it is obscured through the persistence of the obscenity framework and the continued inclusion of categories which have nothing to do with protecting women.

1.5 2019: CPS guidelines on OPA-obscenity redefined in terms of consent

The lack of clarity as to what underpins the CJIA—the prevention of cultural harm or obscenity concerns—might be solved by the change in CPS guidelines on obscenity in relation to the OPA in 2019.[74] This section will outline what this change entails and will provide analysis on how it might streamline the CJIA in support of combatting the cultural harm aim if it is extended to it.

The CPS guidelines on the OPA more narrowly reinterpret an obscene image as one which depicts: 'non-consensual activity … including that which involves those who cannot consent'; 'the infliction of serious bodily harm'; and 'sexual activity which involves the commitment of a crime',[75] removing reference to disgusting-based obscenity. This redefinition of OPA-obscenity has consent at its heart. Notably, this redefinition has only been articulated for the OPA, and not the CJIA, where the CPS guidance still refers to the 'ordinary dictionary definition of obscenity'.[76] However, because the CPS guidelines on the CJIA state that this offence 'is not intended to cover additional material beyond what is illegal to publish under the

[73] Criminal Justice and Immigration Act 2008, s 63(7) and (7A).
[74] CPS OPA Guidance (n 5).
[75] ibid.
[76] CPS Extreme Pornography Guidance (n 49).

OPA',[77] the redefinition of OPA-obscenity in terms of consent can be presumed to extend to the CJIA as well.

When analysing the CJIA from a consent perspective the prohibition on possession of images depicting necrophilia,[78] bestiality,[79] and rape,[80] becomes much easier to justify. Each of these images involve sexual interference with a subject who cannot or has not consented. In fact, consent seems to link these categories more coherently than cultural harm or disgust-based obscenity.

The CJIA's criminalisation of possession of extreme pornography depicting 'life-threatening' acts,[81] or those which may cause 'serious injury',[82] warrants more discussion. The CPS guidelines on the OPA provide a lower threshold—an image is obscene if 'it depicts the infliction of serious bodily harm'.[83] This discrepancy is consistent with the idea that the CJIA intends to be narrower than the OPA.[84] Nonetheless, the idea that an image depicting serious bodily harm is obscene, aligns with the common law principle that a person cannot consent to the infliction of serious harm.[85] Therefore, these two categories also seem to neatly align with the presumed new consent rationale. This focus on the inability to consent to serious harm for the purpose of sexual gratification has also been reflected in the Government's Domestic Abuse Bill, which has codified this common law principle.[86] This seems to represent a more general governmental awareness of consent in relation to GBV, and further supports the idea that this new definition of obscenity should apply to the CJIA.

The OPA redefinition of obscenity from disgust to a lack of consent is a welcome change and could potentially be used to reinterpret the CJIA's obscenity framework to a consent-based one. This would project a message that consent is crucial to Parliament, and could be used to combat rape culture, supporting the official aim of combatting cultural harm. However, it remains unclear if redefining obscenity in this way was Parliament's intention because CPS

[77] ibid.
[78] Criminal Justice and Immigration Act 2008, s 63(7)(c).
[79] ibid, s 63(7)(d).
[80] ibid, s 63(7A).
[81] ibid, s 63(7)(a).
[82] ibid, s 63(7)(b).
[83] CPS OPA Guidance (n 5).
[84] CPS Extreme Pornography Guidance (n 49).
[85] *R v Brown* [1993] 2 W.L.R 556.
[86] Domestic Abuse HC Bill 281 (2019-2021) [36].

guidelines have only changed for the OPA and not the CJIA. Therefore, clarification is needed as to whether the definition of OPA-obscenity also extends to the CJIA. If the intention is not to redefine obscenity in this way, then the claim of alignment between the OPA and CJIA is not achieved, and the tension between cultural harm and obscenity within the CJIA remains in place.

1.6 Conclusion

It is not entirely clear what the CJIA aims to achieve. The underpinning motives of this regulation have evolved over the legislation's lifetime. Its two initial aims, inspired by the campaign following Longhurst's death, presented in the HO consultation, are easy to identify: protecting pornography participants; and protecting society from exposure to extreme pornography so that viewers do not imitate the sexually violent acts they observe. These aims were seemingly overshadowed by obscenity-based concerns in the 2008 Act. Since 2015, combatting cultural harm has been the CJIA's official aim. However, whatever clarification this might have provided is obscured by the Act's continued existence within an obscenity framework, embodying the Act's persistent concern with obscenity and disgust. Extending the 2019 redefinition of OPA-obscenity to the CJIA would replace its disgust-based obscenity framework with a consent-based one. This would streamline the offence's focus and transform it into one which has the potential to effectively achieve its aim of combatting cultural harm. As this refinement to the CJIA has not been confirmed, Part 2 will explore the CJIA's effectiveness, at achieving its cultural harm aim, with consideration being given to both disgust and consent-based obscenity frameworks.

Part 2: To what extent is the CJIA effective in achieving its aim?

This section moves on from analysing the aims of the legislation to considering its effectiveness at achieving them. As established in Part 1, it is difficult to delineate what the true aim underpinning the CJIA is because of the way it evolved over time, with considerable hangover from previous conceptualisations of harm in each of its developments. Accordingly, for the purpose of this article, this section will primarily focus on the CJIA's combatting cultural harm objective, because it is the most recent official aim. This aim relates to preventing the cultural harm associated with pornography—the eroticisation and trivialisation of rape and sexual harassment, which perpetuates a society in which sexual offences are less likely to be

investigated or prosecuted, and rape myths are harder to challenge.[87] In areas where the CJIA cannot be justified along cultural harm lines, the other aims (combatting direct harm and censoring obscene content) will be considered.

Effectiveness at achieving these aims will be investigated in two ways: conceptualisation issues, and practical impact. The assessment of the CJIA's conceptualisation issues will involve scrutinising: singling out pornography; the requirement for content to be realistic and the criminalisation of possession; and the criticism that the Act is overinclusive and underinclusive. The assessment of the CJIA's practical impact will rely on England and Wales' policing and prosecution data. This section will not cover the well-documented concerns around how the CJIA might impact the BDSM community,[88] because these concerns never materialised in terms of the Act's policing.[89]

2.1 Conceptualisation issues: singling out pornography

This section focusses on the Government's singling out of pornography for legislation. This will include consideration being given to feminist arguments that sexist depictions of women in other forms of media may be more culturally harmful than violent pornography. This will be followed by an exploration of vehicles for cultural harm utilised by pornography which might justify singling it out.

Culturally harmful representations of women are not unique to extreme pornography. Accordingly, Palmer has raised concerns that singling extreme pornography out for legislation might send the signal that 'sexual deviance, rather than misogyny, [is] at the root of the problem'.[90] This concept is based on the reasonings of Valverde and Smart. Valverde presents the notion that 'even if violent porn is what angers women most, it is not necessarily the cultural form most dangerous to our own emotional and sexual development.'[91] She argues that this is because 'no woman sees the anonymous models portrayed as victims of male violence as role models', giving the example that 'male-oriented' beauty standards are much more harmful and

[87] McGlynn and Rackley, 'Criminalising Extreme Pornography (n 9) 257.
[88] Eleanor Wilkinson, ''Extreme pornography' and the contested spaces of virtual citizenship' (2011) 12(5) Cultural Geography 493.
[89] McGlynn and Bows (n 48) 481.
[90] Palmer (n 71) 54.
[91] Mariana Valverde, *Sex, Power and Pleasure* (Women's Press 1985) 133.

inflict more suffering on everyday women.[92] Similarly, Smart claims that laws censoring pornography imply that 'female degradation in non-sexual ways' is less troublesome than that which appears in violent pornography.[93] Smart presents romantic novels, advertising, and soap operas as being more problematic than pornography because they eroticise 'sexual difference and forms of domination', but carry more 'pervasive influence'.[94] Valverde's and Smart's arguments rely on the idea that women are more likely to internalise sexist messages in forms of media that are more socially acceptable than pornography, especially those aimed at women. Whilst this point may highlight the need to put stricter regulations on media, it does not follow that pornography does not need to be regulated. From the perspective of cultural harm, it is effective to single out pornography for regulation because of the vehicles for cultural harm utilised by it, which affect both young and older consumers.

Sexual scripts are one such vehicle. This is the idea that through pornography, consumers learn about 'sexual practices and desires', which they internalise and recreate.[95] The concern with sexual scripts is especially pronounced in relation to adolescents. Indeed, it is widely accepted that young men, anxious about their lack of sexual knowledge, turn to pornography to educate themselves,[96] treating pornography as the 'authority on sex' which they purposefully imitate.[97] According to McGlynn and Vera-Grey sexual scripts address five areas:

> '(1) what sex is; (2) who sex is for; (3) what events/acts should or should not happen in sex; (4) how people should respond to these events; (5) the consequences of sex acts'.[98]

This is extremely concerning because, generally, pornography is highly heteronormative, it eroticises the subordination of women, and it is almost always exclusively concerned with male desire and pleasure.[99] Evidence of the harm that these scripts can cause was highlighted through

[92] ibid, 133.
[93] Carol Smart, *Feminism and the Power of Law* (first published 1989, Routledge 2002) 121.
[94] ibid, 126-127.
[95] Vera-Gray and McGlynn (n 56) 478.
[96] Lynda Measor, 'Young people's views of sex education: gender, information and knowledge' (2004) 4(2) Sex Education 153; Maddy Coy, Liz Kelly, Fiona Elvines, Maria Garner and Ava Kanyeredzi, Office of the Children's Commissioner, Sex *without Consent, I Suppose That Is Rape: How Young People in England Understand Sexual Consent* (London, November 2013) (CCS) 43.
[97] Vera-Gray and McGlynn (n 56) 475.
[98] ibid, 479.
[99] Carline (n 36) 320.

research done by the Children's Commissioner which found that young people who consume pornography: engage in riskier sexual conduct, are oblivious to consent, and cultivate sexist attitudes.[100] This illustrates the cultural harm that pornography reinforces in society, especially for those who rely on it for sexual education. This is enhanced when it comes to extreme pornography which present rape as sex, and acts of aggression and coercion as part of a normal sexual encounter.[101] For this reason, although sexual scripts may not be exclusive to it, extreme pornography blurs the lines between rape and sex in a way that exacerbates the problem. Therefore, it is entirely logical to be singling out pornography (especially extreme pornography) for legislation.

The second vehicle for harm relates to the subliminal way in which pornography communicates with its viewers. For a message to be subliminal it must 'exist or function under the threshold of consciousness'.[102] Subliminal messaging is not exclusive to pornography. In advertising, techniques such as 'flashing messages faster than the conscious brain can pick up, but the rest of the brain may decipher' have been employed to achieve this effect.[103] May extends this idea to the way pornography communicates misogynistic, culturally harmful messages to its viewers.[104] He argues that although the erotic character of pornography is apparent, the way in which its erotic dimension reinforces sexist depictions of women is subliminal.[105] This subliminal message is difficult to redress because it is practically impossible to form counter-speech against something you do not realise you have internalised.[106] This is similar to the argument put forward by Salpeter and Swirsky that 'a subliminal message' can easily 'convey a derogatory or prejudicial statement that manipulates the behaviour of the listener'.[107] Importantly, 'both males and females retain information longer and can recall it in more detail if … presented in a sexually arousing manner',[108] making pornography an especially powerful tool for creating unconscious bias. Through repeated exposure to pornography's misogynistic depiction of women and sex, someone's personal attitudes towards these subjects may be

[100] Children's Commissioner, *Basically … Porn is Everywhere* (2013) 7-8.
[101] Palmer (n 71) 42.
[102] Laura Salpeter and Jennifer Swirsky, 'Historical and Legal Implications of Subliminal Messaging in the Multimedia: Unconscious Subjects' (2012) 36 Nova L Rev 497, 499.
[103] ibid, 504.
[104] Larry May, *Masculinity and Morality* (Ithaca, NY: Cornell University Press 2018), 71.
[105] ibid, 72.
[106] ibid, 72.
[107] Salpeter and Swirsky (n 102) 508.
[108] May (n 104) 72.

unconsciously warped.[109] This in turn can cause behavioural changes which contribute to rape culture. This phenomenon illustrates how this cultural harm vehicle can affect everyone who exposes themselves to pornography, not only those who look to pornography to learn about sex.

Singling out pornography for legislation is an effective tool for combatting cultural harm through championing consent. Sexist depictions of women and girls exist in other forms of media but are particularly harmful in the way they manifest in pornography (especially that which is violent or eroticises non-consensual sex). Much of this relates to the way in which pornography subliminally communicates its misogynistic messages. This in turn, can affect anyone who exposes themselves to pornography over time. However, among young men who learn and purposefully copy the sexual scripts that pornography teaches them, and who are also exposed to misogynistic undertones subconsciously, the problem is much worse. This has had tangible consequences for young people as discovered by the Children's Commissioner.

2.2 Conceptualisation issues: the realistic requirement, and possession as a target for criminalisation

This section will look at two additional conceptualisation issues relating to the CJIA's drafting. The first relates to the CJIA's realistic requirement. This is the idea that the law intends to catch both real footage and realistic simulations of the prohibited categories.[110] The second issue relates to whether possession is an effective target for criminalisation in respect of combatting cultural harm.

Prior to the 2015 amendment, the realistic requirement was controversial and seen by some as removed from any of the Act's official aims. For example, Nair and Griffin were critical that in realistic simulations there is no actual harm to performers making the realistic requirement an unprincipled infringement on private life.[111] However, as the CJIA's official goal has shifted to cultural harm, concerns like this have become moot. Nevertheless, Palmer has remained critical of the realistic requirement. She contends that the statute, by drawing no

[109] Amanda Cawston, 'The feminist case against pornography: a review and re-evaluation' (2019) 62(6) Inquiry 624, 634.
[110] Criminal Justice and Immigration Act 2008, s 63(7)-(7A); HO 2006 Consultation Paper (n 22) 6.
[111] Abhilash Nair and James Griffin, 'The regulation of online extreme pornography: purposive teleology (in)action' (2013) 21(4) IJLIT 329, 343.

distinction between images of actual rape and realistic simulations, treats those in morally distinct situations in the same way.[112] This is because, unlike those who believe they are in possession of simulated material, those who believe they possess actual rape footage intentionally participate in the victim's violation and generate demand for more rapes to be carried out and filmed.[113] This is not an unfair point. However, Palmer's extrapolation from this, that by not distinguishing between real and realistic portrayals the law does not 'delineate culturally harmful depictions from benign ones', is misguided.[114] Simulated content can be extremely culturally harmful depending on the framing of the attack. This type of material is created to arouse the viewer and so may, for example, depict rape as pleasurable for both the attacker and the victim, or depict a victim changing their mind halfway through. This may contribute more to desensitising the public and trivialising assault than footage from an actual attack that exposes the true nature of the crime.

There remain significant challenges associated with the formulation of realisticness. CPS guidelines set out that the law is unlikely to prosecute 'artistic representations' of extreme pornography, but no further guidance is given.[115] Consequently, it remains uncertain what the CJIA is targeting. This has prompted Palmer to point out that scenes depicting rape as enjoyable for the victim and other such 'unrealistic' representations, might fall outside the scope of the offence.[116] If this occurred, it would spell profound failure for the Act. This type of depiction, which contributes to rape culture and feeds rape myths, is exactly what this legislation, and the realistic requirement, is meant to prevent. However, a post-2019 consent framework might fill this unrealistic loophole because all non-consensual sexual activity would be considered obscene.

The second conceptualisation issue to be reviewed in this section relates to possession as a target for criminalisation. Criminalising possession is only practical from a direct harm perspective and is not agile enough a concept to rationally apply to combating cultural harm, because possession offences relate to the idea of criminalising risk.[117] If we follow the REA's findings, there is a risk that anyone watching violent pornography might be motivated to

[112] Palmer (n 71) 56-57.
[113] ibid, 56-57.
[114] ibid, 57.
[115] CPS Extreme Pornography Guidance (n 49).
[116] Palmer (n 71) 56.
[117] ibid, 50.

commit sexual assault. As a result, criminalising possession of violent pornography should lead to less sexual assaults being committed, making this a logical step that should yield effective results. However, this logic breaks down when the aim of the legislation is combatting cultural harm. The cultural harm caused by extreme pornography is 'cumulative in nature': one person watching extreme pornography alone cannot create the cultural problem of an entire society becoming desensitised to rape.[118] Criminalising individuals for possession of extreme pornography is therefore likely to have little practical impact from a cultural harm viewpoint. Notwithstanding this, a possession offence may still have an important role in changing consumer habits, both by acting as a deterrent, and through the law's expressive power. Therefore, criminalising possession will make people question their pornography habits and behaviours and this, in turn, will help combat the sexist attitudes and rape culture cultivated by pornography's vehicles for harm.

To effectively combat cultural harm, it is key that legislation covers all realistic footage eroticising a lack of (or inability to) consent because of its contribution to rape culture. Thus, the realistic requirement is an essential element of the CJIA. Similarly, although a possession-based offence is difficult to justify in terms other than the prevention of direct harm, it may still be important in changing consumer habits by inviting people to reflect on their pornography use. Accordingly, both these aspects of the CJIA play a role in effectively combatting cultural harm.

2.3 Conceptualisation issues: over and under-inclusivity

The CJIA has been criticised for being overinclusive and underinclusive, meaning that it does not effectively catch all culturally harmful pornography whilst unfairly criminalising pornography that is not culturally harmful. This section will contend with these criticisms, starting with over-inclusivity followed by under-inclusivity.

The CJIA has been criticised for being too broad. For example, Beattie has asked why an Act, allegedly aimed at combatting cultural harm is linked to other 'deviant forms of sexuality' like bestiality and necrophilia.[119] This can be explained if we look at the CJIA from the perspective

[118] ibid, 49.
[119] Beattie (n 72) 660.

of championing consent through the 2019 redefinition of OPA-obscenity—animals and corpses are not capable of consent. However, as explained in Part 1, it remains unclear whether this redefinition of obscenity extends to the CJIA. Therefore, until Parliament confirms this intention, Beattie's question remains crucial and cannot be answered in definitive terms beyond disgust-based rationales.

The bestiality provision itself presents additional over and under-inclusivity challenges. Inconsistency is created between sexual offence provisions because possessing pornography depicting oral sex on an animal is a criminal offence,[120] even though committing this action is not an offence.[121] Paradoxically, this means the threshold for criminalisation is higher for sexually abusing an animal than for possessing an image of animal abuse. Post-2019, with the new (presumed) consent centric CJIA, the prohibition on pornography depicting this act is progressive and essential. However, if this law is now intended to champion consent, it seems inconsistent that the CJIA does not also prohibit the possession of pornography depicting the 'manual masturbation of/by an animal' which remains 'freely and easily available'.[122] This inconsistency undermines the consent-based rationale—an animal cannot consent to any sexual interference. This problem of under-inclusivity is created by the Act's over-specificity.

Over-specificity (and resulting under-inclusivity) is a phenomenon that plagues the Act more generally. Indeed, the provision criminalising the possession of pornography that depicts the 'serious injury to a person's anus, breasts or genitals' is another example of this.[123] This listing leaves scenes which involve serious injury to other body parts beyond the regulation's reach, which could lead to 'potentially ludicrous results'.[124] Another disturbing oversight relates to the 2015 amendment, by only listing non-consensual penetration it leaves non-consensual non-penetrative sexual attacks beyond the regulation's reach.[125] From a cultural harm perspective, an effective possession law should cover all non-consensual sexual abuse—whether penetrative or not—and all violent pornography.

[120] Criminal Justice and Immigration Act 2008, s63(7).
[121] McGlynn and Rackley, 'Striking a Balance' (n 7) 688.
[122] ibid, 688.
[123] Criminal Justice and Immigration Act 2008, s 63(7)(b).
[124] McGlynn and Rackley, 'Criminalising Extreme Pornography (n 9) 249.
[125] Criminal Justice and Immigration Act 2008, s 63(7A).

The CJIA suffers drafting weaknesses that prevent it from being as effective as it should be in combating cultural harm. It is not entirely convincing that the Act is overinclusive: the inclusion of categories not concerned with GBV can be explained by the post-2019 consent framework. However, in terms of combatting cultural harm through championing consent, it can certainly be argued that the Act is overly specific and consequently underinclusive.

2.4 Practical impact: the Act in action

This section will examine how the CJIA has been implemented to measure its practical effect on achieving the aim of combating cultural harm. It will provide an assessment on policing data based on McGlynn and Bows' research, which utilised a Freedom of Information request submitted to all 44 police forces in England and Wales.[126] The data they collected spans from April 2015 to March 2017,[127] meaning that it directly deals with how the offence was policed following the 2015 amendment, when the official aim of the CJIA became combatting cultural harm. Also, because the data predates 2019, what cannot be understood as relating to cultural harm must be thought of in terms of the censorship of obscene materials.

Considering the 2015 amendment introduced rape pornography into the CJIA,[128] it is surprising that between 2015 and 2017, only 9 incidents of rape pornography possession were recorded by the police.[129] The CPS has reported that in the three years following the amendment they prosecuted 53 cases of rape pornography, amounting to 1.7% of all extreme pornography-related prosecution in this time.[130] Despite ostensibly being the cultural harm-specific category, rape pornography has significantly lower numbers of recording and charging than other types of extreme pornography (except necrophilia).[131] McGlynn and Bows speculate that this might be because, against Parliament's intention, criminal justice personnel are interpreting the legislation as referring only to actual rapes and assaults rather than realistic simulations.[132] This corresponds to Palmer's warning that the criminal justice system is 'notoriously bad at identifying rape' in real life (let alone in pornography), and that they will almost certainly rely

[126] McGlynn and Bows (n 48) 479.
[127] ibid, 480.
[128] 2015 Amendment (n 4).
[129] McGlynn and Bows (n 48) 483.
[130] ibid, 483.
[131] ibid, 483.
[132] ibid, 483.

on rape myths when looking for rape pornography.[133] This means that culturally harmful depictions of sex, which feature coercion or reluctance as standard, might be ignored by authorities.[134] From a cultural harm perspective this is extremely concerning, especially when acknowledging sexual scripts and the way in which young people imitate them.

Instead of protecting women from GBV, this Act has evolved into an animal safeguarding law, with 85% of charges between 2015 and 2017 involving bestiality videos.[135] This is emphasised further by the fact that between those years, pornography depicting 'serious injury' and 'life-threatening acts' made up only 7% and 6% of charges, respectively.[136] This may be because, as suggested by McGlynn and Bows, 'images involving animals' are easy to identify.[137] However, it might also reflect that censoring obscene content has become the CJIA's overriding aim.

Another important aspect to note relates to the type of policing associated with the CJIA. Police guidance, when the legislation was first enacted, was 'not to be proactive in relation to this offence'.[138] Consequently, extreme pornography is rarely discovered unless the police is 'executing a warrant under different legislation', or searching a 'registered sex offenders' home for the purposes of risk assessment or after a tip-off'.[139] This lack of proactiveness, alongside the fact that rape pornography makes a practically negligible difference in the percentage breakdowns of convictions, notwithstanding the amendment, reveals that the CJIA has done little to refocus the statute from obscenity to cultural harm in terms of policing, and therefore has been ineffective in this respect.

In practice, the CJIA, even after the 2015 amendment, has mainly served the purpose of protecting animals from falling victim to bestiality. Protecting animal rights is undoubtedly a noble cause but seems far removed from the aims relating to the protection of women from GBV which initially drove the Act following Longhurst's death. Despite practical reasons why bestiality is the simplest type of pornography to identify and therefore police, it seems that its inclusion in the CJIA has diverted attention away from this goal. Moreover, the cultural harm

[133] Palmer (n 71) 56.
[134] ibid, 58.
[135] McGlynn and Bows (n 48) 481.
[136] ibid, 481.
[137] ibid, 481.
[138] ibid, 486.
[139] ibid, 486.

amendment has done little to refocus the CJIA back onto the protection of women because pornography featuring rape and other forms of GBV account for only a limited percentage of all CJIA cases. This seems to confirm that the Act is currently being used primarily to suppress obscene material. Through the Act's implementation it seems that, if the current aim of the CJIA is combatting cultural harm, then the Act is practically ineffective.

2.5 Conclusion

The aims underpinning the CJIA have evolved over time. The final official iteration of the Act came with the 2015 amendment, which was accompanied by a change in focus to combatting cultural harm. To effectively achieve this, it is important that pornography is singled out and recognised as not just one, among many, sexist depictions of women. This is because of the vehicles for harm—sexual scripts and subliminal messaging—which, although not unique to pornography, have a unique way of affecting pornography viewers. Similarly, the law's focus on realistic simulations of extreme pornography is critical in combating cultural harm. This is because simulated content, through its eroticisation of rape, can often be exceptionally culturally harmful. Unfortunately, the realistic requirement's drafting leaves the possibility that some of the most harmful content can escape the Act's reach. Also, in terms of drafting weaknesses, the Act is overly specific leaving some types of pornography featuring non-consensual sexual attacks unregulated. Moreover, a possession-based law (which might certainly have been interpreted as effective for combatting direct harm) cannot practically combat cultural harm because of its cumulative nature, but might have a social impact through law's expressive power.

In terms of the CJIA's practical impact, the data on how this legislation has been enforced reveals that, despite the relatively progressive aims that underpin this legislation, it is still an obscenity-based law which has mainly served the purpose of protecting animals from falling victim to bestiality.

However, if the obscenity framework has been replaced by a consent-based one post-2019, then many of the CJIA's problems subside. Indeed, this would create a more discernible thread connecting each of the Act's prohibited categories, and support the aim of combatting cultural harm by dismantling rape culture. Accordingly, Part 3 will explore more effective ways to achieve the aim of combatting cultural harm, by championing consent.

Part 3: Combatting cultural harm by championing consent

This section relies on the presumption that the CJIA's current aim is to combat cultural harm. As outlined in Part 2, this aim would be more effectively achieved if it were supported by an obscenity framework that relied on the OPA-obscenity redefinition in terms of consent. Although the new consent-based approach would solve many of the issues that plague the Act, to better combat the cultural harm associated with pornography, there are further steps that might be considered.

Firstly, the CJIA, by only focussing on extreme content, takes too narrow a view on what is culturally harmful. Indeed, as explained in Part 2, cultural harm is cumulative in nature, and rape culture cannot be corrected through the prohibition of extreme pornography as currently defined which is, 'rare, and not routinely viewed by the majority of consumers'.[140] Accordingly, this section will consider how pornography's harm is conceptualised in international instruments and apply this to the CJIA.

Of these international instruments, this section will mainly focus on the PACE recommendations relating to preventing the harm associated with violent and extreme pornography.[141] Following PACE's recommendations, this section will suggest possible changes to the CJIA that might better accomplish its current aim. This will include a study of the Government's 2019 Online Harms White Paper (OHWP), to assess how effective this supplementary scheme on regulating pornography might be in bridging the gaps left by the current OPA/CJIA regime. Similarly, also following PACE, this section will argue that education is a possible solution to legislative shortcomings. Consequently, it will look to New Zealand's (NZ) sex education curriculum, and Iceland's intimate partner violence awareness raising campaign, to see what lessons the UK could learn in implementing consent education.

3.1 The conceptualisation of pornography's harm in international instruments

[140] Ferguson and Hartley (n 26) 328.

[141] Council of Europe, Parliamentary Assembly, 'Resolution 1835 Violent and Extreme Pornography' (5 October 2011) (PACE).

Practically every instrument aimed at promoting gender equality (except the Istanbul Convention) makes some mention to a link between watching pornography, sexist attitudes, and GBV.[142] For example, the UN Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) highlights the vicious cycle that pornography contributes to—those who hold sexist attitudes are more likely to watch pornography, which in turn strengthens these views, contributing to the normalisation of GBV.[143] Of all the international instruments which mention this link,[144] the only one that is explicitly dedicated to pornography and its harm is the PACE Resolution on Violent and Extreme Pornography.[145] Conveniently, PACE's view is not far removed from McGlynn and Rackley's cultural harm theory aligning with the 2015 amendment. It promotes the idea that exposure to extreme pornography can desensitise society to 'moral coercion and physical violence', mostly against women victims.[146] However, PACE goes further by recognising that this is also true for 'other forms of hard and soft pornography'.[147] This idea supports the concept, put forward in Part 2, that the CJIA is too narrow and leaves much culturally harmful pornography unregulated—all coercive, non-consensual forms of pornography need to come under its purview.

Importantly, PACE provides a list of recommendations for member states to minimise this harm more effectively. The next two sections will analyse some of the recommendations relevant to the UK's current regime of regulating extreme pornography to explore ways the UK can more effectively combat cultural harm through the championing of consent.

3.2 PACE recommendation: legislative reform

The PACE recommendations advise member states to make a variety of 'legal and policy' reforms,[148] and to implement measures that will protect minors.[149] The current law in the UK

[142] Beattie (n 72) 658.
[143] UN Committee for the Elimination of all Forms of Discrimination against Women, 'General Recommendation No 19' in 'Note by the Secretariat, Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies' (29 July 1994) UN Doc HRI/GEN/1/Rev.1 (CEDAW) [12].
[144] Office of the High Commission for Human Rights, 'CCPR General Comment No. 28: Article 3 (The Equality of Rights Between Men and Women)' (Adopted at the Sixty-eighth session of the Human Rights Committee (29 March 2000)) [22]; Council of Europe, Council of Europe Gender Equality Strategy 2018-2023 (Adopted by the Committee of Ministers of the Council of Europe (March 2018)) 16; PACE (n 141) [6]-[7].
[145] PACE (n 141).
[146] ibid, [6]-[7].
[147] ibid, [7].
[148] ibid, [9.1].
[149] ibid, [9.2].

already meets some of these recommendations. For example, the UK already criminalises the possession of extreme pornography (the CJIA);[150] and has specific legislation criminalising the production and distribution of extreme pornography (the OPA).[151] However, the current OPA/CJIA regime in the UK does not adequately address all the recommendations. Accordingly, this section will first examine how the CJIA can be amended to meet some PACE requirements more effectively. It will then consider some of the objectives not currently being met by the OPA/CJIA regime and whether the Government's OHWP is well placed to bridge these gaps.

The CJIA meets the PACE recommendation of implementing a possession offence.[152] However, it cannot be said that this recommendation is being fully met because the CJIA's overly specific drafting leaves much violent and harmful content beyond the law's scope. Consequently, the CJIA would benefit from being amended again. Firstly, Parliament should expressly replace the disgust-based obscenity framework with a consent-based one. Secondly, the prohibited categories within the Act should be drafted more broadly. For example, the bestiality provision, in its current form, leaves many videos which depict sexual activity (that is not oral or penetrative) with an animal, unregulated.[153] This should be replaced with a provision, worded in a similar way to the necrophilia category,[154] criminalising the possession of all pornography depicting any sexual interference with an animal (whether dead or alive). This would be a more appropriate, consistent, and effective method for promoting consent. Similarly, in terms of violent pornography, depictions of serious injury to body parts other than the 'anus, breasts, or genitals' fall outside the scope of the CJIA.[155] This is inconsistent with the idea that a person cannot consent to serious bodily harm.[156] Likewise, the rape pornography provision only covers penetrative sexual assault rather than all non-consensual sexual activity.[157] A provision that truly champions consent would, much like the necrophilia provision, criminalise the possession of all pornography depicting non-consensual sexual interference with a person (including images depicting serious bodily harm).

[150] ibid, [9.1.5.2].
[151] ibid, [9.1.5.1].
[152] ibid, [9.1.5.2].
[153] McGlynn and Rackley, 'Striking a Balance' (n 7) 688.
[154] Criminal Justice and Immigration Act 2008, s 63(7)(c)
[155] ibid, s 63(7)(b).
[156] *Brown* (n 85); CPS OPA Guidance (n 5).
[157] Criminal Justice and Immigration Act 2008, s 63(7A).

The current extreme pornography regime cannot be said to fully meet PACE's recommendation to 'ensure effective implementation of existing laws regulating the production, distribution and sale of pornographic material'.[158] The CJIA was implemented to reduce demand for extreme pornography (consequently reducing supply) because of the OPA's inability to regulate pornography produced or platformed outside of the UK.[159] This attempt at curbing supply has been relatively ineffective. According to McGlynn and Bows many mainstream pornography sites still host extreme material without facing any legal sanctions.[160] Similarly, Vera-Grey et al. found that around 2% of images available on the front page of mainstream online pornography websites were labelled as relating to forced or coerced sex.[161]

The OHWP, on the other hand, seems like a promising development in this area, and is more likely to align with PACE recommendations. The OHWP deals with a large range of offences, including extreme pornography,[162] and designates the British Board of Film Classification (BBFC) as the regulator ensuring that 'pornographic material is not normally accessible to those under 18, and that … extreme pornographic material is not made available to any user'.[163] Importantly, the OHWP establishes a new 'statutory duty of care' making companies responsible for user safety and tackling harm caused by the 'content' they offer.[164] This new regime should be able to cut extreme pornography off at the source, and is better placed to take content down and/or make it inaccessible to those in the UK, even if the source is not UK-based, making it more effective than the current regime.

The OPA/CJIA regime cannot be said to fully meet the PACE recommendation requiring that laws 'provide adequate sanctions in case of violations, and monitor compliance and implementation'.[165] Although, OPA offences carry relatively heavy sanctions,[166] its jurisdiction is limited to England and Wales, and so overseas producers and distributers cannot be regulated. Similarly, the CJIA is not policed proactively,[167] meaning consumer violations are also not being adequately or consistently addressed. Again, the regime being suggested by

[158] PACE (n 141) [9.1.1].
[159] HO 2005 Consultation Paper (n 1) i.
[160] McGlynn and Bows (n 48) 487.
[161] ibid, 483.
[162] OHWP (n 6) 31.
[163] ibid, 33.
[164] ibid, 7.
[165] PACE (n 141) [9.1.2].
[166] The Obscene Publications Act 1959, s2(1)(b).
[167] McGlynn and Bows (n 48) 486.

the OHWP appears to be a better alternative because the BBFC will be given practical enforcement powers that are not limited to the UK. These will include: civil fines; serving of notices to companies who breach standards; publishing public notices on non-complaint companies; and, in severe cases, 'blocking companies' platforms from being accessible in the UK.[168] The Government is also exploring the possibility of implementing a new civil, and potentially even criminal, liability for senior managers, holding them personally accountable in cases of major breach of the new statutory duty of care.[169] Targeting companies rather than consumers is a more effective method of reducing supply of extreme pornography, because it cuts the content off at the source and circumvents the difficulties associated with policing individuals' online use.

The PACE recommendations on protecting minors, only requires that member states prevent 'the sale of pornographic material' to children.[170] However, this does little to stop young people accessing free, easily available pornography online. For example, despite the current laws in the UK, a study carried out by the BBFC found that '50% of 11-13-year-olds, 65% of 14-15-year-olds and 78% of 16-17-year-olds' report having seen pornography.[171] Of those interviewed 78% reported it 'coming up' accidentally when they were doing other things,[172] and 23% of them reported having intentionally sought pornography out.[173] Accordingly, exceeding the PACE recommendation, the OHWP proposes requiring all sites which present potentially age-inappropriate content for children to place family friendly filters on their site and to provide warnings for adult content.[174] This should help lower the incidence of children accidentally stumbling across pornography. Moreover, age-verification will be compulsory for commercial pornography websites.[175] This is intended to stop those children purposefully seeking out pornography from being able to access it. Such measures are important because, as explained in Part 2, through subliminal messaging and sexual scripts, pornography negatively impacts children's sexual socialisation, greatly contributing to the problem of young people not understanding consent and engaging in risky sexual behaviour.

[168] OHWP (n 6) 59-60.
[169] ibid, 60.
[170] PACE (n 141) [9.2.2].
[171] BBFC, *Young People, Pornography & Age-verification* (January 2020) 26.
[172] ibid, 26.
[173] ibid, 26.
[174] OHWP (n 6) 75-76.
[175] OHWP (n 6) 76.

Unfortunately, in isolation, it is unlikely that age-verification will be effective in championing consent or changing rape culture among young people. This is largely due to the relative ease with which UK age-verification requirements can be circumvented using a Virtual Private Network (VPN). VPN allows users to disguise their connection as coming from anywhere in the world,[176] meaning that they can disguise themselves as being in a country where the content they are seeking does not require age-verification. According to the BBFC, 23% of the children surveyed already knew how to work around age-verification in this way.[177] It is likely that this knowledge will rapidly circulate among young people once age-verification is implemented.

It can thus be said that the CJIA and the OPA have some major shortcomings. To fully meet all the PACE recommendations, the UK will need to broaden the scope of the CJIA so that it catches all pornography portraying non-consensual sexual interference with a human or animal. Unlike the OPA, the OHWP appears to provide practical solutions to tackling production and distribution of extreme pornography in the UK and beyond. Likewise, by tackling supply, it is likely that the OHWP will be more successful than the CJIA at decreasing the quantity of extreme pornographic material accessible in the UK. If implemented in its current form, it will also exceed PACE recommendations on protecting children from accidental (and intentional) access to pornography. These measures should help tackle the harm associated with viewing pornography (especially at a young age), and in changing UK attitudes towards women and sex. Amending the CJIA and implementing the supplementary OHWP should bring the UK up to the legislative standard recommended by PACE. However, legislative measures are not a silver bullet, especially because most can be circumvented by consumers using easily accessible tools such as VPN.

3.3 PACE recommendation: educational reform

The regime being proposed by the OHWP, in isolation, will not be enough to effectively champion consent and combat rape culture. One of the main problems with pornography is that, in the absence of proper sex education, children turn to it as an ‘instruction manual for

[176] Daniel Markuson, ‘How to change you IP and location with a VPN’ (*Nord VPN*, 26 March 2021) <https://nordvpn.com/blog/vpn-ip-location-changer/#:~:text=Your%20VPN%20app%20lets%20you,can%20also%20select%20the%20city)> accessed 12/04/2021

[177] BBFC (n 171) 56.

sex'.[178] Accordingly, providing children with specifically designed age-appropriate sexual education, which is responsive to children's needs, would alleviate their anxieties and consequent reliance on pornography as an educational tool. This in turn might prevent them from learning the sexual scripts pornography teaches, decreasing the damage it causes in young people, including them not understanding consent, and engaging in risky sexual activity. This is recognised by PACE which requires member states to 'develop sex education materials and programmes for children and young people'.[179] The UK has already recognised that it needs better sex education and has included it in their Ending Violence Against Women and Girls 2016-2020 Strategy.[180] The plan notes that ending GBV requires 'educating and challenging young people about healthy relationships, abuse, and consent'.[181]

This section will first look at the Children's Commissioner Study (CCS) highlighting what knowledge children in England lack.[182] The Children's Commissioner produced this report following evidence revealed in a previous study of a lot of 'forced or coercive sex by young adults against young people taking place in an extraordinarily casual way'.[183] The Council of Europe (CoE) does not give guidance on how to provide young people with effective sex education within the PACE Resolution.[184] However, the CoE Gender Equality Commission have commended Iceland's sex education project.[185] Thus, this section will look to Iceland for evidence of what PACE might be advocating for. Finally, this section will (based on reflections made by the CCS) turn to guidance from NZ on how best to teach children about relationships and sexuality in a way that champions consent.

Young people's sexual socialisation, beginning with their understanding of consent, must undergo significant changes which should begin in the classroom through sex education. This is supported by the extremely concerning findings of the CCS, highlighting the urgent need for educational reform in the UK. According to the CCS, the notion of 'seeking consent is largely alien to young people', in part due to adults' emphasis on 'giving rather than getting

[178] CCS (n 96) 43.
[179] PACE (n 141) [9.4.1].
[180] Home Office, *Ending Violence against Women and Girls: 2016-2020* (March 2016) 16.
[181] ibid, 16.
[182] CCS (n 96).
[183] ibid, 7.
[184] PACE (n 141) [9.4.1].
[185] Council of Europe Gender Equality Commission, *Activities and measures at the national level contributing to the achievement of the objectives of the Council of Europe Gender Equality Strategy 2018-2023: 2019* (Strasbourg, 15 Jan 2020), 177.

consent'.[186] A new curriculum must replace the current understanding of consent from 'absence of resistance', or 'not saying no', to championing positive consent and enthusiastic participation.[187] The CCS also highlights the gendered sexual double standard prevalent among young people where 'a sexual reputation enhances young men's status whilst diminishing young women's'.[188] Ultimately, this has led to a significant minority of young people seeing women 'wearing revealing clothing, drinking alcohol, visiting men's houses, and … sexting … as evidence of sexual availability', and thereby blaming women for any ensuing 'exploitation and violence'.[189] Accordingly, the CCS supports an education system that enables 'young people to critically explore gender'.[190] One of the most alarming results of the CCS is 'that young men register the reluctance of young women and use pressure to override it' which the study asserts is the result of 'a gendered (hetero)sexual script'.[191] Gendered stereotypes and rape myths (which are reinforced and amplified by pornography) are exactly the part of rape culture which must be combatted through education. Education should diminish young people's attraction to pornography in the first place and give them the resources to critically analyse the sexist messages that pornography subconsciously communicates, if they still choose to watch it.

The CoE Gender Equality Commission commended the Iceland education project, 'Crazy Love', as helping promote gender equality.[192] This project emphasises the importance of consent, boundaries, and aims to raise awareness among adolescents regarding intimate partner violence.[193] Following the CCS finding that many young people think 'being in a relationship' implies automatic consent,[194] a similar project in the UK might be beneficial. Furthermore, the initiative focuses on a new subject each year.[195] Significantly, this year's theme is 'pornography, its effects and consequences,' with the goal of equipping young people with the resources they need to 'critically think about their porn use'.[196] This is precisely the kind of campaign which has the potential to create cultural change among young people, neutralising

[186] CCS (n 96) 68.
[187] ibid, 68.
[188] ibid, 70.
[189] ibid, 11.
[190] ibid, 13.
[191] ibid, 90.
[192] Council of Europe Gender Equality Commission (n 185) 177.
[193] ibid, 177.
[194] CCS (n 96) 61.
[195] Council of Europe Gender Equality Commission (n 185) 177.
[196] ibid, 177.

the vehicles of harm utilised by pornography, and creating a society which understands and respects consent.

Importantly, 'Crazy Love' provides a toolkit for putting together workshops and training on how to create an atmosphere where young people can ask questions anonymously and have them answered in a safe way, in a secure environment.[197] A similar campaign, which is flexible and able to draw attention to new contemporary problems facing young people each year, could be extremely valuable in supporting the aim of combatting cultural harm through the championing of consent. However, although these kinds of projects and seminars are 'an important component of behaviour change' research shows that, on their own, information sessions have 'limited effect on the systems or attitudes which support sexual violence'.[198] Thus, it is important that any British equivalent programme is supported by a robust, sex education curriculum.

As identified by the CCS, sex education in the UK needs reform.[199] When discussing this reform, the CCS reflected on NZ's 'new thinking and practice' on exploring sexual consent with young people.[200] Since then, NZ has translated this thinking into a new holistic guide to teaching Relationship and Sexuality Education (RSE) for all school-aged children from years 1 to 13,[201] which will be considered below.

One of the key lessons any new sex education programme launched in the UK should learn from NZ, is that although developing students' understanding of consent and promoting safety in intimate relationships is key to cultural change, it is paramount that RSE is not 'framed by notions of risk and violence, because this can lead to programmes … driven by fear and

[197] Eva Halldora, 'Sjúkást í Tjörninni // Crazy love in Tjörnin' (18 September 2020) <https://tjornin.is/10986-2/> accessed 13/04/2021.
[198] National Association of Services Against Sexual Violence, *Framing best practice: National Standards for the primary prevention of sexual assault through education*, (University of Western Sydney, Australia, January 2009) 45.
[199] CCS (n 96) 12.
[200] ibid, 90.
[201] Ministry of Education, *Relationships and Sexuality Education: A Guide for Teachers, Leaders and Boards of Trustees, Years 1-8* (Wellington, New Zealand, 2020); and
Ministry of Education, *Relationships and Sexuality Education: A Guide For Teachers, Leaders and Boards of Trustees, Years 9-13* (Wellington, New Zealand, 2020).

blame'.[202] This chimes with the CCS findings that many of the harmful beliefs held by British children are connected to consent having been taught to them through a *no means no* rhetoric.[203]

Rather than taking this approach, NZ boasts a comprehensive RSE programme divided into levels 1-4 in primary school,[204] and levels 4-8 in secondary school.[205] The programme is designed in a scaffolding manner, to progress with child development so that pupils have the tools to navigate 'a range of relationships throughout their childhood, teen years, and adult life'.[206] For example, the youngest primary-aged children in NZ start with learning to recognise and name body parts (including their genitals) to help them learn how to communicate boundaries.[207] Age-appropriate, incremental teaching continues to build up until level 8. At this stage, pupils are able to understand consent, the ethics of sex, and critically evaluate 'societal attitudes to sex and sexuality', which includes an understanding of the 'social impacts of pornography'.[208] This demonstrates the extent of a properly conceptualised RSE curriculum. The NZ approach champions consent and combats rape culture through positive, preventative education, whilst simultaneously recognising and meeting children's need of understanding sex and sexuality, eradicating their need to turn to pornography for education. It also, seemingly, arms those who choose to watch pornography with the tools to counter its subliminal method of communication so that they do not develop culturally harmful attitudes.[209]

For real social change to take place, legislative reforms must be supported by educational ones. As identified by the CCS, children in England are 'crying out for meaningful, honest information about sex and relationships'.[210] This lack of information means that young people are relying on unreliable internet sources, including pornography, for their sex education. Consequently, there is evidence that they are internalising pornography's sexist messages, influencing how young men see their female peers,[211] and contributing to an environment where rape myths are unchallenged. Good educational reform should look to NZ for

[202] Ministry of Education, *Years 1-8* (n 201) 27. [203] CCS (n 96) 68.
[204] Ministry of Education, *Years 1-8* (n 201) 30.
[205] Ministry of Education, *Years 9-13* (n 201) 35.
[206] Ministry of Education, *Years 1-8* (n 201) 7.
[207] ibid, 30.
[208] Ministry of Education, *Years 9-13* (n 201) 39.
[209] ibid, 39.
[210] CCS (n 96) 7.
[211] ibid, 45.

inspiration. An RSE curriculum, similar to NZ's, will help in creating a society which understands and respects other people's boundaries, choices, genders and sexualities. The UK could also benefit from a supplementary project, like Iceland's 'Crazy Love', which is flexible and adapts to the contemporary issues facing young people as they present themselves.

3.4 Conclusion

Presuming Parliament intend for OPA-obscenity to extend to the CJIA, all non-consensual pornographic material must fall under the Act's jurisdiction. This will help send a social message that Parliament, and by extension society, recognise the harm associated with all pornography featuring non-consensual sexual interference with a person or animal, dead or alive. This is key to effectively combatting cultural harm as defined internationally. Unlike the OPA/CJIA regime, the OHWP's enforcement powers seem capable of policing the kind of content accessible to UK viewers, and stopping culturally harmful content from being able to be legally viewed. These changes should bring the UK's extreme pornography regime up to the standard recommended by PACE.

However, in isolation, the law cannot bring about social change (especially because people can get around the OHWP proposed age-verifications and local restrictions with relative ease using VPN). This is a cultural problem also requiring a cultural solution—the demand for culturally harmful material needs to be mitigated. An efficient way of doing this, which also prevents the damage done to young people through sexual scripts and subliminal messaging, is through sex education. As identified by the CCS, sex education in the UK needs to be reformed.[212] Children are depending on internet sources including pornography for sex education, and because of this they are internalising sexist messages, contributing to a belief in rape myths and victim blaming. The UK should look to NZ for inspiration on how to build a sex education curriculum that: progresses with child development; mitigates the risks associated with viewing pornography; and produces tolerant, diverse adults for whom consent is instinctual. Similarly, Iceland provides insight into running supplementary educational campaigns that pay attention to the contemporary needs of children. If the UK implemented these changes, it could more effectively champion consent and combat the cultural harm perpetuated by pornography.

[212] ibid, 12.

Conclusion

This article sought to investigate the aim of the CJIA, and its effectiveness in achieving it. To attain this goal, it first addressed the question of what the CJIA's aim is; then examined how effective the CJIA is at achieving its aim; and considered international perspectives on the harm associated with pornography, to inform potential reforms regulating extreme pornography in the UK.

Part 1 undertook a chronological approach through the developments of the CJIA. It started with the murder of Jane Longhurst in 2003, and the public fear this generated regarding extreme pornography and direct harm, and progressed along the timeline of the CJIA's development, until the 2015 amendment. Although the last official iteration of the Act in 2015 was driven by cultural harm concerns, the CJIA still operated within an obscenity and disgust framework, making it difficult to discern its current aim. However, if post-2019, the redefinition of OPA-obscenity has been extended to the CJIA, it becomes possible that a consent framework now supports the combatting cultural harm pursuit of the Act.

If this is the case, then many of the issues stifling the CJIA's effectiveness, as highlighted in Part 2, such as the inclusion of actions that do not have a discernible aim in protecting women (for example, bestiality and necrophilia), would subside. Similarly, a consent framework might fill the unrealistic loophole in the realistic requirement's drafting. Furthermore, it would support the law's expressive power in terms of possession, alleviating the problems associated with internalising sexual scripts and subliminal messages. A consent framework would also prevent criticisms of the CJIA's implementation, such as its inadvertent transformation into an animal safeguarding act. Indeed, championing consent is the best way to justify the CJIA in its entirety. Accordingly, a confirmation that Parliament's intent is to combat cultural harm through the championing of consent is essential.

Ideally, as set out in Part 3, this should be supported by the Act undergoing a further amendment, so that it explicitly covers all pornography featuring non-consensual sexual activity, with humans or animals, dead or alive. This will not only help combat cultural harm as it was defined by McGlynn and Rackley, but also as it was conceptualised in international

instruments.[213] Future work in this area may seek to take an intersectional approach to redefining cultural harm, exploring how pornography reinforces not just sexist attitudes, but also racist and heteronormative ones.[214]

Finally, because pornography contributes to a cultural problem, this article has asserted that a cultural solution, that reinforces legislative reform, is required. An efficient and effective way to do this is through the implementation of a new RSE curriculum in the UK. A similar notion has already been supported by the CCS,[215] and the HO.[216] For this, the UK should look to NZ's approach, and translate it into a British context. Importantly, as in NZ, the new curriculum should include an age-appropriate, scaffolding approach to learning consent, starting with primary-aged children, and progressing with them as they develop. In addition, this model would also provide students with tools designed to combat pornography's vehicles for harm, namely, subliminal messaging and sexual scripts, to effectively combat pornography's contribution to rape culture.

Ultimately, by conducting a comprehensive chronological examination of the evolution of extreme pornography's regulation, this article has highlighted the difficulty with ascertaining the CJIA's current aim. This, in turn, enabled the research to highlight the internal contradictions and drafting weaknesses of the CJIA, demonstrating that, in its current form, it is not fully effective at combatting cultural harm. Accordingly, this research has offered both legislative and educational reforms to help achieve the CJIA's aim more effectively. These reforms should put the UK back on the track of protecting women from the harm associated with extreme pornography.

[213] CEDAW (n 143) [11]-[12].
[214] Eran Shor and Golshan Golriz, 'Gender, Race and Aggression in Mainstream Pornography' (2019) Archives of Sexual Behaviour (48) 739.
[215] CCS (n 96).
[216] HO, *Ending Violence against Women and Girls* (n 180) 16.


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