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The Editorial Board would like to thank all of the staff and students from Newcastle University who have helped in the creation of this issue. Without their support, the North East Law Review would not be possible.

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Foreword by the Editor-in-Chief

I would like to welcome you to Volume 7, Issue 2 of the North East Law Review. This year's edition of the Review is an exemplary illustration of the quality of Newcastle University students in what can only be described as the most trying of times. The COVID-19 global pandemic may well have altered norms of life in almost every aspect possible, yet one norm has remained unscathed. That is the ability of Newcastle University students to produce high-quality work, displayed here for the pleasure of you, the reader. It has been a tremendous honour and privilege to work with the Academic Leads and my Deputy Editor to revive the North East Law Review after a couple of dormant years. To have played but a small part in bringing together this celebration of legal academia has truly been a pleasure, and one which I personally shall treasure beyond the walls of this University.

The North East Law Review cannot be a one person show. Rather, it demands the tireless attention of a multitude of individuals who have been involved in the creation of this Issue. Firstly, to my Deputy Editor, Colette Monahan. Thank you for being a brilliant sounding board and great a source of inspiration when working to revive this Review. It has been a pleasure to work in your company on this. Secondly, a huge debt of gratitude must go to the Academic Leads, Dr Ruth Houghton and Dr David Reader. They have both been an ineffable source of support for every person involved in the work of the review this year, and without their tireless effort, the North East Law Review would undoubtedly be a shadow of what it is currently. Thirdly, my sincere thanks must go to the Editorial Team. Whilst battling the trials and tribulations of a challenging academic year, they have displayed the highest professional standards and work ethic in editing the pieces contained in this review. Finally, none of this would be possible without the brilliant work of the Authors. They deserve all the plaudits for producing brilliant academic work that we get the privilege of showcasing. I hope that what awaits you inspires and fosters an essence of debate about some of the legal issues which dominate modern society. It has been a joy to read the scholarship contained in this journal, and I hope you share a similar experience.

James Merryweather

Foreword by the Deputy Editor-in-Chief

We would like to welcome you to Volume 7, Issue 2 of the North East Law Review. It has been a pleasure editing the North East Law Review this year, a collaborative journal which has allowed us to put together the best of Newcastle Law School despite the ongoing challenges of Covid-19. The aim of the North East Law Review is twofold; it serves to demonstrate the outstanding work of student authors but has also provided an important opportunity for students to contribute to legal debate and provide their own opinions on controversial topics. We would like to take this opportunity to thank all those who helped in this issue of the review. Firstly, thank you to the article writers for allowing us to publish their words; they are a testament to Newcastle University, and we hope you enjoy reading their pieces as much as we have. Secondly, to the Editorial Team, without whom this could not happen and whose tireless work editing these pieces has been nothing short of remarkable. Thirdly, we must of course thank our Academic Leads, Ruth Houghton and David Reader, for their consistent encouragement and support. Finally, thank you to the readers of this issue – we hope you are as fascinated by these articles as we are.

Colette Monahan

North East Law Review Editorial Board 2020-2021

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Daniel McIntosh

1. Introduction

The prevailing view is that algorithms offer greater efficiency in decision-making, hence why governments are keen to popularise their use.[1] They work far more quickly than their human counterparts and can reduce labour costs by replacing humans.[2] This is advantageous at a government level where resources are scarce and there is a backlog of data to process.[3] It is therefore in governments' interests to adopt them. While governments should always be accountable, it will subsequently be shown that the UK's current framework does not provide sufficient accountability of algorithmic decision-making at a government level. It will firstly be shown that algorithmic decision-making contravenes the principles of accountability (derived from general public law theory) due to insufficient transparency and difficulties in ascribing responsibility for decision-making. Secondly, the ramifications of the UK Government using algorithms will be exhibited. As algorithms are unaccountable, it may be unconstitutional for the UK government to adopt widespread use of them. Finally, while there have been solutions proposed to render algorithms accountable, it will be illustrated that they are inadequate. Overall, it will be concluded that at present algorithms are not fit for accountable use in the UK Government. The significance of this is that there must be an entire restructure of the present accountability framework in order to ensure adequate accountability, paving the way for future research.

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[1] See N Diakopoulos, 'Accountability in Algorithmic Decision Making' (2016) 59(2) Coms of ACM 56, 61; HJ Wilson et al., 'Companies Are Reimagining Business Process with Algorithms' (2016) Harvard Business Review <https://hbr.org/2016/02/companies-are-reimagining-business-processes-with-algorithms > - accessed 2/2/20; European Parliament 'Understanding algorithmic decision-making: Opportunities and Challenges' 2019 European Parliamentary Research Service, p20 <https://www.europarl.europa.eu/RegData/etudes/STUD/2019/624261/EPRS_STU(2019)624261_EN.pdf > - accessed 8/2/20

[2] A Etzioni and O Etzioni, 'Pros and Cons of Autonomous Weapons Systems' (2017) Military Review 71, 73

[3] M Cook, 'Artificial Intelligence in Government' (2020) < https://witi.com/articles/1361/Artificial-Intelligence-in-Government:-Current-Examples/ > – accessed 31/1/20

2. Algorithms Unfit For Accountable Use

2.1 Transparency Issues

Transparency is fundamental to accountability and is widely recognised as a prerequisite to accountability.[4] It is impossible for laypersons and key stakeholders to scrutinise decisions if they are unaware of how they have been made. If decisions are not scrutinised then errors will not be identified or remedied, as the principles of accountability require.[5] Although transparency and accountability are not interchangeable,[6] the latter cannot ensue without the former. Consequently, for algorithmic decision-making to be accountable, it must first be transparent.

There is controversy surrounding what transparency encompasses. Public bodies consider it to carry a restrictive definition whereby transparency and explainability are considered separate concepts,[7] implying that transparency does not impose a duty upon public authorities to ensure that information provided is understood by recipients. It is merely a duty to *publicise* information. While this approach offers simplicity due to its literal approach, it renders publication of information less valuable. If the recipients cannot understand the information, it becomes more difficult to identify issues that deserve an explanation or remedy. Practically, therefore, it seems more suitable to interpret transparency as encompassing not only openness, but also explainability and interpretability, as computer science researchers advocate.[8] While it contrasts public bodies' view, it should be endorsed as computer scientists are less likely to be burdened by such a suggestion thus may more willingly acknowledge the practical benefits stemming from explanations. If information is explained to recipients, it will lead to interpretability of the information. Consequently, it becomes easier to hold governments to

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[4] R Masterman and C Murray, *Constitutional and Administrative Law* (2nd edn Pearson Publishing 2018) 434; M Hancock MP 'Data Science Ethical Framework' 2016 Cabinet Office 1, 4; and B Treacy, 'Accountability – moving from theory to practice' (2019) 20(2) Privacy and Data Protection 4, 6

[5] D Oliver, *Constitutional Reform in the UK* (1st edn Oxford Publishing, 2003) 48

[6] L Edwards and M Veale, 'Slave to the algorithm? Why a right to an explanation is probably not the remedy you are looking for' (2017) 16(1) Duke Law & Technology Review 18, 41

[7] European Parliament 'Understanding algorithmic decision-making: Opportunities and Challenges' 2019 European Parliamentary Research Service p27 <https://www.europarl.europa.eu/RegData/etudes/STUD/2019/624261/EPRS_STU(2019)624261_EN.pdf > (accessed 8/2/20)

[8] Z Lipton, 'The mythos of model interpretability' (2018) ICML WHI 1, 15; BD Mittelstadt et al., 'The Ethics of Algorithms: Mapping the Debate' (2016) 3(2) Big Data & Society 6, 11; and B Lepri and N Oliver, 'Fair, Transparent, and Accountable Algorithmic Decision-making Processes' (2018) 31(4) Philosophy and Technology 611, 625

account as issues within the decision-making process are more likely to be uncovered, hence rendering transparency far more purposeful. Encompassing explainability and interpretability within transparency places a burden on governments, who are already short-staffed and constrained by limited resources,[9] as it requires additional time and money. Public bodies likely favour the former approach to transparency as it circumvents said burden. However, it is justifiable to impose this burden on the government as the ideal of transparency places a 'tremendous' burden on individuals to seek out information.[10] Information will likely be gleaned from a Freedom of Information request which while relatively straightforward still requires positive action. It therefore seems a valid quid pro quo that the government be expected to reciprocate the effort and explain the information that they are providing in order to make the effort worthwhile for laypersons or key stakeholders. It is consequently valid that transparency is considered to embody explanations that lead to interpretability as, if not, transparency would not be an effective prerequisite to accountability.

2.1.1 Illiterate Opacity

Algorithmic decision-making gives rise to illiterate opacity. Laypersons and key stakeholders have been described has having a lack of algorithmic literacy,[11] meaning they are unable to understand how algorithms work to produce results. The significance of this is that it prevents effective transparency from ensuing as it has been established that there must be an understanding of information for it to be of use in holding governments to account. Even where an expert offers an explanation, illiteracy shall prevent understanding. Consequently, the layperson may be unable to make a fully informed—thus meaningful—decision when exercising their ability to remove those who govern on their behalf from office, which is the means by which laypersons hold governments to account. Key stakeholders, such as opposition MPs, may also lack relevant knowledge which would reduce the effectiveness of more formal channels of accountability. In response to this, it has been suggested that illiterate opacity could

[9] (n 3)
[10] M Ananny and K Crawford, 'Seeing without knowing: Limitations of the transparency ideal and its application to algorithmic accountability' (2018) 20(3) New Media & Society 973, 979
[11] R Bhargava et al., 'Beyond data literacy: reinventing community engagement and empowerment in the age of data' (2015) Data-Pop Alliance White Paper Series, p30 <http://datapopalliance.org/wp-content/uploads/2015/11/Beyond-Data-Literacy-2015.pdf > - accessed 24/2/20

be attenuated with education programmes in algorithmic literacy.[12] Even though it would be an expensive solution, it would enhance the value of explanations as it would lead to a greater chance of interpretability. Transparency would more likely prevail and offer key stakeholders and laypersons more chance of being able to meaningfully hold decision-makers to account.

However, challenges arise when dealing with algorithms that have learning capacities as they prevent illiterate opacity from subsiding even with education. It has been assumed that explanations will always be available as 'even if laypersons do not understand how [algorithms] work, still experts do'.[13] Therefore, if recipients have been educated, experts can then supposedly transfer their understanding into an interpretable explanation for laypersons or key stakeholders. However, the issue with this idealistic solution is that machine-learning algorithms' functioning processes do not replicate human logic.[14] Indeed, they produce new knowledge and decisions are made with reference to inputs developed and correlated by the machine itself as they self-teach and learn progressively.[15] In contrast, human decisions are 'intuitive in character' and only consider factors which they can fathom.[16] This highlights the difference in how humans and algorithms make decisions. Therefore, it is appropriate to describe machine-learning algorithms as being incomprehensible to humans.[17] Consequently, even experts will be unable to ascertain how such algorithms arrive at a conclusion thus can offer no explanation to recipients, meaning transparency and resulting accountability cannot ensue. It also renders education pointless, which intends to increase transparency. Even if laypersons and key stakeholders have the potential to understand explanations, explanations will be impossible to offer if in relation to machine-learning algorithms.

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[12] J Burrell, 'How the machine 'thinks': understanding opacity in machine learning algorithms' (2016) 3(1) Big Data & Society 1, 10

[13] V Chiao, 'Fairness, accountability and transparency: notes on algorithmic decision-making in criminal justice' (2019) 15(2) Int JLC 126, 136

[14] R Berk and J Hyatt, 'Machine learning forecasts of risk to inform sentencing decisions' (2015) 27(4) Federal Sentencing Reporter 222, 223; D Murray et al., 'International human rights law as a framework for algorithmic accountability' (2019) 68(2) ICLQ 309, 319; and L Edwards, *Law, Policy and the Internet* (Hart 2019) 103

[15] Lepri and Oliver (n 8) 621; (n 13) 136; Edwards (n 14) 103; The Sir Henry Brooke Lecture for BAILII 'Algorithms, Artificial Intelligence and the Law' Freshfields Bruckhaus Deringer, London, Lord Sales, Justice of the UK Supreme Court 12 November 2019, p6 < https://www.supremecourt.uk/docs/speech-191112.pdf > - accessed 4/2/20

[16] (n 13) 126

[17] Mittelstadt et al (n 8) 7

2.1.2 Intentional Opacity

As it is possible for experts to understand algorithms without learning capacities,[18] it is still viable to argue that experts could explain how these algorithms make decisions, hence increase transparency. However, algorithms are routinely developed by commercial businesses external from governments. Businesses frequently deny access to the foundations of their algorithms as they often involve trade secrets that give them a competitive advantage. This leads to commercially developed algorithms being an 'inscrutable black box',[19] hence there is a lack of transparency as explanations become an impossibility. Commercial development of publicly used algorithms, and subsequent denial of access to information, has occurred in the US with their COMPAS system[20] and in the UK with South Wales Police's face recognition software.[21] As this has occurred in two different countries and involved numerous different companies, it highlights that it is a widespread contributor to a lack of transparency.

It is therefore advisable for governments to develop their own algorithms, potentially with the help of academics as with the Durham HART system.[22] While it is acknowledged that it would be difficult for governments to develop their own algorithms without commercial aid, it is possible as has been shown by the HART system. For it to be practically plausible, however, the government would likely need to employ a team of their own experts to avoid commercial interference. While expensive, it outweighs the costs of being unaccountable. This allows for transparency as actors will be able to offer explanations of how algorithms function as they will not be constrained by trade secrets. However, if algorithms are not developed by commercial experts, they are less accurate: COMPAS has an accuracy rate of 65%,[23] whereas HART's (a similar system) is 53%.[24] Notwithstanding this, the latter is still favourable as the developer of the algorithm is not preventing disclosure of information meaning issues emanating from such algorithms can be both illuminated and put right; rendering the process

[18] (n 13) 136
[19] Edwards (n 14) 101
[20] C Rudin, 'Stop explaining black box machine learning models for high stakes decisions and use interpretable models instead' (2019) 1 Nature Machine Intelligence 206, 208
[21] Law Society Commission 'The Use of Algorithms in the Justice System' 2019 The Law Society of England and Wales 1, 37
[22] M Oswald et al., 'Algorithmic risk assessment policing models: lessons from the Durham HART model and 'Experimental' proportionality' (2018) 27(2) Information & Communications Technology Law 223, 249
[23] J Dressel and H Farid, 'The accuracy, fairness, and limits of predicting recidivism' (2018) Science Advances Research Article 1, 2 (Table 1)
[24] (n 22) 229

more accountable.[25] Commercially developed algorithms lack the scope for such scrutiny and rectification as, for example, the company who developed the aforementioned face recognition software prohibit users from viewing or altering the software.[26] Overall, it is clear that many algorithms may lack transparency at present due to being commercially developed, but this problem is solvable.

2.2 Ascription of Responsibility

The decisive body in the decision-making process is relevant as principles of accountability require it to be clear who will remedy a situation or suffer the consequences, hence who is ascribed responsibility.[27] The identity of the primary decision-maker must therefore be clear. In cases of algorithmic decision-making, it may be unclear whether the primary decision-maker is the human or algorithm. It is widely acknowledged that in the context of public decision-making, the human should be the primary decision-maker and algorithms should merely aid them.[28] As it is the primary decision-maker that is accountable, the regular practices of human-focused accountability can apply to actors that employ technology.[29] The significance of the human being held to account is that it allows for adversarial disputation surrounding decision-making. Arguing with a human about their decision offers scope for explanation or reconsideration of their decision, both of which are principles of accountability.[30] If it was the algorithm that was the primary decision-maker, thus being held to account, there would be no scope for adversarial dispute.[31] Machines are physically unable to reason with humans, meaning the scope for said principles of accountability to ensue is severely limited. Although it may seem as though algorithms could provide reasons for their decisions through retrospectively analysing their chain of reasoning, it has already been established that developers may conceal such information, or the reasoning will be impossible for humans to

[25] (n 5) 48
[26] Law Society Commission 'The Use of Algorithms in the Justice System' 2019 The Law Society of England and Wales 1, 37
[27] (n 5) 48
[28] See M Wilson, 'Algorithms (and the) Everyday' (2017) 20(1) Information, Communication & Society 137, 141; Murray et al., (n 14) 323; (n 3)
[29] L McGregor, 'Accountability for governance choices in artificial intelligence: afterword to Eyal Benvenisti's foreword' (2018) 29(4) EJIL 1079, 1085
[30] (n 5) 48
[31] (n 13) 135

decipher. Algorithmic decisions would thus be unaccountable if they were the primary decision-maker in the process. Consequently, so long as humans are the primary decision-maker, accountability will ensue.

An accountability shortcoming arises where humans make a decision but ignore the algorithmic output. To ascertain whether the algorithmic output has been deviated from and why, judicial review proceedings are necessary. Although this will result in accountability through explanations of conduct, the shortcoming is that laypersons bringing an application will need standing, equating to having a sufficient interest in the matter.[32] Accordingly, algorithms may be routinely ignored without justification as not every decision will be scrutinised: laypersons with standing may have no interest in bringing an application, and those interested in doing so may not have standing. The likelihood of judicial review, and the accountability it brings, is therefore limited. To ensure all counts of human ignorance of algorithms are subject to accountability, it is worth considering algorithms as experts. While not suggested in the literature, it has the potential to combat said shortcoming if applied in conjunction with a proposal relating to expert advice. It is not outrageous to consider algorithms as experts: they are routinely developed by computer science experts and trained with data produced by expert government decision-makers. Algorithms have also been shown to be more accurate than expert humans.[33] Accordingly, it is possible to analogise and compare algorithms to the Competition and Markets Authority (CMA), an expert body, as both offer suggestions to government actors on how to make decisions. Lord Leveson suggested that in relation to CMA advice on specific media merger cases, the Secretary of State must either accept the advice, or explain why the advice was ignored.[34] This introduces a further level of immediate accountability as there must be a valid reason for departing from expert advice.

Although this proposal never materialised, it is worth considering it in the context of expert algorithms as it would lead to immediate and mandatory explanation of why an actor circumvented algorithmic outputs, hence would render them accountable without the shortcomings of judicial review hindering the scope for this. The accountability advantages of

[32] Senior Courts Act 1981 s.31(3)
[33] J Kleinberg et al,. 'Human decisions and machine predictions' (2018) 133(1) Quarterly Journal of Economics 237, 237
[34] Lord Leveson 'The Leveson Inquiry: An Inquiry into the Culture, Practices and Ethics of the Press' (Independent report, 2012), vol.3, Part I, Ch 9, para 6.11

this suggestion are therefore clear and would *prima facie* ensue. However, the issue with this proposal is that it may actually reduce the scope for accountability rather than enhance it. Humans may consciously decide to accept the algorithmic output due to it being easier than having to explain why they ignored the algorithm. Even in the absence of this proposal, actors are reluctant to reject algorithmic outputs, specifically because they would find it difficult to explain why they overlooked them.[35] If this suggestion was adopted, it would lead to more deference to the algorithm as actors would definitely have to explain why they deviated from the output, as opposed to presently where there is only a slim chance of having to do so. Algorithms would therefore become the primary decision maker as human input would likely be nominal, rendering accountability extremely difficult. Therefore, it is not advisable to endorse Leveson's suggestion. This shows there is a shortcoming in accountability where actors ignore algorithms, and that there is no obvious way to prevent actors simply ignoring algorithmic outputs without offering any explanation.

The above issue only materialises where humans ignore algorithms. To ascertain if said issue will come to fruition, it is worth evaluating algorithms' influence on humans. It is 'difficult to determine the influence of the algorithm's results on the final decision'[36] as the degree of reliance that the human places on the algorithm is unquantifiable thus ambiguous. This creates the potential for algorithms to play a greater role than they should. It has been proclaimed that human discretion is not affected by algorithmic results.[37] This would permit straightforward ascription of responsibility as the human would be the primary decision-maker and the algorithm, while considered, would be a mere aid. This would lead to accountability advantages offered by adversarialism. It is valid to exclaim that discretion is unaffected as there is a US Supreme Court case—relating to algorithms in the public sector—which held that algorithmic decision-making 'cannot be determinative'[38] meaning humans must be the primary decision-maker. Although not binding, other countries will likely follow this approach given the authority of the US SC and the desire for algorithms to only aid the human decision-making process.[39]

[35] Murray et al., (n 14) 317
[36] Murray et al., (n 14) 323
[37] (n 29) 1082
[38] *State v Loomis* [2016] 881 NW2d 749, 767
[39] See (n 22) 230; Wilson (n 28) 141; Murray et al., (n 14) 323; (n 3)

However, a flaw with this position is that it assumes the presence of human autonomy. It has been discovered that humans 'afford significant weight to… purported scientific calculations'[40] thus their discretion is affected, and they are unlikely to depart from the algorithmic output. Advocates for human autonomy would dismiss this argument as having disregard for the integrity of human decision-making due to humans being 'intuitive in character'[41] hence only consider algorithmic outputs in conjunction with their own reasoning. However, there is psychological evidence corroborating the theory that humans do consider algorithmic conclusions to have a sense of finality about them and will likely side with whatever conclusion the algorithm produces.[42] Consequently, although the politico-legal perspective is that human influences in algorithmic decision-making 'are many',[43] this an idealistic desire for accountability as the psychological evidence shows this to be incorrect.

Aforementioned issues surrounding ignorance of algorithms will not occur in practice, but more serious accountability issues will arise. Algorithms may not only inform, but actually make decisions as human input will likely be nominal thus reducing them to merely rubber-stamping algorithmic outputs.[44] It is therefore unreasonable to proclaim that regular practices of accountability will apply to actors who employ this technology and that human inputs are many, as it is the technology that is making decisions. This will lead to accountability issues as the algorithm becomes the primary decision-maker and, therefore, should be held responsible. It is difficult to hold a machine to account as its status as an inanimate creation means it is unable to offer adversarial dispute;[45] remedy its decision; or offer any explanations. This contrasts with what the principles of accountability require.

2.3 Conclusion

In conclusion, it is clear that algorithms are unfit for accountable use in governments. They are opaque due to their complex nature and commercial design. As transparency is a precursor to

[40] (n 29) 1082; DK Citron, 'Technological Due Process' (2007) 85 Washington University Law Review 1249, 1271
[41] (n 13) 126
[42] Ibid, 134 & 136
[43] (n 1) 57
[44] B Wagner, 'Liable, but not in control? Ensuring meaningful Human Agency in Automated decision-making systems' (2019) 11(1) Policy and Internet 104, 117; Murray et al., (n 14) 317
[45] (n 1) 61

accountability, opacity prevents accountability from ensuing. Additionally, although the issues surrounding human ignorance of algorithms will unlikely occur in practice, a lack of autonomy will result in algorithms being the primary decision-maker. This has significant consequences as algorithms lack adversarial skills needed for accountability, hence are unaccountable. The ramifications of this in the UK will become clear.

3. UK Context

It has already been established that it is in the government's interest to adopt algorithms, but rather than just mere adoption, the UK government is aiming to make the UK a 'global centre for AI' and has plans to use algorithms extensively.[46] Examples include estimating population using satellite images and ascertaining eligibility for benefits. The UK government have stated that they do not want other governments to 'seize the advantage' of algorithms before they do, hence wish to act quickly.[47] The significance of this is that the UK government may have failed to properly consider the accountability-related ramifications of adopting algorithms.

The UK government has committed to ensuring accountability through facilitating transparency of algorithms' data.[48] There are two flaws with this attempt to ensure accountability. Firstly, transparency is only a prerequisite to accountability: the two 'are not synonymous'.[49] The government being transparent does not automatically result in it becoming accountable. Secondly, synonymous with the typical perspective of public bodies, there was no mention of providing necessary explanations to ensure that information is understandable to recipients. This significantly inhibits key stakeholders' ability to meaningfully scrutinise the data; hence the government will unlikely be held to account as issues will not be discovered, meaning explanations or reconsiderations will unlikely be requested. Overall, it is clear that the UK government has not afforded proper consideration of the accountability ramifications

[46] Government Policy Paper 'Artificial Intelligence Sector Deal' 2019 <https://www.gov.uk/government/publications/artificial-intelligence-sector-deal/ai-sector-deal > - accessed 28/1/20
[47] Ibid
[48] Ibid
[49] Edwards and Veale (n 6) 41

of adopting mainstream use of algorithmic decision-making, and its method of supposedly ensuring accountability is fundamentally inadequate.

The consequences of the UK Government's inadequate attempt at ensuring accountability could be catastrophic. The accountability framework in the UK emanates from its unwritten Constitution. The Constitution is derived from numerous sources, most notably conventions. Of relevance is the convention of individual ministerial responsibility which ensures accountability.[50] It stipulates that a minister must be able to account for their decisions,[51] meaning that their actions must be transparent, and it be clear where responsibility lies. It is likely that ministers will be unable to comply if algorithms are used as they have been shown to fall foul of these criteria. The result of this is that the convention will be breached. This may render use of algorithms by the UK government unconstitutional, which has two detrimental consequences. Firstly, the purpose of the constitution is to regulate government power.[52] Therefore, if conventions that do so are not followed, then government power is unregulated. The significance of this is that unregulated power will inevitably lead to abuse of power, which will likely have extremely damaging effects on public rights. Indeed, this will likely occur as the government have promised to publicise the data underpinning their algorithms. This will undoubtedly lead to laypersons' right to privacy being breached as certain training data will include personal data. This highlights the implications of unregulated power. Secondly, another purpose of the constitution is to govern the relationship between the government and citizens.[53] If the government is acting unconstitutionally, it is sending a message to citizens that it is not concerned with maintaining a good relationship with them. This may lead citizens to exercise their ability to remove from office those who govern on their behalf. The significance of this is very clear, and it is not in the interests of any UK government for this to occur.

It is therefore clear that adoption of algorithms by the UK Government would have catastrophic constitutional ramifications due to a lack of accountability. The government already has extensive plans to further its use of algorithms, leaving them two choices: either continue as

[50] Lord Nolan 'First Report of the Committee on Standards in Public Life' 1995 1, p3 & 5 – <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/336919/1stInquiryReport.pdf - accessed 5/3/20 >; and House of Commons library 'Collective responsibility' 2016 Commons Research Briefing – <https://researchbriefings.parliament.uk/ResearchBriefing/Summary/CBP-7755> - accessed 8/2/20

[51] Cabinet Office 'Ministerial Code' 2019 para 1.3(b)

[52] University College London 'What is the UK Constitution?' 2012 The Constitution Unit - <https://www.ucl.ac.uk/constitution-unit/what-uk-constitution/what-uk-constitution > - accessed 31/1/20

[53] Ibid

they are and render their practices unconstitutional, or revise their accountability framework to allow algorithmic decisions to be held to account. On the basis that commercial companies which are accountable report improved stakeholder trust,[54] it is advisable for the government to proceed with the latter as improved trust would likely lead to them remaining in office, the advantages of which are clear.

4. Issues with suggested solutions

As restructuring the traditional accountability framework would be extremely complex, there have been numerous suggestions of how to improve accountability of algorithms. The prevailing view advocates for increasing transparency, whether that be transparency of data used, how algorithms function or human involvement in the process.[55] The underlying rationale for this is that transparency will lead to enhanced scrutiny of the process which will illuminate issues and lead to explanations or reconsiderations, thus accountability.[56] It is consequently clear why so many scholars have suggested increasing transparency as a solution. However, they have all overlooked the numerous shortcomings of transparency as a solution. Firstly, transparency has already been shown to not equate to interpretability; it privileges seeing over understanding, even with explanations, as many people are algorithmically illiterate. This makes scrutiny extremely difficult if they cannot understand what they are given. Thus, accountability cannot ensue. Secondly, transparency may not be possible due to commercial protection of trade secrets. It is unreasonable to compel disclosure of information from private companies as it undermines the purpose of intellectual property laws. Thus, transparency and resulting accountability cannot ensue. Thirdly, transparency does not remedy the lack of adversarial dispute offered by algorithms. Human input will likely be nominal, meaning a solution should be how to hold the algorithm to account not just to reveal more information about the process. Being able to see that the algorithm is making the decision will not improve

[54] Treacy (n 4) 6
[55] See Lepri and Oliver (n 8) 621; N Diakopoulos, 'Algorithmic accountability' (2015) 3(3) Digital Journalism 398, 402; (n 1) 60; E Copeland, '10 principles for public sector use of algorithmic decision making' (Nesta Blogs 2018) – <https://www.nesta.org.uk/blog/10-principles-for-public-sector-use-of-algorithmic-decision-making/ > - accessed 6/2/2020; Murray et al., (n 14) 311; European Parliament 'Understanding algorithmic decision-making: Opportunities and Challenges' 2019 European Parliamentary Research Service, p51 <https://www.europarl.europa.eu/RegData/etudes/STUD/2019/624261/EPRS_STU(2019)624261_EN.pdf > – accessed 8/2/20
[56] (n 1) 61

its ability to communicate with humans and alter its decisions, hence render it accountable. Finally, increasing transparency may be prohibited by law. Sensitive data is used as input data for the algorithms,[57] but the GDPR prohibits public disclosure of such data, meaning it cannot be scrutinised and give rise to accountability.[58] In summary, increasing transparency is clearly not a viable solution as it would not improve accountability. The prevailing view in the literature is therefore inadequate and cannot be relied upon as an effective solution.

It is clear that solutions to this issue have not been properly considered, thus a robust solution is not forthcoming. As accountability is such a wide-ranging concept, it is clear that it cannot be solved with such a simple solution as increased transparency. Therefore, an entire restructure of the UK's accountability framework is required, potentially departing from traditional post-hoc accountability that has sufficed for decades. It seems a modern issue requires a modern structure if it is to be resolved – policy must indeed match the pace of technology. Although this may be considered an insurmountable task, the public sector should note that corporate bodies have been subjected to new forms of responsibility in the advent of technological advances.[59] This illustrates that it is possible to alter processes to facilitate adaptation to modern issues and be accountable even where technology is involved. The comparison illustrates the current difference in approach, and it is time that the UK Government follow suit. While it would not be straightforward, and at present remains a purely speculative suggestion, it is an excellent foundation upon which future research can stem from.

5. Conclusion

To conclude, algorithms are presently unfit for accountable use in the UK Government. There is a need for transparency in order to facilitate accountability, but algorithms lack transparency due to people lacking relevant understanding and developers not wishing to publicise information which reveals how algorithms function. While there are solutions to both issues,

[57] T Zarsky, 'The Trouble with Algorithmic Decisions: An Analytic Road Map to Examine Efficiency and Fairness in Automated and Opaque Decision Making' (2016) 41(1) Science, Technology and Human Values 118, 118

[58] 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), OJ 2016 L 119/1 – Article 9(1)

[59] DU Gilbert et al., 'Accountability in a Global Economy: The Emergence of International Accountability Standards' (2011) 21(1) Business Ethics Quarterly 23, 23

the solutions have shortcomings thus would still be a compromise. Accountability also requires ascription of responsibility and for the relevant body to be able to explain and solve any issues. As the primary decision-maker is likely the algorithm, this gives rise to a lack of adversarial dispute as they are unable to explain or solve issues, hence impinging accountability. It is clear that algorithms are unaccountable, meaning adoption of them by the UK Government is likely unconstitutional. The seriousness of this is obvious: it may lead to the government being removed from office. It is clear there must be a solution, but the prevailing proposal would inadequately solve the problem. Overall, it is clear that algorithms are presently unaccountable and if they are ever to be accountable in order to prevent constitutional anarchy, there must be an entire restructure of the present accountability framework.

Analysis of FOSTA's Constitutionality: How the Supreme Court should approach this issue

Naoise Webster

Introduction

This article will explore whether the 'Allow States and Victims to Fight Online Sex Trafficking Act of 2017', (FOSTA) breaches the First Amendment of the US Constitution.[1] The First Amendment states that "Congress shall make no law … prohibiting the free exercise or abridging the freedom of speech."[2] FOSTA strikes at the participatory nature of the internet by holding intermediary platforms accountable for the speech of third parties thus compromising free speech values envisaged in the First Amendment. Given the strong constitutional protection, such restrictions are only legally permissible if they are able to pass the strict scrutiny test. To pass the strict scrutiny test FOSTA must be necessary to fulfil a compelling interest; be narrowly tailored to that interest; and be the least restrictive means of achieving the interest. This article will argue that none of these conditions are met, and that FOSTA is therefore unconstitutional. The fight to revoke FOSTA has already begun in the Woodhull litigation where the plaintiffs argued that FOSTA breaches the First Amendment.[3] However, we cannot know whether FOSTA will be revoked until the Federal Supreme Court (SCOTUS) hear the plaintiff's case. This article suggests how SCOTUS should approach and decide this constitutional question.

The First Amendment states that "Congress shall make no law…prohibiting the free exercise or abridging the freedom of speech". The 'Allow States and Victims to Fight Online Sex Trafficking Act of 2017' (FOSTA) strikes at the participatory nature of the internet by holding intermediary platforms accountable for the speech of third parties, thus compromising free speech values envisaged in the First Amendment. Given the strong constitutional protection, such restrictions are only legally permissible if they are able to pass the strict scrutiny test. To pass the strict scrutiny test FOSTA must be necessary to fulfil a compelling interest; be narrowly tailored to that interest; and be the least restrictive means of achieving the interest.

[1] U.S. Constitution, Amendment I
[2] Ibid
[3] *Woodhull Freedom Foundation et al v the AG of the United States* No. 18-5298, (D.C. Cir. 2020) 15

None of these conditions are met, so FOSTA is therefore unconstitutional. The fight to revoke FOSTA has already begun in the Woodhull litigation where the plaintiffs argued that FOSTA breaches the First Amendment. However, we cannot know whether FOSTA will be revoked until the Federal Supreme Court (SCOTUS) hear the plaintiff's case.

FOSTA strikes at the heart of the participatory nature of the internet:

FOSTA is unconstitutional and ought to be struck down by SCOTUS for violating the First Amendment. The application of the First Amendment to online platforms is well established in the case of *Reno*.[4] In this case SCOTUS emphasised the central role of the internet in protecting the freedom of speech guaranteed under the First Amendment. They described the internet as, "The most participatory form of mass speech yet developed."[5] FOSTA strikes at the heart of the participatory nature of the internet by holding 'intermediaries' accountable for the speech of those participating on their platform. As online intermediaries are platforms where third parties can express themselves and communicate, they have a central role in preserving free expression in the modern age of the internet. Indeed, online intermediaries like Facebook and Twitter have changed the way in which we express ourselves and communicate. In 2018 Congress decided to compromise free speech values by passing FOSTA. FOSTA was supposed to combat online sex trafficking by making it easier to "prosecute criminal actor websites".[6] This was done by amending section 230 of the Communications Decency Act (CDA).[7]

Section 230 of the CDA granted online intermediaries legal immunity from materials posted to their platform by third parties.[8] It stated: "No provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider".[9] Critics claimed that section 230 had created a loophole in the law, whereby sites that knowingly supported human trafficking ventures could benefit from legal immunity as they could not be treated as the publisher of the illegal material.[10] Many linked this to an increase in human trafficking, as intermediary platforms like Backpage.com

[4] *Reno v. ACLU*, 521 U.S. 844, 879 (1997)
[5] U.S. Constitution, Amendment I
[6] House Report. 'Allow States and Victims to Fight Online Sex Trafficking' No. 115-572, (2018) p3
[7] 47 U. S. C. § 230
[8] 47 U. S. C. § 230 (c)(1)
[9] 47 U. S. C. § 230
[10] Jeff Kosseff, *The Twenty Six Words that Created the Internet* (Cornell University Press, 2019)

(Backpage) were facilitating traffickers and making the crime easier to conduct. FOSTA was Congress' answer to this apparent loophole in the law.[11] This law dismantled the immunities enjoyed under section 230 CDA and imposed severe criminal and civil penalties on intermediaries[12] for owning, managing or operating "an interactive computer service…. with the intent to promote or facilitate the prostitution of another person or attempting or conspiring to do so."[13] The only defence is that prostitution is legal in the relevant jurisdiction.[14] There is also an aggravated offence found in section 2421B for "[p]romoting or facilitating the prostitution of five or more persons or acting in reckless disregard of the fact that such conduct contributed to sex trafficking".[15]

FOSTA also increases opportunities to bring cases before the courts. Section 2124C ensures victims of trafficking under section 2421B may bring civil suits against the intermediary. Moreover, section 1595 authorizes a State Attorney General to bring civil actions in *parens patriae* on behalf of residents of the state who have been "threatened or adversely affected by any person who violates".[16]

SCOTUS should find that FOSTA does not meet the strict scrutiny standard:

This fight against FOSTA has already begun through the *Woodhull* litigation.[17] Plaintiffs in *Woodhull* fear prosecution under FOSTA despite having no intent to promote or facilitate sex trafficking. These plaintiffs have been granted standing by the District of Columbia, Court of Appeal[18] to challenge FOSTA's constitutionality before SCOTUS.

FOSTA constitutes a content based restriction as it alters the substance of what can be said.[19] FOSTA therefore must pass the strict scrutiny test to be deemed constitutional.[20] The strict scrutiny test demands the provision is in pursuit of a compelling state interest. FOSTA claims

[11] Eric Goldman, 'The Complicated Story of FOSTA' (2019) 17 First Amend. L. Rev. 279
[12] 18 U.S.C.A. § 2421A.
[13] Ibid.
[14] Ibid (2)(e)
[15] Ibid § 2421B
[16] *Woodhull Freedom Foundation et al v the AG of the United States* No. 18-5298, (D.C. Cir. 2020)
[17] Ibid
[18] Ibid
[19] *Reed v Town of Gilbert* 135 S.Ct. 2218 (2015)
[20] Ibid

to pursue the compelling interest of combatting online sex trafficking.[21] However, the provision fails to achieve this in a proportionate and effective way. Firstly, to pass the test the legislation must be necessary to achieve a compelling state interest.[22] Secondly, it must be narrowly tailored to that compelling interest.[23] Thirdly, the provision must constitute the least restrictive means possible to achieve the compelling interest.[24] The SCOTUS ought to deem FOSTA unconstitutional under each of the three prongs of the strict scrutiny test. However, FOSTA need only fail one of these hurdles to deemed unconstitutional under the First Amendment.[25]

Part one of this article deals with the first prong of the strict scrutiny test and concludes that FOSTA is not necessary to fulfil its compelling interest. To prove a provision is necessary the case of *Brown* highlighted that there must be a causal link between the harm done and the measure which is meant to combat the harm.[26] However, there is little evidence of a causal link between section 230 immunity and an increase in sex trafficking. Even if such a causal link could be established, FOSTA is incapable of achieving its compelling interest as it targets the visibility of the crime as opposed to the crime itself. Therefore, in addition to being unnecessary, FOSTA is actively harmful to the trafficking victims that the provision was designed to protect.[27] As FOSTA's provisions are completely incongruent with its purported compelling interest, it could be queried whether FOSTA was actually designed for combatting sex trafficking at all.[28]

Part two examines the second prong of the strict scrutiny test and concludes FOSTA is not 'narrowly tailored to its compelling interest'.[29] FOSTA is not narrowly tailored as it refers to 'prostitution' as opposed to sex trafficking.[30] The wording of FOSTA fails to tailor itself to the conduct its compelling interest aims to combat because key terms like 'prostitution', 'promote' and 'facilitate' are not defined.[31] FOSTA is also not narrowly tailored to the 'bad actors' it was

[21] House Report. 'Allow States and Victims to Fight Online Sex Trafficking' No. 115-572, (2018)
[22] *Sweezy v. New Hampshire*, 354 U.S. 234, 265 (1957)
[23] *Austin v. Michigan Chamber of Commerc*e, 494 U.S. 652, 655
[24] *United States v. Playboy Entertainment Group,* (2000) 529 U.S. 803
[25] 47 U. S. C. § 230
[26] *Brown v Entertainment Merchants Association,* (2011) *546 U.S. 786*
[27] Laura Chamberlain, 'FOSTA: A Hostile Law with a Human Cost' (2019) 87 Fordham L. Rev. 2171
[28] Alexandra Levy Yelderman, 'The Virtues of Unvirtuous Spaces' (2017) 50 Wake Forest L. Rev. 403, 419
[29] *Sweezy v. New Hampshire*, 354 U.S. 234, 265 (1957)
[30] 18 U.S.C.A. § 2421A.
[31] Ibid

supposed to capture.[32] This is largely down to the ill-defined *mens rea* requirement in sections 2124A[33] and 1591.[34] The failure to tailor FOSTA's provisions to its compelling interest is already having major effects on the safety of consensual sex workers as it has led to the eradication of platforms sex workers used to vet clients and share information.[35]

Part three will examine FOSTA under the lens of the third and final prong of the strict scrutiny test. It will be shown that FOSTA is not the least restrictive means of combatting online sex trafficking; other legislation like the Travel Act served the compelling interest of combatting sex trafficking in a less restrictive way. Indeed, it was the Travel Act that ultimately caused the demise of Backpage. Moreover, FOSTA did not constitute the least restrictive means of compensating victims.[36] Crucially, the problems with compensating victims that arose under section 230 CDA were due to overly broad judicial interpretation of the immunity which was at odds with Congressional policy. It was never down to section 230 CDA itself.[37]

The final Part will examine the *Woodhull* cases and argue that both courts failed to take an adequate textual approach[38] to interpreting the First Amendment and the question of Article III standing. A strong textual approach should ground SCOTUS' approach to FOSTA's constitutionality. It will be argued that a failure to do this ignores important warnings from SCOTUS in *Packingham*[39] and *Reno*[40] about the special relationship between the internet and free speech. In *Reno,* Justice Dalzell asserted that the internet should attract "the highest protection from governmental intrusion".[41] In *Packingham*, Justice Kennedy wrote, "The Court must exercise extreme caution before suggesting that the First Amendment provides scant protection for access to vast networks in that medium."[42]

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[32] Defendants' Opposition to Plaintiffs' Motion for Preliminary Injunction and Motion to Dismiss Plaintiffs' Complaint at 10, Woodhull Freedom Found. v. United States, 334 F. Supp. 3d 185 (D.D.C. 2018) (No. 18-CV-01552), ECF No. 16
[33] 18 U.S.C.A. § 2421A.
[34] Ibid § 1591
[35] Freedom network USA (Freedom Network Sesta Hearing, 2018) <https://www.eff.org/files/2017/09/18/sestahearing-freedomnetwork.pdf> accessed 30th September 2019
[36] Eric Goldman, 'Worst of Both Worlds FOSTA Signed into Law, Completing Section 230's Evisceration, *(TECH. & MTKG. Law BLOG, 11th April 2018)* < https://blog.ericgoldman.org/archives/2018/04/worst-of-both-worlds-fosta-signed-into-law-completing-section-230s-evisceration.htm> accessed 10th August 2019
[37] 47 U. S. C. § 230
[38] Philip Bobbitt, *Constitutional Fate: Theory of the Constitution* (New York, OUP, 1984) 26
[39] *Packingham v. North Carolina*, (2017) 582 U.S
[40] *Reno v. ACLU*, 521 U.S. 844, 879 (1997)
[41] (Judge Dalzell) *Reno v. ACLU*, 521 U.S. 844, 879 (1997)
[42] (Justice Kennedy) P*ackingham v. North Carolina*, 582 U.S. ___ (2017)

If SCOTUS does deem FOSTA unconstitutional, section 230 immunity would be restored thereby forcing Congress to seek out another solution to the pressing issue of online sex trafficking. While it is beyond the scope of the article to discuss what that may be, this research on FOSTA suggests online sex trafficking cannot be effectively targeted by severely regulating intermediaries. Such legislative policies appear to shoot the messenger and distort the visibility of the problem.

Part 1: FOSTA is not necessary to fulfil the compelling interest

This Part will endeavour to show that FOSTA is not necessary to fulfil Congress' compelling interest of combatting online sex trafficking.[43] In examining the first prong of the strict scrutiny test, SCOTUS should acknowledge that the government cannot prove that the immunity granted to intermediaries under section 230 CDA increased human trafficking. As highlighted in the case of *Brown*,[44] proof of a direct causal link between the regulated entity and the harm which the state interest aims to address is imperative to passing this first constitutional hurdle. However, even if such a causal link could be established, FOSTA is incapable of achieving its compelling interest as it targets the visibility of the crime as opposed to the crime itself. Therefore, FOSTA is not only unnecessary, but a hindrance to the fight against online sex trafficking. By reducing the visibility of online sex trafficking, FOSTA reduces victims' chances of being rescued and infringes on law enforcement's ability to reprimand traffickers.[45] In fact, the ineffectual way that FOSTA serves its legitimate interest allows one to query whether it was designed for the stated compelling purpose at all. If a court found that FOSTA was not designed to fulfil its compelling interest, this too would lead it to fail the first prong of the strict scrutiny test.[46] All these factors should reaffirm to SCOTUS that FOSTA cannot be necessary to fulfil its compelling interest of combatting online sex trafficking and therefore fails the first hurdle of the strict scrutiny test.

1.1 The government cannot prove section 230 immunity caused an increase in human trafficking

[43] *Sweezy v. New Hampshire*, 354 U.S. 234, 265 (1957)
[44] *Brown v Entertainment Merchants Association,* 546 U.S. 786 (2011)
[45] Statement of Russ Winkler, 'Latest Developments in Combating Online Sex Trafficking: Hearing Before the Subcommittee. on Commc'ns & Tech. of the H. Comm. on Energy & Commerce,' 115th Cong. (2017).
[46] *Lochner v. New York,* 198 U.S. 45, 57 (1907)

SCOTUS ought to find that FOSTA is unable to fulfil its compelling interest requirement as the government is incapable of establishing a causal link between the intermediaries it regulates and increases in human sex trafficking. The importance of demonstrating a clear correlation between the actions of the regulated body and the harm that the legislation aims to remedy is highlighted in *Brown v Entertainment Merchants Association*.[47] In this case the court insisted that the government show a direct causal link between the violent video games the law targeted and direct harm to the minors who the law sought to prevent.[48] Likewise, in FOSTA's case, the government must demonstrate that the immunity granted to intermediaries under section 230 CDA directly led to the increase of online sex trafficking. However, no such evidence exists. FOSTA advocates have tried to create the façade of a causal link by forwarding statistics which suggest that a majority of reports of online sex trafficking are linked to ads posted on the intermediary platform Backpage.com.[49] However, such logic significantly oversimplifies the causal link between the harm and intermediary liability, as it equates the frequency with which sex trafficking is reported to the frequency with which it happens.[50] Hence, while there is evidence to suggest that the section 230 immunity led to higher levels of reporting of human trafficking, there is nothing to suggest that this meant there was a greater number of human trafficking victims. Levy highlights that there is no reliable way to test "[t]he covariance of trafficking and reports of trafficking".[51] This is particularly problematic for the government in a strict scrutiny case, as they carry the burden of proving that the law is necessary to fulfill a compelling interest. Without viable evidence the government cannot prove a direct causal link between the harm FOSTA claims to target and the entity it so strictly regulates.[52] FOSTA, therefore, cannot be deemed necessary to fulfill its compelling state interest. It should be deemed unconstitutional under the first prong of the strict scrutiny test by SCOTUS.

1.2 FOSTA is incapable of achieving its compelling interest

Even if the government could prove that intermediary immunity under section 230 CDA caused increases in online sex trafficking, SCOTUS should recognize that FOSTA is still incapable of combatting this issue. This is because its provisions will simply reduce the visibility of the

[47] *Brown v Entertainment Merchants Association,* 546 U.S. 786 (2011)
[48] Ibid
[49] Alexandra Levy Yelderman, 'The Virtues of Unvirtuous Spaces' (2017) 50 Wake Forest L. Rev. 403, 419
[50] Eric Goldman, 'The Complicated Story of FOSTA' (2019) 17 First Amend. L. Rev. 279, 290
[51] Alexandra Levy Yelderman, 'The Virtues of Unvirtuous Spaces' (2017) 50 Wake Forest L. Rev. 403, 419
[52] *Brown v Entertainment Merchants Association,* 546 U.S. 786 (2011)

crime without reducing the crime itself. In determining whether a provision is 'necessary to fulfill a compelling interest',[53] the court appears to be primarily concerned with whether the legislation is capable of achieving the compelling interest it pertains to.[54] In *Frazee v Illinois Department of Employment Security*,[55] SCOTUS held that for a law to pass constitutional scrutiny its end goal must be capable of being directly achieved through the relevant law. FOSTA's goal of combatting online sex trafficking cannot be directly achieved through its provisions.[56]

FOSTA's provisions are incapable of fulfilling its compelling interest as they will drive sex trafficking off mainstream platforms.[57] Goldman highlights that the severe criminal and civil penalties FOSTA exposes intermediaries to will result in intermediaries either filtering third party material posted to their platform, ignoring material posted to their sites or simply exiting the industry altogether.[58] All these reactions will hinder the fight against online sex trafficking.[59] In the first instance, it will result in online sex trafficking ads being automatically filtered instead of reported.[60] Where intermediaries ignore the material in the hope that they exclude themselves from having knowledge of the illegality, this will be tantamount to platforms actively trying to avoid detecting the crime.[61] Additionally, if platforms exit the industry, avenues where human trafficking could have been identified will no longer be available.[62] This prediction has already come to fruition as sites like Craigslist[63] and Reddit have shut down areas of their platforms.[64] All these reactions to FOSTA will severely reduce the visibility of any trafficking which is taking place without any assurance that it will reduce

[53] *Sweezy v. New Hampshire*, 354 U.S. 234, 265 (1957)
[54] Anon, 'Let the End be Legitimate: Questioning the value of heightened scrutiny's compelling and important interest inquiries' (2016) 129 Harv. L. Rev 1406
[55] *Frazee v Illinois Department of Employment Security* 489 U.S. 829 (1989)
[56] Laura Chamberlain, 'FOSTA: A Hostile Law with a Human Cost' (2019) 87 Fordham L. Rev. 2171
[57] Eric Goldman, 'The Complicated Story of FOSTA' (2019) 17 First Amend. L. Rev. 279, 290
[58] Ibid
[59] Elliot Harmon, Sex Trafficking Experts Say SESTA Is the Wrong Solution (Electronic Frontier Foundation, 3rd October 2017) <https://www.eff.org/deeplinks/2017/10/sex-trafficking-experts-say-sesta-wrong-solution> accessed 5th November 2019
[60] Eric Goldman, 'The Complicated Story of FOSTA' (2019) 17 First Amend. L. Rev. 279, 288
[61] Ibid
[62] Ibid
[63] Craigslist, 'FOSTA' (Craigslist.com, 2018) <http://www.craigslist.org/about/FOSTA> accessed 20th October 2019
[64] Karen Gullo and David Greene 'With FOSTA already leading to censorship plaintiffs are seeking reinstatement of their lawsuit challenging the law's constitutionality' (EFF, 1st March 2019) < https://www.eff.org/deeplinks/2019/02/fosta-already-leading-censorship-we-are-seeking-reinstatement-our-lawsuit > accessed 20th January 2020

the sex trafficking itself.[65] Hence, FOSTA's means will not achieve its compelling interest of combatting online sex trafficking because it targets the visibility of the crime on mainstream platforms, without taking measures to reduce the crime itself.

1.3 FOSTA actively harms sex trafficking victims

Conversely, SCOTUS should consider that by reducing the visibility of online sex trafficking FOSTA actively works against the interests of sex trafficking victims. Levy highlights, "To the extent that intermediary platforms are forums for trafficking, they are also forums for its antidote."[66] While increased visibility of human trafficking advertisements made such intermediary platforms a more desirable place for traffickers to advertise, it also increased the possibility that victims would be found, and the trafficker brought to justice.[67] The government have countered such assertions by claiming that some of the intermediary sites furthered human trafficking by failing to alert law enforcement of human trafficking of child victims.[68] However, what such arguments neglect to consider is that the visibility of the victims enabled other private and public bodies to collaborate and recover victims. On one occasion, an individual alerted the 'National Centre for Missing and Exploited Children' (NCMEC) to a Backpage advert which they suspected was a missing child.[69] By using the contact details in the Backpage advert, the NCMEC identified more than fifty additional Backpage ads with the same details.[70] There have been multiple other instances where the families themselves have recovered their loved ones by finding their advert online.[71] As distressing as these stories are, the visibility of the crime is what appears to lead to the recovery of victims and the apprehension of the traffickers. In examining FOSTA, SCOTUS should not overlook the fact that the consequences of FOSTA will actively harm this fight against online sex trafficking as platforms automatically filter or leave the industry in an effort to escape liability.

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[65] Elliot Harmon, Sex Trafficking Experts Say SESTA Is the Wrong Solution (Electronic Frontier Foundation, 3rd October 2017) <https://www.eff.org/deeplinks/2017/10/sex-trafficking-experts-say-sesta-wrong-solution> accessed 5th November 2019

[66] Alexandra Levy Yelderman, 'The Virtues of Unvirtuous Spaces' (2017) 50 Wake Forest L. Rev. 403, 406

[67] Ibid

[68] 164 Cong. Rec. S1872 (daily ed. Mar. 21, 2018)

[69] Amicus Curiae Brief of *The National Center for Missing and Exploited Children, J.S. v. Vill. Voice Media Holdings,* 2014 *LLC*, 359 P.3d 714 (Wash. 2015) (No. 90510-0), WL 4913544

[70] Ibid

[71] Nicolas Kristoff 'Making Life Harder for Pimps' The New York Times, (New York 6th August 2015)

FOSTA is also actively harmful to the safety of all those involved in the sex industry. In 2019 Representative, Ro Khanna, introduced a bill calling for a federal study to examine FOSTA's impact on sex workers' safety.[72] This was partly influenced by the fact that the aftermath of FOSTA has seen the demise of sites where those working in the sex industry could share information and vet abusive clients. 'Verify Him', described as "[t]he world's biggest dating blacklist" is one such site.[73] A survey conducted by COYOTE RI, an organization of sex workers and sex trafficking survivors in Rhode Island, showed that 66 percent of the 156 sex workers surveyed are unable to vet clients online following FOSTA.[74] They assert that they are now at increased risk of meeting with dangerous individuals.[75] The Freedom Network claim they have received an increased number of reports from street-based sex workers about significantly higher levels of victimization, including physical and sexual violence since the passage of FOSTA.[76] This shows that FOSTA is not only unnecessary to fulfilling its compelling interest, it is putting those in the sex industry at increased risk. It is therefore incapable of achieving its compelling interest of combatting online sex trafficking and rescuing victims. SCOTUS should therefore deem FOSTA unconstitutional under the first prong of the strict scrutiny test.

In addition to hindering the rescue of victims, FOSTA will infringe law enforcement's ability to reprimand traffickers. 'The House Report' on FOSTA articulated that the legislation was designed to support law enforcement in combatting human trafficking.[77] However, law enforcement officials have been outspoken about the contrary effects that FOSTA will have on their efforts to reduce the crime. Prior to the enactment of FOSTA, Russ Winkler, a Special Agent who oversees human trafficking investigations at the Tennessee Bureau of Investigation, emphasized to Congress the value of intermediary platforms in criminal investigations and asked legislators not to introduce any legal framework that would undermine the utility of such platforms in fighting human trafficking.[78] Against this warning, Congress passed FOSTA

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[72] Kate Holland, 'New Bill Calls for examination of anti-trafficking FOSTA-SESTA Law' *(ABC News, 20th December 2019)*< https://abcnews.go.com/Politics/bill-calls-examination-anti-trafficking-fosta-sesta-law/story?id=67831743> accessed 5th April 2020

[73] Complaint for Declaratory Injunctive Relief Woodhull to the District Court of Columbia. 19

[74] COYOTE RI, 'COYOTE-RI Impact Survey Results', (COYITE-RI, 26 May 2018) < http://www.swop-seattle.org/wp-content/uploads/2018/11/COYOTE-Survey-Results-2018.pdf > Accessed 5th February 2020

[75] Ibid

[76] Ibid

[77] 164 CONG. REC. H7165-66 (daily ed. July 25, 2018) (statement of Rep. Wagner).

[78] Statement of Russ Winkler, 'Latest Developments in Combating Online Sex Trafficking: Hearing Before the Subcomm. on Commc'ns & Tech. of the H. Comm. on Energy & Commerce,' 115th Cong. (2017).

which will undermine the intermediaries key role in anti-trafficking efforts since platforms are forced to automatically censor vital evidence, actively avoid discovery of online sex trafficking or shut down. Indeed, FOSTA "unwittingly fosters abuse by seeking to subvert the spaces in which it sometimes takes place."[79] Therefore, FOSTA is not only unnecessary to fulfill its compelling interest, it actively works against combatting online sex trafficking.[80] FOSTA's inability to achieve its compelling interest should be sufficient for SCOTUS to deem the provision unconstitutional.

While FOSTA advocates could argue that by reducing the visibility of the crime the criminal enterprise is cut off from some consumers, this argument should be disregarded by SCOTUS in examining FOSTA. Statistics clearly indicate that this is not sufficient to enable law enforcement to 'combat online sex trafficking'. In 2018, the year FOSTA was passed, 7,859 sex trafficking cases reported to the 'National Human Trafficking Hotline'.[81] In the same year only 171 sex trafficking cases were initiated in the Federal Courts.[82] This constitutes a decrease from 2017 when 241 cases were initiated.[83] Therefore, the government cannot prove that FOSTA is capable of achieving its compelling interest as it is clearly not increasing law enforcement's ability to prosecute traffickers. Hence, in addition to being unnecessary, FOSTA is actively harmful to victims of online sex trafficking. SCOTUS should therefore have little doubt that FOSTA is unconstitutional under the first prong of the strict scrutiny test.

1.4 What is the real state interest behind FOSTA?

The great disparity between the compelling interest, and FOSTA's ineffective means of achieving it, raises the question of whether combatting online sex trafficking really was the interest behind FOSTA. In *Lochner v New York*, the court invalidated a statute because the government's assertion that the law was passed for 'public health' was untrue. The court found the statute was actually passed for economic motives.[84] Likewise, if the state's real interest in

[79] Alexandra Levy Yelderman, 'The Virtues of Unvirtuous Spaces' (2017) 50 Wake Forest L. Rev. 403, 404
[80] See Laura Chamberlain, 'FOSTA: A Hostile Law with a Human Cost' (2019) 87 Fordham L. Rev. 2171
[81] Polaris, '2018 Statistics from the National Human Trafficking Hotline' <https://bit.ly/2zb1pyY> accessed 2nd April 2020.
[82] Currier and Feehs, 'Federal Human Trafficking Report' (The Human Trafficking Institute, 2019) < https://www.traffickingmatters.com/wp-content/uploads/2019/04/2018-Federal-Human-Trafficking-Report-Low-Res.pdf> accessed 15th April 2020
[83] Ibid
[84] *Lochner v. New York,* 198 U.S. 45, 57 (1907)

FOSTA is different from the stated compelling interest, this would also render FOSTA unconstitutional under the first prong of the strict scrutiny test. However, determining the state interest in FOSTA could be much harder for SCOTUS than it was with *Lochner*.[85] This problematic obscurity is created because FOSTA is designed so that the compelling interest is achieved through the measures put in place by private intermediaries to regulate their users.[86] Balkin refers to regulations where the government's ultimate goal is achieved by the private regulators as "New school regulations."[87] In FOSTA's case the severe liability risks mean platforms are likely to over censor.[88] Therefore, while FOSTA claims to reduce human trafficking, the real effect of intermediary censorship could create a substantial chill on constitutionally protected speech about sex and other similar subjects.[89] Moreover, as these platforms are private parties they are not directly bound by the Constitution, hence US citizens will be unable to challenge the platform's censorship directly.[90] Whatever the state's motives, it is clear that the interest FOSTA appears to achieve in practice is different to the compelling interest the government asserted it was trying to achieve.[91] If SCOTUS agreed the interest behind FOSTA was different to the stated compelling interest this would be another ground on which it would fail the first prong of the strict scrutiny test.

1.5 Summary

To pass the first hurdle of the strict scrutiny test the provision in question must be 'necessary for a compelling state interest'.[92] By examining the factors in this Part SCOTUS should decide that FOSTA is by no means necessary to fulfil the compelling interest of combatting sex trafficking. To prove that FOSTA was constitutional under this first prong, the government carries the burden of proving a direct causal link between the immunity intermediaries enjoyed under section 230 CDA and an increase to online sex trafficking.[93] Such a link cannot be

[85] Ibid
[86] Jack Balkin, 'Free speech in the Algorithmic Society: Big Data, Private Governance, and New School Speech Regulation' (2018) 51 *U.C. Davis Law Review* 1149, 1172
[87] Ibid.
[88] Danielle Citron & Quinta Jurecic, 'FOSTA: The New Anti-Sex-Trafficking Legislation May Not End the Internet, but It's Not Good Law Either' *(Lawfarblog, 28th March 2018)* <https://www.lawfareblog.com/fosta-new-anti-sex-trafficking-legislation-may-not-end-internet-its-not-good-law-either > accessed 27th January 2020
[89] Eric Goldman, 'Balancing 230 and anti-sex trafficking initiatives' (November 30, 2017) Santa Clara Univ. Legal Studies Research Paper 17/2017 <http://dx.doi.org/10.2139/ssrn.3079193>
[90] Jack Balkin, 'Free speech in the Algorithmic Society: Big Data, Private Governance, and New School Speech Regulation' (2018) 51 *U.C. Davis Law Review* 1149, 1172
[91] Eric Goldman, 'The Complicated Story of FOSTA' (2019) 17 First Amend. L. Rev. 279, 290
[92] *Sweezy v. New Hampshire*, 354 U.S. 234, 265 (1957)
[93] *Brown v Entertainment Merchants Association,* 546 U.S. 786 (2011)

established. Furthermore, even if such a link were established, FOSTA's provisions will not combat sex trafficking. This decrease in visibility on open online platforms will decrease victims' chances of being rescued and traffickers chances of being brought to justice.[94] FOSTA's inability to achieve its compelling interest is sufficient to deem FOSTA unconstitutional.[95] Furthermore, FOSTA's provisions are so incongruent with its compelling interest that the government claims FOSTA pursues, it could be queried whether FOSTA was designed for the stated compelling interest at all. This is arguably the most important of the three prongs, because where a provision is unnecessary to achieve its stated compelling interest, there remains little reason for examining if it is narrowly tailored or the least restrictive means of achieving that interest. However, even if SCOTUS does find that FOSTA is necessary to fulfil its compelling interest the next Part will explain why it fails under the second prong of the strict scrutiny test.

Part 2: FOSTA is not 'narrowly tailored to its compelling interest'

In Part One it was argued that FOSTA was not necessary to fulfil its compelling interest of combatting online sex trafficking. However, even if the government succeeds in proving that it is 'necessary for its compelling interest',[96] this Part will highlight the numerous grounds on which SCOTUS should decide that FOSTA is unconstitutional under the second prong. Hence the purpose of this Part is to explain how FOSTA is not 'narrowly tailored to the compelling state interest.'[97]

This Part will establish that FOSTA is poorly tailored because it encompasses a great deal of speech which is unrelated to its compelling interest. Section 2421 of FOSTA refers to 'prostitution'[98], when the compelling interest is to combat online sex trafficking. Secondly, FOSTA targets the 'promotion' or 'facilitation' of prostitution.[99] These verbs are 'susceptible to multiple and wide ranging meanings'[100] and risk criminalising constitutionally protected speech unrelated to FOSTA's compelling interest of combatting sex trafficking.[101] Finally,

[94] 164 CONG. REC. H7165-66 (daily ed. July 25, 2018) (statement of Rep. Wagner)
[95] *Frazee v Illinois Department of Employment Security* 489 U.S. 829 (1989)
[96] *Sweezy v. New Hampshire*, 354 U.S. 234, 265 (1957)
[97] *Austin v. Michigan Chamber of Commerce*, (1990) 494 U.S. 652, 655
[98] 18 U.S.C.A. § 2421A.
[99] Ibid
[100] *Woodhull Freedom Foundation et al v the AG of the United States* No. 18-5298, (D.C. Cir. 2020), 13
[101] Complaint for Declaratory Injunctive Relief Woodhull to the District Court of Columbia. (2018)

FOSTA is not narrowly tailored to a compelling interest because it does not limit its application to 'bad actor websites'.[102] This problem is largely created through the poorly defined *mens rea* requirement in section 1591[103] and section 2124A.[104] The lack of a clear *mens rea* standard means individuals and organisations, whose speech does not exacerbate online sex trafficking, will inevitably fall within FOSTA's scope.[105] The fact that FOSTA is insufficiently tailored to its compelling interest is already having serious negative effects on consensual sex workers whom the provision was not designed to target.[106] To fully examine this aspect, the court should apply a prudential approach to constitutional interpretation to consider circumstances surrounding the constitutional question.[107] All these factors should lead SCOTUS to conclude that FOSTA is not narrowly tailored to its compelling interest of combatting sex trafficking.

2.1 FOSTA is not narrowly tailored to the conduct it aims to combat

FOSTA is not narrowly tailored to its compelling interest because it refers to prostitution instead of online sex trafficking.[108] As highlighted in the case of *Reno,* for a provision to be narrowly tailored, the government must ensure the wording of the provision pinpoints the exact harm it hopes to combat.[109] *Reno* was the first constitutional free speech internet case in the US. It overturned sections 223(a)[110] and 223(d)[111] of the Communication Decency Act 1996. This legislation made it a criminal offence to engage in "indecent" or "patently offensive" online speech if that speech could be viewed by a minor.[112] The court in *Reno* deemed that these sections of the CDA were not sufficiently tailored to the government's compelling interest because the wording of the provision targeted all 'indecent' or 'patently offensive materials'.[113] The court highlighted that this could have included expression which had 'scientific, educational, or social value'.[114] It did not limit the scope of the provision to pornographic materials which were shared with children. Therefore, as the CDA did not tailor

[102] *Woodhull Freedom Foundation et al v the AG of the United States* No. 18-5298, (D.C. Cir. 2020), 15
[103] 18 U.S.C. §§ 1591
[104] 18 U.S.C.A. § 2421A
[105] *Woodhull Freedom Foundation et al v the AG of the United States* No. 18-5298, (D.C. Cir. 2020), 21
[106] Freedom network USA (Freedom Network Sesta Hearing, 2018) <https://www.eff.org/files/2017/09/18/sestahearing-freedomnetwork.pdf> accessed 30th September 2019
[107] Philip Bobbitt, *Constitutional Fate: Theory of the Constitution* (New York, OUP, 1984) 59
[108] 18 U.S.C.A. § 2421A
[109] *Reno v. ACLU*, (1997) 521 U.S. 844
[110] 47 U.S.C. §223(a)
[111] Ibid. §223(d)
[112] Ibid. § 223(a)(1)
[113] *Reno v. ACLU*, (1997) 521 U.S. 844, 856
[114] Ibid. 862

itself to the precise harm it hoped to criminalise, it was deemed unconstitutional under the second prong of the strict scrutiny test.

Likewise, FOSTA fails to confine its scope to online sex trafficking and instead encompasses all sex work. Section 2124A criminalises anyone who owns, manages, or operates a "computer service . . . to promote or facilitate[e] the prostitution of another person."[115] By referring to 'prostitution' as opposed to online sex trafficking, FOSTA sweeps much wider than Congress' compelling interest to combat online sex trafficking. Congress have defended their reference to prostitution, arguing that prostitution and human trafficking are "inextricably linked".[116] However, the government have not put forward any firm empirical evidence to support this assertion thus far in the *Woodhull* litigation challenging FOSTA. Instead, Congress have relied on research articulated by the Coalition Against Trafficking in Women (CATW).[117] This included sweeping moralistic statements articulating that all sex work, like trafficking, constituted a form of violence which "deprives prostituted people of human dignity".[118] Such claims are moralistic, as opposed to factually founded, as they imply that all sex work is innately violent and undignified. While there may be evidence to suggest that there are higher numbers of reports of sex trafficking in countries like New Zealand where sex work is decriminalised than in countries where sex work is criminalised, higher rates of reporting do not directly point to more trafficking occurring.[119] Indeed, Albright and D'Adamo argue that intensive punitive penalties for sex work prevent the reporting of trafficking.[120] Moreover, Jackson and Heineman highlight that statistics on human trafficking are contradictory. Therefore, any correlation between prostitution and sex trafficking provides an unsound foundation on which to base government legislation and policy.[121] Under the strict scrutiny test the burden falls on the government to prove their law is narrowly tailored. Given that the centrepiece of FOSTA, Section 2421A,[122] hinges on the existence of a firm link between sex trafficking and prostitution existing, a lack of substantive, reliable evidence in the existence for

[115] 18 U.S.C.A. § 2421A
[116] House of Representatives Report (2018) NO. 115-572, at 5
[117] Amicus Curiae Brief of The Coalition Against Trafficking in Women (CATW) *J.S. v. Village Voice Media Holdings, LLC*, 2015 Wash. 951 (Wash. Sept. 3, 2015)
[118] Complaint for Declaratory Injunctive Relief Woodhull to the District Court of Columbia. (2018)
[119] Erin Albright and Kate D'Adamo, 'Decreasing Human Trafficking through sex work decriminalisation' (2017) 19(1) AMA J Ethics.122, 122
[120] Ibid.
[121] Jackson and Heineman *'Repeal FOSTA and Decriminalise sex work'* (2017) 17(3) Contexts 74, 74
[122] 18 U.S.C.A. § 2421A.

such a correlation should be sufficient for SCOTUS to deem the wording insufficiently tailored to the compelling interest of combatting sex trafficking.

2.2 Key terms in FOSTA are undefined

However, even if SCOTUS holds that a correlation between sex trafficking and prostitution does exist, FOSTA cannot be narrowly tailored to its compelling interest because it fails to clearly define what conduct falls within the term 'prostitution' in section 2124A.[123] While some may argue that prostitution has a common everyday meaning of "selling sexual services for money",[124] the Court of Appeal in *Woodhull* highlighted that there are no adjacent verbs that would narrow the term's meaning which would prevent the government from taking a broader interpretation. The court highlighted that under a broad reading, 'prostitution' can encompass a range of actions, including soliciting, selling sex or being involved in a sexual transaction. Therefore, because FOSTA does not define the conduct it aims to target, the legislation cannot be regarded as narrowly tailored to its compelling interest.

FOSTA not only fails to be narrowly tailored to the act it targets. Section 2124A imposes criminal sanctions on anyone who 'promotes or facilitates prostitution'.[125] In the *Woodhull* Appeal the court agreed that both 'facilitate' and 'promotes' could have a wide range of meanings.[126] This makes FOSTA susceptible to encompassing a substantial amount of protected speech. The Court of Appeal in *Woodhull* agreed that one of the plaintiffs, Andrews, could be encompassed within FOSTA's scope as her online forum, "Rate That Rescue", allowed sex worker to share information on aid organisations and information about services which aid them in their work, like the effectiveness of payment processors.[127] While 'facilitate' under its common meaning is to 'make easier' or to 'assist or aid'[128], in some case law 'facilitate' has also meant to 'abet'.[129] The term 'abet' can mean to "encourage someone to do something wrong". Despite the government's assertions that the actions of "Rate That Rescue"

[123] *Woodhull Freedom Foundation et al v the AG of the United States* No. 18-5298, (D.C. Cir. 2020), 13
[124] Cambridge American Dictionary, 'Prostitution' *(Cambridge Dictionary online)* <https://dictionary.cambridge.org/dictionary/english/prostitution?q=Prostitution> accessed 15th March 2020
[125] 18 U.S.C.A. § 2421A.
[126] *Woodhull Freedom Foundation et al v the AG of the United States* No. 18-5298, (D.C. Cir. 2020), 13
[127] ibid 9
[128] *United States v Rivera*, 775 F.2d 1559, 1562 (11th Cir.) (1985)
[129] *Abuelhawa v United States*, 556 U.S. 816, 821(2009)

were not intended to be encompassed within FOSTA, [130] the Court of Appeal stated that, even on a narrow reading of FOSTA, Andrews could be prosecuted as her site makes it easier for sex workers to carry out their jobs.[131] In the *Woodhull* appeal the court made it clear that if Congress wished to exclude certain conduct from liability they had to be explicit about their intentions in the legislation itself.[132] The case solidifies the claim that FOSTA is not narrowly tailored to conduct that furthers online sex trafficking. The fact that its wording is not tailored to this compelling interest allows the provision to engulf forms of protected speech.[133] This is yet another reason FOSTA should be deemed unconstitutional by SCOTUS under the second prong of the strict scrutiny test.

2.3 The government's proposed interpretive aids are ineffective in narrowing FOSTA's scope

The government have tried to defend the broad wording of section 2421A claiming the Travel Act constitutes an interpretive tool for section 2124A.[134] This argument survived at first instance in the *Woodhull* litigation where Judge Leon described the FOSTA as 'mirroring' the Travel Act.[135] However, academics like Levy highlight stark differences between the Travel Act and FOSTA which make such comparisons futile.[136] Fundamentally, the scope of FOSTA is broader than the Travel Act.[137] The Travel Act requires conduct to occur more than once, while FOSTA[138] imposes liability after an online service provider promotes or facilitates prostitution even once.[139] The Travel Act also limits the scope of 'facilitation' of prostitution to speech which directly furthers criminal transactions,[140] while FOSTA applies to any "conduct".[141] Perhaps most importantly, the Travel Act limits itself to illegal conduct under state or federal law.[142] Conversely, FOSTA makes it illegal simply to promote or facilitate the

[130] *Woodhull Freedom Foundation et al v the AG of the United States* (2020) No. 18-5298 14 Oral Arg. Recording at 21:10-21:58; 29:25-30:10 (20th September 2019)
[131] *Woodhull Freedom Foundation et al v the AG of the United States* No. 18-5298, (D.C. Cir. 2020), 14
[132] Ibid 16
[133] Laura Chamberlain, 'FOSTA: A Hostile Law with a Human Cost' (2019) 87 Fordham L. Rev. 2171, 2172
[134] (Government Brief) *Woodhull Freedom Foundation et al v the AG of the United States* (2018) 22
[135] *Woodhull Freedom Foundation et al v the AG of the United States* 334 F. Supp. 3d 185 (D.D.C. 2018)
[136] Alex F. Levy, 'An update on the Constitutional Court Challenge to FOSTA- Woodhull Freedom v. US (Guest Blog Post)' (Eric Goldman Blog, Technology & Marketing Law Blog, 13th August 2018) < https://bit.ly/329ceMt> accessed 30th September 2019
[137] 18 U.S.C. § 1952
[138] Ibid (a)(3)
[139] Ibid § 2421A
[140] Ibid § 1952
[141] Ibid § 2421A
[142] Ibid § 1952

prostitution of another person without any specific pre-existing state or federal law having been breached.[143] Hence, the Travel Act is fundamentally different in scope and content to section 2124A FOSTA, and cannot be used as an interpretative aid to FOSTA. The lower court was therefore wrong to assert that the Travel Act was an adequate tool for interpreting FOSTA.

2.4 FOSTA is not narrowly tailored because it captures people it was never designed to target

FOSTA is not only insufficiently tailored to the conduct it should capture; it also fails to be narrowly tailored to the 'bad actor intermediaries'[144] it aims to target. In *Reno* the court held that one reason the law was not narrowly tailored to its compelling interest was because it would affect any adult who wished to post indecent materials online, even those who were only intending it to be viewed by other adults.[145] The law had not been narrowly tailored to affect those who intended to send pornographic materials to minors. The government assert FOSTA was designed to combat 'bad actor intermediaries'[146] like Backpage, who knowingly and willing promoted and facilitated online sex trafficking.[147] However, like the CDA in *Reno*[148] there is nothing in the wording of FOSTA to refine its scope to intermediaries like Backpage.[149] Unlike FOSTA's predecessor, section 230 CDA,[150] there is no safe haven for "Good Samaritans" who are trying to identify and reduce cases of human trafficking online.[151] Crucially, FOSTA has the potential to encompass people whom the legislation was never intended to capture. A major reason FOSTA fails to narrowly target 'bad actors' is because it has a broad, undefined *mens rea*. FOSTA widened the scope of Section 1591 which defines trafficking for the purposes of the criminal code.[152] The government has asserted that FOSTA did not expand section 1591 but merely "clarified a previously-undefined phrase".[153] However,

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[143] Ibid § 2421A
[144] The Committee on the Judiciary, 'Allow States and Victims to Fight Online Sex Trafficking Act of 2017 Report' (H. Rept. 115-572, 2017)
[145] *Reno v. ACLU*, (1997) 521 U.S. 844, 892
[146] The Committee on the Judiciary, 'Allow States and Victims to Fight Online Sex Trafficking Act of 2017 Report' (H. Rept. 115-572, 2017)
[147] (Government Brief) *Woodhull Freedom Foundation et al v the AG of the United States* (2018) 22
[148] *Reno v. ACLU*, (1997) 521 U.S. 844
[149] *Woodhull Freedom Foundation et al v the AG of the United States* No. 18-5298, (D.C. Cir. 2020), 16
[150] 47 U. S. C. § 230(a)(1), (B)(ii)
[151] Danielle Citron & Quinta Jurecic, 'FOSTA: The New Anti-Sex-Trafficking Legislation May Not End the Internet, but It's Not Good Law Either' (Lawfarblog, 28th March 2018) <https://www.lawfareblog.com/fosta-new-anti-sex-trafficking-legislation-may-not-end-internet-its-not-good-law-either > accessed 27th January 2020
[152] 18 U.S.C. §1591(a)(2), (e)(4)
[153] (Government Brief) *Woodhull Freedom Foundation et al v the AG of the United States* (2018) 25

this statement is clearly untrue. FOSTA has expanded the *mens rea* for "participation in a venture" from "knowing" and active involvement to "knowingly assisting, supporting, or facilitating a violation."[154] There are a number of factors that leave this *mens rea* requirement under the amended section 1591 insufficiently tailored to the compelling interest. Firstly, "assisting, supporting or facilitating" are vague terms open to a range of interpretations, and the amendment lack any further definition of their meanings for the purposes of section 1591.[155] In section 1591, one does not have to directly be aware that what was going on is illegal.[156] "Knowingly" only requires proof of the facts that constitute the offense.[157] This leaves intermediaries who did not intend to participate in a human trafficking venture vulnerable to being encompassed within FOSTA's criminal liability. [158]

Furthermore, under section 1591[159] and 2421(b)[160] claimants will be civilly and criminally liable if they are found to be "act[ing] in reckless disregard of the fact that such conduct contributed to sex trafficking." Once again, the *Woodhull* claimants highlight that this *mens rea* standard does not require actual intent or even actual knowledge of the crime taking place.[161] This means there is "No clear way of avoiding liability".[162] The broad and undefined *mens rea* standard of FOSTA means that the legislation cannot be narrowly tailored to 'bad actor intermediaries'.[163]

2.5 FOSTA's collateral effects on the sex industry must be considered.

[154] Danielle Citron & Quinta Jurecic, 'FOSTA: The New Anti-Sex-Trafficking Legislation May Not End the Internet, but It's Not Good Law Either' (Lawfarblog, 28th March 2018) <https://www.lawfareblog.com/fosta-new-anti-sex-trafficking-legislation-may-not-end-internet-its-not-good-law-either > accessed 27th January 2020
[155] Defendants' Opposition to Plaintiffs' Motion for Preliminary Injunction and Motion to Dismiss Plaintiffs' Complaint at 10, Woodhull Freedom Found. v. United States, 334 F. Supp. 3d 185 (D.D.C. 2018) (No. 18-CV-01552), ECF No. 16
[156] Laura Chamberlain, 'FOSTA: A Hostile Law with a Human Cost' (2019) 87 Fordham L. Rev. 2171, 2181
[157] 18 U.S.C. §1591(a)(2)
[158] Laura Chamberlain, 'FOSTA: A Hostile Law with a Human Cost' (2019) 87 Fordham L. Rev. 2171, 2181
[159] Danielle Citron & Quinta Jurecic, 'FOSTA: The New Anti-Sex-Trafficking Legislation May Not End the Internet, but It's Not Good Law Either' (Lawfarblog, 28th March 2018) <https://www.lawfareblog.com/fosta-new-anti-sex-trafficking-legislation-may-not-end-internet-its-not-good-law-either > accessed 27th January 2020
[160] 18 U.S.C. § 2421B
[161] Defendants' Opposition to Plaintiffs' Motion for Preliminary Injunction and Motion to Dismiss Plaintiffs' Complaint at 10, Woodhull Freedom Found. v. United States, 334 F. Supp. 3d 185 (D.D.C. 2018) (No. 18-CV-01552), ECF No. 16
[162] *Woodhull Freedom Foundation et al v the AG of the United States* No. 18-5298, (D.C. Cir. 2020)
[163] The Committee on the Judiciary, 'Allow States and Victims to Fight Online Sex Trafficking Act of 2017 Report' (H. Rept. 115-572, 2017)

The fact that FOSTA is insufficiently tailored to its compelling interest, means that it has severe collateral consequences on consensual sex workers.[164] A study from Baylor University found that the introduction of Craigslist's "erotic services" section led to a decrease of 17% in homicide rates among female sex workers.[165] However, as highlighted in the previous Part, many of the platforms that increased sex worker's safety have been forced to shut down because FOSTA was inadequately tailored to those it aimed to target. To consider these factors in determining FOSTA's constitutionality, SCOTUS ought to consider what constitutional scholar , Bobbitt describes as a 'prudential approach' to judicial interpretation.[166] This approach involves considering "circumstances surrounding the decision", in forming a constitutional argument.[167] The prudential approach taken by the court in *Reno* led them to consider that collateral effects of the provision would restrict the expression of law abiding adults online.[168] This ultimately led SCOTUS to deem the CDA unconstitutional. FOSTA advocates will argue that the rationale in *Reno* does not apply to FOSTA because prostitution is illegal where 'indecency' and 'obscenity' is not. Indeed, First Amendment protections do not apply to illegal speech and FOSTA does not apply in jurisdictions where prostitution is legal.[169] However, this is irrelevant to the argument at hand because while sex work in certain forms may be illegal, the speech around it is not. FOSTA curtails protected speech surrounding prostitution on online intermediary platforms. Hence, it is a logical step from *Reno* to suggest that the collateral effects of FOSTA on consensual sex workers will indicate that it is not narrowly tailored to its compelling interest. To fully consider these factors, the court should consider a prudential approach in this aspect of the strict scrutiny test.

2.6 Summary

This Part argued that SCOTUS should find that FOSTA is not sufficiently narrowly tailored to its compelling interest of combatting online sex trafficking. Firstly, FOSTA is insufficiently tailored to the conduct it aims to target. Section 2421 of FOSTA refers to 'prostitution' when

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[164] Elliot Harmon, Sex Trafficking Experts Say SESTA Is the Wrong Solution (Electronic Frontier Foundation, 3rd October 2017) <https://www.eff.org/deeplinks/2017/10/sex-trafficking-experts-say-sesta-wrong-solution> accessed 5th November 2019

[165] Scott Cunningham, Gregory DeAngelo, John Tripp., 'Craigslist Reduced Violence Against Women'. (2019) *Baylor University and Claremont Graduate University. <http://scunning. com/craigslist110. pdf.> Accessed* 25th January 2020

[166] Philip Bobbitt, *Constitutional Fate: Theory of the Constitution* (New York, OUP, 1984) 59

[167] ibid 61

[168] *Reno v. ACLU*, (1997) 521 U.S. 844, 862

[169] 18 U.S.C § 2421A.(e)

the compelling interest is to combat online sex trafficking.[170] FOSTA therefore encompasses a great deal of speech which is unrelated to its compelling interest. Furthermore, FOSTA's use of the verbs 'promote' and 'facilitate' in section 2124A risks criminalising constitutionally protected speech unrelated to FOSTA's compelling interest of combatting sex trafficking.[171] Additionally, the poorly defined *mens rea* in section 1591 and section 2124A means that FOSTA's application is not limited to 'bad actor' websites.[172] This will mean those whose speech does not contribute to online sex trafficking, will fall within FOSTA's scope.[173] The collateral effects of online sex trafficking are yet another reason FOSTA is not narrowly tailored. SCOTUS should take a prudential approach in order to fully consider these factors and assess whether FOSTA's compelling interest is being fulfilled. This will clearly illuminate the severe collateral effects FOSTA will have. For all these reasons, FOSTA ought to be struck down by SCOTUS under the second hurdle of the strict scrutiny test.

Part 3: FOSTA is not the least restrictive means of achieving its compelling interest

So far this article has argued that SCOTUS could deem FOSTA unconstitutional under either of the first two hurdles of the strict scrutiny test, as it is neither necessary nor sufficiently narrowly tailored to its compelling interest. This Part argues that SCOTUS could also deem FOSTA unconstitutional under the third prong of the strict scrutiny test because is it not the least restrictive means of combatting online sex trafficking. Indeed, a law cannot be the least restrictive means of achieving a compelling interest if another piece of legislation can achieve the same interest in a less restrictive way.[174] It will be shown that the Travel Act clearly provides a less restrictive means of pursuing FOSTA's compelling interest.[175] Crucially, the Travel Act succeeded in shutting down Backpage and indicting its CEO prior to FOSTA's legislative existence.[176] Moreover, FOSTA is not the least restrictive means of obtaining fair compensation for online sex trafficking victims.[177] While, it must be acknowledged that prior to FOSTA there were numerous injustices against trafficking victims who tried to take cases against Backpage, these injustices were directly linked to the court taking an overly expansive

[170] 18 U.S.C § 2421A.
[171] Complaint for Declaratory Injunctive Relief Woodhull to the District Court of Columbia. (2018)
[172] *Woodhull Freedom Foundation et al v the AG of the United States* No. 18-5298, (D.C. Cir. 2020), 15
[173] *Woodhull Freedom Foundation et al v the AG of the United States* No. 18-5298, (D.C. Cir. 2020), 21
[174] *United States v. Playboy Entertainment Group,* 529 U.S. 803 (2000)
[175] 18 U.S.C. § 1952
[176] Sarah N Lynch and Lisa Lambert, "Sex ads Website Backpage Shut Down by US Authorities" (*Reuters, 6th April 2018)* < https://reut.rs/35nSRQk> accessed 17th August 2018
[177] Eric Goldman, 'The Complicated Story of FOSTA' (2019) 17 First Amend. L. Rev. 279, 287

reading of section 230 immunity.[178] Finally, even if it is successfully argued that other laws could not fulfil FOSTA's compelling interest, FOSTA's harsh penalties must be regarded as unnecessarily restrictive due to the significant chilling effect they will have on protected speech.[179] It is clear SCOTUS should take a prudential approach when interpreting this aspect of the case to fully consider the chilling effects that FOSTA will have on free speech.

3.1 The Travel Act can achieve FOSTA's compelling interest in a less restrictive way.

A law cannot be the least restrictive means of achieving a compelling interest if another piece of legislation can achieve the interest in a less restrictive way.[180] If the government is to prove that a content-based restriction is vital to a compelling state interest, they must establish that they could not have achieved the interest in a different way that had a lesser impact on free speech. This was highlighted in *Playboy Entertainment Ltd,*[181] where the court highlighted that a law will fail on this third prong of the strict scrutiny test where another law provides a less restrictive means of achieving the compelling interest.[182] In this case the court held that a preceding section of the legislation in question, granted adequate protections for the government to achieve their compelling interest of protecting children from pornographic materials. Indeed, section 504 CDA[183] allowed parents to request to have certain channels blocked which was less restrictive than the blanket ban authorised in section 505 CDA.[184]

3.2 The Travel Act fulfilled FOSTA's mission before it even started

Congress accused Backpage.com of hosting 80% of the online trafficking it hoped to combat.[185] Therefore, shutting down Backpage.com was an explicit reason for Congress passing FOSTA.[186] However, it was the Travel Act, and not FOSTA, that ultimately brought

[178] Danielle Keats Citron & Benjamin Wittes, The Internet Will Not Break: Denying Bad Samaritans § 230 Immunity (2017) 86 FORDHAM L. REV. 401
[179] Laura Chamberlain, 'FOSTA: A Hostile Law with a Human Cost' (2019) 87 Fordham L. Rev. 2171, 2173
[180] *United States v. Playboy Entertainment Group,* 529 U.S. 803 (2000)
[181] ibid
[182] ibid 805
[183] 47 U.S.C. § 504
[184] Ibid. § 505
[185] United States senate Permanent Subcommittee on Investigations Committee on Homeland Security and Governmental Affairs, 'Backpage.com's Knowing Facilitation of Online Sex Trafficking' p.2
[186] (Government Brief) *Woodhull Freedom Foundation et al v the AG of the United States* (2018) 4

down Backpage.[187] Five days before FOSTA was signed into law, US law enforcement raided Backpage's premises and shut down the site.[188] The charges brought against the companies CEO, Carl Ferrer, were brought on the grounds of the Travel Act.[189] As highlighted in the previous Part, the Travel Act is less restrictive than FOSTA. It cannot apply to a one-off instance,[190] it demands that a pre-existing State or Federal law be breached[191] and limits the meaning of 'facilitation' of prostitution to speech which directly furthers criminal transactions.[192] Therefore the Travel Act clearly provided a less restrictive means of fulfilling FOSTA's compelling interest. This should lead SCOTUS to fail FOSTA under the third prong of the strict scrutiny test as it is not the least restrictive means of achieving its compelling interest.

The fact that FOSTA did not fulfil the third prong of the strict scrutiny test was even known to Congress before FOSTA was passed. In 2017 the Senate published a report highlighting that Backpage's actions fell squarely within the Travel Act's remit.[193] Through this report, the Senate recognised the Travel Act's ability to bring down Backpage, which was FOSTA's biggest challenge, yet the next year they proceeded to pass FOSTA anyway. The 2017 Senate Report stated that Backpage directly contravened the Travel Act's provisions[194] as it 'knowingly facilitated prostitution and child sex trafficking' by using a 'facility in interstate commerce,' (the internet) and that it did intend 'to promote and facilitate the promotion, management, establishment, and carrying on, of prostitution offenses'.[195] The report stated the site was "acutely aware that its website facilitates prostitution."[196] The existence of this report

[187] Eric Goldman, 'Worst of Both Worlds FOSTA Signed into Law, Completing Section 230's Evisceration, (*TECH. & MTKG. Law BLOG, 11th April 2018)* < https://blog.ericgoldman.org/archives/2018/04/worst-of-both-worlds-fosta-signed-into-law-completing-section-230s-evisceration.htm> accessed 10th August 2019
[188] Sarah N Lynch and Lisa Lambert, "Sex ads Website Backpage Shut Down by US Authorities" (*Reuters, 6th April 2018)* < https://reut.rs/35nSRQk> accessed 17th August 2018; 46 Press Release, U.S. Dep't of Justice, Justice Department Leads Effort to Seize Backpage.Com, the Internet's Leading Forum for Prostitution Ads, and Obtains Count Federal Indictment (Apr. 9, 2018, Department of Justice),< https://www.justice.gov/opa/pr/justice-department-leads-effort-seizebackpagecom-internet-s-leading-forum-prostitution-ads.> Accessed 3rd October 2019
[189] Sarah N Lynch and Lisa Lambert, "Sex ads Website Backpage Shut Down by US Authorities" (*Reuters, 6th April 2018)* < https://reut.rs/35nSRQk> accessed 17th August 2018
[190] 18 U.S.C. § 1952(a)(3)
[191] 18 U.S.C. § 1952
[192] 18 U.S.C. § 1952
[193] United States senate Permanent Subcommittee on Investigations Committee on Homeland Security and Governmental Affairs, 'Backpage.com's Knowing Facilitation of Online Sex Trafficking' p36
[194] Ibid
[195] 18 U.S.C. § 1952
[196] United States senate Permanent Subcommittee on Investigations Committee on Homeland Security and Governmental Affairs, 'Backpage.com's Knowing Facilitation of Online Sex Trafficking' p36

begs the question of how the Senate could have reasonably believed that FOSTA was the least restrictive means of combatting sex trafficking.

The government in *Woodhull* argued that both houses passed FOSTA on the grounds that it created "an independent criminal prohibition specific to the internet and illegal prostitution."[197] This justification fails to adequately show FOSTA to be the least restrictive means of combatting sex trafficking. "An independent criminal prohibition specific to the internet and illegal prostitution" was not necessary, much less the least restrictive way to bring down 'bad actor intermediaries'.[198] This was proven as Backpage was ultimately shutdown under the Travel Act.

3.3 FOSTA was not the least restrictive way of ensuring victims got compensated

While FOSTA may not have been necessary to bring down Backpage, FOSTA advocates continued to claim that FOSTA was the only way to ensure victims got civil compensation.[199] Civil compensation was consistently denied to Backpage's victims under the court's interpretation of section 230 immunity as online intermediaries could not be treated as the publisher of third party user content under the provision.[200] However, there was always a federal crimes exception to section 230 immunity.[201] As Goldman highlights, any victim of a crime relating to sex trafficking is entitled to mandatory civil compensation under section 1591 of the US Criminal Code.[202] Therefore, once Backpage had been proven guilty of "participating in a trafficking venture " under section 1591,[203] the victims would be automatically entitled to civil compensation. FOSTA supporters may argue that to gain civil compensation in these cases, the intermediary's guilt must be proven beyond reasonable doubt. This is a much higher standard of proof than the balance of probabilities standard that must be met in a civil trial. However, just before FOSTA's passage, two separate federal district courts ruled that section 230 CDA did not rule out civil compensation for trafficking victims where intermediaries had

[197] (Government Brief) *Woodhull Freedom Foundation et al v the AG of the United States* 334 F. Supp. 3d 185 (D.D.C. 2018) (2018) 23
[198] The Committee on the Judiciary, 'Allow States and Victims to Fight Online Sex Trafficking Act of 2017 Report' (H. Rept. 115-572, 2017)
[199] Ibid. 5
[200] 47 U.S.C. § 230
[201] 47 U.S.C. § 230 (e)
[202] 18 U.S.C. § 1591(a)(2), (e)(4)
[203] 18 U.S.C. § 1591(a)(2), (e)(4)

knowingly promoted or facilitated their abuse.[204] Following this, both cases were settled resulting in a final decision on the matter never being heard.[205] However, the rulings did make it clear that FOSTA was not necessarily the least restrictive means of granting victims civil compensation because section 230 CDA did not deprive all victims of compensation from 'bad actor intermediaries'. As the previous law was capable of granting victims compensation without having a major impact on free speech, it cannot be said that FOSTA is the least restrictive means of compensating victims.

3.4 If the law was always capable of achieving FOSTA's compelling interest why did it not?

3.4.1 Ignoring the Federal Crimes exception

While existing laws provided less restrictive means of combatting online sex trafficking and compensating victims, judicial interpretation of the law created significant issues for victims.[206] Indeed, due to the federal crimes exception, CDA expert, Jeff Kosseff, argued before Congress that Backpage should not have benefitted from 230 immunity if the criminal claims against the site were proven.[207] Moreover, the SAVE Act 2015 extended the federal crime for sex trafficking to include knowingly advertising victims.[208] Therefore, even if an intermediary was guilty of knowingly advertising online sex trafficking, they should not have benefitted from section 230 immunity. Under 230 CDA, such intermediaries should be exposed to the full extent of the civil liability which flowed from the crime. The fact that Backpage did benefit from immunity stemmed from expansive judicial interpretation which went far beyond the purposes FOSTA was designed for. It was not because of the law itself.[209]

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[204] *Doe No. 1 v. Backpage.com, LLC,* 2018 WL 1542056, 2 (D. Mass. Mar. 29, 2018); Florida Abolitionist v. Backpage.com LLC, 2018 WL 1587477, 4-5 (M.D. Fla. Mar. 31, 2018).
[205] Eric Goldman, 'The Complicated Story of FOSTA' (2019) 17 First Amend. L. Rev. 279, 288
[206] 47 U.S.C. § 230 (e)
[207] Jeff Kosseff, Online Sex Trafficking and the Communications Decency Act: Hearing Before the Subcomm. on Crime, Terrorism, Homeland Sec., & Investigations of the H. Comm. on the Judiciary, (115th Cong. 9-10, 2017) 9
[208] The SAVE Act amended 18 U.S.C. § 1591(a) & (b).
[209] Danielle Keats Citron & Benjamin Wittes, The Internet Will Not Break: Denying Bad Samaritans § 230 Immunity (2017) 86 FORDHAM L. REV. 401, 404

The problematic interpretations of section 230 immunity cumulated in *Doe v Backpage*.[210] In this case the court concluded, that even if the petitioners' complaint plausibly alleged that respondents had violated the federal and state criminal anti-trafficking laws, the claim could not succeed if the causes of action treated the intermediary as the "publisher or speaker" of online advertisements that third-party traffickers had created.[211] This effectively meant that all civil claims against intermediaries were barred. As well as undermining the federal crimes exception the Court of Appeal effectively ignored vital aspects of previous case law such as *Roommates.com*. This case highlighted that if an intermediary helped develop or edit the illegal content, section 230 immunity did not apply.[212] Eric Goldman highlighted "It takes away one of the most powerful and common plaintiff arguments, that a website was designed to capture illegal content."[213] Hence, judicial interpretation of section 230 in trafficking related cases appeared to be incongruous with the federal crime's exception and previous case law like *Roommates*.[214]

3.4.2 Courts ignored the driving policy behind the section 230 CDA

Citron highlighted that "Courts have extended the safe harbour of section 230 CDA far beyond what the provision's words, context, and purpose support".[215] While expansion of the internet was one goal of section 230 CDA, the CDA was primarily designed to improve online safety for young people.[216] Section 230 did this by granting immunity to intermediaries who actively tried to prevent illegal material from appearing on their site. Section 230 CDA was designed to remedy the judicial anomaly presented under the *Prodigy*[217] and *CompuServe*[218] cases. Prior to 230 CDA a court found that Prodigy, who reviewed their third-party content, were liable for illegal content they missed.[219] However, CompuServe escaped liability because they declined

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[210] *Doe No. 1 v. Backpage.com*, LLC, No. 15-1724 (1st Cir. 2016)
[211] Ibid.
[212] *Fair Housing Council of San Fernando Valley v. Roommates.com,* (2008) *LLC*, 521 F.3d 1157 (9th Cir. 2008)
[213] Andrew Chung (Quoting Eric Goldman) 'U.S. Supreme Court will not examine the tech industry legal shield' *(Reuters.com, 9th January 2017)* < https://reut.rs/3322Uuf> accessed 15th January 2020.
[214] *Fair Housing Council of San Fernando Valley v. Roommates.com,* (2008) *LLC*, 521 F.3d 1157 (9th Cir. 2008)
[215] Danielle Keats Citron & Benjamin Wittes, The Internet Will Not Break: Denying Bad Samaritans § 230 Immunity (2017) 86 FORDHAM L. REV. 401, 403
[216] *Doe v. Internet Brands, Inc*., 824 F.3d 846, 851–52 (9th Cir. 2016).
[217] *Stratton Oakmont, Inc. v. Prodigy Services Co.*, 1995 WL 323710 (N.Y. Sup. Ct. 1995)
[218] *Cubby, Inc. v. CompuServe Inc.*, 776 F. Supp. 135 (S.D.N.Y. 1991)
[219] *Doe v. Internet Brands, Inc*., 824 F.3d 846, 851–52 (9th Cir. 2016)

to review any of the content posted to their site at all.[220] Section 230 CDA was meant to ensure intermediaries who worked to protect young people online, like Prodigy, were immune from liability. However, the courts have gradually widened the scope of section 230 CDA to grant "Bad Samaritans" legal immunity.[221] They have justified this by ignoring the policy goal behind 230 CDA to protect young people.

In *Doe*,[222] as with many of the controversial Backpage cases, the court solely focused on, "Congress' avowed desire to permit the continued development of the internet with minimal regulatory interference."[223] The court relied on the separation of powers principle, claiming they had no power to override the will of Congress. However, in saying this, the court simply ignored a major Congressional policy goal of section 230 CDA which was to improve the safety of young people online. Therefore, Citron suggested that section 230's weaknesses should be remedied through "judicial interpretation" and only "modest legislative change" if necessary.[224] Hence, the least restrictive means of remedying this is through the courts amending their interpretations to fit Congress' policy goals. The answer is certainly not to pass more broad legislation like FOSTA.

3.5 FOSTA's penalties will chill constitutionally protected speech

FOSTA encompasses a wide range of conduct and attracts severe penalties for any infringements to its provisions. Therefore, even if SCOTUS holds that legislative action was needed, FOSTA's harsh penalties are unnecessarily restrictive due to the potential they have to chill online speech. As with the second prong of the scrutiny test, SCOTUS should take a prudential approach to examining the potential chill that FOSTA could have on societal free speech online. In *Reno* SCOTUS took a prudential approach and examined the deterrent effect the harsh penalties in the CDA would have on online speech as a whole.[225] This led the court to rule that the CDA was unnecessarily restrictive on free speech.[226] Likewise, with FOSTA

[220] *Stratton Oakmont, Inc. v. Prodigy Services Co.*, 1995 WL 323710 (N.Y. Sup. Ct. 1995)
[221] Danielle Keats Citron & Benjamin Wittes, The Internet Will Not Break: Denying Bad Samaritans § 230 Immunity (2017) 86 FORDHAM L. REV. 401
[222] *Doe No. 1 v. Backpage.com*, LLC, No. 15-1724 (1st Cir. 2016), 10
[223] Ibid 11
[224] Danielle Keats Citron & Benjamin Wittes, The Internet Will Not Break: Denying Bad Samaritans § 230 Immunity (2017) 86 FORDHAM L. REV. 401
[225] *Reno v. ACLU*, (1997) 521 U.S. 844, 872
[226] ibid

the court should consider the potential chilling effect that FOSTA's harsh penalties will have on protected speech. As Windemuth highlights, the concern surrounding chilled speech is rooted in a lack of certainty about how the expression will be received by the law.[227] Ruling that one group of plaintiffs may or may not be affected by the provision does not prevent the greater effect of the law on speech in American society as a whole.[228] The First Amendment differs from other constitutional provisions in its potential to reach outside of those in the courtroom to effect society at large.[229] Therefore, when FOSTA reaches SCOTUS they ought to take a prudential approach in order to consider the full effects of this and uphold First Amendment values.

It could be argued that there was greater reason for taking a prudential approach in *Reno*[230] as the CDA effected all internet users. Conversely, FOSTA only applies to intermediaries. However, FOSTA will stifle protected speech as online intermediaries will censor or shut down spaces where speech can take place, rather than risk liability.[231] Indeed, FOSTA's penalties are already creating deterrent effects. Upon shutting down their adult section Craigslist wrote, "We can't take such risk [of continuing to operate] without jeopardizing all our other services".[232] It does not make commercial sense for intermediaries to risk incurring such severe civil and criminal liability.[233] This has an unnecessarily restrictive impact on speech without furthering the compelling interest and directly undermines the principles in the First Amendment that no law should prohibit free speech.[234] Therefore, SCOTUS should not regard FOSTA as the least restrictive means of pursuing the compelling interest.

3.6 Summary

[227] Anne Windemuth, The First Challenge To FOSTA Was Dismissed — Along With The First Amendment's Unique Standing Doctrine (Yale Law School or the Media Freedom and Information Access Clinic, 27th December 2018) <https://law.yale.edu/mfia/case-disclosed/first-challenge-fosta-was-dismissed-along-first-amendments-unique-standing-doctrine> accessed 30th September 2019
[228] ibid
[229] ibid
[230] *Reno v. ACLU*, (1997) 521 U.S. 844, 872
[231] Eric Goldman, 'The Complicated Story of FOSTA' (2019) 17 First Amend. L. Rev. 279, 287
[232] Craigslist, 'FOSTA' *(Craigslist.com, 2018)* <http://www.craigslist.org/about/FOSTA> accessed 20th October 2019
[233] Eric Goldman, 'Worst of Both Worlds FOSTA Signed into Law, Completing Section 230's Evisceration, *(11th TECH. & MTKG. Law BLOG, April 2018)* < https://blog.ericgoldman.org/archives/2018/04/worst-of-both-worlds-fosta-signed-into-law-completing-section-230s-evisceration.htm> accessed 10th August 2019
[234] U.S. Constitution, Amendment I

FOSTA is far from the least restrictive means of achieving FOSTA's compelling interest. Firstly, the Travel Act provides a less restrictive means of pursuing FOSTA's compelling interest.[235] The Act accomplished FOSTA's biggest challenge by shutting down Backpage, before FOSTA was even passed into law.[236] Secondly, FOSTA is not the least restrictive way of ensuring victims of online sex trafficking obtain fair compensation. However, one cannot ignore the injustices that arose during the string of Backpage cases in which victims were denied any form of compensation from the criminal intermediary. These injustices were directly linked to the court's interpretation of section 230 CDA as opposed to the legislation itself.[237] The courts did not pay due attention to the federal crimes exception,[238] ignored previous case law such as *Roommates* and failed to acknowledge the driving policy behind section 230 CDA.[239] The CDA was designed to protect young people online and reward intermediaries who contributed to this goal. As highlighted by Citron the least restrictive way of altering this is through narrowing judicial interpretation of 230 CDA.[240] However, even if it is successfully argued that pre-existing laws could not fulfil FOSTA's compelling interest, FOSTA's penalties must be regarded as unnecessarily restrictive.[241] These penalties will cause most intermediaries to limit the free speech on their platform in order to avoid liability. This flies in the face of the First Amendment.[242] For SCOTUS to consider the major chilling effect this could have on online free speech they should take a prudential approach to this part of the constitutional question. The prudential approach taken by the court in *Reno* drove the court to decide that the law was not the least restrictive means of pursuing the compelling interest.[243] A similar prudential approach should lead the court to the same result regarding FOSTA.

This article has now argued why FOSTA should fail to pass each of the three prongs of the strict scrutiny test. In the next Part, I will examine the *Woodhull* cases in the District Court and the Court of Appeal and demonstrate the issues with both courts' approach to interpretation. It

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[235] 18 U.S.C. § 1952
[236] Sarah N Lynch and Lisa Lambert, "Sex ads Website Backpage Shut Down by US Authorities" (*Reuters, 6th April 2018)* < https://reut.rs/35nSRQk> accessed 17th August 2018
[237] Danielle Keats Citron & Benjamin Wittes, The Internet Will Not Break: Denying Bad Samaritans § 230 Immunity (2017) 86 FORDHAM L. REV. 401, 404
[238] 47 U.S.C. § 230 (e)
[239] *Doe No. 1 v. Backpage.com*, LLC, No. 15-1724 (1st Cir. 2016)
[240] Danielle Keats Citron & Benjamin Wittes, The Internet Will Not Break: Denying Bad Samaritans § 230 Immunity (2017) 86 FORDHAM L. REV. 401, 404
[241] 18 U.S.C. § 2421A
[242] Eric Goldman, 'Worst of Both Worlds FOSTA Signed into Law, Completing Section 230's Evisceration, *(TECH. & MTKG. Law BLOG, 11th April 2018)* < https://blog.ericgoldman.org/archives/2018/04/worst-of-both-worlds-fosta-signed-into-law-completing-section-230s-evisceration.htm> accessed 10th August 2019
[243] *Reno v. ACLU*, (1997) 521 U.S. 844, 892 (1997)

will be argued that SCOTUS should root their interpretation in a textual approach when examining FOSTA's constitutionality in order to avoid these issues.

Part 4: The Fight Against FOSTA

In January 2020 the Court of Appeal overturned the District Court's decision to deny the *Woodhull* plaintiffs standing.[244] This means that the case will now proceed to SCOTUS where the final verdict on FOSTA's constitutionality will be declared. For any constitutional case to be heard by SCOTUS plaintiffs must first be granted Article III standing. The purpose of this Part is to highlight the importance of courts taking a textual interpretative approach to First Amendment cases. Bobbitt describes a textual approach as one where the court looks to the precise wording in the amendment as the primary guild to their constitutional decision. In many First Amendment cases, courts have applied a more relaxed standard to the question of standing by taking a textual approach to constitutional interpretation.[245] This is because the effects of First Amendment infringements tend to reach beyond the plaintiffs in the courtroom and have a significant impact on free expression in society.[246] However, the District Court and the Court of Appeal in *Woodhull* completely neglected to consider the effect of FOSTA on society as a whole.[247] In *Woodhull*, the District Court and the Court of Appeal were asked whether a series of plaintiffs who feared prosecution under FOSTA had standing to challenge the law under the First Amendment. At first instance, the District Court made FOSTA effectively unchallengeable by ruling that standing required plaintiffs to prove they had the *mens rea* to commit the crimes proscribed in FOSTA.[248] While the Court of Appeal mitigated the damaging effects of the lower court's decision by granting the plaintiffs standing, they did so on the basis that wording of FOSTA had a broader scope than the lower court claimed. This meant the plaintiffs could be prosecuted under FOSTA and could therefore fulfil the 'injury in fact' requirement.[249]However, the Court of Appeal did not consider the effects of FOSTA on society as a whole. Such interpretations seem to explicitly undermine SCOTUS' decision in *Packingham* which urged other courts to consider the societal effects of curtailing free speech

[244] *Woodhull Freedom Foundation et al v the AG of the United States* No. 18-5298, (D.C. Cir. 2020), 15
[245] Anne Windemuth, The First Challenge To FOSTA Was Dismissed — Along With The First Amendment's Unique Standing Doctrine (Yale Law School or the Media Freedom and Information Access Clinic, 27th December 2018) <https://law.yale.edu/mfia/case-disclosed/first-challenge-fosta-was-dismissed-along-first-amendments-unique-standing-doctrine> accessed 30th September 2019
[246] Ibid
[247] *Woodhull Freedom Foundation et al v the AG of the United States* 334 F. Supp. 3d 185 (D.D.C. 2018)
[248] Ibid., 23
[249] *Lujan v. Defefenders*. of Wildlife, 504 U.S. 555, 560–61 (1992)

online.[250] Therefore, in examining FOSTA, SCOTUS, should root their judicial interpretation in a textual approach.[251] If the court fails to do this, they risk ignoring the effects FOSTA has on society at large. This may undermine the objectives of the First Amendment, which was to ensure that Congress could not make laws that infringed free speech.

4.1 Constitutional standing

To bring a case to challenge a piece of legislation under the First Amendment, the court must first grant standing to the plaintiff. To establish standing the plaintiff must show (1) an injury in fact, (2) a sufficient 'causal connection between the injury and the conduct complained of and (3) a likelihood that the injury will be redressed by a favourable decision.[252] While this is designed to promote zealous advocacy in constitutional cases, differing levels of rigidity have been attached to these factors when they are applied by courts. This is particularly true with the 'injury in fact' requirement which is the hurdle most plaintiffs fail to overcome.[253]

4.2 The First Amendment reaches beyond the courtroom

As laws that prohibit free expression have the capacity to reach beyond those in the courtroom, many courts have relaxed the standing requirements in First Amendment cases. This was something that the District Court and the Court of Appeal in *Woodhull* did not consider in their judgements. This led the District Court to completely deny the *Woodhull* plaintiffs standing to take the case against FOSTA forward. Courts that have applied a more relaxed standard have employed textual modes of constitutional interpretation.[254] A textual approach is where the court relies on the exact words in the constitutional provision to determine its meaning.[255] With a textual interpretation, the court gives the wording its ordinary contemporary meaning.[256] This is justified on the basis that the given text has not been amended or updated by those in modern society.[257] Textualists, like Hugo Black hold that the meaning of these words should not be

[250] *Packingham v. North Carolina*, 582 U.S. (2017)
[251] While SCOTUS should take a prudential approach to specific aspects of the case, as outlined in previous chapters, they should root their interpretation in a textual approach. Under Bobbitt's view of judicial interpretation judges can be influenced by multiple approaches to differing extents.
[252] *Lujan v. Defefenders*. of Wildlife, 504 U.S. 555, 560–61 (1992)
[253] Ronald D Rotunda and John E. Nowak, *Treatise on Constitutional Law: Substance and Procedure* (1992)
[254] Philip Bobbitt, *Constitutional Fate: Theory of the Constitution* (New York, OUP, 1984) 25
[255] Ibid 26
[256] Ibid 26
[257] Ibid 25

departed from by the courts.[258] The Amendment states that "Congress shall make no law that interferes with freedom of expression" and there is no text in the provision that qualifies this imperative.[259] Therefore, under a textual approach its meaning is absolute and not limited to a certain group of plaintiffs.

In *Secretary of State of Md. v. Joseph H. Munson Co., Inc.*, the judges acknowledged the wide reaching effects of prohibitions on free speech.[260] The court highlighted that "Where there is a danger of chilling speech the concern that constitutional adjudication be avoided whenever possible may be outweighed by society's interest in having the statute challenged".[261] The court recognised that even where citizens did not appear to directly fulfil the injury in fact requirement, if a law caused protected speech to be chilled, " Society as a whole would be the loser".[262] This would stand in contradiction with the absolutist textual foundations of the First Amendment.[263] With this in mind the court ruled that, litigants could challenge a statute because it's existence may cause others to refrain from free speech or expression.[264] This was something that both the District Court and the Court of Appeal in *Woodhull* completely ignored as neither court discussed the impact that FOSTA had beyond whether it was significant enough to fulfil the injury in fact requirement for the plaintiffs in the case.[265]

4.3 An unchallengeable FOSTA

By failing to give adequate consideration to the textual foundations of the First Amendment, the District Court made FOSTA almost unchallengeable.[266] The textual foundations of the First Amendment clearly aims to provide an avenue through which Congress can be challenged for restricting speech. In the District Court in *Woodhull*, Judge Leon ruled that the plaintiffs did not fulfil the 'injury-in-fact requirement' because they did not have a "credible threat of prosecution."[267] To establish a credible threat of prosecution, he claimed that the plaintiffs must

[258] Ibid
[259] U.S. Constitution, Amendment I
[260] Secretary of State of Md. v. Munson Co., 467 U.S. 947 (1984)
[261] Ibid
[262] Ibid
[263] Philip Bobbitt, *Constitutional Fate: Theory of the Constitution* (New York, OUP, 1984)
[264] U.S. Constitution, Amendment I
[265] *Woodhull Freedom Foundation et al v the AG of the United States* 334 F. Supp. 3d 185 (D.D.C. 2018)
[266]Ibid
[267] *Lujan v. Defefenders*. of Wildlife, 504 U.S. 555, 560–61 (1992)

prove they had the *mens rea* to commit a crime proscribed by FOSTA.[268] They would therefore have to prove their conduct had "a nexus with illegal prostitution" and that they had "intended to explicitly further an unlawful act".[269] This would mean that although FOSTA affects free expression across society, it could only be challenged by those willing to admit to a crime. If such a ruling had been upheld, it would have made FOSTA virtually impossible to challenge

Moreover, under *Babbitt* there is no requirement to admit to committing a crime to establish standing.[270] The ruling of the District Court, therefore, stands in direct contradiction with this authority. Moreover, even if a plaintiff were willing to admit to the mental element of the crime, it would likely prove futile as illegal acts are not protected under the First Amendment. This was recently highlighted when Backpage tried to challenge the constitutionality of the SAVE Act in *Backpage v Lynch*.[271] The argument of the claimants in *Woodhull* was that FOSTA encompassed those who were not pursuing illegal acts.[272] However, the apparent inability of non-criminal actors to challenge FOSTA meant that its wide reaching effects on free speech could have gone unchallenged.

4.4 Did the Court of Appeal fix the problem?

The practical effects of the District Court's ruling were mitigated by the Court of Appeal's decision, as they granted the plaintiffs standing to bring the case before SCOTUS.[273] However, the Court of Appeal, like the lower court, appeared to only consider whether Congress could plausibly prosecute the plaintiffs in *Woodhull*. The Court of Appeal took what Bobbitt refers to as a doctrinal approach.[274] This is where a court primarily uses previous legal authority and precedent to decide constitutional questions.[275] In *Woodhull*, the Court of Appeal examined the scope that had been applied to terms like 'promotes' and 'prostitution' in previous case law and concluded that the plaintiffs did have 'a credible threat of prosecution'. Therefore, the central difference in the ruling of the two courts was that the Court of Appeal disagreed on the

[268] *Woodhull Freedom Foundation et al v the AG of the United States* 334 F. Supp. 3d 185 (D.D.C. 2018) 23
[269] Ibid 23
[270] *Babbitt v. Youpee* (1997) 519 U.S. 234, 117 S. Ct. 727
[271] *Backpage.com, LLC v. Lynch, no. 1:2015cv02155 (D.D.C. 2016)*
[272] *Woodhull Freedom Foundation et al v the AG of the United States* 334 F. Supp. 3d 185 (D.D.C. 2018)
[273] *Woodhull Freedom Foundation et al v the AG of the United States* No. 18-5298, (D.C. Cir. 2020),
[274] Ronald D Rotunda and John E. Nowak, *Treatise on Constitutional Law: Substance and Procedure* (1992) 39
[275] ibid 40

scope of the wording in FOSTA.[276] However, if they had agreed with the District Court on the scope of the wording in FOSTA they too may have come to the decision that the plaintiffs in *Woodhull* did not have standing as they did not take a textual approach. Therefore, while the Court of Appeal mitigated the practical effects of the lower court's decision, their approach to the constitutional question could have undermined the First Amendment imperative which restricts Congress from creating any law that prohibited free expression.[277]

4.4.1 *Packingham*

In the recent case of *Packingham,* SCOTUS urged other courts not to overlook the societal effect of curtailing speech online.[278] *Packingham* highlighted that in the age of the internet, chilling effects on society caused by speech restrictions are amplified.[279] The internet has been identified as one of the greatest platforms for mass speech.[280] Taking a strong textual approach,[281] SCOTUS in *Packingham* highlighted the link between access to social media and First Amendment rights, stating that there is a fundamental First Amendment principle that laws should not restrict persons having access to places where they can speak and listen.[282] The court recognized that social media users employ these intermediary platforms to engage in a wide array of protected First Amendment activity on topics.[283] The court warned other courts to "exercise extreme caution before suggesting that the First Amendment provides scant protection [to the internet]."[284] Conversely, *Woodhull* seems to have taken little consideration of the gravity online speech restrictions have on society as a whole.[285] This stems from the fact neither court took a textual approach to determining standing. In doing this the courts negated to consider the broader reaching scope of laws that target the content of speech and can so easily erode the principles that drive the First Amendment. In order to observe the court's warning in *Packingham*,[286] SCOTUS should root their judicial interpretation of FOSTA in a

[276] *Woodhull Freedom Foundation et al v the AG of the United States* No. 18-5298, (D.C. Cir. 2020), 15
[277] Philip Bobbitt, *Constitutional Fate: Theory of the Constitution* (New York, OUP, 1984)
[278] *Packingham v. North Carolina*, 582 U.S. (2017)
[279] *Packingham v. North Carolina*, 582 U.S. (2017)
[280] *Reno v. ACLU, 521 U.S. 844, 879 (1997)*
[281] Ronald D Rotunda and John E. Nowak, *Treatise on Constitutional Law: Substance and Procedure* (1992) 26
[282] *Packingham v. North Carolina*, 582 U.S. (2017)
[283] Ibid 1735-36
[284] Ibid 2047
[285] *Woodhull Freedom Foundation et al v the AG of the United States* 334 F. Supp. 3d 185 (D.D.C. 2018)
[286] *Packingham v. North Carolina*, 582 U.S. (2017)

textual approach.[287] Failing to do so will undermine the objectives of the First Amendment, which was to ensure that Congress could not make laws that infringed free speech.[288]

4.5 Summary

The courts in Woodhull failed to follow other courts in applying a lower a more relaxed standard in establishing standing in First Amendment cases.[289] Judges had previously done this by taking a textual approach to constitutional interpretation. Such modes of judicial interpretation leads judges to consider the intent behind the amendment and therefore examine the broader societal impacts speech restrictions might have on societal free speech.[290] However, the District Court in *Woodhull* steered away from such textual interpretations by failing to reflect on the consequences of FOSTA on wider society.[291] Furthermore, the District Court made FOSTA effectively unchallengeable by ruling that standing required plaintiffs to prove they had the *mens rea* requirement to commit the crimes proscribed in FOSTA.[292] The Court of Appeal mitigated the damaging effects of the lower courts decisions by granting the plaintiffs standing.[293] However, this was because they believed the wording of FOSTA was broader than the lower court had claimed it was.[294] Yet, like the lower court, the Court of Appeal failed to reflect on the effects FOSTA has on society at large. Such interpretations risk undermining SCOTUS' warning in *Packingham*,[295] where the judges expressed the importance of considering the societal effects of curtailing free speech online. Therefore,[296] SCOTUS should take a textual approach when examining FOSTA's constitutionality. Failing to do so will undermine the clear objectives of the First Amendment, which was to ensure that Congress made no laws infringing free speech.[297]

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[287] Ronald D Rotunda and John E. Nowak, *Treatise on Constitutional Law: Substance and Procedure* (1992) 26
[288] Philip Bobbitt, *Constitutional Fate: Theory of the Constitution* (New York, OUP, 1984)
[289] Anne Windemuth, 'The First Challenge To FOSTA Was Dismissed — Along With The First Amendment's Unique Standing Doctrine' (Yale Law School or the Media Freedom and Information Access Clinic, 27th December 2018) <https://law.yale.edu/mfia/case-disclosed/first-challenge-fosta-was-dismissed-along-first-amendments-unique-standing-doctrine> accessed 30th September 2019
[290] *Secretary of State of Md. v. Munson Co., 467 U.S. 947 (1984)*
[291] *Woodhull Freedom Foundation et al v the AG of the United States* 334 F. Supp. 3d 185 (D.D.C. 2018)
[292] Ibid 23
[293] *Woodhull Freedom Foundation et al v the AG of the United States* No. 18-5298, (D.C. Cir. 2020), 15
[294] ibid 13
[295] *Packingham v. North Carolina*, 582 U.S. (2017)
[296] Philip Bobbitt, *Constitutional Fate: Theory of the Constitution* (New York, OUP, 1984)
[297] ibid

Conclusion

The First Amendment states that "Congress shall pass no law that prohibits free expression".[298] This article has shown why FOSTA breaches this amendment. If FOSTA is to be deemed constitutional the government must prove that it is necessary, narrowly tailored and the least restrictive means of achieving its compelling interest. The multiple grounds on which the legislation fails these three prongs of the strict scrutiny test have been outlined. SCOTUS have the opportunity to remedy the potentially major chilling effects of FOSTA by adopting the approaches highlighted in the preceding Parts when examining the provision in light of the US constitution.

5.1 FOSTA should not pass strict scrutiny

In Part one, I argued that FOSTA is not necessary to achieve its compelling interest of combatting online sex trafficking. Firstly, there is little evidence of a causal link between section 230 immunity and increases in sex trafficking. The case of *Brown* highlighted that there must be a causal link between the harm and the measure which is meant to combat the harm.[299] Secondly, FOSTA decreases the visibility of sex trafficking ads without necessarily decreasing the number of victims. As highlighted in *Frazee* if a law is incapable of achieving its compelling interest it cannot pass the first hurdle of the strict scrutiny test.[300] In FOSTA's case its provisions do not directly combat online sex trafficking.[301] Finally, not only is FOSTA unnecessary, but it is actively harmful towards efforts to fight online sex trafficking.[302] The decline of online platforms removed the spaces in which victims were discovered and hindered the ability of law enforcement to reprimand traffickers.[303] Given that FOSTA's provisions are so incongruent with the compelling interest that the government claims FOSTA pursues, it could be queried whether FOSTA was designed to combat online sex trafficking at all.

Having established that FOSTA was not necessary to fulfil its compelling interest, Part two examined the second prong of the strict scrutiny test and concluded that FOSTA is not

[298] U.S. Constitution, Amendment I
[299] *Brown v Entertainment Merchants Association,* (2011) *546 U.S. 786*
[300] *Frazee v Illinois Department of Employment Security* (1989) *489 U.S. 829*
[301] Laura Chamberlain, 'FOSTA: A Hostile Law with a Human Cost' (2019) 87 Fordham L. Rev. 2171, 12
[302] Ibid
[303] Latest Developments in Combating Online Sex Trafficking: Hearing Before the Subcomm. on Commc'ns & Tech. of the H. Comm. on Energy & Commerce, 115th Cong. (2017) (Statement of Russ Winkler).

sufficiently narrowly tailored to its compelling interest. FOSTA is not sufficiently narrowly tailored as it refers to 'prostitution' as opposed to sex trafficking.[304] Furthermore, FOSTA does not define key terms like 'prostitution', 'promote' and 'facilitate'.[305] FOSTA is also not sufficiently narrowly tailored to the 'bad actor intermediaries' that the government claimed it was designed to target.[306] This is largely down to the ill-defined *mens rea* requirement in sections 2124A[307] and 1591[308]. FOSTA's inadequate tailoring is already having an effect on the safety of those working in the sex industry as it has led to the eradication of platforms which sex workers used to check clients and share information.[309] For SCOTUS to fully consider the extent to which FOSTA is insufficiently tailored to those whom its compelling interest aims to target, they should take a prudential approach.[310]

In Part three it was argued that FOSTA does not provide the least restrictive means of fulfilling its compelling interest and it should therefore also be struck down on the third prong of the test. *Playboy* highlighted that where a pre-existing piece of legislation can fulfil the compelling interest,[311] the legislation under scrutiny cannot constitute the least restrictive means. The Travel Act was capable of fulfilling FOSTA's compelling interest in a less restrictive way.[312] Indeed, it was the Travel Act that ultimately caused the demise of Backpage. However, the Travel Act had a much narrower potential scope of plaintiffs and conduct that it could encompass, rendering it less restrictive than FOSTA. Moreover, FOSTA did not constitute the least restrictive means of compensating victims.[313] Crucially, the problems that had arisen under section 230 CDA were due to overly broad judicial interpretation of the immunity which was at odds with Congressional policy.[314] It was never down to section 230 CDA itself.[315]

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[304] 18 U.S.C.A. § 2421A
[305] Ibid
[306] House Report. 'Allow States and Victims to Fight Online Sex Trafficking' No. 115-572, (2018) pt. 1, at 3.
[307] 18 U.S.C.A. § 2421A
[308]Ibid. §1591
[309] Freedom network USA (Freedom Network Sesta Hearing, 2018) <https://www.eff.org/files/2017/09/18/sestahearing-freedomnetwork.pdf> accessed 30th September 2019
[310] Philip Bobbitt, *Constitutional Fate: Theory of the Constitution* (New York, OUP, 1984) 59
[311] *United States v. Playboy Entertainment Group*, 529 U.S. 803 (2000)
[312] Eric Goldman, 'Worst of Both Worlds FOSTA Signed into Law, Completing Section 230's Evisceration, *(TECH. & MTKG. Law BLOG, 11th April 2018)* < https://blog.ericgoldman.org/archives/2018/04/worst-of-both-worlds-fosta-signed-into-law-completing-section-230s-evisceration.htm> accessed 10th August 2019
[313] Ibid
[314] Danielle Keats Citron & Benjamin Wittes, 'The Internet Will Not Break: Denying Bad Samaritans § 230 Immunity' (2017) 86 FORDHAM L. REV. 401
[315] 47 U. S. C. § 230

5.2 SCOTUS should root their interpretation in a textual approach

The final Part of this article argued that because the repercussions of First Amendment infringements ripple well beyond the small number of plaintiffs in the courtroom, courts should take a textual interpretative approach to First Amendment cases. Bobbitt described the textual approach as an approach where judges look to the textual wording of the constitution as their primary source of interpretation.[316] When this approach is applied to the First Amendment the absolutist tones become clear.[317] Such a textual approach has led to a more lenient standard being applied to Article III standing in First Amendment cases. However, neither the District Court nor the Court of Appeal in *Woodhull* applied this more relaxed standard as the judges failed to take a textual approach to interpreting the question of Article III standing.[318] The constitution itself clearly does not limit the free speech protection to those in the court room. If SCOTUS fails to root their interpretation in a textual approach, they risk undermining the clear objectives of the First Amendment, which was to ensure that Congress made no laws infringing free speech.[319]

5.3 What next for FOSTA?

The Plaintiffs in the *Woodhull* case have indicated intention to have their case heard before SCOTUS who will decide on the constitutionality of FOSTA. It is clear FOSTA should be struck down in its entirety by SCOTUS. While I have detailed the reasons why FOSTA should fail under all three prongs of the strict scrutiny test, it need only fail one branch of the test to be deemed unconstitutional under the First Amendment and struck down. If FOSTA were to be deemed unconstitutional and struck down, section 230 immunity would be restored thereby forcing Congress to look for another solution to the pressing issue of online sex trafficking. While it is beyond the scope of this article to discuss what that may be, what this research on FOSTA suggests is that the compelling interest will not be achieved by severely regulating intermediaries. Such legislative policies appear to shoot the messenger and distort the visibility of the problem.

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[316] Philip Bobbitt, *Constitutional Fate: Theory of the Constitution* (New York, OUP, 1984) 26
[317] U.S. Constitution, Amendment I
[318] *Secretary of State of Md. v. Munson Co*., (1984) 467 U.S. 947
[319] (n 1)

My child, whose choice? Does the law on the application of the best interests standard in relation to withholding or withdrawing treatment in paediatric care require reform?

Katie Bowen Nicholas

Introduction

"When hearts, lungs and kidneys failed in the past, death came swiftly and without discussion… [yet] death, in our modern medical age, increasingly requires a choice. Switches must be flicked, buttons pushed and tubes removed. It is a choreographed event preceded by discussion, debate, and not infrequently, conflict".[1]

At present, the 'gold standard' for adjudicating treatment disputes concerning paediatric medical treatment is the best interests standard.[2] In practice, in Queensland, Australia, (where the law is the same), "to act in a child's best interests is to do whatever will best promote all the child's interests. It is a maximising concept which involves doing the best possible for the child overall".[3] The best interests standard was determined as the appropriate means to settle such disputes in advance of the prominence of the ethical principles of privacy and autonomy.[4] On reflection of this prominence, the emergence of medical advancements, the change in the doctor-patient relationship and recent high-profile paediatric court cases, the question of whether the best interests standard is in fact the appropriate standard has been widely debated by academics and the public alike.

Typically, the obtainment of informed consent is imperative prior to clinical intervention.[5] An adult with full mental capacity is within their right to refuse medical treatment, even if such

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[1] Ellen Waldman, 'Bioethics Mediation at the end of life: Opportunities and Limitations' (2014) 15(2) Cardozo Journal of Conflict Resolution 449.
[2] Dave Archard, 'My child, my choice': parents, doctors and the ethical standards for resolving disagreement' (2019) 70(1) Northern Ireland Legal Quarterly 93, 95.
[3] Queensland Government, 'Implementation Guidelines: End-of-life care: Decision-making for withholding and withdrawing life-sustaining measures from patients under the age of 18 years' (*Queensland Government*, 27 February 2017) <https://www.childrens.health.qld.gov.au/wp-content/uploads/PDF/qcycn/imp-guideline-eolc-part-2.pdf> accessed 2 January 2020 1, 10.
[4] Tom Beauchamp and James Childress, *Principles of Bioethical Medicine* (5th edition, Oxford University Press, 2001) 102.
[5] Helen Taylor, 'What are 'Best Interests'? A critical evaluation of 'Best Interests' decision-making in clinical practice (2016) 24(2) Medical Law Review 176.

refusal is deemed to be not in their best interests.[6] As reflected in cases as far back as *Schloendorff v Society of New York Hospital,*[7] and as reinforced further in *Re T (Adult: refusal of treatment),*[8] medical practitioners must respect their patients decision, thereby upholding the notion of self-determination. However, in contrast, children cannot consent to treatment under the law, thus consent is provided by those who hold parental responsibility for the child.[9]
As per section one of the Family Reform Act 1969, a child is deemed to be any person under the age of 18. [10] Section 8 of the Act provides for recognised exceptions and as such children who are 16 or 17 are presumed to be capable of consenting to treatment. [11] Both the child's parents and the medical professionals have to agree to the treatment plan. In situations where the parents and medical professionals disagree as to what is in the best interests of the child, the court decides.[12] Whilst the principle of autonomy is held in high regard by the courts, a paternalistic approach is taken where children are concerned in order to promote their welfare. Thus, at the point where it is believed that a child's welfare is engaged, the courts can intervene in the decision to determine what is in the child's best interests.[13]

There is no moral distinction between acts and omissions.[14] As expressed by Holman J in *Central Manchester University Hospitals NHS Foundation Trust v A*, "there is, and can be, no legal (nor indeed ethical) distinction between a decision to withhold artificial ventilation and a decision to withdraw or discontinue it once started". [15] The reasoning for this is that in neither case is the child killed, the child "dies because of the natural result or effect of his underlying disorder or disease". [16] However, whilst ethically there is no distinction, as expressed by the Royal College of Paediatrics and Child Health "emotionally they are sometimes poles apart".[17]

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[6] Emily Jackson, *Medical Law: Texts, Cases and Materials* (5th edn, OUP Oxford, 2019) 240.
[7] *Schloendorff v Society of New York Hospital* [1914] 105 NE 92.
[8] *Re T (Adult: refusal of treatment)* [1993] Fam 95.
[9] Emily Jackson, *Medical Law: Texts, Cases and Materials* (5th edn, OUP Oxford, 2019) 302.
[10] Family Reform Act 1969, section 1.
[11] Ibid, section 2.
[12] Giles Birchley, Rachael Gooberman-Hill, Zuzana Deans, James Fraser and Richard Huxtable, "Best Interests' in paediatric intensive care: an empirical ethics study' (2017) 102(10) Archives of Disease in Childhood 930.
[13] Children Act 1989, section 1.
[14] Jonathon Herring, *Medical Law and Ethics* (8th edn, Oxford University Press, 2020) 580.
[15] *Central Manchester University Hospitals NHS Foundation Trust v A* [2015] EWHC 2828 (Fam) [6] (Holman J).
[16] *Central Manchester University Hospitals NHS Foundation Trust v A* [2015] EWHC 2828 (Fam); Jonathon Herring, *Medical Law and Ethics* (8th edn, Oxford University Press, 2020) 579.
[17] Royal College of Paediatrics and Child Health, 'Withholding or Withdrawing Life Sustaining Treatment in Children: A Framework for Practice' (*Royal College of Paediatrics and Child Health*, May 2004) <https://councilfordisabledchildren.org.uk/sites/default/files/field/attachemnt/Withholding%26withdrawing_treatment.pdf> accessed 18 October 2019 13.

On analysis of recent high-profile court cases involving disagreements between parents and medical professionals, it is unsurprising that many consider conflict in paediatric practice as the norm.[18] Due to the plethora of complexities that surround the decision-making process, it is hard to determine where the boundary should lie between private life and state intrusion, with many questioning whether the doctrine of *parens patriae* is fair.[19] As a result of a combination of factors, namely access to the internet and the growth of social media, parents are able to research treatment options and publicise their disagreement.[20] Multiple ethical dilemmas arise in this context.[21] However, the most widely debated one at present is who is best placed to make the decision whether to treat or not to treat.[22]

As evidenced above, changes in societal and social norms, combined with the emergence of medical technologies, creates new ethical dilemmas and legal issues. Through conducting doctrinal research, this thesis explores these dilemmas and issues in greater detail. Due to the entwinement of medical law and ethics, the concept of morality is an underlying theme of the discussion. As expressed by Hoffmann LJ in *Bland*, "this is not an area [in] which any difference can be allowed to exist between what is legal and what is morally right. The decision of the court should be able to carry conviction with the ordinary person as being based[,] not merely on legal precedent[,] but also on acceptable ethical values". [23]

With this backdrop in mind, after an introduction to the best interests standard and the ethical controversies in this area utilising the ethical approach of principlism, chapter two will explore whether this is the right standard to be applied to treatment decisions concerning children.[24] To evaluate the success of the standard, the application of the best interests standard in the United States (hereafter, 'US') is examined and the significant harm threshold is explored as an

[18] Dave Archard, 'My child, my choice': parents, doctors and the ethical standards for resolving their disagreement' (2019) 70(1) Northern Ireland Legal Quarterly 93.
[19] Imogen Goold, 'Evaluating 'Best Interests' as a Threshold for Judicial Intervention in Medical Decision-Making on Behalf of Children' in Imogen Goold, Jonathan Herring and Cressida Auckland, *Parental Rights, Best Interests and Significant Harms* (1st edn, Hart Publishing, 2019).
[20] Dave Archard, 'My child, my choice': parents, doctors and the ethical standards for resolving their disagreement' (2019) 70(1) Northern Ireland Legal Quarterly 93, 94.
[21] Chunmei Lyu and Li Zhang, 'Who decides in withdrawal of treatment in a critical care setting? A case study on ethical dilemma' (2018) 5(3) International Journal of Nursing Sciences 310.
[22] Ibid
[23] *Airedale NHS Trust v Bland* [1993] All ER 821 [850] LJ Hoffmann.
[24] J DeMarco, 'Principlism and moral dilemmas: a new principle' (2005) 31(2) Journal of Medical Ethics 101-105.

alternative standard.[25] In chapter three the interests of the relevant parties will be explored, focusing particularly on parental and medical concerns and how the promotion of shared decision-making is achieved in theory.[26] Combined, these chapters illustrate the need for a practical solution to provide an alternative to lengthy court battles between parents and hospitals. In this vein, chapter four presents mediation as a solution. It shall be argued that whilst the best interests standard has its weaknesses, on balance the centrality of this standard should remain as a matter of substantive law with the addition of the use of mediation. Utilising mediation would reduce court involvement and promote communication between parents and medical professionals.

1. The Best Interests Standard

As aptly stated by Wellesley and Jenkins, "modern medicine gives us the ability to prolong life even in situations where it may not be right to do so".[27] A multitude of varying treatments exist all with the premise that they sustain life.[28] Whilst this may be true, sustainment of life should not be undertaken at the expense of the foreseeable benefit for the patient.[29] The ability of patients' and their families to crowdsource for answers has fundamentally changed the doctor-patient relationship, illustrating a strong departure from the traditional notions of paternalism.[30] Guidance provided by General Medical Council stipulates that medical professionals must be "satisfied that the drugs or treatment serve the patient's needs".[31] Thus, as noted by Jackson,

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[25] Douglas Diekema, 'Parental Refusals of Medical Treatment: The Harm Principle as Threshold for State Intervention' (2004) 25 Theoretical Medicine and Bioethics; Lainie Ross, Alissa Hurtwitz Swota, 'The Best Interest Standard: Same Name but Different Roles in Paediatric Bioethics and Child Rights Frameworks' (2017) 60(2) Perspectives in Biology and Medicine.

[26] Viv Larcher, Finella Craig, Kiran Bhogal, Dominic Wilkinson, Joe Brierley, on behalf of the Royal College of Paediatrics and Child Health, 'Making decisions to limit treatment in life-limiting and life-threatening conditions in children: a framework for practice' (2015) BMJ <https://nornet.org.uk/wp-content/uploads/2017/07/File-16-RCPCH.pdf> accessed 12 December 2019 s1, s10.

[27] Hugo Wellesley and Ian Jenkins, 'Withholding and withdrawing life-sustaining treatment in children' (2009) 19(10) Pediatric Anesthesia 972.

[28] Royal College of Paediatrics and Child Health, 'Withholding or Withdrawing Life Sustaining Treatment in Children: A Framework for Practice' (*Royal College of Paediatrics and Child Health*, May 2004) <https://councilfordisabledchildren.org.uk/sites/default/files/field/attachemnt/Withholding%26withdrawing_treatment.pdf> accessed 18 October 2019 12.

[29] Ibid.

[30] Tessa Richards, 'When doctors and patients disagree' (*BMJ*, 10 September 2014) <https://www.bmj.com/content/bmj/349/bmj.g5567.full.pdf?casa_token=tRgKnbMeOG4AAAAA:qJOhwu54d8BTMPx9iFJhatOf_k3ryICtjTLDfDkWdQk_oYvycPkVlB-vGgOm7x_PXEMEt72SgCs> accessed 30 April 2019; Peter Nicholls, 'Three ways the Charlie Gard case could affect future end-of-life cases globally' (*The Conversation*, July 2017) <https://theconversation.com/three-ways-the-charlie-gard-case-could-affect-future-end-of-life-cases-globally-81168> accessed 15 September 2019.

[31] GMC, 'Good Medical Practice' (*General Medical Council*, March 2013) <https://www.gmc-uk.org/-/media/documents/Good_medical_practice___English_1215.pdf_51527435.pdf> accessed 10 October 2019 16.

"where life-prolonging treatment would be futile, overly burdensome, or where there is no prospect of recovery, it may be withdrawn or withheld".[32] Using the ethical framework, principlism, produced by Beauchamp and Childress, when making a decision "health care professionals should balance the ethical principles of autonomy, beneficence, non-maleficence and justice".[33] Infants lack the capacity to consent, thus consent is usually granted by the parents.[34] In the event that the parent's wishes are deemed not to be in an infant's best interests, court involvement normally ensues.[35] Further discussion will explore the application of the current standard used to determine whether to withdraw or withhold treatment, the best interests standard, focusing exclusively on its application to incapacitated infants. The rights afforded to the infants' parents and the court are then examined, weighing up their individual roles in the decision-making process. This examination involves a detailed exploration of how the ethical principles referenced above are applied in practice.

1.1 Application of the Best Interests Standard in Paediatric Care

In England and Wales, the hallmark legal standard for determining whether to withhold or withdraw life-sustaining treatment for critically impaired infants is the best interests standard.[36] The standard was established in *Re F,*[37] and whilst this case did not involve the withdrawal of treatment, in the subsequent cases of *Bland* and *Re J,*[38] the best interests standard was applied to withdrawal decisions, with the latter extending it to children.[39] The best interests test and the best interests standard are interchangeable terms, thus certain sources refer to the standard as the best interests test. For the purpose of this thesis the term best interests standard will be employed unless in reference to a particular source. The Mental Capacity Act 2005 refined the best interests standard, placing it on a statutory footing. [40] Section 4 states that "any act done, or a decision made, under this Act or on behalf of a person who lacks capacity must be done,

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[32] Emily Jackson, *Medical Law: Texts, Cases and Materials* (5th edn, OUP Oxford, 2019) 275.
[33] Chunmei Lyu and Li Zhang, 'Who decides in withdrawal of treatment in a critical care setting? A case study on ethical dilemma' (2018) 5(3) International Journal of Nursing Sciences 310, 313.
[34] Emily Jackson, *Medical Law: Texts, Cases and Materials* (5th edn, OUP Oxford, 2019) 302.
[35] Ibid.
[36] L McCrossan and R Seigmeth, 'Demands and requests for 'inappropriate' or 'inadvisable' treatments at the end of life: what do you do at 2 o'clock in the morning when …?' (2017) 119(1) British Journal of Anaesthesia i90, i92.
[37] *Re F (Mental patient sterilisation)* [1990] 2 AC 1.
[38] *Re J (Children)* [2013] UKSC 9.
[39] L McCrossan and R Seigmeth, 'Demands and requests for 'inappropriate' or 'inadvisable' treatments at the end of life: what do you do at 2 o'clock in the morning when …?' (2017) 119(1) British Journal of Anaesthesia i90, i92.
[40] Mental Capacity Act 2005.

or made, in his best interests".[41] As critiqued by Lim et al "the lack of an agreed definition of 'best interests'… result[s] in decisions being made in murky waters".[42] However, the lack of definition can be "defended on the basis that [the best interest standard needs to be]… sufficiently malleable to take into account the particular circumstances of individual cases".[43] Thus, whilst the term 'best interests' is not defined within section 4 of the Act, a checklist of factors to take into account is provided to enable a flexible approach tailored to the individual patient's circumstances.[44] No guidance is provided as to how these considerations are weighted, thus, as noted by Lim et al, establishing relevant considerations often results in the exercise of "indeterminacy and frustration".[45] However, the introduction of "a strict hierarchy would detract from individualised decision-making".[46] On account of this, when reviewing the checklist it appears apt to view acting in one's best interest as the promotion of the maximisation of good for the individual.[47]

At present, treatment can be lawfully withdrawn or withheld if it is deemed to be against a child's best interests.[48] As evidenced above, determining what is in a child's best interests is not a straightforward task. Reaching a decision often requires balancing a great number of considerations.[49] Interests in this context relates to factors that influence a child's quality of life.[50] As opined by Tibballs, a "composite view [of relevant case law] reveals three legal criteria for withholding or withdrawing treatment… the present and future 'quality of life',

[41] Ibid, section 4; L McCrossan and R Seigmeth, 'Demands and requests for 'inappropriate' or 'inadvisable' treatments at the end of life: what do you do at 2 o'clock in the morning when …?' (2017) 119(1) British Journal of Anaesthesia i90, i92.
[42] Chong-Ming Lim, Michael Dunn and Jaqueline Chin, 'Clarifying the best interests standard: the elaborative and enumerative strategies in public policy-making' (2016) 42(8) Journal of Medical Ethics 542.
[43] David Benbow, 'An analysis of Charlie's Law and Alfie's Law' (2019) Medical Law Review 1, 4.
[44] Mental Capacity Act 2005, section 4; L McCrossan and R Seigmeth, 'Demands and requests for 'inappropriate' or 'inadvisable' treatments at the end of life: what do you do at 2 o'clock in the morning when …?' (2017) 119(1) British Journal of Anaesthesia i90, i92; Chong-Ming Lim, Michael Dunn and Jaqueline Chin, 'Clarifying the best interests standard: the elaborative and enumerative strategies in public policy-making' (2016) 42(8) Journal of Medical Ethics 542; Helen Taylor, 'What are 'best interests'? A critical evaluation of 'best interests' decision-making in clinical practice' (2016) 24(2) Medical Law Review 176,182.
[45] Chong-Ming Lim, Michael Dunn and Jaqueline Chin, 'Clarifying the best interests standard: the elaborative and enumerative strategies in public policy-making' (2016) 42(8) Journal of Medical Ethics 542.
[46] Elaine Sutherland, 'The Welfare Test: Determining the Indeterminate' (2018) 22(1) Edinburgh Law Review 94, 97.
[47] Allen E Buchanan and Dan W Brock, *Deciding for Others: The Ethics of Surrogate Decision Making* (1st edn, Cambridge University Press, 1989) 88.
[48] Emily Jackson, *Medical Law: Texts, Cases and Materials* (5th edn, OUP Oxford, 2019) 275.
[49] Hugo Wellesley and Ian Jenkins, 'Withholding and withdrawing life-sustaining treatment in children' (2009) 19(10) Pediatric Anesthesia 972, 974.
[50] Nuffield Council on Bioethics, 'Critical care decisions in fetal and neonatal medicine: ethical issues' (*Nuffield Council on Bioethics*, November 2006) <https://nuffieldbioethics.org/assets/pdfs/Critical-care-decisions.pdf> accessed 15 August 2019 15.

'futility' of present treatment and a comparison of the 'burdens versus benefits' of present and future treatment and its discontinuance".[51] Within *Re J* the 'quality of the life' approach was introduced as a touchstone for withholding treatment decisions as the court took into account the predicted pain, suffering and quality of life the infant was likely to endure if life was prolonged through artificial ventilation.[52] Treatments can be deemed to be futile if there is no scientific rationale or if the patient's condition is held to be irreversible.[53] For instance, in *Gard,*[54] the experimental treatment posed was rejected on the grounds that the chance of success was too low and thus futile.[55] By serving the best interests of the child, it is common practice to withdraw treatment when the distress induced outweighs the potential benefit.[56] In *NHS v B,*[57] a report was produced detailing the benefits and burdens of all the factors to aid the decision-making process. [58] Holman J's concluding judgment rejected the doctors' medical evidence, noting that "these burdens did not outweigh the obvious benefits".[59]

Due to "procedural justice, personal and professional responsibility and the wellbeing of those most closely involved, the importance of an appropriate decision-making process cannot be overstated".[60] Whilst widely used, the best interests standard has been critiqued by commentators as being a "vague rhetoric used by courts as a 'mantra' that has obscure[d] the complexities of the decision-making process".[61] Robertson's plea for a uniform authoritative

[51] James Tibbals, 'Legal basis for ethical withholding and withdrawing life-sustaining medical treatment from infants and children' (2007) 43(4) Journal of Paediatric Child Health 230.
[52] James Tibbals, 'Legal basis for ethical withholding and withdrawing life-sustaining medical treatment from infants and children' (2007) 43(4) Journal of Paediatric Child Health 230, 231.
[53] Julian Savulescu and Peter Singer, 'Julian Savulescu and Peter Singer: Unpicking what we mean by best interests in light of Charlie Gard' (2017) BMJ <https://blogs.bmj.com/bmj/2017/08/02/unpicking-what-we-mean-by-best-interests-in-light-of-charlie-gard/> accessed 2 February 2020.
[54] *Great Ormond Street Hospital for Children NHS Foundation Trust v Yates and others* [2017] EWCA Civ 410.
[55] Emma Cave and Emma Nottingham, 'Who Knows Best (interests)? The Case of Charlie Gard' (2008) 26(3) Medical Law Review 500.
[56] Royal College of Paediatrics and Child Health, 'Witholding or Withdrawing Life Sustaining Treatment in Children: A Framework for Practice' (*Royal College of Paediatrics and Child Health*, May 2004) <https://councilfordisabledchildren.org.uk/sites/default/files/field/attachemnt/Withholding%26withdrawing_treatment.pdf> accessed 18 October 2019 13.
[57] *NHS v B* [2006] EWHC 507 (Fam).
[58] Claudia Carr, *Unlocking Medical Law and Ethics* (2nd edn, Routledge, 2014) 358.
[59] Ibid.
[60] Nuffield Council on Bioethics, 'Critical care decisions in fetal and neonatal medicine: ethical issues' (*Nuffield Council on Bioethics*, November 2006) <https://nuffieldbioethics.org/assets/pdfs/Critical-care-decisions.pdf> accessed 15 August 2019 22.
[61] L McCrossan and R Seigmeth, 'Demands and requests for 'inappropriate' or 'inadvisable' treatments at the end of life: what do you do at 2 o'clock in the morning when …?' (2017) 119 British Journal of Anaesthesia i90, i92; Fox M and McHale J, 'In whose best interests?' (1997) 60(5) Mod Law Rev.

decision-making process has garnered widespread support.[62] For instance, Bhatia argues that the best interests standard "should be governed with a greater degree of objectivity, transparency and tangibility" as at present the standard is "too nebulous and idiosyncratic to constitute a coherent assessment".[63] The case of *Raqeeb* exemplifies this point. [64] The case judgment illustrates a derogation from the decisions reached in *Evans,*[65] and *Gard,* as Tafida Raqeeb was able to access treatment overseas.[66] However, clinical guidelines are purposefully non-stringent to allow for clinical discretion and thus it can be argued that "the infinite variety of the human condition… defeats any attempt to be more precise".[67] Such a critique is not unique to England and Wales, other jurisdictions have also struggled to produce a satisfactory legal response to the nebulous nature of the best interests standard and the problem of 'medical futility'.[68] The approach followed in England and Wales, whilst heavily criticised as a result of recent cases, "compares favourably with others in its transparency, rigour, and consistency".[69]

1.2 Partnership of care

Legally, the Children Act 1989,[70] gives parents the right to make treatment decisions on behalf of their children who are unable to express preferences as long as it is clear that they are acting in the child's best interests.[71] However, this is not an absolute right as stated by Schraer, "the

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[62] John Robertson, 'Substantive Criteria and Procedures in Withholding Care from Defective Newborns' in Stuart Spicket, Joseph Healy and Tristram Engelhardt, *The Law-Medicine Relation: A Philosophical Exploration* (Reidel Publishing Company, 1981) 217,223; Maria Sheppard, 'Neera Bhatia, Critically Impaired Infants and End of Life Decision Making: Resource Allocation and Difficult Decisions' (2016) 24(4) Medical Law Review 647, 648.
[63] Ibid, 73.
[64] Raqeeb v Barts Health NHS Trust (Litigation Friend) [2019] EWHC 2976.
[65] *Alder Hey Children's NHS Foundation Trust v Evans* [2018] EWCA Civ 805.
[66] Shannon Woodley, 'Shannon Woodley discusses Raqeeb v Barts NHS Foundation Trust' (*Park Square Barristers*, 8 October 2019) <https://www.parksquarebarristers.co.uk/news/shannon-woodley-discusses-raqeeb-v-barts-nhs-foundation-trust/> accessed 5 January 2020.
[67] *Portsmouth NHS Trust v Wyat*t [2005] 1 WLR 3995; L McCrossan and R Seigmeth, 'Demands and requests for 'inappropriate' or 'inadvisable' treatments at the end of life: what do you do at 2 o'clock in the morning when …?' (2017) 119(1) British Journal of Anaesthesia i90, i92.; Maria Sheppard, 'Neera Bhatia, Critically Impaired Infants and End of Life Decision Making: Resource Allocation and Difficult Decisions' (2016) 24(4) Medical Law Review 647, 648.
[68] Dominic Wilkinson and Julian Savulescu, 'Alfie Evans and Charlie Gard – should the law change?' (2018) BMJ <https://www.bmj.com/content/361/bmj.k1891.long> accessed 18 October 2019.
[69] Ibid.
[70] Children Act 1989.
[71] Royal College of Paediatrics and Child Health, 'Witholding or Withdrawing Life Sustaining Treatment in Children: A Framework for Practice' (*Royal College of Paediatrics and Child Health*, May 2004) <https://councilfordisabledchildren.org.uk/sites/default/files/field/attachemnt/Withholding%26withdrawing_treatment.pdf> accessed 18 October 2019 18; Rachel Schraer 'Tafida Raqeeb: Who decides the care of sick children? (*BBC News*, October 2019) <https://www.bbc.co.uk/news/uk-43893709> accessed 20 October 2019.

best interests of the child are the deciding factor".[72] Currently if medical professionals deem the treatment not to be in the child's best interest, on recourse to the court, treatment can be withdrawn.[73] As stated by McFarlane LJ during the case of *Gard*, "the sole principle is that the best interests of the child must prevail and that must apply even to cases where parents, for the best of motives, hold on to some alternative view".[74]

The views of parents are not determinate.[75] In order to fulfil duty of care obligations, the medical professionals and parents will enter what can be termed a 'partnership of care', with the sole aim of serving the best interests of the child.[76] Achieving complete consensus between the medical team and the parents is often unrealistic as "all parties draw on different facts and emotions in forming their decisions, and may give these attributes different weights".[77] Generally, the aim is to come to an agreement that respects "as much common ground as possible, while acknowledging sincerely held differences of opinion".[78] Despite "their command of medical knowledge, [medical professionals are not given]… any special moral authority with regard to deciding on his or her best interests".[79]

1.3 The role of the court

[72] Rachel Schraer 'Tafida Raqeeb: Who decides the care of sick children? (*BBC News*, October 2019) <https://www.bbc.co.uk/news/uk-43893709> accessed 20 October 2019.
[73] Rachel Schraer 'Tafida Raqeeb: Who decides the care of sick children? (*BBC News*, October 2019) <https://www.bbc.co.uk/news/uk-43893709> accessed 20 October 2019.
[74] *Great Ormond Street Hospital for Children NHS Foundation Trust v Yates* [2017] EWCA Civ 410, [112] (McFarlane LJ).
[75] Polly Morgan, 'Alfie Evans, best interests, and parental rights' (*Transparency Project*, May 2018) <http://www.transparencyproject.org.uk/alfie-evans-best-interests-and-parental-rights/> accessed 10 December 2019.
[76] Royal College of Paediatrics and Child Health, 'Witholding or Withdrawing Life Sustaining Treatment in Children: A Framework for Practice' (*Royal College of Paediatrics and Child Health*, May 2004) <https://councilfordisabledchildren.org.uk/sites/default/files/field/attachemnt/Withholding%26withdrawing_treatment.pdf> accessed 18 October 2019 15.
[77] Nuffield Council on Bioethics, 'Critical care decisions in fetal and neonatal medicine: ethical issues' (*Nuffield Council on Bioethics*, November 2006) <https://nuffieldbioethics.org/assets/pdfs/Critical-care-decisions.pdf> accessed 15 August 2019 16.
[78] Royal College of Paediatrics and Child Health, 'Witholding or Withdrawing Life Sustaining Treatment in Children: A Framework for Practice' (*Royal College of Paediatrics and Child Health*, May 2004) <https://councilfordisabledchildren.org.uk/sites/default/files/field/attachemnt/Withholding%26withdrawing_treatment.pdf> accessed 18 October 2019 12.
[79] Nuffield Council on Bioethics, 'Critical care decisions in fetal and neonatal medicine: ethical issues' (*Nuffield Council on Bioethics*, November 2006) <https://nuffieldbioethics.org/assets/pdfs/Critical-care-decisions.pdf> accessed 15 August 2019 23.

In attempting to ascertain what is in a child's best interests it is reasonable for people to come to different conclusions.[80] If the outcome cannot be agreed, the final arbiter is the court. Typically, end of life treatment decisions are determined in a hospital setting and cases involving court intervention are infrequent.[81] In England and Wales the threshold for judicial intervention is at the point the child's welfare is engaged; "the "best interest" standard has become the judicial and ethical standard used to determine when state interference is justified".[82] The court is left to decide "which course of action is in the child's best interests" in lieu of either the views of the medical professionals or parents. [83] In the recent high-profile court cases of *Evans*, *Gard,* and *Haastrup,*[84] the court deemed the continuation of life sustaining treatment not to be in the children's best interests, thus treatment was withdrawn.[85] It is extremely difficult to appeal such decisions as to do so one needs to provide evidence that the judge was legally wrong in his examination of the relevant factors.[86]

In light of these cases, many commentators consider the authority awarded to the courts to be too wide.[87] As noted by Laurie the "courts' inherent jurisdiction to intervene can be seen as grounded in the feudal notion of *parens patriae*".[88] Furthermore in *Re Flynn,*[89] it was established that courts could intervene if the welfare of the child was brought into question.[90] Lady Hale upheld this position in *Gard* as she stated "parents are not entitled to insist upon

[80] Hugo Wellesley and Ian Jenkins, 'Withholding and withdrawing life-sustaining treatment in children' (2009) 19(10) Pediatric Anesthesia 972, 974.
[81] Neera Bhatia, *Critically Impaired Infants and End of Life Decision Making*: *Resource Allocation and Difficult Decisions* (1st edn, Routledge Cavendish Publishing, 2015) 73.
[82] Douglas Diekema, 'Parental Refusals of Medical Treatment: The Harm Principle as Threshold for State Intervention' (2004) 25 Theoretical Medicine and Bioethics 243, 245; Imogen Goold, Jonathon Herring and Cressida Auckland*, Parental Rights, Best Interests and Significant Harms* (1st edn, Hart Publishing, 2019) 29.
[83] Imogen Goold, 'Evaluating 'Best Interests' as a Threshold for Judicial Intervention in Medical Decision-Making on Behalf of Children' in Imogen Goold, Jonathan Herring and Cressida Auckland, *Parental Rights, Best Interests and Significant Harms* (1st edn, Hart Publishing, 2019) 29.
[84] *Kings College Hospital NHS Foundation Trust v Haastrup* [2018] EWHC 127 (Fam).
[85] Imogen Goold, Jonathon Herring and Cressida Auckland*, Parental Rights, Best Interests and Significant Harms* (1st edn, Hart Publishing, 2019) 31.
[86] Polly Morgan, 'Alfie Evans, best interests, and parental rights' (*Transparency Project*, May 2018) <http://www.transparencyproject.org.uk/alfie-evans-best-interests-and-parental-rights/> accessed 10 December 2019.
[87] Imogen Goold, 'Evaluating 'Best Interests' as a Threshold for Judicial Intervention in Medical Decision-Making on Behalf of Children' in Imogen Goold, Jonathan Herring and Cressida Auckland, *Parental Rights, Best Interests and Significant Harms* (1st edn, Hart Publishing, 2019) 31.
[88] Ibid, 33; GT Laurie, 'Parens Patriae Jurisdiction in the Medico-Legal Context: The Vagaries of Judicial Activism' (1999) 95 Edinburgh Law Review.
[89] *Re Flynn* (1848) De G and Sm 457, 474.
[90] Imogen Goold, Jonathon Herring and Cressida Auckland*, Parental Rights, Best Interests and Significant Harms* (1st edn, Hart Publishing, 2019) 34.

treatment by anyone which is not in their child's best interests".[91] However, as opined by many academics, the great emphasis placed on medical opinion "allows judges to abdicate themselves of any real responsibility for making life and death decisions by simply legitimising medical practitioners' conduct".[92] As noted by Leask "this support is not automatic and is not the legal rule, but is, in practice, a common outcome".[93] Arguably, this is due to the fact that "judges are not mediators… instead [they are] constrained by the dominant principle of best interests and the requirement to consider the test from the child's point of view".[94]

1.4 Ethical Framework

1.4.1 Justice

Healthcare resources are not finite, the National Health Service (hereafter, 'NHS') has limited funding and an impossible task cannot be placed on them.[95] Medical professionals have an ethical duty to allocate resources fairly.[96] By engaging in the process of resource allocation, medical professionals have to balance the clinical and resource need of patients against the availability of treatments.[97] Whilst medical professionals engage with distributive justice, "scarce resources are rarely used explicitly as reasons to forgo, withhold, or withdraw treatments,"[98] thus confirming the view that this principle "should not drive decision-making at the bedside".[99] However, Wilkinson and Savulescu argue that ethically doctors can refuse to provide futile treatment where it is "contrary to the interests of the patient [or] where there are

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[91] Lady Hale 'Lady Hale's explanation of the Supreme Court's decision' (*Supreme Court*, June 2017) <www.supremecourt.uk/news/permission-to-appeal-hearing-in-the-matter-of-charlie-gard.html> accessed 11 December 2019.

[92] Neera Bhatia, *Critically Impaired Infants and End of Life Decision Making*: *Resource Allocation and Difficult Decisions* (1st edn, Routledge Cavendish Publishing, 2015) 66.

[93] K Leask, 'The role of the courts in clinical decision-making' (2005) 90(12) Archives of Disease in Childhood) 1256, 1257.

[94] Emma Cave and Emma Nottingham, 'Who Knows Best (interests)? The Case of Charlie Gard' (2008) 26(3) Medical Law Review 500, 513.

[95] Ibid.

[96] L McCrossan and R Seigmeth, 'Demands and requests for 'inappropriate' or 'inadvisable' treatments at the end of life: what do you do at 2 o'clock in the morning when …?' (2017) 119(1) British Journal of Anaesthesia i90, i91.

[97] Queensland Government, 'End-of-life care: Decision-making for withholding and withdrawing life-sustaining measures for patients under the age of 18 years' (*Queensland Government,* February 2017) <https://www.childrens.health.qld.gov.au/wp-content/uploads/PDF/qcycn/imp-guideline-eolc-part-2.pdf> accessed 2 January 2020 13-14.

[98] L McCrossan and R Seigmeth, 'Demands and requests for 'inappropriate' or 'inadvisable' treatments at the end of life: what do you do at 2 o'clock in the morning when …?' (2017) 119(1) British Journal of Anaesthesia i90, i92.

[99] Hugo Wellesley and Ian Jenkins, 'Withholding and withdrawing life-sustaining treatment in children' (2009) 19(10) Pediatric Anesthesia 972, 973.

insufficient resources to provide treatment".[100] In juxtaposition, the General Medical Council guidance states that withdrawal of treatment or failure to start treatment cannot be justified purely on the grounds of resource constraints.[101] On this issue, the Nuffield Council of Bioethics' Working Party recommends that medical professionals "should be aware of, but not driven by, the resource implications of their decisions".[102]

1.4.2 Autonomy

Whilst many interpretations exist for autonomy, autonomy can be deemed to be a necessary principle of healthcare in a democratic society. Legally the mother is "the arbitrator of the best interests of the fetus… she decides whether to consent to or refuse any option for fetal surgery".[103] However, once the child is born parental autonomy is limited as the "doctor's primary duty is now owed to the baby",[104] as the baby has an independent legal status. [105] Parents can choose between plausible alternatives, and whilst this freedom allows them to "acquiesce to expert judgement…it doesn't supplant it".[106] As noted by the Nuffield Council of Bioethics "the duty to care for the baby is not a duty to prolong life at all costs".[107] Resultingly, there is a continuing tension between parental autonomy and the child's welfare. The doctrine of *parens patriae* allows the state to act as 'surrogate parents' when they believe a decision has been made that is contrary to the child's best interests.[108] As case law clearly

[100] L McCrossan and R Seigmeth, 'Demands and requests for 'inappropriate' or 'inadvisable' treatments at the end of life: what do you do at 2 o'clock in the morning when …?' (2017) 119(1) British Journal of Anaesthesia i90, i92; Dominic Wilkinson and Julian Savulsecu, 'Knowing when to stop: futility in the intensive care unit' (2011) 24(2) Curr Opin Anaesthesiol.
[101] L McCrossan and R Seigmeth, 'Demands and requests for 'inappropriate' or 'inadvisable' treatments at the end of life: what do you do at 2 o'clock in the morning when …?' (2017) 119(1) British Journal of Anaesthesia i90, i93; The General Medical Council, 'Treatment and care towards the end-of-life: good practice in decision making' (*General Medical Council*, May 2010) <https://www.gmc-uk.org//media/documents/Treatment_and_care_towards_the_end_of_life___English_1015.pdf_48902105.pdf> accessed 15 October 2019.
[102] Nuffield Council on Bioethics, 'Critical care decisions in fetal and neonatal medicine: ethical issues' (*Nuffield Council on Bioethics*, November 2006) <https://nuffieldbioethics.org/assets/pdfs/Critical-care-decisions.pdf> accessed 15 August 2019 18.
[103] Ibid, 46.
[104] Ibid.
[105] Ibid.
[106] Iain Brassington, 'Charlie Gard: An Ethical Analysis of a Legal Non-Problem' (*BMJ*, 11 August 2017) <https://blogs.bmj.com/medical-ethics/2017/08/11/charlie-gard-an-ethical-analysis-of-a-legal-non-problem/> accessed 8 December 2019.
[107] Nuffield Council on Bioethics, 'Critical care decisions in fetal and neonatal medicine: ethical issues' (*Nuffield Council on Bioethics*, November 2006) <https://nuffieldbioethics.org/assets/pdfs/Critical-care-decisions.pdf> accessed 15 August 2019 46.
[108] Douglas Diekema, 'Parental Refusals of Medical Treatment: The Harm Principle as Threshold for State Intervention' (2004) 25 Theoretical Medicine and Bioethics 243, 244.

illustrates; if further treatment is deemed to be futile or burdensome, acting in the best interests of the child means treatment should be withdrawn or withheld to allow them to die with comfort and dignity.[109]

1.4.3 Beneficence and non-maleficence

On assessing best interests, bioethical principles need to be considered as physical, social and economic factors influence the decision-making process.[110] Best interests is a maximising concept, thus "acting in a child's best interests should not necessarily be equated with prolonging the child's life for as long as possible".[111] Two extremes exist in medicine; "where death is certain and where cure is certain".[112] Determining the course of action for a case that lies between these extremes is challenging and often results in a value judgement being made based on outcome predictions.[113] In reaching a decision, medical professionals have the difficult task of trying to determine what level of uncertainty should be permitted.[114] As noted by the Nuffield Council on Bioethics, "pain and suffering are highly subjective, and difficult to quantify in objective terms".[115] Beneficence is a "positive requirement to produce more good than harm",[116] and non-maleficence relates to "actions that do not bring harm to patients and others".[117] Thus, if a "reasonable prospect for recovery is unavailable", palliative care may be deemed more suitable. [118]

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[109] Nuffield Council on Bioethics, 'Critical care decisions in fetal and neonatal medicine: ethical issues' (*Nuffield Council on Bioethics*, November 2006) <https://nuffieldbioethics.org/assets/pdfs/Critical-care-decisions.pdf> accessed 15 August 2019 46.
[110] Queensland Government, 'End-of-life care: Decision-making for withholding and withdrawing life-sustaining measures for patients under the age of 18 years' (*Queensland Government,* February 2017) <https://www.childrens.health.qld.gov.au/wp-content/uploads/PDF/qcycn/imp-guideline-eolc-part-2.pdf> accessed 2 January 2020 9-10.
[111] Ibid, 10.
[112] Royal College of Paediatrics and Child Health, 'Witholding or Withdrawing Life Sustaining Treatment in Children: A Framework for Practice' (*Royal College of Paediatrics and Child Health*, May 2004) <https://councilfordisabledchildren.org.uk/sites/default/files/field/attachemnt/Withholding%26withdrawing_treatment.pdf> accessed 18 October 2019 27.
[113] Ibid.
[114] Julian Savulescu and Peter Singer, 'Julian Savulescu and Peter Singer: Unpicking what we mean by best interests in light of Charlie Gard' (2017) BMJ <https://blogs.bmj.com/bmj/2017/08/02/unpicking-what-we-mean-by-best-interests-in-light-of-charlie-gard/> accessed 2 February 2020.
[115] Nuffield Council on Bioethics, 'Critical care decisions in fetal and neonatal medicine: ethical issues' (*Nuffield Council on Bioethics*, November 2006) <https://nuffieldbioethics.org/assets/pdfs/Critical-care-decisions.pdf> accessed 15 August 2019 16.
[116] Chunmei Lyu and Li Zhang, 'Who decides in withdrawal of treatment in a critical care setting? A case study on ethical dilemma' (2018) 5(3) International Journal of Nursing Sciences 310, 311.
[117] Ibid, 312; Janie Butts and Karen Rich, *Nursing Ethics* (3rd edn, Jones and Bartlett Publishers, 2012).
[118] Chunmei Lyu and Li Zhang, 'Who decides in withdrawal of treatment in a critical care setting? A case study on ethical dilemma' (2018) 5(3) International Journal of Nursing Sciences 310, 311.

1.4.4 Sanctity of life versus quality of life

Determining quality of life is challenging as it is "hard to define and harder to measure".[119] Albeit the ambiguity of the term, the courts have ruled that it is an appropriate factor to consider.[120] In *Re J,*[121] an examination of the child's quality of life was deemed to be a "major consideration during the decision making process".[122] The sanctity of life versus the quality of life was also explored in the case of *Wyatt,*[123] where the judge considered the doctrine of sanctity of life, but deemed Charlotte's quality of life to be poor and thus supported the decision not to ventilate.[124] It is not uncommon due to certain beliefs founded in religious teachings for parents to regard the principle of the sanctity of life as absolute, and as a result that an overriding duty to preserve a child's life prevails.[125] However, "upholding the principle that the sanctity of life is absolute may be at the cost of alleviating suffering".[126] On exploring the impact of Article 2 of the Human Rights Act 1998, Baroness Butler-Sloss held that the "State only had a positive obligation to provide life-sustaining treatment if it was in the patients' best interests".[127] Therefore, whilst "English law stresses the reverence for life, it does not adopt a rule that sanctity of life always demands its prolongation".[128]

1.5 Summary

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[119] P Boddington, T Podpadec, 'Measuring quality of life in theory and in practice' in H Kushe and P Singer *Bioethics: An Anthology* (Oxford: Blackwell, 1999); Hugo Wellesley and Ian Jenkins, 'Withholding and withdrawing life-sustaining treatment in children' (2009) 19(10) Pediatric Anesthesia 972, 974.
[120] L McCrossan and R Seigmeth, 'Demands and requests for 'inappropriate' or 'inadvisable' treatments at the end of life: what do you do at 2 o'clock in the morning when …?' (2017) 119(1) British Journal of Anaesthesia i90, i92.
[121] *Re J (A Minor) (Wardship: Medical Treatment)* [1990] 3 All ER 930 CA.
[122] K Leask, 'The role of the courts in clinical decision-making' (2005) 90(12) Archives of Disease in Childhood 1256, 1257.
[123] *Portsmouth Hospitals NHS Trust v Wyatt and others* [2005] EWCA Civ 1181.
[124] BBC News, 'Ill baby 'should not be revived'' (*BBC News*, October 2004) <http://news.bbc.co.uk/1/hi/health/3723656.stm> accessed 21 December 2019; K Leask, 'The role of the courts in clinical decision-making' (2005) 90(12) Archives of Disease in Childhood 1256, 1257.
[125] Hugo Wellesley and Ian Jenkins, 'Withholding and withdrawing life-sustaining treatment in children' (2009) 19(10) Pediatric Anesthesia 972.
[126] Queensland Government, 'End-of-life care: Decision-making for withholding and withdrawing life-sustaining measures for patients under the age of 18 years' (*Queensland Government,* February 2017) <https://www.childrens.health.qld.gov.au/wp-content/uploads/PDF/qcycn/imp-guideline-eolc-part-2.pdf> accessed 2 January 2020 10.
[127] L McCrossan and R Seigmeth, 'Demands and requests for 'inappropriate' or 'inadvisable' treatments at the end of life: what do you do at 2 o'clock in the morning when …?' (2017) 119(1) British Journal of Anaesthesia i90, i92; *NHS Trust A v M*, *NHS Trust B v H* [2000] WL 1544593.
[128] Nuffield Council on Bioethics, 'Critical care decisions in fetal and neonatal medicine: ethical issues' (*Nuffield Council on Bioethics*, November 2006) <https://nuffieldbioethics.org/assets/pdfs/Critical-care-decisions.pdf> accessed 15 August 2019 46.

In summation, at present the current standard utilised in England and Wales for deciding whether to withdraw or withhold treatment from critically impaired children is the best interests standard.[129] Medical professionals and the court utilise Beauchamp and Childress' ethical framework, Principlism, to assist them in balancing a plethora of considerations in a moral practical way, in determining their decision.[130] As highlighted briefly above whilst the law on this area had seemed quite settled, the recent surge in high-profile court cases such as those of *Evans* and *Gard* have brought into question whether the best interests standard is the pre-eminent way to deal with disputes between parents and the medical team. The ethical debate surrounding the effectiveness of the current standard is examined to a greater extent in the next chapter.

2. Is the Best Interests standard the right standard?

In recent years, there has been much academic commentary on whether the best interests standard is the right standard to use in withdrawal of treatment cases. This approach once deemed to be well-settled in English law has faced intense scrutiny from the medical profession, academics and the public alike.[131] With critics arguing that the current threshold for state intervention should be reformed to be based on a harm threshold.[132] Such an argument was advanced by Diekema.[133] In his opinion state intervention should only be justified when parental wishes place the child at risk of significant harm.[134] If there was to be reform, the trigger for state intervention would be the avoidance of harm, rather than welfare.[135] Subsequent discussion explores this ethical question in detail. This is achieved through assessing the issues with the current framework and exploring, in particular, the problem of indeterminacy. Examination of the weight currently awarded to parental views and whether

[129] L McCrossan and R Seigmeth, 'Demands and requests for 'inappropriate' or 'inadvisable' treatments at the end of life: what do you do at 2 o'clock in the morning when …?' (2017) 119(1) British Journal of Anaesthesia i90, i92.
[130] Emily Jackson, *Medical Law: Texts, Cases and Materials* (5th edn, OUP Oxford, 2019).
[131] Graeme Laurie, Shawn Harmon and Edward Dove, *Mason and McCall Smith's Law and Medical Ethics* (11 edn, Oxford University Press, 2019) 529-530.
[132] Giles Birchley, 'Harm is all you need? Best Interests and disputes about parental decision-making' (2016) 42(2) Journal of Medical Ethics 111.
[133] Douglas Diekema, 'Parental Refusals of Medical Treatment: The Harm Principle as Threshold for State Intervention' (2004) 25 Theoretical Medicine and Bioethics.
[134] Ibid, 243, 258.
[135] Rachel Taylor, 'Parental Decisions and Court Jurisdiction: Best Interests or Significant Harm' in Imogen Goold, Jonathan Herring and Cressida Auckland, *Parental Rights, Best Interests and Significant Harms* (1st edn, Hart Publishing, 2019).

court involvement is justified will also be discussed. This examination will result in a debate on whether the harm threshold should be adopted in reforming the law. The chapter will conclude that the harm threshold in fact does little to address the current issues associated with the best interests standard, before offering a solution to the current issue through remodelling of the best interests standard and limited application of the harm threshold.

2.1 Does the law need revisiting?

At present, as evidenced in chapter one, subsection 2.3, the court is the ultimate arbiter.[136] However, as questioned by Mason and McCall Smith "who is to say judges qua judges are ultimately suited to decide controversial questions of the value of infant life?".[137] On analysis of recent high-profile court cases "the use of the courts to make a final determination… compounded the existing divisions between the parties".[138] In cases such as these, as opined by Herring, the "judiciary appears to be happier than it is in adult cases in asking more openly whether a life is worth living".[139] The legal attitude to brain damaged adults is different to that of children and has taken far longer to develop amidst vast disputation.[140] Therefore, in England and Wales it appears that greater weight is given to a "life that has 'been lived' than to life which has no past".[141] In a similar vein, Lord Donaldson in *Re J (A Minor)* recognised that in applying the standard it was crucial to consider that "even severely handicapped people find a quality of life rewarding which to the unhandicapped may seem manifestly intolerable". [142]

As expressed by Baroness Hale, the best interests standard is the "laws 'gold standard' for adjudicating disagreements between parents and doctors".[143] However, due to the "cultural shift that has occurred [in medicine]… from medical paternalism towards patient autonomy", the legal position that had seemed well settled in rulings post-Donaldson is now undergoing

[136] Graeme Laurie, Shawn Harmon and Edward Dove, *Mason and McCall Smith's Law and Medical Ethics* (11 edn, Oxford University Press, 2019) 529, 530.
[137] Ibid, 542.
[138] Dave Archard, 'My child, my choice': parents, doctors and the ethical standards for resolving their disagreement' (2019) 70(1) Northern Ireland Legal Quarterly 93.
[139] Jonathon Herring, *Medical Law and Ethics* (6th edn, Oxford University Press, 2016) 524.
[140] Graeme Laurie, Shawn Harmon and Edward Dove, *Mason and McCall Smith's Law and Medical Ethics* (11 edn, Oxford University Press, 2019) 549.
[141] Ibid.
[142] *Re J (A Minor) (Wardship: Medical Treatment)* [1990] 3 All ER 930, 935.
[143] Dave Archard, 'My child, my choice': parents, doctors and the ethical standards for resolving their disagreement' (2019) 70(1) Northern Ireland Legal Quarterly 93, 95.

increased scrutiny. [144] As a result of this shift and recent high-profile court cases, academics such as Truog are left questioning whether "best interests [is] the right standard for evaluating these types of cases".[145] Propositions for reform had been expressed prior to the rise in high-profile court cases with Diekema favouring the significant harm standard and other academics advocating for a zone of parental discretion.[146]

2.2 The ill-defined nature of 'best interests'

The best interest standard is not applied uniformly. At present there is a lack of transparency surrounding how courts determine best interests. This arguably results from the "Janus-like quality" of the standard in that the "virtue of flexibility [has been combined] with the vice of vagueness". [147] Such vagueness allows "gender biases and subjective value judgments to replace objective considerations".[148] For instance, as highlighted by Mason et al, "the concept of futility carries with it the real danger that it can be used as a portal of entry to disguised and arbitrary rationing of resources".[149] Such danger could be easily resolved if there were clearer guidelines concerning the allocation of resources. Benbow opines that this would most successfully be achieved through empowering the public to influence the criteria by democratising the NHS.[150] Such a move "could afford the public, informed by medical opinion and evidence, the opportunity to influence, through deliberation, what treatments (including experimental treatments if they arise) should be available".[151] A more transparent articulation of how the judgment was reached would result in the promotion of the rule of law as "clarity and certainty regarding legal rights and interests" would be achieved. [152]

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[144] Graeme Laurie, Shawn Harmon and Edward Dove, *Mason and McCall Smith's Law and Medical Ethics* (11 edn, Oxford University Press, 2019) 520.
[145] Robert Truog, 'Is 'best interests' the right standard in cases like that of Charlie Gard' (2020) 46(1) Journal of Medical Ethics 16.
[146] David Benbow, 'An analysis of Charlie's Law and Alfie's Law' (2019) Medical Law Review 1, 11.
[147] Elaine Sutherland, 'The Welfare Test: Determining the Indeterminate' (2018) 22(1) Edinburgh Law Review 94; Eliana Close, Lindy Willmott, Benjamin White, 'Charlie Gard: in defence of the law' (2008) 44 Journal of Medical Ethics 476, 479.
[148] Robert A Warshak, 'The Approximation Rule, Child Development Research, and Children's Best Interests After Divorce' (2007) 1(2) Child Development Perspectives 119, 120.
[149] Graeme Laurie, Shawn Harmon and Edward Dove, *Mason and McCall Smith's Law and Medical Ethics* (11 edn, Oxford University Press, 2019) 544.
[150] David Benbow, 'An analysis of Charlie's Law and Alfie's Law' (2019) Medical Law Review 1.
[151] David Benbow, 'An analysis of Charlie's Law and Alfie's Law' (2019) Medical Law Review 1, 23.
[152] Eliana Close, Lindy Willmott, Benjamin White, 'Charlie Gard: in defence of the law' (2008) 44 Journal of Medical Ethics 476, 479.

Due to the value-laden task of determining best interests, judgments of this type have been widely criticised for being indeterminate and vague.[153] As expressed by Taylor, "the concept of 'best interests' in itself [is] ill defined… existing guidance for best interests decision-making is insufficient".[154] In support of this view, other critics have noted that the standard is "unclear,… inconsistently applied and varies based on the values of the assessor".[155] Birchley has gone as far to suggest that "the challenge of indeterminacy is the central problem of the best interests test".[156] However, as highlighted by Sutherland and expressed briefly in chapter one, subsection 2.1, "indeterminacy is an inevitable corollary [of the standards]… flexibility".[157] Such flexibility is required as due to the nature of medicine, clinical factors are "often uncertain, changeable and challengeable".[158] In defence of the malleability, Benbow notes that it is required to "take into account the particular circumstances of individual cases".[159] Thus, as noted by Mason et al, "the search for objectivity in their application may itself be a futile exercise".[160]

2.3 Is a sufficient amount of weight afforded to parental rights?

One could argue that the best interests standard does not reflect the cultural shift from medical paternalism to a patient-centred approach.[161] There is great concern that once a treatment decision has been determined medical professionals "get tunnel vision [and]… become closed to all other arguments or evidence".[162] As opined by Woolfe, "we cannot go on treating parents as bystanders, little more than unrelated and largely unwanted visitors when it comes to

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[153] Giles Birchley, 'Harm is all you need? Best Interests and disputes about parental decision-making' (2016) 42(2) Journal of Medical Ethics 111.
[154] Helen Taylor, 'What are 'best interests'? A critical evaluation of 'best interests' decision-making in clinical practice' (2016) 24(2) Medical Law Review 176,178.
[155] Eliana Close, Lindy Willmott, Benjamin White, 'Charlie Gard: in defence of the law' (2008) 44 Journal of Medical Ethics 476, 477.
[156] Giles Birchley, 'Harm is all you need? Best Interests and disputes about parental decision-making' (2016) 42(2) Journal of Medical Ethics 111, 112.
[157] Elaine Sutherland, 'The Welfare Test: Determining the Indeterminate' (2018) 22(1) Edinburgh Law Review 94, 99.
[158] Emma Cave and Emma Nottingham, 'Who Knows Best (interests)? The Case of Charlie Gard' (2008) 26(3) Medical Law Review 500, 507.
[159] David Benbow, 'An analysis of Charlie's Law and Alfie's Law' (2019) Medical Law Review 1, 4.
[160] Graeme Laurie, Shawn Harmon and Edward Dove, *Mason and McCall Smith's Law and Medical Ethics* (11 edn, Oxford University Press, 2019) 547.
[161] Graeme Laurie, Shawn Harmon and Edward Dove, *Mason and McCall Smith's Law and Medical Ethics* (11 edn, Oxford University Press, 2019) 520.
[162] Steven Woolfe, 'The Alfie Evans case has proven that we need to change the law in favour of parents' (*The Independent,* 27 April 2018) <https://www.independent.co.uk/voices/alfie-evans-case-steven-woolfe-law-change-needed-opinion-a8326041.html> accessed 15 October 2019.

decisions made by doctors and the courts".[163] Herring offers support to this view as he notes that "normally, the views of medical experts will be preferred to those of parents, even if the parents' views are rational and understandable".[164]

As questioned by Mason et al in a situation where "there is no way in which a neonate can consent to treatment, suffering or death", is it fair that parental rights can be usurped by the courts? [165] Contrary to the recognised legal position, the British Medical Association guidelines state that "parents are usually best placed and equipped to weigh this evidence and apply it to their child's own circumstances".[166] However, instead of strengthening parental rights, Benbow suggests that "efforts to enhance patient and public involvement would be preferable".[167] If suggested reform is to go ahead it may be at the cost of distributive justice as unproven and futile treatments may be demanded at the expense of other patients.[168] As noted by Benbow, "the process of trialling new medicines and treatments offers protection from false hope and quackery".[169]

2.4 Introduction of the significant harm standard

As defined by Archard, the significant harm principle is "a level of parental care, the falling below of which sets into operation measures of child protection".[170] In essence, under this standard only when parents are deemed to be causing significant harm can the state intervene.[171] Thus as expressed by Foster, "the word "harm" is more protective to parents than the more nuanced term "best interests" [as] it sets the bar for intervention higher".[172] Many critics of the best interests approach favour a harm-based standard. Arguably this is due to the ,presence of a harm threshold in other aspects of English law.[173] Whilst, such a change "would

[163] Ibid.
[164] Jonathon Herring, *Medical Law and Ethics* (6th edn, Oxford University Press, 2016) 525.
[165] Graeme Laurie, Shawn Harmon and Edward Dove, *Mason and McCall Smith's Law and Medical Ethics* (11 edn, Oxford University Press, 2019) 540.
[166] British Medical Association Medical Ethics Committee, *Withholding and Withdrawing Life-Prolonging Medical Treatment: Guidance for Decision Making* (3rd edn, Blackwell publishing, 2007) 98.
[167] David Benbow, 'An analysis of Charlie's Law and Alfie's Law' (2019) Medical Law Review 1, 2.
[168] Ibid, 17.
[169] Ibid, 15.
[170] Dave Archard, 'My child, my choice': parents, doctors and the ethical standards for resolving their disagreement' (2019) 70(1) Northern Ireland Legal Quarterly 93, 99.
[171] Ibid.
[172] Charles Foster, 'Harm: as Indeterminate as best interests but useful for triage' (2016) 42(2) Journal of Medical Ethics 121.
[173] Giles Birchley, 'Harm is all you need? Best Interests and disputes about parental decision-making' (2016) 42(2) Journal of Medical Ethics 111, 112.

make legal decisions about medical treatment consistent with the standard applied to other types of decisions" as opined by Gollop and Pope, [174] application of the harm threshold "would turn an inquisitorial process…into an adversarial process".[175] This is true upon acknowledging that it would "require the hospital to pivot away from its sole core purpose – the care of its patients – towards child protection". [176]

Within the recent case of *Gard*, his parents argued that instead of utilising the best interests standard, to establish an interference with parental autonomy the question asked should be whether such a decision results in or risks significant harm to the child.[177] This was the first time in an English court case that a direct statement was raised as to the issue of the harm threshold.[178] As expressed by Taylor such an argument "sought to make parents the sole arbiters of their child's welfare within firm boundaries designed to limit judicial oversight".[179] However, this argument was rejected by McFarlane LJ as he noted that the "risk of significant harm played no part in the best interests test".[180] A conclusion akin to this was similarly reached in the recent case of *Evans*.[181] In comparison, in the US, whilst the legal benchmark is the best interests standard, in practice clinical decisions are based on harm principles.[182] As noted by Ross, "physicians are not mandated to report decisions that are not in the child's best interest, only those decisions that they suspect are abusive or neglectful".[183] In essence, the best interests

[174] Dominic Wilkinson and Julian Savulescu, 'Alfie Evans and Charlie Gard – should the law change?' (2018) BMJ <https://www.bmj.com/content/361/bmj.k1891.long> accessed 18 October 2019.
[175] K. Gollop and S. Pope, "Charlie Gard, Alfie Evans and R (A Child): Why A Medical Treatment Significant Harm Test Would Hinder Not Help", (Transparency Project 28/05/2018) <http://www.transparencyproject.org.uk/charlie-gard-alfie-evans-and-r-a-child-why-a-medical-treat- ment-significant-harm-test-would-hinder-not-help/> accessed 20 March 2020.
[176] Ibid.
[177] Emily Jackson, *Medical Law: Texts, Cases and Materials* (5th edn, OUP Oxford, 2019) 323.
[178] Dominic Wilkinson, 'In Defence of a Conditional Harm Threshold Test for Paediatric Decision-Making' in Imogen Goold, Jonathan Herring and Cressida Auckland, *Parental Rights, Best Interests and Significant Harms* (1st edn, Hart Publishing, 2019).
[179] Rachel Taylor, 'Parental Decisions and Court Jurisdiction: Best Interests or Significant Harm?' in Imogen Goold, Jonathan Herring and Cressida Auckland, *Parental Rights, Best Interests and Significant Harms* (1st edn, Hart Publishing, 2019).
[180] Cressida Auckland and Imogen Goold, 'Defining the Limits of Parental Authority: Charlie Gard, Best Interests and the Significant Harm Threshold' (2018) 134 Law Quarterly Review.
[181] Dominic Wilkinson, 'In Defence of a Conditional Harm Threshold Test for Paediatric Decision-Making' in Imogen Goold, Jonathan Herring and Cressida Auckland, *Parental Rights, Best Interests and Significant Harms* (1st edn, Hart Publishing, 2019).
[182] Lainie Ross, Alissa Hurtwitz Swota, 'The Best Interest Standard: Same Name but Different Roles in Paediatric Bioethics and Child Rights Frameworks' (2017) 60(2) Perspectives in Biology and Medicine 186, 190.
[183] Lainie Ross, 'Predictive Genetic Testing of Children and the Role of the Best Interest Standard' (2013) 41(4) The Journal of Law, Medicine and Ethics 899, 904.

standard is a "regulative ideal".[184] Thus, unlike in England and Wales where the best interests standard serves as both a guidance and intervention principle, in the US the standard only serves as a guidance principle.[185] The significant harm standard is employed to act as the intervention principle.[186]

A study conducted on 130 diverse adult research participants from across the United Kingdom (hereafter, 'UK') concluded reluctances by participants to overrule parental decisions.[187] Out of the five hypothetical cases presented to them, the participants only favoured going against parental wishes in a case where they were convinced the child was completely unaware.[188] Instead of assessing the child's best interests, the standard the participants held more strongly was whether the decision was causing the child harm.[189] However, on assessing attitudes towards treatment withdrawal and the benefit of life, many respondents felt either were permissible within the hypothetical cases.[190] These results are likely to be due to the moral uncertainty that withdrawal of treatment cases carry.[191] This uncertainty can lead to competing views as to what is ethically in the best interests of the child, and thus differing conclusions are reasonable.[192]

2.5 Application of the significant harm standard to experimental treatment

Whilst one is of the view that broad application of the harm threshold should be prevented as it would result in medical professionals having to provide treatment they deem not to be in the

[184] Lainie Ross, Alissa Hurtwitz Swota, 'The Best Interest Standard: Same Name but Different Roles in Paediatric Bioethics and Child Rights Frameworks'(2017) 69(2) Perspectives in Biology and Medicine 186, 190.
[185] Ibid.
[186] Ibid.
[187] Robert Truog, 'Is 'best interests' the right standard in cases like that of Charlie Gard' (2020) 46(1) Journal of Medical Ethics 16.; Claudia Brick, Guy Kahane, Dominic Wikinson, Lucius Caviola and Julian Savulescu, 'Worth living or worth dying? The views of the general public about allowing disabled children to die' (2019) 46(1) Journal of Medical Ethics 7, 8.
[188] Claudia Brick, Guy Kahane, Dominic Wikinson, Lucius Caviola and Julian Savulescu, 'Worth living or worth dying? The views of the general public about allowing disabled children to die' (2019) 46(1) Journal of Medical Ethics 7, 11.
[189] Robert Truog, 'Is 'best interests' the right standard in cases like that of Charlie Gard' (2020) 46(1) Journal of Medical Ethics 16.
[190] Claudia Brick, Guy Kahane, Dominic Wikinson, Lucius Caviola and Julian Savulescu, 'Worth living or worth dying? The views of the general public about allowing disabled children to die' (2019) 46(1) Journal of Medical Ethics 7, 11.
[191] Dominic Wilkinson, 'In Defence of a Conditional Harm Threshold Test for Paediatric Decision-Making' in Imogen Goold, Jonathan Herring and Cressida Auckland, *Parental Rights, Best Interests and Significant Harms* (1st edn, Hart Publishing, 2019).
[192] Ibid.

child's best interests, there is argument, however, to suggest that limited application of the harm standard would solve this problem. For instance, academics such as Wilkinson favour a conditional harm standard.[193] Such a standard would apply in the limited circumstance that another doctor is willing to provide the treatment that the parents desire.[194] As noted by Wilkinson "it would sanction courts overriding parents on the same basis as court intervention in other parental decisions".[195] As a result, this appears to be an acceptable medium as greater weight is afforded to parental decisions whilst ensuring the courts can intervene when welfare is engaged.

Central to discussions in *Gard* was the ethical question of whether the law in England and Wales should use the harm threshold in cases where experimental treatment is available abroad.[196] Charlie Gard's parents' legal team proposed that the courts in England and Wales should adopt the approach taken in the US as explored earlier in this chapter, and limit the application of the best interests standard to merely a guidance principle.[197] However, such distinction was rejected by the courts, as on reviewing medical evidence from clinicians in England and Barcelona they deemed the treatment to be futile and thus upheld the use of the best interests standard.[198]

2.6 Does the significant harm standard resolve the problem of indeterminacy?

Reforming the law to introduce a significant harm threshold for treatment decisions would not solve the objectivity problem raised above. The application of the significant harm threshold would still result in the courts determining what constitutes 'significant harm', an analysis which would "often be subjective, influenced by the person's culture, religious beliefs, and

[193] Dominic Wilkinson, 'In Defence of a Conditional Harm Threshold Test for Paediatric Decision-Making' in Imogen Goold, Jonathan Herring and Cressida Auckland, *Parental Rights, Best Interests and Significant Harms* (1st edn, Hart Publishing, 2019).
[194] Ibid.
[195] Ibid.
[196] Eliana Close, Lindy Willmott, Benjamin White, 'Charlie Gard: in defence of the law' (2008) 44 Journal of Medical Ethics 476, 476; Dominic Wilkinson and Julian Savulescu, *Ethics, Conflict and Medical Treatment for Children: From Disagreement to Dissensus* (1st edn, Elsevier, 2018) 15.
[197] *Yates & Anor v Great Ormond Street Hospital For Children NHS Foundation Trust & Anor* (Rev 1) [2017] EWCA Civ 410; Lainie Ross and Alissa Swota, 'The Best Interest Standard: Same Name but Different Roles in Pediatric Bioethics and Child Rights Framework' (2017) 60(2) Perspectives in Biology and Medicine 186, 191.
[198] Lainie Ross and Alissa Swota, 'The Best Interest Standard: Same Name but Different Roles in Pediatric Bioethics and Child Rights Framework' (2017) Perspectives in Biology and Medicine 60(2) 186, 191.

social matrix".[199] As such, this application results in comparable levels of indeterminacy.[200] This view can be supported by reflecting on the use of the harm standard in other areas of English law as the application suggests that the standard is "significantly more evaluative than, and suffers from similar levels of indeterminacy to, the best interests test".[201] Diekema counters such a claim by stating that as "a threshold based upon harm better fits the point where intervention against parental wishes is justified in practice and is therefore less likely to cause confusion in clinicians than the obfuscatory language of best interests".[202] Yet, whilst one can see how this may aid in addressing clinical matters such as circumcision, one cannot see how switching terminologies would address the overbearing problem of indeterminacy in the context of complex clinical decisions.[203] As stated by Birchley, if the harm threshold were to reform the law the outcome would be that "one opaque test replaces another".[204] Best interests "provides a well-established analytical framework which has developed over decades and allows harm to be considered within a wider context of other considerations".[205] Thus, a solution to the indeterminacy problem that has garnered significant support is "not to attempt to *rename* the best interests test, but to identify the values *informing* best interests".[206]

2.7 Summary

To conclude, the best interests standard should be retained. Whilst one can appreciate the reasoning behind the reform of the law to introduce the significant harm standard, as it would arguably reduce court involvement by increasing the threshold for state intervention, the significant harm threshold would not resolve the problems raised in relation to the current standard. As evidenced above, some level of reform is required to resolve the power imbalance between parents and medical professionals, however this will not be achieved through the introduction of a harm threshold. Mediation will be explored in depth in chapter four as a means

[199] Cressida Auckland and Imogen Goold, 'Defining the Limits of Parental Authority: Charlie Gard, Best Interests and the Significant Harm Threshold' (2018) 134 Law Quarterly Review.
[200] Giles Birchley, 'Harm is all you need? Best Interests and disputes about parental decision-making' (2016) 42(2) Journal of Medical Ethics 111.
[201] Ibid.
[202] Ibid, 112.
[203] Ibid.
[204] Giles Birchley, 'The harm threshold and parents' obligation to benefit their children' (2016) 42(2) Journal of Medical Ethics 123.
[205] Cressida Auckland and Imogen Goold, 'Defining the Limits of Parental Authority: Charlie Gard, Best Interests and the Significant Harm Threshold' (2018) 134 Law Quarterly Review.
[206] Giles Birchley, 'Harm is all you need? Best Interests and disputes about parental decision-making' (2016) 42(2) Journal of Medical Ethics 111, 114.

of "levelling…the moral "playing field" in an arena with clear power and status differentials".[207]

3. Interested Parties

As evidenced in chapter one, "the ethical and legal basis for all decisions is that it is the best interest of the child that is paramount";[208] it is the "prevailing standard".[209] Due to a series of high-profile withdrawal of care cases, there has been much debate over who should have the final say.[210] Whilst disputes such as this are far from new, the extensive media attention generated by cases such as *Evans*, *Gard*, *King* and *Haastrup* have highlighted the complexities that arise when an agreement is not met between the parents and the medical team.[211] When a child is too young to express meaningful views, who should decide for them? Many parents feel that as a parent they have a parental responsibility to the child and thus they should be able to have the final say, however the final arbiter is the court.[212] Further discussion explores parental rights versus the child's best interests, the role of medical practitioners and the process of shared decision-making, weighing up the extent to which the current system is truly a 'partnership'. This examination will result in a debate on whether the court should be the ultimate arbiter.

3.1 Parental rights versus the child's best interests

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[207] Autumn Fisher, 'Bioethics and the end of Clinical Ethics as we know it' (2014) <https://pdfs.semanticscholar.org/1712/6d598966dcb09ded54126343e50b07f333a4.pdf> accessed 20 March 2020 501, 507.

[208] Mike Linney, Richard Hain, Dominic Wilkinson, Peter-Marc Fortune, Sarah Barclay, Vic Larcher, Jacqueline Fitzgerald and Emily Arkell, 'Achieving consensus advice for paediatricians and other health professionals: on prevention, recognition and management of conflict in paediatric practice' (2019) Arch Dis Child 413, 414.

[209] Douglas Diekema, 'Parental Refusals of Medical Treatment: The Harm Principle as Threshold for State Intervention' (2004) 25 Theoretical Medicine and Bioethics 243, 246.

[210] Cressida Auckland and Imogen Goold, 'Parental rights, best interests and significant harms: who should have the final say over a child's medical care?' (2019) 78(2) The Cambridge Law Journal 287.

[211] *Alder Hey Children's NHS Foundation Trust v Evans* [2018] EWCA Civ 805; *Great Ormond Street Hospital for Children NHS Foundation Trust v Yates* [2017] EWCA Civ 410; *In the matter of Ashya King (A Child)* [2014] EWHC 2964 (Fam); *Kings College Hospital NHS Foundation Trust v Haastrup* [2018] EWHC 127 (Fam); Cressida Auckland and Imogen Goold, 'Parental rights, best interests and significant harms: who should have the final say over a child's medical care?' (2019) 78(2) The Cambridge Law Journal 287, 290.

[212] Viv Larcher, Finella Craig, Kiran Bhogal, Dominic Wilkinson, Joe Brierley, on behalf of the Royal College of Paediatrics and Child Health, 'Making decisions to limit treatment in life-limiting and life-threatening conditions in children: a framework for practice' (2015) BMJ <https://nornet.org.uk/wp-content/uploads/2017/07/File-16-RCPCH.pdf> accessed 12 December 2019 s1, s9.

Ascribable to parental responsibility outlined in the Children Act 1989,[213] parents have both the legal and ethical authority to consent to treatment decisions concerning their children.[214] However, these rights are not absolute. Whilst parents can propose a desire for a specific course of action, medical professionals are under no duty to undertake treatment they do not perceive to be in the child's best interests.[215] To ensure the best interests of the child are upheld, the state has the authority to question and challenge parental views.[216] This ability to challenge is required as "being motivated to do what is best for someone does not make one the best or even a better judge of what is in fact best".[217] Thus, it can be held that, "a partial right is provided [to parents] with a protective paternalistic undercoat".[218]

As a result of the attention generated by high-profile withdrawal of care court cases, a "substantial disjunction between what the legal position is and what many believe it ought to be" has been revealed.[219] These cases have "polarised thinking and polarised views".[220] For instance, the emotive nature of the battle cry, 'my child, my choice' employed in the case of *Gard* "gives expression to an almost visceral sense of entitlement to determine what should happen to one's child".[221] However, as noted by Lady Hale, at present the best interests standard is the 'gold standard' and thus, treatment contrary to the child's best interests cannot be demanded by the parents.[222] As expressly noted by the Counsel for Charlie Gard's parents, such an intrusion into private life erodes "the scope for protection against state interference afforded by our most basic constitutional values, as well as by Article 8 [European Convention

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[213] Children Act 1989.
[214] Viv Larcher, Finella Craig, Kiran Bhogal, Dominic Wilkinson, Joe Brierley, on behalf of the Royal College of Paediatrics and Child Health, 'Making decisions to limit treatment in life-limiting and life-threatening conditions in children: a framework for practice' (2015) BMJ <https://nornet.org.uk/wp-content/uploads/2017/07/File-16-RCPCH.pdf> accessed 12 December 2019 s1, s9-s10.
[215] Maria Manalo, 'End-of-life Decisions about Withholding or Withdrawing Therapy: Medical, Ethical and Religio-Cultural Considerations' (2013) 7 Palliative Care: Research and Treatment 1, 2; Rob Heywood, 'Parents and medical professionals: conflict, cooperation, and best interests' (2012) 20(1) Medical Law Review 29, 30.
[216] Dave Archard, 'My child, my choice': parents, doctors and the ethical standards for resolving their disagreement' (2019) 70(1) Northern Ireland Legal Quarterly 93, 95.
[217] Ibid, 105.
[218] Rob Heywood, 'Parents and medical professionals: conflict, cooperation, and best interests' (2012) 20(1) Medical Law Review 29, 33.
[219] Cressida Auckland and Imogen Goold, 'Parental rights, best interests and significant harms: who should have the final say over a child's medical care?' (2019) 78(2) The Cambridge Law Journal 287, 290.
[220] Catherine Burns, 'Charlie Gard's parents want 'Charlie's Law'' (*BBC News*, 20 June 2018) <https://www.bbc.co.uk/news/health-44334306> accessed 17 October 2019.
[221] Dave Archard, 'My child, my choice': parents, doctors and the ethical standards for resolving their disagreement' (2019) 70(1) Northern Ireland Legal Quarterly 93, 108.
[222] Graeme Laurie, Shawn Harmon and Edward Dove, *Mason and McCall Smith's Law and Medical Ethics* (11 edn, Oxford University Press, 2019) 553; Cressida Auckland and Imogen Goold, 'Parental rights, best interests and significant harms: who should have the final say over a child's medical care?' (2019) 78(2) The Cambridge Law Journal 287, 292.

on Human Rights]".[223] Whilst this infringement on parental autonomy has been critiqued by many international commentators and politicians, awarding parents full parental autonomy would be at the expense of medical professionals, who would have to provide care that they ultimately believe is causing substantial harm.[224] As aptly highlighted by Lord Justice Wall, "everybody sympathises with the parents of a disabled child, but there are limits to that sympathy when parental conduct ceases to bear any relation to the child's welfare".[225]

There is much debate as to how much value should be afforded to parental preferences, with many critics expressing the notion that the best interests standard "rides roughshod over parental rights".[226] Yet in the recent case of *Raqeeb*, the parents' views - especially their religious preferences - were pertinent to the best interests pronouncement.[227] Through the protection of parental choice evident in *Raqeeb*, the best interests standard was applied in a novel and unprecedented manner.[228] Tafida Raqeeb was permitted to "remain alive in accordance with the tenets of the religion in which she was being raised",[229] a belief Wilkinson and Savulescu consider to be "arguably irrational".[230] In evaluating this position, Gupta goes further as she questions whether the case "sets a dangerous role of religion in society".[231] Evidence of religious preferences guiding decision-making is also evident in other areas of medicine, for instance Jehovah's Witnesses refuse to provide consent for blood transfusions in spite of the fact that it may save their child's live.[232] However, as noted by Brierley et al, it is

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[223] Supreme Court 'In the matter of Charlie Gard (Permission to Appeal Hearing)' (*Supreme Court*, 8 June 2017) <https://www. supremecourt.uk/news/permission-to-appeal-hearing-in-the-matter-of-charlie-gard.html> accessed 10 February 2020.
[224] Dominic Wilkinson and Julian Savulescu, 'Alfie Evans and Charlie Gard – should the law change?' (2018) BMJ <https://www.bmj.com/content/361/bmj.k1891.long> accessed 18 October 2019.
[225] *Portsmouth Hospitals NHS Trust v Wyatt and another* [2005] EWCA Civ 1181; [2005] WLR 3995: [119] (Justice Wall).
[226] Giles Birchley, 'Expert reaction to Tafida Raqeeb ruling from High Court' (*Science Media Centre*, 3 October 2019) <https://www.sciencemediacentre.org/expert-reaction-to-tafida-raqeeb-ruling-from-high-court/> accessed 10 January 2020.
[227] Emma Cave, Joe Brierley and David Archard, 'Making Decisions for Children— Accommodating Parental Choice in Best Interests Determinations: Barts Health NHS Trust v Raqeeb [2019] EWHC 2530 (Fam); Raqeeb and Barts Health NHS Trust [2019] EWHC 2531 (Admin)' (2020) 28(1) Medical Law Review 183, 186.
[228] Ibid.
[229] Barts Health NHS Trust v Raqeeb [2019] EWHC 2530 (Fam); Raqeeb and Barts Health NHS Trust [2019] EWHC 2531 (Admin), [173].
[230] Dominic Wilkinson and Julian Savulescu, *Ethics, Conflict and Medical Treatment for Children: From Disagreement to Dissensus* (1st edn, Elsevier, 2018).
[231] Rahila Gupta, 'Does religion have a privileged status in the UK?' (*CNN*, 20 November 2019) <https://edition.cnn.com/2019/11/20/opinions/rahila-gupta-religion-privileged-status-uk/index.html> accessed 10 January 2020.
[232] Silvio Ferrari, *Routledge Handbook of Law and Religion* (1st edn, Routledge, 2017); Douglas Diekema, 'Parental Refusals of Medical Treatment: The Harm Principle as Threshold for State Intervention' (2004) 25 Theoretical Medicine and Bioethics 243, 255.

standard practice for parental views to be overridden in this context to promote the welfare of the child.[233] Therefore, whilst consideration of moral disagreements such as the sanctity of life are explored in court, consideration "does not discharge the court from its fundamental obligation to determine what in its view is objectively in the child's best interests".[234] Thus, whilst a clear sympathy to the wishes of the parents can be witnessed, the position on parental preferences established by Holman J in *An NHS Trust v MB*[235] is upheld.[236]

3.2 The role of Medical Professionals

Parental input and medical expertise is required to decide what is in the child's best interests. Medical professionals are the "gatekeepers of best interests",[237] arguably holding the corporate moral responsibility for the decision due to their moral and legal duties.[238] Legally, doctors cannot act in a manner that is contrary to their professional judgment, there is no obligation for doctors to provide treatment that they regard to be futile.[239] Whilst advancements in medical science have led to the creation of technology that can keep a child alive, withdrawing or withholding treatment is sometimes the best option if there is no likelihood of a cure or prospect of recovery.[240] Modern paediatric care has evolved at such a pace that it is often hard to predict the course of a condition and there are now a range of treatment options for once deemed incurable conditions.[241] National guidance stipulates that withdrawal of treatment may be

[233] Steven Clarke, 'When they believe in miracles' (2015) 39(9) Journal of Medical Ethics 582.
[234] Emma Cave, Joe Brierley and David Archard, 'Making Decisions for Children— Accommodating Parental Choice in Best Interests Determinations: Barts Health NHS Trust v Raqeeb [2019] EWHC 2530 (Fam); Raqeeb and Barts Health NHS Trust [2019] EWHC 2531 (Admin)' (2020) 28(1) Medical Law Review 183, 190.
[235] *An NHS Trust v MB* [2006] EWHC 507 (Fam).
[236] Emma Cave, Joe Brierley and David Archard, 'Making Decisions for Children— Accommodating Parental Choice in Best Interests Determinations: Barts Health NHS Trust v Raqeeb [2019] EWHC 2530 (Fam); Raqeeb and Barts Health NHS Trust [2019] EWHC 2531 (Admin)' (2020) 28(1) Medical Law Review 183, 191.
[237] Emma Cave and Emma Nottingham, 'Who Knows Best (interests)? The Case of Charlie Gard' (2008) 26(3) Medical Law Review 500, 510.
[238] Royal College of Paediatrics and Child Health, 'Withholding or Withdrawing Life Sustaining Treatment in Children: A Framework for Practice' (*Royal College of Paediatrics and Child Health*, May 2004) <https://councilfordisabledchildren.org.uk/sites/default/files/field/attachemnt/Withholding%26withdrawing_treatment.pdf> accessed 18 October 2019 27.
[239] Maria Manalo, 'End-of-life Decisions about Withholding or Withdrawing Therapy: Medical, Ethical and Religio-Cultural Considerations' (2013) 7 Palliative Care: Research and Treatment 1, 2; Rob Heywood, 'Parents and medical professionals: conflict, cooperation, and best interests' (2012) 20(1) Medical Law Review 29, 30.
[240] Emily Harrop, 'Setting the scene – supporting and informing shared decision-making at the bedside – avoiding and de-escalating conflict between Clinicians and Families' in Imogen Goold, Jonathan Herring and Cressida Auckland, *Parental Rights, Best Interests and Significant Harms* (1st edn, Hart Publishing, 2019) 7.
[241] Ibid, 13.

permissible "when life is limited in quantity",[242] "when life is limited by quality",[243] and in situations of "informed competent refusal of treatment".[244]

End of life decisions are highly complex and evoke a sense of unease and distress.[245] It is not uncommon for medical professionals to have different views about a treatment plan.[246] Wilkinson et al have gone as far to say that due to "value pluralism and moral uncertainty in end-of-life decisions", unanimity is "unrealistic and counterproductive".[247] However, it is crucial that all decisions stem from an amalgamation of values and facts: this is vital as medical professionals' "command of medical knowledge does not make them able to predict the future health of a baby with complete accuracy or give them any special moral authority".[248] As expressed by the Royal College of Paediatrics and Child Health, "conflicting emotions can affect the balance of both parental and professional judgment".[249]

3.3 The use of shared decision-making

Typically, medical professionals and parents work in partnership through a process of shared decision-making to aid the promotion of the child's best interests.[250] Advancements in medical technology have resulted in patients being able to balance on the boundary of life and death.[251]

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[242] Viv Larcher, Finella Craig, Kiran Bhogal, Dominic Wilkinson, Joe Brierley, on behalf of the Royal College of Paediatrics and Child Health, 'Making decisions to limit treatment in life-limiting and life-threatening conditions in children: a framework for practice' (2015) BMJ <https://nornet.org.uk/wp-content/uploads/2017/07/File-16-RCPCH.pdf> accessed 12 December 2019 s1, s4.
[243] Ibid.
[244] Ibid, s5.
[245] Dominic Wilkinson, Robert Truog and Julian Savulescu 'In Favour of Medical Dissensus: Why We Should Agree to Disagree about End-of-Life Decisions' (2015) 30(2) Bioethics 109, 118.
[246] Ibid.
[247] Ibid.
[248] Nuffield Council on Bioethics, 'Critical care decisions in fetal and neonatal medicine: ethical issues' (*Nuffield Council on Bioethics*, November 2006) <https://nuffieldbioethics.org/assets/pdfs/Critical-care-decisions.pdf> accessed 15 August 2019; C Harrison, Canadian Paediatric Society, Bioethics Committee, 'Treatment decisions regarding infants, children and adolescents' (2004) Paediatrics and Child Health 9(2) 99.
[249] Royal College of Paediatrics and Child Health, 'Witholding or Withdrawing Life Sustaining Treatment in Children: A Framework for Practice' (*Royal College of Paediatrics and Child Health*, May 2004) <https://councilfordisabledchildren.org.uk/sites/default/files/field/attachemnt/Withholding%26withdrawing_treatment.pdf> accessed 18 October 2019 40.
[250] Viv Larcher, Finella Craig, Kiran Bhogal, Dominic Wilkinson, Joe Brierley, on behalf of the Royal College of Paediatrics and Child Health, 'Making decisions to limit treatment in life-limiting and life-threatening conditions in children: a framework for practice' (2015) BMJ <https://nornet.org.uk/wp-content/uploads/2017/07/File-16-RCPCH.pdf> accessed 12 December 2019 s1, s10.
[251] Goedele Baeke, Jean-Pierre Wils and Bert Broeckaert, 'Orthodox Jewish Perspectives on withholding and withdrawing life-sustaining treatment' (2011) 18 Nursing Ethics 835.

Arguably this has resulted in the creation of an 'expectation gap'.[252] An 'expectation gap' may arise as a consequence of "undue faith in modern medicine, an understandable but overly optimistic hope of recovery, or a suspicion of rationing".[253] A by-product of these unrealistic expectations is disagreements between doctors and patients.[254] Whilst, every effort should be made to settle such disputes internally, if the disagreement becomes entrenched, court intervention will be sought to determine whether or not the proposed treatment plan is in the child's best interests.[255]

As alluded to in chapter one, since the 1960s the doctor-patient relationship has significantly shifted. Due to the rife nature of patients' rights and consumer movement, the relationship changed from one centred on paternalism to a patient-centred approach.[256] Each party has a clear interest: the parents have a parental duty to do what they feel best for their child, whilst the medical professionals have an interest in carrying out their professional duty, their legal duty of care.[257] Thus, as noted by Moorkamp, "decision-making, especially that which occurs in end of life situations, requires the presence and incorporation of many voices".[258] In light of this a joint decision-making process in regards to withholding or withdrawing treatment decisions seems the most suited.[259] Firstly, as aptly noted by the Nuffield Council of Bioethics, such a process "satisfies several important ethical considerations".[260] This is achieved as the process allows for parties to present their views, discuss different perspectives and be assured that their views have been considered appropriately.[261] Secondly, a joint decision-making process facilitates the view presented by Cave that "treatment is an enterprise that is depended

[252] Hugo Wellesley and Ian Jenkins, 'Withholding and withdrawing life-sustaining treatment in children' (2009) 19(10) Pediatric Anesthesia 972, 975.
[253] Ibid.
[254] Ibid.
[255] Abi Rimmer 'When doctors and parents disagree: royal college issues advice on dealing with conflict' (2019) BMJ Clinical Research 365 <https://www.bmj.com/content/365/bmj.l1835> accessed 11 December 2019; Viv Larcher, Finella Craig, Kiran Bhogal, Dominic Wilkinson, Joe Brierley, on behalf of the Royal College of Paediatrics and Child Health, 'Making decisions to limit treatment in life-limiting and life-threatening conditions in children: a framework for practice' (2015) BMJ <https://nornet.org.uk/wp-content/uploads/2017/07/File-16-RCPCH.pdf> accessed 12 December 2019 s1, s9.
[256] Ellen Waldman, 'Bioethics Mediation at the end of life: Opportunities and Limitations' (2014) 15(2) Cardozo Journal of Conflict Resolution 449.
[257] Dave Archard, 'My child, my choice': parents, doctors and the ethical standards for resolving their disagreement' (2019) 70(1) Northern Ireland Legal Quarterly 93, 107.
[258] Amy Moorkamp, 'Don't Pull the Plug on Bioethics Mediation: The Use of Mediation in Health Care Settings and End of Life Situations' (2017) 1(16) Journal of Dispute Resolution 219, 226.
[259] Nuffield Council on Bioethics, 'Critical care decisions in fetal and neonatal medicine: ethical issues' (*Nuffield Council on Bioethics*, November 2006) <https://nuffieldbioethics.org/assets/pdfs/Critical-care-decisions.pdf> accessed 15 August 2019 22.
[260] Ibid.
[261] Ibid.

upon cooperation and this necessitates a relational approach".[262] Thirdly, research has indicated that parental involvement in decision-making can decrease long-term parental grief.[263] However, whilst medical professionals' duty to consult parents is evident in both law and ethics, Cave highlights that "the waters are muddied by inconsistent ethical guidance on unproven, innovative treatment and latterly by inconsistencies in the legal approach".[264] For instance, in *Gard* the lack of certainty surrounding experimental treatments being used was highlighted.[265] Furthermore, parents require more knowledge of the decision-making process. As expressed by Hazel Greig-Midlane, a mother who knows from experience how traumatic the process can be, there needs to be "a common plateau of understanding - we need educating in how clinicians reach recommendations, and we want staff to acknowledge the value of our child".[266]

3.4 Overcoming conflict

Due to the non-homogenous nature of parents and healthcare professionals, every situation differs and conflicts can arise.[267] Conflicts often originate due to differences in ethical opinions, with parents and medical professionals' ethical positions differing greatly due to "diverse, social, cultural, religious, moral and familial influences".[268] As a result, discussions regarding care need to be individualised to respect the "preferences, beliefs, values, and cultures of both the patient and their family".[269] As expressed by Manalo, "recognising this pluralism is fundamental to the provision of high quality end-of-life care".[270]

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[262] Emma Cave and Emma Nottingham, 'Who Knows Best (interests)? The Case of Charlie Gard' (2008) 26(3) Medical Law Review 500, 512.
[263] Megan Marsac, Christine Kindler, Danielle Weiss and Lindsay Ragsdale, 'Let's Talk About It: Supporting Family Communication during End-of-Life Care of Pediatric Patients' (2018) 21(6) Journal of Palliative Medicine 862, 875.
[264] Emma Cave and Emma Nottingham, 'Who Knows Best (interests)? The Case of Charlie Gard' (2008) 26(3) Medical Law Review 500, 513.
[265] Ibid.
[266] Hazel Greig-Midlane, 'The distinction between withdrawing life sustaining treatment under the influence of paralysing agents and euthanasia: the parents' perspective on withdrawing treatment' (2001) 323 British Medical Journal 390.
[267] Clare Delany, Vicki Xafis, Lynn Gillam, Jo-anne Hughson, Jenny Hynson and Dominic Wilkinson, 'A good resource for parents, but will clinicians use it?: Evaluation of a resource for paediatric end-of-life decision making' (2017) 16(12) BMC Palliative Care 1, 4.
[268] James Tibbals, 'Legal basis for ethical withholding and withdrawing life-sustaining medical treatment from infants and children' (2007) 43(4) Journal of Paediatric Child Health 230.
[269] Maria Manalo, 'End-of-life Decisions about Withholding or Withdrawing Therapy: Medical, Ethical and Religio-Cultural Considerations' (2013) 7 Palliative Care: Research and Treatment 1, 4.
[270] Ibid, 3.

It is illegal to start or withdraw treatment without the consent of the parents, unless it is an emergency or the treatment plan has been permitted by the court.[271] The increasing prevalence of information online and the 'expectation gap' derived from the vast availability of life sustaining treatments has led to an increased risk of conflict.[272] As opined by Wilkinson, families often struggle to accept that there is a limit to what medicine can do to help.[273] However, continuation of life-sustaining treatment, in the absence of a high probability of improvement, not only places the child in a position of potential harm but also "represents an unreasonable and unfair use of limited healthcare resources".[274] Savulescu noted that "limitations in medical resources, such as extensive care, mean not everyone can be treated who might possibly benefit. They must be distributed according to a principle of distributive justice".[275] Similarly, the vast amount of information available online makes it easy for parents to search for solutions to their child's medical condition, however many suggestions are based on unproven treatments and are not available on the NHS.[276]

Nonetheless, as noted by Wilkinson and Savulescu, "cases of intractable disagreement, like [Charlie Gard] are the exception rather than the rule".[277] This is supported by a study at Great Ormond Street Hospital, where out of 203 cases where withdrawal of treatment was recommended by medical professionals, agreement was reached in 186 cases.[278] However, whilst the study illustrates that a large volume of cases reach consensus without dispute, as highlighted by the Nuffield Council of Bioethics, there is great room for more to be done to

[271] Hugo Wellesley and Ian Jenkins, 'Withholding and withdrawing life-sustaining treatment in children' (2009) 19(10) Pediatric Anesthesia 972, 976.
[272] Mike Linney, Richard Hain, Dominic Wilkinson, Peter-Marc Fortune, Sarah Barclay, Vic Larcher, Jacqueline Fitzgerald and Emily Arkell, 'Achieving consensus advice for paediatricians and other health professionals: on prevention, recognition and management of conflict in paediatric practice' (2019) Arch Dis Child 413; Hugo Wellesley and Ian Jenkins, 'Withholding and withdrawing life-sustaining treatment in children' (2009) 19(10) Pediatric Anesthesia 972, 975.
[273] Abi Rimmer 'When doctors and parents disagree: royal college issues advice on dealing with conflict' (2019) BMJ Clinical Research 365 <https://www.bmj.com/content/365/bmj.l1835> accessed 11 December 2019.
[274] Dominic Wilkinson and Julian Savulescu 'Hard lessons: learning from the Charlie Gard case' (2018) 44(7) Journal of Medical Ethics 438, 439.
[275] Julian Savulescu, 'Is it in Charlie's best interest to die? (2017) 389(10082) The Lancet 1868, 1869.
[276] Mike Linney, Richard Hain, Dominic Wilkinson, Peter-Marc Fortune, Sarah Barclay, Vic Larcher, Jacqueline Fitzgerald and Emily Arkell, 'Achieving consensus advice for paediatricians and other health professionals: on prevention, recognition and management of conflict in paediatric practice' (2019) Arch Dis Child 413.
[277] Dominic Wilkinson and Julian Savulescu 'Hard lessons: learning from the Charlie Gard case' (2018) 44(7) Journal of Medical Ethics 438.
[278] Dave Archard, 'My child, my choice': parents, doctors and the ethical standards for resolving their disagreement' (2019) 70(1) Northern Ireland Legal Quarterly 93, 94.

reduce protracted disputes.[279] In essence, "the aim should be: good communication between families and healthcare staff… appropriate involvement of parents in discussions…timely use of effective resolution interventions…and attention to the profound psychological effects that disagreements can have".[280] Thus, new constructive solutions are required to "avoid, mitigate, and resolve disagreements about treatment".[281]

3.5 Court Intervention

The orthodox position is that the court can intervene at the point welfare is engaged. At this stage, it could be argued that the parents are discharged of their parental responsibility as the court is required to "exercise independent and objective judgment",[282] and in doing so "may overrule the decision of a parent".[283] As expressed by MacDonald J in *Haastrup,* in exercising its jurisdiction, the court "take[s] over the parent's duty to give or withhold consent in the best interests of the child".[284]

"Recourse to the court is [the] final step".[285] On referral of a matter to court, the court will want to see evidence that attempts were made to resolve the conflict.[286] This stems from the resource implications of going to court and the nature of the process, which is "time consuming and protracted with a profound psychological impact on families and staff".[287] Court involvement

[279] Nuffield Council on Bioethics, 'Bioethics Briefing Note: Disagreements in the care of critically ill children' (*Nuffield Council on Bioethics*, April 2019) <https://www.nuffieldbioethics.org/assets/pdfs/Disagreements-in-the-care-of-critically-ill-children.pdf> accessed 19 February 2020 1.
[280] Ibid, 6.
[281] Dominic Wilkinson and Julian Savulescu, 'Alfie Evans and Charlie Gard – should the law change?' (2018) BMJ <https://www.bmj.com/content/361/bmj.k1891.long> accessed 18 October 2019.
[282] Viv Larcher, Finella Craig, Kiran Bhogal, Dominic Wilkinson, Joe Brierley, on behalf of the Royal College of Paediatrics and Child Health, 'Making decisions to limit treatment in life-limiting and life-threatening conditions in children: a framework for practice' (2015) BMJ <https://nornet.org.uk/wp-content/uploads/2017/07/File-16-RCPCH.pdf> accessed 12 December 2019 s1, s9.
[283] Ibid.
[284] *Kings College Hospital NHS Foundation Trust v Haastrup* [2018] 2 FLR 1028, [69] (MacDonald J).
[285] Mike Linney, Richard Hain, Dominic Wilkinson, Peter-Marc Fortune, Sarah Barclay, Vic Larcher, Jacqueline Fitzgerald and Emily Arkell, 'Achieving consensus advice for paediatricians and other health professionals: on prevention, recognition and management of conflict in paediatric practice' (2019) Arch Dis Child 413.
[286] Viv Larcher, Finella Craig, Kiran Bhogal, Dominic Wilkinson, Joe Brierley, on behalf of the Royal College of Paediatrics and Child Health, 'Making decisions to limit treatment in life-limiting and life-threatening conditions in children: a framework for practice' (2015) BMJ <https://nornet.org.uk/wp-content/uploads/2017/07/File-16-RCPCH.pdf> accessed 12 December 2019 s1, s9.
[287] Mike Linney, Richard Hain, Dominic Wilkinson, Peter-Marc Fortune, Sarah Barclay, Vic Larcher, Jacqueline Fitzgerald and Emily Arkell, 'Achieving consensus advice for paediatricians and other health professionals: on prevention, recognition and management of conflict in paediatric practice' (2019) Arch Dis Child 413, 414; Emma Cave and Emma Nottingham, 'Who Knows Best (interests)? The Case of Charlie Gard' (2008) 26(3) Medical Law Review.

is therefore rare.[288] The number of cases referred to the High Court in England is in the region of ten per year.[289] However, as aptly noted by Auckland and Goold, "in almost every case where a dispute has arisen between the parents and the treating team, neither party could achieve their desired outcome without the court's assistance".[290] The parents cannot force a doctor to treat their child, nor can a doctor withdraw treatment without consent, thus court involvement is required to arbitrate between the positions.[291]

Attributable to the adversarial nature of the court process, consensus between both parties (parents and doctors) is arguably less likely to be achieved, since the "role of the judge is not one of mediator but protector of the child's best interests".[292] Moreover, on the face of it, it could be argued that the courts are more likely to endorse professional judgment, given the fact that they do so in most cases where the treatment is deemed to be futile and burdensome by medical professionals.[293] In determining what is in the child's best interests as enunciated in *Wyatt*, the "court must conduct a balancing exercise in which all relevant factors are weighed".[294] Undertaking a balancing exercise is imperative as merely viewing best interests from a narrow medical perspective results in the notion of medical paternalism being upheld. As noted by Professor Brazier, if applied in this manner the best interests standard resembles an "empty mantra".[295] However, unlike in cases concerning the care of the child, the absence of a statutory framework results in judges applying the standard to varying degrees, with some even determining the outcome based on significant harm.[296]

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[288] Nuffield Council on Bioethics, 'Bioethics Briefing Note: Disagreements in the care of critically ill children' (*Nuffield Council on Bioethics*, April 2019) <https://www.nuffieldbioethics.org/assets/pdfs/Disagreements-in-the-care-of-critically-ill-children.pdf> accessed 19 February 2020 3.
[289] Ibid.
[290] Cressida Auckland and Imogen Goold, 'Parental rights, best interests and significant harms: who should have the final say over a child's medical care?' (2019) 78(2) The Cambridge Law Journal 287, 291.
[291] Ibid.
[292] Emma Cave and Emma Nottingham, 'Who Knows Best (interests)? The Case of Charlie Gard' (2008) 26(3) Medical Law Review 500, 510; Dominic Wilkinson and Julian Savulescu 'Hard lessons: learning from the Charlie Gard case' (2018) 44(7) Journal of Medical Ethics 438, 440.
[293] Nuffield Council on Bioethics, 'Critical care decisions in fetal and neonatal medicine: ethical issues' (*Nuffield Council on Bioethics*, November 2006) <https://nuffieldbioethics.org/assets/pdfs/Critical-care-decisions.pdf> accessed 15 August 2019 137.
[294] *Portsmouth Hospitals NHS Trust v Wyatt* [2005] EWCA Civ 1181, 87; Louise Austin and Richard Huxtable, 'Resolving Disagreement about the Care of Critically Ill Children: Evaluating Existing Processes and Setting the Research Agenda' in Imogen Goold, Jonathan Herring and Cressida Auckland, *Parental Rights, Best Interests and Significant Harms* (1st edn, Hart Publishing, 2019).
[295] Margot Brazier, 'An Intractable Dispute: When Parents and Professionals Disagree' (2005) 13(3) Medical Law Review 412, 415; Rob Heywood, 'Parents and medical professionals: conflict, cooperation, and best interests' (2012) 20(1) Medical Law Review 29, 34.
[296] BBC News, ' Reality Check: Why don't Charlie Gard's parents have the final say?' (*BBC News*, 14 July 2017) <https://www.bbc.co.uk/news/uk-40600932> accessed 7 December 2019.

3.6 Summary

From the exploration of the interests of the relevant parties, it is clear to see how disagreements regarding withdrawal of treatment can result in conflict and ultimately end up in court. Attributable to the rise in cases reaching court and their high-profile nature, academics, parties to the dispute and the public alike have questioned whether the procedure used in England and Wales provides sufficiently robust support to prevent protracted disputes. From examining the current procedure for handling parent-doctor disputes, it is evident that further intervention is required to make the process more effective.[297] Whilst more in-depth research needs to be undertaken to determine its success, as will be explored in great detail in chapter four, mediation may present the perfect solution to resolve disputes with court intervention being the last resort.

4. Mediation

Mediation is a form of Alternative Dispute Resolution.[298] It is a flexible process in which both parties are provided with the opportunity to discuss their views in the presence of an impartial third party.[299] As a result of the Woolf reforms, mediation gained prominence in England and Wales from 1999, the most common form being facilitative mediation.[300] In facilitative mediation, the mediators role is not to impose a decision, but to facilitate the parties in reaching an agreement.[301] Typically, mediation has been used to settle familial and commercial disputes rather than ethical ones.[302] Nonetheless, the use of mediation in medical disputes was

[297] Rebecca Limb, 'Alfie's Law and Charlie's Law: Are there alternatives to court battles between parents and hospitals?' (*Lacuna*, 29 November 2018) <https://lacuna.org.uk/food-and-health/alfies-law-and-charlies-law-are-there-alternatives-to-court-battles-between-parents-and-hospitals/> accessed 28 November 2019.
[298] Giuseppe De Palo, Ashley Feasley and Flavia Orecchuni, 'Quantifying the cost of not using mediation – a data analysis' (*European Parliament*, April 2011) <https://www.europarl.europa.eu/RegData/etudes/note/join/2011/453180/IPOL-JURI_NT(2011)453180_EN.pdf> accessed 15 February 2020.
[299] Simon Meller and Sarah Barclay, 'Mediation: an approach to intractable disputes between parents and paediatricians' (2011) 96(7) Arch Dis Child 619, 620.
[300] Donald Lambert and Nicole Finlayson, 'Mediation in United Kingdom' (*Lexology*, 9 September 2019) <https://www.lexology.com/library/detail.aspx?g=02ee5416-79ba-484b-bd62-eb26318d330b> accessed 5 March 2020.
[301] Ibid.
[302] Danny Lee and Paul Lai, 'The Practice of mediation to resolve clinical, bioethical, and medical malpractice disputes' (2015) 21(6) Hong Kong Medical Journal 560; Simon Meller and Sarah Barclay, 'Mediation: an approach to intractable disputes between parents and paediatricians' (2011) 96(7) Arch Dis Child 619, 620.

recommended by Justice Francis in the case of Charlie Gard.[303] However, the wider application of mediation had been advocated for by several members of the judiciary in the context of medical cases prior to this case.[304] Ever since Justice Francis alluded to the success of utilising mediation in end of life disputes, academics and fellow judges alike have questioned whether his comment was "overly optimistic about mediation's potential",[305] or whether "mediation in this setting provides a perfect way to build better dialogue".[306] Due to the absence of a formal definition for 'mediation' in English law, for the purpose of this thesis, mediation is defined as "a process in which an independent neutral third party assists parties to a dispute to work towards a negotiated settlement".[307] Subsequent discussion will explore the use of mediation generally and the strengths and weaknesses of its usage. The use of mediation in the medical context will then be examined, weighing up the extent to which it could aid in the process of resolving disputes. The examination will result in a debate on how effective mediation will be, focusing primarily on medical futility conflicts.

4.1 The use of mediation in England and Wales

As aptly noted by Sinclair, "the core of the mediation approach is interest-based negotiation, a key principle of which is differentiating between positions and interests".[308] Unlike the adversarial nature of litigation and arbitration, in mediation the principle decisionmakers are the parties.[309] As a result, impartiality is crucial: the mediator must be completely independent and objective.[310] The parties are encouraged to work together.[311] The collaborative ethos of mediation enables the parties to communicate their interests and needs in the hope that a

[303] Great Ormond Street Hospital for Children NHS Foundation Trust v Yates [2017] EWHC 1909 (Fam).
[304] Katrina Choong, 'Can "Medical Futility" Conflicts be Mediated?" (2018) 6(1) Journal of Medical Law and Ethics 41,44.
[305] Ibid, 55.
[306] Mike Talbot, 'Mediation in Healthcare settings' (*UK Mediation*, 4 December 2017) <https://ukmediation.net/2017/12/04/mediation-healthcare-settings/> accessed 12 October 2019.
[307] Donald Lambert and Nicole Finlayson, 'Mediation in United Kingdom' (*Lexology*, 9 September 2019) <https://www.lexology.com/library/detail.aspx?g=02ee5416-79ba-484b-bd62-eb26318d330b> accessed 5 March 2020.
[308] Craig Sinclair, Catherine Davidson and Kirsten Aure, 'The role of mediation in advance care planning and end-of-life care' (2016) 45(1) The Royal Australian College of General Practitioners 69.
[309] Armand Antonmaria, 'Alternative Dispute Resolution and Pediatric Clinical Ethics Consultation: Why the Limits of Ethical Expertise and the Indeterminacy of the Best Interests Standard Favor Mediation' (2007) 23(1) Ohio State Journal on Dispute Resolution 17, 22.
[310] Simon Meller and Sarah Barclay, 'Mediation: an approach to intractable disputes between parents and paediatricians' (2011) 96(7) Arch Dis Child 619, 620; Danny Lee and Paul Lai, 'The Practice of mediation to resolve clinical, bioethical, and medical malpractice disputes' (2015) 21(6) Hong Kong Medical Journal 560.
[311] Mediation Matters, 'Role of the Mediator in Healthcare Disputes' (*Mediation Matters*, 11 April 2017) <https://www.mediation.com/blog/role-of-the-mediator-in-healthcare-disputes/> accessed 1 March 2020.

mutually satisfactory outcome can be achieved.[312] Its allure stems from the potential to "identify common ground, and push disputants towards more moderate, creative, and mutually satisfying outcomes".[313] As expressed by Choong, "given its amicable and harmonious character, parties are more likely to preserve and sustain their relationship after the conflict is resolved".[314] If the case goes to court, "the legal process is costly, adversarial, and restrictive in scope"[315]. Therefore, the mediator strives to empower the parties so the decision-making authority is not given to a judge.[316]

As stated by Benbow, "mediation is consensual, flexible, relatively quick and relatively cheap".[317] At present, mediation in England and Wales is not mandatory.[318] However, from 2003 to 2018 the number of cases resolved through mediation had risen by 10,000.[319] As noted by Aswani et al, "success rates for mediation are high",[320] with same day settlements being in the region of 80% and a further 10% being settled shortly thereafter.[321] Although, as expressed by Antonmaria "mediation is [not] a panacea [it]… may fail, either in the absence of an agreement or as the result of the mediator's withdrawal".[322] Yet whilst mediation cannot be regarded as the answer to every case, the advantages offered in relation to "time, costs and the parties remaining in control – mean that its use and popularity are likely to spread".[323] As expressed above, impartiality is a central element of mediation, securing confidence in the

[312] Katrina Choong, 'Can "Medical Futility" Conflicts be Mediated?' (2018) 6(1) Journal of Medical Law and Ethics 41,43.
[313] Thaddeus Pope and Ellen Waldman, 'Mediation at the End of Life: Getting Beyond the Limits of the Talking Cure' (2007) 23(1) Ohio State Journal on Dispute Resolution 143.
[314] Katrina Choong, 'Can "Medical Futility" Conflicts be Mediated?' (2018) 6(1) Journal of Medical Law and Ethics 41,43.
[315] Dominic Wilkinson, Sarah Barclay and Julian Savulescu,'Disagreement, mediation, arbitration: resolving disputes about medical treatment' (2018) 391(10137) The Lancet 2302, 2304.
[316] Mediation Matters, 'Role of the Mediator in Healthcare Disputes' (*Mediation Matters*, 11 April 2017) <https://www.mediation.com/blog/role-of-the-mediator-in-healthcare-disputes/> accessed 1 March 2020.
[317] David Benbow, 'Tafida Raqeeb v Barts NHS Foundation Trust and Others [2019]: Bolstering the argument for mediation' (2019) 19(4) Medical Law International 298, 300.
[318] Bryan Clark, 'Lomax v Lomax & the future of compulsory mediation' (2019) 169 New Law Journal.
[319] Chris Freeman, 'The Value of mediation in resolving commercial disputes' (*Ashfords*, 14 August 2018) <https://www.ashfords.co.uk/news-and-media/general/the-value-of-mediation-in-resolving-commercial-disputes> accessed 23 February 2020.
[320] Ravi Aswani, Stefanie Johnston, Pamela Milgrim and Lewis McDonald, 'US vs UK – a comparison of mediation processes' (*The Field*, May 2017) <https://www.skuld.com/topics/legal/pi-and-defence/us-vs-uk---a-comparison-of-mediation-processes/> accessed 20 February 2020.
[321] Ibid.
[322] Armand Antonmaria, 'Alternative Dispute Resolution and Pediatric Clinical Ethics Consultation: Why the Limits of Ethical Expertise and the Indeterminacy of the Best Interests Standard Favor Mediation' (2007) 23(1) Ohio State Journal on Dispute Resolution 17, 59.
[323] Gard News, 'The Future of mediation in the UK' (*Gard News*, 1 August 2010) <http://www.gard.no/web/updates/content/5613679/the-future-of-mediation-in-the-uk> accessed 2 April 2020.

process.[324] However, critics have asserted that it is "impossible for a mediator to be purely impartial",[325] and thus mediation is "adjudication in secret".[326] Although Sharland notes that "no-one can genuinely claim to be impartial" [327], mediators are encouraged to continually review their feelings and adjust accordingly where necessary to counter this potential issue.[328]

4.2 The use of mediation in the medical context

As evidenced in the previous Chapter, "decision-making at the end of life… requires the inclusion of many voices"[329] as "death in our modern medical age, increasingly requires a choice".[330] As a result, disagreements in clinical practice are common.[331] If not handled in the right manner conflicts over treatment have the potential to "lead to a cycle of frustration, stress and dismay for all parties".[332] However, Wilkinson et al notes that whilst "disagreement in medicine is inevitable… conflict should not be".[333] In light of the "magnitude of the decision being made, as well as the abundance of other considerations" as expressed by Moorkamp, "the case for a creative, problem-solving process of dispute resolution, such as mediation, is ripe".[334]

Mediation has been heralded as "the magic Band-Aid to solve end-of-life conflicts".[335] As expressed by Shelton, "mediation of end-of-life treatment disputes provides a forum to counterbalance the coercive nature of the right to terminate treatment".[336] Guidance endorsed by the General Medical Council has been promoting the use of mediation as a tool to resolve

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[324] Simon Meller and Sarah Barclay, 'Mediation: an approach to intractable disputes between parents and paediatricians' (2011) 96(7) Arch Dis Child 619, 620.
[325] Jonathon Herring, *Legal Ethics* (1st edn, Oxford University Press, 2014) 309.
[326] Ibid, 310.
[327] Alan Sharland, 'Impartiality' (*Mediate*, December 2008) <https://www.mediate.com/articles/sharlandA7.cfm> accessed 1 March 2020.
[328] Ibid.
[329] Ellen Waldman, 'Bioethics Mediation at the end of life: Opportunities and Limitations' (2014) 15(2) Cardozo Journal of Conflict Resolution 449, 450.
[330] Ibid, 449.
[331] Danny Lee and Paul Lai, 'The Practice of mediation to resolve clinical, bioethical, and medical malpractice disputes' (2015) 21(6) Hong Kong Medical Journal 560.
[332] Kerry Bowman, 'Communication, Negotiation, and Mediation: Dealing with Conflict in End-Of-Life Decisions' (2000) 16 Journal of Palliative Care S17, S18.
[333] Dominic Wilkinson, Sarah Barclay and Julian Savulescu,'Disagreement, mediation, arbitration: resolving disputes about medical treatment' (2018) 391(10137) The Lancet 2302, 2304.
[334] Amy Moorkamp, 'Don't Pull the Plug on Bioethics Mediation: The Use of Mediation in Health Care Settings and End of Life Situations' (2017) 1(16) Journal of Dispute Resolution 219.
[335] Thaddeus Pope and Ellen Waldman, 'Mediation at the End of Life: Getting Beyond the Limits of the Talking Cure' (2007) 23(1) Ohio State Journal on Dispute Resolution 143.
[336] David Shelton, 'Keeping end-of-life decisions away from the courts after thirty years of failure: biomedical mediation as an alternative for resolving end-of-life disputes' (2008) 31(1) Hamline Law Review 103, 132.

disagreements regarding withdrawal of treatment in children since 2010.[337] As opined by Pope and Waldman, "dissonant values, tragic choices, and roiling grief and loss would be confronted, managed and soothed during the emotional alchemy of the mediation process".[338] However, as alluded to above, whilst mediation is offered at some NHS Trusts, the use of it is not currently mandatory.[339] Whilst, mediation in the healthcare context in relation to medical negligence claims has been encouraged for the past few decades, its application in medical futility cases had not been widely advocated for until recently.[340] Application of mediation has the potential to be a huge success, albeit within a framework tailored to the unique characteristics associated with withdrawal of treatment decisions such as the presence of time-sensitive decisions, the involvement of the patient's family rather than the patient and highly emotionally charged discussions.[341] Whilst the mediator does not need to be a lawyer, in the context of end of life decisions, according to one view, the mediator would be expected to have an understanding of medical law.[342] As noted by Bowan, "it is essential that mediators have the knowledge, skill and empathy to explore this difficult terrain".[343] Whilst, academics such as McCrossan and Siegmeth express similar concerns in regards to application, they conclude that in spite of this, "now more than ever, we must [utilise mediation services]".[344]

Conflict in end of life decision-making usually occurs due to a breakdown in communication.[345] As expressed by Yates, "our current legal situation disempowers both doctors and parents by failing to provide them with enough ways to prevent and deescalate

[337] Simon Meller and Sarah Barclay, 'Mediation: an approach to intractable disputes between parents and paediatricians' (2011) 96(7) Arch Dis Child 619, 620.
[338] Thaddeus Pope and Ellen Waldman, 'Mediation at the End of Life: Getting Beyond the Limits of the Talking Cure' (2007) 23(1) Ohio State Journal on Dispute Resolution 143.
[339] David Benbow, 'Tafida Raqeeb v Barts NHS Foundation Trust and Others [2019]: Bolstering the argument for mediation' (2019) 19(4) Medical Law International 298, 300.
[340] Katrina Choong, 'Can "Medical Futility" Conflicts be Mediated?' (2018) 6(1) Journal of Medical Law and Ethics 41,44.
[341] Ibid, 49.
[342] Mike Talbot, 'Mediation in Healthcare settings' (*UK Mediation*, 4 December 2017) <https://ukmediation.net/2017/12/04/mediation-healthcare-settings/> accessed 12 October 2019.
[343] Kerry Bowman, 'Communication, Negotiation, and Mediation: Dealing with Conflict in End-Of-Life Decisions' (2000) 16 Journal of Palliative Care S17, S21.
[344] L McCrossan and R Siegmeth, 'Demands and requests for 'inappropriate' or 'inadvisable' treatments at the end of life: what do you do a 2 o'clock in the morning when…?' (2017) 119(1) British Journal of Anaesthesia i90,i97.
[345] Ken Hillman and Jack Chen, 'Conflict Resolution in end of life treatment decisions: a rapid review' (*NSW Health*, November 2008) <https://www.health.nsw.gov.au/research/Documents/14-conflict-resolution-end-of-life.pdf > accessed 21 January 2020.

conflict".[346] For instance, in the recent *Raqeeb* case, a lack of dialogue resulted in the disintegration of the relationship between the parents and the treating team.[347] As noted by Benbow, this case along with other high-profile court cases "demonstrates the need for legal reform to ensure that mediation is offered where such disputes arise".[348] In cases such as these the very idea of litigation "may fuel conflict and entrench the polarised positions of clinicians and parents".[349] Therefore, "mediation in this setting provides a perfect way to build better dialogue".[350] Court proceedings often fail to account for the enormity of emotion that underlies decision-making in this context.[351] Furthermore, Ethics Committees are not able to appreciate and comprehend the range of nuances enmeshed in the individual case, as arguably they are too distant from it.[352] Thus, as expressed by Fisher, mediation is "the only justifiable method for resolving values-based conflicts in a pluralistic society".[353] Through successful mediation, "court action is consequently headed off, adverse reporting is minimised, and both 'sides' can feel that they have been thoroughly heard and understood".[354] As opined by Craig, "such heuristic and beneficent communication process can only improve outcomes for patients and professionals alike".[355]

4.3 The use of mediation in medical treatment disputes in other jurisdictions

[346] Connie Yates, 'I lost my son Charlie after a lengthy court dispute. Now I'm campaigning to revolutionise NHS care' (*The Independent*, 27 September 2019) <https://www.independent.co.uk/voices/charlie-gard-nhs-connie-yates-courts-charlies-law-a9122906.html> accessed 15 November 2019.
[347] David Benbow, 'Tafida Raqeeb v Barts NHS Foundation Trust and Others [2019]: Bolstering the argument for mediation' (2019) 19(4) Medical Law International 298.
[348] David Benbow, 'Tafida Raqeeb v Barts NHS Foundation Trust and Others [2019]: Bolstering the argument for mediation' (2019) 19(4) Medical Law International 298, 300.
[349] Ibid.
[350] Mike Talbot, 'Mediation in Healthcare settings' (*UK Mediation*, 4 December 2017) <https://ukmediation.net/2017/12/04/mediation-healthcare-settings/> accessed 12 October 2019.
[351] Caitlin McClay, 'Mediation in Medical Treatment: A More Effective Way to Manage Disputes' (2019) Catholic University Law Review 68(3) 525.
[352] Royal College of Paediatrics and Child Health, 'Witholding or Withdrawing Life Sustaining Treatment in Children: A Framework for Practice' (*Royal College of Paediatrics and Child Health*, May 2004) <https://councilfordisabledchildren.org.uk/sites/default/files/field/attachemnt/Withholding%26withdrawing_treatment.pdf> accessed 18 October 2019.
[353] Autumn Fisher, 'Bioethics and the end of Clinical Ethics as we know it' (2014) <https://pdfs.semanticscholar.org/1712/6d598966dcb09ded54126343e50b07f333a4.pdf> accessed 20 March 2020 501, 502.
[354] Mike Talbot, 'Mediation in Healthcare settings' (*UK Mediation*, 4 December 2017) <https://ukmediation.net/2017/12/04/mediation-healthcare-settings/> accessed 12 October 2019.
[355] Yvonne Craig, 'Patient decision-making: medical ethics and mediation' (1996) Journal of Medical Ethics 22 164, 165.

The use of mediation to resolve withdrawal of treatment disputes is much more prevalent in the US.[356] Within the US "mediation has been widely espoused as the best mechanism for resolving end-of-life treatment disputes".[357] A report produced by the American Society for Bioethics and Humanities' endorsing such a view has been cited widely in academic literature.[358] As noted by Morreim, "those in the midst of the conflict may not, by themselves, be equipped to navigate a reflective, productive resolution process",[359] and thus a trained mediator is required.[360] American academics have yielded the open, collaborative nature of the mediative process a success, especially when compared to the "secret, hidden, authoritarian" nature that is usually adopted in healthcare settings.[361]

A study conducted to evaluate the success of the use of mediation to solve medical disputes in China has strongly indicated the importance of the role of alternative dispute resolution in that it reduced "the need for initiating litigation and… ultimately increase[d] satisfaction with the healthcare system".[362] Thus offering mediation for withdrawal of treatment disputes in England and Wales is likely to facilitate greater understanding amongst medical professionals and parents and has the potential to "prevent expensive, time-consuming and stressful litigation".[363] Mediation has also been widely used in the medical field in New Zealand, South Africa, Canada and Australia with great effect.[364] For instance, in South Africa a quarter of their trained mediators are medical mediators.[365]

4.4 The success of mediation in withdrawal of treatment disputes

[356] Deirdre Madden, *Medicine, Ethics and the Law* (3rd edn, Bloomsbury Professional, 2016).
[357] Thaddeus Pope and Ellen Waldman, 'Mediation at the End of Life: Getting Beyond the Limits of the Talking Cure' (2007) 23(1) Ohio State Journal on Dispute Resolution 143, 156.
[358] Ibid.
[359] Haavi Morreim, 'Conflict Resolution in the Clinical Setting: A Story Beyond Bioethics Mediation' (2015) 43(4) The Journal of Medicine and Ethics 843, 850.
[360] Ibid.
[361] Amy Moorkamp, 'Don't Pull the Plug on Bioethics Mediation: The Use of Mediation in Health Care Settings and End of Life Situations' (2017) 1(16) Journal of Dispute Resolution 219, 226.
[362] Mengxiao Wang, Gordon Liu, Hanging Zhao, Thomas Butt, Maorui Yang and Yujie Cui, 'The role of mediation in solving medical disputes in China' (2020) 20(225) BMC Health Services Research 1.
[363] David Benbow, 'Tafida Raqeeb v Barts NHS Foundation Trust and Others [2019]: Bolstering the argument for mediation' (2019) 19(4) Medical Law International 298, 300.
[364] Ibid.
[365] The Conversation, 'Why mediation and arbitration offer a better route to solving medical disputes' (*The Conversation*, 26 September 2017 <https://theconversation.com/why-mediation-and-arbitration-offer-a-better-route-to-solving-medical-disputes-83986> accessed 25 February 2020.

The aim of the use of mediation in withdrawal of treatment disputes is to provide "a more acceptable closure to such disputes and [to] minimis[e] [the] financial, emotional and publicity costs that accompany them".[366] However, there is a "limited capacity to compromise in mediation".[367] As aptly noted by New Zealand's Research, Ethics and Public Health Training Branch during mediation, the medical team "could not agree to resolve a dispute by continuing treatment that was viewed by treating clinicians as futile and not in the patient's best interests".[368] Thus, academics have questioned whether "mediation's framework [is] capacious and elastic [enough] to embrace this subset of end of life dispute",[369] with Gallon and Pope going as far as asserting that "mediation would have less, not more chance of success".[370] Whilst more empirical data is required to support the efficiency and effectiveness of mediation, results from a UK pilot training program conducted in a children's hospital highlight that staff felt that through the use of mediation they now had "greater ability to recognise conflicts that were developing as well as feeling better able to manage and de-escalate conflict".[371] De-escalation occurs as mediation allows for more insightful and structured discussions, as opined by Dubler: "at the end of life, short answers are inappropriate, only essays will do".[372]

Litigation is expensive, thus through the use of mediation the NHS could save millions of pounds.[373] The extent of the expense on the NHS can be evidenced through looking at the *Gard* and *Evans* court cases, as at the conclusion of these cases the NHS' legal fees totalled £470,000.[374] Farmer and Hurst note that this sum is "over and above money routinely spent on

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[366] Simon Meller and Sarah Barclay, 'Mediation: an approach to intractable disputes between parents and paediatricians' (2011) 96(7) Arch Dis Child 619, 620-621.
[367] Research, Ethics and Public Health Training Branch, 'Conflict Resolution in End of Life Settings (CRELS)' (*NSW Health*, August 2010) <https://stgrenal.org.au/sites/default/files/upload/Renal_supportive_care/conflict-resolution.pdf> accessed 2 November 2019.
[368] Research, Ethics and Public Health Training Branch, 'Conflict Resolution in End of Life Settings (CRELS)' (*NSW Health*, August 2010) <https://stgrenal.org.au/sites/default/files/upload/Renal_supportive_care/conflict-resolution.pdf> accessed 2 November 2019.
[369] Katrina Choong, 'Can "Medical Futility" Conflicts be Mediated?' (2018) 61(1) Journal of Medical Law and Ethics 41,44.
[370] K. Gollop and S. Pope, "Charlie Gard, Alfie Evans and R (A Child): Why A Medical Treatment Significant Harm Test Would Hinder Not Help", (Transparency Project 28/05/2018) <http://www.transparencyproject.org.uk/charlie-gard-alfie-evans-and-r-a-child-why-a-medical-treatment-significant-harm-test-would-hinder-not-help/> accessed 20 March 2020.
[371] Dominic Wilkinson and Julian Savulescu, *Ethics, Conflict and Medical Treatment for Children: From Disagreement to Dissensus* (1st edn, Elsevier, 2018) 127; Danny Lee and Paul Lai, 'The Practice of mediation to resolve clinical, bioethical, and medical malpractice disputes' (2015) 21(6) Hong Kong Medical Journal 560, 563.
[372] Nancy Dubler, 'Conflict and Consensus at the End of Life' (2005) Hastings Center Report 35(6).
[373] BBC News, 'Doctor urges compulsory mediation in patient care rows' (*BBC News*, 29 May 2016) <https://www.bbc.co.uk/news/health-36407596> accessed 14 January 2020.
[374] Emily Jackson, *Medical Law: Texts, Cases and Materials* (5th edn, OUP Oxford, 2019).

salaried in-house lawyers during litigation".[375] As supported by Danbury, "mediation costs a great deal less than going to court".[376] Thus more efforts should be put into "promoting the use of mediation to settle medical malpractice claims in the community in order to save time and public resources".[377] However, academics have noted that whilst the cost of mediation is less than the cost of litigation, those cases that do not reach agreement through mediation ultimately will end up in court.[378] Despite the fact that failed mediation cases do result in court action, the value of the mediation process is not lost as the level of understanding on each other's views the parties have achieved through mediation will help to alleviate tensions associated with the litigation process.[379] In Justice Francis' judgement in the *Gard* case, he alluded to this potential problem as he noted that "whilst possibly not resolving all issues mediation would have been more likely to have produced a greater degree of shared understanding and potentially limited some of the heartache".[380]

4.5 Summary

In summation, the current process for handling disputes between medical professionals and parents needs to be revised. A practical solution is needed to prevent reliance on the courts.[381] Through exploration of its use currently in the England and Wales and in other jurisdictions it is clear that a practical solution can be found in the form of mediation.[382] Through utilising mediation and ensuring wide application, the need for litigation will be reduced as most cases

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[375] Brian Farmer and Pat Hurst 'Charlie Gard and Alfie Evans cases cost NHS half a million in legal fees after lengthy court battles' (The Independent, 14 October 2018) <https://www.independent.co.uk/news/uk/home-news/charlie-gard-alfie-evans-nhs-legal-fees-half-million-high-court-great-ormond-street-hospital-a8583346.html> accessed 10 March 2020.
[376] BBC News, 'Doctor urges compulsory mediation in patient care rows' (*BBC News*, 29 May 2016) <https://www.bbc.co.uk/news/health-36407596> accessed 14 January 2020.
[377] Danny Lee and Paul Lai, 'The Practice of mediation to resolve clinical, bioethical, and medical malpractice disputes' (2015) 21(6) Hong Kong Medical Journal 560, 563.
[378] Simon Meller and Sarah Barclay, 'Mediation: an approach to intractable disputes between parents and paediatricians' (2011) 96(7) Arch Dis Child 619, 620.
[379] David Shelton, 'Keeping end-of-life decisions away from courts after thirty years of failure: bioethical mediation as an alternative for resolving end-of-life disputes' (2008) Hamline Law Review 31(1) 103, 142.
[380] *Great Ormond Street Hospital for Children NHS Foundation Trust v Yates* [2017] EWHC 1909 (Fam); Phil Hesketh, 'Judge proposes mediation for serious medical treatment cases' (*Trust Mediation,* 27 February, 2019) <https://www.trustmediation.org.uk/judge-proposes-mediation-for-serious-medical-treatment-cases/> accessed 19 January 2020.
[381] Rebecca Limb, 'Alfie's Law and Charlie's Law: Are there alternatives to court battles between parents and hospitals?' (*Lacuna*, 29 November 2018) <https://lacuna.org.uk/food-and-health/alfies-law-and-charlies-law-are-there-alternatives-to-court-battles-between-parents-and-hospitals/> accessed 28 November 2019.
[382] Ibid.

will be resolved before recourse to litigation is required.[383] In addition, mediation has the potential to greatly improve the relationship between the healthcare professionals and families before their views become entrenched and polarised.[384]

Conclusion

Determining whether to withhold or withdraw treatment in paediatric care is a highly complex and often emotionally-fuelled process. Prolonging futile treatment inflicts unnecessary harm onto the child and results in dissipation of the NHS's finite resources, that could arguably be more suitably used on others.[385] However, determining whether treatment is futile is a difficult task. It is extremely hard to forecast the future or to ascertain the extent of harm experienced. As noted aptly by the Royal College of Paediatrics and Child Health, "decisions to stop or withhold certain treatments will almost always be based on probabilities rather than certainties".[386] As illustrated throughout this thesis, high-profile court cases have resulted in ardent debate on whether the law in relation to treatment decisions in children should be reformed.

In adjudicating disagreements, the interest at the centre of discussions must be what is best for the child.[387] Due to advancements in modern medicine there is now grave concern that prolongation of life may be pursued at the expense of harm imposed on the child.[388] Whilst, some feel that the introduction of a significant harm standard would afford greater weight to parental views, as has been noted in this thesis, the orthodox approach already allows for sufficient and appropriate consideration of parental views.[389] The recent case of *Raqeeb*

[383] Ken Hillman and Jack Chen, 'Conflict Resolution in end of life treatment decisions: a rapid review' (*NSW Health*, November 2008) <https://www.health.nsw.gov.au/research/Documents/14-conflict-resolution-end-of-life.pdf > accessed 21 January 2020.
[384] David Benbow, 'Tafida Raqeeb v Barts NHS Foundation Trust and Others [2019]: Bolstering the argument for mediation' (2019) 19(4) Medical Law International 298, 300.
[385] Roderick Bagshaw, 'Modernising the doctor's duty to disclose risks of treatment' (2016) Law Quarterly Review 182, 185.
[386] Royal College of Paediatrics and Child Health, 'Witholding or Withdrawing Life Sustaining Treatment in Children: A Framework for Practice' (*Royal College of Paediatrics and Child Health*, May 2004) <https://councilfordisabledchildren.org.uk/sites/default/files/field/attachemnt/Withholding%26withdrawing_treatment.pdf> accessed 18 October 2019 29.
[387] Dave Archard, 'My child, my choice': parents, doctors and the ethical standards for resolving disagreement' (2019) 70(1) Northern Ireland Quarterly Review 93, 94.
[388] Canadian Paediatric Society, 'Treatment decisions regarding infants, children and adolescents' (2004) 9(2) Paediatric Child Health 99, 102.
[389] Imogen Goold, 'Evaluating 'Best Interests' as a Threshold for Judicial Intervention in Medical Decision-Making on Behalf of Children' in Imogen Goold, Jonathan Herring and Cressida Auckland, *Parental Rights, Best Interests and Significant Harms* (1st edn, Hart Publishing, 2019).

illustrated that the best interest standard is flexible enough to take into account a range of factors.[390] As expressed by Birchley, deciding whether a parent's decision is putting their child at risk of harm requires greater "evaluative overtones" and the outcome of parental action being deemed harmful could result in "pejorative connotations".[391] Furthermore, a shift to the significant harm standard will result in no practical difference.[392] As aptly put by Wilkinson, "if parents make suboptimal decisions, professionals will usually only seek to override parents if what parents have decided poses a real risk of harming the child".[393] Thus, whilst the significant harm standard has been proposed as an alternative threshold for state intervention, the best interests standard should be retained.

Consideration of the interests of the parties who are privy to the decision-making process did not conclude that parental rights should be afforded greater weight. Instead, the promotion and necessity of shared decision-making upheld the notion that what is crucial is that both medical professionals and parents have the chance to express their views.[394] As noted by the Nuffield Council of Bioethics, "whilst there will always be instances where healthcare staff disagree [with parents], there is scope for policy makers and others to do more to support the creation of healthcare environments that foster good, collaborative relationships between parents and healthcare staff".[395] Thus, the current system needs to be reviewed to provide a practical solution for the value-laden nature of end of life decisions.[396]

Through extensive exploration of mediation it is clear that to reduce the power differential between the different actors involved in decision-making and promote parental empowerment,

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[390] David Benbow, 'Tafida Raqeeb v Barts NHS Foundation Trust and Others [2019]: Bolstering the argument for mediation' (2019) 19(4) Medical Law International 298.
[391] Giles Birchley, 'Harm is all you need? Best Interests and disputes about parental decision-making' (2016) 42(2) Journal of Medical Ethics 111, 113.
[392] Imogen Goold, 'Evaluating 'Best Interests' as a Threshold for Judicial Intervention in Medical Decision-Making on Behalf of Children' in Imogen Goold, Jonathan Herring and Cressida Auckland, *Parental Rights, Best Interests and Significant Harms* (1st edn, Hart Publishing, 2019).
[393] Ibid.
[394] Nuffield Council on Bioethics, 'Critical care decisions in fetal and neonatal medicine: ethical issues' (*Nuffield Council on Bioethics*, November 2006) <https://nuffieldbioethics.org/assets/pdfs/Critical-care-decisions.pdf> accessed 15 August 2019 22.
[395] Nuffield Council on Bioethics, 'Bioethics Briefing Note: Disagreements in the care of critically ill children' (*Nuffield Council on Bioethics*, April 2019) <https://www.nuffieldbioethics.org/assets/pdfs/Disagreements-in-the-care-of-critically-ill-children.pdf> accessed 19 February 2020 7.
[396] Rebecca Limb, 'Alfie's Law and Charlie's Law: Are there alternatives to court battles between parents and hospitals?' (*Lacuna*, 29 November 2018) <https://lacuna.org.uk/food-and-health/alfies-law-and-charlies-law-are-there-alternatives-to-court-battles-between-parents-and-hospitals/> accessed 28 November 2019; David Shelton, 'Keeping end-of-life decisions away from the courts after thirty years of failure: bioethical mediation as an alternative for resolving end-of-life disputes' (2008) Hamline Law Review 31(1) 103, 136.

mediation should be adopted to a greater extent in the healthcare setting.[397] Currently a large volume of treatment disputes are ascribable to a lack of communication, however frequently the disagreement centres on a clash of values.[398] Mediation has the potential to offer a feasible solution, through actively facilitating difficult conversations by promoting dialogue to explore moral and ethical imperatives.[399] Utilising mediation in contentious cases can help bridge the power imbalance between the medical professionals and the parents as a sense of empowerment would be achieved through greater participation of the parents in the decision-making process.[400] As expressed by Fisher, this would be achieved as mediation averts "privileging one stakeholder over another".[401] Therefore, reform has the potential to "facilitate understanding between parents and clinicians and potentially result in mutual agreement that could prevent expensive, time-consuming and stressful litigation."[402] Thus, legal reform is required within England and Wales to assure the promotion of mediation in this context.

Further research needs to be undertaken as to the effectiveness of mediation in withdrawal or withholding of treatment disputes in England and Wales, as at present there is scarce data available in this field.[403] However, through utilising research conducted in other jurisdictions, such as the US, there is a strong indication that mediation will be effective in resolving disputes.[404] In undertaking further research, when assessing mediation a broader approach needs to be taken than simply judging it from the "one-dimensional axis of continuing care/withdrawing care".[405] This approach is too restrictive as a sense of closure for the parties can have a profound impact and conjure a "comforting or satisfying sense of finality", even if the decision is not the one they originally sought.[406]

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[397] David Benbow, 'An analysis of Charlie's Law and Alfie's Law' (2019) Medical Law Review 1; M Lagerway, Book Review (2011) 'Bioethics Mediation: A guide to shaping shared solutions' Choice 49(3) 543.
[398] Canadian Paediatric Society, 'Treatment decisions regarding infants, children and adolescents' (2004) 9(2) Paediatric Child Health 99, 102.
[399] Mike Talbot, 'Mediation in Healthcare settings' (*UK Mediation*, 4 December 2017) <https://ukmediation.net/2017/12/04/mediation-healthcare-settings/> accessed 12 October 2019.
[400] David Benbow, 'An analysis of Charlie's Law and Alfie's Law' (2019) Medical Law Review 1.
[401] Autumn Fisher, 'Bioethics and the end of Clinical Ethics as we know it' (2014) <https://pdfs.semanticscholar.org/1712/6d598966dcb09ded54126343e50b07f333a4.pdf> accessed 20 March 2020 501, 506.
[402] David Benbow, 'Tafida Raqeeb v Barts NHS Foundation Trust and Others [2019]: Bolstering the argument for mediation' (2019) 19(4) Medical Law International 298.
[403] Ibid.
[404] Ibid.
[405] Autumn Fisher, 'Bioethics and the end of Clinical Ethics as we know it' (2014) <https://pdfs.semanticscholar.org/1712/6d598966dcb09ded54126343e50b07f333a4.pdf> accessed 20 March 2020 501, 509.
[406] Ibid.

In summation, this thesis concludes that the best interests standard should be retained, albeit with the reformation and enhancement of the use of mediation. Through revising the current process used to resolve treatment disputes in England and Wales, the promotion of mediation has the potential to remedy many of the fundamental problems associated with the current approach. Utilisation of mediation provides a possible resolution, whilst guaranteeing that the protection of the welfare of the child is not adversely affected. Thus, instead of "my child, my choice",[407] this new process promotes the notion of 'my child, a collective choice'.

[407] Dave Archard, 'My child, my choice': parents, doctors and the ethical standards for resolving disagreement' (2019) 70(1) Northern Ireland Quarterly Review 93, 105.


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