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Foreword by the Editor-in-Chief

It is my pleasure as Editor-in-Chief to welcome readers to Volume 9, Issue 1 of the North East Law Review. The credo behind the North East Law Review remains the same in this Issue: to promulgate thought-provoking student scholarship at Newcastle Law School in an effort to make fruitful contributions to the legal communities. Indeed, as can be seen from the Contents Page, our Authors have contributed exacting and ambitious work in diverse areas of law—ranging from critical feminist contributions to socio-legal analysis of legal systems and cultures.

With that being said, none of this could be made possible without the help of the Volume's Academic Lead, Dr Ruth Houghton. She has been an invaluable source of wisdom to my fellow Editors and I; ranging from helping in the more mundane editorial issues, such as the perils Editors face when encountering Styles on Word for the first time, to the pastoral issues our Editors have faced whilst trying to meet deadlines. Furthermore, I would like to thank my fellow Editors on the Editorial Board; without their efforts the continuation of the North East Law Review would not be possible. Their high work ethic and professional standards are hopefully made clear throughout the reading of this Issue.

I have thoroughly enjoyed my time as Editor-in-Chief of the North East Law Review and I hope readers enjoy the Issue just as much as I have. The appraisal of this Volume is not up to me, however. That role belongs to you, the reader.

Tarik Rae

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This year the NELR podcast was hosted by Scarlett Clarke, with editorial support by Daisy Robinson.

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Dismantling Dominance: An (Intersectional) Feminist exploration of Animal Oppression

Phoebe Glide

Introduction

Animal oppression is a feminist issue. This theoretical exploration provides an (intersectional) insight into the need for feminist engagement with the animal movement. This contribution reveals that dismantling dominance is as crucial to fighting speciesism, as it is to combatting sexism, and as such an intersectional approach must be taken by respective animal and feminist movements. The following will critique literature and legislation from the UK and US, two arguably paralleled Common Law jurisdictions, with particular weight being afforded to the UK, simply because this is the location in which the author is situated.

Firstly, one will set the tone for the article, by exploring how patriarchal attitudes of domination create paralleled means of oppressing non-human animals (animals) and women. We will then briefly address how the law upholds hierarchical domination by means of the oppressive personhood/property binary.

Once the reader has gained an understanding of the harmful culture of domination in which this critique is situated, we will delve into a deeper intersectional (feminist) analysis of animal oppression. Firstly, exploring the expansive nature of intersectional feminist theory and its ability to encompass animal oppression within its realm, and subsequently the overbearing need for it to do so. Conversely, we will follow on to discuss the need for animal liberationists to engage with feminist ideals, and the detrimental consequences of them failing to do so. Ending in the conclusion that compartmentalising oppressions, is both harmful and counterintuitive: reverting us back to the need to reject domination in *all* forms.

To strengthen the need for animal oppression to be a feminist concern, the final section will analyse a specific case study of gendered violence borne in animal agriculture: The Dairy Industry. Ending in a discussion of the perverse ways in which the law facilitates and "justifies" the gendered abuse in question.

The above will end in the inevitable conclusion that any *rationale* for oppressing animals is merely situated in hierarchal speciesism and false superiority. As such, feminists must engage with the movement, and seek to dismantle *all* dominative attitudes, driving society to transcend the hierarchal domination ingrained into the human psyche.

Notably, this contribution alludes to a thought-provoking journey of awareness and self-reflection. Importantly, one is aware that the ability to embark on journeys of awareness is the subject of class-based privilege, so whilst this exploration is about society generally, the critique is aimed at those who are privileged enough to engage with social justice issues, beyond their own.

1. Hierarchical Domination of Animals and Women

All oppression is the subject of domination. The dominating classes "justify" oppressing others by creating hierarchies sustained by a false sense of superiority. There are many forms of domination, most socially reprehensible, are forms of 'human-human prejudice': [1] racism, classism, sexism, ableism, homophobia, transphobia etc. Yet, society seem less attuned to the wrong of speciesism – that being, humankinds' domination over non-human animals.

All forms of oppression intersect on similar axis of domination[2] and false superiority, but the constraints of this contribution provide that one will only focus on the paralleled means that oppress animals (speciesism) and women (sexism). Women and animals are mutually harmed by 'relations of power that intersect gender and species,'[3] thus, ecofeminist's have rightly asserted that societies engagement with speciesism and sexism is 'impacted by patriarchal values that emphasize domination.'[4] Marilyn's French depiction of patriarchy is particularly illuminative here: she posits that patriarchy is the subject of 'an ideology founded on the

[1] Robyn Trigg, Intersectionality – 'An Alternative to Redrawing the Line in the Pursuit of Animal Rights', ETHICS & THE ENVIRONMENT, 26(2) 2021, 93.
[2] Patricia Hill Collins, *Black Feminist Thought: Knowledge, Consciousness, and the Politics of Empowerment.* Boston, MA: Unwin Hyman (1990), 222.
[3] Richard Twine, 'Intersectional disgust? Animals and (eco)feminism'. Feminism & Psychology, (2010), vol 20(3) 397–406, 400.
[4] Ashley Allcorn and Shirley M Ogletree, 'Linked Oppression: Connecting animal and gender attitudes', Feminism and Psychology, (2018), Vol. 28(4), 457-469, 457. Citing: Brittany Bloodhart, & Janet K Swim, (2010). 'Equality, harmony, and the environment: An ecofeminist approach to understanding the role of cultural values on the treatment of women and nature'. Ecopsychology, 2(3), 187–194.

assumption that man is distinct' from, and 'superior to' animals.[5] Trigg reveals the falsity of this 'ingrained hierarchy'[6] by reminding us that the very nature of it is maintained by humans 'disassociating' themselves from their own animality.[7] The false nature of this superiority is further exposed when we consider the inability of being able to 'name a single character trait of ability shared by *all* humans but by no other animals', we become alert to the reality that 'human superiority is as much a lie as male superiority'.[8]

French's depiction is strengthened when we consider the divisive nature of our everyday language: frequently humans are collectively characterised as *mankind*, and use of these 'pseudo generics' implicitly excludes 'women from humankind'.[9] Similar hierarchal linguistics are deployed by use of the word *animal* which 'falsely removes humans from animal kind'.[10] This language is deeply ingrained within societal norms and facilitates a harmful culture which is sadly sustained by our legal justice system, a point to which this discussion will now turn.

The Common Law jurisdictions in question are restricted to operate within a legal binary – someone is either characterised as a legal person, or legal property. The restrictive nature of this dualism provides that it can be, and has been, deployed as a means of domination, by those with 'power and privilege'.[11] Therefore, in Western Culture's, it has traditionally been 'white educated, property owning' men,[12] who decide whether someone should be categorised as a legal *person* or *property*. Considering that the powerful members of our society historically branded women and slaves with this objectifying property status,[13] it is perhaps unsurprising that animals await their emancipation from the property paradigm. Though we remain unwilling to extend protection to animals by granting them legal personhood, alarmingly, those with power, have willingly extended the 'personhood' category to non-living beings, such as 'corporations'.[14]

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[5] Marilyn, French, Beyond Power: On Women, Men and Morals. New York: Summit (1985). Cited in Carol Adams and Josephine Donovan, *Animals and Women: Feminist Theoretical Explanations*, Duke University Press, (1995), 2.
[6] Trigg (n.1) 77.
[7] *Ibid.* 77.
[8] Carol Adams and Josephine Donovan, *Animals and Women: Feminist Theoretical Explanations*, Duke University Press, (1995), Chapter 1: Joan Dunayer: Sexist Words, Speciesist Roots, 23.
[9] *Ibid.* 19.
[10] *Ibid.* 19, Citing *The American Heritage Dictionary* (1992), 72.
[11] Trigg (n.1) 76.
[12] *Ibid.* 77.
[13] Mary Midgley, *Persons and Non-Persons*, New York: Basil Blackwell, (1985), 2.
[14] *Ibid.*

This contribution does not bear the capacity to explore the unsuitability of this restrictive legal categorisation, so we will focus on its ability to facilitate abuse. The property paradigm is harmful both theoretically and practically. Regarding the latter, if you are classified as 'property', you cannot possess your own rights, this lack of legal standing means that animals can be '*legally* abused, disenfranchised,' 'harmed and killed'.[15] But symbolically speaking, this status objectifies its subject, characterising them as 'submissive'.[16] This lays the foundations that facilitate further abuse, as humans feel it is justifiable to oppress animals, 'on the basis that animals are rightly', and legally 'subjugated'.[17] We must become aware how 'hierarchical speciesism results in endless harm',[18] and whilst the property paradigm may somewhat *explain* humankinds sustained dominance over animals, it does not *excuse* it.

Our dominance over, and oppression of animals is rooted in speciesism, and is sustained by oppressive legal binary's which marginalize animals 'to a degree that is incomprehensible'.[19] It is crucial that we as humans transcend the constraints of the 'false opposition'[20] fashioned between humans and the rest of the animal kingdom, to emancipate these sentient beings from oppression. Crucial to dismantling *all* dominance, is the rejection of speciesism, or rather, human superiority - 'once we reject speciesism, every justification for the privileged moral status of human beings falls apart.'[21] Providing that, rejecting dominative attitudes of superiority is as vital to combatting speciesism as it is to fighting sexism. Thus, we must now delve into a deeper theoretical analysis of the intersecting nature of these two oppressions, and the need for an intersectional approach to be deployed by the respective movements.

1.1. Intersectionality

Prior to engaging with a deeper intersectional analysis of animal oppression, it is important to acknowledge its roots and aims. Initial theorisation of intersectionality is credited to Kimberlé

[15] Marc Bekoff, 'Why "good welfare" isn't "good enough": Minding animals and increasing our compassionate footprint', Annual Review of Biomedical Sciences, Vol.10, 2008, 5.
[16] Greta Gaard, *Ecofeminism*, Temple University Press, (1993), Chapter 3: Lori Gruen, 'Dismantling Oppression: An Analysis of the Connection Between Women and Animals', 60-90, 61.
[17] Trigg (n.1) 77.
[18] Bekoff (n.15) 5.
[19] Jay Shooster, 'Justice for All: Including Animal Rights in Social Justice Activism' (2015) 40 NYU Review of Law & Social Change, 39-44, 42.
[20] Adams and Donovan (n.8), Chapter 1: Joan Dunayer: Sexist Words, Speciesist Roots, 22.
[21] Shooster (n.19) 41.

Crenshaw in 1980.[22] Borne in black feminism, it articulates how black women are discriminated against based on their race and gender, and thus are marginalised by intersecting axes of oppression.[23] By focusing on collective means of oppression, the theory is expansive in nature. It can encompass 'a variety of other marginalised groups by analysing the overlapping and connected axes of subordination that affect them', including (*inter alia*) 'species categorization'.[24]

Intersectional feminism is an important theory in promoting wider societal progression as it has the ability to create an assembly of social justice causes, therefore avoiding 'the tradition of single-mindedness so common in Western institutions'.[25] It is important that we work beyond the common exclusivity of liberation movements, as this conduct 'clouds the expansive nature of oppression' and 'hinders the process' of combatting the 'overarching structure of domination'.[26] It is this overarching structure which will form the foundational theme for this discussion.

1.2. Intersectional Feminism Encompassing Animal Oppression

For purposes of the discussion at hand, the most illuminative interpretation of intersectionality to draw upon is that adduced by Patricia Hill Collins' (alluded to above). She noted that 'distinctive systems of oppression … [are] part of one overarching structure of domination', in which 'each system needs the others in order to function.'[27] Thus, *all* forms of oppression are the subject of domination facilitated by some form of false superiority, which links us back to the need for a systemic rejection of *all* oppression, including speciesism. When one engages in or supports *any* form of domination/oppression they are merely adding to a culture of violence that extracts power from the oppressed, placing it directly into the hands of the oppressor. Adams and Donovan allude to intersectional feminism by asserting that 'all

[22] Kimberlé Crenshaw, 'Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory, and Antiracist Politics'. University of Chicago Legal Forum 1989(1): 139-67.
[23] Trigg (n.1) 75, 79, 89.
[24] *Ibid.* 89.
[25] Gaard (n.16) Chapter 3: Lori Gruen, 'Dismantling Oppression: An Analysis of the Connection Between Women and Animals', 60-90, 60.
[26] *Ibid.*
[27] Hill Collins (n.2) 222.

oppressions are interconnected: no one creature will be free until all are free – from abuses, degradation, exploitation, pollution and commercialization.'[28]

Some may question whether feminist engagement with the animal movement would divert attention from marginalised and discriminated classes of women. Whilst there is value in this concern, again, its basis is situated in human hierarchy, which embraces the false 'dualistic premise that humans' and animals' needs are 'in conflict.'[29] A hierarchy, which we must remember, has historically 'favoured neither woman' or animals.[30] Additionally, by compartmentalising oppressions, we merely seek to feed 'competition … between different groups of the oppressed', risking favouring 'one particular oppression as our special cause', as opposed to 'challenging the power relationships and interests that institutionalise these oppressions.'[31] To specify, actively refusing to engage in, or support oppression, and transcending the desire to dominate, which is so deeply 'ingrained'[32] into the human psyche will aid *all* social justice movements, including the most marginalised members of our society.

1.3. The Linked Oppression Thesis

Wycoff characterised the interconnected nature of speciesism and sexism as 'the linked oppression thesis.'[33] A thesis supported by scientific research which revealed 'a psychological link between speciesism … and other forms of human-human prejudice'.[34] Illustrating not only how imbedded this is within the human psyche, but also how *all* oppression is borne from similar psychological logic. A study conducted by a University in Texas discovered a similar correlation,[35] but additionally reiterated the additional influence of the culture in which these 'hegemonic attitudes toward women and animals' are situated.[36] That being, the 'male-dominated' and 'masculine-oriented' societies[37] which possess most (Western) cultures.

This research strengthens the claims that animals and women have been, and are oppressed by similar dominative means, and 'until the mentality of domination is ended is all its forms, these afflictions will

[28] Adams and Donovan (n.8) 3.
[29] *Ibid.*
[30] *Ibid.*
[31] Adams and Donovan (n.8) Chapter.13, Susanne Kappeler, Speciesism, Racism, Nationalism … or the Power of Scientific Subjectivity, 321.
[32] Trigg (n.1) 77.
[33] Jason Wycoff, 'Linking sexism and speciesism', Hypatia, (2014) vol 29(4), 721–737.
[34] Trigg (n.1) 93.
[35] Allcorn and M Ogletree (n.4) 465.
[36] *Ibid.* 464, 467.
[37] *Ibid.* 464.

continue.'[38] We have established that actively rejecting speciesism can simultaneously aid the eradication of sexism. But feminist's must dismantle domination of animals not just because of the benefits that this conduct can endow onto the feminist movement, but rather because any feminist participation 'in the oppression of the less powerful, is not only hypocritical; it is … a profound betrayal of our deepest commitments.'[39] One cannot remain 'neutral' in observing oppression: we can either 'participate' in it, 'or we challenge it', as 'to observe in silence is to be complicit'.[40]

It is apparent that wider-feminist engagement with the animal movement is both possible, and necessary when an intersectional approach is taken – but should the animal movement concern itself with feminism?

1.4. Animal Liberationists and Feminism

Animal liberationists can inadvertently harm women and have a detrimental impact on feminist movements if they do not deploy an intersectional approach. The most striking example of this is unabashedly displayed by People for the Ethical Treatment of Animals (PETA), an American animal rights organisation that not only 'neglects to take a position against sexism, but actually directly engages in it'.[41]

PETA's campaigns frequently feature naked women (exemplified by multiple 'I'd Rather go Naked than Wear Fur' campaigns[42]). Indeed, PETA was right when they asserted that 'women—and men—should be able to use their own bodies as political statements'.[43] But concerningly, PETA's Vice President admitted that they tend to use naked female bodies over male ones because 'people are more interested in seeing women rather than men naked.'[44] So, whilst the modern liberal eye may view these women as both sexually and politically empowered, there is distinct gender-discrimination here.

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[38] Adams and Donovan (n.8) 3.
[39] *Ibid.* 8.
[40] *Ibid.* 3.
[41] N.P. Pendergrast, 'PETA, Patriarchy and Intersectionality', Animal Studies Journal, (2018), vol 7(1), 59-79, 64.
[42] PETA: 'Victory! 'I'd Rather Go Naked Than Wear Fur' Goes Out With A Bang' – available at: https://www.peta.org/features/id-rather-go-naked-than-wear-fur-campaign-ends/
[43] PETA: 'Why Does PETA Sometimes Use Nudity in its Campaigns?'– available at: https://www.peta.org/about-peta/faq/why-does-peta-sometimes-use-nudity-in-its-campaigns/#:~:text=All%20of%20PETA's%20%E2%80%9Cnaked%E2%80%9D%20advertisements,animals%20in%20laboratories%20or%20circuses. Accessed on, 20/01/22.
[44] Pendergrast (n.41) 65.

A deeper analysis reveals the inherently damaging nature of *using* naked female bodies to 'get the word out about animal abuse'.[45] Interestingly in Prendagrasts' intersectional analysis of PETA's campaigns he refrains from referring to these women as being 'used', as he feels it 'neglects' their 'agency' in 'taking part'.[46] But one could plausibly digress here. Indeed, 'the women taking part' may make the autonomous decision to remove their clothes 'as a form of political activism',[47] but when we contextualise this conduct within its patriarchal society that normalises and even sexualises the objectification of women, one struggles to view this conduct as fully autonomous. So, whilst the specific woman engaging in the advertisement may feel empowered, this conduct risks disempowering and degrading women systemically, by promoting a message that women are more likely to be heard if they remove their clothes.

More concerning than PETA's sexualisation of women, lies with their compartmentalisation and commodification of female bodies: rather than advertising the women as 'complete people',[48] their 'advertising often features just parts' of women's bodies. [49] The reduction of women 'to certain consumable body parts',[50] reinforces patriarchal attitudes that *justify* the objectification of women, feeding into 'a social climate that is dangerous for women'.[51] Conduct which normalises and even sexualises the objectification and commodification of female bodies is unjustifiable and systemically harmful.

Pendergrast's analysis of PETA's explicitly sexist campaign mechanisms prove that an anti-intersectional approach to animal advocacy can have vast ranging societal and dangerous implications for women and the feminist movement.[52] But interestingly, research has proven that their controversial advertisements can also be detrimental to their own cause. Counterintuitively their aim of increasing 'moral concern for some living things, such as animals,' is 'undermined by sexualised imagery that diminishes moral concern for others (e.g.,

[45] *Ibid.* 64. Citing: Ashley Fruno, 'Personal Interview.' 23 February 2011.
[46] Pendergrast (n.41) 67.
[47] *Ibid.*
[48] Pendergrast (no.41) citing: Stephanie Baran, 'Visual Patriarchy: PETA Advertising and the Commodification of Sexualized Bodies.' Women and Nature?: Beyond Dualism in Gender, Body, and Environment. Edited by Douglas A. Vakoch. and Sam Mickey. Routledge, 2017, pp. 43-56, 45.
[49] *Ibid.*
[50] Pendergrast (n.41) 69.
[51] *Ibid.* 69. Citing: Bongiorno, Renata, Paul G. Bain, and Nick Haslam. 'When Sex Doesn't Sell: Using Sexualized Images of Women Reduces Support for Ethical Campaigns.' Plos One, vol. 8, no.12, 2013, pp. 1-6, 5.
[52] Pendergrast (n.41).

by dehumanizing women).'[53] Subsequently, studies have revealed that 'sexualised advertising' reduced 'intentions to support' PETA.[54]

Reiteration of Wyckoff's linked oppression thesis is necessary here to expose activists who use 'exploitation tactics … that oppress one group for the benefit of the other'.[55] PETA unabashedly display these 'tactics' and reinforce 'how intractable and interconnected oppressions' between women and animals are.[56] An intersectional examination reveals how PETA's campaigns not only contribute 'to sexist attitudes, but this sexism also undermines their effectiveness in challenging speciesism,'[57] 'as both forms of oppression are built on a similar logic of commodification.'[58] More generally, 'all oppressions are interlocking and when any oppression is embraced, all oppressions are strengthened',[59] thus, we find ourselves reverting back to the need to dismantle dominance in its entirety.

Taking our analysis of these paralleled oppression's further – we will analyse a specific case study of gender violence borne in animal agriculture. This will simultaneously reveal the horrific extent of our will to dominate whilst highlighting that animal oppression is inherently gendered, furthering our claim to encompass it within the feminist realm.

2. A Case Study on Gendered Oppression: The Dairy Industry

2.1. Gendered Violence

Animal agriculture is a gendered violence: it very existence is sustained via the exploitation of female reproductive capacities, which maintains 'human use of animals by providing a constant supply' of them.[60] But beyond this, is the 'prolonged harm'[61] that cows are subjected to in the

[53] Bongiorno, Renata, Paul G. Bain, and Nick Haslam. 'When Sex Doesn't Sell: Using Sexualized Images of Women Reduces Support for Ethical Campaigns.' Plos One, vol. 8, no.12, 2013, pp. 1-6, 1.
[54] *Ibid.* 4.
[55] Allcorn and Ogletree (n.4) 459.
[56] Carol J Adams, 'Why Feminist-Vegan Now?' Feminism & Psychology (2010), vol.20(3), 302-317, 306.
[57] Pendergrast (n.41) 72.
[58] *Ibid.* 71. Citing: Manesha Deckha,'Disturbing Images: Peta and the Feminist Ethics of Animal Advocacy.' Ethics & the Environment, (2008), vol.13 (2), pp. 35-76, 55, 56. And: Carol L Glasser, 'Tied Oppressions: An Analysis of How Sexist Imagery Reinforces Speciesist Sentiment.' The Brock Review, (2011), vol.12(1), pp. 51-68.
[59] Carol L Glasser, 'Tied Oppressions: An Analysis of How Sexist Imagery Reinforces Speciesist Sentiment.' The Brock Review, (2011), vol.12(1), pp. 51-68, 52.
[60] Trigg (n.1) 92.
[61] *Ibid.*

dairy industry. This being, the vicious cycle of 'insemination, impregnation, and gestation so that the lactation resulting from their pregnancies can be taken advantage of,'[62] for human sensory pleasure (taste).

The immorality behind the dairy industry is rarely questioned by society, yet generally, we seem to be becoming more attuned to the harms of meat production. This is perhaps due to a number of reasons: firstly, humans feel entitled to exploit animals via production by convincing ourselves that consumption of animal by-products is a human necessity, (one will coin this: 'The Necessity Rationale'). Additionally, there is a common (mis)conception that dairy production bears no immortality as the products are not a result of 'outright death'.[63] Let's unpack the latter first.

Dairy products are far from 'victimless foods.'[64] Indeed, a cow does not have to directly die for you to consume milk or cheese, but alarmingly, once cows are 'no longer able to survive a pregnancy' they are 'then killed for meat.'[65] However, it is not solely the inevitable slaughtering of dairy cows which highlights the moral reprehensibility of this industry, but rather the means of production. As soon as cows are literally assigned female at birth, they 'begin their lives as vessels of reproduction.'[66] Like other mammals, dairy cows 'only produce milk after a nine-month pregnancy and birth',[67] meaning that they are 'kept perpetually pregnant and/or lactating,'[68] in order to 'constantly produce milk' for human consumption.[69] Cows are forced to endure a relentless cycle of forcible impregnation, unwanted pregnancy, labour, and offspring abduction – all because we like the taste of the product resulting from this pain. Surely this provides that the dairy industry is more morally reprehensible than the meat industry.

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[62] *Ibid.*
[63] Angela Lee, 'The Milkmaid's Tale: Veganism, Feminism and Dystopian Food Futures', Windor Review of Legal and Social Studies, (2019), vol.40, 34.
[64] Adams (n.56) 305.
[65] April, L Mackenzie, 'Readying of the Rape Rack: Feminism and the Exploitation of Non-Human Reproductive Systems', The College at Brockport State University of New York (2022), 55.
[66] *Ibid.*
[67] Laura-Lisa Hellwig, Why Milk is a Feminist Issue, (2020) (available at: https://viva.org.uk/blog/why-milk-is-a-feminist-issue/), accessed on: 21/12/21.
[68] Adams and Donovan (n.8) Chapter 1: Joan Dunayer: Sexist Words, Speciesist Roots, 13.
[69] Mackenzie (n.65) 53.

Carol Adam's coined the term 'feminized protein'[70] in a (successful) attempt to capture the inherent sexualised nature of the dairy and egg industries, products borne via human manipulation of female reproductive organs.[71] However, it is necessary to expand upon Adam's characterisation for the purposes of this contribution, to recognise that the abuse is *gendered*, not solely *feminized.* Male bodies also suffer at the hands of an industry which extradites its profit from the manipulation of female bodies. Horrifically, 'around 60,000 – 95,000 male dairy claves are shot and discarded soon after being born in the UK every single year',[72] as the industry is unable to exert profit from exploiting their bodies. This conduct is innately barbaric and oppressive, but one will draw on the power of linguistics to differentiate between these gendered oppressions. Notably, one will refrain from characterising the industry's oppression of male bodies as 'exploitation', in an attempt to emphasise that only *female* bodies are exploited, this is not to mitigate the harms faced, but rather to differentiate.

The gendered nature of the dairy industry is indisputable when we realise that it is 'biological differentiation'[73] that determines the human abuse they will be subjected to throughout their short and painful lives.[74] Here, Mackenzie draws from Adam's assertion to highlight how biological makeup simultaneously dictates how 'human beings will be socialised and treated throughout their lifetime'.[75] Understandably, the revelations exposed in this section may be hard for a layperson to digest, or even accept – but Jones was right to contend that we are obliged to 'speak of such things in a way that keeps them uncomfortably conscious'. [76] Therefore, we must confront the 'perversely sexualized exploitation of female farmed animals that is the norm in animal agriculture.'[77] Thus, we will turn to evaluate the need for wider feminist engagement, and the necessity of dismantling dominance, and gender-based oppression.

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[70] Adams (n.56) 305.
[71] *Ibid.*
[72] Ed Winters, *This is Vegan Propaganda*, Ebury Publishing, (2022), Quoting: Jane Dalton, 'Morrisons aims to halt practice of shooting male calves at birth', *Independent*, 21 August 2019, https://www.independent.co.uk/climate-change/news/morrisons-meat-male-calves-dairy-shot--birth-farms-a9073821.html
[73] Mackenzie (n.65) 53.
[74] *Ibid.* citing: Carol Adams, *Neither man nor beats: Feminism and the defense of animals,* New York: Bloomsbury Academic, Bloomsbury Publishing Plc (2018).
[75] *Ibid* citing: Carol Adams, *Neither man nor beats: Feminism and the defense of animals,* New York: Bloomsbury Academic, Bloomsbury Publishing Plc (2018).
[76] Lisa A. Kemmerer, *Sister Species: Women, Animals and Social Justice*, University of Illinois Press (2011), Chapter 1: Pattrice Jones, 'Fighting cocks: Ecofeminism versus sexualized violence', 45-56, 53.
[77] *Ibid.*

It is time we feminist's confronted 'the sickening collision of sex and violence by which nonhuman animals are electro jaculated and forcibly impregnated for human pleasures.'[78] A closer analysis of these industries reveals the 'hurtful exploitation of specifically female bodies so that some people can enjoy sensual pleasures of consumption while others enjoy the psychological pleasure of collecting profits.'[79] Jones' critique asserts that supporting these industries is akin to sexism, and whilst it would be hard to digress here, she then focuses her aim on the participation of specifically women. Jones notes that we must 'start talking to women about the sexist exploitation of female reproductive capacities to produce consumer goods that hurt women and children.'[80] Indeed, there seems to be a special, (*albeit* troubling) irony in women supporting an industry which profits from the exploitation of female bodies, but Jones was wrong to single out women here. The onus cannot and should not be solely placed on women to care about ending the oppression of female bodies, whether that be human or non-human, animals. This problem lies deeper than *female* engagement – as with other feminist issues, all feminists should concern themselves, no matter their gender.

The very existence of animal agriculture is rooted in speciesism and a false sense of human hierarchy. It is now important to analyse the aforementioned 'necessity rationale', that enables the law to justify oppression borne in animal agriculture.

2.2. The 'Necessity' Rationale

Objectification facilitated by the property paradigm, creates an 'emotional distance' which 'permits abuse without commensurate guilt.'[81] It is this very detachment which sustains humankinds' oppression of animals, and simultaneously mask's the immorality of such dominance. The Animal Welfare Act 2006[82] present in England and Wales is a prime example of this: it provides that you may cause an animal to suffer if it is necessary.[83] But what do we regard as necessary suffering?

The very existence of farms profiting from the exploitation of female bodies provides that the gain from this, must be a human necessity. Regarding dairy production, Adams asserts that

[78] *Ibid.*
[79] *Ibid.*
[80] *Ibid.*
[81] Adams and Donovan (n.8) 18.
[82] Animal Welfare Act, 2006, section.4(d).
[83] *Ibid.*

reproductive capacities are 'manipulated for human needs',[84] but one would struggle to plausibly justify mere sensory pleasure (taste) as a human necessity. Here, it is important to distinguish between human desire, embedded in 'pleasure and convenience,'[85] and genuine human necessity.

If we transcend the false hierarchy that has been 'ingrained'[86] into our psyche, then any remaining justification for supporting animal agriculture is ultimately a subject of narrow-minded, 'self-serving' speciesism.[87] Bekoff aptly reminds us, that any rationale for animal oppression, ultimately boils down to 'in the name of humans'[88] no matter how we try to mask it. Nonetheless let's specifically explore how we humans seek to explain the 'necessity' behind production and consumption of dairy products.

Western cultures have been conditioned to believe that we *need* animal (by) products to live a healthy life. Most significantly, but additionally most irrationally we have been 'socialized to believe' that 'we need the milk from another mammal to sustainably survive.'[89] But why do we fail to question the absurdity behind being the 'only mammals in existence' to drink another mammal's milk, a milk intended for *their* baby.[90] The view that 'cow's milk is the best source of calcium is deeply entrenched in the British psyche and is sustained by the government-sponsored dairy industry.'[91] Similarly, in America, the USDA recommends that as part of a healthy diet, two-three cups of dairy should be consumed a day.[92] But science is finally revealing the fallacy behind these claims. A study conducted on circa 53,000 North American women, disclosed that those who drank the recommended amount of cow's milk had a 70%-80% increased risk of developing breast cancer.[93] Additionally, British research has uncovered that dairy consumption is directly linked to 'osteoporosis, cancer, heart disease, obesity, and diabetes'.[94] Consequently, not only would the health justification be unjustifiable if we are to

[84] Adams (n.56) 305.
[85] Gary Francione, 'Taking Sentience Seriously', Journal of Animal Law and Ethics (2005) 1, 6.
[86] Trigg (n.1) 77.
[87] Bekoff (n.15) 3, 5.
[88] *Ibid.* 5.
[89] Mackenzie (n.65) 52.
[90] *Ibid.* 58.
[91] Dr. Justine Butler, 2020, Boning up on Calcium, Why Plant Calcium is Best, Viva! Health, p.1. Available at: https://viva.org.uk/wp-content/uploads/2020/03/calcium-factsheet.pdf
[92] SURGE, Meat and Masculinity Debunked, citing: Gary E Fraser, 'Diary, Soy and risk of breast cancer: those confounded Milks', International Journal of Epidemiology, vo.49(5) (2020), pages 1526-1537. Accessed at: https://www.surgeactivism.org/howoneindustryliedtotheworld – Accessed on: 08/01/22.
[93] *Ibid.*
[94] Butler (n.91) 4.

transcend this speciesist hierarchy, but science supports that not only do we not *need* this animal by-products to be healthy, but rather, consumption of them can be detrimental to our health. Thus, the suffering imposed here is not legally justifiable, and we can no longer use the 'necessity' rationale to mask the horrors of animal agriculture.

3. Conclusion

All 'oppressions are interlocking and mutually reinforcing within an overarching system of domination'.[95] Thus, we must dismantle *all* means of domination. By continuing to compartmentalise oppressions, we will merely hinder the ability to undermine oppression, and liberate those who are oppressed.[96] Transcending the hierarchical dominance so deeply ingrained into the human psyche, alerts us to our immoral and cruel use of animals. Though the law's objectification and degradation of animals may *explain* how they are so easily oppressed, it does not *excuse* it.

Once we feminists become aware of the hypocrisy that stems from oppressing one class, whilst fighting against the oppression of another, we are no longer able to "justify" our participation in animal oppression. This contribution drew upon a specific case study of gendered violence borne within the dairy industry to emphasise the feminist issue at hand. Whilst the gendered harms of animal agriculture provide that this is a feminist concern, the interlocking nature of speciesism and sexism heighten the need for feminist engagement on a broader scale.

[95] Glasser (n.59) 52.
[96] Gaard (n.16) Chapter 3: Lori Gruen, 'Dismantling Oppression: An Analysis of the Connection Between Women and Animals', 60-90, 60.

To What Extent is the Law Sufficiently Equipped to Deal with the Arising Socio-legal Issues of Heritable Genome Editing?

Ella Louise Carman

Introduction

Where the concept of heritable genome editing (HGE) was once no more than the storyline of a dystopian film, Jennifer Dounda's pioneering of CRISPR-Cas9 technology for the purpose of genetic modification in humans has transformed this Hollywood-style possibility into a fast-coming reality. Whilst fears of 'designer babies,' genetically engineered superhumans and a return to Nazi style eugenic practices, were previously a driving force behind not even considering genetic modification, it has since been suggested that robust international governance can ensure safe practice, and the retention of human integrity.

More recently, governing bodies from both the US and UK have suggested situations whereby germline modifications may be ethically permissible given the right framework being in place to regulate such treatments. Indeed, the need for such a framework has been greatly accelerated since Dr He Jiankui announced that he had modified the genes of twin girls in utero attempting to make them HIV immune in November 2018.[1] The announcement came as a stark reminder of the potential that such technology carries, and the need to implement regulation in such a volatile field. However, given the nature of germline interventions having exponential global effect on future generations, there is a great need for international acquiescence on how to go about tackling such issues. In light of internationally divergent cultural, ethical and political values this may be easier said than done.

This article critically examines a number of ethical and legal issues arising from the use of such technology and evaluates the extent to which they can limit its use. It further explores methods of international governance as a response to other internationally significant problems. Ultimately, it is sustained that current methods of governance are not adequate to ensure these issues are reconciled. Either they are too rigid and are unlikely to gather acquiescence from powerful countries who do not want to be restrained in their use of HGE techniques or are too weak in their enforcement powers; effectively allowing nations to sidestep the requirements.

[1] Vera Lucia Raposo, 'The First Chinese Edited Babies: A Leap of Faith in Science' (2019) JBRA Assisted Reproduction, 197

However, a new international governance framework to which countries must assent with rigidly defined parameters as to the absolute boundaries of the technology may be a suitable solution to address the rapidly evolving issues that arise from HGE.

1. Part One: The Ethical Debate

1.1. Introduction to Part One

This part outlines the ethical concerns raised by HGE technology. Whilst some might suggest that concerns should mainly focus on the safety of the technology, this view fails to consider societal differences. In a different situation this might not be problematic; however, where germline interventions are concerned their very nature means that the global population will be affected. Thus, it is crucial to give voice to those concerns which are grounded in morality rather than science, after all it is these opinions which will ultimately shape the future of policymaking on HGE.

Here, focus is given to the two most prominent ethical debates. Firstly, whether we should allow any heritable applications of the technology in a clinical setting. Secondly whether such technology should be authorised for genetic enhancement purposes, or if the technology should be limited to strictly therapeutic applications. In terms of the former debate, it is sustained that heritable applications should be limited to situations whereby there is no alternative treatment available to ensure that we protect the integrity of the human germline. Contrarily, it is submitted that all enhancement focused applications of CRISPR-Cas9 technology are categorically unnecessary and would only seek to exacerbate the already widening inequalities in our society. Thus, it is found that we should limit ourselves to strictly therapeutic applications of the technology.

1.2. Heritable vs Non-Heritable Applications

Current genetic engineering practice allows for certain therapeutic intervention in somatic cells. For example, recent clinical trials have been carried out on the effects of somatic gene therapy on patients suffering from sickle cell disease which consequently led to a correction of

the biological hallmarks of the disease in one patient.[2] By contrast, where somatic interventions are isolated in the patient; germline interventions affect reproductive cells, and thus have the potential to affect future generations. This raises multiple concerns for the viability of the clinical application of the technology, for example there may be unintended negative consequences which could not be predicted prior to trial. Aside from safety concerns it has been suggested that issues of consent and protecting the integrity of the human genome also arise. Indeed, international instruments such as the Oviedo Convention have codified concerns that such treatment could pose a harm to such future generations.[3]

However, where germline interventions were once seen as a 'red line', which was categorically not to be crossed.[4] Expert committees such as the Nuffield Council on Bioethics have since suggested that the use of HGE to influence the characteristics of future generations 'could be acceptable in some situations.'[5] Thus, here the focus remains on whether such intervention is ethically acceptable given the potential societal impacts.

It has been suggested that in the discussion of the ethics of heritable genome editing, three types of consideration are distinguishable: (i) pragmatic, (ii) socio-political and (iii) categorical.[6] Pragmatic considerations reflect on the safety of the technology and therefore are subject to change with the rapid development of current CRISPR technology. Socio-political considerations are concerned with the potential societal impacts of technologies such as the promotion of inequality and therefore are dependent on the specific context in which they arise. Categorical concerns are slightly more abstract than the first two as they refer to some sort of innate moral obligation that might arise in similar situations to the present. For example, one might suggest that maintaining human dignity is a categorical barrier to the introduction of germline interventions. These considerations will be examined as follows:

[2] Jean-Antoine Ribeil et al., 'Gene Therapy in a Patient with Sickle Cell Disease' (2017) 376 New England Journal of Medicine 848
[3] Convention for the Protection of Human Rights and Dignity of the Human Being with Regard to the Application of Biology and Medicine (1997), Article 13
[4] Robert Ranisch and Hans-Jörg Ehni, 'Fading Red Lines? Bioethics of Germline Genome Editing' (2020) 34(1) Bioethics 3
[5] Nuffield Council on Bioethics, 'Genome editing and human reproduction: social and ethical issues' (2018), 7
[6] Mara Almeida and Robert Ranisch, 'Beyond Safety: Mapping the Ethical Debate on Heritable Genome Editing Interventions' (2022) Humanities & Social Sciences Communications 7

1.2.1. Pragmatic Concerns

The primary reason for which most would find gene editing technology unacceptable is the high risk for serious harm given the novelty of the technology. This threat is only exacerbated where the technology is used for heritable purposes, as it could have unintended consequences that affect the human genome for generations to come. One such consequence is the possibility of genetic mosaicism, for which there is a high propensity when it comes most applications of CRISPR-Cas9 technology. The most obvious negative consequence of mosaicism is the 'generation of false-positive genotyping results.'[7] This is problematic as it means that where results might suggest deletion of a certain gene has been successful, the targeted gene may still be carried through the germline. However, it has also been found that mosaicism can 'trigger malignant transformation of a normal cell'[8] thus leading to an increased risk of cancer, as well as a higher risk of genetic mutations and other abnormalities. At the heart of the issue is that where heritable gene edits are concerned, we simply cannot predict what other unintended consequences of such technology might arise in the future.

However, as previously stated, the rate at which the technology is developing could mean that heritable gene edits will be safe enough in the near future that they will become clinically applicable, Baylis finds that this is not only a possibility, but an inevitability.[9] This idea is maintained by many recent reports supporting progress towards the implementation of clinical HGE, for example the German Ethics Council found that 'previous categorical rejection of germline interventions'[10] are no longer maintainable. As such, safety cannot be the only pre-requisite to authorising heritable gene edits in the future.

1.2.2. Socio-political Concerns

[7] Maryam Mehravar et al., 'Mosaicism in CRISPR-Cas9 Mediated Genome Editing' (2019) 445 (2) Developmental Biology 156
[8] Anatoly V. Lichtenstein, 'Genetic Mosaicism and Cancer: Cause and Effect' (2018) 78(6) Cancer Research 1377
[9] Françoise Baylis and Jason Scott Robert, 'The Inevitability of Genetic Enhancement Technologies' (2004) 18(1) Bioethics 1
[10] Deutscher Ethikrat, 'Intervening in the Human Germline' (2019), 5, available at https://www.ethikrat.org/en/publications/publication-details/?tx_wwt3shop_detail%5Bproduct%5D=119&tx_wwt3shop_detail%5Baction%5D=index&tx_wwt3shop_detail%5Bcontroller%5D=Products&cHash=25e88ad52f8b75d311510a9bf7a8dc86

Whilst socio-political concerns are generally dependent on the context in which they arise, in the case of HGE the two main concerns are the rights of the future child (and by extension transgenerational rights), and the potential for discrimination to surface.

In terms of the rights of the future child, it has been suggested that heritable gene interventions 'present an ethical constraint on the impossibility of future generations of providing consent to an intervention on their genome'[11]. Consider the importance of informed consent in medical ethics. As early as 1947, the Nuremberg Code enshrined having legal capacity to give voluntary consent to experimental treatment as 'absolutely essential'[12]. As such it is hard to reconcile germline interventions with the principle of informed consent. Whilst it is often argued that embryos are 'not experimental subjects in an analogous way to humans, as they are not afforded the moral status of personhood,'[13] the lifelong nature of such interventions may refute such claims. For example, in clinical trials, subjects will have the option to revoke their consent and no longer be a part of the study. Due to the irreversible nature of germline modification this is not possible. In this way it is difficult to see how germline modification can be compatible with the concept of informed consent.

Indeed, this issue was raised in the discussion of the ethics surrounding the He Jiankui controversy, as it was suggested that there was insufficient information given to those involved to be able to properly consent to treatment. The document He provided had 'no discussion about the meaning and significance of off-target effects or undesirable on-target changes on the child; and protected his team from responsibility for unforeseen risks,'[14] and thus seemed like a waiver of accountability rather than an open account of the associated risks of the trial.

A further concern arises in the form of discrimination against the disabled. Current Pre-Natal Testing (PNT) techniques to selectively choose embryos free from severe disability have been criticised for reinforcing negative stereotypes about living with a disability; this has been coined the expressivist argument[15]. The argument suggests that on the discovery of a 'disabling' gene, there is no further consideration of other 'positive' traits which the embryo

[11] Almeida & Ranisch (n 6) 9
[12] 'The Nuremberg Code (1947)' (1996) 313 British Medical Journal 1448
[13] Joanna Smolenski, 'CRISPR/Cas9 and Germline Modification: New Difficulties in Obtaining Informed Consent' (2015) 15(12) The American Journal of Bioethics 36
[14] Sheldon Krimsky, 'Ten Ways in Which He Jiankui Violated Ethics' (2019) 37(1) Nature Biotechnology 20
[15] Allen Buchanan et al., *From Chance to Choice: Genetics and Justice* (Cambridge University Press 2000)

may be carrying. In essence, 'the trait obliterates the whole'[16]. Moreover, it has been suggested that PNT and the need to remove certain disability from the gene pool is based on misinformation about what life with a disability is like. Whilst many of us have a preconceived idea, this is rarely based on any specific data; a study carried out by Ferguson has found that where adaptive equipment is available for families with disabilities, profiles of families with a disabled child virtually resemble those families who do not.[17] In the context of HGE this view is only exacerbated. For example, a study undertaken by Boardman and Hale found that a majority of people with genetic disabilities feel uncomfortable with selective reproduction to effectively remove people with that disability from the gene pool.[18] As the disabled community are generally disproportionately under-represented in genomic debate,[19] it seems that HGE for the purpose of disability removal will only propound the culture of mistrust that exists across the disabled community.

1.2.3. Categorical Concerns

One of the main categorical concerns that has been central to the debate on HGE is human dignity. While the concept of 'human dignity' is widely regarded as underpinning ideas of human rights, as suggested by it taking centre stage in the EU Charter of Fundamental Rights,[20] there remains strong debate as to how the concept is truly defined. Kantian deontology asserts that at the heart of the meaning of dignity is to treat people 'never merely as a means to an end, but always at the same time as an end.'[21] Put succinctly, Kant believed that the epitome of dignity was to allow people to live freely without being instrumentalised for another's gain. This idea has been taken by many academics to mean that dignity can be equated to autonomy, however this view is problematic, and fails to consider those who do not have physical or mental autonomy. By contrast, teleological perspectives of dignity as 'objective human flourishing'[22] take precedent from the Aristotelian concept of eudaimonism; in the context of

[16] Erik Parents & Adrienne Asch, 'Disability Rights Critique of Prenatal Genetic Testing: Reflections and Recommendations' (2003) 9 Mental Retardation and Developmental Disabilities Research Review 42
[17] Phillip M. Ferguson et al., 'The Experience of Disability in Families: A Synthesis of Research and Parent Narratives' in Parens E, and Asch A (eds), *Prenatal Testing and Disability Rights* (Georgetown University Press 2000) 72-94
[18] Felicity K. Boardman and Rachel Hale, 'How do Genetically Disabled Adults View Selective Reproduction? Impairment, Identity, and Genetic Screening' (2018) 6(6) Molecular Genetics & Genomic Medicine 941
[19] Gregor Wolbring, 'The Discussions around Precision Genetic Engineering: Role of and Impact on Disabled People' (2016) 5(3) Laws 8
[20] EU Charter of Fundamental Rights (2000), Article 1
[21] Immanuel Kant, *Grounding for the Metaphysics of Morals* (3rd edn, Hackett Publication Company 1993)
[22] Charles Foster, *Dignity in Bioethics and Law* (Hart Publishing 2011) 6

genome editing this may manifest in using those tools available to us to eradicate inherited disease, thus perpetuating greater flourishing. Here, two proposed ideas of dignity are examined, dignity as autonomy and as a legal concept. However, it is ultimately found that that any conditions put onto dignity as a value could serve to undermine its universality.

Dignity as Autonomy

Opponents of the use of human dignity as a constraint to heritable genome editing suggest that it has no meaning beyond the implications of the overarching principle of medical ethics, namely, respect for persons. As a result, Macklin suggests that the concept of dignity 'can be eliminated without any loss of content.'[23] Griffin has suggested that it is constituted by 'the life, autonomy and liberty of the individual.'[24] This argument is supported by Raposo, who suggests that where we associate dignity as autonomy, meaning 'the individual is an independent being capable of self-determination, free to make their own decisions.'[25]

While at face value this seems like a sufficient definition, Mamberti finds that such 'reductionism is unconvincing'[26] and finds that 'if autonomy and dignity were essentially synonymous, then logically only autonomous individuals could be said to possess dignity.'[27] Indeed, Baroness Hale follows suit in this position, suggesting that 'although respect for individual autonomy is an essential part of respect for human dignity, we are also required to respect the human dignity of those who are unable to make an autonomous choice.'[28] Essentially submitting that dignity cannot solely encompass autonomy in a meritocratic society. This is not the only criticism Macklin and Raposo face for the conflation of the two concepts, it seems that there are some things that would pose an 'affront to one's dignity, but which have nothing to do with violating one's autonomy.'[29] For example, Schachter suggests

[23] Ruth Macklin, 'Dignity is a useless concept,' (2003) 327 British Medical Journal1419, 1420
[24] James Griffin, *On Human Rights* (Oxford University Press 2009) 249
[25] Vera Lúcia Raposo, 'Gene Editing, the Mystic Threat to Human Dignity,' (2019) 16(2) Bioethical Inquiry249, 250
[26] Dominique Mamberti, 'Respect for human dignity as a "substantive basic norm.*"*' (2014) 10(1) International Journal of the Law in Context 28
[27] Ibid
[28] Brenda Hale, 'Dignity' (2009) 31(2) Journal of Social Welfare and Family Law 106
[29] Mamberti (n 26) 30

that the greatest violation of dignity is 'treatment that demeans or humiliates them,'[30] however this sort of humiliation doesn't always involve a violation of autonomy.

Dignity as a legal principle

Another common claim of those that do not believe human dignity to be a restraint on germline gene editing is that there is no legal definition of the concept, and further the documents that do mention the concept are not legally binding, thus immaterial. Raposo described dignity as one of the most 'poorly defined legal concepts,' however she fails to take into consideration where the law is not explicitly written down. It seems that in common law countries the concept of human dignity is the underlying factor to which the law appeals, despite being unwritten. For example in the UK, whilst there is no legislation to enforce dignity across cases, judges have recognised it as a 'core value of the common law, long pre-dating the Convention and the Charter.'[31] Where some have argued that if the concept of dignity is equal to a human right then it should have the same explicit limits and boundaries as written in ECHR, it seems that because the essence of human dignity 'applies to all human beings from the moment of birth' and extends even 'beyond death,'[32] it encompasses the nature of human rights. Hence, whilst the right to privacy is endowed on us from birth, there are limits as ascertained by Judge Pettiti who found that 'not every aspect of private life automatically qualifies for protection under the convention,' it is not intended to protect 'baseness or the promotion of criminal immunity.' Rather he finds that the intended meaning of Article 8 is the protection of personal 'intimacy and dignity,'[33] the emphasis on dignity here would suggest that it takes precedent over other universal rights.

Indeed, this is the majority opinion of several judges, for example Lady Hale found that there exists a legal 'responsibility of others to protect human dignity whether or not the individual wants her dignity respected,' and she believes this is the case as 'not to respect the dignity of others is also not to respect one's own dignity.'[34] It seems that whilst human dignity is not written down as some perfectly defined legal concept, this is not the intention. The concept of

[30] Oscar Schachter, 'Human Dignity as a Normative Concept' (1983) 77(4) American Journal of International Law 850
[31] *R (A, B, X, and Y) v East Sussex County Council (No.2)* [2003] EWHC 167 (Admin)
[32] Sir James Munby, '*Why do we ignore dignity? Some comments*,' (2019) 2 European Human Rights Law Review 119
[33] *Laskey, Jaggard and Brown v United Kingdom* [1997] 24 E.H.R.R. 39, 61
[34] Hale (n 28) 106

dignity is meant to be universal no matter to whom it is attached, thus, to give it a normative definition would inevitably exclude some people from reaping its benefits. Therefore, in looking for a legal document definition, Raposo reduces the concept of dignity to a 'one-size-fits-all' hypothesis, which it cannot be.

How then can we define human dignity? This remains ambiguous; however, it is in this ambiguity that makes it such a malleable concept and an appropriate response to the problems of heritable genome editing. As the future potential of such technology is still unknown it would be naïve to ascribe a concept that cannot be applied universally. As ethics in practice is about navigating one's way 'through a world of competing goods'[35] a simple solution would not be viable. In terms of dignity being a categorical concern in the heritable gene editing debate there are many avenues through which the protection of human dignity cannot be compatible with germline editing. Ultimately it will always be the case that *a priori* human dignity is an inviolable concept[36], and where it might be used to support the removal of debilitating diseases from the gene pool, it seems that any other application of genetic modification would indeed be a violation of our human dignity.

1.3. Enhancement vs Therapeutic Applications

A secondary debate arises as to whether clinical applications of human gene editing technologies should be used for solely therapeutic purposes, or whether we should authorise non-therapeutic applications, such as physical, intellectual, and psychological enhancements. On one side of the debate, it is submitted that all enhancement focused applications of gene editing technologies should not only be permitted, but there exists a moral imperative to pursue genetic enhancement.[37] By contrast the opposition holds that such enhancement edits will inevitably have harmful societal consequences, such as creating new forms of discrimination whereby those who do not have access to enhancement treatments may be treated as inferior by those who do. It is purported that despite the huge potential that enhancement technology might have in terms of improvement to quality of life; ultimately the authorisation of such technology would lead to the creation of a slippery slope with the potential to lead to a new

[35] David G. Kirchhoffer, 'Human Dignity and Human Enhancement: A Multidimensional Approach' 31 (2017) Bioethics 381
[36] Basic Law for the Federal Republic of Germany, Article 1
[37] Baylis (n 9) 4

form of eugenics. As such, it is maintained that human gene editing should only be used to therapeutic purposes.

Some commentators argue that on the minimisation of the risk in enhancement technology, clinical use should be permissible. Savulescu argues that there is no 'relevant moral difference between environmental and genetic intervention'[38] to improve quality of life and suggests that there is no difference between raising a child in a stimulating environment, and directly altering the child's genes to allow them to grow up more intelligent. Indeed, this is an argument that frequently arises; society already actively encourages alternative methods of 'enhancement'. Through medical means we can improve mood via selective serotonin reuptake inhibitors (SSRIs), and appearance via cosmetic surgery. The argument here is that if society accepts the ability to enhance human performance by such means, what is different about directly altering genes to the same effect?

Whilst this line of argument is reasonable, it seems that Savulescu overlooks the real extent of the effects of genetic enhancement. Whilst most medical interventions such as the prescription of SSRI's and other medication are all reversible processes, the effects of genetic enhancement are not. The issue of cosmetic surgery further begs the question of the need for homogeneity. It is suggested that current practices of plastic surgery generally disproportionately promote westernised beauty standards, i.e., women undergoing extensive weight loss surgery to fit in with the west's idea of the 'perfect body.' The issue here is that the ability to undergo such surgery for the purpose of 'fitting in' is an inappropriate enforcement of norms, and what makes it inappropriate is the 'excessive, punitive, unfair or cruel'[39] cost of living up to these high standards society sets. It would be hard to suggest that such standards would not be exacerbated where genetic enhancement for aesthetic purposes is available.

Savulescu's moral imperative suggests that the mere existence of the new genome editing technologies leaves us with greater moral responsibility to make decisions as to when we should use these. For example, one might suggest that it is immoral not to modify an embryo that has been identified as having or being susceptible to an inherited disease. The Nuffield

[38] Julian Savulescu, 'Genetic Intervention and the Ethics of Enhancement of Human Beings' in David M. Kaplan (ed), *Readings in the Philosophy of Technology* (2nd ed, Rowman & Littlefield Publishers 2009)421
[39] Margaret Olivia Little, 'Cosmetic Surgery, Suspect Norms and the Ethics of Complicity' *in Enhancing Human Traits: Ethical and Social Implications* (Georgetown University Press 1999) 167

Council on Bioethics find that 'this means that we have to take responsibility for both acts and conscious omissions.'[40] Such a decision would require the opinion of both the prospective parents and the medical experts involved in the procedure. Some commentators have suggested that we have an obligation to modify an embryo that is susceptible to disease. For example, those who take a utilitarian standpoint would suggest that the maximisation of welfare for the greatest number of people is the single most important principle to live by, as such Savulescu has proposed that there is a principle of 'procreative beneficence' by these standards. This principle suggests that couples 'should select the child…who is expected to have the best life,'[41] and in doing so equates 'the best life' to the child with the most desirable characteristics.

The issue here is that by picking and choosing effectively what are the 'most desirable genes' one implicitly denotes the genes that we do not want in the gene pool. In doing so we seem to be going down the slippery slope into eugenics. Savulescu suggests that what sets his 'liberal eugenics' apart from the Nazi's form of eugenics, is its voluntary nature; however, it is the unaffected parents that are giving their consent and not the unborn child who is ultimately affected by such treatment. Indeed, this idea of 'liberal eugenics' is not novel to Savulescu's writing, rather, Agar has suggested that where eugenics was given a bad name by the monstrous actions that took place in Nazi Germany, the addition of 'liberal' to the term has transformed 'an evil doctrine into a morally acceptable one.'[42] Central to liberal eugenics are three fundamentals which set it aside from eugenics, these are that decisions on reproductive selection are (i) voluntary, (ii) individualistic and (iii) state-neutral; the last of which is described by Agar as 'the distinguishing mark'[43] of the new liberal eugenic movement. The crux of the argument presented by liberal eugenicists is that because reproductive decision making is such a crucial part of our identity and what it means to be human, that such decision making should be entrusted wholly to the individual rather than being regulated by a centralised government. Hughes even goes so far as to suggest that if women are allowed the right to choose the father of their child, knowing full well his attendant characteristics, they should be 'allowed the right to choose the characteristics from a catalogue.'[44] This idea falls along the

[40] Nuffield Council on Bioethics (n 5) 73, [3.38]
[41] Julian Savulescu, 'Procreative Beneficence: The Moral Obligation to have the Best Children' (2001) 15(5-6) Bioethics 415
[42] Nicholas Agar, *Liberal Eugenics: In Defence of Human Enhancement* (Blackwell 2004) 135
[43] Nicholas Agar 'Liberal Eugenics' (1998) 12(2) Public Affairs Quarterly 137
[44] James Hughes, 'Embracing Change with All Four Arms' (1996) 6(4) Eubios Journal of Asian and International Bioethics 99

same line of argument that non-genetic child rearing practices are no different in affecting a child's life to making genetic interventions *in utero*.

However, in drawing such parallels, liberal eugenicists seem to lose consistency. Namely, Fox has suggested that to remain consistent to their line of reasoning, then in the same way that the liberal state requires us to enhance children's cognitive and social skills via schooling, the state 'must also mandate genetic interventions that safely enhance comparable natural primary goods in embryos.'[45] This would be inconsistent with the central principle of voluntariness prescribed by the proponents of liberal eugenics themselves.

A more pressing issue that arises here is the propensity for discrimination occur. Whilst Savulescu suggests that by enhancing children's natural capabilities, equality of opportunity will be improved, this argument falls foul of reductionism. In suggesting that enhancement will lead to equality of opportunity, he fails to account for how the inequalities that exist today across different cultures will only be propounded by genetic enhancement. For example, history has shown that when new advanced technology enters the commercial market it is immediately too expensive for most of the population to afford, as was seen with the invention of the computer and the telephone. Whilst the cost may decrease after a certain period; it is sustained that the widespread use of such technologies will only accentuate the 'vagaries of the natural lottery as well as create socio-economic differences'[46]. It seems that the equality of opportunity that Savulescu is suggesting is simply based on financial resources and allows those with 'economic power'[47] greater opportunities than those without. Further, Silver considers the extent of 'unfettered global capitalism' and finds that on an international scale 'the social advantage that wealthy societies currently maintain could be converted into a genetic advantage.'[48] As such it is suggested that where such technology is viable and commodified some parents will inevitably choose to modify their children genetically, as more parents follow suit the demand for genetic enhancement will increase. Though, because genetic enhancement technology will never be universally available, 'the myth of equality of opportunity may well be shattered, thereby dividing human societies into genetic nobilities jockeying biological

[45] Dov Fox, 'The Illiberality of Liberal Eugenics,' (2007) 20(1) Ratio 14
[46] Baylis (n 9)11
[47] Michael H. Shapiro, 'The Impact of Genetic Enhancement on Equality' (1999) 34 Wake Forest Law Review 561, 579
[48] Lee M. Silver, 'Reprogenetics: How do a Scientist's Own Ethical Deliberations Enter into the Process?' (1999) Presented at the conference: *Humans and Genetic Engineering in the new Millennium – How are we Going to get 'Genethics' Just in Time?*

under-classes.'[49] It is sustained here that the erosion of equality of opportunity within our society 'threatens the foundations of our democratic order,'[50] where our society is characterised by inherited social status; it is hard to imagine the place of equality in such a society.

Finally, at the heart of the debate it is submitted that there is simply no need for such enhancement in our society, rather it seems that arguments positing it are based in hedonism, a deeply entrenched societal need for perfection. However, it is submitted that by genetically engineering perfection it loses its impressiveness. Consider the example of doping in sports, whilst most people praise sportsmen such as Michael Jordan for the natural talent endowed to him by his height, this would be undermined if it turned out that his height had been manufactured. Sandel has suggested that the main problem with genetically modified athletes is that 'they corrupt competition as a human activity that honours the cultivation and display of natural talents.'[51] In this sense the ethic of wilfulness deriving from genetic modifications undermines the concept of giftedness which is a highly regarded attribute in society. As we continue to promote genetically engineered talent, we burden ourselves with a greater responsibility to choose; parents will feel the affliction to choose the best talents for their child or risk feeling as if they've failed their child in the future. As such it is maintained here that there remains a real need to embrace a contingency of our gifts, as suggested by Sandel, this is what will save a meritocratic society from 'sliding into the smug assumption that the rich are rich because they are more deserving than the poor.'[52]

Ultimately, it seems that whilst the theoretical opportunities for improvement to quality of life entailing from genetic enhancement are vast, in the context of current society it seems that such action would only seek to exacerbate the inequalities that are already deeply entrenched in society. As such it is submitted that the only permissible applications of human genetic modification should be those that are necessary in a therapeutic setting where alternative methods of treatment are not readily available.

1.4. Summary to Part One

[49] Baylis (n 9) 15
[50] Maxwell J. Mehlman, 'How Will we Regulate Genetic Enhancement' (1997) 226 Faculty Publications 688
[51] Michael J. Sandel, 'The Case Against Perfection' (*The Atlantic* 2004), available at: https://www.theatlantic.com/magazine/archive/2004/04/the-case-against-perfection/302927/
[52] Ibid

Overall, a deep ethical analysis of the potential societal consequences of human genome editing suggests that whilst a lot of caution should be taken in implementing clinical applications of such technology, in taking a pragmatic approach it seems that human gene editing for therapeutic purposes will be a viable practice in the near future. That being said, whilst arguments in favour of genetic enhancement may seem convincing, here it is sustained that the societal implications of such practices are far too great. It would be a categorical violation of our collective human dignity to use technology with so much potential for good for wholly hedonistic purposes. As such it is maintained that non-heritable therapeutic engineering techniques, and in a last resort case heritable therapeutic interventions where they are the only viable option, should be authorised once safety has been established.

2. Part Two: The Legal Debate

2.1. Introduction to Part Two

Aside from the ethical implications discussed above, there remains legal ramifications of HGE techniques that must be considered before implementing these technologies into a clinical setting. The following section will detail some of the on-going legal debates that have caused additional controversy in the area. It will then examine the methods of governance that have previously deployed to deal with similar issues; ultimately finding that neither method is sufficient to deal with the issues posed by HGE.

2.2. Legal issues

Given the extent of the ethical issues raised by HGE, it should come as no surprise that complex legal issues also arise. One such issue is that of medical tourism; 'the practice of travelling to different countries in order to obtain health care facilities.'[53] Whilst in most cases this practice is uncontroversial, for example, in search for more cost-effective and accessible treatment; [54] in the case of more contentious medical treatments such as HGE legal issues are bound to arise. Moreover, there exists an important concern in protecting the rights and collective interests of

[53] Sukanya Banerjee et al., 'Global Medical Tourism: A Review' in *Medical Tourism: Breakthroughs in Research and Practice* (IGI Global 2018) 2
[54] R. Alto Charo, 'On the Road (to a Cure?) – Stem Cell Tourism and Lessons for Gene Editing' (2016) 374(10) The New England Journal of Medicine 901

the global population. However, it has been suggested that a purely human rights focused approach to HGE can have limited success as it does not look at the wider societal implications.

2.2.1. Medical Tourism

One prominent controversy associated with HGE concerns fertility tourism. Specifically international surrogacy whereby infertile couples may travel from their home country which may prohibit surrogacy altogether, to those countries with more lenient or even nonexistence surrogacy regulation in order to have a child. For example, under the French Bioethics Act 1994[55] surrogacy is prohibited, and other countries had adopted similar standpoints such as Italy and Germany. However, nations such as India, have little regulation on surrogacy arrangements, and in 2002 it became the first country to explicitly allow commercial surrogacy arrangements.[56] As such, India has been referred to as 'a top destination for fertility tourism,'[57] due to its relaxed regulations, facilitating laws, affordable surrogacy services and advanced medical technology.[58] As a result of such a broad variety of international policies on surrogacy, a range of complex legal issues have arisen.

For example, in the case of *Re X and Another*,[59] an infertile British couple travelled to Ukraine and paid a surrogate mother to carry their child for them. Whilst payment for surrogacy in the UK is prohibited under Human Fertilisation and Embryology Act 1990,[60] it is permitted under Ukrainian law and such transaction was lawful. On returning to the UK, it was determined that under English law the children had no English parents while under Ukrainian law the surrogate mother had no parental responsibility to the resulting twins, thus leaving them stateless and parentless. In the applicants' appeal, Hedley J granted parentage under Section 30 of the HFEA on the grounds of protecting the welfare of the children. However, in doing so he explained that whilst Parliament is 'entitled to legislate against commercial surrogacy' they are leaving difficult policy considerations to be dealt with by 'one wholly unequipped to comprehend it.'[61]

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[55] Bioethics Act (France) No. 94-654 of 29th July 1994.
[56] Susan Finnerty, 'Who profits from international surrogacy? The legal and bioethical ramifications of international surrogacy' (2015) 21(2) Medico-Legal Journal of Ireland83
[57] Jennifer Rimm, 'Booming Baby Business: Regulating Commercial Surrogacy in India' (2009) University of Pennsylvania Journal of International Law 1429
[58] Elizabeth Bartholet, 'International Adoption: The Human Rights Position' (2010) 1(1) Global Policy 93-100
[59] *In Re X and Another (Children) (Parental Order: Foreign Surrogacy)* [2008] EWHC 3030 (Fam)
[60] Human Fertilisation and Embryology Act (1990), Section 30(7)
[61] *In Re X* (n 59)80-81

Moreover, he found that there are very few cases whereby refusing to grant parentage would not be gravely detrimental to the welfare of the child. It therefore seems that although the UK does not permit commercial surrogacy arrangements, the courts are often put in the position where they are obliged to due to fertility tourism.

This idea was considered in the European Court of Human Rights in the case of *Mennesson v France*, in which parentage was not granted to a couple who had flown to California to enter into a commercial surrogacy agreement. The international court found that, despite the French governments legitimate policy claim, rendering the children stateless the French court was in violation of their Article 8 right to respect for private life[62], and as such this decision was overruled.[63] Whilst the outcome of this case was overall positive in favour of the applicants, it took fourteen years to be reached, leaving the children in a legal void for the most part of their childhood.

These difficult legal questions highlight some of the issues arising from fertility tourism. It has been suggested that *Mennesson* in particular 'illustrates the issues involved in failing to achieve an international regulatory framework,'[64] especially where the affected party is the resulting children. One might suggest that as HGE is a far more controversial technology in comparison to surrogacy; the issues of medical tourism would be exacerbated without international accordance. Additionally, as gene editing technologies develop it is inevitable that countries with more lenient regulation will start offering treatments in a clinical setting before it has been established that such treatment is wholly safe. This can be dangerous as in many cases those looking for treatment are often desperate for help. Combined with the fact that media coverage often distorts the extent to which new technologies are successful in treating such diseases,[65] there is a high risk for exploitation without international safeguarding measures.[66]

The practice of fertility tourism has not arisen without critical response. Namely, feminist thinker Naomi Pfeffer has questioned those intergovernmental agencies which recognise the danger of practices such as organ importation and exportation and have accordingly

[62] EU Charter of Fundamental Rights (2000), Article 8
[63] *Mennesson v France* [2014] (Application no. 65192/11)
[64] Melanie Hess, 'A Call for an International Governance Framework for Human Germline Gene Editing' (2020) 95 Notre Dame Law Review 1377
[65] Charo (n 55) 902
[66] Mrinal Vijay, 'Commercial Surrogacy Arrangements: The Unresolved Dilemmas' (2014) 3(1) UCL Journal of Law and Jurisprudence214

criminalised the 'exchange of cash for kidneys'; but 'elect to remain silent on the inconsistencies in the regulation of the trade in human eggs that lubricate fertility tourism'.[67] Indeed, the Report of the Council of Europe and United Nations finds that 'there is a growing body of evidence that human trafficking has been affecting women and girls disproportionately'[68]. It is therefore surprising that despite this evidence, there is such a disparity in the response to transplant and fertility tourism. Critics such as Scheper-Hughes have gone so far as to suggest that neo-liberal practices promote the existence of a pool of 'bioavailable women' generally from a less affluent eastern backgrounds, offered to western men. In effect this broadens the inequality gap and further entrenches the idea that we can commodify desperation.

One argument against such criticism is that the surrogate would have to give consent to engage in such a transaction. But it is submitted that where there is a financial imbalance between parties, such consent is precarious. Take, for example, the situation where a surrogate is a mother with many children living in poverty in a third world country, if they are offered a significant sum of money to go through a pregnancy and then give up that child, despite the hardships that this may cause her, can she really refuse? This is the crucial issue at the heart of trafficking, that it feeds off the desperation of the needy. The Council of Europe contends that even if compensation for organs was relatively high, few would be willing to sell'[69], why then, when women's bodies are the subject, should they be incentivised to do so? As such, it is argued that the inconsistent approach in responses to fertility tourism and the commodification of women's bodies to serve the wealthy elite will always lead to the exploitation of vulnerable women and girls.

2.2.2. Protection of Global Human Rights and Collective Human Interests

A further problem stemming from HGE is the need to protect human rights and the global common interest in safeguarding the integrity of the human genome. Whilst it is generally the prerogative of a nation state to legislate in areas concerning political or economic issues; history has shown that where an act 'violates fundamental human rights law or important

[67] Naomi Pfeffer 'Eggs-ploiting women: a critical feminist analysis of the different principles in transplant and fertility tourism' (2011) 23 Reproductive Biomedicine Online 634
[68] Council of Europe and United Nations, 'Trafficking in organs, tissues and cells and trafficking in human beings for the purpose of the removal of organs' (2009) 12
[69] Ibid31

principles of medical ethics it becomes a matter of concern'[70] on an international scale. Furthermore, it has been suggested that where all nations claim to have ownership of an asset, each country must contribute to protecting it. Indeed, as early as 1982, the Parliamentary Assembly of the Council of Europe considered that the right to life, enshrined by Article 2 of the ECHR, implies 'the right to inherit a genetic pattern which has not been artificially changed.'[71] Thus, it is submitted that any attempt to permanently alter the human germline should have international assent before it can be authorised.

The clearest indicator of the current stance on the importance of a focus on international human rights and the integrity of the human genome can be found in UNESCO's 'Universal Declaration on the Human Genome and Human Rights' (1997). Enshrined in Article 1, the body finds that 'the human genome underlies the fundamental unity of all members of the human family, as well as the recognition of their inherent dignity and diversity' and later finds that 'germ line editing'[72] could be in contravention of such interests. Indeed, the Oviedo Convention sets such beliefs out in treaty form to legally bind European Union member states to only make 'preventative, diagnostic or therapeutic'[73] interventions, thus indirectly prohibiting germline interventions.

However, since its implementation, for a variety of different reasons only 29 of the 47 member states assented to being bound by such restrictions. Yotova suggests that whilst these international instruments purport to regulate gene editing from a human rights perspective, their 'adequacy to address the challenges it poses remain open to question.'[74] Historically, a human right focused approach to an issue requires a balancing of the interests of the individual against those of the public, with a general focus on protecting the individual against the state. In order to achieve this, the doctrine of proportionality is often deployed. Essentially constitutional law 'requires that government intrusions on freedoms be justified'[75] and that the need to impose such intrusions is proportional to the benefit that will come from it. However, it has been suggested that this is not the best method of governance given that it would place a

[70] Gary E. Marchant, 'Global Governance of Human Genome Editing: What are the Rules?' (2021) 22 Annual Review of Genomics and Human Genetics 392
[71] Parliamentary Assembly of the Council of Europe, 'Recommendation on Genetic Engineering' (1982) Recommendation 934, sub 4a
[72] UNESCO, 'Universal Declaration on the Human Genome and Human Rights' (1997), Article 24
[73] Oviedo Convention (n 3)
[74] Rumiana Yotova, 'Regulating Genome Editing Under International Human Rights Law' (2020) 69(3) International & Comparative Law Quarterly' 680
[75] Vicki C. Jackson, 'Constitutional Law in an Age of Proportionality' (2015) 124 Yale Law Review 3094

burden on the state to 'justify restrictive regulation' and such a burden may be 'difficult to discharge in the face of the scientific uncertainties surrounding the use of germline editing.'[76]

This difficulty to strike a balance between interests is illustrated by the diverging key objectives of the early drafters of the UNESCO Declaration and those of the later published Oviedo Convention and UNESCO Declaration on Bioethics and Human Rights. The former places greater emphasis on enabling scientific progress and protecting 'freedom of research'[77] as opposed to the latter which gives primacy to 'the interests and welfare of the individual.'[78] Whilst the primacy of the human being in the field of biomedicine is now a well-established concept, there remains a trend towards rushing scientific progress at the expense of allowing the general population to understand what such technology might mean for them in the future. For example, whilst current research suggests that for the time being, a moratorium on HGE research is necessary to ensure safety, leading experts in the field have suggested that this is 'antiethical to the goals of science.'[79] This difficulty in finding a balance between scientific progress and the rights of the general population will be explored further in part three.

Finally, the difficulties that arise when it comes to balancing the interests of stakeholders are further complicated when we consider the rights of future generations. For example, whilst we might suggest that we have a duty to protect those unborn embryos that would be affected by germline interventions, might we be inadvertently undermining the entire premise of the pro-choice argument for the right to an abortion in doing so? For example, the debate will force us to decide whether we see an embryo as a prospective person already or whether the embryo might only be the biological material that in the future may give rise to the prospective person.[80] If we took the former determination to be true, it would hinder all current embryo research as it would effectively be suggesting such embryos have comparable rights to human subjects. Such arguments will require careful consideration prior to any authorisations of HGE in a clinical setting. It is suggested here that whilst human rights can provide a strong base in which

[76] Yotova (n 74) 680
[77] UNESCO, 'Birth of the Universal Declaration on the Human Genome and Human Rights' (1994) 40
[78] UNESCO, 'Declaration on Bioethics and Human Rights' (2005), Article 3(2)
[79] 'Science Summit Denounces Gene-Edited Babies Claim, But Rejects Moratorium' (NPR November 2018) available at: https://www.npr.org/transcripts/671657301?t=1652343366944
[80] Bonginkosi Shozi et al., 'Future of Global Regulation of Human Genome Editing: A South African Perspective on the WHO Draft Governance Framework on Human Genome Editing' (2022) 48 Journal of Medical Ethics 167

regulation of HGE is grounded, it is too abstract a concept to be the only basis upon which regulation is based.

2.3. Existing methods of international governance

Where globally significant legal issues arise, gathering international acquiescence to deal with such issues is generally difficult due to internationally diverging opinions on the best method of governance. Since the world wars, there has been a trend towards international cooperation to ensure equality across the nations and an opportunity for all opinions to be heard on a global scale. In the context of scientific development international conferences have emerged as a popular method of gathering consensus on global opinions to deal with these novel issues. Similarly, whilst only one treaty concerning HGE exists (The Oviedo Convention), treaties and soft law are often successful in bringing light to the need to legislate in a certain area. That being said, these methods of international governance are submitted to be an insufficient response to the potential far reaching consequences that HGE attracts.

2.3.1. International Conferences

One popular method of bringing global opinions concerning HGE together is via international conferences. The past two decades has seen a rise in the number of these conferences. It has been suggested that this method of governance is suitable to deal with current issues of HGE as the 'wide range of experts can offer a holistic perspective on the issue.'[81] However, these conferences are often invite only to those interested parties who have expert knowledge in the field. Whilst they allow a broad range of expert opinion to be heard, they seem to exclude the opinion of the general public, which will ultimately decide the role that HGE plays in our society. In order to illustrate these concerns two examples are outlined as follows:

Asilomar (1975)

The early 1970's saw the rise of recombinant DNA (rDNA), which was met with concerns that this technology could possibly 'change normally innocuous microbes into cancer-causing

[81] Scott J. Schweikart, 'What is Prudent Governance of Human Genome Editing' (2019) 21(12) AMA Journal of Ethics 1045

agents.'[82] The Asilomar conference was a direct response to such concerns after a de facto moratorium was imposed on rDNA research. The conference concluded that it was in the interests of scientific progress to lift the global moratorium, and thus 'safety guidelines of varying stringency according to the degree of risk'[83] were implemented.

Whilst generally received as a strong guideline for dealing with such concerns, it has since been suggested that the Alisomar model is 'poor for governing newly emerging gene editing technologies'[84]. For example, it has been suggested that Berg's enthusiasm regarding the model as a way for 'geneticists to push research to its limits'[85] is dangerous especially when it comes to the application of CRISPR technology. This linear mode of thought would suggest that scientific expert opinion on the matter is somehow more valuable than that of the general public.

Indeed, one of the most significant criticisms of the conference is that it 'did not cast a wide net outside the scientific community'[86] and thus the conversation was limited to safety issues rather than considering ethical and societal concerns. Whilst Asilomar clearly was a starting point for scientific self-regulation, and since then conferences concerning HGE have included a wider range of experts, it is still not enough to only engage with experts in these fields as this impulse to dismiss public opinion as ill-informed deprives society of the freedom to decide what forms of progress are culturally and morally acceptable'[87].

Rather, it is suggested that engaging proactively with mass media so that the general public can understand such issues is vital; after all, 'the most transparent of webcasts is meaningless if only a rarified group of already interested individuals know the meeting is happening.'[88]

German Ethics Council (2019)

[82] Paul Berg, 'Meetings That Changed the World: Asilomar 1975: DNA Modification Secured' (2008) 445(18) Nature 290
[83] Ibid
[84] Sheila Jasanoff et al., 'CRISPR Democracy: Gene Editing and the Need for Inclusive Deliberation' (2015) 32(1) Issues in Science and Technology 2
[85] Berg (n 82)291
[86] This Week Editorial 'After Asilomar' (2015) 526 Nature 294
[87] Jasanoff (n 84)3
[88] (n 86) 294

The German Ethics Council (GEC) concerned recent developments in HGE and recommended the implementation of a legally binding moratorium on current research. In contrast to Asilomar, the GEC noted the need not to reduce the debate to a 'mere risk and opportunity analysis.'[89] This suggests that safety and efficacy are merely starting points in the analysis of how to implement these techniques into everyday medicine. It is submitted that whilst the model implemented at the GEC was more inclusive than Asilomar, it still was not sufficient to close the 'knowledge deficit' on HGE techniques.

Whilst empirical data on the extent to which we can ever really fill the knowledge deficit gap is limited, it is suggested that more needs to be done than holding expert conferences. For example, where pioneers in the field are leading conferences, there is often a bias towards creating public acceptance of such technology. It is however submitted that public engagement is designed to facilitate 'the sharing and exchange of knowledge…among groups who often have differences in expertise, power, and values'[90] to 'motivate attention to issues important to the public good.'[91] As such it is important to ensure that the conversation is grounded in neutrality and considers all opinions, especially those with no expert knowledge on the subject.

It is submitted here that whilst international conferences are a good starting point for a conversation about the implications of HGE technology, it is not a sufficient replacement for proper international governance or a globally inclusive conversation on the subject.

2.3.2. Treaties and Soft Law

The two most frequently used methods of international governance are treaties and soft law. Where treaties create legally binding agreements between nation states; soft law, though not binding offers a guideline to nations on how to navigate an internationally significant issue whilst not imposing on their sovereignty to legislate. However, it is maintained that neither of these options are sufficient to deal with the issues arising from HGE; whilst treaties are a good enforcement of international agreements against nations, recent trends have shown that their crucial rigidity is repeatedly undermined by powerful nations. On the other hand, it has been

[89] German Ethics Council (n 10)
[90] NASEM, *Gene Drives on the Horizon: Advancing Science, Navigating Uncertainty, and Aligning Research with Public Values* (The National Academies Press 2016) 22
[91] NASEM, *Communicating Science Effectively: A Research Agenda*(The National Academies Press 2016) 2

suggested that the non-binding nature of soft law means that it is 'simply not law at all'[92]. The issues concerning these methods of international governance will be examined as follows:

Treaties

Traditionally, treaties were the primary method of achieving harmonisation of national regulatory requirements. Indeed, after horrific events such as the two world wars; treaties, such as the Geneva Convention, were the most suitable method of imposing strict international legislation and sanctions to ensure similar events could never take place again. However, in the case of war, harmonisation was an international and uncontroversial interest, where more controversial debates arise treaties often hinder progress due to their time-consuming nature. Whilst there is limited evidence to this statement in terms of HGE due to its novelty, one only needs to look to international environmental law to see the extent to which agreement is essentially impossible to reach. For example, the Paris Climate Agreement (2015) sought to gather international accord on measures that could be taken to prevent dangerous climate change and irreversible environmental damage. As the culmination of 'more than twenty years of negotiation'[93] since the Kyoto Agreement (1997) one would have expected that such an agreement would have created significant change in the direction of climate change prevention. However, it seems the opposite was true; in favour of a symbolic agreement the Paris Accord 'officially abandoned the idea of an international equitable burden-sharing arrangement' and effectively 'side-lined environmental justice as a guiding principle for multilateral cooperation'[94]. The agreement, somewhat contradictorily to the values of a treaty, was built around a voluntary accord to the principles. Essentially, whilst the text was legally binding, countries were free to withdraw from it without sanction. Indeed, in 2017 the USA as the world's largest polluter (historically contributing 27% of global CO2 emissions[95]) did withdraw from the agreement, it therefore seems somewhat redundant to go through the longwinded motions of ratifying a treaty if powerful nations can leave without consequence.

[92] Andrew T. Guzman and Timothy L. Meyer, 'International Soft Law' (2010) 2(1) Journal of Legal Analysis 172

[93] Mari Luomi, 'Is the Paris Agreement a Success and What Does it Mean for the Energy Sector' (2016) 105 COP21 and Implications for Energy 4

[94] Raymond Clémençon, 'The Two Sides of the Paris Climate Agreement: Dismal Failure or Historic Breakthrough?' (2016) 25(1) Journal of Environment & Development 3-4

[95] Chris Mooney, 'The U.S. has Caused More Global Warming Than any Other Country. Here's how the Earth will get its Revenge' (*Washington Post*, January 2015), available at https://www.washingtonpost.com/news/energy-environment/wp/2015/01/22/the-u-s-has-contributed-more-to-global-warming-than-any-other-country-heres-how-the-earth-will-get-its-revenge/

In the context of HGE, the similar highly controversial nature of the topic will inevitably lead to slow progress in ratifying treaties and such treaties being weak in their enforcement. Indeed, the main reason behind the USA leaving the Paris Accord was for economic expansion and capitalist gains; given the huge potential to capitalise off the back of HGE technology, how can we expect powerful nations to act any differently?

Soft Law

Whilst the definition of 'soft law' is slightly ambiguous, Senden's definition suggesting that it is the 'rules of conduct that are laid in instruments which have not been attributed legally binding force, but nevertheless may have certain indirect legal effects'[96] well encompasses the parameters of what is meant. It is this non-binding force that it often attributed praise concerning soft law. Indeed, one might suggest that in the case of HGE technology the flexibility that is entrenched in the soft law method is desirable because it allows for the law to develop organically as the technology evolves. However, Kenner has suggested that whilst soft law is a suitable method to 'address policy gaps where a lack of political consensus on a subject precludes the development of hard law,'[97] it should not be adopted as a total replacement for binding law. Rather, he advocates that it should be used merely as a transitionary legal mechanism before hard law can be implemented. Effectively, he suggests that a reliance on soft law will lead to indolent legislating and open the door for nation states to bypass the requirements of the law as they please.

In the case of HGE this is not a viable option. As previously mentioned, the risks associated with HGE are far too great to be dealt with via non-binding legislation. Undoubtedly, it may provide an ephemeral solution in the face of real concern, such as after Dr He's experiment; however, this cannot replace binding legislation in the long term. It has been seen that much of this soft law is often ignored by states without sanction, whilst this may not be too problematic with regards to other issues, the consequences here are globally significant.

[96] Linda Senden, *Soft Law in European Community Law* (Hart 2005)112
[97] Emer O'Hagan, 'Too Soft to Handle? A Reflection on Soft Law in Europe and Accession States' (2004) 26(4) Journal of European Integration 383

2.4. Summary to Part Two

Overall, the arising legal issues of HGE raise important questions as to how best we can strike a balance between the rights of the individual and the interests of rapidly developing scientific knowledge. This is further complicated by the global scale nature of the effects of germline editing. Where treaties and soft law are often enacted to hinder the pace at which such technology can develop in order to allow the public to be able catch up, it has been suggested that the He Jiankui experiment has led to a 'growing sense of inevitability'[98] that soon we will indeed be editing the human germline. As such it is necessary to consider alternative possibilities to current methods of governance in order to ensure that we can reconcile such issues before blindly running into approving HGE in the interests of science.

3. Part Three: Proposed Methods of International Governance

3.1. Introduction to Part Three

Whilst there have been calls for a number of different methods of governing the progress of HGE technologies, two stand out with the greatest level of support: the implementation of a moratorium on all clinical uses of human germline editing,[99] and the creation of an international governance framework which would regulate any and all research on heritable genome editing, as well as providing a clear model of how such research could be implemented into a clinical setting. Whilst in the earliest stages of the development of HGE techniques, a moratorium seemed to be the best method to tackle what was seen as such a volatile technology, as safety measures prove more successful, it seems that a ban would only seek to stagnate progress on the technology.

3.2. Call for a Moratorium

Despite calls for the implementation of a formal international moratorium, they have never come to fruition. However, the National Academies of Sciences (NAS) first International Summit on Human Gene Editing in 2015 recommended that 'it would be irresponsible to

[98] Mildred Z. Solomon, 'Gene Editing Humans: It's Not Just About Safety' (*Scientific American*, August 2019), available at: https://blogs.scientificamerican.com/observations/gene-editing-humans-its-not-just-about-safety/
[99] Eric Lander et al., 'Adopt a Moratorium on Heritable Genome Editing' (2019) 567 Nature 165

proceed with any clinical use'[100] of HGE techniques without fully reviewing the safety of the process. Since this summit, most countries have followed such recommendation and prohibited any such applications of germline editing.

Whilst a moratorium may seem like an appropriate governance method for the time being, it is by definition a temporary solution, therefore any formal moratorium imposed would have to define a circumstance that would trigger its dissolution. In this case one may suggest this would be a point at which we know that applications of human germline editing are safe, however due to the longevity of the effect of such treatment it seems almost impossible to know when this point will be.

Another problem often faced when implementing a moratorium is enforceability. Due to international law's principle of the sovereign state, i.e., that only a state can have absolute power to legislate over its nation, any moratorium would need to address how it would be enforceable whilst respecting sovereignty, else 'it would simply result in another ineffectual political expression of intent.'[101] This could suggest that despite the enforcement of a moratorium, it is unlikely to hold any real weight and would rather impose greater hinderance to scientific progress than necessary. Indeed, after the first International Summit, the US Congress passed an amendment to the Consolidated Appropriation Act 2016 stipulating that 'none of the funds made available by [the] Act may be used…[where] a human embryo is intentional created or modified to include a heritable genetic modification,'[102] effectively banning further research on heritable genome editing for a fixed period. However, this amendment had the further unintended effect of banning mitochondrial replacement therapy (MRT) treatments.[103]

The success of MRT in the UK however has further placed arguments in favour of a moratorium for the clinical usage of germline therapies 'under pressure.'[104] Since the

[100] Committee on Science, Technology and Law; Policy and Global Affairs; National Academies of Sciences, Engineering and Medicine, *International Summit on Human Gene Editing: A Global Discussion*(National Academies Press 2016)
[101] Terry Kaan et al., 'Germline Genome Editing: Moratorium, Hard Law, or an Informed Adaptive Consensus?' (2021) 17(9) PLOS Genetics 3
[102] Consolidated Appropriations Act 2016, Public Law no. 114-113 (2015)
[103] I. Glenn Cohen et al., 'The FDA is Prohibited from Going Germline' (2016) 353(6299) Science 546
[104] Paul A. Martin & Ilke Turkmendag, 'Thinking the unthinkable: how did human germline editing become ethically acceptable' (2021) New Genetics and Society 384, [13]

implementation of the 2015 regulations on the clinical use of MRT[105], the sustainability of the UK government's argument against the use of HGE technologies has deteriorated. As the MRT process involves therapeutic application of mitochondria, 'to prevent the transmission of serious mitochondrial diseases,'[106] into a 'permitted'[107] egg, it essentially has permitted the 'practice of making deliberate biological changes that may be inherited by future generations.'[108] At a face value, in approving such treatment, and singling a single class of disease which is deemed *worthy* of eradication by genetic modification of nuclear DNA, the UK seems to have opened the door to the possibility of germline editing becoming permissible in the near future.

Baltimore argues that the ultimate flaw of the moratorium is its inflexibility and even suggests that 'to make rules is probably not a good idea.'[109] Whilst it may be true that moratoriums often do not grant much flexibility, to suggest that to make any rules is not a good idea, would be to leave the field totally unregulated. Hurlbut finds that the unregulated nature of the field is exactly what allowed Dr He to conduct such a rogue experiment, suggesting that 'setting a rule that clearly prohibited HGGE – and threatening excommunication from international science for violating it'[110] is what could have restrained He. Baltimore further suggests that 'there's nothing like actually moving ahead [with research] to teach us what the actual pitfalls are,'[111] and whilst it some situations this may be applicable, the identified potential risks of heritable genome editing are so great that Baltimore's suggestion seems rash. Ultimately there is a need to balance the rapid pace at which science is developing against the safety of society; as Doudna has suggested governance must catch up by 'thoughtfully crafting regulations of the technology without stifling it.'[112]

3.3. International Governance Framework

[105] The Human Fertilisation and Embryology (Mitochondrial Donation) Regulations (2015)
[106] Ibid, Section 3ZA
[107] Ibid, Section 3
[108] Nuffield Council on Bioethics (n 5) 103 [4.7]
[109] Tina Hesman Saey, 'A Nobel Prize Winner Argued Banning CRISPR Babies Won't Work' (2019) Science News
[110] J. Benjamin Hurlbut, 'Imperatives of Governance: Human Genome Editing and the Problem of Progress' (2020) 63(1) Perspectives in Biology and Medicine 189
[111] Saey (109)
[112] Jennifer Doudna, 'CRISPR's Unwanted Anniversary,' (2019) 366 (6467) Science 777

As it seems that a moratorium on HGE can only provide a temporary solution to the arising problems, it is important to develop an international governance framework to ensure that when the moratorium is lifted, research and clinical applications of gene editing technologies are conducted safely. Hurlbut illustrates the importance of a coherent governance framework in suggesting that our approach to governance of human genome editing now will shape 'not only the trajectory of genome editing, but the ways social and political communities will contend with technologies that touch upon fundamental dimensions of human life.'[113] This urgency to devise a suitable framework has been further exacerbated by Dr He's experimental treatment, and it seems that as the 'unthinkable has now become conceivable'[114] we cannot expect a moratorium to act as an effective deterrent to such treatments. Hurlbut concludes that Dr He's actions should be taken as an example of 'manufactured inevitability…used to assert an imperative of governance,'[115] and if we do not govern over such practices in favour of a moratorium, then more rogue experiments will be inevitable. This idea is confirmed by Dzau who found that the case 'highlights the urgent need to accelerate efforts to reach international agreement upon more specific criteria and standards that have to be met before human germline editing would be deemed possible.'[116] Thus, whilst a moratorium may provide an adequate temporary solution; as technology inevitably develops, so too must the law, providing an effective safeguarding to the field.

How, then, can one regulate such a volatile field whilst ensuring to maintain a balance between safety and scientific progress? In its consideration of the oversight of human genome editing, the National Academies of Sciences suggested seven overarching principles which should be present in any developed governance framework, namely: (1) promoting well-being, (2) transparency, (3) due care, (4) responsible science, (5) respect for persons, (6) fairness, and (7) transnational cooperation.[117] Hess has suggested that there are four broad prerequisites that must be met before we can implement regulation into the field and begin trials for clinical applications of heritable genome editing.[118] These will be discussed in turn, and in relation to the NAS principles as follows:

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[113] Hurlbut (n 110) 178
[114] David Baltimore, 'Why We Need a Summit on Human Gene Editing' (2016) 32(3) Issues in Science and Technology
[115] Hurlbut (n 110) 187
[116] Victor J. Dzau et al., 'Wake-Up Call from Hong Kong' (2018) 362 (6420) Science 1215
[117] NASEM, *Human Genome Editing: Science, Ethics and Governance* (The National Academies Press 2017) 182
[118] Hess (n 64)

3.3.1. Broad Societal Consensus

The concept of Broad Societal Consensus (BSC) suggests that before we can even consider introducing clinical applications of germline editing, society must be given an informed and unbiased overview of what such treatment could entail, and how it may be harmful to society. It also assures that not only scientific opinion is given centre stage on the issue, rather, Lander has suggested that 'unless a wide range of voices are equitably engaged from the outset'[119] efforts to regulate clinical germline editing will lack legitimacy and may backfire. Indeed, the NAS committee identified BSC about the 'appropriateness of the proposed application'[120] of gene editing techniques as a crucial stipulation to introducing them into a clinical setting.

Following from this, questions arise as to who should be involved in this conversation and what it should entail. In its 2015 statement, the NAS included a broad range of people to be involved in a discussion about the 'acceptable uses [if any] of human germline editing,' including: 'biomedical scientists…ethicists, health care providers, patients, and their families…policymakers…faith leaders'[121] and others. However, in its 2017 statement the conversation now included 'the public' (which was not defined any further at any point in the statement), and the conversation was now centred around the question as to whether germline editing would be permissible for enhancement purposes, as it was assumed that it was already permissible for therapeutic purposes. In doing so, Baylis suggests that the original question of *who* has become 'opaque,' and the question of *what* has been transformed from a question about the moral demarcation line between somatic and germline gene editing, to a question about the line between germline editing for therapeutic and enhancement purposes; a transformation that she finds to be 'problematic, to say the least.'[122]

It is also important to ask why BSC is a necessary stipulation to introducing HGE in a clinical setting, where some may suggest such a decision should be left up to experts in their respective fields, it is maintained here that to not include the general public in such a decision would lead to greater misinformation and mistrust in governance. The Global Risks report 2015 found that 'given the power of public opinion to shape regulatory responses, the general public must also

[119] Lander (n 99)
[120] NASEM (n 100)
[121] Ibid
[122] Françoise Baylis, 'Human Germline Genome Editing and Broad Societal Consensus' (2017) 1 Nature Human Behaviour 2

be included' in such conversations and stated that governance would be more stable 'if the various stakeholders likely to be affected are involved in the thinking about potential regulatory regimes.'[123]

However, whilst including the public in such a conversation is necessary, this is a difficult task considering that here 'the public' includes all potential stakeholders, which, with the far-reaching potential of such technology, could include most people in the world. Given the various cultural differences across different nations, it seems coming to a united decision on how best to implement HGE in a clinical setting would be a near impossible task. A study by the Pew Research Centre found that whilst a majority of Americans had heard of gene editing techniques, a substantial minority (42%) had not heard anything about it at all. Those who had heard about the technology were further divided on the extent to which they would be comfortable introducing those techniques into daily life, with religious divides being highlighted as among the most prominent.[124] If such divides exist within nations, can we really expect any sort of worldwide unity?

A final issue to add further complication to enforcing BSC is that of misinformation. Headlines concerning new technology will often exaggerate the extent to which such technologies are successful or their efficacy for the sake of selling a story. For example, where TALENS and ZFN gene editing technologies have had two prominent successful cases, reporting on such has totally understated the extent to which such technologies have been unsuccessful. After the success, the Today Show reported that 'gene-editing treats baby girl's leukaemia' and gushed over how the story 'had all the elements of a movie script,'[125] despite the highly experimental nature of the treatment, and doctors being sceptical of the extent to which it was the sole treatment of the child. Headlines as such give the public the illusion that gene-editing techniques are far better established than they truly are, and that potentially life changing treatment is just around the corner. As previously mentioned, this false hope could lead to those in desperate need of medical treatment to travel to countries with unregulated, potentially dangerous HGE practices because they have not been informed fully of the associated risks.

[123] World Economic Forum, 'Global Risks' (10th edn, 2015)41
[124] Cary Funk et al., 'U.S. Public Opinion on the Future Use of Gene Editing' (2016) Pew Research Centre
[125] Maggie Fox, 'Gene-editing technique treats baby girl's leukaemia' (*Today* 2015), available at https://www.today.com/health/gene-editing-technique-treats-baby-girls-leukemia-t56596

In the UK, given the history of using referendums as a method of gathering BSC as to a pressing issue, one might suggest the use of this method to decide whether the government will permit clinical applications of HGE. However, past referendums have shown how easily, and far misinformation can travel and even dramatically affect the result of the referendum, with it being suggested that 'political elites delegated a decision of profound public interest to a social divisive process requiring no reflection or engagement.'[126] In effect, the combination of misinformation, a climate of apathy and political distrust, and a decision-making process which required little to no engagement, led to the ill-informed Brexit decision.

As such it seems that whilst establishing BSC is necessary to ensuring a safe implementation of HGE techniques, in practice it seems that this is a harder task than one might initially think. It is submitted, that; as recommended by the Nuffield Council of Bioethics; to garner BSC it is essential to establish an international 'commission, independent of the government…which would have the function of helping to identify and produce and understanding of public interest through promotion of public debate.'[127]

3.3.2. Creation of Standards Distinguishing Between Acceptable and Unacceptable Applications:

As an extension of the establishment of BSC, it is necessary to decide which applications of human gene editing are acceptable and which are not. Here, two main debates arise; these are between using human gene editing for therapeutic versus enhancement purposes, and heritable versus non-heritable applications. Whilst the main arguments for and against such applications have been discussed earlier, it is important to establish such parameters at an early stage so that there is a recognised limit to the extent to which human gene editing technologies are applicable; such limits are likely to be influenced by societal views on the associated risk and benefit. For example, a recent study has found that the perceived societal risk of human gene editing was lower among participants informed of potential therapeutic applications of the technology compared to those who were informed on the potential of enhancement edits.[128] This suggests that the limit to such technology should be established at a point where the sole purpose of the treatment is genetic enhancement.

[126] Nuffield Council of Bioethics (n 5) 142
[127] Ibid, 143
[128] Emily L. Howell et al., 'Enhanced Threat or Therapeutic Benefit? Risk and Benefit Perceptions of Human Gene Editing by Purpose and Heritability of Edits' (2022) 25(2) Journal of Risk Research 147

Indeed, such a position is supported by NAS who has recommended that, at this time we 'should not authorise clinical trials of somatic or germline genome editing for purposes other than treatment or prevention of disease or disability.'[129] One of the main arguments to uphold this recommendation is the fear that 'public outcry about such an ethical breach could hinder a promising area of therapeutic development.'[130] Certainly, it would be a great disservice to those who have pioneered a technology whereby there is a real possibility of treating monogenic diseases, such as sickle cell anaemia and Huntington's disease, to have such research limited due to experimental research on the use of the technology for inappropriate purposes. Moreover, it is in the interests of 'due care' to ensure that the outer limits of human gene editing are established early on, as it will allow researchers to proceed cautiously and incrementally with their research, as is required by adherence to such a principle. [131]

3.3.3. Establishing Preconditions for Experimentation and Clinical Trials

Hess's third requirement suggests that prior to carrying out any clinical trials, there should be a universally assented to set of preconditions established as to how human experimentation could be performed safely. This creation of a universal minimum standard for clinical trials ensures that doctors are held to the highest standard and can be held accountable against such standard where problems arise. As has been previously discussed, Dr He's experiment fell short of any standards, whether that be ethical or scientific, thus such a list of predicate conditions may ensure that similar rogue experiments cannot repeat themselves. The 2017 NAS report recommends a comprehensive list of conditions that could be adopted form the basis of such preconditions:

I. The absence of reasonable alternatives.
II. Restriction to preventing serious disease.
III. Restriction to editing genes that have been convincingly demonstrated to cause or to strongly predispose to that disease.
IV. Restricting to converting such genes to versions that are prevalent in the population and are known to be associated with ordinary health.

[129] NASEM (n 117) 192
[130] Edward Lanphier et al., 'Don't Edit the Human Germline' (2015) 519 Nature 410
[131] NASEM (n 117) 183

V. Availability of credible preclinical data on risks.
VI. Ongoing rigorous oversight during clinical trials.
VII. Comprehensive plans for long-term, multigenerational follow up that still respect personal autonomy.
VIII. Maximum transparency.
IX. Continued reassessment of both health and societal benefits, with broad ongoing participation by the public.
X. Reliable oversight mechanisms to prevent extension to uses other than preventing a serious disease or condition.[132]

These prerequisites seem to well encompass issues that have been previously discussed and ensure that the conversation is not only had prior to clinical trial approval but can develop organically alongside HGE techniques. Moreover, it is easy to see how these predicates tie in closely with the overarching principles for developing a framework. For example, there is a direct correlation between the third and fourth predicates and the principle of responsible science. In following such principles, the law can develop incrementally to ensure the best possible governance of HGE techniques.

3.3.4. Regulatory Regime and Approval Process for Research and Clinical Applications

Finally, Hess suggests that an international framework might detail the required level of regulation and 'hold out robust regulatory regimes as an example for any countries that have not yet implemented such regimes.'[133] One might look to the UK's HFE Authority as an example of a body that has to date well governed current heritable genome editing research. Under the HFEA (2008), the authority has the discretion to develop regulatory policy to govern the exercise of its powers within the scope of the Act. This process allows for a more flexible approach to regulation, as it avoids going through the parliamentary legislative amendment process every time new regulations are approved. Through the regulation of Pre-Implantation Genetic Diagnosis (PGD) the authority has highlighted the importance of consulting stakeholders in the process, and of an internal appeal system. The Nuffield Council also stressed the importance of the authority's decisions being subject to individual judicial review.

[132] NASEM (n 117) 134-135
[133] Hess(n 64) 1394

This was illustrated in the case of *Quintavalle* whereby it was suggested that the use of PGD had the sole purpose of embryo selection, a power which did not fall within the authority's jurisdiction.[134] However, the courts unanimously dismissed the appeal on the grounds that subject to prohibitions found in subsection three of the Act, 'the licensing power of the authority is defined in broad terms.'[135] What is crucial here is not the facts of the case, but the approach taken by the courts. In dismissing the appeal, they affirm the broad powers delegated to the authority; but the vital element here is that the authority *can be* independently reviewed by the courts. This is often an issue that arises where complex technical problems are involved, as the only people who can really hold the bodies to account are the bodies themselves, which could give rise to extra-jurisdictional decisions being made. Thus, it is sustained that a similar judicial review and appeals process should be implemented to ensure accountability on the part of those responsible for authorising clinical trials for HGE.

However, one issue that has caused difficulty is that the authority is not very accessible to the general public. When applying for assisted reproductive treatments, patients will have to apply directly to the authority before they can be approved, especially in the case of more experimental treatments. However, studies have shown that this process is often difficult for the average person to understand, and there remains a lack of trust in such authorities given recent data breaches. For example, one patient suggested that the authority is 'very detached' and 'feels like a big unknown'.[136] In that sense, it is submitted that to ensure that a similar licensing authority for the governance of HGE techniques is successful, it is important for this body to be transparent in its aims, and intentions. In garnering public trust an authority will also receive greater support in its endeavours in developing the technology.

3.4. Summary to Part Three

Having looked closely at the possible modes of governance available to us when dealing with HGE, it seems abundantly clear that a loosely put together patchwork of legislation will not be an adequate solution. Whilst the framework considered above would theoretically provide a

[134] *R (Quintavalle) v Human Fertilisation and Embryology Authority (Secretary of State for Health Intervening)* [2005] UKHL 28
[135] Ibid, at 570, per Lord Hoffman
[136] Claire Carson, Lisa Hinton, Jenny Kurinczuk et al., 'I haven't met them, I don't have any trust in them. It just feels like a big unknown' A Qualitative Study Exploring the Determinants of Consent to use Human Fertilisation and Embryology Authority Registry Data in Research' (2019) British Medical Journal Open 9, 9

solid solution to many of the issues stemming from HGE, it comes with the caveat of practicality. In a perfect world, all countries would cooperate harmoniously to come to a unanimous decision and stick to such regulations. History has shown that this is unfortunately not a reality, often the burden will fall on a small number of states to implement global regulation to which assent is limited. Thus, it is submitted that gathering international agreement will be a long process, nonetheless this should not be a deterrent. We have already considered the great potential that germline editing could entail, and we should not allow for reckless regulation to hinder this.

4. Conclusion

This article has sought to develop a better understanding as to how the law can reconcile the numerous socio-legal issues arising from the recent proliferation in the use of HGE technology. Such questions rightfully impose serious concern on whether we can safely and ethically authorise the use of this technology. In doing so, it has explored the widening rift between researchers' need to make broad swathes towards scientific progression and public engagement with such technology. Those who advocate in favour of scientific progress suggest that HGE in a clinical setting is an inevitability and should be fully embraced into society. However, it is held here that in no other aspect of social life would this be acceptable. Where some may be 'sceptical about the value of public involvement'[137] it is maintained in line with Hurlbut that the judgment of even a 'whole professional community should not be privileged over a societal commitment to democratic governance.'[138]

Rather it is sustained that having considered the social and ethical implications the only feasible way to deal with such issues is via a carefully devised international governance framework. International cooperation is an essential factor in ensuring the success of such framework as it is held that these implications transcend state lines; however, this is much easier said than done. We have seen the effects of a failure of international collaboration in the context of environmental regulation, and it is submitted that in a similar vein the global nature and potential human impact of a misuse of HGE could be devastating. Where Dr He's experiment may have acted as a catalyst in arousing greater engagement in the debate; it is asserted that to

[137] Simon Burall, 'Don't Wait for an Outcry About Gene Editing'(2018) 555 Nature 439
[138] Hurlbut (n 111)188

wait for another rogue misuse of the technology, with potentially devastating consequences, would be a disservice to the life-saving potential that HGE holds.

An appraisal of the Criminal Justice System's Fairness and Ability to Promote Effective Participation in Light of Society's Wealth Disparities

Carina Rebecca Oliva

"Our courts have our faults, as does any human institution, but in this country our courts are the great levellers, and in our courts all men are created equal."[1]

Introduction

In the last decade there has been a 40% reduction in the number of law firms carrying out legal aid work. It is estimated that £135 million is needed to address the current backlog of 59,000 Crown Court cases and to prevent the exodus of more criminal legal aid lawyers.[2] The consequences of the shortage of lawyers and delays in the criminal justice system (CJS) have been felt predominantly by the lower socio-economic class, who demographically account for the majority of defendants in the CJS and now face an access to justice crisis.

Legal aid is a government-funded scheme for individuals who cannot afford legal advice or representation.[3] It aimed to promote legal equality by ensuring all individuals could vindicate their fair trial right[4] and access legal representation, regardless of their socio-economic status.[5] Those from lower-socio economic backgrounds who cannot afford legal representation rely on legal aid. It was first established under the Legal Aid and Advice Act 1949 and was available following a means test and an 'interest of justice' test. The idea was that free legal advice would be provided within the 'existing structure of the legal profession'[6] where solicitors and barristers would be paid by the state on a case-by-case basis. The criminal legal aid system

[1] Harper Lee, *To Kill A Mockingbird* (Arrow Books 2006) 226-227.
[2] Dominic Casciani, 'Legal aid: Review calls for £135m funding to stem courts crisis' *BBC News* (16 December 2021) < https://www.bbc.co.uk/news/uk-59688504> accessed 14 April 2022.
[3] Jacqui Kinghan, 'A Guide to Public Interest Law' (University College London, 2019) <https://www.ucl.ac.uk/access-to-justice/files/uclpubliclawguide2019pdf> accessed 2 November 2021.
[4] Human Rights Act 1998, sch 1, pt 1, art 6.
[5] Jacqui Kinghan, 'A Guide to Public Interest Law' (University College London, 2019) <https://www.ucl.ac.uk/access-to-justice/files/uclpubliclawguide2019pdf> accessed 2 November 2021.
[6] Sir Christopher Bellamy, 'Independent Review of Criminal Legal Aid' (GOV.UK, 2021) 4.2 <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1041117/clar-independent-review-report-2021.pdf> accessed 12 April 2022.

became a reality in 1960 and 80% of the population were eligible for some form of legal aid.[7] Two statutory duty solicitor schemes provided 'immediate assistance'[8] for police station detainees and unrepresented defendants in the Magistrate's Court.

The Legal Aid, Sentencing and Punishment of Offenders Act 2012 (LASPO) was a push for austerity and dramatically reduced the number of legal aid areas. However, this reform was about reducing public expenditure by cutting 'unnecessary and adversarial litigation'[9] rather than improving access to justice. Three of the aims related to finance while only one concerned legal aid eligibility.[10] In 2019 it was revealed that LASPO had successfully met its objective with a yearly saving of £140 million.[11] However the cost of the recent pandemic has outweighed this saving by slowing the progression of cases through the CJS. It is estimated that it will cost £220 million and take 2 years to return to pre-lockdown court wait times.[12]

Following legal aid austerity reforms and the introduction of LASPO the lower-socio economic class's position has worsened. The reformed legal aid eligibility criteria means many individuals no longer qualify under the new scheme.[13] As will be discussed in Part 2, there has been an influx of litigants in person (LIPs) in the courts, who represent themselves without a practising lawyer as they cannot afford to self-fund private representation. The LASPO financial saving was at the cost of access to justice and equality of arms; that the prosecution and defence have equal opportunity to present their case and access to legal expertise to do so. LIPs do not have the same legal skill set or knowledge as a legal practitioner which impedes their access to justice,[14] where they are confronted with a plethora of challenges in their ability

[7] Freya Hawken, 'Failed justice: the impact of the Legal Aid, Sentencing and Punishment of Offenders Act 2012 on the legal system of England and Wales' (2019) 24 Coventry Law Journal 129, 129.
[8] Alastair Gray, 'The Reform of Legal Aid' (1994) 10 Oxford Review of Economic Policy 51, 55.
[9] Ministry of Justice, *Legal Aid Reform in England and Wales: the GovernmentResponse* (Cm 8072, 2011) 4.
[10] Freya Hawkin, 'Failed justice: the impact of the Legal Aid, Sentencing and Punishment of Offenders Act 2012 on the legal system of England and Wales' (2019) Cov L.J. 129, 131.
[11] The Justice Committee, 'The Future of Legal Aid' (House of Commons, 2021) 18 <https://committees.parliament.uk/publications/6979/documents/72829/default/> accessed 22 April 2022.
[12] Ana Speed, Callum Thomson and Kayliegh Richardson, 'Stay home, stay safe, save lives? An analysis of the impact of COVID-19 on the ability of gender-based violence to access justice' (2020) 84(6) Journal of Criminal Law 539, 549.
[13] Donald Hirsch 'Report on the affordability of legal proceedings for those who are excluded from eligibility for criminal legal aid under the Means Regulations, and for those who are required to pay a contribution towards their legal costs' (The Law Society 2018) 3 <https://repository.lboro.ac.uk/articles/report/The_affordability_of_legal_proceedings_for_those_excluded_from_eligibility_for_criminal_legal_aid/9470948> accessed 22 April 2022.
[14] Rabeea Assy, *Injustice in Person: The Right to Self-Representation* (OUP 2015), 11.

to effectively participate in court. Lawyers' support is necessary as it offers both a resilience mechanism and empowerment.[15]

Part 1 will examine how recent reforms have eroded legal equality and have had a disproportionate negative impact on the lower-socio economic class.[16] We will see how the introduction of fixed fees has reduced criminal legal aid lawyers' remuneration and several studies have demonstrated the impact of financial incentives on their decision-making which can adversely affect clients' legal outcomes.[17] Lawyers are increasingly more frustrated with the nature of their working life – many suffering from low morale. Many have moved away from criminal law completely or entered private work instead.[18] Furthermore, fewer trainees are being attracted to criminal legal aid work and the majority of those that start their careers there have little intention to continue long term.[19] As a result many areas in the UK are now facing a shortage of criminal legal aid lawyers.[20] This limits access to justice and therefore the fairness of the CJS for the less well off in society.[21]

Finally, a reoccurring theme in this article will be the impact of managerial measures in the adversarial system which have resulted in a working culture shift and conflicts of interest for legal aid lawyers.[22] These measures have been brought into force to improve efficiency rather than to improve effective participation and therefore LIPs continue to experience difficulties related to the structure of the adversarial court.[23] Part 3 will examine the working practices of private lawyers and public defenders and their impact on the fairness of the CJS particularly in light of the Early Guilty Plea Scheme (EGPS). We will consider the lower socio-economic

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[15] Roxanna Dehaghani and Daniel Newman, 'Criminal Legal Aid and Access to Justice: an empirical account of a reduction in resilience' (2021) 29 IJLP 1, 6.
[16] Rohini Teather 'Problems and solutions: the Westminster Commission on Legal Aid's report on sustainability in the sector is imminent' (Legal Action Group, September 2021) <https://www.lag.org.uk/article/211477/problems-and-solutions--the-westminster-commission-on-legal-aid-s-report-on-sustainability-in-the-sector-is-imminent> accessed 2 November 2021 .
[17] The Justice Committee, 'The Future of Legal Aid' (House of Commons, 2021) 20 <https://committees.parliament.uk/publications/6979/documents/72829/default/> accessed 22 April 2022.
[18] ibid, 17.
[19] James Thornton, 'Is publicly funded criminal defence sustainable? Legal aid cuts, morale, retention and recruitment in the English criminal law professions' (2020) 2 Legal Studies (Society of Legal Scholars) 230, 245.
[20] The Justice Committee, 'The Future of Legal Aid' (House of Commons, 2021) 66 <https://committees.parliament.uk/publications/6979/documents/72829/default/> accessed 22 April 2022 .
[21] James Thornton, 'Is publicly funded criminal defence sustainable? Legal aid cuts, morale, retention and recruitment in the English criminal law professions' (2020) 2(3) Legal Studies (Society of Legal Scholars) 230, 232.
[22] Andrew Sanders, Richard Young and Mandy Burton, *Criminal Justice* (4th edn, OUP 2010) 452.
[23] Adrian Zuckerman, 'No justice without lawyers - the myth of an inquisitorial solution' (2014) 33(4) CJQ 355.

class's distinct vulnerabilities, which undermine the voluntary nature of their plea decisions.[24] We conclude that engagement with the right to a fair trial and the CJS is heavily impacted by our socio-economic background. Those in the upper socio-economic class are better equipped to effectively participate in court, make autonomous decisions, access representation and in turn secure more favourable outcomes.[25]

This research topic was chosen to identify disparities in the experiences of the criminal courts within different socio-economic groups, to investigate how the CJS indirectly discriminates against the less well off in society and to determine its consequences namely, the inability to vindicate the right to a fair trial, to access justice, to effectively participate and finally to make free and informed plea decisions.

The article has adopted a socio-legal approach where the functioning of the CJS was considered in practice and some of the wider social issues were further informed though the study of the Law and Social Justice module at Newcastle Law School. The research method undertaken involved documentary analysis through an amalgam of sources including: books, academic articles, recent parliamentary reports, legislation, and case law.

Part 1. Legal aid reform

1.1. A changing legal aid legislative landscape

The introduction of the Green Form Scheme in 1973 was subject to a great deal of criticism which led to the legal aid reforms. It had allowed solicitors to give oral and written advice within a three-hour time limit. Advice was available following a basic means test carried out by law firms,[26] which unfortunately was open to abuse. It placed a great deal of trust in solicitors as it was their responsibility to account for their working hours. This scheme was blamed for increased legal aid expenditure given its difficulty to police. Where a solicitor correctly completed the form and their sums, Area Office Staff were unable to determine if work undertaken was necessary or carried out proficiently. Payments were calculated on an

[24] Rebecca K Helm, 'Conviction by Consent? Vulnerability, Autonomy, and Conviction by Guilty Plea' (2019) 83(2) Journal of Criminal Law 161, 164.
[25] ibid, 170.
[26] Alastair Gray, 'The Reform of Legal Aid' (1994) 10(1) Oxford Review of Economic Policy 51, 55.

hourly rate. So, the more time spent on a case the greater the sum of money they would receive. This did not incentivise efficient work and seemingly rewarded those who were less proficient. Furthermore, another issue which arose was the interpretation of 'separate matters'[27] which allowed a new form to be completed for each distinct matter. However, there was no definition of 'separate matter', and it was left open to the solicitor's interpretation.[28] A quality-mark system called franchising replaced the Green Form Scheme. Evidently the Green Form Scheme was not perfect, but the ensuing LASPO cuts were punitive and franchising simply created new problems surrounding legal equality.

Legal aid cuts reduced the number of criminal legal aid areas to the following: the determination of criminal charge proceedings, Parole Board proceedings directing an individual's release, disputes over a Parole Board's sentence calculation and disciplinary cases where the litigant had met the Tarrant principles, and the governor had approved representation.[29] Changes were also made to the legal aid eligibility test[30] or means test which has become more difficult to satisfy. These two steps undermined the CJS's fairness by limiting access to justice for the less affluent in society, reliant on legal aid.[31] More of those from disadvantaged backgrounds are now forced to resort to self-representation, which we will learn in Part 2 undermines both legal equality and effective participation.

Originally everyone was eligible for legal aid in the Crown Court and the purpose of means testing was simply to determine whether a defendant should make some contribution to their legal costs. Legal Aid Transformation (LAT) reforms brought in an upper eligibility threshold and if a defendant had a disposable household income of £37,500 or more, they would no longer qualify.[32] The threshold failed to consider external factors such as debt. The Government claimed to provide for these extenuating circumstances by introducing the option to apply for a hardship review.[33] 69% of the hardship fund safety net applications were granted,[34] however,

[27] John Baldwin, 'The Green Form: Use or Abuse?' (1988) 138 NLJ 631, 631.
[28] ibid
[29] Criminal Legal Aid (General) (Amendment) Regulations 2013, SI 2013/2790.
[30] Legal Aid, Sentencing and Punishment of Offenders Act 2012, pt 1.
[31] Terry McGuinness, 'Legal Aid: the review of LASPO Part 1' (House of Commons Library 2020) 4 <https://researchbriefings.files.parliament.uk/documents/CBP-8910/CBP-8910.pdf> accessed 20 April 2022.
[32] The Justice Committee, 'The Future of Legal Aid' (House of Commons, 2021) 27 <https://committees.parliament.uk/publications/6979/documents/72829/default/> accessed 22 April 2022.
[33] Terry McGuinness, 'Legal Aid: the review of LASPO Part 1' (House of Commons Library 2020) 31 <https://researchbriefings.files.parliament.uk/documents/CBP-8910/CBP-8910.pdf> accessed 20 April 2022.
[34] ibid

those who narrowly missed out on legal aid were hit hardest especially in light of the innocence tax (discussed later).

The legal aid means test,[35] a barrier to justice, requires defendants to make unaffordable contributions if they wish to maintain a socially acceptable standard of living.[36] It only allows for half of the average living costs and is well below the recognised poverty line. The living costs and income limit figures have not been increased since 2008 despite the average living cost having climbed by a quarter, while the minimum cost of living has risen even more sharply.[37] This finding was reiterated by the Supreme Court who held that the current means test required individuals to choose between access to justice and maintaining an acceptable standard of living as per the minimum income standard.[38] Now fewer people are eligible for legal aid and those that qualify in part are often unable to maintain an acceptable standard of living where they are required to make contributions. As a result, more individuals are forced to self-represent as they do not qualify for legal aid and cannot afford private representation. This undermines their effective court participation and legal equality (see Part 2).

While the reforms for the most part impacted the lower-socio economic class they also had some wider implications for those defendants who paid for private legal representation. Legal Aid Reform (LAR) and LAT changed defendants' ability to recover legal costs incurred where they received a not guilty verdict. Originally, in this case defendants recovered their costs from central funds following submission of a defendant's cost order. Post-LAT those who had failed to secure legal aid and paid for their representation were subjected to the 'innocence tax'[39] and could only claim back their fees at capped legal aid rates which were substantially lower than private fees.[40] Nigel Evans MP claimed that he lost a total of £130,000 in legal fees due to the 'innocence tax'.[41] The Government justified this policy because the Post Implementation

[35] Criminal Legal Aid (Financial Resources) Regulations 2013, SI 2013/471.
[36] Donald Hirsch 'Report on the affordability of legal proceedings for those who are excluded from eligibility for criminal legal aid under the Means Regulations, and for those who are required to pay a contribution towards their legal costs' (The Law Society 2018) 3 <https://repository.lboro.ac.uk/articles/report/The_affordability_of_legal_proceedings_for_those_excluded_from_eligibility_for_criminal_legal_aid/9470948> accessed 22 April 2022.
[37] ibid
[38] *R (UNISON) v Lord Chancellor* [2017] UKSC 51; [2017] 3 WLR 409, 438.
[39] The Justice Committee, 'The Future of Legal Aid' (House of Commons, 2021) 29 <https://committees.parliament.uk/publications/6979/documents/72829/default/> accessed 22 April 2022.
[40] Terry McGuinness, 'Legal Aid: the review of LASPO Part 1' (House of Commons Library 2020) 32 <https://researchbriefings.files.parliament.uk/documents/CBP-8910/CBP-8910.pdf> accessed 20 April 2022.
[41] ibid

Review found that it had reduced central funds expenditure from £101 million to £48 million. It seems particularly unfair that where the prosecution has forced an innocent defendant into the CJS that they are penalised for being unable to secure legal aid and not opting to self-represent.

1.2. Fixed fees and quality of representation

The 2006 Carter Review prompted the transition from hourly rates to fixed fees for legal aid.[42] These fees do not represent the time spent or the complexity of work being undertaken.[43] They do not provide a 'financial incentive to improve the quality or take on complex cases',[44] rather they act as a disincentive. When the work required, and the fixed fee do not correspond it undoubtedly impacts a lawyer's work ethic and style. Now, for criminal legal aid work to be profitable lawyers must take on a large caseload and cannot afford to dedicate the same level of attention to their cases.[45] Those solicitors working in firms which participate in both private and legal aid work need to do more work faster to make the static rates profitable and find it increasingly more challenging to meet private practice profit levels.[46] Lawyers are therefore reluctant to take on more complex cases undermining access to representation and stretched financial resources lead to poorer representation for the less well off,[47] which undermines legal equality.[48]

The Duty Solicitor Scheme's Police Station free pre-charge advice was undermined by the introduction of fixed fees. Police station work is unpopular amongst practitioners as it is underpaid, especially where the case is more complex, and it also requires solicitors to take on large numbers of cases to guarantee profit.[49] The standard fee payable is £169 and this is regardless of how many hours are spent in the station and therefore they are encouraged to 'get

[42] The Justice Committee, 'The Future of Legal Aid' (House of Commons, 2021) 20 <https://committees.parliament.uk/publications/6979/documents/72829/default/> accessed 22 April 2022.
[43] ibid, 3.
[44] Terry McGuinness, 'Legal Aid: the review of LASPO Part 1' (House of Commons Library 2020) 21 <https://researchbriefings.files.parliament.uk/documents/CBP-8910/CBP-8910.pdf> accessed 20 April 2022.
[45] The Justice Committee, 'The Future of Legal Aid' (House of Commons, 2021) 21-22 <https://committees.parliament.uk/publications/6979/documents/72829/default/> accessed 22 April 2022.
[46] Richard Moorhead, 'Legal Aid and the Decline of Private Practice: Blue Murder or Toxic Job?' (2004) 11(3) IJLP 159, 161.
[47] The Justice Committee, 'The Future of Legal Aid' (House of Commons, 2021) 21 <https://committees.parliament.uk/publications/6979/documents/72829/default/> accessed 22 April 2022.
[48] ibid, 21-22.
[49] Roxanna Dehaghani and Daniel Newman, 'Criminal Legal Aid and Access to Justice: an empirical account of a reduction in resilience' (2021) 29(1) IJLP 1, 6.

in and out'.[50] Many firms now avoid the issue of clients' detention since this involves the most laborious work for minimal profit and instead concentrate on police interviews. The most experienced lawyers are tempted to complete the least taxing work since it is less time-consuming, and they can delegate work to non-lawyers who do not have the necessary skill set to deal with more challenging cases.[51] Lawyers are a crucial source of resilience at the police station where they clarify the process for the defendant and challenge any impropriety on the part of the police officers. If a client does not have good support at this stage their rights and entitlements may be circumvented by the police. Therefore, the lower socio-economic class's legal equality is undermined where legal aid lawyers fail to provide necessary attention to police station cases and as a result the CJS's fairness is undermined.[52]

Lawyers' unwillingness to complete police station work encourages 'discontinuous representation'.[53] This is where a defendant has a different lawyer at every stage in their case. It undermines the fairness of a defendant's trial where the lawyer who represents them in court is unfamiliar with their case and the client-lawyer relationship is eroded.[54] Legal aid work in the Magistrate's Court is governed by fixed fees whereas Crown Court cases are valued using both fixed fees and hourly rates, making it the most profitable criminal legal aid work.[55] In short police station work is considered a 'loss-leader',[56] Magistrate's work is about 'cashflow'[57] rather than profit and Crown Court work is profitable and therefore the only area that makes criminal legal aid feasible. These circumstances are particularly problematic for lawyers' morale where parts of their work are seemingly valueless.[58] As a result their focus is on Crown Court cases, where the general approach is to spend as little time working as possible to make the maximum profit.[59] This juxtaposes with the position of a private fee-paying client

[50] ibid, 7.
[51] The Justice Committee, 'The Future of Legal Aid' (House of Commons, 2021) 21 <https://committees.parliament.uk/publications/6979/documents/72829/default/> accessed 22 April 2022.
[52] Roxanna Dehaghani and Daniel Newman, 'Criminal Legal Aid and Access to Justice: an empirical account of a reduction in resilience' (2021) 29(1) IJLP 1, 8.
[53] ibid, 7.
[54] ibid
[55] The Justice Committee, 'The Future of Legal Aid' (House of Commons, 2021) 12 <https://committees.parliament.uk/publications/6979/documents/72829/default/> accessed 22 April 2022.
[56] ibid, 22.
[57] ibid
[58] James Thornton, 'Is publicly funded criminal defence sustainable? Legal aid cuts, morale, retention and recruitment in the English criminal law professions' (2020) 2 Legal Studies 230.
[59] The Justice Committee, 'The Future of Legal Aid' (House of Commons, 2021) 22 <https://committees.parliament.uk/publications/6979/documents/72829/default/> accessed 22 April 2022.

where the solicitor is fully invested in vigorously advocating for their interests, in the knowledge that they will be sufficiently compensated for all their efforts.

Fixed fees affect the 'financial viability'[60] and the quality of service provided, the inevitable result is the erosion of legal equality as a lawyer may be more concerned with profits over the quality of representation provided. It is challenging to pin down the precise impact of fixed fees on the quality of defence work, but it is evident that the system is not working as it does not allow lawyers to perform to their best as they are overstretched and insufficiently remunerated. We are now seeing a monumental change in the criminal legal aid landscape where retainment problems have escalated, flowing from the consequences of fixed fees[61] and the recent pandemic's financial hardships.

1.3. Retention of criminal legal aid lawyers

Fixed fees have not only undermined the lower socio-economic class's quality of representation, but also their access to the CJS. They have resulted in a drop in the number of criminal legal aid firms which fell from 1861 in 2010 to 1090 in April 2021.[62] The legal aid lawyer retention issue stems from the fixed fees but is further exacerbated by the background public narrative. The media create an image of 'fat cat'[63] legal aid lawyers leaching off the tax-payer money and growing rich in the process. This is completely fictitious; legal aid work is not glamorous, nor lucrative.[64] Furthermore, these lawyers have been criticised for taking on unpopular cases: cases which impact areas far from their 'prosperous neighbourhoods'[65] and whose outcomes have little impact on their daily lives.[66] In response to this image created by the media legal aid lawyers commonly feel that they, and their work are not respected. They suffer from low morale and ultimately move on.[67]

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[60] ibid, 20
[61] Rohini Teather 'Problems and solutions: the Westminster Commission on Legal Aid's report on sustainability in the sector is imminent' (Legal Action Group, September 2021) <https://www.lag.org.uk/article/211477/problems-and-solutions--the-westminster-commission-on-legal-aid-s-report-on-sustainability-in-the-sector-is-imminent> accessed 2 November 2021.
[62] Sir Christopher Bellamy, 'Independent Review of Criminal Legal Aid' (GOV.UK, 2021) 6.5 <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1041117/clar-independent-review-report-2021.pdf> accessed 12 April 2022.
[63] HC Deb 22 October 2020, vol 682, col 494W.
[64] ibid
[65] Jacqueline Kinghan, *Lawyers, Networks and Progressive Social Change* (Hart, 2021) 149.
[66] ibid.
[67] Tom Smith, 'Trust, choice and money: why the legal aid reform "u-turn" is essential for effective criminal defence' (2013) 11 CLR 906, 911.

Morale relates to how an individual feels about their job. Finance and fixed fees have direct and indirect consequences. Direct consequences relate to the stress from not being able to make a living. Indirect consequences are connected to the value placed on work. For example, serious sex crime cases are emotionally draining and when you are inadequately remunerated for challenging work your morale plummets.[68] Lawyers are disgruntled with the fixed fees which made them work in ways which are 'restrictive, distasteful or even ethically uncomfortable'.[69] They are frustrated with their working life as they do not have the necessary time to prepare their cases to a high standard. Where they do go the extra mile, it is not profitable, and in light of their caseload it often results in burnout. These lawyers suffering from burnout are stretched thin over a large number of cases and are not adequately remunerated which in turn impacts the lower-socio economic class's experience of the CJS and the quality of representation provided.

Given that criminal legal aid lawyers are reliant on the Crown Court for their income the fall in the number of Crown Court cases is worrying. In 2010–11, there were 38,114 Crown Court cases but by 2018–19 this had dropped to 25,063.[70] This has negatively impacted on newly qualified junior barristers' workload and career development. Many have also speculated that this problem will be further exacerbated by the COVID 19 pandemic. Legal aid expenditure dropped from £838 million in 2019–20 to £563 million in 2020–21. Most criminal barristers faced financial problems throughout the pandemic. 4/5 had to take on personal debt or dip into savings to maintain their practice. Around ¼ have taken on more than 20,000 pounds in debt.[71] Therefore many more criminal legal aid barristers and providers will continue to leave the market. This poses a great challenge for the Government, following their recent policies to recruit more police and reduce the system backlog, the demand for legal aid is only going to grow. Legal aid expenditure is forecasted to increase by 13% in the year 2025/26.[72]

[68] James Thornton, 'Is publicly funded criminal defence sustainable? Legal aid cuts, morale, retention and recruitment in the English criminal law professions' (2020) 2 Legal Studies 230, 231.
[69] ibid, 248
[70] The Justice Committee, 'The Future of Legal Aid' (House of Commons, 2021) 23 <https://committees.parliament.uk/publications/6979/documents/72829/default/> accessed 22 April 2022.
[71] ibid, 27.
[72] Sir Christopher Bellamy, 'Independent Review of Criminal Legal Aid' (GOV.UK, 2021) 1.21 <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1041117/clar-independent-review-report-2021.pdf> accessed 12 April 2022.

There is a shortage of criminal legal aid barristers which undermines access to justice. Many cite the stagnant pay rates, a shortage of private work and resulting financial difficulty as their motivations to depart. Regardless of an increase in seniority and taking on more complex cases a criminal legal aid barrister's pay will not reflect this and they have no clear career progression.[73] Their fees have not been increased in 20 years which has exacerbated the issue of sustainability.[74] For example, a Plea and Trial Preparation Hearing is fixed at £126 which when broken down is lower than minimum wage.[75] A common trend observed is legal aid barristers leaving criminal work after securing a job with the Crown Prosecution Service who offer superior salaries and more room for career progression.[76] Lord Wolfson highlights that for the legal aid system to function there must be an adequate number of legal professionals to meet the need and he states, 'a system which means that people cannot vindicate their legal rights is a legal aid system that is not working'.[77] Incentives to remain in the criminal legal aid arena are practically non-existent and this means the retention and recruitment problem will spiral further.

1.4. The future of criminal legal aid lawyers

Criminal legal aid work is an ageing part of the legal profession with 50 being the average age of a solicitor and in some areas there are no practising solicitors under the age of 35.[78] This problem is also prevalent in the Bar and has been termed the 'sandwich' in the legal profession; there are new inexperienced barristers and older barristers coming up to retirement, but a gap in the middle with many leaving the profession around the 10-year mark.[79] In 2018 the Law Society's heat map demonstrated the shortage of duty solicitors and its concerns on the 'viability of criminal legal aid firms'[80] with fewer entering the profession. In addition to the

[73] The Justice Committee, 'The Future of Legal Aid' (House of Commons, 2021) 16 <https://committees.parliament.uk/publications/6979/documents/72829/default/> accessed 22 April 2022.
[74] ibid, 18.
[75] ibid, 19.
[76] Sir Christopher Bellamy, 'Independent Review of Criminal Legal Aid' (GOV.UK, 2021) 6.51 <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1041117/clar-independent-review-report-2021.pdf> accessed 12 April 2022.
[77] The Justice Committee, 'The Future of Legal Aid' (House of Commons, 2021) 5 <https://committees.parliament.uk/publications/6979/documents/72829/default/> accessed 22 April 2022.
[78] HC Deb 22 October 2020, vol 682, col 496W.
[79] The Justice Committee, 'The Future of Legal Aid' (House of Commons, 2021) 16 <https://committees.parliament.uk/publications/6979/documents/72829/default/> accessed 22 April 2022 .
[80] Sir Christopher Bellamy, 'Independent Review of Criminal Legal Aid' (GOV.UK, 2021) 4.39 <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1041117/clar-independent-review-report-2021.pdf> accessed 12 April 2022.

low rates of remuneration and legal aid lawyers' apparent low standing in public discourse other issues which act as deterrents are frequent unsocial hours, emotionally detrimental work for which there is little support, a 'poor work/life balance'[81] and 'high demands of regulatory compliance'.[82]

In May 2021 a survey revealed that over 50% of students would not wish to have a career in criminal legal aid because it was considered a 'dying' profession involving hard work for little pay.[83] Those trainees that do enter the criminal legal aid world merely use it to gain experience and 'springboard'[84] their careers into another area of law. If these opinions and patterns persist, in the absence of fee scheme reform, there will be an impending shortage of qualified criminal legal aid lawyers to defend suspects and the fairness of the CJS will be compromised.[85] Defendants' fair trials will be dismantled as they will be required to self-represent and will ultimately be disempowered, on an unequal footing with their represented counterparts. Furthermore, criminal legal aid work is a 'training ground'[86] for future judges therefore if the CJS is unable to recruit individuals the justice system will 'seize up'[87] because of the lack of experienced judges.

To address this problem, Bellamy has made several well-informed recommendations relating to fixed fees and remuneration. He suggested that a 15% increase of £100 million would be required by criminal legal aid firms so as they could 'invest in recruitment, compete for talent, maintain quality, provide training, and ensure retention'.[88] He felt that it would also be necessary to accompany this investment with structural fee scheme reform. This would ensure that any work completed was sufficiently remunerated reflecting the case complexity. He also

[81] The Justice Committee, 'The Future of Legal Aid' (House of Commons, 2021) 16 <https://committees.parliament.uk/publications/6979/documents/72829/default/> accessed 22 April 2022.
[82] ibid
[83] Sir Christopher Bellamy, 'Independent Review of Criminal Legal Aid' (GOV.UK, 2021) 3.1 <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1041117/clar-independent-review-report-2021.pdf> accessed 12 April 2022.
[84] James Thornton, 'Is publicly funded criminal defence sustainable? Legal aid cuts, morale, retention and recruitment in the English criminal law professions' (2020) 2(3) Legal Studies 230, 245.
[85] The Justice Committee, 'The Future of Legal Aid' (House of Commons, 2021) 66 <https://committees.parliament.uk/publications/6979/documents/72829/default/> accessed 22 April 2022.
[86] Sir Christopher Bellamy, 'Independent Review of Criminal Legal Aid' (GOV.UK, 2021) 6.5 <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1041117/clar-independent-review-report-2021.pdf> accessed 12 April 2022.
[87] ibid
[88] ibid, 16.4.

recommended that 'perverse incentives'[89] be removed and administrative costs kept to a minimum.

1.5. Legal aid franchising

In 2000 the introduction of franchising reduced the number of criminal legal aid providers significantly.[90] Not only did it seek to reduce legal aid expenditure, but the Legal Aid Board also wanted to ensure a good standard of legal advice and to promote a level-playing-field between legal aid clients and private clients. Therefore, it was a positive step towards securing a fairer CJS. It cut the number of criminal legal aid providers by more than half from 11,000 to 5,000. Those cut were mainly smaller providers who were not completing a significant quantity of legal aid work or could not meet the contractual requirements.[91] While these requirements perhaps improved the quality of service received, they simultaneously limited the options available to clients[92] and their access to justice.

The bureaucratic nature of these contracts drove many firms away and the profession is divided on whether better quality legal aid advice is being provided. The quality bureaucracy is said to have a 'bifurcation effect';[93] while it can improve 'quality and system management'[94] it also demotivates legal aid providers. Where this is the case the quality of representation provided may be negatively affected as the additional administrative requirements increase workload and lawyers become burnt out. To secure legal aid contracts there were several mandatory requirements. These related to law firms' expertise, location and opening hours.[95] Firms who secured contracts would be expected to have an experienced supervisor in each area of law in which they held a contract. A supervisor needed an existing caseload in the area of expertise

[89] ibid, 1.35.
[90] Richard Moorhead, 'Legal Aid and the Decline of Private Practice: Blue Murder or Toxic Job?' (2004) 11(3) IJLP 159, 161.
[91] ibid
[92] Ole Hansen, 'A limiting franchise on giving legal aid: Ole Hansen finds that cutting expenditure may be a higher priority than improving quality' *The Guardian* (London, 22 September 1989) <https://www.proquest.com/hnpguardianobserver/docview/186905812/fulltextPDF/4F18FC32F073488EPQ/1?accountid=12753> accessed 27 April 2022.
[93] Richard Moorhead, 'Legal Aid and the Decline of Private Practice: Blue Murder or Toxic Job?' (2004) 11(3) IJLP 159, 182.
[94] ibid
[95] Ole Hansen, 'A limiting franchise on giving legal aid: Ole Hansen finds that cutting expenditure may be a higher priority than improving quality' *The Guardian* (London, 22 September 1989) <https://www.proquest.com/hnpguardianobserver/docview/186905812/fulltextPDF/4F18FC32F073488EPQ/1?accountid=12753> accessed 27 April 2022.

or to show their experience through 'direct supervision and involvement in cases'[96] within the last year. In criminal law this could be shown through membership in the duty schemes. Supervisors were also expected to attend regular training and keep up to date in their legal area.[97] While there is clearly much to be gained from better management and better-quality work there is a real difference between doing good work and appearing to do good work. The latter can have the effect of eroding a 'professional's self-image'[98] and undermine their motivations for becoming a lawyer. Franchising was an effort to improve legal equality but it limited access to justice by reducing the number of legal aid providers.

Following the legal aid cuts legal aid solicitors suffered from a 'decline in income, greatly increased work burdens, high stress and low morale'[99] which together negatively impacted the system's fairness for the lower-socio economic class. The 'New Public Management' philosophy which emerged following the introduction of franchising and its creation of 'legal aid factories' were in part to blame.[100] These were firms which would come out top and performed large quantities of low-quality legal aid work but did so ultimately at the client's expense, undermining the quality of the lower socio-economic class's representation. Meanwhile firms with genuine altruistic motivations experienced all-time low morale levels.

1.6. Summary of Part 1

The lower socio-economic class are reliant on legal aid and recent austerity cuts have resulted in their disempowerment[101] and undermined their right to a fair trial. They have been disarmed against the prosecution in a way never experienced by those able to afford private representation. The quality of their legally aided representation suffers due to the fixed fees which have changed lawyers' working style to the lower socio-economic class's detriment.[102] Their ability to access legal advice is undermined by the ever-smaller pool of criminal legal

[96] Richard Moorhead, 'Legal Aid and the Decline of Private Practice: Blue Murder or Toxic Job?' (2004) 11(3) IJLP 159, 181.
[97] ibid
[98] ibid
[99] James Thornton, 'Is publicly funded criminal defence sustainable? Legal aid cuts, morale, retention and recruitment in the English criminal law professions' (2020) 2(3) Legal Studies 230, 231.
[100] ibid
[101] Roxanna Dehaghani and Daniel Newman, 'Criminal legal aid and access to justice: an empirical account of a reduction in resilience' (2021) 29(1) IJLP 1, 45.
[102] The Justice Committee, 'The Future of Legal Aid' (House of Commons, 2021) 21 <https://committees.parliament.uk/publications/6979/documents/72829/default/> accessed 22 April 2022.

aid providers,[103] the result flowing from lawyers' low morale, low remuneration and the bureaucracy of franchising.[104] Furthermore, fewer trainees are making the decision to enter criminal legal aid work.[105] Finally, the reduced number of criminal legal aid categories and the means test threshold means those who had previously qualified for legal aid are now being excluded and forced into self-representation as LIPs[106] which as we will see in the following section undermines the lower socio-economic class's legal equality and ability to effectively participate in court.

Part 2. Litigants in person (LIPs) and effective participation in the criminal courts

2.1. An introduction to LIPs

Everyone has the right to self-representation. However, since LASPO there has been an influx in the number of self-represented individuals, otherwise known as LIPs, as fewer individuals are eligible for legal aid.[107] The result is justice not being done.[108] There are different categories of LIPs; those who do not meet the legal aid criteria, those who cannot afford to make contributions to legal aid provision and those whose legal aid has been terminated on refusal of an unsatisfactory settlement.[109] During court participation LIPs face intellectual, practical, emotional and attitudinal barriers[110] which mean they cannot effectively participate to vindicate their self-representation right.[111] The problem is that the right of access to the court and the right of self-representation are often considered to be interchangeable.[112] This undermines the fairness of the criminal courts given that rights must be distinctly enforceable otherwise, they

[103] Sir Christopher Bellamy, 'Independent Review of Criminal Legal Aid' (GOV.UK, 2021) 6.5 <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1041117/clar-independent-review-report-2021.pdf> accessed 12 April 2022.
[104] James Thornton, 'Is publicly funded criminal defence sustainable? Legal aid cuts, morale, retention and recruitment in the English criminal law professions' (2020) 2(3) Legal Studies 230, 231.
[105] The Justice Committee, 'The Future of Legal Aid' (House of Commons, 2021) 16 <https://committees.parliament.uk/publications/6979/documents/72829/default/> accessed 22 April 2022.
[106] Freya Hawkin, 'Failed justice: the impact of the Legal Aid, Sentencing and Punishment of Offenders Act 2012 on the legal system of England and Wales' (2019) Cov L.J. 129, 131.
[107] Freya Hawkin, 'Failed justice: the impact of the Legal Aid, Sentencing and Punishment of Offenders Act 2012 on the legal system of England and Wales' (2019) Cov L.J. 129, 131
[108] HC Deb 5 September 2017, vol 628, col 3
[109] Norman Lewis 'Litigants in Person and Unrepresented Defendants' (1972) 35 MLR 494, 494-495
[110] Gráinne McKeever, 'Remote Justice? Litigants in Person and Participation in Court Processes during Covid-19' (MLR, 3 August 2020) <https://www.modernlawreview.co.uk/mckeevers-remote-justice/> accessed 20 November 2021
[111] Human Rights Act 1998, sch 1, pt 1, art 6
[112] Rabeea Assy, *Injustice in Person: The Right to Self-Representation* (OUP 2015) 12

'might as well not exist'.[113] Our adversarial court system is rooted in the presumption that there is equality of arms between the prosecution and the defence. However, as we will see this is rarely the case in a LIP's experience and the confidence in the CJS is undermined where their outcomes may be considered unfair.[114]

LIPs have been stereotyped as 'legally uniformed'[115] and 'difficult'.[116] Typically they are younger with low income and education levels which exacerbate their vulnerability in the court.[117] They are not legally trained and have limited, if any legal knowledge or skills, which undermines their participation. Several studies have demonstrated that in comparison to represented litigants regardless of the merits of their case they are more likely to receive unfavourable decisions[118] which calls into question the fairness of the CJS. There should be safeguards in place to level the playing field between represented and unrepresented litigants and to ensure the effective participation of all parties regardless of their respective financial means.[119]

2.2. Practical and intellectual barriers to effective court participation

Practical barriers are concerned with LIPs being unaware of where to go to get help with self-representation. There is no one 'central information point',[120] information sources are inconsistent in their message and LIPs are unsure which sources are trustworthy.[121] The intellectual barrier concerns the use of complex legal language or legalese coupled with the confusing court procedures[122] which can make the entire system 'incomprehensible'[123] and in turn LIPs cannot effectively participate. Meanwhile, represented parties exploit specialist

[113] Freya Hawkin, 'Failed justice: the impact of the Legal Aid, Sentencing and Punishment of Offenders Act 2012 on the legal system of England and Wales' (2019) Cov L.J. 129, 135
[114] Sir Christopher Bellamy, 'Independent Review of Criminal Legal Aid' (GOV.UK, 2021) 3.4 < https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1041117/clar-independent-review-report-2021.pdf> accessed 12 April 2022
[115] Richard Moorhead, 'The Passive Arbiter: Litigants in Person and the Challenge To Neutrality' (2007-09) 16 (3) Social & Legal Studies 405, 406
[116] ibid
[117] Jessica Jacobson and Penny Cooper, *Participation in Courts and Tribunals Concepts, Realities and Aspirations* (Bristol University Press 2020) 43
[118] Rabeea Assy, *Injustice in Person: The Right to Self-Representation* (OUP 2015) 11
[119] ibid, 12
[120] Gráinne McKeever, 'Remote Justice? Litigants in Person and Participation in Court Processes during Covid-19' (MLR, 3 August 2020) <https://www.modernlawreview.co.uk/mckeevers-remote-justice/> accessed 20 November 2021.
[121] ibid
[122] ibid
[123] Rabeea Assy, *Injustice in Person: The Right to Self-Representation* (OUP 2015) 14.

language in their favour aiding court proceedings. Court paperwork is inaccessible for LIPs because the legalese is heavy and lengthy. In addition, it is subject to 'numerous deadlines and filing requirements'[124] which are 'unfamiliar and demanding'.[125] Assistance from the court staff is unreliable since they are usually time pressured or do not have the required knowledge. Where they do offer help, they are astutely aware of the fine line between giving practical advice and legal advice.[126]

Simplification of the legal jargon would fail to address the inherent complexities in the law.[127] To fully grasp the complexities of the language used you must go beyond understanding technical terms, one should be able to identify the appropriate legal rules, to recognise the relevant facts, to classify them to a legal category and 'engage in a particular type of interpretation and reasoning'.[128] All of these skills are natural to a lawyer but quite foreign to a LIP. A LIP's difficulty interpreting legalese puts them at an unfair disadvantage, impeding their effective participation in court and in turn potentially leading to unfair outcomes.[129]

The Judicial Working Group on LIPs petitioned the Ministry of Justice and the courts to create audio-visual material to provide LIPs with information on what they will experience in court and what is expected from them. They suggested a review of the available information online to ensure that it was easily accessible and clearly defined the process along with the various courses of action to best prepare their case. While there has been some progress such as videos and online guidance, including downloadable forms, the Chief Executive of HM Courts and Tribunals Service, addressing the House of Commons Justice Committee felt the wording of the forms remained an issue and stated that LIPs should not be expected to know how to complete forms designed for trained lawyers.[130]

2.3. Crime control trends

[124] Sarah Moore and Alex Newbury, *Legal Aid in Crisis: Assessing the Impact of Reform* (Bristol University Press 2017) 45.
[125] ibid
[126] ibid, 46.
[127] Rabeea Assy, *Injustice in Person: The Right to Self-Representation* (OUP 2015) 74.
[128] ibid
[129] ibid, 11.
[130] Sarah Moore and Alex Newbury, *Legal Aid in Crisis: Assessing the Impact of Reform* (Bristol University Press 2017) 45-46.

The CJS has become more concerned with efficiency and crime control measures and less focused on due process protections. It is no longer so attentive in ensuring defendants' voices are heard, especially where the defendant is a LIP who slows court processes down. Adopting the crime control model, the CJS seeks to process the maximum number of cases as quickly as possible. Packer's crime control model is like a 'conveyor belt';[131] it is continuously moving cases through the courts without stopping. It is managerial in nature and emphasis is on reducing the time spent in court and the number of cases which make it to trial.[132] On the other hand, the due process model is based on the presumption that a defendant will have their 'day in court',[133] this is rooted in the principle of natural justice. Natural justice provides that defendants should have the 'full and fair opportunity of being heard'.[134] Due process also supports the 'golden thread' protecting the defendant's right to a fair trial, requiring that the prosecution has the legal burden and must prove guilt.[135] The prosecution's evidence will be tested to determine its merit. The process is like an 'obstacle course'[136] and the prosecution at each stage are confronted with various barriers to furthering their case. Therefore, the move to crime control away from due process has disarmed the defendant against the prosecution and ignores the protections of natural justice and the 'golden thread'.

A LIP is seen as an illegitimate court participant causing disruption[137] and crime control measures mean that LIPs often report that they do not feel listened to. The rules of evidence are not communicated to them, yet judges, with the aim of keeping litigants focused on the set material, end up policing relevance.[138] Litigants end up feeling that their voice is not being heard each time they are dismissed or reprimanded for breaching the rules and it often seems that decisions never go their way. Meanwhile their opponent appears to receive a higher level

[131] Ed Johnson, 'The adversarial defence lawyer: myths, disclosure and efficiency - a contemporary analysis of the role in the era of the Criminal Procedure Rules' (2020) 24(1) International Journal of Evidence & Proof 35, 49.
[132] ibid
[133] Jo Easton, 'Where to Draw the Line? Is Efficiency Encroaching on a Fair Justice System?' (2018) 89(2) The Political Quarterly 246, 250.
[134] *General Medical Council v Spackman* [1943] 2 All ER 337, 343
[135] Ed Johnson, 'The adversarial defence lawyer: myths, disclosure and efficiency - a contemporary analysis of the role in the era of the Criminal Procedure Rules' (2020) 24(1) International Journal of Evidence & Proof 35, 48.
[136] Matthew Stanbury, 'Reduction in sentence for a guilty plea: comments on the proposed reforms' (2016) 1 Sentencing News 6, 6.
[137] Gráinne McKeever, 'Remote Justice? Litigants in Person and Participation in Court Processes during Covid-19' (MLR, 3 August 2020) 3 <https://www.modernlawreview.co.uk/mckeevers-remote-justice/> accessed 20 November 2021.
[138] Richard Moorhead, 'The Passive Arbiter: Litigants in Person and the Challenge To Neutrality' (2007-09) 16 (3) Social & Legal Studies 405, 416-417.

of attention which creates a sense of unfairness. Rather than assisting LIPs in obtaining justice the adversarial system creates 'confusion, hindrance, and frustration'[139] and many have reported feeling that it appeared the judge was not interested in finding the truth which reflects the shift to crime control and its associated unfairness.[140]

2.4. Emotional barriers

Emotional barriers results in LIPs struggling to maintain objectivity due to their emotional investment which undermines effective participation. Their case is personal and the consequences impact their life.[141] Lawyers understandably are less 'emotionally-engaged'[142] and therefore are unlikely to experience these feelings of 'discomfort, alienation and isolation'.[143] They have a wealth of advocacy experience and are therefore in a stronger position to give 'expression to defendants' participation'[144] than an accused.

2.5. The adversarial judge: the 'passive arbiter'[145]

Our adversarial system and the role it defines for judges creates systemic difficulties and inequalities for LIPs.[146] Adversarial legal systems require 'two self-interested opponents'[147] to present their 'evidence and arguments before a neutral judge whose task is to establish the facts and apply the law'.[148] This is a system designed for lawyers. There has been much academic debate surrounding the role of the judge in LIP cases. One school of thought believes that judges, as promoted by the adversarial system should demonstrate 'judicial passivity and

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[139] ibid, 417.
[140] ibid, 414.
[141] Gráinne McKeever, 'Remote Justice? Litigants in Person and Participation in Court Processes during Covid-19' (MLR, 3 August 2020) <https://www.modernlawreview.co.uk/mckeevers-remote-justice/> accessed 20 November 2021.
[142] Abenaa Owusu-Bempah, 'The Interpretation and Application of the Right to Effective Participation' (2018) 22(4) International Journal of Evidence & Proof 321, 328.
[143] ibid
[144] ibid
[145] Richard Moorhead, 'The Passive Arbiter: Litigants in Person and the Challenge To Neutrality' (2007-09) 16 (3) Social & Legal Studies 405.
[146] Abenaa Owusu-Bempah, 'The Interpretation and Application of the Right to Effective Participation' (2018) 22(4) International Journal of Evidence & Proof 321, 328.
[147] Rabeea Assy, *Injustice in Person: The Right to Self-Representation* (OUP 2015) 12.
[148] ibid

neutrality'[149] behaving as 'passive arbiters'.[150] However, if this approach is to continue, steps should be taken to bridge the power imbalance between the parties.[151]

LIPs disturb courtroom norms, challenging judges' ability to behave consistently and put pressure on their communication and court management skills.[152] There is inconsistency in how judges treat LIPs which is particularly problematic and demonstrates the great deal of uncertainty surrounding the 'boundaries of legitimate assistance'.[153] Tugendhat LJ explained that courts must see justice being done and therefore a court should go so far as to look for arguments in the self-representee's interest.[154] By contrast LJ Mostyn was not so lenient when it came to compliance with procedural requirements and he stated that there is not 'one rule for the rich and one rule for the poor'.[155] Judges that are reluctant to assist LIPs may be concerned with professional economy. They do not want to deprive lawyers from cases by encouraging self-representation.[156] Nevertheless, there needs to be consistency in LIP's treatment and judges should understand their needs and as far as legitimately possible facilitate effective participation and a fair trial.

2.6. The myth of party control

A positive outcome of the adversarial system is the level of control a defendant has over the proceedings which aims to inspire confidence and regardless of the outcome establish a sense of justice being done.[157] It claims to be more efficient in identifying key legal and factual issues, given that the parties are the ones to investigate and present their cases[158] and should have a better understanding of all the facts and easy access to the relevant evidence. However,

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[149] ibid
[150] Richard Moorhead, 'The Passive Arbiter: Litigants in Person and the Challenge To Neutrality' (2007-09) 16 (3) Social & Legal Studies 405.
[151] Rabeea Assy, *Injustice in Person: The Right to Self-Representation* (OUP 2015) 15.
[152] Richard Moorhead, 'The Passive Arbiter: Litigants in Person and the Challenge To Neutrality' (2007-09) 16 (3) Social & Legal Studies 405, 405.
[153] Hazel Genn, 'DO-IT-YOURSELF LAW: Access to Justice and the Challenge of Self-Representation' (Atkin Memorial Lecture, London, 12 October 2012) <https://www.ucl.ac.uk/laws/sites/laws/files/atkin-memorial-lecture-2012-do-it-yourself-law-hazel-genn.pdf> accessed 6 December 2021.
[154] *O'Dwyer v ITV Plc* [2012] EWHC 3321 (QB) [55].
[155] *Maughan v Michael* [2014] EWHC 1288 (Fam) [6].
[156] Richard Moorhead, 'The Passive Arbiter: Litigants in Person and the Challenge To Neutrality' (2007-09) 16 Social & Legal Studies 405, 410.
[157] ibid, 406
[158] Adrian Zuckerman, 'No justice without lawyers - the myth of an inquisitorial solution' (2014) 33 CJQ 355, 359.

this is not an advantage for a LIP; Lord Denning argues that a judge must be more than a mere umpire to fulfil their overarching aim of finding the truth and see justice done. The quest for the truth has been limited by the adversarial system because a judge is confined to the material presented by the parties[159] and as previously discussed, unlike their legally trained opposition, those self-representing may not be able to identify the best arguments, which undermines the fair trial process.[160]

2.7. Adversarial court adaptations

Our adversarial courts are not LIP friendly and there has been much normative debate over whether judges should adopt a more interventionist role when a LIP's interests are at stake.[161] Adversarialism normally supports a fair trial by preserving judicial objectivism and neutrality. The judge is presented with the two accounts of facts and they can weigh up the competing arguments rather than being dragged into the investigation of the case.[162] However, the adversarial judge model does not support a LIP's fair trial and therefore adaptations should be made to support effective participation.

Some critics argue that passivity creates a power imbalance between the parties and that a judge should correct this.[163] They believe a more managerial judicial style should be adopted, for example judicial assistance could be provided when presenting evidence, relevant procedural and evidentiary rules could be relaxed, simplified and explained.[164] LIP's questioning style when necessary could be improved by 'extensively or wholly adopting the questioning of witnesses'[165] and by performing 'factual investigations'.[166] Judges could say things like "Maybe what you are trying to say is this?".[167] However, if this managerial court system was

[159] Richard Moorhead, 'The Passive Arbiter: Litigants in Person and the Challenge To Neutrality' (2007-09) 16 Social & Legal Studies 405, 415-16.
[160] Jessica Jacobson and Penny Cooper, *Participation in Courts and Tribunals Concepts, Realities and Aspirations* (Bristol University Press 2020) 47.
[161] Rabeea Assy, *Injustice in Person: The Right to Self-Representation* (OUP 2015) 13.
[162] Adrian Zuckerman, 'No justice without lawyers - the myth of an inquisitorial solution' (2014) 33 CJQ 355, 359.
[163] Rabeea Assy, *Injustice in Person: The Right to Self-Representation* (OUP 2015) 13.
[164] Adrian Zuckerman, 'No justice without lawyers - the myth of an inquisitorial solution' (2014) 33 CJQ 355, 356.
[165] Chris Bevan, 'Self-represented litigants: the overlooked and unintended consequence of legal aid reform' (2013) 35 The Journal of Social Welfare & Family Law 43, 50.
[166] Rabeea Assy, *Injustice in Person: The Right to Self-Representation* (OUP 2015) 96.
[167] Hazel Genn, 'DO-IT-YOURSELF LAW: Access to Justice and the Challenge of Self-Representation' (Atkin Memorial Lecture, London, 12 October 2012) 15 <https://www.ucl.ac.uk/laws/sites/laws/files/atkin-memorial-lecture-2012-do-it-yourself-law-

adopted it could prove to be 'disproportionately time-consuming'[168] particularly in light of the current delays. Judges would be expected to 'micro-manage cases'[169] directing the parties to the issues that needed resolution.[170] It would also give judges more responsibility which would open them, and the justice system, to a greater level of public criticism in terms of the correctness of outcomes and the legitimacy of the judiciary.[171] A better option would be for the represented party's advocate to summarise the facts given their ability to relay the pertinent ones.[172] Partisan lawyers would be preferable and more cost-efficient[173] but until the Government adjusts the legal aid eligibility criteria a realistic solution would be the use of McKenzie Friends (discussed later).

The introduction of the Criminal Procedure Rules (CPR) allowed for the emergence of the interventionist judge who has been given greater powers in order to ensure more time and cost-efficient trials.[174] While the CPR witnessed a rise in managerialism this did not correspond with improved court participation for self-represented litigants. The 'scope of judicial management'[175] expanded but the objective remained the same, to ensure adequate pre-trial preparations that promoted an effective trial of the case issues.[176] As part of 'active case management'[177] judges are now expected to 'intervene proactively in the management of criminal cases'.[178] This involves identifying the key issues early, creating a case timetable for what needs to be done, encouraging agreement between parties, promoting early starts to trials, which they should ensure have a narrow focus and do not go on longer than required.[179] At the Plea and Case Management Hearing the CPR require 'good case management'.[180] This means judges should limit cross-examination and stop the defence calling particular witnesses. These

hazel-genn.pdf> accessed 6 December 2021.
[168] *Wright v Michael Wright Supplies Ltd* [2013] EWCA Civ 234 [1]–[2].
[169] ibid
[170] Rabeea Assy, *Injustice in Person: The Right to Self-Representation* (OUP 2015) 24.
[171] Richard Moorhead, 'The Passive Arbiter: Litigants in Person and the Challenge To Neutrality' (2007-09) 16 Social & Legal Studies 405, 410.
[172] ibid, 411.
[173] Rabeea Assy, *Injustice in Person: The Right to Self-Representation* (OUP 2015) 96.
[174] Jenny McEwan, 'From Adversarialism to Managerialism: Criminal Justice in Transition' (2011-12) 31 Legal Studies 519, 528.
[175] Adrian Zuckerman, 'No justice without lawyers - the myth of an inquisitorial solution' (2014) 33 CJQ 355, 359.
[176] ibid
[177] Criminal Procedural Rules 2020, r3.2(2).
[178] Jenny McEwan, 'From Adversarialism to Managerialism: Criminal Justice in Transition' (2011-12) 31 Legal Studies 519, 527.
[179] Criminal Procedural Rules 2020, r3.2(2)
[180] Jenny McEwan, 'From Adversarialism to Managerialism: Criminal Justice in Transition' (2011-12) 31 Legal Studies 519, 529.

changes reflect a loss of party control in favour of more managerial procedures without the institutional changes that would be required to establish an inquisitorial system.[181] While these rules allow a judge to direct the proceedings, they aim to improve efficiency rather than to support LIP's effective participation, reflective of a shift from due process to crime control.

Civil law systems have inquisitorial court systems where the judge has a more active role in the investigation of the case. They decide what issues to investigate and how to do so, create arguments for one party against another, identify witnesses and decide whether they should be cross-examined.[182] There is little party control in the inquisitorial system as the fact-finding process is carried out by the agents of the state.[183] By reducing the role of the parties the inquisitorial system would rebalance the position of a LIP and their represented opposition whereby they would not be disadvantaged in their inability to identify the pertinent issues in their case.[184] However simultaneously it could lead to other problems regarding the CJS's fairness. The concern raised here is that if a judge is forced into a more investigative role they will be likely to determine the relevant facts early and reach a premature decision known as 'confirmation bias'.[185] This is where a hypothesis is formed early on and there is a tendency to look for evidence that will support it while ignoring that which may undermine it.[186] Furthermore, it would be difficult to remain impartial having both 'presented evidence and formed arguments on behalf of litigants'.[187] Where judges are subject to both 'emotional and cognitive demands'[188] they will be more likely to identify or sympathise with the LIP's interests.[189] There is a limit to the extent which judicial assistance may 'redress the disadvantage suffered by litigants in person in an adversarial process'.[190] Adversarialism shields judges from responsibility for erroneous decisions and is the only system that ensures 'rational, objective and even-handed dispute resolution process'.[191]

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[181] ibid, 544.
[182] Adrian Zuckerman, 'No justice without lawyers - the myth of an inquisitorial solution' (2014) 33 CJQ 355, 359.
[183] Jenny McEwan, 'From Adversarialism to Managerialism: Criminal Justice in Transition' (2011-12) 31 Legal Studies 519, 520.
[184] Rabeea Assy, *Injustice in Person: The Right to Self-Representation* (OUP 2015) 98.
[185] ibid
[186] Adrian Zuckerman, 'No justice without lawyers - the myth of an inquisitorial solution' (2014) 33(4) CJQ 355, 362.
[187] Rabeea Assy, *Injustice in Person: The Right to Self-Representation* (OUP 2015) 98.
[188] Richard Moorhead, 'The Passive Arbiter: Litigants in Person and the Challenge To Neutrality' (2007-09) 16 Social & Legal Studies 405, 415.
[189] ibid
[190] Adrian Zuckerman, 'No justice without lawyers - the myth of an inquisitorial solution' (2014) 33 CJQ 355, 372.
[191] ibid

2.8. McKenzie Friends

In light of our current adversarial environment, LIPs need access to legal advice to ensure equality of arms, to empower them to take a legal position and help them through the court process.[192] To make this reality there are two available strategies. Firstly, the legal market could be liberalised through an expansion of the class of individuals who can provide unrepresented litigants legal advice by giving rights of audience to people without formal qualifications. Normally, rights of audience are a reserved activity[193] and can only be exercised by 'authorised individuals'[194] who are both qualified and insured in compliance with the relevant professional regulators. With time these alternative legal advisors could be a more realistic option than solicitors; ensuring equality of arms, a more effective CJS and making legal services more affordable. Being a LIP would become a choice rather than an 'economic necessity'.[195] Alternatively, and somewhat less ambitiously, we could increase the role of McKenzie Friends.

Traditionally, LIPs have used McKenzie Friends in court who have voluntarily provided 'moral support',[196] assisted with legal documentation and given advice on aspects of the case. However, there are now an increasing number of fee-charging McKenzie Friends who aim to address the justice gap following LASPO. While there are concerns regarding the quality of advice received by McKenzie Friends and the lack of protective measures e.g. qualifications, codes of conduct and insurance, their input is welcomed as they have helped to better access to justice, enabling equality of arms particularly where the other side is represented.[197] In a study of fee-paying McKenzie Friend clients the feedback received was very positive where they felt they received a unique form of support not provided by lawyers. They noted that McKenzie Friends were more accessible, approachable, informal and saw them as an 'ally'.[198]

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[192] Roxanna Dehaghani and Daniel Newman, 'Criminal Legal Aid and Access to Justice: an empirical account of a reduction in resilience' (2021) 29 IJLP 1, 6.
[193] Legal Services Act 2007, s 12.
[194] Leanne Smith, Emma Hitchings and Mark Sefton, 'Fee-charging McKenzie Friends in private family cases: key findings from the research report' (2017) 47 Family Law (Bristol) 971, 973,
[195] Adrian Zuckerman, 'No justice without lawyers - the myth of an inquisitorial solution' (2014) 33 CJQ 355, 374.
[196] Legal Services Consumer Panel, 'Fee Charging McKenzie Friends' (Legal Services Consumer Panel, 2014) 1.1 <https://www.legalservicesconsumerpanel.org.uk/publications/research_and_reports/documents/2014%2004%2017%20MKF_Final.pdf> accessed 12 April 2022 .
[197] ibid, 1.7.
[198] Leanne Smith, Emma Hitchings and Mark Sefton, 'Fee-charging McKenzie Friends in private family cases: key findings from the research report' (2017) 47 Family Law (Bristol) 971, 979.

2.9. Online courts

Digital justice emerged and developed quickly during the recent pandemic and following the Coronavirus Act 2020 which allowed for the 'expansion and availability of live links'.[199] Remote hearings raised concerns surrounding effective participation. Fair Trials, the CJS watchdogs have found that in the online courtroom defendants receive 'less effective participation in hearings and are enjoying less opportunity to challenge information presented'.[200] The most obvious limitation to communication are technical problems with accessing the courtroom link and a stable connection with good visual and audio quality. Some court users may not have access to the required equipment to facilitate this or the digital literacy to participate.[201] The provisions allowing for criminal proceedings via live links also depend on courts having the required technology in place. However, concerns have been raised surrounding the quality of technology being used and research suggests millions in investment will be needed to make the CJS 'fit for purpose'.[202]

On the other hand, critics such as Susskind believe that online courts are a positive change, improving the courts' overall efficiency, reducing the time taken to resolve minor conflicts, so courts have more time to focus on more complex cases.[203] However this focus on efficiency is at the expense of effective participation as it disregards those who do not have the necessary digital skills, IT equipment, or due to vulnerabilities struggle to effectively participate in the hearing. Disturbingly in 2018 JUSTICE reported that digital exclusion (people lacking the skills or IT access) was most prominent amongst more vulnerable groups in society, who to make matters worse are over-represented in the criminal courts.[204]

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[199] Ana Speed, Callum Thomson and Kayliegh Richardson, 'Stay home, stay safe, save lives? An analysis of the impact of COVID-19 on the ability of gender-based violence to access justice' (2020) 84 Journal of Criminal Law 539, 549.
[200] Gráinne McKeever, 'Remote Justice? Litigants in Person and Participation in Court Processes during Covid-19' (MLR, 3 August 2020) <https://www.modernlawreview.co.uk/mckeevers-remote-justice/> accessed 20 November 2021.
[201] Jessica Jacobson and Penny Cooper, *Participation in Courts and Tribunals Concepts, Realities and Aspirations* (Bristol University Press 2020) 52.
[202] Ana Speed, Callum Thomson and Kayliegh Richardson, 'Stay home, stay safe, save lives? An analysis of the impact of COVID-19 on the ability of gender-based violence to access justice' (2020) 84 Journal of Criminal Law 539, 545.
[203] Jessica Jacobson and Penny Cooper, *Participation in Courts and Tribunals Concepts, Realities and Aspirations* (Bristol University Press 2020) 52.
[204] JUSTICE, 'Preventing Digital Exclusion from Online Justice' (JUSTICE 2018) 2.81 <https://files.justice.org.uk/wp-content/uploads/2018/06/06170424/Preventing-Digital-Exclusion-from-Online-Justice.pdf> accessed 29 April 2022.

There are also concerns surrounding the impact of online hearings on the number of early guilty pleas. Defendants are not being made aware of or giving 'proper consideration'[205] to the consequences of pleading guilty. This has been demonstrated in police station video-link first hearings, which saw a higher rate of guilty pleas and custodial sentences than traditional in person courts.[206] The perception of fairness could also be impacted where an individual has not had the option of participating in person. If they do not get their desired outcome, they may blame the failure on their inability to participate in person. Worryingly the passing of the Police, Crime, Sentencing and Courts Bill[207] will mean that a court will be able to order a defendant to participate remotely regardless of their wishes. This will only further emphasis feelings of unfairness amongst defendants who have not had the opportunity to participate in person. [208]

There are some advantages to online hearings, but these are outweighed by the disadvantages. Online courts have the potential to benefit data collection proficiency resulting in early identification of LIPs to direct them to useful resources. This improvement has the potential to secure better LIP participation.[209] They also remove practical barriers involved in getting to court for example locating suitable public transport, covering work commitments, and organising childcare.[210] The courtroom is often reported to be intimidating for self-representing litigants due to the gravatas that is associated with the building, wigs and gowns. In online hearings LIPs can participate from the comfort of their own home and will perhaps feel less anxious where there are assigned set time slots and spend less time waiting around the courtroom.[211]

2.10. Summary of Part 2

[205] Jessica Jacobson and Penny Cooper, *Participation in Courts and Tribunals Concepts, Realities and Aspirations* (Bristol University Press 2020) 53.
[206] ibid.
[207] Police, Crime, Sentencing and Courts HC Bill (2021-22) [298].
[208] Laura Hoyano, 'Postage Stamp Justice? Virtual Trials in the Crown Court under the Police, Crime, Sentencing and Courts Bill' (2021) 12 CLR 1029.
[209] Gráinne McKeever, 'Remote Justice? Litigants in Person and Participation in Court Processes during Covid-19' (MLR, 3 August 2020) <https://www.modernlawreview.co.uk/mckeevers-remote-justice/> accessed 20 November 2021, 6.
[210] ibid, 7.
[211] ibid

LIPs face multiple barriers in the courtroom which impede their ability to effectively participate. These difficulties stem from their challenge in interpreting legal language, their emotional investment in their case, the inconsistency in judges' assistance and navigating online courts. There is no doubt that the adversarial system is inappropriate for LIPs and best suited to lawyers who have a plethora of experience in advocacy and are specially trained to extract the key issues to build a robust case. While there has been a real shift towards managerialism, these steps have been introduced to improve court efficiency rather than the defendant's ability to effectively participate. LIPs need in-person support in the courtroom, and this would be best served through an expansion of the McKenzie Friend role. In Part 3 we will examine the EGPS in light of these managerialist measures and underline their role in undermining the lower socio-economic class's fair trial in pursuit of administrative advantages.

Part 3. The early guilty plea scheme (EGPS) and the public defender system

Vulnerabilities in the courtroom are not limited to LIPs; under the vulnerability theory every individual is reliant on institutions which either 'exploit or mitigate human vulnerability'.[212] This is particularly relevant in the context of guilty pleas which assume that individuals are autonomous and capable of making independent decisions. However, many defendants are vulnerable 'due to actual or potential restrictions on their freedom and influenced by social and economic pressures'.[213] Therefore the consent and voluntariness of innocent defendants' decisions to plead guilty are often questionable and many surrender their right to a trial feeling pressurised into early guilty pleas. Early guilty pleas are incentivised by the state and are reached through plea bargaining where defendants by pleading guilty early receive a less serious charge or a sentence discount.[214] These pre-trial negotiations advance a managerialist agenda but undermine the 'golden thread'.[215] At its very worst the EGPS can threaten a defendant's vindication of their right to a fair trial and lead to miscarriages of justice where the innocent plead guilty and those suspected of serious crimes manipulate the scheme and are charged with the equivalent of a minor crime sentence.[216] Lawyers should offer a resilience

[212] Rebecca K Helm, 'Conviction by Consent? Vulnerability, Autonomy, and Conviction by Guilty Plea' (2019) 83 Journal of Criminal Law 161, 163.
[213] ibid, 164.
[214] Claire McGourlay and Andrew Green, 'Criminal Judges: Legitimacy, Courts and State-Induced Guilty Pleas in Britain' (2015) 12 CLR 1022, 1022.
[215] Ed Johnson, 'The adversarial defence lawyer: myths, disclosure and efficiency - a contemporary analysis of the role in the era of the Criminal Procedure Rules' (2020) 24 International Journal of Evidence & Proof 35, 48.
[216] Claire McGourlay and Andrew Green, 'Criminal Judges: Legitimacy, Courts and State-Induced Guilty Pleas in Britain' (2015) 12 CLR 1022, 1022.

mechanism and empower defendants whatever they plead. It is therefore concerning that their interests have become increasingly conflicted, both through financial incentives (see Part 1) and the introduction of managerialist measures.[217] These external pressures can influence the quality and level of support provided to enter a not guilty plea. Where the lower socio-economic class's voluntariness to enter an early guilty plea is undermined[218] lawyers are in a better position to extract guilty pleas.

We previously learned how the introduction of fixed fees impacted legal aid lawyers' working practices and now we will consider how a defendant's representation impacts guilty plea rates. In particular, we will compare the salaried Public Defender System (PDS) (set up to reduce legal aid costs) with private legal aid lawyers. Public defenders have on-going relationships with the prosecution and are therefore better able to negotiate. Nevertheless, there are concerns surrounding their clients' satisfaction and their ability to provide partisan client representation.[219] In summary this chapter will discuss how guilty pleas, managerialist agendas and lawyers' conflicted interests together undermine the fairness of the CJS and indirectly discriminate against individuals from lower socio-economic backgrounds.

3.1. Managerial measures over adversarial protections

Criminal legal aid lawyers have become increasingly conflicted between advancing their client's best interest and their pre-trial obligations,[220] following the introduction of the CPR, which brought into force case management rules and the guilty plea system. Both marked a shift away from the adversarial system and its associated defendant protections to a more managerialist one focused on securing guilty pleas as quickly as possible,[221] which undermined fair trials and due process protections. The CPR aid the prosecution over the defence and undermine the 'golden thread'. Lawyers must identify the pertinent issues and witnesses and provide written evidence at a very early stage.[222] Where the defence fails to comply with the

[217] Ed Johnson, 'The adversarial defence lawyer: myths, disclosure and efficiency - a contemporary analysis of the role in the era of the Criminal Procedure Rules' (2020) 24 International Journal of Evidence & Proof 35, 36.
[218] Rebecca K Helm, 'Conviction by Consent? Vulnerability, Autonomy, and Conviction by Guilty Plea' (2019) 83(2) Journal of Criminal Law 161, 170.
[219] Richard D Hartley, Holly V Miller and Cassia Spohn, 'Do you get what you pay for? Type of counsel and its effect on criminal court outcomes' (2010) 38 Journal of Criminal Justice 1063, 1064.
[220] Ed Johnson, 'The adversarial defence lawyer: myths, disclosure and efficiency - a contemporary analysis of the role in the era of the Criminal Procedure Rules' (2020) 24 International Journal of Evidence & Proof 35, 35.
[221] Andrew Sanders, Richard Young and Mandy Burton, *Criminal Justice* (4th edn, OUP 2010) 489.
[222] Criminal Procedural Rules 2020, SI 2020/759, r 3.2.

disclosure requirements the court is allowed to draw inferences.[223] By contrast, there are no consequences for the prosecution if they do not disclose the relevant evidence for the accused, by a certain time. This is reflective of a system that is more concerned with securing guilty pleas and efficiency over protecting the defendant against miscarriages of justice.[224] The requirement for early disclosure means lawyers are to some degree working for the prosecution and disadvantaging the defendant, undermining their right to a fair trial.[225]

Many defence lawyers have commented that it has become increasingly challenging to provide 'adequate legal advice'[226] given that a plea must be entered at the first hearing regardless of the availability of the prosecution's disclosure. Case management form admissions may incriminate defendants and the prosecution can use these against them.[227] Furthermore, the forms mean lawyers can no longer hold back information and take the prosecution by surprise, revealing it later to weigh the scales in their favour. This puts the prosecution in a very strong position where they are up against a weakened opponent and know exactly the case to answer.[228] The prosecution typically does not provide their disclosure[229] or case information until the last minute. This also had a negative impact on the defence's ability to prepare their case. The lawyer is under a great deal of time pressure,[230] does not have all the evidence to advise on its strength[231] and therefore is not in the best position to negotiate at the first hearing.[232]

Furthermore, late evidence disclosure can delay decisions regarding the provision of legal aid. Lawyers are reluctant to start work on a case unless they have a representation order. This

[223] Criminal Justice Act 2003, s 39.
[224] Ed Johnson, 'The adversarial defence lawyer: myths, disclosure and efficiency - a contemporary analysis of the role in the era of the Criminal Procedure Rules' (2020) 24 International Journal of Evidence & Proof 35, 47.
[225] Roxanna Dehaghani and Daniel Newman, 'Criminal legal aid and access to justice: an empirical account of a reduction in resilience' (2021) 29(1) IJLP 1, 36.
[226] Ed Johnson, 'The adversarial defence lawyer: myths, disclosure and efficiency - a contemporary analysis of the role in the era of the Criminal Procedure Rules' (2020) 24(1) International Journal of Evidence & Proof 35, 45.
[227] ibid, 44 .
[228] Roxanna Dehaghani and Daniel Newman, 'Criminal legal aid and access to justice: an empirical account of a reduction in resilience' (2021) 29 IJLP 1, 46.
[229] ibid, 35.
[230] Tamara Goriely, 'Evaluating the Scottish Public Defence Solicitors' Office' (2003) 30 Journal of Law and Society 84, 89.
[231] Matthew Stanbury, 'Reduction in sentence for a guilty plea: comments on the proposed reforms' (2016) 1 Sentencing News 6, 7.
[232] Tamara Goriely, 'Evaluating the Scottish Public Defence Solicitors' Office' (2003) 30 Journal of Law and Society 84, 89.

results in little time being dedicated to the case[233] and many lawyers end up preparing last minute on the trial date. Due to these time pressures and discontinuous representation the lawyer is not well acquainted with the client or their case. They meet them for the first time at the trial and the approach adopted is as one barrister phrased "meet 'em, greet 'em, plead 'em".[234] This is problematic as it reduces the resilience of the defence against the prosecution given the speed at which the defence is expected to make the life-changing decision of how to plead. Many defendants struggle to decide in such a short time frame and there is greater room for error as they cannot properly consider the available options. Similarly, a lawyer's advice may be flawed.[235] All these factors undermine the fairness of the CJS especially for those reliant on time-pressured legal aid lawyers.

We can quickly see how early guilty pleas under the managerialist head of 'robust case management' act to cover up a system's true motive, one which assumes guilt to process as many guilty cases as possible. This assumption of guilt is 'deeply non-adversarial',[236] ignores the golden thread and reduces due process protections.[237] The prosecution is no longer required to prove the defendant's guilt beyond reasonable doubt to the jury.[238] Evidence goes without being examined, cross-examination of witnesses is not conducted, and no questions are raised regarding the exclusion of evidence.[239] Therefore, those cases based on 'vague allegations'[240] or the 'misuse of state prosecutorial power'[241] go unchecked. This arguably is a reworking of miscarriages of justice into a system, which breaches the right to a fair trial.

3.2. Early guilty pleas and sentence discounts

The EGPS raises a number of issues that impede access to a fair trial and indirectly discriminate against the less well-off in society.[242] Plea-bargaining is common practice in the United States

[233] Roxanna Dehaghani and Daniel Newman, 'Criminal legal aid and access to justice: an empirical account of a reduction in resilience' (2021) 29 IJLP 1, 45.
[234] ibid
[235] ibid, 46.
[236] Ed Johnson, 'The adversarial defence lawyer: myths, disclosure and efficiency - a contemporary analysis of the role in the era of the Criminal Procedure Rules' (2020) 24 International Journal of Evidence & Proof 35, 47.
[237] ibid
[238] ibid, 48.
[239] Andrew Sanders, Richard Young and Mandy Burton, Criminal Justice (4th edn, OUP 2010) 440.
[240] ibid, 489.
[241] ibid
[242] Rebecca K Helm, 'Conviction by Consent? Vulnerability, Autonomy, and Conviction by Guilty Plea' (2019) 83 Journal of Criminal Law 161, 170.

and is used to resolve 95% of cases.[243] Our equivalent is the EGPS which offers sentence discounts to reduce the punishment for individuals facing convictions. Unlike the US which purports a system of somewhat unbridled discretion the sentence discounts available in the UK are lesser and dependent on the stage at which the accused decides to enter the guilty plea.[244] If they plead guilty at the earliest reasonable opportunity a defendant will receive a discount of 1/3 to their plea. When the trial date has been set this reduces to ¼ and finally it drops to 1/10 when made on the day of the trial or after it has begun.[245] The form this takes varies, they may receive a discount to their head sentence where they face imprisonment, 'a recommendation for early release on parole'[246] or a community-based order instead of a custodial order.

The main justification for the scheme is 'administrative efficiency'.[247] It is a reward for freeing up the CJS and saving the state the cost of a full trial.[248] A typical hearing for a not guilty plea usually lasts an average of 18 hours in comparison to 1 ½ hours in the case of a guilty plea hearing. Not guilty pleas are 9 times more expensive than guilty pleas.[249] Guilty pleas ensure that the victims and witnesses will not need to be cross-examined at trial which is often a stressful and emotionally draining experience.[250] Nevertheless, for some victims the trial process offers therapeutic justice; they can tell their story and see justice done.[251] A guilty plea is argued to be representative of the accused's remorse and remorseful defendants are more open to rehabilitation. However, this utilitarian argument ignores that a link between a guilty plea and remorse are somewhat unsubstantiated.[252] There is no way a court can differentiate between a guilty plea motivated by remorse and those entered to avoid a more serious sentence.[253] The reality is that the stronger an innocent defendant believes a judge will convict them in error, the greater the chances of an acceptance of a guilty plea. Meanwhile, the more that a guilty defendant feels the judge will rule in their favour, the greater the chances that they

[243] Richard L Lippke, *The Ethics of Plea Bargaining* (OUP 2011) 1.
[244] ibid.
[245] Sentencing Guidelines Council, 'Reduction in Sentence for a Guilty Plea' (Sentencing Council 2007) <Reduction in Sentence for a Guilty Plea - revised 2007 (sentencingcouncil.org.uk)> 4.2 accessed 20 April 2022.
[246] Geraldine Mackenzie, 'The guilty plea discount: does pragmatism win over proportionality and principle?' (2007) 11 Southern Cross University Law Review 205, 211.
[247] ibid
[248] ibid
[249] Andrew Sanders, Richard Young and Mandy Burton, *Criminal Justice* (4th edn, OUP 2010) 440.
[250] ibid
[251] ibid, 489.
[252] Geraldine Mackenzie, 'The guilty plea discount: does pragmatism win over proportionality and principle?' (2007) 11 Southern Cross University Law Review 205, 212.
[253] Andrew Sanders, Richard Young and Mandy Burton, *Criminal Justice* (4th edn, OUP 2010) 440.

will reject plea bargains.[254] Plea bargains and their resulting sentence discounts undermine fair 'proper sentencing principles'[255] and legal certainty given that the penalty for the same offence varies depending on time spent in court. They occur outside of the courtroom which undermines open justice given that negotiations are not transparent,[256] and therefore contravene the right to a fair trial.[257]

The scheme was set up under the presumption that it would not deny a defendant's 'complete freedom of choice'[258] on how to plead. The reality is that the inconsistent application of the sentence discount principle, solicitors' advice[259] and a defendant's personal circumstances mean the above condition is not met.[260] Therefore, the main concern that arises from entering an early guilty plea is that it is a 'breach of procedural justice'[261] which could result in innocent defendants being encouraged to plead guilty. Alarmingly the majority of defendants (51.6%) reaffirmed their innocence following entering into an early guilty plea.[262] Also, Beenstock's quantitative study found that factually innocent defendants on average pled guilty.[263] As a matter of principle the scheme goes against the right to a fair trial, the presumption of innocence, the right against self-incrimination[264] and creates more opportunity for miscarriages of justice where the innocent accept plea bargains and the guilty are acquitted.[265]

In effect sentence discounts discriminate against those who plead not guilty by imposing a penalty following a guilty verdict after the exercise of their right to a fair trial.[266] This indirectly

[254] Michael Beenstock, Josh Guetzkow and Shir Kamenetsky-Yadan, 'Plea Bargaining and the Miscarriage of Justice' (2021) 37 Journal of Quantitative Criminology 35, 40.
[255] Geraldine Mackenzie, 'The guilty plea discount: does pragmatism win over proportionality and principle?' (2007) 11 Southern Cross University Law Review 205, 221.
[256] ibid, 219.
[257] Human Rights Act 1998, sch 1, pt 1, art 6(1).
[258] *R v Turner* [1970] 2 Q.B. 321, 326.
[259] Andrew Sanders, Richard Young and Mandy Burton, *Criminal Justice* (4th edn, OUP 2010) 451.
[260] Ed Johnson, 'The adversarial defence lawyer: myths, disclosure and efficiency - a contemporary analysis of the role in the era of the Criminal Procedure Rules' (2020) 24 International Journal of Evidence & Proof 35, 46.
[261] Richard L Lippke, *The Ethics of Plea Bargaining* (OUP 2011) 1.
[262] Dr Jay Gormley, Dr Rachel McPherson and Professor Cyrus Tata, 'Sentence Discounting: Sentencing and Plea Decision Making' (Scottish Sentencing Council 2020) 13 <https://www.scottishsentencingcouncil.org.uk/media/2076/20201216-sentence-discounting-lit-review.pdf > accessed 20 April 2022 .
[263] Michael Beenstock, Josh Guetzkow and Shir Kamenetsky-Yadan, 'Plea Bargaining and the Miscarriage of Justice' (2021) 37 Journal of Quantitative Criminology 35, 63.
[264] Richard L Lippke, *The Ethics of Plea Bargaining* (OUP 2011) 2.
[265] Michael Beenstock, Josh Guetzkow and Shir Kamenetsky-Yadan, 'Plea Bargaining and the Miscarriage of Justice' (2021) 37 Journal of Quantitative Criminology 35, 37.
[266] Geraldine Mackenzie, 'The guilty plea discount: does pragmatism win over proportionality and principle?' (2007) 11 Southern Cross University Law Review 205, 206.

discriminates against ethnic minorities who are more likely to receive a custodial sentence, and one of a longer duration given that they more typically exercise their right to a fair trial.[267] Furthermore, the Black community are at the forefront of the 'abuse of police and prosecutorial power'[268] where their cases are usually based on weaker evidence.[269] The Lammy Review revealed a widely held opinion amongst Black, Asian and Minority Ethnics (BAME) that the CJS worked against their interests. Their reasoning for pleading not guilty and electing a jury trial was rooted in a deep mistrust of the police and legal aid lawyers, who they simply saw as another element of a biased system.[270] Problematically, their mistrust of the Magistrate's Court and preference for jury trials does not shield them from racial prejudice as jurors' decision-making is influenced by 'moral values, personal experiences, personality, beliefs, predispositions and prejudices'.[271] Articles 6 and 14 of the European Convention of Human Rights demand a trial with an 'impartial tribunal'[272] devoid of racial discrimination. While it is acceptable that jurors may draw on their past experiences, it is unacceptable where they consider 'extra-evidential factors'[273] that could lead to miscarriages of justice for example using 'racial stereotypes to interpret evidence and assess witness credibility'.[274] Normally jury deliberations following the principle of jury secrecy are inadmissible as the basis for a claim of apparent racial bias and it is suggested that reform is needed to better protect defendants. This could be done through routine tape-recordings of jury deliberations.[275]

In an analysis of the CJS's defendant demographic a pattern was established in the profiles of the 100,000 individuals classed as the 'most persistent offenders'.[276] A third had been in care as children, half had no qualifications, almost half had 'been excluded from school'[277] and three quarters were unemployed with minimal to no legal income. 45% of male convicts had no qualifications to speak of. Therefore, the typical defendant is a member of the most vulnerable groups in society. These statistics depict a link between 'social class and crime, whereby those

[267] Penny Darbyshire, 'The mischief of plea bargaining and sentencing rewards' (2000) Nov CLR 895, 901.
[268] Andrew Sanders, Richard Young and Mandy Burton, *Criminal Justice* (4th edn, OUP 2010) 489.
[269] ibid
[270] Sir Christopher Bellamy, 'Independent Review of Criminal Legal Aid' (GOV.UK, 2021) 4.57-4.58 <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1041117/clar-independent-review-report-2021.pdf> accessed 12 April 2022.
[271] Gillian Daly and Rosemary Pattenden, 'Racial Bias and the English Criminal Trial' (2005) 64 CLJ 678, 680.
[272] Human Rights Act 1998, sch 1, pt 1, art 6.
[273] Gillian Daly and Rosemary Pattenden, 'Racial Bias and the English Criminal Trial' (2005) 64 CLJ 678, 681.
[274] ibid
[275] ibid, 703
[276] Rebecca K Helm, 'Conviction by Consent? Vulnerability, Autonomy, and Conviction by Guilty Plea' (2019) 83 Journal of Criminal Law 161, 164.
[277] ibid

of a lower socio-economic class are more likely to be arrested, convicted, and incarcerated'.[278] Their practical realities often mean they urgently need to get out of custody or cannot socially or economically afford the risk of a custodial sentence.

The trial cost deters these innocent defendants from going to trial and has been proven to make them more willing to accept a plea bargain.[279] They often cannot afford to take the time off work especially where their employment and childcare arrangement are insecure, and they need to escape the system to look after their dependants, to get back to work and rectify damaged relationships.[280] The legal aid eligibility test means only those with an income of £12,475 or less will be able to secure complete funding. Therefore, the majority of defendants will need to provide a contribution, and many will struggle to pay for trial representation.[281] Numerous defendants simply want to 'get it over with'[282] especially when faced with 'delay and repeated'[283] court appearances. If the early guilty plea is the difference between a community and custodial sentence or if the accused is on remand and pleading guilty means an immediate release from custody, they feel incentivised.

Therefore, lower socio-economic class disadvantages defendants where their voluntary choice and their right to a fair trial are undermined as they desperately need to escape the CJS and do so through an early guilty plea. Goodman by contrast argues that pre-trial negotiations and the resulting sentence discounts provide equality between defendants of varying wealth, given that those with more resources have less opportunity to spend more on their defence which usually increases the likelihood of acquittal. However, this ignores the fact that unlike the wealthy the poor feel greater pressure to get themselves out of the system as soon as possible.[284] The unjust result is that we see financially troubled innocent defendants pleading guilty while those innocent defendants, with sufficient means continue to trial to be found not guilty.[285]

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[278] ibid
[279] Michael Beenstock, Josh Guetzkow and Shir Kamenetsky-Yadan, 'Plea Bargaining and the Miscarriage of Justice' (2021) 37 Journal of Quantitative Criminology 35, 42.
[280] Rebecca K Helm, 'Conviction by Consent? Vulnerability, Autonomy, and Conviction by Guilty Plea' (2019) 83 Journal of Criminal Law 161, 170.
[281] ibid
[282] Tamara Goriely, 'Evaluating the Scottish Public Defence Solicitors' Office' (2003) 30 Journal of Law and Society 84, 98.
[283] ibid
[284] John C Goodman and Philip Porter, 'Is the Criminal Justice System Just?' (2002) 22 International Review of Law and Economics 25, 26.
[285] Rebecca K Helm, 'Conviction by Consent? Vulnerability, Autonomy, and Conviction by Guilty Plea' (2019) 83(2) Journal of Criminal Law 161, 170.

A plea hearing decision is heavily influenced by the defendant's representation. As previously discussed, many lawyers are time pressured and are working for minimal pay which impacts the quality of legal advice provided. A barrister '…must be completely free to give the accused his best advice, albeit in strong terms'[286] and will often advise to plead guilty. This 'strong advice' is highly influential, and an innocent defendant may change their plea where a conviction following a not guilty plea in their lawyer's opinion is likely.[287] Newman's study found that the majority of lawyers presumed the client's guilt and facilitated a guilty plea (even where the defendant wanted to plead not guilty).[288] They did so by highlighting the consequences of a not guilty plea regarding their increased costs and the reduced mitigation available following an unsuccessful trial.[289] Worryingly, as we have seen a lawyer is rarely in a good position to offer sound advice on how to plead where they do not have 'a full picture of facts'.[290] Lawyers' ability to influence vulnerable defendants' decisions, particularly those of limited financial means is concerning and disempowers defendants instead of acting as a resilience mechanism providing 'emotional support'.[291] Where there is a lack of positive support to pursue a not guilty plea defendants are subjected to the psychological consequences, feeling pressure to resign and accept a guilty plea.[292]

3.3. Public defenders

The Access to Justice Act 1999 introduced the Public Defender Service (PDS) as a more economical way of meeting legal aid needs. It was state funded and initially operated as a pilot scheme of salaried solicitors.[293] In Part 1 we saw how fixed fees led to disparities in the quality of representation received by fee paying clients and legal aid clients. This section of the article will investigate whether the salaried PDS leads to fairer outcomes and better representation for those reliant on legal aid.

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[286] *R v Turner* [1970] 2 Q.B. 321, 326.
[287] Meredith Blake and Andrew Ashworth, 'Some ethical issues in prosecuting and defending criminal cases' (1998) 1 CLR 16, 25.
[288] Ed Johnson, 'The adversarial defence lawyer: myths, disclosure and efficiency - a contemporary analysis of the role in the era of the Criminal Procedure Rules' (2020) 24 International Journal of Evidence & Proof 35, 48.
[289] Andrew Sanders, Richard Young and Mandy Burton, *Criminal Justice* (4th edn, OUP 2010) 451.
[290] Ed Johnson, 'The adversarial defence lawyer: myths, disclosure and efficiency - a contemporary analysis of the role in the era of the Criminal Procedure Rules' (2020) 24 International Journal of Evidence & Proof 35, 44.
[291] Tamara Goriely, 'Evaluating the Scottish Public Defence Solicitors' Office' (2003) 30 Journal of Law and Society 84, 98.
[292] ibid
[293] Daniel Newman, *Legal Aid Lawyers and the Quest for Justice* (Hart Publishing 2013) 16.

3.3.1. Client satisfaction

In Tata's pilot study public defenders' rate of client satisfaction was lower when compared with that of those who used private lawyers. Only 46% said that they would use the PDS again. 39% felt the public defender had 'stood up for their rights'[294] compared with 71% of those who used private solicitors. Much of the feedback was that public defenders worked with great efficiency but were too neutral, business-like, and lacked 'human warmth'.[295] There was lack of 'positive support to maintain a plea of not guilty',[296] which explains why they secured guilty pleas at an earlier stage when compared to private lawyers. Clients resented being directed to the PDS and felt they had little choice in the matter which served to undermine trust.

3.3.2. The public defenders' working culture

This trust was only further eroded where public defenders were viewed as 'double agents';[297] working for both the client and the state, and clients believed their interests were conflicted.[298] In comparison to private lawyers public defenders are perhaps more concerned with the 'smooth and efficient'[299] running of cases and they want to foster good relationships rooted in cooperation as regular members in the courtroom. For this reason they were conflict-adverse[300] and did not provide the vigorous defence required in the adversarial system.[301] A private barrister in comparison may never see the judge or prosecution again and is not so concerned with preserving these relationships.[302] Nevertheless, the relationship a public defender has with the prosecution can be helpful where they may be able to 'negotiate more favourable

[294] Tamara Goriely, 'Evaluating the Scottish Public Defence Solicitors' Office' (2003) 30 Journal of Law and Society 84, 97.
[295] ibid, 98.
[296] ibid
[297] Richard D Hartley, Holly V Miller and Cassia Spohn, 'Do you get what you pay for? Type of counsel and its effect on criminal court outcomes' (2010) 38 Journal of Criminal Justice 1063, 1064.
[298] Cyrus Tata and others, 'Does mode of delivery make a difference to criminal case outcomes and clients' satisfaction? The public defence solicitor experiment' (2004) Feb CLR 120, 131.
[299] Richard D Hartley, Holly V Miller and Cassia Spohn, 'Do you get what you pay for? Type of counsel and its effect on criminal court outcomes' (2010) 38(5) Journal of Criminal Justice 1063, 1064.
[300] ibid
[301] Cyrus Tata and others, 'Does mode of delivery make a difference to criminal case outcomes and clients' satisfaction? The public defence solicitor experiment' (2004) Feb CLR 120, 133.
[302] Richard D Hartley, Holly V Miller and Cassia Spohn, 'Do you get what you pay for? Type of counsel and its effect on criminal court outcomes' (2010) 38 Journal of Criminal Justice 1063, 1064.

outcomes'[303] to reduce punishment.[304] Also, it has been noted that the prosecution often preferred dealing with public defenders because they were considered more trustworthy given that their set salaries meant they were not motivated by money. They also felt that when it came to negotiating pleas they tended to be 'more realistic',[305] organised and proactive in their approach.

3.3.3. Early guilty plea rates

One of the key criticisms surrounding public defenders is that they are too quick to negotiate away under-privileged clients' rights to a fair trial.[306] Exchanging 'a small but measurable chance of a later acquittal for the certainty of immediate conviction'.[307] Research shows that while the total percentage of guilty pleas was not significantly different between those who used the public defenders scheme and those who opted for the standard legal aid scheme, public defenders resolved cases at a much earlier stage through early guilty pleas.[308] 76% plead guilty when using private lawyers and 78% plead guilty when using the public defender system. However, only 29% of the PDS's cases reached the trial date in comparison to 40% in the case of private lawyers. This appears to reflect the impact of fee schemes on private lawyers' decision-making and their tendency to wait until the trial date to plead guilty and to receive greater remuneration for doing so.[309] Research has demonstrated that this practice is usually preferable to pleading guilty at an earlier stage. This is because where the prosecution is faced with an excessive number of trials they are 'particularly amenable to lesser pleas immediately before trial'.[310] This again raises the concerns of legal certainty and fairness; why should the timing of a guilty plea return a different sentence for the equivalent offence?

3.4. Summary of Part 3

[303] ibid
[304] ibid
[305] Tamara Goriely, 'Evaluating the Scottish Public Defence Solicitors' Office' (2003) 30(1) Journal of Law and Society 84, 93.
[306] Richard D Hartley, Holly V Miller and Cassia Spohn, 'Do you get what you pay for? Type of counsel and its effect on criminal court outcomes' (2010) 38 Journal of Criminal Justice 1063, 1064.
[307] Tamara Goriely, 'Evaluating the Scottish Public Defence Solicitors' Office' (2003) 30 Journal of Law and Society 84, 100.
[308] ibid
[309] Andrew Sanders, Richard Young and Mandy Burton, *Criminal Justice* (4th edn, OUP 2010) 475.
[310] Tamara Goriely, 'Evaluating the Scottish Public Defence Solicitors' Office' (2003) 30 Journal of Law and Society 84, 94.

Public defenders are particularly bad at offering positive support to clients who wish to plead not guilty, and this has a great psychological impact on an accused's decision. The EGPS undermines the 'golden thread', a paramount fair trial safeguard. This is of particular concern for the lower socio-economic class whose financial circumstances undermine their voluntary decision when entering a plea. It is repugnant that the lower-socio economic class must 'choose between protesting their own innocence and their family's future financial security'[311] and therefore the scheme should be discarded, and greater focus placed on due process protections over crime control, cost cutting measures.

4. Conclusion

This article has considered the injustices which the lower-socio economic class experience in the CJS. In a 21st century democratic society every individual regardless of their economic circumstances should be equal in a court of law.[312] However, as we have seen this is not the case. The principle of legal equality has been disparaged by the legal aid reforms where only a proportion of society are able to access representation and effectively defend themselves against a criminal charge. We no longer have equality of arms between the prosecution and defence, particularly where the defendant is unrepresented. This has sought to increase the prosecution's resilience while disempowering the defence.[313] The legal aid reforms and self-represented litigants' participation difficulties are demonstrative of the unequal treatment of different socio-economic classes and the injustice within the system.[314]

The reformed legal aid eligibility test has increased the number of self-representing litigants in court and these individuals have suffered a decline in their resilience. They face several barriers within the adversarial system and are ill-equipped to tackle them without legal assistance. Therefore, steps should be taken to ensure equality of arms so they are not disadvantaged and can effectively participate. The increase in managerial measures have ironically reduced LIP's resilience and ability to participate as greater focus has been placed on securing efficient case

[311] Freya Hawken, 'Failed justice: the impact of the Legal Aid, Sentencing and Punishment of Offenders Act 2012 on the legal system of England and Wales' (2019) 24 Coventry Law Journal 129, 135.
[312] Sir Christopher Bellamy, 'Independent Review of Criminal Legal Aid' (GOV.UK, 2021) 3.4 <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1041117/clar-independent-review-report-2021.pdf> accessed 12 April 2022.
[313] Roxanna Dehaghani and Daniel Newman, 'Criminal legal aid and access to justice: an empirical account of a reduction in resilience' (2021) 29 IJLP 1.
[314] ibid

management at the expense of due process protections.[315] A more interventionist judge or the implementation of an inquisitorial system would create problems in terms of 'confirmation bias',[316] impartiality and judicial scrutiny. Therefore, the most realistic response to the self-represented litigants' difficult situation is to ensure they gain adequate assistance through the likes of McKenzie Friends. Changes to the legal aid eligibility criteria to expand the group in society eligible would be preferable but in the meantime, it seems that some form of legal and emotional support is better than nothing.[317]

Litigants in the CJS from the lower-socio economic class have seen their resilience against the prosecution worn down completely. If they find themselves eligible for some form of legal aid the lawyers provided are unable to give them the support and empowerment required. As we have seen, this is due to the introduction of fixed fees and the cuts to lawyers' remuneration alongside the new CPR managerial court obligations which have had a detrimental psychological impact, reducing legal aid providers' morale. As a result there are few remaining incentives to stay in the system or for trainees to enter this part of the profession, as they are underpaid for often complex and emotionally draining work.[318] The pool of available criminal legal aid providers is shrinking and if the number of legal aid providers continues to fall in the same trajectory it is predicted that within the next 5 to 10 years there will be insufficient criminal defence solicitors in many areas of the UK.[319] This needs to be addressed through an increase of at least £100 million in criminal legal aid lawyers' remuneration together with structural fee scheme reforms to ensure that there is a sufficient number of lawyers to meet the forecasted increased legal aid demand and in turn secure equality of arms.[320]

The EGPS has resulted in a shift from due process protections to crime control measures. This has undermined the 'golden thread' and the defendant's right to a fair trial. Lawyers are under a great deal of time pressure to advise on life-changing plea decisions, where the prosecution

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[315] Adrian Zuckerman, 'No justice without lawyers - the myth of an inquisitorial solution' (2014) 33 CJQ 355, 359.
[316] Rabeea Assy, *Injustice in Person: The Right to Self-Representation* (OUP 2015) 98.
[317] Legal Services Consumer Panel, 'Fee Charging McKenzie Friends' (Legal Services Consumer Panel, 2014) <https://www.legalservicesconsumerpanel.org.uk/publications/research_and_reports/documents/2014%2004%2017%20MKF_Final.pdf> accessed 12 April 2022.
[318] The Justice Committee, 'The Future of Legal Aid' (House of Commons, 2021) 16 <https://committees.parliament.uk/publications/6979/documents/72829/default/> accessed 22 April 2022.
[319] Sir Christopher Bellamy, 'Independent Review of Criminal Legal Aid' (GOV.UK, 2021) 4.39 <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1041117/clar-independent-review-report-2021.pdf> accessed 12 April 2022.
[320] ibid, 16.4-16.5.

fails to provide disclosure on time, and they are unfamiliar with the client and the case.[321] This once again undermines legal equality and chips away at the lower-socio economic class's resilience and in turn their fair trial. Many of these litigants want to escape the system as soon as possible due to reasons linked to their economic circumstances. Their lawyers assuming guilt are often so convincing in their portrayal of the advantages of pleading guilty early that regardless of innocence the accused concedes.[322] Public defenders are particularly bad for rushing their clients into an early guilty plea. The result; miscarriages of justice and the diminishment of legal equality.[323] The legal certainty of sentence principles is undermined where sentences for the same crime are inconsistent and depend on the stage at which a plea was entered rather than the gravity of the offence.[324] The scheme should be abolished to protect defendants against abuse of state power and ensure their fair trial rights can be exercised and protected.

Faith in the CJS to produce fair case outcomes has been completely eroded. This plethora of practical issues in the CJS namely, the LASPO cuts, the criminal legal aid lawyer retention and recruitment issues, the adversarial system's barriers to LIP participation, the erosion of due process protections in favour of crime control measures and the consequences of the EGPS's incentives have together acted as a catalyst in the access to justice crisis within the lower-socio economic class. Urgent Government action must be taken to reach a position where regardless of personal financial circumstances we have legal equality and the lower-socio economic class's right to a fair trial is protected. If the statutory recognition and/or procedural rules normatively argued for in this article were to be adopted, under the analysis shown herein, the less affluent in society would be removed from their current unequal footing and would be better equipped to approach their legal battles.

[321] Roxanna Dehaghani and Daniel Newman, 'Criminal legal aid and access to justice: an empirical account of a reduction in resilience' (2021) 29 IJLP 1, 45.
[322] Tamara Goriely, 'Evaluating the Scottish Public Defence Solicitors' Office' (2003) 30 Journal of Law and Society 84, 98.
[323] Ed Johnson, 'The adversarial defence lawyer: myths, disclosure and efficiency - a contemporary analysis of the role in the era of the Criminal Procedure Rules' (2020) 24 International Journal of Evidence & Proof 35, 46.
[324] Geraldine Mackenzie, 'The guilty plea discount: does pragmatism win over proportionality and principle?' (2007) 11 Southern Cross University Law Review 205, 221.

Defoe's Moll Flanders and Roxana: Law, Society and Sexuality in the Early Eighteenth Century Novel

Katy Grace Dunn

Introduction

The purpose of this article is to explore law, society and sexuality in the early eighteenth century through the lens of literary novelist, Daniel Defoe, focusing exclusively on *Moll Flanders*[1] and *Roxana*.[2] Both novels act as windows into Defoe's interpretation of law, society and sexuality in the early eighteenth century. It maps the law and social context of the time critiqued by Defoe's damning interpretation of women's rights and dismal working opportunities during that period.

The methodology adopted is an exercise in literary jurisprudence. Literary texts allow us to take a step back from the world and 'contemplate it'.[3] The presentation of law and society in a historically situated text, enables us to view a literary text as an 'informing educative aid'.[4] Nussbaum states that it provides us with the 'ability to think what it might be like to be in the shoes of a person different from oneself, to be an intelligent reader of that person's story, and to understand the emotions and wishes and desires that someone so placed might have.'[5] Furthermore, Weisberg states that 'stories about the "other" induce us to see the other, and once we do, we endeavour consistently to understand the world from within the other's optic.'[6] Defoe provides us with the ability to see society through the eyes of the 'other', in this context women in patriarchal eighteenth century society, raising awareness of the 'socio-political shortcomings of a legal order'[7] in a specific historical time frame.

[1] Daniel Defoe, *Moll Flanders*, (Wordsworth Editions Limited 1993)
[2] Daniel Defoe, *Roxana*, (Oxford University Press 1996)
[3] Femi Oyebode, 'Fictional narrative and psychiatry' (2004) 10(2) Advances in Psychiatric Treatment, 145
[4] Ian Ward, 'Rape and Rape Mythology in the Plays of Sarah Kane' (2013) 47(2) Comparative Drama 225, 226
[5] Ian Ward, 'On Literary Jurisprudence' (2011) 1. JL & Interdisc Stud 6, 10
[6] ibid
[7] Ian Ward, 'The Educative Ambition of Law and Literature' (1993) 13(3) Legal Studies 323, 329

This article will draw upon Mandeville's distinction (in *A modest Defence of Publick Stews*)[8] between 'public whoring'[9] and 'private whoring'[10] (detailed in Part One), the latter of which influenced Defoe's works to challenge societal prejudice.

Tony Henderson in *Disorderly Women in Eighteenth-Century London-Prostitution and Control in the Metropolis 1730-1830* and Dan Cruickshank in *The Secret History of Georgian London* write about law, society and sexuality in the early eighteenth century. Their works will be referenced in Part One, explicitly regarding 'public whoring' and sexuality. Henderson's study of prostitution in London throughout the eighteenth and early nineteenth century uncovers the reality of life for common prostitutes, exposing society, its policing systems and attitudes towards females. Cruickshank further discusses the diverse attitudes of contemporaries who sympathised with or admonished common prostitutes.

Academics including Lacey, Watt and Gladfelder acknowledge an increasing number of writers, including Richardson, Fielding, Cleland and Defoe, who were addressing and raising awareness about law, society and sexuality in the early eighteenth century.

Ganz, Scheuermann and Wang specifically examine Defoe's critique of law, society and sexuality in *Moll Flanders and Roxana*, regarding 'private whoring'. Ganz focuses on Defoe's critique of the constraints of English matrimonial law on women. Scheuermann endorses Defoe's view that limited legitimate working opportunities for women often forced them to engage in 'private whoring' driven by economic necessity. Wang discusses marriage as an institution where women sought to place themselves in a financially stable situation with an awareness of her 'possible fate in the patriarchal system'.[11] Their perspectives will be drawn upon in Parts Two and Three.

This article will present Defoe as prescient and a force for societal change in relation to law, opportunities and attitudes towards women and sexuality in eighteenth century England.

1. Part One

[8] Bernard Mandeville, *A modest Defence of Publick Stews* (first published 1724, Ex-classics Project 2018)
[9] Bernard Mandeville, *A modest Defence of Publick Stews* (first published 1724, Ex-classics Project 2018) 11
[10] Bernard Mandeville, *A modest Defence of Publick Stews* (first published 1724, Ex-classics Project 2018) 13
[11] Ya-huei Wang, 'Love and Money in Daniel Defoe's Moll Flanders' (2011) 1(8) International Journal of Humanities and Social Science 252, 252

In early eighteenth century, prostitutes were viewed as dangerously sexual beings, and equally women sexually active outside marriage were viewed in a condemnatory light. This Part will begin by exploring the cultural views held by society regarding 'public'[12] and 'private'[13] whoring and how legal intervention led to a more empathetic view of common prostitution. The Part will then discuss the awareness of growing literary context regarding issues of law, society and sexuality in the early eighteenth century. Particular focus will be placed on Daniel Defoe's two novels, *Moll Flanders* and *Roxana*. Defoe suggests that all women were vulnerable in patriarchal eighteenth-century society, whether as a common prostitute (public) or engaging in extramarital sexual activity (private). Defoe's focus was on critiquing strict marriage laws of the time and the lack of working opportunities for women. As Enderby states, 'Whatever [Defoe] may have thought of the morals of a Moll Flanders or Roxana, he had nothing but respect for their wits'.[14] Defoe was in discord with the hypocrisy that sanctioned public whoring, whilst denigrating private whoring, both negatively impacted by laws that applied to all women within society.

1.1. Societal attitudes towards public and private whoring

In eighteenth century England, sexual morality and marriage held considerable social significance.[15] Brabcová states marriage was the only space women could express their sexuality.[16] Holmes recognises that both prostitution and extra-marital sex 'subvert[ed] the place of sexuality in enhancing the emotional and spiritual intimacy of marriage'.[17] Increasing concern of society in the late seventeenth century that irregulation and immorality were sweeping the country, prompted the establishment of the Societies for the Reformation of Manners.[18] Their aim was to tackle 'lewdness', the vague term encompassing all sexual acts

[12] Bernard Mandeville, *A modest Defence of Publick Stews* (first published 1724, Ex-classics Project 2018) 11
[13] Bernard Mandeville, *A modest Defence of Publick Stews* (first published 1724, Ex-classics Project 2018) 13
[14] Margaret Enderby, 'Defoe's Attitude Toward The Position of Women In The Eighteenth Century' (1967) <https://digital.library.unt.edu/ark:/67531/metadc130838/m2/1/high_res_d/n_03524.pdf> accessed 13 October 2021, 71
[15] Alice Brabcová , 'Marriage in the Seventeenth-Century England: The Woman's Story' (2006) <https://www.phil.muni.cz/angl/thepes/thepes_02_02.pdf> accessed 11 January 2022, 21
[16] Alice Brabcová , 'Marriage in the Seventeenth-Century England: The Woman's Story' (2006) <https://www.phil.muni.cz/angl/thepes/thepes_02_02.pdf> accessed 11 January 2022, 22
[17] Thomas Alan Holmes, 'Sexual Positions and Sexual Politics: John Cleland's Memoirs of a Woman of Pleasure' (2009) 74(1) South Atlantic Review 124, 126
[18] Tony Henderson, 'Disorderly Women in Eighteenth-Century London-Prostitution and Control in the Metropolis, 1730-1830', (Pearson Educated Limited 1999), 86

'inconsistent with the Character and Safety of a Christian'.[19] There was no professional policing system prior to the eighteenth century.[20] Ordinary citizens acted as constables, watchmen and magistrates, enforcing 'collective justice within their communities'.[21] The Societies began in the 'militant religious revival of the 1670s',[22] established by young Anglicans responding to the perceived immorality of the Royal Court and the popular resolution to promote Anglican virtues 'in the face of a much-feared Roman Catholic resurgence'.[23] This resurgence emerged during James II's reign but ended in 1688 when King William and Queen Mary consolidated their Protestant grip over England.[24] The first Society was formed in 1690 by parish officers and 'more substantial citizens of Tower Hamlets'.[25] This area was renowned for bawdy houses which the Society wanted suppressed. Morality and law enforcement became key features of the monarchs' ruling. Queen Mary, who 'feared divine retribution for the nation's moral misdeeds',[26] added her support to the reforming movement. The movement swiftly grew with the formation of other Societies, culminating in the 1691 London Society for the Reformation of Manners.[27] By early eighteenth century, twenty Societies for the Reformation of Manners operated in London, encouraged by a series of statutes and Royal Proclamations including one in 1699 by William III concerning the suppression of 'Blasphemy and Profaneness'[28] and 'Immorality.'[29]

The Societies for the Reformation of Manners and society in general viewed the common prostitute and women sexually active outside marriage as fundamentally alike.[30] Henderson describes how both were viewed as unified in their defiance of the moral injunction against

[19] Tony Henderson, 'Disorderly Women in Eighteenth-Century London-Prostitution and Control in the Metropolis, 1730-1830', (Pearson Educated Limited 1999), 180
[20] Faramerz Dabhoiwala, 'The best books on The 18th Century Sexual Revolution' Five Books- History Books- Early Modern History (1400-1800) <https://fivebooks.com/best-books/18th-century-sexual-revolution/> accessed 13 December 2021
[21] ibid
[22] Dan Cruickshank, *The Secret History of Georgian London*, (Random House Books 2009), 465
[23] ibid
[24] ibid
[25] Tony Henderson, 'Disorderly Women in Eighteenth-Century London-Prostitution and Control in the Metropolis, 1730-1830', (Pearson Educated Limited 1999), 86
[26] Dan Cruickshank, *The Secret History of Georgian London*, (Random House Books 2009), 469
[27] Tony Henderson, 'Disorderly Women in Eighteenth-Century London-Prostitution and Control in the Metropolis, 1730-1830', (Pearson Educated Limited 1999), 86
[28] Dan Cruickshank, *The Secret History of Georgian London*, (Random House Books 2009), 469
[29] ibid
[30] Tony Henderson, 'Disorderly Women in Eighteenth-Century London-Prostitution and Control in the Metropolis, 1730-1830', (Pearson Educated Limited 1999), 180

fornication and in their unchaste sexuality,[31] both referred to as 'whores' within society.[32] Mandeville, in *A modest Defence of Publick Stews (1724),*[33] differentiated between 'public whoring'[34] (common prostitution whereby a certain set of women 'have shook off all pretence to modesty; and for such a sum of money…profess themselves always in a readiness to be enjoyed'[35] by multiple men) and 'private whoring'[36] (sexual activity between a man and woman outside marriage, expressing the 'violence of female desire').[37]

1.2. Legal focus on suppression of public whoring

Henderson argues that despite societal condemnation towards public and private whoring, it was prostitution's direct link with crime and public disorder that concerned those in authority.[38] Many feared that common prostitutes and thieves would combine 'in the destruction of the public peace'.[39] Thus, throughout the eighteenth and early nineteenth centuries, attempts were made to suppress public whoring, particularly street prostitution and bawdy-houses.

Cruickshank describes the laws to tackle these issues by Societies as 'ancient and decrepit'.[40] Reformers used an act from Edward III's rule sanctioning the arrest of women based on pure suspicion of the individual being a prostitute 'intending to solicit,'[41] and a 1545 statute made it a common law offence to 'keep a brothel anywhere in London or to engage in grossly indecent behaviour in a public place.'[42] Early in the movement, prostitutes or bawdy houses were identified through 'agent provocateurs'[43] turning 'informer and complainant'.[44] They filled in a warrant naming the accused, their house and their alleged offence, getting a compliant

[31] Tony Henderson, 'Disorderly Women in Eighteenth-Century London-Prostitution and Control in the Metropolis, 1730-1830', (Pearson Educated Limited 1999), 181
[32] Tony Henderson, 'Disorderly Women in Eighteenth-Century London-Prostitution and Control in the Metropolis, 1730-1830', (Pearson Educated Limited 1999), 180
[33] Bernard Mandeville, *A modest Defence of Publick Stews* (first published 1724, Ex-classics Project 2018)
[34] Bernard Mandeville, *A modest Defence of Publick Stews* (first published 1724, Ex-classics Project 2018) 11
[35] Bernard Mandeville, *A modest Defence of Publick Stews* (first published 1724, Ex-classics Project 2018) 13
[36] ibid
[37] Bernard Mandeville, *A modest Defence of Publick Stews* (first published 1724, Ex-classics Project 2018) 24
[38] Tony Henderson, 'Disorderly Women in Eighteenth-Century London-Prostitution and Control in the Metropolis, 1730-1830', (Pearson Educated Limited 1999), 176
[39] Tony Henderson, 'Disorderly Women in Eighteenth-Century London-Prostitution and Control in the Metropolis, 1730-1830', (Pearson Educated Limited 1999), 177
[40] Dan Cruickshank, *The Secret History of Georgian London*, (Random House Books 2009), 464
[41] ibid
[42] ibid
[43] ibid
[44] Dan Cruickshank, *The Secret History of Georgian London*, (Random House Books 2009), 465

magistrate to sign the warrant.[45] The Societies' constables carried out the warrant, and if the victim was deemed a 'whore', she would be sent to the local Bridewell.[46]

In 1709 Lord Chief Justice Sir John Holt was cautious of the Societies' activities. He stated that it was unlawful 'to take up a woman on bare suspicion only, having been guilty of no breach of the peace, nor any unlawful act'.[47] Quinlan explains how Defoe, 'a great projector and reformer himself'[48] took issue with the Societies in Defoe's *Poor Man's Plea* and *Reformation of Manners* because 'they devote their efforts solely to prosecuting the poor while the flagrant vices of the upper classes go unpunished.'[49] Cruickshank states that suppressing bawdy-houses was legally problematic because the law based on the 1545 statute was 'extremely difficult to implement'.[50] If reformers raided a private house and were wrong in their suspicions of prostitution, they could themselves become liable to prosecution.[51] Societies printed handbooks explaining laws concerning 'lewd and disorderly practices',[52] stating 'whether an offence was punishable by summary conviction or had to be prosecuted by indictment, and setting out the penalties to which the guilty were liable.'[53] Henderson believes uncertainty encircling these laws, and the irregularity with which Justices interpreted them, halted the success of the Societies' endeavours.[54] The Societies wanted to purge the streets of 'the wretched Tribe of Night-walking Prostitutes',[55] contrary to the Statute of Winchester 1285 (13 Edw St.2)[56] that 'provided for the setting of a night watch in towns'[57] requiring watchmen to 'arrest suspicious persons and deliver them to the magistrates'.[58] What constituted 'suspicion' was debatable. In 1656 Lord Chief Justice Sir John Popham suggested an arrest in itself was sufficient to prove the accused was a nightwalker.[59] Although arrested women were

[45] ibid
[46] ibid
[47] Dan Cruickshank, *The Secret History of Georgian London*, (Random House Books 2009), 471
[48] Maurice J. Quinlan, 'Swift's Project for the Advancement of Religion and the Reformation of Manners' (1956) 71(1) Cambridge University Press 201, 204
[49] ibid
[50] Dan Cruickshank, *The Secret History of Georgian London*, (Random House Books 2009), 472
[51] ibid
[52] Tony Henderson, 'Disorderly Women in Eighteenth-Century London-Prostitution and Control in the Metropolis, 1730-1830', (Pearson Educated Limited 1999), 87
[53] ibid
[54] ibid
[55] Dan Cruickshank, *The Secret History of Georgian London*, (Random House Books 2009), 472
[56] Statute of Winchester 1285
[57] Tony Henderson, 'Disorderly Women in Eighteenth-Century London-Prostitution and Control in the Metropolis, 1730-1830', (Pearson Educated Limited 1999), 88
[58] ibid
[59] ibid

subject to orders to keep the peace, Henderson explains that Justices 'interpreted their discretionary powers generously'.[60]

By 1730, the Societies were in 'terminal decline'.[61] However, for law-enforcing agencies, common prostitution remained a public order issue.[62] Existing customary common law provisions required statutory reinforcement. The Societies'' eventual disappearance left policing of prostitutes to the Parish Watch.[63] The Vagrancy Act 1609 (7 Jac.I, c.4)[64] previously held that two justices of the peace could issue privy search warrants requiring constables within their jurisdiction to find and bring 'rogues, vagabonds, and sturdy beggars, and all such persons as are suspected to keep bawdy houses, and the frequenters thereof, and also all disturbers of the peace'.[65] The Vagrancy Act 1744[66] added that privy searches be carried out 'at least four times a year'.[67] The lack of legal clarity regarding prostitution (primarily the failure to mention the trade by name) created confusion as to when, where and for what reason the watch could arrest prostitutes.[68] Additionally, the readiness of justices of the peace to discharge the majority of women brought before them made the law futile.[69] Fielding advocated bringing streetwalkers explicitly within the scope of the vagrancy laws.[70]

The first important alteration regarding prostitution in law was the Disorderly Houses Act 1751 (25 Geo 2 c36).[71] Section two stated 'the multitude of places of entertainment for the lower sort of people is another great cause of thefts and robberies, as they are thereby tempted to spend their small substances in riotous pleasures.'[72] Henderson understands the Act's purpose

[60] ibid
[61] Tony Henderson, 'Disorderly Women in Eighteenth-Century London-Prostitution and Control in the Metropolis, 1730-1830', (Pearson Educated Limited 1999), 89
[62] Tony Henderson, 'Disorderly Women in Eighteenth-Century London-Prostitution and Control in the Metropolis, 1730-1830', (Pearson Educated Limited 1999), 191
[63] Tony Henderson, 'Disorderly Women in Eighteenth-Century London-Prostitution and Control in the Metropolis, 1730-1830', (Pearson Educated Limited 1999), 89
[64] Vagrancy Act 1609
[65] Tony Henderson, 'Disorderly Women in Eighteenth-Century London-Prostitution and Control in the Metropolis, 1730-1830', (Pearson Educated Limited 1999), 92
[66] Vagrancy Act 1744
[67] Tony Henderson, 'Disorderly Women in Eighteenth-Century London-Prostitution and Control in the Metropolis, 1730-1830', (Pearson Educated Limited 1999), 92
[68] Tony Henderson, 'Disorderly Women in Eighteenth-Century London-Prostitution and Control in the Metropolis, 1730-1830', (Pearson Educated Limited 1999), 90
[69] ibid
[70] Tony Henderson, 'Disorderly Women in Eighteenth-Century London-Prostitution and Control in the Metropolis, 1730-1830', (Pearson Educated Limited 1999), 91
[71] Disorderly Houses Act 1752
[72] Tony Henderson, 'Disorderly Women in Eighteenth-Century London-Prostitution and Control in the Metropolis, 1730-1830', (Pearson Educated Limited 1999), 93

as preventing temptations by ensuring such places in London or 'for twenty miles around'[73] must 'be licensed at the discretion of the justices of the peace.'[74] Unlicensed places were deemed disorderly. Constables could enter and arrest those within, including the house's keeper who had to pay £100 or be punished for keeping a disorderly house.[75] Licensed houses could not open before 5pm or their licence would be revoked.[76] The consequences of this Act were not as dramatic as anticipated. Cruickshank describes how this was partly because the more exclusive, discrete brothels were not seen as 'disorderly houses', remaining beyond the law's reach.[77] Sir John Fielding suggested the Act failed to rid London of 'low and common bawdy-houses'[78] because they were difficult to suppress 'for want of evidence'.[79] Constables could enter suspected houses, but if compromising evidence had been removed, they could not prosecute.[80] Restricted legal controls over street prostitution 'not only added greatly to the difficulties of those Magistrates who were anxious to clear the streets, but even exposed them to vexatious prosecutions.'[81]

Little changed regarding the regulation of prostitution during the remaining century. Not until 1822 (vol 6 cc1047-8)[82] was the 1744 Act altered meaning a 'common prostitute found wandering in the public street, who could not give a satisfactory account of herself, was liable to be declared an 'idle and disorderly person''.[83] This was the first time 'prostitute' appeared in English law, outlining grounds which prostitutes, as opposed to other disturbers of the peace, would be prosecuted.[84] This amendment was 'too extreme and impracticable'[85] so in 1824 (5 Geo. 4. c. 83)[86] was narrowed. A common prostitute, soliciting in the public street was not enough to bring a woman within the law, she had to behave 'in a riotous or indecent manner'.[87]

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[73] ibid
[74] Tony Henderson, 'Disorderly Women in Eighteenth-Century London-Prostitution and Control in the Metropolis, 1730-1830', (Pearson Educated Limited 1999), 94
[75] ibid
[76] ibid
[77] Dan Cruickshank, *The Secret History of Georgian London*, (Random House Books 2009), 494
[78] Dan Cruickshank, *The Secret History of Georgian London*, (Random House Books 2009), 503
[79] ibid
[80] ibid
[81] ibid
[82] Vagrancy Act 1822
[83] Dan Cruickshank, *The Secret History of Georgian London*, (Random House Books 2009), 503
[84] Catherine Curzon, 'Prostitution and the Law in the Long 18th Century' (2016) <https://www.madamegilflurt.com/2016/02/prostitution-and-law-in-long-18th.html> accessed 11 November 2021
[85] Dan Cruickshank, *The Secret History of Georgian London*, (Random House Books 2009), 503
[86] Vagrancy Act 1824
[87] Dan Cruickshank, *The Secret History of Georgian London*, (Random House Books 2009), 503

The Metropolitan Police Act 1829 (10 Geo 4)[88] replaced the parish constable system with the Metropolitan Police. Constables could arrest 'all loose, idle and disorderly Persons whom he shall find disturbing the public Peace, or of whom he shall have just cause to suspect of any evil Designs...or loitering...and not giving a satisfactory account of themselves'.[89] In 1839 (2 & 3 Vict c 47)[90] amendments to this act finally made soliciting in the street illegal, holding that 'any common prostitute loitering or soliciting for the purposes of prostitution to the annoyance of inhabitants or passers-by'[91] could be arrested and imprisoned for a month and fined. This legislation remained for the next 120 years as the law tackling street prostitution.[92] But 'while street prostitution decreased from 1822, bawdy-houses, brothels and unlicensed places of public entertainment continued to operate outside the reach of the law.'[93]

1.3. A change in societal views regarding public whoring

Increasingly by the 1730s, society began to understand that public whoring was predominantly caused by 'the appetite for food, not fornication'.[94] Confrontational crowds would rescue arrested prostitutes and attack those making the arrests.[95] In 1709, reforming constable John Dent, was killed by soldiers when apprehending known prostitute, Ann Dickens.[96] The judiciary freed Dent's killers on technicalities under guidance of Lord Chief Justice Sir John Holt.[97] Acceptance and toleration became frequent attitudes towards common prostitution, particularly amongst prostitute's plebeian neighbours. They witnessed first-hand the circumstances forcing common prostitutes into the profession. Mandeville saw public whoring as driven principally by economic necessity. He challenged the Societies' methods, stating that their 'success does but too plainly make it appear, that they were mistaken in their measures, and had not rightly considered the nature of this evil'.[98] Mandeville elucidated the implausibility of a scheme of reform, adopted by the Societies, reducing a woman to further

[88] Metropolitan Police Act 1829
[89] Dan Cruickshank, *The Secret History of Georgian London*, (Random House Books 2009), 503
[90] Metropolitan Police Act 1839
[91] Dan Cruickshank, *The Secret History of Georgian London*, (Random House Books 2009), 504
[92] ibid
[93] ibid
[94] Tony Henderson, 'Disorderly Women in Eighteenth-Century London-Prostitution and Control in the Metropolis, 1730-1830', (Pearson Educated Limited 1999), 197
[95] Tony Henderson, 'Disorderly Women in Eighteenth-Century London-Prostitution and Control in the Metropolis, 1730-1830', (Pearson Educated Limited 1999), 89
[96] ibid
[97] ibid
[98] Bernard Mandeville, *A modest Defence of Publick Stews* (first published 1724, Ex-classics Project 2018) 11

poverty to make her chaste when this lack of money had her living otherwise.[99] Mandeville's views grew in popularity. There was a difference between common prostitution and desire.[100] Prostitutes were viewed principally by the rich as having chosen their occupation through indolence,[101] believing that Prostitutes willingly entered the trade remaining there by choice. Ludovicus wrote in 1752 the wealthy could abhor the woman's lack of virtue but 'it is easy talking of being virtuous with a coach and six, but impossible, being really so, without either Friends, Money, Character, or Subsistence…Pray then what must they do to get Bread?'[102]

Mandeville explains the common scenario whereby, 'a man persuades a women…into such a good opinion of you, and assurance of your love to her, that she trusts you…and this with no other view but the gratification of a present passion…at the certain expense of her ruin, and putting her under the necessity of leading the life of a public courtesan.'[103] Due to the lack of work options available,[104] sustainable methods for women to survive were uncommon and marriage became the chief route for a woman to gain financial security. Lemmings argues English marriage law had degenerated into a 'confused and contradictory mess'.[105] Aside from marriage that complied with the 'stipulated formalities'[106] (approved by the Anglican Church), there lay a variety of ceremonies. All were in theory valid, however the law held different attitudes towards certain marriages.[107]

Contract marriage consisted of parties exchanging consent to marry without the presence of a priest.[108] The church and canon law treated the exchange of simple words of consent between a couple as adequate to conduct a binding union.[109] Boulton notes that the courts upheld such

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[99] Tony Henderson, 'Disorderly Women in Eighteenth-Century London-Prostitution and Control in the Metropolis, 1730-1830', (Pearson Educated Limited 1999), 184
[100] Tony Henderson, 'Disorderly Women in Eighteenth-Century London-Prostitution and Control in the Metropolis, 1730-1830', (Pearson Educated Limited 1999), 182
[101] Tony Henderson, 'Disorderly Women in Eighteenth-Century London-Prostitution and Control in the Metropolis, 1730-1830', (Pearson Educated Limited 1999), 170
[102] Tony Henderson, 'Disorderly Women in Eighteenth-Century London-Prostitution and Control in the Metropolis, 1730-1830', (Pearson Educated Limited 1999), 183
[103] Bernard Mandeville, *A modest Defence of Publick Stews* (first published 1724, Ex-classics Project 2018) 14
[104] Julia Brannan, '18th Century Prostitutes- Courtesans' (2019) <https://juliabrannan.com/2019/01/14/18th-century-prostitutes-courtesans/> accessed 14 February 2022
[105] David Lemmings, 'Marriage and the Law in the Eighteenth Century: Hardwicke's Marriage Act of 1753' (1996) 39(2) The Historical Journal 339, 344
[106] Rebecca Probert, 'The Impact Of The Marriage Act Of 1753: Was It Really "A Most Cruel Law For The Fair Sex"?' (2005) 38(2) Eighteenth-Century Studies 247, 249
[107] ibid
[108] ibid
[109] David Lemmings, 'Marriage and the Law in the Eighteenth Century: Hardwicke's Marriage Act of 1753' (1996) 39(2) The Historical Journal 339, 344

marriages 'with decreasing enthusiasm',[110] requiring strong evidence, including the testimony of two plausible witnesses, to establish its validity. *Priest v Parrot*[111] noted there were often promises of marriage 'which it is almost impossible to give evidence of.'[112] The common law courts did not recognise contract marriage: a woman who succeeded in becoming a wife under canon law could still be denied any share in the matrimonial property when her husband died.[113] Ecclesiastical courts did not consider contract marriage as complete in all cases. In *Haydon v Gould*[114] a husband was refused administration of his wife's estate because their marriage had not taken place before a priest.[115]

As a result of contract marriage, men commonly deceived young women by entering into contracts they never intended to acknowledge.[116] Prospects for fallen women were frightful as few men would marry a woman of easy virtue and few would employ her as a worker.[117] These women were left in financial poverty due to limited economic opportunities, their only options being to resort to prostitution or crime.[118] As Mandeville stressed, women 'never change that course of life for the better'[119] and could never recover their virtue or good name, 'which is so absolutely necessary to their getting a maintenance in any honest way'.[120]

The common prostitute's actions were still regarded as sinful, however, forgiveness was now the most fitting emotional response.[121] Prostitutes needed sustainable methods to clothe, shelter and feed themselves.[122] Welch in 1758 published a document that saw little hope for 'the

[110] Rebecca Probert, 'The Impact Of The Marriage Act Of 1753: Was It Really "A Most Cruel Law For The Fair Sex"?' (2005) 38(2) Eighteenth-Century Studies 247, 251
[111] Priest v Parrot [1750-1] 28 ER 103
[112] Rebecca Probert, 'The Impact Of The Marriage Act Of 1753: Was It Really "A Most Cruel Law For The Fair Sex"?' (2005) 38(2) Eighteenth-Century Studies 247, 251
[113] Rebecca Probert, 'The Impact Of The Marriage Act Of 1753: Was It Really "A Most Cruel Law For The Fair Sex"?' (2005) 38(2) Eighteenth-Century Studies 247, 253
[114] Haydon v Gould [1711] 91 ER 113
[115] Rebecca Probert, 'The Impact Of The Marriage Act Of 1753: Was It Really "A Most Cruel Law For The Fair Sex"?' (2005) 38(2) Eighteenth-Century Studies 247, 253
[116] Melissa J. Ganz, 'Moll Flanders and English Marriage Law' (2005) 17(2) University of Toronto press 157, 162
[117] Julia Brannan, '18th Century Prostitutes- Courtesans' (2019) <https://juliabrannan.com/2019/01/14/18th-century-prostitutes-courtesans/> accessed 14 February 2022
[118] Beth Martin Birky, 'Penitents Or Prostitutes?: The Narratives of Fallen Women in Defoe, Richardson, and Fielding' (1998) <https://ecommons.luc.edu/cgi/viewcontent.cgi?article=4723&context=luc_diss> accessed 5 December 2021, 7
[119] Bernard Mandeville, *A modest Defence of Publick Stews* (first published 1724, Ex-classics Project 2018) 13
[120] ibid
[121] Tony Henderson, 'Disorderly Women in Eighteenth-Century London-Prostitution and Control in the Metropolis, 1730-1830', (Pearson Educated Limited 1999), 197
[122] ibid

unhappy creatures'[123] (common prostitutes) unless society made greater efforts to help. Women could be sent to a Bridewell or, if diseased, to a Lock Hospital, but when released or discharged, without a 'recommendation or honest method of supporting themselves',[124] they would, through necessity, be driven to 'their former practices for support'.[125] Founders of the Magdalen Hospital emphasised every woman's containment of an 'inner spark of virtue'.[126] Those in the hospital received moral and religious instruction and learnt a suitable trade, generally domestic service[127] in the hopes of ridding the financial need to return to prostitution. Only small numbers of prostitutes entered the hospital, concentrating its efforts on those at risk of becoming common prostitutes.[128] As Henderson explains, the hospital symbolised a more accurate and transformed way of viewing common prostitution.[129] The prostitute was the victim, not of her own uncontrolled sexuality, but of 'material want and male heedlessness.'[130]

Seduced reluctantly into immorality, resulting in a loss of reputation and unable to find employment and marriage, these women were impotent in returning to reputability through honest means.[131] By declaring common prostitutes defenceless victims of circumstance, it exacerbated the perception of 'private whores' as dangerously sexual beings.

1.4. Literary context and an introduction to Defoe

Lacey states that novels were written to inform readers how best to 'live and interpret their surroundings'.[132] Literature helps to 'correct and reform humankind'.[133] Heinzelman argues that associating the novel with serious matters allows it to become the 'literary equivalent of the law and of political, religious, and social doctrine, settling battles between the legal and the

[123] Dan Cruickshank, *The Secret History of Georgian London*, (Random House Books 2009), 499
[124] ibid
[125] ibid
[126] Tony Henderson, 'Disorderly Women in Eighteenth-Century London-Prostitution and Control in the Metropolis, 1730-1830', (Pearson Educated Limited 1999), 185
[127] Tony Henderson, 'Disorderly Women in Eighteenth-Century London-Prostitution and Control in the Metropolis, 1730-1830', (Pearson Educated Limited 1999), 186
[128] Tony Henderson, 'Disorderly Women in Eighteenth-Century London-Prostitution and Control in the Metropolis, 1730-1830', (Pearson Educated Limited 1999), 197
[129] ibid
[130] Tony Henderson, 'Disorderly Women in Eighteenth-Century London-Prostitution and Control in the Metropolis, 1730-1830', (Pearson Educated Limited 1999), 185
[131] ibid
[132] Nicola Lacey, *Women, Crime, And Character From Moll Flanders to Tess of the D'Urbervilles*, (Oxford University Press 2008) 46
[133] Nicola Lacey, *Women, Crime, And Character From Moll Flanders to Tess of the D'Urbervilles*, (Oxford University Press 2008) 47

illegal, the moral and the immoral, and passing judgement on questions of virtue and questions of truth'.[134] Eighteenth century was the first period where women's voices were publicly heard, influencing the general outlook regarding love, courtship, and sex.[135] Stephen suggests 'the gradual extension of the reading class affected the development of the literature addressed to them'.[136] The push to make novel writing and reading more respectable required those novels of sexual and lustful intrigue associated with popular women writers of the late seventeenth and early eighteenth centuries, including Behn, Manley and Haywood, to be overwritten by male writers including Defoe, Fielding and Richardson.[137] Heinzelman states how women writers appeared to many contemporary male writers as 'versions of those midnight hags whose illicit deeds filled the news sheets.'[138]

Richardson, Fielding, Cleland and Defoe were predominant contributors to growing literary interest set against the backdrop of law, society and sexuality in eighteenth century England. Richardson's novel *Clarissa* is one of the earliest works to examine courtship, love, sex and rape from a female perspective.[139] In Richardson's *Pamela*, focus is on 'courtship leading to marriage',[140] representing the aspirations of women in society where their future depended on their ability to marry and on the kind of marriage made.[141] Being a magistrate, Fielding's novels drew on his legal career.[142] Wilputte suggests that Fielding calls attention to the 'plight of eighteenth-century woman to whom his culture denied an education, a political voice, any tangible social significance, and even an identity once she was married.'[143] Fielding changes the negative image of a fallen woman from a whore to 'the female who falls from Man's

[134] Susan Sage Heinzelman, *Law, Literature, and Gender*, (Stanford University Press 2010) 66-67
[135] Faramerz Dabhoiwala, 'The best books on The 18th Century Sexual Revolution' Five Books- History Books- Early Modern History (1400-1800) <https://fivebooks.com/best-books/18th-century-sexual-revolution/> accessed 13 December 2021
[136] Ian Watt, *The Rise Of The Novel- Studies in Defoe, Richardson and Fielding*, (Chatto and Windus Ltd 1957) 34
[137] Susan Sage Heinzelman, *Law, Literature, and Gender*, (Stanford University Press 2010) 56-57
[138] Susan Sage Heinzelman, *Law, Literature, and Gender*, (Stanford University Press 2010) 57
[139] Faramerz Dabhoiwala, 'The best books on The 18th Century Sexual Revolution' Five Books- History Books- Early Modern History (1400-1800) <https://fivebooks.com/best-books/18th-century-sexual-revolution/> accessed 13 December 2021
[140] Ian Watt, *The Rise Of The Novel- Studies in Defoe, Richardson and Fielding*, (Chatto and Windus Ltd 1957) 148
[141] Ian Watt, *The Rise Of The Novel- Studies in Defoe, Richardson and Fielding*, (Chatto and Windus Ltd 1957) 147
[142] Susan Sage Heinzelman, *Law, Literature, and Gender*, (Stanford University Press 2010) 68
[143] Earla A. Wilputte, '"Women Buried": Henry Fielding and Feminine Absence' (2000) 95(2) The Modern Language Review 324, 324

definition of the ideal woman',[144] demonstrating how patriarchal society condemns women to the role of 'servant-wife, invisible mother, absent woman.'[145] Cleland's erotic novel *Fanny Hill* was the first pornographic novel written from a female prostitute's perspective.[146] Cleland, like Richardson, creates a fictional 'feminine consciousness'[147] which he uses to filter his own insights into female sexuality.[148]

Brown discusses how 'Defoe was virtually ignored for most of the eighteenth century.'[149] However, Blewett explains we now acknowledge Defoe as 'one of the most important moralists writing about family life in the early eighteenth century.'[150] Kahn acknowledges Defoe 'in his guise as an autobiographical narrator of true events',[151] produces an 'unambiguous tale with a clear moral message.'[152] Novak describes Defoe as 'a master of realism'[153] who 'assured his readers that he was telling a true story.'[154] Bayle suggests this was effective because 'most readers felt great pleasure if they believed they were reading of real people and events.'[155] Watt discusses 'Defoe's forte'[156] was 'once his imagination seized on a situation he could report it with a comprehensive fidelity which was much in advance of any previous fiction, and which, indeed, has never been surpassed.'[157] Defoe had much to say about eighteenth century women and the problems they faced. Novels were aimed at and read by women. Lacey ponders whether the pleasure of reading is 'like that of crowds at public executions',[158] identifying with the

[144] Earla A. Wilputte, '"Women Buried": Henry Fielding and Feminine Absence' (2000) 95(2) The Modern Language Review 324, 327
[145] ibid
[146] Kate Aaron, 'People in Fiction- Fanny Hill' (2015) People In History <https://kateaaron.com/people-in-fiction-fanny-hill/#:~:text=Written%20by%20John%20Cleland%2C%20Memoirs,another%20female%20prostitute%2C%20her%20first> accessed 6 December 2021
[147] Robert Markley, 'Language, Power, and Sexuality in Cleland's "Fanny Hill"' (1984) 63(3) Philological Quarterly 343, 347
[148] Robert Markley, 'Language, Power, and Sexuality in Cleland's "Fanny Hill"' (1984) 63(3) Philological Quarterly 343, 352
[149] Homer Brown, 'The Institution of the English Novel: Defoe's Contribution' (1996) 29(3) NOVEL: A Forum on Fiction 299, 300
[150] David Blewett, 'Changing Attitudes toward Marriage in the Time of Defoe: The Case of Moll Flanders' (1981) 44(2) Huntington Library Quarterly 77, 82
[151] Madeleine Kahn, *Narrative Transvestism: Rhetoric and Gender in the Eighteenth-Century English Novel*, (Cornell University Press 1991) 59
[152] ibid
[153] Maximillian E. Novak, Defoe's Theory of Fiction' (1964) 61(4) Studies in Philology 650, 659
[154] Maximillian E. Novak, Defoe's Theory of Fiction' (1964) 61(4) Studies in Philology 650, 660
[155] ibid
[156] Ian Watt, *The Rise Of The Novel- Studies in Defoe, Richardson and Fielding*, (Chatto and Windus Ltd 1957) 129
[157] ibid
[158] Nicola Lacey, *Women, Crime, And Character From Moll Flanders to Tess of the D'Urbervilles*, (Oxford University Press 2008) 49

deviant. Gladfelder describes how Defoe represented his female characters with an air of complexity and empathy which 'underline their resemblance to stories readers might tell of their own lives.'[159] Readers become sufficiently informed judges of the moral choices made by Defoe's fictional characters.[160] Novak believes Defoe's fiction was written with two intentions in mind: 'that the intent of the stories is serious'[161] and that they are 'directed toward a moral goal.'[162]

1.5. Defoe and 'private whoring'

Through *Moll Flanders* and *Roxana*, Defoe demonstrates that women engaging in public and private whoring were equally victims of patriarchal society, acting in the only way they saw possible to protect and financially support themselves. Sufferings of women differed in degree and type, but little doubt remained that the majority of eighteenth-century women faced difficulties.[163] Defoe's main focus regarding 'private whoring' was to challenge strict Anglican marriage laws and the lack of legitimate, adequately paid job opportunities for women.

While Defoe criticised young women for engaging in sexual relations before being publicly married, Ganz argues that Defoe believed the underlying problem was the law's recognition of 'unsolemnized and unwitnessed vows'.[164] Defoe addresses this issue in *Moll Flanders* where Moll falls in love with her employer's elder son who promises to marry her when he inherits his father's estate.[165] He later refuses to acknowledge that the two of them have exchanged such marriage vows, leaving Moll with her virtue stripped and vulnerable.[166] Contract marriage will be further addressed in Part Two.

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[159] Hal Gladfelder, *Criminality and Narrative in Eighteenth-Century England- Beyond the Law*, (The Johns Hopkins University Press 2001) 13
[160] Susan Sage Heinzelman, *Law, Literature, and Gender*, (Stanford University Press 2010) 67
[161] Maximillian E. Novak, Defoe's Theory of Fiction' (1964) 61(4) Studies in Philology 650, 664
[162] ibid
[163] Margaret Enderby, 'Defoe's Attitude Toward The Position of Women In The Eighteenth Century' (1967) <https://digital.library.unt.edu/ark:/67531/metadc130838/m2/1/high_res_d/n_03524.pdf> accessed 13 October 2021, 31
[164] Melissa J. Ganz, 'Moll Flanders and English Marriage Law' (2005) 17(2) University of Toronto press 157, 167
[165] Melissa J. Ganz, 'Moll Flanders and English Marriage Law' (2005) 17(2) University of Toronto press 157, 164
[166] Melissa J. Ganz, 'Moll Flanders and English Marriage Law' (2005) 17(2) University of Toronto press 157, 165

Defoe disagreed with using marriage 'improperly for gain'[167] rather than for love.[168] However, Brabcova acknowledges that 'widespread opinion'[169] was that love came after marriage. Despite Defoe condemning 'Matrimonial Whoredom'[170] for its abuse of the 'sacred institution',[171] Wang believes that Defoe equally understood that women could not be 'self-sufficient in a capitalist society.'[172] For many women, marriage was the only way they felt they could survive. Defoe explores 'Matrimonial Whoredom' in *Moll Flanders* where Moll learns 'by Experience…that Marriages were…the Consequences of politick Schemes, for forming Interests, and, carrying on Business, and that Love had no Share, or but very little in the Matter'.[173] 'Matrimonial Whoredom' will be discussed later.

Defoe was critical of a wife's subservience to her husband, both financially and psychologically.[174] The legal situation impacting married women made it impossible for them to realise the 'aims of economic individualism'.[175] Defoe understood this problem, and dramatises it in the desperate actions Roxana is forced to take to overcome the 'legal disabilities of women.'[176] Equally, Moll's husband spends both his and Moll's money and is able to do this due to the limited property rights of married women. Coverture was the common law term for a married woman's legal condition,[177] based upon the 'unity of person',[178] with husband and wife sharing a legal identity.[179] Coverture also affected property laws. After marriage, a woman's personal or movable property 'became her husband's'.[180] Real property remained

[167] David Blewett, 'Changing Attitudes toward Marriage in the Time of Defoe: The Case of Moll Flanders' (1981) 44(2) Huntington Library Quarterly 77, 87
[168] ibid
[169] Alice Brabcová , 'Marriage in the Seventeenth-Century England: The Woman's Story' (2006) <https://www.phil.muni.cz/angl/thepes/thepes_02_02.pdf> accessed 11 January 2022, 22
[170] David Blewett, 'Changing Attitudes toward Marriage in the Time of Defoe: The Case of Moll Flanders' (1981) 44(2) Huntington Library Quarterly 77, 85
[171] David Blewett, 'Changing Attitudes toward Marriage in the Time of Defoe: The Case of Moll Flanders' (1981) 44(2) Huntington Library Quarterly 77, 86
[172] Ya-huei Wang, 'Love and Money in Daniel Defoe's Moll Flanders' (2011) 1(8) International Journal of Humanities and Social Science 252, 252
[173] Daniel Defoe, *Moll Flanders*, (Wordsworth Editions Limited 1993) 53
[174] Sarah Rasher, '"She Never Had Been a Bride in Her Life": The Marriage of Roxana and Amy' (2009) The Archives of Digital Defoe- Studies in Defoe & His Contemporaries <https://english.illinoisstate.edu/digitaldefoe/features/rasher.pdf> accessed 13 December 2021, page 2
[175] Ian Watt, *The Rise Of The Novel- Studies in Defoe, Richardson and Fielding*, (Chatto and Windus Ltd 1957) 94
[176] Ian Watt, *The Rise Of The Novel- Studies in Defoe, Richardson and Fielding*, (Chatto and Windus Ltd 1957) 141
[177] Tim Stretton, 'Married Women and the Law in England since the Eighteenth Century' (2003) 14(1) L'Homme Z. F. G. 124, 124
[178] ibid
[179] ibid
[180] ibid

hers, but she had no control over her property throughout the marriage.[181] Without an independent legal identity, and inability to own separate property, a wife could not 'enter into contracts in her own name',[182] leaving her dependent on her husband.[183] She could not 'write a will without her husband's approval, and even if he gave this approval he could withdraw it again at any time right up until her will was proved.'[184] The common law represented English society's patriarchal values.[185] Additionally, bankruptcy laws meant that if a husband became bankrupt, his wife and children also had to suffer.[186] Richetti explains how Defoe was forced to declare bankruptcy to the amount of £17,000. Bankruptcy and the 'unjust and illogical laws governing its punishment were to become obsessive topics' in Defoe's works. Okin argues that both the legal structure of marriage and attitudes towards it were such that 'only in fantasy can we regard eighteenth-century married life as a situation of companionship between equals.'[187]

Legal divorce allowing remarriage was unavailable until 1857, apart from by a private Act of Parliament, which was an expensive process only available for men.[188] Grounds for separation included 'adultery, cruelty, bigamy, incest or sodomy.'[189] Proof of adultery enabled a man to gain a separation, but women had to additionally prove cruelty on other grounds, a further example of English marital law leaving women further disadvantaged.[190] Married women could 'sue their husbands in the church courts because those courts acknowledged them to be separate persons.'[191] However, separation was not the same as divorce, and under the common law, these couples remained married to one another.[192] Defoe's disagreement regarding the canon law forbidding women to ever remarry will be examined in Part Two.

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[181] Tim Stretton, 'Married Women and the Law in England since the Eighteenth Century' (2003) 14(1) L'Homme Z. F. G. 124, 125
[182] ibid
[183] ibid
[184] ibid
[185] Tim Stretton, 'Married Women and the Law in England since the Eighteenth Century' (2003) 14(1) L'Homme Z. F. G. 124, 126
[186] Margaret Enderby, 'Defoe's Attitude Toward The Position of Women In The Eighteenth Century' (1967) <https://digital.library.unt.edu/ark:/67531/metadc130838/m2/1/high_res_d/n_03524.pdf> accessed 13 October 2021, 34
[187] Susan Moller Okin, 'Patriarchy and Married Women's Property in England: Questions on Some Current Views' (1983-1984) 17(2) Eighteenth-Century Studies 121, 138
[188] Tim Stretton, 'Married Women and the Law in England since the Eighteenth Century' (2003) 14(1) L'Homme Z. F. G. 124, 126-127
[189] Tim Stretton, 'Married Women and the Law in England since the Eighteenth Century' (2003) 14(1) L'Homme Z. F. G. 124, 127
[190] Tim Stretton, 'Married Women and the Law in England since the Eighteenth Century' (2003) 14(1) L'Homme Z. F. G. 124, 129
[191] Tim Stretton, 'Married Women and the Law in England since the Eighteenth Century' (2003) 14(1) L'Homme Z. F. G. 124, 127
[192] ibid

Defoe affirmed that bigamy was a sin as it was illegal in England and that every man should obey his government's laws.[193] However, Defoe was sympathetic to the plight of abandoned women with little prospect of financial security outside marriage. In regard to the confusion surrounding marriage law at this time, another form of accepted marriage ceremony as well as contract marriage, was clandestine marriage. This was celebrated before a priest but was not in accordance with canon law requirements.[194] Outhwaite's research found that many marriages were only clandestine by being celebrated at 'uncanonical hours in a parish where the parties did not belong'.[195] 1690s legislation (1696: 7&8 Wm 3 c. 35))[196] inflicted financial penalties on both couples that married clandestinely and on the clergymen marrying them.[197] Probert suggests that this led irregular marriages to move to the Fleet prison, where clergymen were 'already imprisoned for debt (so) had little to lose.'[198] Clandestine marriage was valid under common law.[199] Informal registers of the marriages kept by Fleet parsons were backdated or forged.[200] Probert questions how attentive priests were when inspecting parties' eligibility to marry.[201] In *Taylor v Taylor*[202] the court was tasked with discovering which of three women was the genuine widow of Thomas Taylor, who had 'contracted three marriages, two of them in the Fleet.'[203] Complicating things further was the suspicion that his first 'wife' was married to another man.[204] Lacey describes how unmarried women were faced with the unpleasant choice between working for very low wages and living a life of 'virtual slavery',[205] or as Watt describes, becoming largely 'superfluous dependents'[206] in a bigamous marriage.

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[193] Margaret Enderby, 'Defoe's Attitude Toward The Position of Women In The Eighteenth Century' (1967) <https://digital.library.unt.edu/ark:/67531/metadc130838/m2/1/high_res_d/n_03524.pdf> accessed 13 October 2021, 55

[194] Rebecca Probert, 'The Impact Of The Marriage Act Of 1753: Was It Really "A Most Cruel Law For The Fair Sex"?' (2005) 38(2) Eighteenth-Century Studies 247, 249

[195] ibid

[196] An Act for the enforcing the Laws which restrain Marriages without Licence of Banns, and for the better registering Marriage Births, and Burials 1696

[197] Rebecca Probert, 'The Impact Of The Marriage Act Of 1753: Was It Really "A Most Cruel Law For The Fair Sex"?' (2005) 38(2) Eighteenth-Century Studies 247, 249

[198] ibid

[199] Rebecca Probert, 'The Impact Of The Marriage Act Of 1753: Was It Really "A Most Cruel Law For The Fair Sex"?' (2005) 38(2) Eighteenth-Century Studies 247, 253

[200] ibid

[201] ibid

[202] Taylor v Taylor [1756] 161 ER 339

[203] Rebecca Probert, 'The Impact Of The Marriage Act Of 1753: Was It Really "A Most Cruel Law For The Fair Sex"?' (2005) 38(2) Eighteenth-Century Studies 247, 253

[204] ibid

[205] Nicola Lacey, *Women, Crime, And Character From Moll Flanders to Tess of the D'Urbervilles*, (Oxford University Press 2008) 74

[206] Ian Watt, *The Rise Of The Novel- Studies in Defoe, Richardson and Fielding*, (Chatto and Windus Ltd 1957) 144

To conclude Part One, Defoe's belief was that as society began to express empathy rather than judgement to public whoring, he was complete and robust in his belief that private whoring should be considered with the same level of empathy rather than damnation. Defoe had a 'genuine passion for humanity'[207] and was a 'herald of social reform.'[208] The patriarchal society within which Moll and Roxana lived clearly required reform, and Defoe's work was conducted toward promoting this idea.[209]

2. Part Two

Moll Flanders was published in 1722, around the middle of Defoe's career as an author. *Moll Flanders* tells the tale of a woman born in Newgate Prison, who seeks security through money, and has opportunities to acquire money only through marriage, becoming a mistress and eventually resorting to theft. Given the limited possibilities for women to work through honest means, marriage becomes to Moll, as to many women in society, her primary means of ensuring financial stability. Moll commits a number of bigamous marriages and only when reaching the age beyond her 'flourishing time'[210] to be courted, is she forced to turn to theft to financially support herself.

Gladfelder states that Moll's story 'originates in her first hand testimony: a set of manuscript memorandums 'written in the year 1683''.[211] Watt states that Defoe's narrative technique is to 'produce a convincing likeness to the autobiographical memoir of a real person.'[212] Khan further argues there is 'certainly nothing in Moll Flanders which clearly indicates that Defoe sees the story differently from the heroine'.[213] The moral purpose of *Moll Flanders* is to create

[207] Margaret Enderby, 'Defoe's Attitude Toward The Position of Women In The Eighteenth Century' (1967) <https://digital.library.unt.edu/ark:/67531/metadc130838/m2/1/high_res_d/n_03524.pdf> accessed 13 October 2021, 59
[208] Margaret Enderby, 'Defoe's Attitude Toward The Position of Women In The Eighteenth Century' (1967) <https://digital.library.unt.edu/ark:/67531/metadc130838/m2/1/high_res_d/n_03524.pdf> accessed 13 October 2021, 60
[209] ibid
[210] Daniel Defoe, *Moll Flanders*, (Wordsworth Editions Limited 1993) 147
[211] Hal Gladfelder, *Criminality and Narrative in Eighteenth-Century England- Beyond the Law*, (The Johns Hopkins University Press 2001) 13
[212] Madeleine Kahn, *Narrative Transvestism: Rhetoric and Gender in the Eighteenth-Century English Novel*, (Cornell University Press 1991) 62
[213] Madeleine Kahn, *Narrative Transvestism: Rhetoric and Gender in the Eighteenth-Century English Novel*, (Cornell University Press 1991) 63

a 'strong feeling of identification'[214] as to 'compel the reader to confront his or her own likeness in the text.'[215]

Although Defoe published his novel in 1722, the narrator's final words are 'written in the year 1683'.[216] It was commonplace for novels at the time of Defoe's writing to be set back in time to give a sense of authorial difference. Rees acknowledges that the 'administration in the time that Moll's story was set knew how to belabour women like Moll with an enormous stick, but not how to provide them with a different way of existence.'[217] Defoe argued this was still the case in 1722.

Part Two discusses how women were damned by society for engaging in private whoring, though social restrictions of limited working opportunities, coupled with legal restrictions placed on women in marriage left women with little choice. Defoe argued that women were 'economically capable human being(s)'[218] and given equal opportunities to men, would not have had to rely on marriage for financial security. Similarly, he argued that marriage law left women impuissant to live a chaste life; hence Defoe argued that contract marriage, coverture and divorce law necessitated reform.

2.1. Moll's first lover in Colchester

Defoe condemned how canon law recognised the 'exchange of unwitnessed and unsolemnized vows'[219] and instead called attention for law to 'require the celebration of conjugal vows in formal, public ceremonies.'[220] In *Moll Flanders,* Defoe focuses from the perspective of the deserted wife whilst critiquing these private matches. Moll lives with her employer's family in Colchester early in life. She falls in love with the elder son who promises to marry her when

[214] Hal Gladfelder, *Criminality and Narrative in Eighteenth-Century England- Beyond the Law*, (The Johns Hopkins University Press 2001) 13
[215] ibid
[216] Sian Rees, *Moll- The Life And Times of Moll Flanders*, (Chatto & Windus 2011) 3
[217] Sian Rees, *Moll- The Life And Times of Moll Flanders*, (Chatto & Windus 2011) 76
[218] Mona Scheuermann, *Her Bread To Earn: Women, Money, and Society from Defoe to Austen*, (The University press of Kentucky 1993) 13
[219] Melissa J. Ganz, *Public Vows: Fictions of Marriage in the English Enlightenment,* (University of Virginia Press 2019) 31
[220] Melissa J. Ganz, 'Moll Flanders and English Marriage Law' (2005) 17(2) University of Toronto press 157, 159

he comes to his estate.[221] Moll states that he 'told me I was his Wife, and I look'd upon myself as effectively so'.[222] Consequently, Moll and the elder brother engage in sexual relations. However, the younger brother in the Colchester household asks for Moll's hand in marriage and the elder brother encourages Moll to marry the younger brother. Moll reminds the elder brother of 'the many Hours pains you have taken to perswade me to believe myself an honest Woman; that I was your Wife intentionally, tho' not in the Eye of the World, and that it was as effectual a Marriage that had pass'd between us as if we had been publickly Wedded by the Parson of the Parish.'[223] Church courts recognised that marriage could be formed from the present tense exchange of an unconditional promise to marry.[224] The elder brother refuses to accept that such vows have been exchanged. He states 'I have not broken one Promise with you yet'[225] because despite the fact that 'I did tell you I would Marry you when I was come to my Estate…My Father is a hail healthy Man, and may live these thirty Years still…and you never propos'd my Marrying you sooner'.[226] Ganz explains how this symbolised the 'fluid, unstable world of lower-class courtship in early modern England.'[227] In *Conjugal Lewdness,* Defoe fears that the voluntary vow exchange invites the more powerful party to manipulate the situation if he later has a change of heart, and questions whether a binding contract has been made.[228] As noted in Part One, the church courts had become progressively hostile towards contract marriage by the time Defoe published *Moll Flanders*, seeking to discourage such unions by increasingly refusing to recognise them in spite of official canon law.[229] Contract marriage provided men with power to disregard a woman's consent, highlighting the need for the enforcement of 'the technical requirements of the canon law.'[230] Whilst Defoe condemns Moll for her willing sexual relations with a man who may not make her 'fair, and honourable

[221] Melissa J. Ganz, 'Moll Flanders and English Marriage Law' (2005) 17(2) University of Toronto press 157, 164
[222] Daniel Defoe, *Moll Flanders*, (Wordsworth Editions Limited 1993) 28
[223] Daniel Defoe, *Moll Flanders*, (Wordsworth Editions Limited 1993) 31
[224] Melissa J. Ganz, *Public Vows: Fictions of Marriage in the English Enlightenment,* (University of Virginia Press 2019) 28
[225] Daniel Defoe, *Moll Flanders*, (Wordsworth Editions Limited 1993) 30
[226] Daniel Defoe, *Moll Flanders*, (Wordsworth Editions Limited 1993) 30-31
[227] Melissa J. Ganz, 'Moll Flanders and English Marriage Law' (2005) 17(2) University of Toronto press 157, 165
[228] Melissa J. Ganz, 'Moll Flanders and English Marriage Law' (2005) 17(2) University of Toronto press 157, 166
[229] ibid
[230] Melissa J. Ganz, *Public Vows: Fictions of Marriage in the English Enlightenment,* (University of Virginia Press 2019) 31

Proposals of Marriage',[231] he admonishes the injustice of the elder brother's ability to dismiss and reject his union with Moll.[232]

2.2. Moll's 'Matrimonial Whoredom'

Before reaching the age of twenty, Moll's attitude towards marriage becomes 'practical and cold.'[233] After her experience with the elder brother in Colchester, Moll decides that to love without the guaranteed security of marriage is dangerous: 'I had been trick'd once by that Cheat called love…I was resolv'd now to be Married or Nothing, and to be well Married or not at all'.[234] Scheuermann recognises that a woman's potential for 'productive work'[235] is restricted by 'society's definition of what means for earning money are available to her'.[236] Moll must search for a 'renewable source of income',[237] usually a spouse.[238] Wang argues that Moll's 'pursuit of wealth is not to be seen as a quest for riches, but rather a desire to feel secure.'[239] Moll's choices are 'practical, made because she has a clear picture of her fate should she not act'.[240]

After Moll's first husband's death (the younger brother), she moves to London viewing it as a 'marriage market',[241] with the intention of using her inheritance and attractive appearance to secure a marriage.[242] Defoe believed that marriage without love was 'the compleatest misery in life'[243] and those entering into such marriages were little more than 'legal Prostitutes.'[244] Defoe views Moll as a 'matrimonial whore, one who uses the institution of marriage improperly

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[231] Daniel Defoe, *Moll Flanders*, (Wordsworth Editions Limited 1993) 21
[232] Melissa J. Ganz, 'Moll Flanders and English Marriage Law' (2005) 17(2) University of Toronto press 157, 166
[233] Ya-huei Wang, 'Love and Money in Daniel Defoe's Moll Flanders' (2011) 1(8) International Journal of Humanities and Social Science 252, 253
[234] Daniel Defoe, *Moll Flanders*, (Wordsworth Editions Limited 1993) 47
[235] Mona Scheuermann, *Her Bread To Earn: Women, Money, and Society from Defoe to Austen*, (The University press of Kentucky 1993) 13
[236] ibid
[237] Mona Scheuermann, *Her Bread To Earn: Women, Money, and Society from Defoe to Austen*, (The University press of Kentucky 1993) 21
[238] ibid
[239] Ya-huei Wang, 'Love and Money in Daniel Defoe's Moll Flanders' (2011) 1(8) International Journal of Humanities and Social Science 252, 255
[240] ibid
[241] Ya-huei Wang, 'Love and Money in Daniel Defoe's Moll Flanders' (2011) 1(8) International Journal of Humanities and Social Science 252, 253
[242] ibid
[243] David Blewett, 'Changing Attitudes toward Marriage in the Time of Defoe: The Case of Moll Flanders' (1981) 44(2) Huntington Library Quarterly 77, 77
[244] ibid

for profit.'[245] Watt argues that the plot of *Moll Flanders* 'flatly contradicts Defoe's purported moral theme.'[246] However, this article agrees with Novak who argues that Defoe rather 'regarded much of his fiction as a form of 'satyr' or criticism of the vice and immorality of his time.'[247] Defoe ensures that Moll's marriages end in desertion, death, and incest'[248] to present Moll's story as a 'negative illustration of the essential need for love in marriage'.[249] She is appropriately punished for her 'marital misdeeds'.[250] Moll describes when discovering that her marriage was incestuous, 'it was certain that my Life was very uneasie to me; for I liv'd…in the worst sort of Whoredom'.[251] However, despite punishing Moll for her 'Matrimonial Whoredom,'[252] Defoe understands that Moll learned 'by Experience…that Marriages were…the consequences of politick Schemes'[253] and that 'marriages of convenience were the norm.'[254] Defoe critiques society for treating marriage as a 'money market reducing a sacred institution into mere conjugal lewdness'[255] and encouraging the behaviour Moll deemed necessary in order to survive.

2.3. Legal restrictions on married women

Moll learns money leads to independence, and she can secure money through marriage.[256] However ironically, marriage places restrictions on women making them defenceless.

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[245] Ya-huei Wang, 'Love and Money in Daniel Defoe's Moll Flanders' (2011) 1(8) International Journal of Humanities and Social Science 252, 254
[246] David Blewett, 'Changing Attitudes toward Marriage in the Time of Defoe: The Case of Moll Flanders' (1981) 44(2) Huntington Library Quarterly 77, 84
[247] David Blewett, 'Changing Attitudes toward Marriage in the Time of Defoe: The Case of Moll Flanders' (1981) 44(2) Huntington Library Quarterly 77, 85
[248] Ya-huei Wang, 'Love and Money in Daniel Defoe's Moll Flanders' (2011) 1(8) International Journal of Humanities and Social Science 252, 252
[249] David Blewett, 'Changing Attitudes toward Marriage in the Time of Defoe: The Case of Moll Flanders' (1981) 44(2) Huntington Library Quarterly 77, 87
[250] ibid
[251] Daniel Defoe, *Moll Flanders*, (Wordsworth Editions Limited 1993) 70
[252] David Blewett, 'Changing Attitudes toward Marriage in the Time of Defoe: The Case of Moll Flanders' (1981) 44(2) Huntington Library Quarterly 77, 86
[253] Daniel Defoe, *Moll Flanders*, (Wordsworth Editions Limited 1993) 53
[254] Ya-huei Wang, 'Love and Money in Daniel Defoe's Moll Flanders' (2011) 1(8) International Journal of Humanities and Social Science 252, 253
[255] David Blewett, 'Changing Attitudes toward Marriage in the Time of Defoe: The Case of Moll Flanders' (1981) 44(2) Huntington Library Quarterly 77, 86
[256] Mona Scheuermann, *Her Bread To Earn: Women, Money, and Society from Defoe to Austen*, (The University press of Kentucky 1993) 16

Like Defoe, Wollstonecraft understood one of the most serious hardships society imposed on women was their inability to 'get and keep money.'[257] Under the common law doctrine of coverture, discussed in Part One, a wife could not own property. Her money and property were left in the hands of her husband to do with as he pleased.[258] Moll is rapidly made aware that money is a better safeguard than marriage.[259] She explains how she ruins herself 'in the grossest Manner that ever Woman did'[260] through marriage. Her second husband, after taking control of Moll's money 'fell into such a profusion of Expence, that all I had, and all he had before…would not have held it out above one Year.'[261] Her husband leaves Moll in a financially worse situation than prior to marriage. Similarly, when Moll marries the banker later in the novel, she laments after his death that 'the Loss my Husband had sustain'd had reduc'd his circumstances so low…I saw nothing before me but the utmost Distress.'[262] The combination of social circumstances and legal marital restrictions for women left women exploited.

As well as spending all their money, Moll's second husband abandons her. Peterson confirms that in English matrimonial law, wilful desertion was nowhere considered a sufficient ground for divorce.[263] Moll remains married to her second husband as they are neither divorced nor separated. With marriage her primary financial security option, Moll begins a career of 'culmulative bigamy interspersed with adultery'.[264]

Defoe enters into prominent debates about divorce in early modern England.[265] In the same way that Moll's relationship with the elder brother in Colchester illuminates the dangers of engaging in private unions, Defoe's novel highlights the issues that result in couples attempting

[257] Ya-huei Wang, 'Love and Money in Daniel Defoe's Moll Flanders' (2011) 1(8) International Journal of Humanities and Social Science 252, 255
[258] Melissa J. Ganz, *Public Vows: Fictions of Marriage in the English Enlightenment,* (University of Virginia Press 2019) 58
[259] Mona Scheuermann, *Her Bread To Earn: Women, Money, and Society from Defoe to Austen*, (The University press of Kentucky 1993) 16
[260] Daniel Defoe, *Moll Flanders,* (Wordsworth Editions Limited 1993) 48
[261] ibid
[262] Daniel Defoe, *Moll Flanders,* (Wordsworth Editions Limited 1993) 147
[263] Spiro Peterson, 'The Matrimonial Theme of Defoe's Roxana' (1955) 70(1) Cambridge University Press 166, 174
[264] Ian Watt, *The Rise Of The Novel- Studies in Defoe, Richardson and Fielding*, (Chatto and Windus Ltd 1957) 115
[265] Melissa J. Ganz, 'Moll Flanders and English Marriage Law' (2005) 17(2) University of Toronto press 157, 167

to dismiss their own vows.[266] Milton held the radical view that divine law should permit couples to terminate their own unions and dissolve their vows if they found it 'impossible to live together as true companions.'[267] Defoe found consensual divorce vexing and directly criticised Milton's ideas in *Conjugal Lewdness.*[268] Whilst advocating marriage for love, he opposed divorce on the grounds of simply being unhappy. He explained how this 'would fill the World with Confusion, would pollute the Ordinance of Matrimony instead of keeping it sacred as God's holy Ordinance; 'twould make Marriage a Stale, a Convenience, to gratify the sensual Part.'[269] Ganz views *Moll Flanders* as an extended reply to Milton in this aspect.[270]

The novel's challenge of consensual divorce is illustrated through anxieties surrounding the inequality of power distribution in marriage.[271] After Moll's second husband becomes bankrupt, he attempts to dissolve their union, 'if you never hear of me more…I wish you well'.[272] Moll becomes 'a widow bewitched; I had a husband and no husband, and I could not pretend to marry again, though I knew well enough my husband would never see England any more'.[273] Rees argues this is 'the worst position a woman can find herself in',[274] unable to legally remarry and bereft of economic support. Rees argues it is 'misfortune, rather than any moral deficiency, which sets Moll off onto the path of fraud, identity change and serial bigamy.'[275]

Later in the novel, Moll and Jemy (Moll's Lancashire husband) exchange private vows before a Catholic priest in a clandestine marriage, previously discussed in Part One.[276] Jemy abandons Moll the morning after the couple discover they have committed a 'double fraud'[277] because neither have the money they claimed to have had. He explains in a letter to Moll 'our marriage is nothing, I shall never be able to see you again; I here discharge you from it; if you can marry

[266] Melissa J. Ganz, *Public Vows: Fictions of Marriage in the English Enlightenment,* (University of Virginia Press 2019) 31
[267] ibid
[268] Melissa J. Ganz, *Public Vows: Fictions of Marriage in the English Enlightenment,* (University of Virginia Press 2019) 32
[269] Melissa J. Ganz, *Public Vows: Fictions of Marriage in the English Enlightenment,* (University of Virginia Press 2019) 33
[270] ibid
[271] ibid
[272] Daniel Defoe, *Moll Flanders*, (Wordsworth Editions Limited 1993) 49
[273] Daniel Defoe, *Moll Flanders*, (Wordsworth Editions Limited 1993) 50
[274] Sian Rees, *Moll- The Life And Times of Moll Flanders,* (Chatto & Windus 2011) 36
[275] ibid
[276] Melissa J. Ganz, *Public Vows: Fictions of Marriage in the English Enlightenment,* (University of Virginia Press 2019) 34
[277] Daniel Defoe, *Moll Flanders*, (Wordsworth Editions Limited 1993) 115

to your advantage do not decline it on my account'.[278] Jemy's desertion emphasises the negative consequences of consensual divorce as more acute than Moll's second husband's departure.[279] At length, Defoe describes their detailed exchange. Following abandonment, Moll discovers she is pregnant with Jemy's child, leaving her without financial or emotional support.[280]

The 'slipperiness and manipulability of consent'[281] and the 'ease with which intentions and feelings can be recast and reinterpreted'[282] support Defoe's reasoning for critiquing consensual divorce, as he similarly critiques contract marriage. As with Moll's relationship with the elder brother in Colchester, her reluctance to consent to the termination of her marital union is futile. The more powerful party to the marriage determines its outcome.[283]

Whilst rejecting consensual divorce, Defoe suggests that the canon law's treatment of abandoned spouses is 'too restrictive'.[284] Less than a year after her second husband abandons her, Moll adopts an affluent widow persona reinventing herself within the marriage market.[285] Moll calls out the law for preventing her from remarrying and Defoe draws attention to the injustice of this by reminding readers of Moll's remaining legal connection to her second husband immediately after stating that she is free[286] 'from all the Obligations ... of Wedlock or Mistresship in the World.'[287] Moll decries her resulting situation. Defoe does not directly address whether Moll is justified in remarrying so soon after her second husband deserts her.[288] However, he presents her new marriage following her second husband's desertion, and thus her act of bigamy, in a repulsive light through the discovery of incest between Moll and her brother/husband. This may be Defoe's way of condemning Moll for marrying for money, but also for remarrying so quickly after her husband's departure.

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[278] Daniel Defoe, *Moll Flanders,* (Wordsworth Editions Limited 1993) 119
[279] Melissa J. Ganz, *Public Vows: Fictions of Marriage in the English Enlightenment,* (University of Virginia Press 2019) 35
[280] ibid
[281] Melissa J. Ganz, 'Moll Flanders and English Marriage Law' (2005) 17(2) University of Toronto press 157, 173
[282] ibid
[283] ibid
[284] ibid
[285] Melissa J. Ganz, *Public Vows: Fictions of Marriage in the English Enlightenment,* (University of Virginia Press 2019) 40
[286] Melissa J. Ganz, 'Moll Flanders and English Marriage Law' (2005) 17(2) University of Toronto press 157, 178
[287] Daniel Defoe, *Moll Flanders,* (Wordsworth Editions Limited 1993) 99
[288] Melissa J. Ganz, 'Moll Flanders and English Marriage Law' (2005) 17(2) University of Toronto press 157, 176

Defoe does however challenge the absolute forbidding of Moll to remarry Jemy, suggesting she should be justified in remarrying in the lengthy aftermath of her husband's departure, it now being fifteen years hence.[289] Defoe suggests that Moll should be free to remarry, not because her second husband tells her so, but because he has been absent for so many years.[290] By implication, Defoe suggests that Moll's husband may as well be dead. Ganz argues that Defoe criticises the law for refusing to acknowledge Moll as a widow.[291] Wang explains how in the eighteenth century, 'there were no social services for deserted or widowed wives.'[292] Defoe presents the law as 'inaccurate as well as harmful'[293] by continuing to view Moll as remaining married to her second husband after so long. United in America at the end of the novel, Moll can declare her identity as Jemy's wife.[294] Defoe demonstrates his support for Moll and Jemy's unlawful union, a union that Ganz explains 'cannot be formally celebrated in the world of the novel'[295] due to English marriage law. America signifies broken marital ties and opportunities for fresh beginnings.[296]

2.4. Moll's career as a thief

Defoe views Moll as an 'economically capable human being',[297] denied the opportunity to earn money through honest means. Moll was living in 'utmost Tranquillity'[298] with her 'Quiet, Sensible, Sober'[299] banker husband, but when he loses a large sum of money, he 'grew Melancholy and Disconsolate, and from thence Lethargick, and died'.[300] This leaves Moll in a

[289] Melissa J. Ganz, 'Moll Flanders and English Marriage Law' (2005) 17(2) University of Toronto press 157, 177
[290] Melissa J. Ganz, *Public Vows: Fictions of Marriage in the English Enlightenment,* (University of Virginia Press 2019) 42
[291] Melissa J. Ganz, 'Moll Flanders and English Marriage Law' (2005) 17(2) University of Toronto press 157, 180
[292] Ya-huei Wang, 'Love and Money in Daniel Defoe's Moll Flanders' (2011) 1(8) International Journal of Humanities and Social Science 252, 255
[293] Melissa J. Ganz, 'Moll Flanders and English Marriage Law' (2005) 17(2) University of Toronto press 157, 179
[294] Ya-huei Wang, 'Love and Money in Daniel Defoe's Moll Flanders' (2011) 1(8) International Journal of Humanities and Social Science 252, 257
[295] Melissa J. Ganz, 'Moll Flanders and English Marriage Law' (2005) 17(2) University of Toronto press 157, 182
[296] ibid
[297] Mona Scheuermann, *Her Bread To Earn: Women, Money, and Society from Defoe to Austen*, (The University press of Kentucky 1993) 13
[298] Daniel Defoe, *Moll Flanders,* (Wordsworth Editions Limited 1993) 146
[299] ibid
[300] ibid

'dismal and disconsolate Case indeed…it was past the flourishing time with me when I might expect to be courted for a Mistress…and the Loss my Husband had sustain'd had reduc'd his Circumstances so low…that To-morrow I was to fast, and be starv'd to Death.'[301] Moll notes that 'I would gladly have turn'd my Hand to any honest Employment if I could have got it'.[302] She finds herself in desperate need of money, and believing herself too old for marriage or to be courted for a mistress, Moll's only other option is to turn to committing theft in order to survive economically.[303] Defoe's descriptions of Moll's thieving career are expressed in 'precisely the same tone'[304] as her undertaking as a legitimate planter in the colonies later in the novel. For Moll, thieving becomes a business move, just as planting becomes her business in the final interval of her life.[305] If we applaud Moll's judgement and acumen in her dealings with the captain of the ship she boards to America and in providing and supporting herself when she gets to Virginia, we must equally praise her intellect and skills when engaging in survival skills in less legal circumstances.[306] It is Moll's ability and necessity to survive that Defoe acknowledges.[307]

Wang states that for the many years Moll has sought financial security through marriage, 'it is through her own wits and talents that Moll finally finds a certain degree of financial security.'[308] However, just as Defoe condemns Moll's 'marital whoredom', he cannot condone Moll's success through theft.[309] Symbolised through the cyclical structure of the novel, Moll finds herself back at her birthplace, Newgate prison. Watt states that Defoe teaches an ethical lesson that 'vice must be paid for and crime does not pay.'[310] However, he ultimately allows for her redemption through her ability to be 'reborn again'.[311] He understands and sympathises with Moll's predicament as a woman of her age with limited options of financially supporting

[301] ibid
[302] Daniel Defoe, *Moll Flanders*, (Wordsworth Editions Limited 1993) 154
[303] Ya-huei Wang, 'Love and Money in Daniel Defoe's Moll Flanders' (2011) 1(8) International Journal of Humanities and Social Science 252, 255
[304] ibid
[305] ibid
[306] Mona Scheuermann, *Her Bread To Earn: Women, Money, and Society from Defoe to Austen*, (The University press of Kentucky 1993) 29
[307] ibid
[308] Ya-huei Wang, 'Love and Money in Daniel Defoe's Moll Flanders' (2011) 1(8) International Journal of Humanities and Social Science 252, 256
[309] ibid
[310] Ian Watt, *The Rise Of The Novel- Studies in Defoe, Richardson and Fielding*, (Chatto and Windus Ltd 1957) 114
[311] Ya-huei Wang, 'Love and Money in Daniel Defoe's Moll Flanders' (2011) 1(8) International Journal of Humanities and Social Science 252, 256

herself. As the Preface to the novel states, 'there is not a wicked action in any part of it, but is first or last rendered unhappy or unfortunate'.[312]

With a marriage based on love, Moll is able to enjoy all the things that her years of false marriages inhibited.[313] When initially moving to America, Moll is dependent upon her brother/husband. However, facilitated by Moll's inheritance, in contrast she now leads Jemy to America[314] and is empowered to decide where they will live and how they will survive financially.[315] Equity courts operated alongside the common law and regarded married women as separate persons in relation to property through the doctrine of separate estates.[316] The doctrine of separate estates will be revisited in Part Three. Through an 'instrument of equity',[317] a trust, Moll's mother leaves her a 'small Plantation'[318] along with a 'Stock of Servants and Cattle'.[319] Stretton describes how 'during marriage, if the married woman's relatives or supporters wanted to give her gifts or leave her legacies, they could write terms in deeds or wills'[320] ensuring that this property would only be for the woman's use. However, trusts had to be created in advance with lawyers, so became progressively expensive, narrowing the number of women with the combined knowledge and resources to utilise to their own advantage.[321] Moll was fortunate to benefit, but trusts were still rare in the 1720's. Rietz suggests that Defoe 'endorses such equitable inventions that protect a wife's property and that enable her to attain a degree of autonomy in her marriage.'[322] Blewett observes that Mol and Jemy's union is now not only grounded in mutual love, as Defoe believed a marriage should be, but the marriage

[312] Daniel Defoe, *Moll Flanders,* (Wordsworth Editions Limited 1993) 5
[313] Ya-huei Wang, 'Love and Money in Daniel Defoe's Moll Flanders' (2011) 1(8) International Journal of Humanities and Social Science 252, 256
[314] Melissa J. Ganz, *Public Vows: Fictions of Marriage in the English Enlightenment,* (University of Virginia Press 2019) 42-43
[315] Melissa J. Ganz, *Public Vows: Fictions of Marriage in the English Enlightenment,* (University of Virginia Press 2019) 42
[316] Tim Stretton, 'Married Women and the Law in England since the Eighteenth Century' (2003) 14(1) L'Homme Z. F. G. 124, 127
[317] Melissa J. Ganz, 'Moll Flanders and English Marriage Law' (2005) 17(2) University of Toronto press 157, 181
[318] Daniel Defoe, *Moll Flanders,* (Wordsworth Editions Limited 1993) 260
[319] ibid
[320] Tim Stretton, 'Married Women and the Law in England since the Eighteenth Century' (2003) 14(1) L'Homme Z. F. G. 124, 127
[321] Tim Stretton, 'Married Women and the Law in England since the Eighteenth Century' (2003) 14(1) L'Homme Z. F. G. 124, 128
[322] Melissa J. Ganz, 'Moll Flanders and English Marriage Law' (2005) 17(2) University of Toronto press 157, 181

also enables Moll to secure some economic security through her own business acumen[323] whilst advocating the right for wives to hold their own separate property.[324]

Chaber argues that Moll's ability to adapt to circumstances reflects the 'independence from men achieved by her mother',[325] who transformed herself from a felon in Newgate Prison, to owning a successful plantation in Virginia. Her mother 'by her Diligence and good Management after her Husband's Death…had improved the Plantations to such a degree…so that most of the Estate was of her getting, not her Husband's.'[326] In this more equitable society, female potential is rescued from 'waste and perversion',[327] reflecting Defoe's belief that England needed reform to enable more open opportunities for women to earn an honest living. Hummel suggests that Defoe wants us to recognise 'that stealing runs counter to Scripture.'[328] However simultaneously, Defoe highlights awareness that stealing reveals in Moll a sense of 'courage, heroism, inward strife, and intellectual alacrity'[329] that 'could not surface'[330] when she was merely reliant upon men for her finances.

To conclude Part Two, Defoe uses *Moll Flanders* to represent the problems women in early eighteenth-century society faced regarding their limited possibilities to work for a sufficient amount of money through honest means. As a result, marriage or becoming a mistress to a man with money appeared their only alternative option of securing financial stability. However, marital laws left women even more vulnerable (penniless and/or deserted) resulting in the subsequent committal of bigamous and adulterous relationships, in the hopes of improving their situation through yet another marriage. Defoe suggests that if women were given the opportunity to earn their own money through legal and honest means, women would not have had to rely upon marrying for money and could instead marry for love. Defoe demonstrates that Moll is capable of handling her own finances when she is enabled control over them. As

[323] David Blewett, 'Changing Attitudes toward Marriage in the Time of Defoe: The Case of Moll Flanders' (1981) 44(2) Huntington Library Quarterly 77, 87
[324] Melissa J. Ganz, *Public Vows: Fictions of Marriage in the English Enlightenment,* (University of Virginia Press 2019) 43
[325] Lois A. Chaber, 'Matriarchal Mirror: Women and Capital in Moll Flanders' (1982) 97(2) Cambridge University Press 212, 222
[326] Daniel Defoe, *Moll Flanders*, (Wordsworth Editions Limited 1993) 69
[327] Lois A. Chaber, 'Matriarchal Mirror: Women and Capital in Moll Flanders' (1982) 97(2) Cambridge University Press 212, 222
[328] William E. Hummel, '"The Gift of My Father's Bounty": Patriarchal Patronization in "Moll Flanders" and "Roxana"' (1994) 48(2) Rocky Mountain Review of Language and Literature 119, 133
[329] ibid
[330] ibid

Bell argues, 'Defoe believes in the self-made man'[331] but what is more remarkable and magnificent is that 'he believes equally in the self-made woman'.[332]

Defoe reveals in *Moll Flanders* the 'concrete social and legal conditions throttling women's potential.'[333] Defoe advocated for marital laws to be reformed, including prohibiting contract marriage, allowing women to hold and control their own property and a wife's entitlement to remarry after a period of long desertion. Moll and Jemy's relationship at the end of the novel illustrates the ability for husband and wife in a loving marriage to enjoy equal financial control and independence and to ensure women retain their dignity and virtue.

3. Part Three

Roxana was published two years after *Moll Flanders* in 1724. As Kahn comments, *Roxana* 'pretends to be an autobiographical narrative, written…in the first-person voice.'[334] As stated in the introduction, 'Defoe's novels present themselves as recordings rather than inventions'[335] evoking a sense of realism concerning the financial predicament women in the early eighteenth century often found themselves in. Like Moll, Roxana must 'follow the same path of ensuring her own survival'.[336]

Roxana tells the story of an attractive woman whose father arranges her marriage to a brewer for economic purposes. Her 'Fool'[337] husband loses all their money and abandons Roxana and her five children. At the point of literal starvation if she does not act, Roxana, instead of doing as Moll does, remarrying and committing bigamy, becomes mistress to her landlord, a 'well-to-do jeweller'[338] who in return financially supports her. When he is killed, she uses her business acumen to act efficiently and manages circumstances to secure a considerable amount

[331] Mona Scheuermann, *Her Bread To Earn: Women, Money, and Society from Defoe to Austen*, (The University press of Kentucky 1993) 12
[332] ibid
[333] Lois A. Chaber, 'Matriarchal Mirror: Women and Capital in Moll Flanders' (1982) 97(2) Cambridge University Press 212, 222
[334] Madeleine Kahn, *Narrative Transvestism: Rhetoric and Gender in the Eighteenth-Century English Novel*, (Cornell University Press 1991) 66
[335] Daniel Defoe, *Roxana*, (Oxford University Press 1996) xii
[336] Mona Scheuermann, *Her Bread To Earn: Women, Money, and Society from Defoe to Austen*, (The University press of Kentucky 1993) 35
[337] Daniel Defoe, *Roxana*, (Oxford University Press 1996) 8
[338] Nicola Lacey, *Women, Crime, And Character From Moll Flanders to Tess of the D'Urbervilles*, (Oxford University Press 2008) 82

of money. After Roxana experiences the 'socially prescribed course of marriage'[339] and discovers first-hand how English matrimonial law limits the opportunity of women to control their own money and property, she realises she can earn her own money and more importantly, manage her own finances, by replacing marriage with illicit relationships, away from the law's restrictive grip.

Ganz describes how Defoe's novel probes 'the limits of matrimony for women.'[340] Defoe understands Roxana's resentment towards marriage law as the principle of coverture leads her family into financial ruin. Defoe further reveals that marrying a 'fool' is the risk you take when marrying for economic purposes. Defoe praises Roxana's business acumen and her ability to deal with finances, as he does with Moll, demonstrating how if provided with more opportunities to work through honest means, women would not resort to earning money in illicit ways. Defoe condemns Roxana's rejection of marriage altogether despite understanding the reasoning behind her views. He argues that if marital laws were reformed to grant women property rights, women would not fear marriage as Roxana does and could marry for love, respecting the sacred institution of marriage.

3.1. Roxana's experience with her first husband

Unlike Moll, Roxana 'begins life in financial security'.[341] At only fifteen, Roxana's father sets up her marriage to an English brewer. Rasher describes how in early eighteenth century England, there was a growing tension between the view of marriage as transactional, where marriage was used as a 'way of joining families or increasing a man's financial stability',[342] and the view of marriage as joining together two individuals based on love.[343] Roxana's marriage is symbolic of the former. As acknowledged in Part Two, Defoe was a strong advocate of companionate marriage. The majority of *Conjugal Lewdness* is dedicated to the 'illustration

[339] Mona Scheuermann, *Her Bread To Earn: Women, Money, and Society from Defoe to Austen*, (The University press of Kentucky 1993) 13
[340] Melissa J. Ganz, *Public Vows: Fictions of Marriage in the English Enlightenment,* (University of Virginia Press 2019) 57
[341] Mona Scheuermann, *Her Bread To Earn: Women, Money, and Society from Defoe to Austen*, (The University press of Kentucky 1993) 35
[342] Sarah Rasher, '"She Never Had Been a Bride in Her Life": The Marriage of Roxana and Amy' (2009) The Archives of Digital Defoe- Studies in Defoe & His Contemporaries <https://english.illinoisstate.edu/digitaldefoe/features/rasher.pdf> accessed 13 December 2021, page 2
[343] ibid

of failed, miserable, and sinful marriages,'[344] which are the 'long-term results of unions based on status, money, convenience or lust.'[345] The same is true of Roxana's first marriage to a 'Fool'.[346]

Scheuermann reminds us how 'gender and marital status determine a person's legal profile.'[347] The combination of Roxana being married and also being a woman prevents her from having her own legal identity due to coverture, mentioned in Part Two. The right to control or own property is unavailable to Roxana, resulting in her being 'subsumed into her husband'.[348] When Roxana's father-in-law dies leaving his son his brewhouse, the brewer painfully mismanages it and goes into debt. This aspect of matrimonial law impacts upon Roxana. When a husband goes bankrupt, a man's wife and children also suffer. Peterson, among other critics, emphasised the injustice of the law to protect the wife and children from the financial disasters that the husband sustains.[349] Roxana's husband is able to sell the brewhouse to pay off his debts, leaving 'between Two and Three Thousand Pound in his Pocket.'[350] Roxana tries to persuade her husband to invest this money to avoid further financial difficulty, yet he continues to fritter away the money, consequently abandoning her and their children. Stone recognises Roxana as 'forcefully critical of a wife's financial and psychological subordination to her husband.'[351] It is apparent that Roxana's financial and business knowledge is superior to her husbands, who she describes using the primitive, animalistic metaphor as a 'weak, empty-headed, untaught Creature'.[352] Scheuermann argues that Defoe challenges English marital laws through 'focusing the reader's attention on Roxana's helplessness even in the face of her own good business sense'.[353] Rasher further discusses how the novel 'brings to mind twenty-first-century

[344]Sarah Rasher, '"She Never Had Been a Bride in Her Life": The Marriage of Roxana and Amy' (2009) The Archives of Digital Defoe- Studies in Defoe & His Contemporaries <https://english.illinoisstate.edu/digitaldefoe/features/rasher.pdf> accessed 13 December 2021, page 5
[345] ibid
[346] ibid
[347] Mona Scheuermann, *Her Bread To Earn: Women, Money, and Society from Defoe to Austen*, (The University press of Kentucky 1993) 46
[348] ibid
[349] Spiro Peterson, 'The Matrimonial Theme of Defoe's Roxana' (1955) 70(1) Cambridge University Press 166, 188
[350] Daniel Defoe, *Roxana*, (Oxford University Press 1996) 10
[351] Sarah Rasher, '"She Never Had Been a Bride in Her Life": The Marriage of Roxana and Amy' (2009) The Archives of Digital Defoe- Studies in Defoe & His Contemporaries <https://english.illinoisstate.edu/digitaldefoe/features/rasher.pdf> accessed 13 December 2021, page 2
[352] Daniel Defoe, *Roxana*, (Oxford University Press 1996) 7
[353] Mona Scheuermann, *Her Bread To Earn: Women, Money, and Society from Defoe to Austen*, (The University press of Kentucky 1993) 36

conversations about marriage equality.'[354] Spielman describes how the devastation Roxana is faced with influences how she later processes her relationships with men. She views them as a means of accumulating money, whilst maintaining autonomy over her own money by adopting the role of mistress as opposed to wife.[355] Roxana experiences the 'potentiality of the matrimonial law to work ill on the woman.'[356] Peterson understands Roxana's fears and agrees that, 'it is not surprising that Roxana should reach the conclusion that the laws of matrimony were wholly on the side of the husband.'[357]

3.2. Roxana's experience as a mistress

Roxana's financial situation rapidly deteriorates, 'as Time run on a Week, two Weeks, a Month, two Months, and so on, I was dreadfully frightened at last…I remain'd in this dejected Condition near a Twelve-month.'[358] As noted in *Moll Flanders,* legitimate employment for women generated little income and job opportunities were limited.[359] Roxana is left with two options, the same options that Moll faces after she suffers her desertion by her second husband: she can re-marry for money as Moll does but this would result in bigamy, or she could become a mistress to a wealthy man. Roxana believes that 'A Woman ought rather to die, than to prostitute her Virtue and Honour'.[360] However, facing starvation, and coupled with her understandable fears of marriage, Roxana reluctantly chooses the latter option when the opportunity is presented to her in the form of her landlord. Scarred from her previous marriage, Roxana 'chooses to be a single woman throughout a long part of her life.'[361] This supports Defoe's view that 'private whoring' was not caused by lustful desires. Roxana's refusal to marry is due to existing matrimonial laws. Roxana and the Landlord's spouses both remain alive so Roxana 'remembered that neither [the landlord] or I, either by the Laws of God or Man, cou'd come together, upon any other Terms than that of notorious Adultery.'[362] Despite

[354] Sarah Rasher, '"She Never Had Been a Bride in Her Life": The Marriage of Roxana and Amy' (2009) The Archives of Digital Defoe- Studies in Defoe & His Contemporaries <https://english.illinoisstate.edu/digitaldefoe/features/rasher.pdf> accessed 13 December 2021, page 1
[355] David Wallace Spielman, 'The Value of Money in Robinson Crusoe, Moll Flanders, and Roxana' (2012) 107(1) The Modern Language Review 65, 82
[356] Spiro Peterson, 'The Matrimonial Theme of Defoe's Roxana' (1955) 70(1) Cambridge University Press 166, 188
[357] ibid
[358] Daniel Defoe, *Roxana*, (Oxford University Press 1996) 12-13
[359] Sian Rees, *Moll- The Life And Times of Moll Flanders*, (Chatto & Windus 2011) 36
[360] Daniel Defoe, *Roxana*, (Oxford University Press 1996) 29
[361] Paula R. Backscheider, *Daniel Defoe: Ambition and Innovation*, (University press of Kentucky 1986) 189
[362] Daniel Defoe, *Roxana*, (Oxford University Press 1996) 38

not legally married to the landlord, he still 'fulfills all his promises'[363] in financially supporting Roxana and providing 'financial safeguards for her that are significantly better than those she might have had if they were legally married.'[364]

Discussing the differences between being a wife and a mistress, Roxana argues that 'a Wife must give up all she has, have every Reserve she makes for herself be thought hard of, and be upbraided with her very Pin-Money, whereas a Mistress makes the Saying true, that what the Man has, is hers, and what she has, is her own'.[365] This begins Roxana's 'climb up the financial ladder.'[366] The men to whom she is mistress treat her better than how her husband treated her.[367] Through these means, Roxana is aware she can remain in control of her finances and retain financial independence.

When the landlord is killed on a business trip, Roxana demonstrates her impressive business acumen and management skills. She acts quickly in taking stock of her assets[368] and orders her servant Amy to 'liquidate the household so that the lawful wife cannot claim any of the goods.'[369] She keeps the jewels belonging to the landlord whilst deceiving others that they had been stolen. She persuades the Prince that her financial situation is worse than reality, resulting in the prince granting her 'two Thousand Livres a Year'.[370] Despite not acting in the most moral or legal way, Defoe demonstrates Roxana's supreme business skills and observes how she works expeditiously when she 'is not fettered by someone else's right to ruin her.'[371] Watt argues that Roxana's 'scandalous speciality'[372] could be 'developed into the most lucrative career then open to women.'[373] Acknowledging that the 'decay of domestic industry'[374] negatively impacted upon women, Defoe demonstrates how if given the opportunity to work

[363] Mona Scheuermann, *Her Bread To Earn: Women, Money, and Society from Defoe to Austen*, (The University press of Kentucky 1993) 39
[364] ibid
[365] Daniel Defoe, *Roxana*, (Oxford University Press 1996) 132
[366] Mona Scheuermann, *Her Bread To Earn: Women, Money, and Society from Defoe to Austen*, (The University press of Kentucky 1993) 39
[367] ibid
[368] ibid
[369] Mona Scheuermann, *Her Bread To Earn: Women, Money, and Society from Defoe to Austen*, (The University press of Kentucky 1993) 40
[370] Daniel Defoe, *Roxana*, (Oxford University Press 1996) 60
[371] Mona Scheuermann, *Her Bread To Earn: Women, Money, and Society from Defoe to Austen*, (The University press of Kentucky 1993) 39
[372] Ian Watt, *The Rise Of The Novel- Studies in Defoe, Richardson and Fielding*, (Chatto and Windus Ltd 1957) 141
[373] ibid
[374] ibid

through honest means, Roxana would excel. She clearly has the potential to be a great businesswoman and would not have to resort to earning money through illicit means.

Defoe advocated giving women opportunities for involvement in business matters. In *The Complete English Tradesman*, Defoe aims to persuade his male readers to make his wife 'mistress of her own circumstances'.[375] Roxana states that 'it was my Opinion, a Woman was as fit to govern and enjoy her own Estate, without a Man, as a Man was, without a Woman.'[376] Rogers suggests that Roxana contains the 'ego-drives of men in that she wants wealth, public acclaim and professional skill',[377] and wishes to be a 'She-Merchant'[378] where she can pick her sexual partners and control her own money and life. Peterson describes how Roxana attacks 'the double-standard of morality',[379] which feminists 'like Mrs Manley'[380] had already challenged. She describes how being unmarried and a mistress allows her to become 'Masculine in her politic Capacity'.[381] Backscheider comments on the mysteriousness of a woman in society not needing to rely on a man despite the 'many ways (that) have been devised to prevent such a possibility.'[382] Defoe becomes fascinated with Roxana's ability to drastically alter her financial circumstances from being a woman fearing poverty in the beginning of the novel, to her ability to earn a fortune by the end of the novel, mirroring his fascination by Moll's resourcefulness and ability to survive. Scheuermann describes how Defoe, when discussing Roxana's 'financial manipulations',[383] views her gender as irrelevant. Instead, the 'salient fact is that she is so capable.'[384]

Roxana began her business of becoming a mistress firstly out of economic necessity. However, by the time she becomes the prince's mistress, she is no longer struggling financially and could avoid extra-marital sexual activity and adultery. Afterall, the combination of money and jewels

[375] Sarah Rasher, '"She Never Had Been a Bride in Her Life": The Marriage of Roxana and Amy' (2009) The Archives of Digital Defoe- Studies in Defoe & His Contemporaries <https://english.illinoisstate.edu/digitaldefoe/features/rasher.pdf> accessed 13 December 2021, page 3
[376] Daniel Defoe, *Roxana*, (Oxford University Press 1996) 149
[377] Paula R. Backscheider, *Daniel Defoe: Ambition and Innovation*, (University press of Kentucky 1986) 213
[378] Daniel Defoe, *Roxana*, (Oxford University Press 1996) 131
[379] Spiro Peterson, 'The Matrimonial Theme of Defoe's Roxana' (1955) 70(1) Cambridge University Press 166, 184
[380] ibid
[381] Daniel Defoe, *Roxana*, (Oxford University Press 1996) 148
[382] Paula R. Backscheider, *Daniel Defoe: Ambition and Innovation*, (University press of Kentucky 1986) 210
[383] Mona Scheuermann, *Her Bread To Earn: Women, Money, and Society from Defoe to Austen*, (The University press of Kentucky 1993) 59
[384] ibid

she maintains after her landlord's death makes her financially self-sufficient.[385] Defoe suggests it is the independence that an unmarried life provides Roxana with which she does not wish to give up. When the Dutch merchant asks for her hand in marriage, she argues that 'the very Nature of the Marriage-Contract was, in short, nothing but giving up Liberty, Estate, Authority, and every-thing, to the Man, and the Woman was indeed, a meer woman ever after, that is to say, a slave.'[386] Furthermore 'whoever the Woman was, that had an Estate, and would give it up to be the Slave of a Great Man, that Woman was a Fool'.[387] Roxana challenges 'the law of matrimony, which 'puts the Power into [his] Hands; bids [him] do it, commands [him] to command; and bids [her], forsooth, to obey'.[388] Hentzi argues that Roxana's critique of 'the inequalities of marriage as an unfair restriction on a woman's power of self-determination is never actually refuted.'[389] After Roxana lists her reasons for aversion to marriage, the merchant 'was confounded at this Discourse, and told me, he cou'd not say but I was right in the Main'.[390] Ganz recognises that despite the merchant's responses to many of the objections Roxana raises against them marrying, 'he does not- and cannot- refute her charges concerning the legal consequences of matrimony.'[391]

Roxana repeatedly reminds her readers of the illicit means by which she acquired her wealth implying she does feel some guilt for her 'private whoring', however, she prefers to accept her whoredom and 'sin on',[392] given how highly she values her financial independence.[393] Crane describes Roxana's transition in her life as one from 'fear of poverty'[394] to 'fear of loss of self and of control.'[395] Contrary to societal belief at the time, Roxana's 'private whoring' is not motivated by sexual desire, and thus Rosenthal describes how this becomes one of Roxana's

[385] Margaret Enderby, 'Defoe's Attitude Toward The Position of Women In The Eighteenth Century' (1967) <https://digital.library.unt.edu/ark:/67531/metadc130838/m2/1/high_res_d/n_03524.pdf> accessed 13 October 2021, 78
[386] Daniel Defoe, *Roxana*, (Oxford University Press 1996) 148
[387] Daniel Defoe, *Roxana*, (Oxford University Press 1996) 149
[388] Daniel Defoe, *Roxana*, (Oxford University Press 1996) 151
[389] Gary Hentzi, 'Holes in the Heart: Moll Flanders, Roxana, and "Agreeable Crime"' (1991) 18(1) Duke University Press 174, 184
[390] Daniel Defoe, *Roxana*, (Oxford University Press 1996) 153
[391] Melissa J. Ganz, *Public Vows: Fictions of Marriage in the English Enlightenment,* (University of Virginia Press 2019) 58
[392] Daniel Defoe, *Roxana*, (Oxford University Press 1996) 82
[393] Mona Scheuermann, *Her Bread To Earn: Women, Money, and Society from Defoe to Austen*, (The University press of Kentucky 1993) 40
[394] Julie Crane, 'Defoe's "Roxana": The Making and Unmaking of a Heroine' (2007) 102(1) The Modern Language Review 11, 22
[395] ibid

'most disconcerting qualities'.[396] Backscheider agrees that Roxana 'pays men in sex sometimes because she had rather part with her body than her money',[397] thus her whoredom is driven by economic necessity and after this, the need to remain independent and self-sufficient.

3.3. Roxana marries the Dutch merchant

After rejecting the marriage proposal from the Dutch merchant, Roxana becomes mistress to the King of England and finally to an English lord.[398] However, Defoe demonstrates that life as a mistress, despite its profitability, is extremely isolating,[399] 'I began to be sick of the Vice'[400] and asks 'what was I a whore for now?'[401] Ganz observes how her description of the affair with the lord is overshadowed by her attempts to make amends with her children, implying her 'longing for familiar connection'[402] which life as a mistress cannot bring her.

Roxana's reunion with the merchant asserts Defoe's view of the importance of a loving marriage. Ganz calls this reunion 'a reconstructed matrimony',[403] so that Roxana's fears regarding the loss of control over her property within a marriage do not prevent her from marrying. Peterson explains how the premarital contract and the trust in the courts of equity was the most 'significant social change'[404] throughout the early eighteenth century. The chancery started to recognise 'separate estates' wherein property brought into a marriage by a woman could remain in trust for her use and that of her children. Historians credit Lord Mansfield as largely responsible for developing these separate estates, as Shientag demonstrates when he praises Mansfield for recognising 'the common law's capacity for growth, its power to meet the changing needs of society, its continuity, its consistency and its supreme utility in promoting justice and fair dealing.'[405] Roxana brings her 'entire

[396] Laura J. Rosenthal, *Infamous Commerce: Prostitution in Eighteenth-Century British Literature and Culture*, (Cornell University Press 2006) 73
[397] Paula R. Backscheider, *Daniel Defoe: Ambition and Innovation*, (University press of Kentucky 1986) 202
[398] Melissa J. Ganz, *Public Vows: Fictions of Marriage in the English Enlightenment,* (University of Virginia Press 2019) 58
[399] ibid
[400] Daniel Defoe, *Roxana*, (Oxford University Press 1996) 200
[401] Daniel Defoe, *Roxana*, (Oxford University Press 1996) 201
[402] Melissa J. Ganz, *Public Vows: Fictions of Marriage in the English Enlightenment,* (University of Virginia Press 2019) 59
[403] ibid
[404] Spiro Peterson, 'The Matrimonial Theme of Defoe's Roxana' (1955) 70(1) Cambridge University Press 166, 187
[405] Bernard L. Shientag, 'Lord Mansfield Revisited- A Modern Assessment' (1941) 10(3) Fordham Law Review 345, 388

miscellaneous fortune into the public stock and has invited the Dutch merchant to claim possession.'[406] The merchant states that he 'will not touch them, says he, nor one of them, till they are all settl'd in Trustee's Hands, for your own Use, and the Management wholly your own.'[407] Here, as in *Moll Flanders*, Defoe recognises developments in equity that 'chip away at women's disabilities during coverture.'[408] Defoe implies that if the husband 'acted as became him',[409] Roxana could use the safeguards the law was starting to make available to married women.[410] With her husband's consent, the wife could 'have property settled upon her.'[411] It wasn't until the 1740's when the need for a husband's consent to this arrangement was eradicated.[412] Peterson questions whether the safeguards would completely serve their purpose if the husband refused to provide his consent[413] and was not as 'generous and caring'[414] as the Dutch merchant. As noted in *Moll Flanders*, there were also the issues of acquiring lawyers and costs surrounding trusts. Thus, despite the trust being an improvement in relation to women's property rights, at the time of Defoe's writing of the novel, he still believed there was further reform necessary in order for women to feel financially independent and adequately protected within marriage. Defoe develops the 'portrait of reconstructed matrimony,'[415] as he does with Jemy and Moll at the end of *Moll Flanders*, symbolising the equality and agency of both spouses who have married upon purely affectionate grounds.[416] Defoe accepted the 'abiding concern with women's unequal position under the law'[417] but argued that if women were awarded property rights in marriage, a loving marriage should be encouraged. An individual should not be deprived of the chance to love due to fears of financial ruin. *Roxana* raises awareness of the peril of rejecting matrimony entirely.[418]

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[406] Spiro Peterson, 'The Matrimonial Theme of Defoe's Roxana' (1955) 70(1) Cambridge University Press 166, 190
[407] Daniel Defoe, *Roxana*, (Oxford University Press 1996) 259
[408] Melissa J. Ganz, *Public Vows: Fictions of Marriage in the English Enlightenment,* (University of Virginia Press 2019) 59
[409] Spiro Peterson, 'The Matrimonial Theme of Defoe's Roxana' (1955) 70(1) Cambridge University Press 166, 190
[410] ibid
[411] Spiro Peterson, 'The Matrimonial Theme of Defoe's Roxana' (1955) 70(1) Cambridge University Press 166, 188
[412] ibid
[413] Spiro Peterson, 'The Matrimonial Theme of Defoe's Roxana' (1955) 70(1) Cambridge University Press 166, 190
[414] Melissa J. Ganz, *Public Vows: Fictions of Marriage in the English Enlightenment,* (University of Virginia Press 2019) 60
[415] Melissa J. Ganz, *Public Vows: Fictions of Marriage in the English Enlightenment,* (University of Virginia Press 2019) 27
[416] ibid
[417] Melissa J. Ganz, *Public Vows: Fictions of Marriage in the English Enlightenment,* (University of Virginia Press 2019) 62
[418] ibid

3.4. Roxana's daughter Susan

Despite understanding the circumstances Roxana's first husband left her in and the limited options available for her to earn a living and rebuild her financial situation through honest means, like Moll, Defoe ensures that Roxana cannot be condoned for living an immoral life. Snow discusses how we see 'the sense of Roxana's arguments against marriage'[419] and understand the 'complexity of her dilemma.'[420] However, Roxana's happiness in finally marrying the Dutch merchant is rapidly obliterated by reminders of the 'vile abominable Trade I had driven so long.'[421] Maddox describes how Roxana's past returns to 'haunt her in the figure of her daughter.'[422] Susan (her daughter) has the potential to uncover Roxana's immoral sexual conduct. Roxana questions how her children will react 'when they find their Mother, however rich she may be, is at best but a Whore, a common Whore?'[423] and whilst not only wanting to conceal her past from her children, she also wishes to conceal it from her husband. Gladfelder describes 'the impossibility of ever freeing oneself of the burden of guilt'.[424] Defoe condemns Roxana's immoral life as a mistress by describing the severe consequences she is inevitably riddled with years later; 'Sin and Shame follow one-another…the Crime going before, the Scandal is certain to follow'.[425] Roxana explains at the end of the novel how 'the Blast of Heaven seem'd to follow the Injury done the poor Girl, by us both; and I was brought so low again, that my Repentance seem'd to be only the Consequence of my Misery, as my Misery was of my Crime.'[426] Defoe draws a connection between the psychological 'injury' Roxana later suffers and the 'injury' she causes her daughter through her refusal to acknowledge her and the lengths she suspects Amy has gone to in order to conceal Roxana's past, suggesting that her misfortunes are a just punishment for her scandalous whoredom.[427] Crane describes

[419] Malinda Snow, 'Arguments to the Self in Defoe's Roxana' (1994) 34(3) Studies in English Literature 523, 530
[420] Malinda Snow, 'Arguments to the Self in Defoe's Roxana' (1994) 34(3) Studies in English Literature 523, 531
[421] Daniel Defoe, *Roxana*, (Oxford University Press 1996) 207
[422] Melissa J. Ganz, *Public Vows: Fictions of Marriage in the English Enlightenment,* (University of Virginia Press 2019) 60
[423] Daniel Defoe, *Roxana*, (Oxford University Press 1996) 208
[424] Hal Gladfelder, *Criminality and Narrative in Eighteenth-Century England- Beyond the Law*, (The Johns Hopkins University Press 2001) 14
[425] Daniel Defoe, *Roxana*, (Oxford University Press 1996) 298
[426] Daniel Defoe, *Roxana*, (Oxford University Press 1996) 330
[427] Melissa J. Ganz, *Public Vows: Fictions of Marriage in the English Enlightenment,* (University of Virginia Press 2019) 61

how Roxana's injury is 'an inner one, tied to her sense of self and to her past and conscience.'[428] Many critics claim that the ending of *Roxana* is left unfinished, however Hume defends Defoe by arguing that this was Defoe's intention because 'it is sufficient for us to know that Roxana ends badly for the design of the plot to achieve closure'.[429] Defoe must punish Roxana for her immoral actions. Hummel argues that the narrative is 'more cyclical than linear'[430] and hence this is not so much an ending as a circling back to the beginning of the narrative. This is Defoe's way of demonstrating how a life of vice may help a woman initially economically, but that the happiness this brings is not long-term happiness and will never make a woman entirely content. Roxana is left after years of living as a mistress feeling just as distressed as when she was penniless, struggling to survive at the beginning of the novel.

To conclude Part Three, Roxana is another female forced to fight to survive in society, and similar to Moll, she finds herself in affairs where her 'virtue and survival appear at odds.'[431] Given the lack of opportunities for women to earn an income by honest means, Roxana's options after her husband deserts her are the same as Moll's: either to remarry another man and in turn commit bigamy, or to become a mistress. Defoe examines the real world in which he lives whereby marriage offers no degree of security, but financial agglomeration does.[432] Roxana views marriage as dangerous and restrictive. Defoe presents Roxana as capable of managing her own finances and prefers to actively chase her own financial goals as opposed to leaving her business for a man to control.[433] Defoe challenges what Richetti defines as 'the loss of self attendant upon being merely a woman.'[434]

Defoe suggests that given equal working opportunities to men, women could prosper and would not be forced to rely on illicit means to earn their money and maintain their independence. Reform in property law was necessary so women could marry for love without

[428] Julie Crane, 'Defoe's "Roxana": The Making and Unmaking of a Heroine' (2007) 102(1) The Modern Language Review 11, 24
[429] Robert J. Griffin, 'The Text in Motion: Eighteenth-Century "Roxanas"' (2005) 72(2) ELH 387, 392
[430] Madeleine Kahn, *Narrative Transvestism: Rhetoric and Gender in the Eighteenth-Century English Novel*, (Cornell University Press 1991) 72
[431] Mona Scheuermann, *Her Bread To Earn: Women, Money, and Society from Defoe to Austen*, (The University press of Kentucky 1993) 35
[432]Mona Scheuermann, *Her Bread To Earn: Women, Money, and Society from Defoe to Austen*, (The University press of Kentucky 1993) 47
[433]Mona Scheuermann, *Her Bread To Earn: Women, Money, and Society from Defoe to Austen*, (The University press of Kentucky 1993) 49
[434] Madeleine Kahn, *Narrative Transvestism: Rhetoric and Gender in the Eighteenth-Century English Novel*, (Cornell University Press 1991) 74

the fears of marriage restrictions. Defoe explores the social and legal factors that trap a woman like Roxana into a life whereby 'sex is commodified'.[435] As Rosenthal argues, 'Defoe's narrative demands that we see the world from [Roxana's] perspective and at least in this limited sense identify with her predicament.'[436] Roxana must negotiate 'a radically unstable financial world with only the body's labor and imagination's capacity as resources.'[437]

4. Conclusion

Defoe was an acute observer regarding law, society and sexuality. He empowers women with a voice through his first-person narrative style. The elements of 'self-definition and self-assertion'[438] provide a fallen woman narrator with a voice straight from the page to present the conditions of her fall in a way that may inform and educate society's interpretation of her behaviour.[439] He critiques law, society and sexuality by communicating that both public and private whoring were driven by economic necessity, as a result of the damning consequences of married women's rights and dismal opportunities. Defoe calls for a general reform in society. He advocates equitable property rights for married women, an abolition of contract marriage, the ability for a wife to secure a divorce and remarriage after a substantial period of time following desertion, and job opportunities to earn money through honest means. Women could then enter into a marriage of love and sacred matrimony without being fearful and compromised.

The Married Women's Property Acts 1870[440] and 1882[441] 'undid the most limiting restrictions of coverture by allowing married women to own and control property separately from their husbands and to write wills.'[442] Parliament took the existing concept of 'separate estate' that

[435] Sarah Rasher, '"She Never Had Been a Bride in Her Life": The Marriage of Roxana and Amy' (2009) The Archives of Digital Defoe- Studies in Defoe & His Contemporaries <https://english.illinoisstate.edu/digitaldefoe/features/rasher.pdf> accessed 13 December 2021, page 13
[436] Laura J. Rosenthal, *Infamous Commerce: Prostitution in Eighteenth-Century British Literature and Culture*, (Cornell University Press 2006) 75
[437] ibid
[438] Beth Martin Birky, 'Penitents Or Prostitutes?: The Narratives of Fallen Women in Defoe, Richardson, and Fielding' (1998) <https://ecommons.luc.edu/cgi/viewcontent.cgi?article=4723&context=luc_diss> accessed 5 December 2021, page 9
[439] ibid
[440] Married Women's Property Act 1870
[441] Married Women's Property Act 1882
[442] Tim Stretton, 'Married Women and the Law in England since the Eighteenth Century' (2003) 14(1) L'Homme Z. F. G. 124, 129

equity courts had offered to affluent women, and extended it to all married women.[443] Full rights for 'married women to own property as if they were single'[444] was provided under the Law of Property Act 1925.[445] Hardwicke's Marriage Act 1753 (26 Geo. 2 c.33)[446] was a substantial statutory intervention preventing contract marriage. Section I described a 'public ceremony according to the book of common prayer in the parties' local church or chapel, preceded by the publication of banns'[447] as the only form of legal marriage in England. Additionally, 'in order to preserve the evidence of the marriages',[448] section XV stated that 'all marriages shall be solemnized in the Presence of two or more credible Witnesses, beside the Minister who shall celebrate the same'.[449] Immediately after every marriage, an entry was made in a register confirming 'that the said Marriage was celebrated by Banns or Licence; and if both or either of the Parties married by Licence, be under Age, with Consent of the Parents or Guardians'.[450] This was signed by the Minister, and 'by the Parties married and attested by two such Witnesses'.[451] Legal divorce allowing remarriage was available in 1857.[452] Prior to this, it was available only via a private act of Parliament and was an extremely expensive process, effectively available to men.[453]

Defoe had a precursive insight into later law reform which acknowledged economic necessity as the definitive cause of private whoring. Defoe was 'clearly in command of his pen, his subject, his character, and her society.'[454]

[443] ibid
[444] ibid
[445] ibid
[446] An Act for the Better Preventing of Clandestine Marriage 1753
[447] David Lemmings, 'Marriage and the Law in the Eighteenth Century: Hardwicke's Marriage Act of 1753' (1996) 39(2) The Historical Journal 339, 345
[448] Section XV An Act for the Better Preventing of Clandestine Marriage 1753
[449] ibid
[450] ibid
[451] ibid
[452] The Divorce and Matrimonial Causes Act 1857
[453] Tim Stretton, 'Married Women and the Law in England since the Eighteenth Century' (2003) 14(1) L'Homme Z. F. G. 124, 126-127
[454] Paula R. Backscheider, *Daniel Defoe: Ambition and Innovation*, (University press of Kentucky 1986) 200

Deceptive sex is "*that* bad": an analysis of consent and deception through the lens of sexual autonomy

Serena Jade Norman-Thomas

Introduction

'Deceptive sex, however bad it may be, isn't *that* bad.'[1] Rubenfeld's remark reflects the judicial reluctance to criminalise deceptive sexual relations (DSR) which has prevailed since the 19th century. In opposition, this article will use the principle of sexual autonomy to challenge the common law approach to consent and deception, arguing in favour of a broader approach which will rightly criminalise more instances of deception.

Under English criminal law, sexual offences are 'non-consensual'[2] and the notion of consent is where the law has particularly 'struggled'.[3] With no legal definition of consent until the Sexual Offences Act 2003 (SOA),[4] determining consent was a matter for the courts, done so through a narrow lens. Until the enactment of the SOA 2003, only two types of deception were capable of negating consent:[5] fraud as to the nature of the act,[6] and fraud as to the identity of the defendant.[7] Yet, even with a statutory definition of consent under Section 74 of the SOA 2003,[8] there continues to be 'much confusion and debate' in identifying which deceptions are capable of negating consent.[9] Thus, it is no surprise that this area of law has also sparked 'controversy and heated debate' in the wider academic commentary.[10]

This article will offer a contribution to the ongoing debate around the criminalisation of DSR. While much of the legal scholarship accepts that obtaining sex by deception is 'morally

[1] Jed Rubenfeld, 'The Riddle of Rape-by-Deception and the Myth of Sexual Autonomy', 122 Yale Law Journal (2013) 1372, 1415.
[2] Karl Laird, 'Rapist or Rogue? Deception, Consent and the Sexual Offences Act 2003' [2014] Criminal Law Review, 492, 493.
[3] ibid, 495.
[4] Sexual Offences Act 2003, s74.
[5] *R v Clarence* (1888) 22 QBD 23, 44.
[6] *R v Flattery* [1877] 2 QBD 410, *R v Williams* [1923] 1 KB 340.
[7] *R v Dee* (1884) LR 14 lr. 468, *R v Elbekkay* [1995] Crim LR 163.
[8] Sexual Offences Act 2003, (n 4) s74.
[9] Bethany Simpson, 'Why Has the Concept of Consent Proven So Difficult to Clarify?', (2016) 80(2) Journal of Criminal Law, 97, 109.
[10] David W Selfe, 'The Meaning of Consent within the Sexual Offences Act 2003', Criminal Lawyer 2008, 178, 3.

wrong',[11] there is a great deal of discourse as to whether this conduct is worthy of criminal sanction, and if so 'what should the label be?'[12] Using the concepts of consent, sexual autonomy, and harm, this article argues for a broader approach to consent and deception, challenging the law's reluctance to criminalise DSR. Consent obtained by deception is not valid nor true consent and DSR can cause 'real and serious harm' that warrants protection under the criminal law.[13] The 'principal' harm of deception is a violation of sexual autonomy,[14] in which the victim's 'freedom to withhold sexual contact' is hindered. [15] Further, victims of deception suffer 'multiple physical, psychological and emotional harms'.[16] Yet throughout the past two centuries, the restrictive judicial approach has failed to adequately recognise the harms of DSR that deserve criminal protection. Instead, the law has sought 'to preserve men's scope to lie and mislead in the course of 'seduction'.[17] This article does not argue for 'absolute'[18] sexual autonomy, in which all deceptions should be criminalised,[19] it recognises that a line has to be drawn. Yet in an area of law in which sexual autonomy takes centre stage,[20] a more expansive approach is required. Procuring a woman to engage in sexual activity through deception is inherently wrong, and in the 21st century in which gender equality is promoted, the law should no longer be in a position that 'privilege[s] men to take advantage of women'.[21]

This article is structured into four main parts. The first part analyses the concepts of consent, sexual autonomy, and harm, under which the remainder of the article is framed. The second part discusses the traditional common law approach to consent and deception that was too

[11] Hyman Gross, 'Rape, Moralism and Human Rights', (2007) 3 Criminal Law Review, 220, 226.
[12] Amanda Clough, 'Conditional Consent and Purposeful Deception', Journal of Criminal Law 2018 82(2), 178, 189.
[13] Jonathan Herring, 'Human Rights and Rape: A Reply to Gross', [2007] Criminal Law Review, 228.
[14] Matthew Gibson, 'Deceptive Sexual Relations: A Theory of Criminal Liability', Oxford Journal of Legal Studies, Vol. 40, No. 1 (2020), 82, footnote 105.
[15] Home Office, *Setting the Boundaries: Reforming the Law on Sexual Offences*, (July 2000, Volume 1) 2.7.2 <https://lawbore.net/articles/setting-the-boundaries.pdf> accessed 19 November 2021.
[16] Patricia J Falk, 'Not Logic, But Experience: Drawing on Lessons from the Real World in Thinking about the Riddle of Rape-by-Fraud', 123 Yale Law Journal 353 (2013), 353, 361. <http://yalelawjournal.org/forum/not-logic-but-experience-drawing-on-lessons-from-the-real-world-in-thinking-about-the-riddle-of-rape-by-fraud> accessed 25 January 2022.
[17] Caroline Derry, 'Sustained Identity Deceptions' in *Reforming the Relationship between Sexual Consent, Deception and Mistake*, Criminal Law Reform Now Network, Consultation (December 2021), 15 <https://www.criminalbar.com/wp-content/uploads/2021/12/CLRNN3-Deception-Consultation-Paper.pdf> accessed 25 January 2022.
[18] Mark Dsouza, 'False Beliefs and Consent to Sex' in *Reforming the Relationship between Sexual Consent, Deception and Mistake*, Criminal Law Reform Now Network, Consultation (December 2021), 24, 26 <https://www.criminalbar.com/wp-content/uploads/2021/12/CLRNN3-Deception-Consultation-Paper.pdf> accessed 25 January 2022.
[19] Jonathan Herring, 'Mistaken sex', (2005) 7 Criminal Law Review, 511.
[20] Home Office, *Setting the Boundaries*, (n 15) 2.7.2.
[21] Falk (n 16) 359.

narrow, failing to afford adequate weight to sexual autonomy and thus protecting victims from harm. The third part evaluates the case law succeeding the SOA 2003, which was enacted to afford greater protection to sexual autonomy,[22] and argues that in practice the Act failed to do so, with the courts continuing to adopt a restrictive approach to consent. The final part discusses the different reform proposals that have been suggested in the wider commentary and offers a proposed solution to tackle the failures of the current legal position.

It is worth noting that there are a few instances of deception that are outside the scope of exploration. In the case of *R v McNally*, it was held that deception as to gender was capable of vitiating consent under section 74 of the SOA 2003.[23] In the author's opinion, deception as to gender, in circumstances concerning a transgender defendant, should not be regarded as deception at all. Trans and non-binary people are already subject to high levels of discrimination and thus there are 'good reasons' to exclude failures to disclose gender identity and history from criminal liability.[24] Hence, gender fraud will not be discussed in this article. For broadly similar reasons, HIV transmission cases will also fall outside the scope of exploration, given the variety of wider 'social and public policy implications'[25] involved, as well as its relationship with offences against the person. Both of these instances of deception deserve lengthy discussion and analysis which this paper cannot provide. Further, while much of the legal scholarship base their arguments on hypothetical scenarios regarding deception, for the purpose of this article, the focus will be on the types of deception considered in the case law both preceding and succeeding the SOA 2003 which will be used to support the proposed reform.

The main research method employed in this article has been doctrinal research, engaging with a range of statutes, cases, and academic literature to support the thesis.

Part 1: Consent, Sexual Autonomy and Harm

[22] Home Office, *Setting the Boundaries*, (n 15) 2.7.2.
[23] *R v McNally* [2013] EWCA Crim 1051, [2014] QB 593 [10].
[24] Tanya Palmer 'Freedom to Negotiate' in *Reforming the Relationship between Sexual Consent, Deception and Mistake*, Criminal Law Reform Now Network, Consultation (December 2021), 70, 75 <https://www.criminalbar.com/wp-content/uploads/2021/12/CLRNN3-Deception-Consultation-Paper.pdf> accessed 20 February 2022.
[25] *R v B* [2006] EWCA Crim 2945, [2007] 1 WLR 1567 [20].

Consent, sexual autonomy, and harm are key principles in the law on sexual offences which frame the analysis in this article. On this premise, this part will discuss the purpose of consent and its different understandings. It offers an analysis on sexual autonomy as a principle, in addition to establishing the harms of DSR which can be distinguished into experiential and non-experiential harm. Reaching the conclusion that a broader understanding of consent is required to recognise the inherent harms of DSR that warrant protection under the criminal law.

1.1. The Role of Consent

'Consent is the crucial issue' in sexual offences and undoubtedly the purpose of consent in the law on sexual offences is to protect sexual autonomy and to protect victims from harm. [26] Concentrating on consent as the regulator of sexual conduct is essential as it ensures that appropriate weight is afforded to the right of autonomy.[27] In fact, Gibson furthers this, indicating that consent plays a 'morally transformative' role[28], and Gardner and Shute agree as they believe that consent is 'necessary'[29] as it permits everyone to 'act as moral agents.'[30] Consequently, one could argue that the role of consent is to bring morality into the law. Despite Herring's strong reluctance to label himself a 'legal moralist',[31] his broad understanding of consent and sexual autonomy relates to the idea of using the criminal law 'to teach moral lessons'.[32] For Herring, 'sex obtained by deception'[33] is inherently wrong, and the criminal law should not be encouraging the "gentle art of seduction"[34] in which 'ruses and lies are all part of a sexual game'.[35] Conversely, Gross disregards the idea of bringing morality into the law as he argues that it is a 'serious abuse of public power.'[36] Gross purports that DSR are 'simply … morally wrong'[37] and the criminal law is not a means of promoting 'moral consciousness' due

[26] Home Office, *Setting the Boundaries*, (n 15) 2.1.1.
[27] Sharon Cowan, 'Freedom and Capacity to Make a Choice: A feminist analysis of consent in the criminal law of rape' in Vanessa Munro, and Carl Stychin (eds) *Sexuality and the Law: Feminist Engagements*, (Taylor & Francis Group 2007), 51.
[28] Gibson, 'Deceptive Sexual Relations' (n 14) 92.
[29] John Gardner and Stephen Shute, 'The Wrongness of Rape' in Jeremy Horder (ed) *Oxford Essays in Jurisprudence* (4th series, Oxford: Clarendon Press 2000) 1, 26.
[30] ibid, 20.
[31] Herring 'Human Rights and Rape' (n 13) 228.
[32] Gross (n 11) 227.
[33] Herring, 'Human Rights and Rape' (n 13) 228.
[34] Herring, 'Mistaken Sex' (n 19) 522.
[35] ibid, 520.
[36] Gross (n 11) 225-226.
[37] ibid, 226.

to the severity of criminal punishment.[38] Conversely, it is submitted that the criminal law more generally *does* and *should* 'teach moral lessons' and Herring is not alone in holding this opinion.[39] Stannard also indicates that the criminal law 'clearly has an educational function'[40] and one cannot deny this. Placing consent at the forefront of sexual offences could easily be said to be encouraging 'moral improvement' in the way men and women engage in sexual encounters as it ensures that consent is provided to the sexual act.[41] While for some, like Gross, any mention of the word "moral" or "morality" in conjunction with the criminal law will be alarming, one must question whether they can really deny that the criminal law is used to 'send valuable message[s] that certain conduct is unacceptable and should not be tolerated'.[42] Thus, there is a strong argument to support the role of consent relating to bringing morality into the law, but morality might not be the preferred word for it.

While the vast majority of academics agree that the role of consent is to protect sexual autonomy, there are different perceptions regarding the meaning of consent which reflect the differing ways in which consent is understood.[43] For instance, Hurd regards consent as a 'remarkable power(s) of personhood' with a strong 'commitment to autonomy'.[44] Further, Gibson notes that it is 'an exercise of the will: it must be sufficiently free'.[45] Herring suggests that 'genuine, morally significant consent' should be required,[46] in which there must be a 'truthful understanding of what is involved' and it must be 'free from illegitimate pressures'.[47] Herring's broad approach to consent is persuasive, as to restrict or narrow its meaning would place a constraint on the principle of sexual autonomy and contradict its role in this area of law. Consent must be perceived 'in a rich sense'[48] as otherwise, it cannot fulfil its purpose of protecting and promoting the right to sexual autonomy.

[38] ibid, 227.
[39] ibid.
[40] John Stannard, 'The Emotional Dynamics of Rape' (2015) 79 Journal of Criminal Law, 422, 435.
[41] Gross (n 11) 225.
[42] Stannard (n 40) 436.
[43] Gibson 'Deceptive Sexual Relations' (n 14) 92.
[44] Heidi M Hurd, 'The Moral Magic of Consent' (1996) 2 Legal Theory 121.
[45] Gibson 'Deceptive Sexual Relations' (n 14) 92.
[46] Onora O'Neill, 'Between Consenting Adults', (1985) 14 Philosophy and Public Affairs, 252, 258.
[47] Herring, 'Human Rights and Rape' (n 13) 229.
[48] Herring, 'Mistaken Sex' (n 19) 516.

It is worth noting that consent cannot be removed from its 'social context'[49] as it is a 'deeply gendered' concept.[50] The law regarding sexual offences largely seeks to protect women, yet the gendered nature of consent and the significant power imbalances in sexual encounters between women and men fails to be recognised.[51] As Mackinnon notes, 'the law [of rape] presents consent as free exercise of choice under conditions of equality of power without exposing the underlying structure of constraint and disparity'.[52] Further, determining whether a woman consented can be significantly influenced by personal beliefs and rape myths to the detriment of women.[53] Gross' understanding of consent is a prime example of this.[54] For instance, when discussing the case of *R v Williams*, in which a singing teacher deceived the victim into engaging in sexual intercourse to open her air passage,[55] Gross argued that if the singing teacher 'truly believed' that engaging in sexual intercourse would improve her singing ability, then it should be held that she consented.[56] In agreement with Herring, not only is this 'startling' and 'concerning' but it is 'extraordinary'.[57] To say that a 'man's state of mind dictates whether a woman has consented'[58] reflects an archaic attitude towards consent, and indicates how different perceptions of consent can prejudice women. Accordingly, the fact that the role of consent is to protect sexual autonomy, one must question whether it is 'a useful concept at all',[59] as its legal application does not appropriately 'protect women's sexual embodied autonomy'[60] which contradicts its goals. Whether the concept of consent should be replaced is later discussed in Part 4.

1.2. Sexual Autonomy as an Overarching Principle

[49] Nicola Lacey, *Unspeakable Subjects: Feminist Essays in Legal and Social Theory*, (Oxford: Hart Publishing 1998) 117.
[50] Rosemary Hunter and Sharon Cowan, (eds) *Choice and Consent: Feminist Engagements with Law and Subjectivity* (Routledge-Cavendish: Abingdon 2007) 1.
[51] Cowan (n 27) 52.
[52] Catherine A MacKinnon, *Towards a Feminist Theory of the State*, (Harvard University Press, 1989), 175.
[53] Jennifer Temkin and Barbara Krahé, *Sexual Assault and the Justice Gap: A Question of Attitude* (Oxford: Hart Publishing, 2008) 31-52.
[54] Gross (n 11).
[55] *Williams* (n 6).
[56] Gross (n 11) 223.
[57] Herring, 'Human Rights and Rape' (n 13) 230.
[58] ibid.
[59] Stannard (n 40) 435.
[60] Cowan (n 27) 54.

Consent and sexual autonomy are 'inseparable'[61] and thus the protection of sexual autonomy should be regarded as an overarching principle in the law on sexual offences.[62] In terms of defining sexual autonomy, an apt description of it is 'the right to decide with whom one will have sexual activity, where and when one will have it and under what additional circumstances.'[63] Likewise, to consent, there are varying academic perspectives on the appropriate breadth that should be given to the understanding of sexual autonomy. For instance, Schulhofer perceives autonomy as consisting of two categories, both of equal significance: 'moral or intellectual autonomy' which relates to the 'capacity to choose, unconstrained by impermissible pressures and limitations' and 'physical autonomy' which refers to physical boundaries.[64] One submits that a better alternative for categorising sexual autonomy would be positive and negative sexual autonomy.[65] Dripps distinguishes between positive and negative sexual autonomy,[66] with positive sexual autonomy referring to 'the freedom to have sex with whomever one wishes' and negative as 'the freedom to refuse to have sex with anyone for any reason.'[67] Dripps dismisses attributing any weight to positive sexual autonomy on the grounds that an enforceable right 'to have sex with whomever one wishes' would 'trample the … freedom *not* to have sex.'[68] This seems out of step with the principle of consent and thus one agrees with Dripps' distinction. [69] Moreover, Herring regards sexual autonomy as 'respecting that they are entitled to know the truth and to make an informed choice about whether to engage in sexual intercourse.'[70] Theoretically, this is a preferred understanding of sexual autonomy which coincides with his argument that one must perceive consent 'in a rich sense', as a broad understanding of consent is essential to give full weight to the principle of sexual autonomy. [71] Although practically, Herring's perception of consent and sexual autonomy would mean that all deceptions would be capable of negating consent.[72] Under Herring's understanding, a man (Ted) who told a woman (Mary) that he loved her and wanted to marry her to deceive her into

[61] ibid, 51.
[62] Home Office, *Setting the Boundaries*, (n 15) 2.7.2.
[63] Stuart P Green, 'Lies, Rape, and Statutory Rape' in A Sarat (ed), *Law and Lies: Deception and Truth-Telling in the American Legal System* (CUP 2015) 207.
[64] Stephen J Schulhofer, 'Taking Sexual Autonomy Seriously', 11 Law and Philosophy (1992) 35, 70-71.
[65] Donald A Dripps, 'Beyond Rape: An Essay on the Difference Between the Presence of Force and the Absence of Consent" (1992) 92 Columbia Law Review, 1780 see also Gibson, 'Deceptive Sexual Relations' (n 14).
[66] ibid (Dripps) 1785.
[67] ibid, 1785.
[68] ibid (emphasis added).
[69] ibid.
[70] Herring, 'Human Rights and Rape' (n 13) 231.
[71] Herring, 'Mistaken Sex' (n 19) 516.
[72] ibid.

engaging in sexual intercourse, would negate her consent and he would commit rape.[73] Numerous academics have serious problems with this outcome, most notably Gross who argues that regarding Mary as a 'helpless victim of deception' denies her any 'respect' as a 'sexually autonomous person'.[74] Nonetheless, Herring disagrees and argues that under the principle of sexual autonomy, Mary has a right to decline to have sex with a man who does not love her or does not want to marry her.[75] Theoretically speaking, Herring's perception is the most compatible with the purpose of consent and protection of sexual autonomy, but practically it is difficult to support. What one must, even if reluctantly, accept is that 'not every constraint on sexual autonomy is illegal or even immoral.'[76]

Whilst it is submitted that sexual autonomy is an important principle in the law on sexual offences, one must consider Rubenfeld's '(in)famous'[77] argument that sexual autonomy is a 'myth'.[78] Rubenfeld argues that 'the idea of a fundamental right to sexual autonomy … is both unattainable and undesirable'.[79] Noting that there is a wide understanding that sexual autonomy relates to 'self-determination'[80] and securing everyone this right is 'quite impossible'.[81] Considering that the law should only be concerned with negative sexual autonomy casts doubt on this aspect of Rubenfeld's argument as, surely, securing the right to refuse to have sex is both 'attainable' and 'desirable'.[82] Conversely, there is a noteworthy aspect of his claim that might be persuading. Rubenfeld asserts that 'to protect autonomy is to protect consent from fraud and force alike',[83] and therefore on this basis there should be no controversy regarding the criminalisation of rape by fraud.[84] However, this is not the case and he offers no explanation as to why the law differentiates between deception and force. Accordingly, he makes a persuading conclusion that, on this basis, sexual autonomy cannot 'be rape law's principle'.[85]

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[73] ibid, 511.
[74] Gross (n 11) 224.
[75] Herring, 'Mistaken Sex' (n 19) 522; Herring, 'Human Rights and Rape' (n 13) 231.
[76] Dripps (n 65) 1788.
[77] Gibson 'Deceptive Sexual Relations' (n 14) 93.
[78] Rubenfeld, 'The Riddle of Rape-by-Deception' (n 1) 1413.
[79] ibid, 1415.
[80] Stephen J. Schulhofer, 'Unwanted Sex: The Culture of Intimidation and the Failure of the Law (1998) 15, 16-17.
[81] Rubenfeld, 'The Riddle of Rape-by-Deception' (n 1) 1418.
[82] ibid, 1417.
[83] Jed Rubenfeld, 'Rape-by-Deception - A Response', 123 Yale Law Journal Online (2013), 389, 397 <http://yalelawjournal.org/forum/rape-by-deceptiona-response> accessed 1 October 2021.
[84] Rubenfeld, 'The Riddle of Rape-by-Deception' (n 1) 1403.
[85] Rubenfeld, 'The Riddle of Rape-by-Deception' (n 1) 1423.

Arguably, this accounts for a convincing argument as if the law regards sexual autonomy as an overarching principle in this area of law, then DSR should warrant criminalisation.

1.3. Sexual Autonomy as a Harm

In cases of deception, it is purported that the 'principal' harm is the violation of negative sexual autonomy in which the defendant's deceit withholds the victims right to decline to engage in sexual activity.[86] Victims of deception exercise both positive and negative sexual autonomy and both are violated by the defendant's conduct, unlike in situations of force or coercion.[87] Consequently, one could argue that deception causes greater harm.[88] While theoretically, this may be true, an infringement of negative sexual autonomy 'is much *more* serious than violating its positive counterpart.'[89] This is largely due to the harm caused. As Gibson indicates, the 'harm' that one will suffer from failing to secure positive sexual autonomy will 'simply [be] disappointment' and dissatisfaction.[90] Whereas a violation of negative sexual autonomy is harmful in that it denies the victim the right 'to resist undesired sexual encounters.'[91]

Conversely, according to Gross, a violation of sexual autonomy cannot be perceived as a harm as it is not something which can be 'given away' or 'lost when a woman has sex', unlike in 'property transactions' in which deception results in a consequential loss of property.[92] This argument is hardly resounding provided that sexual offences are regarded as violations of sexual autonomy.[93] Further, Gross seems reluctant to perceive the right to sexual autonomy as meaningful, as when discussing the case of *R v Konzani* (which was a case regarding a deception as to a positive HIV status)[94] he states that 'the defendant was seriously endangering his sexual partner, not merely failing to respect her sexual autonomy'.[95] His use of the word 'merely'[96] is unsettling, and demonstrates the little weight he accords to the notion of sexual autonomy, which is out of touch with the modern perception of sexual offences.

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[86] Gibson 'Deceptive Sexual Relations' (n 14) 105.
[87] ibid, 101.
[88] ibid, 103.
[89] ibid.
[90] ibid.
[91] ibid.
[92] Gross (n 11) 225.
[93] Home Office, *Setting the Boundaries*, (n 15) 2.1.1, 2.7.2.
[94] *R v Konzani* [2005] EWCA Crim 706.
[95] Gross (n 11) footnote 6.
[96] ibid.

1.4. Experiential Harm

Experiential harm refers to the 'physical or psychological harms' that victims of DSR can suffer.[97] Deception can cause 'serious bodily harm', such as unwanted pregnancy, abortions, and sexually transmitted diseases, in addition to a wide range of psychological harms. [98] For instance, 'deception regret' which is a type of psychological injury,[99] 'ex post mental distress' which can involve feeling 'used, betrayed, duped, and even traumatized',[100] and 'serious emotional and psychological distress'.[101] Stannard makes a plausible point in arguing that 'emotional trauma' ought to be better recognised and 'taken more seriously' if substantial weight is to be attributed to the protection of sexual autonomy.[102] Further, Falk argues that 'the psychological consequences of rape-by-fraud can be equally severe' as the physical harms.[103]

On the contrary, some academics do not regard DSR as particularly harmful.[104] For instance, Gross asserts that deception cannot be regarded as 'genuinely harmful' but should be perceived as 'simply hurtful',[105] this is largely based on his perception that upon realisation – typically the next morning – all the victims will suffer is 'disappointment'.[106] It is important to note that no evidence was provided by Gross to support this claim,[107] and thus it is probable that his understanding of harm is largely reliant on his perception that sexual intercourse 'is one of nature's blessings'.[108] This is staggering, and as Herring quite rightly pointed out, Gross completely ignores the fact that 'all too often sexual penetration is a powerful violation of a victim's sexual autonomy, the ultimate treating of women as objects for men's sexual pleasure.'[109] Further, whilst Bohlander is not convinced by Gross, he perceives the harm of DSR as constituting 'humiliation' which is only suffered once the victim finds out about the

[97] Amit Pundik, 'Coercion and Deception in Sexual Relations' (2015) 28 Canadian Journal of Law and Jurisprudence, 97, 117.
[98] Gibson 'Deceptive Sexual Relations' (n 14) 101.
[99] ibid, Alan Wertheimer, *Consent to Sexual Relations* (CUP 2003) 111.
[100] ibid (Wertheimer) 202.
[101] Deana Pollard Sacks, 'Intentional Sex Torts', 77 Fordham Law Review (2008) 1051, 1071.
[102] Stannard (n 40) 435.
[103] Falk (n 16) 359.
[104] Gross (n 11); Rubenfeld, 'The Riddle of Rape-by-Deception' (n 1); Michael Bohlander, 'Mistaken Consent to Sex, Political Correctness and Correct Policy' (2007) 71(5) Journal of Criminal Law, 412.
[105] Gross (n 11) 225.
[106] Herring, 'Human Rights and Rape' (n 13) 229.
[107] ibid, 231.
[108] Gross (n 11) 220.
[109] Herring, 'Human Rights and Rape' (n 13) 229.

deceit. Bohlander purports that this 'is not what the archetypal offence of rape was meant to cover.'[110] Further, Rubenfeld strongly claims that 'deceptive sex, however bad it may be, isn't *that* bad'.[111] This claim is far from 'empirically sound' and disrespectful to victims and their lived experiences.[112] Gross, Bohlander and Rubenfeld's perceptions of harm must be dismissed on the basis that they ignore the real and lived experiences of the harms of deceptive sex.

1.5. What Harms Should the Law Protect?

As has been discussed, DSR causes are both experiential and non-experiential harms, although one must determine which of these harms the criminal law should recognise and protect. According to John Stuart Mill's 'harm principle', the criminal law should only regulate conduct as a means of preventing harm to others.[113] Gardner and Shute argue that the harm principle can be met on the basis that if the conduct was 'not criminalised, *that* would be harmful'.[114] It is submitted that this is persuading and a preferred perception of Mill's principle. As sexual autonomy is understood as a principal pillar in this area of law – with the other being consent – it is a prerequisite that the law should protect non-experiential harm. Particularly considering that the principal harm of DSR is a violation of sexual autonomy. Yet, for the reasons discussed so far, the protection against infringements of sexual autonomy should be limited to those of negative sexual autonomy. In terms of experiential harm, there is a strong argument that the criminal law should protect victims from physical harm, for example, unwanted pregnancy. Deceptions about the use of a condom or the withdrawal method[115] seriously infringe the victim's sexual and reproductive autonomy, inhibiting their choice to become a 'parent'.[116] Further, pregnancy involves 'profound physical changes' to the woman's 'body',[117] and the fact that in these instances pregnancy is actively avoided, strongly supports the argument that it should be recognised as a physical harm.

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[110] Bohlander (n 104) 416.
[111] Rubenfeld, 'The Riddle of Rape-by-Deception' (n 1) 1415.
[112] Falk (n 16) 354.
[113] John Stuart Mill, *On Liberty* (OUP, 1991) Chapter 1.
[114] Gardner and Shute (n 29) 39.
[115] *Assange v Swedish Prosecution Authority* [2011] EWHC 2849 (Admin), [2011] 11 WLUK 63; *R (on the application of F) v DPP* [2013] EWHC 945 (Admin), [2014] QB 581.
[116] Chloë Kennedy, 'Sex, Selfhood and Deception', in *Reforming the Relationship between Sexual Consent, Deception and Mistake*, Criminal Law Reform Now Network, Consultation (December 2021), 15 <https://www.criminalbar.com/wp-content/uploads/2021/12/CLRNN3-Deception-Consultation-Paper.pdf> accessed 20 February 2022.
[117] *Parkinson v St James's and Seacroft University Hospital NHS Trust* [2001] EWCA Civ 530, Hale LJ [64].

In relation to the psychological and emotional harms suffered, whether the criminal law should protect these is where there tends to be discourse. For many academics, the types of emotional harm suffered by victims of DSR do not warrant protection under the criminal law.[118] Largely on the grounds that feeling 'used'[119] or 'betrayed'[120] or 'humiliated'[121] is not worthy of criminal sanction. Admittedly, the author does have difficulties accepting that it is appropriate for these types of emotional harm to fall within the scope of criminal law. Yet, arguably, emotional harm is a direct result of violations of sexual autonomy which should be protected by the criminal law. Further to this, the type of emotional harm that victims of DSR suffer will be distinct to each victim and whether the harm is serious and severe enough to warrant criminal protection may have to be decided on a case-by-case basis.

The key question to answer is whether deceptive sex should be rape. Apart from the likes of Herring,[122] much of the legal scholarship has sought to argue that DSR should fall under a different criminal offence.[123] How DSR should be criminalised is discussed in Part 4, although for the purpose of this part, it is important to note that deception can be distinguished from force or coercion.[124] In most instances of deception, the victim tries to exercise both positive and negative sexual autonomy, 'willingly' engaging in sexual activity but on the terms of a condition or 'deal-breaker'.[125] While in instances of force or coercion, there is no willingness on behalf of the victim whatsoever.[126] This is a distinction that the law should make as it reflects a difference in consent wrongfulness and harmfulness.

Ultimately, the purpose of consent in this area of law is to protect sexual autonomy and to protect victims from harm. As such, a broad understanding of consent is required to afford sufficient weight to the principle of sexual autonomy. DSR can be inherently harmful with the 'principal' harm constituting a violation of negative sexual autonomy,[127] in which the victim is denied 'the right to resist undesired sexual encounters'.[128] This is a harm that warrants

[118] Bohlander (n 104); Gross (n 11); Rubenfeld (n 1).
[119] Wertheimer (n 99) 202.
[120] ibid.
[121] Gross (n 11) 417.
[122] Herring, 'Mistaken Sex' (n 19); Herring, 'Human Rights and Rape' (n 13).
[123] Gibson, 'Deceptive Sexual Relations' (n 14); Pundik (n 97).
[124] ibid, Pundik; Gibson (n 14); 'Deceptive Sexual Relations' (n 14).
[125] ibid, (Gibson) 104.
[126] ibid.
[127] ibid, footnote 105.
[128] ibid, 103.

protection under the criminal law. Yet in addition to this, further experiential harms, such as unwanted pregnancy, are suffered which too are worthy of criminal protection. The next part will discuss the common law approach to consent and deception preceding the 2003 Act.

Part 2: The Traditional Common Law Approach

The traditional common law approach to consent and deception was too narrow, it afforded very little weight to sexual autonomy and failed to recognise the harm suffered by victims of DSR. Dating back to the late 19th century,[129] only two instances of deception were capable of vitiating consent: fraud as to the nature of the act[130] and fraud as to the identity of the defendant.[131] This part will first discuss the decision of *R v Clarence*,[132] in which this principle was laid out, offering a critique of the judgment and outcome. Secondly, offering an analysis of fraud as to the nature of the act the identity of the defendant and their limited scope. Thirdly, one will discuss the attempts to expand these categories to include fraud as to the quality of the act or attributes of the defendant.

2.1. *R v Clarence*

The decision in *Clarence* is a resounding example of the limited scope of the old common law approach in which consent, sexual autonomy and harm were afforded very little protection. In *Clarence*, the defendant had gonorrhoea and was aware of this, but nonetheless, he had sexual intercourse with his wife, without informing her of his venereal disease.[133] The defendant was charged and convicted at trial of unlawfully and maliciously inflicting grievous bodily harm,[134] and occasioning actual bodily harm.[135] On appeal, the Court faced numerous issues around assault, offences against the person and the infliction of a disease, however for the purpose of this article the analysis will focus on the court's perception and application of consent.[136]

[129] *Clarence* (n 5) 44.
[130] *Flattery* (n 6).
[131] Sexual Offences Act 1956, s1(2).
[132] *Clarence* (n 5).
[133] ibid, 23
[134] Offences Against the Person Act 1861, s20.
[135] ibid, s47.
[136] *Clarence* (n 5).

Justice Stephen contended that the wife's consent 'was as full and conscious as consent could be', as 'it was not obtained by fraud either as to the nature of the act or as to the identity of the agent.'[137] It is submitted that this is an erroneous understanding of consent that affords no weight to sexual autonomy. How can the complainant's consent be regarded as 'full and conscious'[138] when she did not consent to the contraction of a venereal disease? Yet any acknowledgement of the complainant's sexual autonomy is missing from the judgment, as well as any recognition of the harm suffered. For instance, despite acknowledging that the deception was 'wicked and cruel', Justice Wills does not regard the deceit as causing any harm worthwhile of protection under the criminal law. Thus, demonstrating a narrow approach to the concept of harm in instances of deception. Further, Justice Wills affirmed 'that consent obtained by fraud is no consent at all is not true as a general proposition either in fact or in law.'[139] Justice Wills justified this claim using a hypothetical example of 'a man' intentionally giving a prostitute 'bad money' to deceive her into sexual intercourse.[140] While it was recognised that 'he obtains her consent by fraud', Justice Wills asserts that 'it would be childish to say that she did not consent.'[141] As far as the author is concerned, it is 'childish' for Justice Wills to regard the woman's consent as valid.[142] Interestingly, over a century later, under very similar circumstances, a jury convicted a man of rape.[143]

It is worth noting that at the time of *Clarence,* a husband could not be guilty of raping his wife and 'consent to coition on the part of the wife [was] a matrimonial obligation'.[144] This certainly had an influence on the Court's understanding of consent and ultimately their outcome. Although this influence must be challenged as *Clarence* was not a unanimous decision, with a majority of 9 and a minority of 4.[145] Justice Hawkins, who dissented, had no problem with upholding the defendant's conviction.[146] Indeed, in Justice Hawkins' opinion, for the defendant to 'wilfully … place his diseased person in contact with hers without her express consent amounts to an assault.'[147] Moreover, he contended that 'it must also be taken as a fact' that if

[137] *Clarence* (n 5) per Justice Stephen 44.
[138] ibid.
[139] ibid, 27.
[140] ibid.
[141] ibid.
[142] ibid.
[143] *R v Linekar (Gareth)* [1995] QB 250; Shivam Kaushik, 'The Impossible Trinity of Deception, Sex and Consent', Journal of Criminal Law, 2021, 85(6), 415, 417.
[144] *Clarence* (n 5) 25.
[145] ibid, 23.
[146] ibid, 46.
[147] ibid, 51.

the complainant was aware of the defendant's condition 'she would have refused to submit to such intercourse.'[148] This is the correct understanding of consent and sexual autonomy that the court should have applied. Justice Hawkins' dissent demonstrates an attempt to expand the common law position, although it is evident that the court preferred a narrow approach.[149]

2.2. Fraud as to the Nature of the Act

The first case regarding fraud as to the nature of the act was *R v Flattery* in 1877.[150] The complainant was deceived into engaging in sexual intercourse with the defendant on the basis that she believed he was performing a surgical procedure to treat her illness.[151] At trial, the defendant was convicted of rape,[152] and this was upheld by the Court largely on the grounds of consent.[153] The Court unanimously held that the complainant did not 'consent, either in fact or law, to the act of carnal connection',[154] the victim only consented to 'the performance of a surgical act'.[155] Another leading case regarding fraud as to the nature of the act is *R v Williams*[156] in which a singing teacher engaged in sexual intercourse with his student who was under the false pretence that it would better her singing and breathing ability.[157] The Court upheld the conviction of rape, relying on *Flattery* and the fact that the victim consented to what she believed was a medical act – not a sexual act.[158] There is no doubt that fraud as to the nature of the act invalidates consent and constitutes a significant violation of negative sexual autonomy. In both *Williams* and *Flattery*, the complainants did not have 'a truthful understanding of what [was] involved' and thus their consent cannot be regarded as valid, true consent.[159] Further, the complainants suffered significant harm, namely a violation of sexual autonomy in which the defendant's deceit withheld their freedom to choose to engage in sexual conduct.

[148] ibid, 46.
[149] Laird, 'Rapist or Rogue?' (n 2) 496.
[150] *Flattery* (n 6).
[151] ibid, 412
[152] ibid, 414.
[153] ibid.
[154] *Flattery* (n 1) 414 per Denman J.
[155] ibid, 413 per Kelly CB.
[156] *Williams* (n 6).
[157] ibid, 340.
[158] ibid.
[159] Herring, 'Human Rights and Rape' (n 13) 229.

Conversely, the narrow scope of fraud as to the nature of the act has failed to protect consent, sexual autonomy and harm in circumstances falling outside of the context of *Williams* and *Flattery*. *R v Linekar*[160] is a prime example of this. In *Linekar,* the complainant engaged in sexual intercourse with the defendant on the basis that he was going to pay her £25, however, he did not pay and never had any intention of doing so.[161] At trial, the defendant was convicted of rape,[162] although, on appeal, the conviction was quashed on the grounds that the complainant consented to the act of sexual intercourse and this consent was 'not destroyed' by the defendant's deception.[163] Upholding Justice Stephen's perception of consent in *Clarence,* Justice Moreland purported that the significance of *Clarence* 'is that it exposes the fallacy of the submission that there can be rape by fraud or false pretences'.[164] Herring is critical of the decision in *Linekar,* arguing that it was 'wrongly decided on the issue of consent' and one must agree. While the complainant's consent was apparent, it was conditional on the basis that she would be paid £25. This did not occur, and thus the defendant's deception invalidated her consent. Further, the fact that 'the defendant never intended to pay'[165] constitutes serious wrongdoing as it is highly likely that he would have been aware that without payment the complainant would not have consented. [166] Yet the Court continued to limit the meaning of consent strictly to the nature of the sexual act, and thus failed to recognise that the complainant suffered harm whatsoever.

It Is worth noting that the court accepted that the defendant would have been 'guilty of an offence under section 3' of the SOA 1956 in which it was 'an offence for a person to procure a woman, by false pretences or false representations, to have unlawful sexual intercourse'.[167] This seems to suggest that the court recognised that the defendant's deception was wrong and warranted criminal sanction. Although, the maximum punishment for this lesser offence was two years imprisonment[168] which does not reflect the gravity of the wrongdoing on behalf of the defendant, nor the harm suffered by the complainant.

[160] *Linekar* (n 143).
[161] ibid, 250.
[162] ibid.
[163] ibid, 261.
[164] ibid, 258.
[165] ibid, 250.
[166] Graham Virgo, 'When is Consent Not Consent? (When it is Vitiated by Mistake)' Archbold News 1995, 6.
[167] Sexual Offences Act 1956, s3(1).
[168] ibid; Sexual Offences Act 1956 s37; Part Two, (8).

2.3. Fraud as to the identity of the defendant

As first recognised in *R v Dee*,[169] a conviction of rape could only be upheld in cases where there was a fraud as to the identity of the victim's husband. [170] In fact, prior to *Dee,* the common law rejected the idea that a man could be convicted of rape for impersonating a woman's husband.[171] In *Reg v Barrow*,[172] the court held that as the complainant was not 'asleep or unconscious' at the time of sexual intercourse, then she consented, and while her consent was 'obtained by fraud, the act done does not amount to rape.'[173] Nonetheless, in *Dee* the Court upheld a conviction of rape where the victim was fraudulently misled to believe that the man she engaged in sexual intercourse with was her husband.[174] The decision reflects a broader understanding of consent and a greater recognition of sexual autonomy than that of the previous courts, as Palles C.B. indicated that the complainant consented 'to the act of the husband *only*, and of this the prisoner was aware.'[175]

Over a century later, the Court of Appeal in *R v Elbekkay*[176], which concerned the impersonation of the complainant's boyfriend, extended this principle to include the impersonation of a 'long-term, live-in lover or … partner of the woman concerned.'[177]

The Court in *Elbekkay* were conscious that over a century had passed since *Dee*, with no expansion in the law and thus demonstrated a great deal of discomfort with the idea of restricting impersonation to that of a husband.[178] In fact, Lord Justice McCowan contended that it would be 'extraordinary' to continue to do so in 1994.[179] The Court adopted a broader approach to consent, affording considerable weight to sexual autonomy and recognising the harm suffered. Citing the trial judge, the court held that restricting this principle 'would also very seriously curtail or interfere with the right of women to choose, understanding the true

[169] *Dee* (n 7).
[170] ibid.
[171] *R v Jackson* (1822) Russ & Ry 487; *R v Saunders* (1838) 8 C & P 265; *R v Williams* (1838) 8 C & P 286; *R v Clarke* (1854); *R v Dears* CC 579; *R v Barrow* (1868) *LR 1 CCR 156.*
[172] *Reg v Barrow* (1868) LR 1 CCR 156.
[173] ibid, 158.
[174] *Dee* (n 7).
[175] ibid, 488, emphasis added.
[176] *Elbekkay* (n 7).
[177]ibid.
[178] ibid.
[179] ibid.

facts, whether to participate or not in the act of sexual intercourse.'[180] Further to this, Lord Justice McCowan contended that consent is absent equally in situations where there is an impersonation of a 'husband or another.'[181] The decision in *Elbekkay* is welcomed and constitutes an appropriate understanding of consent, autonomy, and harm that the common law had failed to recognise until this decision. Nevertheless, the fact that this expansion in the law took over a hundred years emphasises the narrow judicial approach to consent and deception.

2.4. Fraud as to the quality of the act or attributes of the defendant

In the late 20th century, it seemed that there was an attempt to expand the law by widening the scope of the two categories capable of negating consent. This is demonstrated through the cases of *R v Richardson*[182] and *R v Tabassum*.[183]

Richardson concerned an offence against the person,[184] although Lord Justice Otton relied on several sexual offences cases,[185] and contended that the same rules applied.[186] In *Richardson*, a number of patients consented to dental treatment performed by the defendant on the grounds that she was 'a registered dental practitioner'.[187] But unknown to the complainants, the defendant had been 'suspended from practice' and thus the key issue in the case was whether the fraud negated the complainants' consent.[188] The Crown argued that the "identity of the defendant" principle should be expanded to include 'the qualifications or attributes of the dentist'.[189] Although, the Court rejected this claim and quashed the conviction on the grounds that the patients 'were fully aware of the identity of the defendant'[190] and therefore their consent was 'valid'.[191] In the author's view, the complainants' consent cannot be regarded as 'valid'[192] when they consented to the dental treatment performed by a qualified professional, yet what occurred was fundamentally different.[193] It seems that the Crown was attempting to expand the

[180] ibid, per Judge Gordon p 5.
[181] ibid.
[182] *R v Richardson (Diane)* [1999] QB 444.
[183] *R v Tabassum* [2000] 5 WLUK 243.
[184] Offence Against the Person Act 1861, s47.
[185] *Clarence* (n 5); *Williams* (n 6); *Papadimitropoulos v The Queen (1957) 98 CLR 249*.
[186] *Richardson* (n 182) 450.
[187] ibid, 445.
[188] ibid.
[189] ibid, 450.
[190] ibid.
[191] ibid, 450.
[192] iibid.
[193] ibid, 450.

common law approach in order to better protect consent and autonomy, yet the courts – once again – preferred a restrictive approach.

Conversely, just a year later in *Tabassum*, the Court of Appeal expanded the principle of fraud as to the nature of the act to include fraud as to the 'quality'.[194] The defendant in *Tabassum* carried out breast examinations on the three complainants, to which they consented under the false belief that it was for a 'medical purpose', or that he was medically trained.[195] The Court held that while there 'was consent to the nature of the act' there was no consent to 'its quality' as they consented 'to touching for medical purposes not to indecent behaviour'.[196] Thus, 'there was no true consent.'[197] This extension of the law is applauded as it recognises that the victims' sexual autonomy was violated as they were unaware that they were engaging in sexual conduct, [198] thus inhibiting their 'freedom to withhold sexual contact'.[199] *Tabassum*, therefore, takes a preferable approach than *Richardson*. However, it is worth noting that the Court in *Richardson* focused on fraud as to the identity of the defendant,[200] and *Tabassum* fraud as to the nature of the act,[201] thus highlighting that whether deception is capable of negating consent was still very much restricted to these two categories.

Ultimately, 'the clock of law dealing with deception in a sexual matter has been stuck on a decision delivered in 1888.'[202] The strict application of the two categories recognised as vitiating consent has resulted in a flawed understanding of consent, with insufficient weight afforded to the principle of sexual autonomy and thus failed to protect victims of DSR from harm. The next part will discuss the law following the SOA 2003 and assess to what extent the law has improved in its protection of sexual autonomy.

Part 3: The Sexual Offences Act 2003 and its Application

As highlighted in Part 2, the judicial approach to consent and deception prior to the enactment of the SOA 2003 was too narrow, described as 'archaic, incoherent and discriminatory' and

[194] *Tabassum* (n 183) [38].
[195] ibid.
[196] ibid.
[197] ibid.
[198] ibid.
[199] Home Office, *Setting the Boundaries*, (n 15) 2.7.2.
[200] *Richardson* (n 182).
[201] *Tabassum* (n 183).
[202] Kaushik (n 143) 424.

therefore reform was vital. [203] While the 2003 Act was enacted to afford greater protection to sexual autonomy,[204] throughout this part it is argued that, in practice, this has not been the case. Firstly, the reforms introduced by the SOA 2003 will be outlined. Secondly, an analysis of the case law regarding Section 76. Thirdly, the judicial approach to applying Section 74 will be discussed, including a critique of the recent development of the "closely connected" test.

3.1. The Sexual Offences Act 2003

In the lead up to the 2003 Act, there were numerous Home Office Reports, which all largely proposed a statutory definition of consent.[205] With no real definition of consent in law, there was a significant lack of clarity in its 'full legal meaning'.[206] Hence, a statutory definition was required that would allow for the law to be 'as clear as possible about what consent means'.[207] Consent was defined in Section 74 of the SOA 2003 as 'a person consents if he agrees by choice, and has the freedom and capacity to make that choice.'[208] Further to this, the Act includes two further sections.[209] Section 75 outlines 'evidential presumptions about consent', however, none of which relate to deception, and thus it will not be discussed. [210] Section 76 states two 'conclusive presumptions about consent', in which it will be presumed that there was both no consent to the relevant act[211] and no reasonable belief in consent.[212] The two circumstances are firstly, if there is intentional deception 'as to the nature or purpose of the relevant act'[213] or secondly, if the defendant intentionally impersonates 'a person known personally to the complainant'.[214] This provision constitutes a slight expansion of the common law as the Act included the concept of 'purpose'[215] and expanded the impersonation of a 'long term, live-in lover or … partner'[216] to someone 'known personally to the complainant'.[217]

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[203] HL Deb 13 February 2003, vol 644, cc 771 (Lord Falconer and Thoroton).
[204] Home Office, *Setting the Boundaries*, (n 15) 2.7.2.
[205] Ibid; Home Office, *Protecting the Public: Strengthening Protection Against Sex Offenders and Reforming the Law on Sexual Offences*, (Nov 2002) <https://webarchive.nationalarchives.gov.uk/ukgwa/20131205100653/http:/www.archive2.official-documents.co.uk/document/cm56/5668/5668.pdf> accessed 28 November 2021.
[206] ibid, (*Setting the Boundaries*) 2.3.1.
[207] Home Office, *Protecting the Public*, (n 205) para 28.
[208] Sexual Offences Act 2003, (n 4) s74.
[209] ibid, ss75-76.
[210] ibid, s75.
[211] ibid, s76(1)(a).
[212] ibid, s76(1)(b).
[213] ibid, s76(2)(a).
[214] ibid, s76(2)(b).
[215] ibid, s76(2)(a).
[216] *Elbekkay* (n 7).
[217] Sexual Offences Act 2003, s74, s76(2)(b).

Another key aspect of the 2003 Act was the repeal of Section 3 of the SOA 1956 in which it was 'an offence for a person to procure a woman, by false pretences or false representations to have unlawful intercourse'.[218] The Home Office recommended retaining the Section 3 offence, as while it was 'very rarely used' they were not willing to contend that it was 'no longer needed'.[219] Nonetheless, this recommendation was not implemented and any reason or justification for this has been impossible to find.[220] Whether the section 3 offence should be re-implemented to aid the law in tackling consent and deception will be discussed in Part 4.

3.2. Section 76 in Practice

It is submitted that Section 76 does not simply reflect 'a statutory reformulation of the common law'[221] but it is much harsher in that the defendant has no defence.[222] Hence, it is no surprise that it has been described as a 'draconian provision'.[223] The limits of fraud as to the nature – and now purpose – of the act remain narrow which is demonstrated in three key cases.

The first case regarding Section 76 was the case of *R v Jheeta*[224] which concerned a 'bizarre and unpleasant story'[225] wherein the complainant was subject to an elaborate and severe level of deceit over four years which induced her to engage in sexual intercourse several times.[226] The main issue for the Court of Appeal was whether Section 76 could be applied to the case.[227] The Court contended that Section 76 'require[s] the most stringent scrutiny'[228] and held that fraud as to the nature or purpose of the act will only apply in 'comparatively rare cases'.[229] Reading between the lines, as the Court cited and relied upon *Flattery* and *Williams*, it is likely that the scope of this section will continue to be limited to instances such as the "medical cases".[230] However, the Court did recognise that the complainant did not exercise 'free choice,

[218] ibid, s3(1).
[219] Home Office, *Setting the Boundaries*, (n 15) 2.18.2.
[220] Laird, 'Rapist or Rogue?' (n 2) 499.
[221] Selfe (n 10) 4.
[222] Sexual Offences Act 2003, s74, s76.
[223] E. Freer, 'Yes, No, Maybe - Recent Cases on Consent and Freedom to Choose', (2016) Archbold Review 6.
[224] *R v Jheeta (Harvinder Singh)* [2007] EWCA Crim 1699, [2008] 1 WLR 2582.
[225] ibid, [5].
[226] ibid, [9].
[227] ibid, [15].
[228] ibid, [23].
[229] ibid, [24].
[230] ibid, [25].

or consent for the purposes of the Act' and thus the defendant's deception was capable of vitiating consent under section 74, but not section 76.[231]

Just a year following *Jheeta*, came *R v Devonald.*[232] The defendant was charged and convicted of causing a person to engage in sexual activity without consent[233] after he fraudulently acted as a '20-year-old female' and 'encouraged and persuaded' the complainant 'to masturbate in front of a webcam.'[234] Out of step with the decision in *Jheeta*, the Court held that 'the complainant was deceived as to the purpose of masturbation', and thus section 76 applied.[235] This broader understanding of 'purpose', adopted by the court, has been subject to criticism 'as being neither necessary nor desirable'.[236]

Hence, in *R v Bingham*, which was analogous to *Devonald*, the Court favoured *Jheeta* and held that Section 76 could not be applied to the facts of the case.[237] This was largely on the grounds that Section 76 'must be strictly construed' as there is no defence, and thus it should only be applied in rare circumstances.[238] The Court regarded that to give 'purpose' a wide definition would be out of step with Parliament's intentions.[239] It is submitted that this is a valid contention, as perhaps by making Section 76 an irrebuttable presumption, Parliament intended to retain a limited scope to these categories of deception.

Section 76 is a 'sledgehammer',[240] and it is evident that only very 'rare' circumstances,[241] such as the "medical cases" will fall under section 76. Although considering that this provision eliminates a defendant's 'only line of defence to a serious criminal charge'[242] its strict application seems appropriate. While the old common law approach was certainly too narrow and restrictive to afford adequate protection of consent and sexual autonomy, the law now has Section 74. The definition of consent under Section 74 can cover more instances of deception

[231] ibid, [29].
[232] *R v Devonald (Stephen)* [2008] EWCA Crim 527, [2008] 2 WLUK 413.
[233] Sexual Offences Act 2003, s74, s4.
[234] *Devonald* (n 232) [2].
[235] ibid [7].
[236] Simpson (n 9) 108; Felicity Gerry, Catarina Sjolin and Lyndon Harris, *Sexual Offences Handbook: Law, Practice & Procedure*, (2nd edn, Wildy, Simmonds and Hill Publishing: London 2009).
[237] *R v Bingham* [2013] EWCA Crim 823, [2013] 4 WLUK 633 [20].
[238] ibid.
[239] ibid [19].
[240] Catarina Sjolin, 'Ten Years on: Consent under the Sexual Offences Act 2003', (2015) 79(1), Journal of Criminal Law, 20, 28.
[241] ibid, *Bingham* (n 237) [20] per Hallet LJ.
[242] ibid.

that do not go to fraud as to the nature or purpose or as to the identity of the defendant,[243] as is highlighted in *Jheeta*,[244] and thus the limited scope of Section 76 can be justified.

3.3. Section 74 in Practice

3.3.1. Conditional Consent Cases

In *Assange v Swedish Prosecution Authority*[245] and R (on the application of *F) v DPP*,[246] known as the 'conditional consent cases',[247] the courts took a more expansive approach than the previous common law, focusing on the concepts of "freedom" and "choice" to recognise deceptions capable of vitiating consent outside the scope of the nature of the act or identity of the defendant.[248]

In *Assange*, the complainant consented to sexual intercourse with the defendant on the condition that he wore a condom.[249] The Court contended that 'whatever the position may have been prior to … [the] Act', the complainant 'had made clear' the condition to her consent and the defendant's violation of this 'would therefore amount to an offence under' the 2003 Act.[250] In *F*, consent was provided on the condition that the defendant would not ejaculate inside the complainant.[251] The Court of Appeal purported that the complainant in *F* 'was deprived of choice relating to the crucial feature on which her original consent to sexual intercourse was based' and consequently 'her consent was negated.'[252] The same can be said for the complainant in *Assange*. The defendants in both *Assange* and *F* were aware of the conditions for the complainant's consent, yet intentionally disregarded it, violating their right to refuse sexual intercourse.[253] As both conditions related to reproduction, the deceit not only violated the complainant's sexual autonomy but their reproductive autonomy too. This constitutes a

[243] Sexual Offences Act 2003, s74, s76.
[244] *Jheeta* (n 224) [29].
[245] *Assange* (n 115).
[246] *F* (n 115).
[247] Jonathan Herring, 'Rape and the Definition of Consent', (2014) 26(1) National Law School of India Review, 70, see also '*Rape and Sexual Offences* – Chapter 6: Consent' (*CPS*, 19 October 2020) <https://www.cps.gov.uk/legal-guidance/rape-and-sexual-offences-chapter-6-consent> accessed 1 April 2022.
[248] *Assange* (n 115) [86] & *F* (n 115) [26].
[249] ibid (*Assange)* [74].
[250] ibid, [86].
[251] *F* (n 115) [14].
[252] ibid, [26].
[253] *Assange* (n 115), *F* (n 115).

serious level of wrongdoing that warrants criminalisation, and it is welcomed that the courts recognised this.

Following *Assange* and *F*, it seemed that the concept of conditional consent was aiding the courts to perceive and apply the notions of "freedom" and "choice" to better protect sexual autonomy in instances of DSR. Although, as noted by Doig and Wortley in their article on *F*, 'the question the courts will now have to address is whether the concept of conditional consent ought to be extended to other situations.'[254] In response to this, it seems that the Court of Appeal in *R v Lawrance*[255] decided in the negative. The complainant in *Lawrance* expressly gave a condition for her consent; that she would only engage in unprotected sexual intercourse if the defendant had undergone a vasectomy.[256] Yet the Court held that, regardless of this condition, her consent was not negated for the purpose of section 74.[257] A full discussion of *Lawrance* will follow.

3.3.2. The "Closely Connected" Test

The Divisional Court in *R (on the application of Monica) v DPP*[258] asserted that the governing principle in the case law both preceding and succeeding the SOA 2003 is that only deceptions which are 'closely connected to the performance of the sexual act' are capable of negating consent.[259] This was approved in *Lawrance*[260] and will hereafter be referred to as the "closely connected" test. It is contended that the "closely connected" test is too restrictive, it fails to recognise invalid consent, protect the victim's sexual autonomy, and acknowledge the harm suffered.

Monica concerned about an undercover police officer who engaged in a sexual relationship with the complainant for over six months, during which the complainant 'was completely unaware of his real identity'.[261] In relation to the offence of rape, the Divisional Court held that

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[254] Gavin A. Doig and Natalie Wortley, 'Conditional Consent? An Emerging Concept in the Law of Rape: *R (on the Application of F) v DPP and A* [2013] EWHC 945 (Admin)',The Journal of Criminal Law (2013) 77(4), 286, 291.
[255] *R v Lawrance* [2020] EWCA Crim 971, [2020] 1 WLR 5025.
[256] ibid [4].
[257] ibid [43].
[258] *R (on the application of Monica) v DPP* [2018] EWHC 3508 (Admin), [2019] QB 1019.
[259] ibid, [80].
[260] *Lawrance* (n 255) [41].
[261] *Monica* (n 258) [2].

deception as to the defendant's true identity was not capable of vitiating consent under Section 74.[262] Yet missing from the judgment in *Monica* was any consideration as to how and whether the complainant's "freedom" and "choice" were impacted by the deception. The claimant's lawyer's submissions in this respect are convincing. Ms Kaufmann contended that the complainant was deprived of her 'freedom to choose' to engage in sexual encounters with the defendant, as she was wholly unaware that he was 'an agent of the state who was deployed to infiltrate her movement and spy on her.'[263] As far as the complainant was concerned, she was 'interacting with an entirely different person' to whom she believed and thus her consent cannot be regarded as valid, true consent when ultimately, she did not know to whom she was consenting to.[264] Indeed, the complainant contended that she would not have consented to any sexual activity with the defendant if she was aware of his true identity, [265] and therefore the deception violated her 'right to resist undesired sexual encounters'.[266] The fact that the DPP's refusal to prosecute was upheld,[267] is difficult to reconcile as not only was the deceit 'sustained, wide-ranging and profound',[268] but the complainant 'was deceived about a matter that would have been highly material to her decision-making.'[269]

In the Court's view, the enactment of Section 74 did 'no more than reflect[ing] the common law'[270] and to identify the deception as one capable of negating consent would be 'not just a step but a leap'[271] which the Court was not comfortable with taking.[272] After a review of the case law both preceding and succeeding the SOA 2003, the Court contended that consent had only been negated by deceptions that were either 'closely connected to the performance of the sexual act … or cases of impersonation.'[273] While this is technically true, it is submitted that the law should not be restricted to these two types of deception. It is recognised that the courts might not be the best means of expanding the law, and thus parliamentary intervention might be required, but nonetheless, this restriction does not afford adequate weight to sexual

[262] ibid, [74].
[263] ibid, 1024.
[264] Palmer, 'Freedom to Negotiate' (n 24) 76.
[265] *Monica* (n 258).
[266] Gibson, 'Deceptive Sexual Relations' (n 14) 103.
[267] *Monica* (n 258) [98].
[268] Derry (n 17) 15.
[269] HH Peter Rook and Robert Ward, *Rook & Ward on Sexual Offences: Law and Practice* (6th edn, Sweet & Maxwell 2004) 2.7.2.
[270] *Monica* (n 258) [84].
[271] ibid, [82].
[272] ibid, [86].
[273] bid, [80].

autonomy and recognise enough harm suffered in cases of deception. Indeed, as *Monica* demonstrates.

Just two years later, the courts were confronted once more with determining which deceptions are capable of negating consent in the case of *Lawrance.*[274] Following *Monica,*[275] the Court applied the "closely connected" test to render a lie about a vasectomy incapable of negating consent under section 74.[276] It is submitted that *Lawrance* was wrongly decided, drawing 'arbitrary' distinctions,[277] and failing to adequately protect sexual autonomy. The Court distinguished *Lawrance* from *Assange* and *F* on the grounds that the complainant did not 'impos[e] any physical restrictions'.[278] However, this must be challenged as the complainant did impose a 'physical restriction'[279] that 'the defendant's ejaculate did not contain sperm'.[280] What the Court should have recognised is that there is a key similarity in all three cases – none of the complainants 'consented to the presence of sperm in their bodies'.[281] And as Krebs indicates, 'the deposition of sperm inside the female body is an integral part of sexual intercourse in its most natural form'.[282] Further, the convictions in *Assange* and *F* were not upheld because the deception was 'closely connected' to the sexual act, but because of 'the existence of a condition' that 'was a crucial feature of the complainant's consent' to which the defendants were aware.[283] Like *Assange* and *F,* the complainant in *Lawrance* expressly gave a condition to her consent – that the defendant had undergone a vasectomy – and the defendant 'knowingly and deliberately violate[d] this'.[284] Consequently, under Section 74 the complainant did not consent as, contrary to the Court's opinion, the deception inhibited her 'freedom to choose whether to have the sexual intercourse that occurred'.[285] The very thing the complainant sought to avoid was falling pregnant, yet the defendant's deception violated this,

[274] *Lawrance* (n 255).
[275] *Monica* (n 258) [80].
[276] *Lawrance* (n 255) [41].
[277] Isabella Glendinning, 'Should Mistaken Consent still be Consent? In defence of an Incremental Understanding of Consent in the Sexual Offences Act 2003', Journal of Criminal Law, 2021, 85(3), 223, 224.
[278] *Lawrance* (n 255) [37].
[279] ibid.
[280] Karl Laird, 'Sexual consent: *R v Lawrance (Jason)* Court of Appeal (Criminal Division): Lord Burnett CJ, Cutts and Tipples JJ: 23 July 2020; [2020] EWCA Crim 971', Criminal Law Review 2021, 612.
[281] Rebecca Williams, 'A Further Case on Obtaining Sex by Deception', Law Quarterly Review, 2021, 137 (Apr) 183, 186.
[282] Beatrice Krebs, 'Rape, Consent and a Lie About Fertility', Journal of Criminal Law 2020, 84(6), 622, 625.
[283] Dr Kyle L Murray and Tara Beattie, 'Conditional Consent and Sexual Offences: Revisiting the Sexual Offences Act 2003 after *Lawrance'*, Criminal Law Review, 2021, 7, 556, 566.
[284] ibid, 571.
[285] *Lawrance* (n 255) [38].

with the complainant having to undergo the trauma of a termination.[286] The decision in *Lawrance* is difficult to reconcile as the level of wrongfulness and harmfulness is equivalent to that in *Assange* and *F*, yet the defendant walked free.[287]

The outcomes in both *Monica* and *Lawrance* raise serious doubts about the "closely connected" test and its application to consent under Section 74. Identifying whether the deception was 'closely connected to the performance of the sexual act' has not allowed for the sufficient application of the notions of "freedom" and "choice" as is evident in the judgments of *Monica* and *Lawrance*. As a result, deceptions that are wrong and have seriously violated the victim's sexual autonomy have fallen outside the scope of criminal law.

This part has argued that, despite its aims, the 2003 Act has not been successful and the law is still failing to afford adequate protection of sexual autonomy. Section 74 was enacted to ensure that the legal understanding and application of consent was 'clear and unambiguous',[288] although the courts are still struggling to determine what deceptions are capable of negating consent and the application of "freedom" and "choice" has not been consistent. While the courts attempted to create some form of 'overriding principle',[289] greater clarity has attempted to be achieved at the cost of sexual autonomy and thus cannot be supported. With the "closely connected" test restricting criminal liability to deceptions regarding the 'physical performance of the sexual act', it seems that the courts are trying to restrict the parameters of rape.[290] However, the law as it stands is not suitable, and reform is required, yet as the Court in *Lawrance* recognised 'these issues require debate as a matter of social and public policy'.[291]

Part 4: Reform

[286] HH Peter Rook QC, UCL Centre for Criminal Law Webinar, Consent to Sex, Deception and *R v Lawrance*, (11 August 2020) <https://www.youtube.com/watch?v=TBR3jlWR69Y&ab_channel=UCLLaws> accessed 16 October 2021.
[287] *Lawrance* (n 255) [43].
[288] Home Office, *Protecting the Public*, (n 205) para 30.
[289] David Omerod, 'Rape and Deception (Again)', Criminal Law Review, 2020, 10, 877, 878.
[290] *Lawrance* (n 255) [37].
[291] *Lawrance* (n 255) [42].

The only notion that the legal scholarship can agree upon is that the law regarding deception and consent is in dire need of reform.[292] As has been discussed throughout this article, DSR are inherently wrong, causing significant non-experiential and experiential harms. It has been argued that the principal harm of DSR is a violation of negative sexual autonomy; 'the right to resist undesired sexual encounters'[293] that the law has failed to sufficiently protect. While the protection of sexual autonomy is of utmost importance, there are other factors that must be considered in attempting to offer a solution to this complex area of law. Namely, clarity and consistency,[294] the principle of fair labelling[295] and the risk of overcriminalisation. This part will discuss several reform proposals, for instance, the removal of consent and sexual autonomy as principles in this area of law, the creation of a universally applicable test, drawing a list of deceptions capable of negating consent and a re-enactment of the section 3 SOA 1956 offence. It is submitted that a more expansive approach to consent and sexual autonomy is required to afford adequate protection and recognition of the harms of DSR. The proposed reform is to create a set of DSR that would 'mirror' sections 1-4 of the 2003 Act[296] and adapt the definition of consent under Section 74.[297]

4.1. A Rethinking of Consent and Sexual Autonomy?

The issues with consent go wider than the statutory definition of consent under section 74, with much of the feminist scholarship challenging the use of consent in sexual offences in its entirety.[298] This has largely been on the grounds that consent operates to the detriment of

[292] Rachel Clement Tolley, 'Deception, Mistake and Difficult Decisions', 90 and Matthew Dyson, 'Redefining Sexual Conditions', 36 in *Reforming the Relationship between Sexual Consent, Deception and Mistake*, Criminal Law Reform Now Network, Consultation (December 2021), https://www.criminalbar.com/wp-content/uploads/2021/12/CLRNN3-Deception-Consultation-Paper.pdf accessed 20 April 2022.
[293] Gibson, 'Deceptive Sexual Relations' (n 14) 103.
[294] Rebecca Williams, 'Economic and Sexual Autonomy' in *Reforming the Relationship between Sexual Consent, Deception and Mistake*, Criminal Law Reform Now Network, Consultation (December 2021), 105 <https://www.criminalbar.com/wp-content/uploads/2021/12/CLRNN3-Deception-Consultation-Paper.pdf> accessed 20 April 2022.
[295] Andrew Ashworth, 'The Elasticity of Mens Rea' in C F H. Tapper (ed), *Crime, Proof and Punishment: Essays in Memory of Sir Rupert Cross* (London: Butterworth 1981) 45, 53.
[296] Matthew Gibson, 'Deception, Consent and the Right to Sexual Autonomy' in in *Reforming the Relationship between Sexual Consent, Deception and Mistake*, Criminal Law Reform Now Network, Consultation (December 2021), 44 <https://www.criminalbar.com/wp-content/uploads/2021/12/CLRNN3-Deception-Consultation-Paper.pdf > accessed 20 April 2022.
[297] Glendinning (n 276) 229.
[298] Catherine A. MacKinnon, 'Rape Redefined', Harvard Law & Policy Review. 2016, Vol. 10 Issue 2, 431; Tanya Palmer, 'Distinguishing Sex from Sexual Violation: Consent, Negotiation and Freedom to Negotiate' in

women,[299] failing to recognise the 'inherently asymmetric and unequal' nature of sexual relations.[300] As Lacey has argued, the perception of consent endorses 'the stereotypes of active masculinity and passive femininity'.[301] MacKinnon is a strong advocate for the removal of consent in defining rape, arguing that it should, instead, be defined as forced sex.[302] While one appreciates the difficulties that lie with consent, to define rape – and other sexual offences – as "forced" would fail to adequately recognise the harms suffered by victims of DSR which are largely violations of sexual autonomy.[303] Alternatively, Palmer has proposed a model in which 'lack of freedom to negotiate' would replace 'consent' in the current SOA.[304] To some extent, this proposal is convincing as it would allow 'for a more contextualised enquiry into the interaction between the parties and the conditions under which sex took place', thus recognising much of the limitations of consent.[305] That being said, consent has been a central element of sexual offences since the 19th century,[306] and in the author's view, it is not time for the removal of such a pivotal notion in this area of law. Ultimately, the law is not ready for such a radical change.

In relation to sexual autonomy, it is important to return to Rubenfeld's argument that sexual autonomy cannot 'be rape law's principle'.[307] As has been demonstrated throughout this paper, the law has failed and continues to fail to adequately protect sexual autonomy with serious instances of deception falling outside the scope of criminal law. Despite Rubenfeld's argument having some bite, it is submitted that his argument is based on an erred understanding of sexual autonomy.[308] For Rubenfeld, regarding sexual autonomy as 'rape law's principle', means protecting 'absolute'[309] sexual autonomy, and thus criminalising all instances of deception.[310] However, he fails to recognise that the criminal law *can* protect and uphold sexual autonomy without affording 'absolute' sexual autonomy to victims.[311] Further, violations of negative

Alan Reed, Michael Bohlander, Nicola Wake and Emma Smith (eds.) *Consent: domestic and comparative perspectives* (Routledge 2016).
[299] MacKinnon, 'Rape Redefined'; (n 397) 452.
[300] Palmer, 'Distinguishing Sex from Sexual Violation' (n 297) 11.
[301] Lacey (n 49) 60.
[302] MacKinnon, *Towards a Feminist Theory of the State,* (n 52).
[303] Robin West, 'A Comment on Consent, Sex and Rape', (1996) 2 Legal Theory 233, 242.
[304] Palmer, 'Freedom to Negotiate' (n 24) 72.
[305] ibid, 70.
[306] Palmer, 'Distinguishing sex from sexual violation' (n 297) 9.
[307] Rubenfeld, 'The Riddle of Rape-by-Deception' (n 1) 1423.
[308] Luis E Chiesa, 'Solving the Riddle of Rape-by-Deception', (2017) 35 Yale Law & Policy Review, 407, 409.
[309] Dsouza (n 18) 26.
[310] Rubenfeld, 'The Riddle of Rape-by-Deception' (n 1) 1423.
[311] Dsouza (n 18) 26.

sexual autonomy are the 'principal' harm of DSR,[312] and thus sexual autonomy cannot be dismissed in this area of law.

4.2. Other Reform Proposals

Arguably, the simplest and most coherent reform in this area of law would be for the introduction of an overarching principle or test that could be applied to all instances of deception. This is largely what the common law has sought to do following the 2003 Act. Conversely, as has been discussed in Part 3, this has not only resulted in a great deal of inconsistency in the law but also failed to adequately protect sexual autonomy. A key example of this is the "closely connected" test, which has been perceived as 'an overriding principle to be applied'[313] yet fails to capture enough instances of deception, as the outcomes in *Monica* and *Lawrance* emphasise. As Williams notes, 'no single test can provide an acceptable balance between rationality and policy outcome.'[314] Unless the law adopts Herring's proposal that deception as to any material fact will negate the consent[315] or Rubenfeld's approach that deception cannot vitiate consent for the purpose of a sexual offence,[316] it is impossible to come up with a singular test that could apply coherently. Further, given the complexity of this area of law, it seems more appropriate to leave 'the task for the legislature'.[317]

Another approach that the common law also seems to have tried to take is to decipher a list of deceptions that are capable of vitiating consent for the offence of rape.[318] Supposedly, this approach would create greater clarity and consistency in the law provided that the categories were 'clear, predictable and defensible'.[319] Although, this seems unlikely, and the judicial approach to do so by relying on 'common sense' has only encouraged this sort of arbitrary line drawing.[320] Further, the harms suffered by victims of DSR and their severity will depend on

[312] Gibson, 'Deceptive Sexual Relations' (n 14) footnote 105.
[313] Omerod (n 288) 878.
[314] Rebecca Williams, 'Deception, Mistake and Vitiation of the Victim's Consent" (2008) 124 Law Quarterly Review, 132, 158.
[315] Herring, 'Mistaken Sex' (n 19).
[316] Rubenfeld, 'The Riddle of Rape-by-Deception' (n 1).
[317] Victor Tadros, 'Rape Without Consent', Oxford Journal of Legal Studies, Vol. 26, No 3 (2006), 515, 543.
[318] Rachel Clement Tolley, UCL Centre for Criminal Law Webinar, Consent to Sex, Deception and *R v Lawrance* (11August 2020) <https://www.youtube.com/watch?v=TBR3jlWR69Y&ab_channel=UCLLaws> accessed 16 October 2021.
[319] Williams, 'Economic and Sexual Autonomy', (n 294) 99.
[320] Sjolin (n 240) 32.

each victim's experience,[321] and this approach would fail to recognise this. 'In practice', any sort of line drawing has been 'murky and uncertain' and thus parliamentary intervention is necessary.[322]

Further, several academics have suggested that the law should reintroduce section 3 of the SOA 1956, procuring 'a woman by false pretences or false representations', [323] as a lesser offence for cases of deception, [324] yet it is submitted that this would not be a favourable approach. Dsouza has proposed a new offence of 'procurement of sexual activity' which seems to be a combination of the old section 3 offence and the current section 4 offence ('causing a person to engage in sexual activity')[325] with a maximum punishment of ten years.[326] Dsouza acknowledges that sexual autonomy is infringed in instances where there is no 'consent to the sexual act' and in circumstances where there is apparent consent, it is 'tainted' by deceit.[327] Nonetheless, he purports that 'these wrongs' are distinguishable in 'nature,[328] and … seriousness' and thus warrant separate criminalisation.[329] While this is agreed upon, the creation of a lesser offence which would criminalise all instances of deception would fail to recognise that some instances of deception cause greater violations of sexual autonomy and harm, and thus warrant criminalisation under a more grave offence. For instance, the deception in *Lawrance* caused a severe infringement of both sexual and reproductive autonomy, in addition to a physical harm – unwanted pregnancy.[330] Without undermining the violation of sexual autonomy suffered in *Devonald*, the harm suffered was to a lesser degree than that in *Lawrance*, and the law should respond to this. Indeed, Sjolin rejects a re-enactment of section 3 SOA 1956, noting that juries have convicted instances of deception as rape and other non-consensual offences and a lesser offence would undermine this.[331] Ultimately, the 2003 Act and the law regarding sexual offences more broadly are premised around the notion of consent and a re-enactment of the section 3 offence would be out of touch with this.[332]

[321] Gibson, 'Deceptive Sexual Relations' (n 14) 102.
[322] J Spencer, 'Sex by Deception' [2013] 9 Archbold Review, 6-7.
[323] Sexual Offences Act 1956, s1(2), s3(1).
[324] Dsouza (n 18); Laird, 'Rapist or Rogue?' (n 2); Spencer (n 322); Simpson (n 9).
[325] Sexual Offences Act 2003, s74, s4.
[326] Dsouza (n 18) 33.
[327] ibid, 25.
[328] Gibson, 'Deceptive Sexual Relations' (n 14) 82.
[329] Dsouza (n 18) 25.
[330] *Lawrance* (n 255).
[331] Sjolin (n 240) 32.
[332] Williams, 'A further case on obtaining sex by deception' (n 280) 187.

4.3. The Proposed Reform

Drawing on the work of Gibson[333] and Glendinning,[334] it is proposed 'a series of deceptive sexual offences' should be introduced which would mirror the 'principal sexual offences in section 1-4 of the SOA', as recommended by Gibson.[335] In addition to this, the definition of consent under section 74 should be slightly adapted in its application to deceptive sexual offences in that 'choice will include the wider surrounding circumstances involved in the performance of the sexual acts.'[336] Whereas for the principal sexual offences, 'choice concerns the strict performance of the sexual act', as adapted from Glendinning.[337] It is worth noting that this proposal is an adapted version of the distinguishable work of Gibson and Glendinning and it does not entirely align with their own proposals. Nonetheless, it is submitted that this proposal is the best solution to the current legal approach to consent and deception, aligning with the thesis of this article.

The first element of the proposal is for DSR to be criminalised separately from the principal sexual offences which is persuading for several reasons. The 'current predicament' in the law is that in instances of deception, there are only two options available – a conviction of rape or an acquittal.[338] Reading between the lines, the courts do not seem to be comfortable with some instances of deception constituting rape, as can be inferred from *Monica* and *Lawrance*, and as a result, the option chosen has been acquittal.[339] This judicial reluctance is likely to relate to a concern of fair labelling. But a separate set of deceptive sexual offences would adhere to this concern. In most instances of DSR, there is apparent consent on behalf of the victim, yet the deception renders this consent invalid. Whereas, in instances of force or coercion, there is no consent on behalf of the victim whatsoever. This reflects a difference in wrongfulness which warrants separate criminalisation and thus accords with the principle of fair labelling.[340] Further, as Williams has emphasised, there must be 'coherence, certainty and predictability of

[333] Gibson, 'Deceptive Sexual Relations' (n 14); Gibson, 'Deception, Consent and the Right to Sexual Autonomy' (n 296).
[334] Glendinning (n 276) 229.
[335] Gibson, 'Deception, Consent and the Right to Sexual Autonomy' (n 296) 51.
[336] Glendinning (n 276) 229.
[337] ibid.
[338] Simpson (n 9) 110; Andrew Ashworth and Jeremy Horder, *Principles of Criminal Law,* (7th edn, OUP Oxford 2013) 353.
[339] *Lawrance* (n 255); *Monica* (n 258).
[340] Gibson, 'Deception, Consent and the Right to Sexual Autonomy' (n 296) 49 and Gibson, 'Deceptive Sexual Relations' (n 14) 109.

the law' and consequently, any reform should seek to implement this.[341] A separate set of offences dealing with deception will afford the law a great deal of clarity and structure, removing any requirement to decide whether deception is serious enough to warrant a conviction of rape which is a key issue with the current legal approach.[342] Further, a separate set of offences for DSR will allow the law to communicate and signpost to society that obtaining sexual activity by deception is 'unacceptable and should not be tolerated' which is where the law has been struggling.[343]Moreover, the submitted proposal is twofold and both elements are interdependent, therefore DSR need to be criminalised separately to allow for a distinguishable definition of consent, which will be discussed.

While these are more procedural advantages of the proposed reform, it is important to emphasise that it is not in the authors' view that a separate criminalisation of DSR will undermine the protection of sexual autonomy and harm. What is being proposed here is not a lesser offence, such as the re-enactment of section 3, but a series of offences which mirror the current non-consensual offences. It is not within the scope of this article to provide the exact 'sentencing regime' for these offences but they will display close affinity to sections 1-4.[344] This will allow the law to respond to the differing levels of harm that are prevalent in DSR. Not only this, but mirroring sections 1-4 will acknowledge that obtaining sexual activity can cause an almost 'equivalent degree' of harm as the 'principal sexual offences', particularly in relation to a violation of negative sexual autonomy.[345]

The second element of the proposed reform is adapting Glendinning's 'incremental definition of consent' in which consent will have a different definition for DSR.[346] Following the development of the "closely connected" test, it is evident that Section 74 in its current form is inadequate. The current judicial approach in applying Section 74 is too restrictive, limiting the concept of "choice" to the 'performance of the sexual act'.[347] In doing so, the law fails to recognise that some deceptions are capable of negating consent that goes to the 'broad circumstances surrounding' the sexual act.[348] For instance the deception in *Monica*. Having a

[341] Williams, 'Economic and Sexual Autonomy' (n 294) 105.
[342] Clement Tolley, UCL Centre for Criminal Law Webinar, (n 317).
[343] Stannard (n 40) 436.
[344] Gibson, 'Deceptive Sexual Relations' (n 14) 106.
[345] ibid, 103.
[346] Glendinning (n 276) 229.
[347] *Lawrance* (n 255) [37].
[348] ibid, [35].

different definition of consent for deceptive sexual offences will not only allow for greater protection of sexual autonomy, but it will recognise the difference in consent for each set of offences. Limiting the definition of rape for the principal sexual offences to 'the strict performance of the sexual act'[349] will acknowledge that there is no willingness on behalf of the complainant.[350] Yet in broadening the meaning of consent in DSR to the 'wider circumstances involved' will recognise that there might have been apparent consent to the sexual act, but the deception vitiated this consent regardless.[351]

Under this proposal, the following cases would fall under the mirrored section 1 offence: *Linekar*, *Jheeta*, *Assange*, *F*, *Monica* and *Lawrance*. While it is appreciated that these defendants were charged and convicted of rape at trial,[352] for the purposes of clarity all instances of deception should fall under the new deceptive sexual offences. As the new offence would mirror that of section 1 SOA 2003, this would not undermine the level of wrongfulness on behalf of the defendant, or the level of harm suffered by the complainant. *Devonald* and *Bingham* would fall under the mirrored section 4 offence to recognise the difference in the nature of the offence and the level of harm suffered. It is worth outlining the impact of the proposed reform on section 76 of the 2003 act. As highlighted in Part 2, conclusive presumptions are very 'rarely used' and only 'very specific' circumstances, such as the "medical cases",[353] will satisfy section 76.[354] On this premise, the deceptions outlined in section 76 will remain unaffected by the proposed reform and will continue to operate in their current form.

It is accepted that this proposal might provoke critique for potentially being too broad or resulting in overcriminalisation, although there are three arguments one purports in response to this. Firstly, based on its application to the case law, one does not regard it to be too broad or cause any form of overcriminalisation. In *Linekar*, *Jheeta*, *Assange*, *F*, *Monica* and *Lawrance* the complainants consented either based on a condition or a mistaken belief, and this cannot be rendered valid, true consent.[355] In relation to the mens rea, it is difficult to see how the defendants in these cases could have had a reasonable belief in consent. For instance, in

[349] Glendinning (n 276) 229.
[350] Gibson, 'Deceptive Sexual Relations' (n 14) 104.
[351] Glendinning (n 276) 229.
[352] *Linekar* (n 143); *Jheeta* (n 224); *Assange* (n 115); *F* (n 115); *Monica* (n 258); *Lawrance* (n 255).
[353] *Flattery* (n 6); *Williams* (n 6).
[354] Glendinning (n 276) 231.
[355] *Linekar* (n 143); *Jheeta* (n 224); *Assange* (n 115); *F* (n 115); *Monica* (n 258); *Lawrance* (n 255).

Linekar, it would seem arbitrary to regard that the defendant was unaware that a condition of the prostitute's consent would be that she receive a form of payment.[356] The deception in all these cases violated the complainants' sexual autonomy in constraining their right to refuse to engage in sexual intercourse. It is difficult to regard this as overcriminalisation when there is a serious level of wrongfulness on behalf of the defendant and a serious level of harm, thus warranting a serious sexual offence. In the words of Gardner and Shute, 'if the action were not criminalised, *that* would be harmful'.[357]

Secondly, the proposal is not that of Herring in which every deception should be criminalised, for instance, in situations where Ted lies to Mary that he loves her and wants to marry her to gain her consent to engage in sexual intercourse.[358] Therefore, the overcriminalisation concern can further be diluted on the grounds that not every deception would fall within the scope of the proposed reform. Sexual autonomy cannot be 'absolute', and it is recognised that a line must be drawn, as ultimately there are some 'common or garden lies'[359] that cannot and should not be criminalised. Determining where this line of drawing is is not easy, and it is ultimately outside the scope of this article, although some suggestions can be made. Perhaps the notion of 'materiality'[360] might help the law in identifying a minimum threshold. Whether a deception is material to consent, or the victim's "choice" could be determined objectively by a jury, although there might be difficulties with this as 'whether any given fact or factor is material is case-specific'.[361] Or there is a potential argument that there must be a minimal threshold of a violation of sexual autonomy that would not be met by 'common or garden lies',[362] thus restricting the law to deceptions that cause graver violations of sexual autonomy. Further, in terms of drawing these lines, there will have to be some flexibility, ideally on a case-by-case basis as 'deceptive sexual relations may be experienced as more or less harmful by different people'.[363] A key example of this could be a deception as to religion, which has been suggested should fall outside the scope of criminal law.[364] Deception as to religion will cause a significant violation of negative sexual autonomy for a victim whose religion prohibits 'sex with those

[356] ibid (*Linekar*).
[357] Gardner, Shute (n 29) 39.
[358] Herring, 'Mistaken Sex' (n 19) 511.
[359] *Jheeta* (n 224) [24].
[360] Chloë Kennedy, 'Criminalising Deceptive Sex: Sex, Identity and Recognition' (2020) Legal Studies 1, 94.
[361] Omar Madhloom, 'Deception, Mistake and Non-disclosure: Challenging the Current Approach to Protecting Sexual Autonomy' (2019) 70(2) Northern Ireland Legal Quarterly, 203, 209.
[362] *Jheeta* (n 224) [24].
[363] Gibson, 'Deceptive Sexual Relations' (n 14) 102.
[364] Kennedy, 'Criminalising Deceptive Sex' (n 359) 105.

from outside that group' and thus could warrant criminalisation.[365] Of course, this is just a hypothetical example, however, it emphasises that a more flexible approach would be required.

Thirdly, the law as it stands is too restrictive, and a broader approach must be taken for consent, sexual autonomy, and harm to be better protected. In looking back to the early case law on consent and deception, the lack of evolution and expansion must be challenged. In the 21st century, one must question why 'as a society … are we so eager to protect the exchange of lies for sex?'[366] McJunkin has been very critical of the law regarding 'rape by fraud' and his arguments are convincing, particularly that 'a desire to protect the practice of seduction has been influential in constraining the scope of criminal protection.'[367] Rather than protecting the interests of men, the law should seek 'to promote equality between men and women.' Indeed, as Herring has contended, 'we should no longer be in an age when the "gentle art of seduction" is revered'.[368] The law needs to do more to recognise the serious harms caused by DSR that warrant criminalisation, signposting to society that obtaining sexual activity by deception is wrong. Consequently, it is inherent that a more expansive approach to consent and deception is taken, namely the proposed reform.

Offering a solution to a very complex and difficult area of the law is not simple, and difficult lines must be drawn. But the SOA 2003 and its application as it stands cannot adequately address DSR. The proposed reform will adhere to all the considerations essential to reforming this area of law, namely, clarity, fair labelling, overcriminalisation and most importantly the protection of sexual autonomy.

5. Conclusion

The law has struggled with the concepts of consent and deception since the 19th century, and despite the enactment of the SOA 2003 which aimed to provide clarity, the law continues to be incoherent, inconsistent and 'deeply unsatisfactory'.[369] The SOA 2003 recognised only two types of deception capable of negating consent under Section 76, thus leaving the courts in a difficult position, with fundamentally no 'guidance' on how to deal with other types of

[365] ibid.
[366] Ben A McJunkin, 'Deconstructing Rape by Fraud', (2014) 28 Columbia Journal of Gender and Law 1, 20.
[367] ibid, 21.
[368] Herring, 'Mistaken Sex' (n 19) 522.
[369] Palmer, 'Freedom to Negotiate' (n 24) 70.

deception apart from the definition of consent in Section 74.[370] Hence, to no surprise, there has been little expansion in the law since the 19th century. The judicial reluctance to criminalise DSR seems to be premised on the concern of overcriminalisation, yet it is submitted that the court's unwillingness also lies with the assertion that 'deceptive sex, however bad it may be, isn't *that* bad.'[371]

This article has used the framework of consent, sexual autonomy, and harm to prove that DSR are inherently harmful, capable of negating consent and thus warrant criminalisation. Through an analysis of the key cases regarding deception both preceding and succeeding the SOA 2003, it is evident that obtaining sex by deception is a violation of sexual autonomy, inhibiting the victim's right to refuse to engage in sexual activity.[372] Thus, for an area of law premised around consent and sexual autonomy, it certainly seems paradoxical that most instances of deception are not criminalised under the current law. Failing to protect sexual autonomy has come at the price of endorsing 'ruses and lies' in the bedroom which cannot be supported.[373]

It has been suggested that the proposed solution to this complex area of law would be to criminalise deception under a separate set of offences which would mirror sections 1-4 of the SOA 2003.[374] In addition to this, an adaption of the definition of consent under section 74 is required in which the concept of "choice" will involve 'the wider surrounding circumstances' for the deception offences.[375] As has been demonstrated in Part 4, this reform would allow for the appropriate criminalisation of all deceptions that the case law has already dealt with, recognising the wrongfulness and harmfulness of the conduct.

Albeit, in terms of future cases put before the courts, a line will have to be drawn as to the types of deception capable of negating consent as 'not every constraint on sexual autonomy' should be criminalised.[376]Any detailed exploration of this is outside the scope of this article, although a few suggestions have been made. For instance, the concept of 'materiality'[377] might aid the

[370] Williams, 'A Further Case on Obtaining Sex by Deception' (n 280) 186.
[371] Rubenfeld, 'The Riddle of Rape-by-Deception' (n 1) 1415.
[372] ibid, 1415.
[373] Herring, 'Mistaken Sex' (n 19) 520.
[374] Gibson, 'Deception, Consent and the Right to Sexual Autonomy' (n 296) 51.
[375] Glendinning (n 276) 229.
[376] Dripps (n 65) 1788.
[377] Kennedy, 'Criminalising Deceptive Sex' (n 359) 94.

law in drawing this line or identifying a minimum threshold of harm that would not be triggered by 'common or garden lies'.[378]

Ultimately, obtaining sex by deception is '*that* bad',[379] and the time for reform is now. The criminal law needs to take a more expansive stance to consent and deception, sending the message that lying and misleading cannot be justified as a means of seduction; it is inherently wrong.

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[378] Jheeta (n 224) [24].
[379] Rubenfeld, 'The Riddle of Rape-by-Deception' (n 1) 1415.

What Dystopia Can Tell Us About Law: a Feminist Exploration of Dystopian Fiction

Niamh Kenny

Introduction

"Both law and literature have often assumed that if not totally absent, women are the other, the object of the male gaze, the subject of the discussion, not the speaker. Looking at "law" and at "literature" together enables us to see how each discipline incorporates these assumptions (as men speak, judge, describe, and ascribe) […]".[1]

This article will explore how law is utilised in dystopias to uphold patriarchal norms. When looking for law in dystopian fiction, it is evident that dystopias subvert law's utopian aim,[2] by using it as a tool of oppression, and in particular a tool by which men oppress women.[3]

This article will explore three dystopias: Oceania, in George Orwell's *1984*,[4] The Ford in Aldous Huxley's *Brave New World*,[5] and Gilead in Margaret Attwood's *The Handmaid's Tale*[6] and *The Testaments*.[7] These dystopias are particularly useful because they engage in extensive world-building, using law as a driving force for the narrative. For a critical feminist exploration, *The Handmaid's Tale* and *The Testaments* are an obvious choice, depicting a regime crafted on extreme patriarchal values. In contrast, *Brave New World* and *1984* are not patriarchal at face value, but as law in these texts is interrogated, the patriarchy comes to the forefront. In *Brave New World*, values of femininity go unquestioned as they are so deeply engrained,[8] and in *1984* women are depicted as sexual deviants in need of conditioning.[9]

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[1] Carol Helibrun and Judith Resnik, "Convergences: Law, Literature and Feminism" (1990) 99(8) The Yale Law Journal 1913, 1914
[2] Miguel Angel Ramiro Avilés, "The Law-Based Utopia" (2000) 3(2-3) Critical Review of International Social and Political Philosophy 225, 226
[3] Shira Pavis Minton, "Hawthorne and the Handmaid: An Examination of the Law's Use as a Tool of Oppression" (1998) 13 Wisconsin Women's Law Journal 45, 45
[4] George Orwell, *1984* (first published 1949, Polygon 2021)
[5] Aldous Huxley, *Brave New World* (first published 1932, Vintage 1994)
[6] Margaret Atwood, *The Handmaid's Tale* (first published 1986, Vintage 1996)
[7] Margaret Atwood, *The Testaments* (Chatto & Windus 2019)
[8] Margaret J. Daniels and Heather E Bowen, "Feminist Implications of Anti-leisure in Dystopian Fiction" (2003) 35(4) Journal of Leisure Research 423, 428
[9] Ibid, 433

The role of law in entrenching the patriarchy in dystopian fiction will be explored in three parts. The first part responds to existing scholarship on utopia,[10] law in utopia,[11] and Feminist utopias,[12] which has attached too much value to unobtainable visions, while also dismissing dystopias for being too pessimistic for these current, dystopian times.[13] This part will first explore the Law and Literature movement, highlighting some of the key debates within the movement, situating the study of law in dystopias within the Critical Project,[14] and Barthes' approach to literary analysis,[15] so dystopian fiction is best utilised. This part will also explore the concept of dystopia, where it came from, how it can be defined and distinguished from utopias and anti-utopias. It will also discuss how dystopia has been used by scholars (including those outside the strictly legal sphere), and the characteristics a dystopia must have to be useful. Finally, this part will explore how a feminist approach to dystopian literature can improve our understanding of law in dystopia. By examining the importance of feminism in the broader study of law, feminist critiques of the public/private divide and consciousness raising, for example, can then be identified and explored within dystopian fiction to see how the patriarchy is upheld.

The second part will explore the rule of law in the chosen dystopian narratives, as law "becomes unpredictable for those governed by it because totalitarian governments change rules and regulations, even the constitution, at will".[16] The part will begin by examining the rule of law from the core principles outlined by Dicey, and move to a more substantive conception of the rule of law.[17] It will examine the principle of legality within the dystopias, evaluating the extent to which law is clear, concise, predictable,[18] whether it is applied equally to all,[19] and whether the fairness of law can be upheld through a fair trial.[20] The part will then move on to examine

[10] Davina Cooper, *Everyday Utopias: The Conceptual Life of Promising Spaces* (Duke University Press 2014)
[11] Michael P. Malloy, "UTOPIA and the Law and Literature Movement" (2016) 48 University of the Pacific Law Review 1
[12] Ruth Houghton and Aoife O'Donoghue, "'Ourworld': a feminist approach to global constitutionalism" (2020) 9 Global Constitutionalism 38
[13] Tom Moylan, "The Necessity of Hope in Dystopian Times: a Critical Reflection" (2020) 31(1) Utopian Studies 164
[14] Robin West, "The Literary Lawyer" (1996) 27 The Pacific Law Journal 1188
[15] Roland Barthes, "Death of the Author" in Roland Barthes, *Image, Music, Text* (Fontana 1977)
[16] Chris Boge, ""There Were No Longer Any Laws": Voices of Authority, Complicity, a Resistance in Totalitarian Dystopias and Holocaust Imaginings" (2015) 9(2) Pólemos 265, 268
[17] AV Dicey, *Introduction to the Study of the Law of the Constitution* (by JWF Allison ed, first published 1885, Oxford University Press 2013)
[18] Lon Fuller, *The Morality of Law* (Revised edition, Yale University Press 2011)
[19] Dicey (n 17)
[20] Tom Bingham, *The Rule of Law* (Penguin 2011)

the extent to which state actors are answerable to the law and how they are held accountable for breaches of the law,[21] in the absence of judicial review. The part will explore the extent to which the substantive law is upheld through the protection of human rights,[22] and the dystopian states' conception of freedom. Then, it will address the tension between feminist approaches to the rule of law and how the subversion of the rule of law in these dystopias reinforces the patriarchy.

The third part will explore law's performance in dystopian narratives. An exploration of law and performance shows that formal law can be assisted by rituals, ceremonies, and practices to subject constituents to authoritarian commands,[23] with a focus on the law's reception by the legal subject rather than a focus on the law's production.[24] Stone Peters argues performance is "an agent of autocratic regulation, producing the law in a dramatic performance meant to conceal its violent origins and its ongoing groundlessness, pointing to an absent authority too terrifying to confront, masking law's continuing violence with ritual splendour, injecting law into our bodies and souls though invisible pathways".[25] Stone Peters' themes of violence, groundlessness and authority are pervasive in dystopias. The performance of law in these dystopian fictions is examined through legal events, through the enforcement in law at trial and in policing, in addition to the punishment of those found to have broken the law. The rituals and ceremonies in these dystopias are also performances of law. Whether constituents participate or bear witness to these performances, the law is used as a way of reinforcing individuality, denying constituents the opportunity to come together and share their experience of oppression. This consciousness raising is particularly important for women, who face patriarchal oppression which must be recognised for it to be dismantled.[26] Performance of the law can also reinforce gender roles,[27] as men and women are treated differently and play different roles in law's performance, using these roles as a method of control. The performance of law in these dystopias also demonstrates the pervasiveness of law across the public/private

[21] Ibid
[22] Ronald Dworkin, *A Matter of Principle* (Oxford University Press 1985), 11-13
[23] Julie Stone Peters, "Legal Performance Good and Bad" (2008) 4 Law, Culture and the Humanities 179, 190
[24] Ibid
[25] Ibid, 196
[26] Catharine A MacKinnon, *Toward a Feminist Theory of the State* (Harvard University Press 1980), 83
[27] Catharine MacKinnon, *Feminism Unmodified: Discourses on Life and Law* (Harvard University Press 1987), 39

divide, demonstrating women are relegated to private sphere, but are still heavily regulated by the state.[28]

Dystopias have been missed by feminists as a tool of legal analysis and should be taken more seriously. While feminist utopias have explored how law can assist in dismantling the patriarchy,[29] this dissertation explores ways in which dystopia uses law to entrench the patriarchy and how law uses the patriarchy as a method of control.

1. A Literary Overview

In this part, it will be argued that scholarship on dystopia is incredibly limited, meaning dystopia is unable to respond to the flaws in feminist explorations of the law in utopian fiction. This dissertation seeks to fill that gap in the literature, by defining and conceptualising dystopia. This part will explore the purposes and methods of the Law and Literature movement and will argue to best uncover law in dystopian fiction, a critical approach should be taken, as dystopia highlights the drawbacks of a legal order and provides a testing ground for how laws which entrench the patriarchy can play out. It will also argue that for dystopia to be most useful, these fictions should be read in a way which disregards the author's intention. This part will then explore the relationship between utopia and dystopia, arguing for dystopia to effectively respond to utopia, it needs to be better conceptualised. This section of the part will also define what dystopian fiction is. Finally, this part will explore feminist approaches to Law and Literature and to feminist utopianism, so the relationship between feminist literary criticism, feminist legal criticism and law in dystopia can be properly identified. It will also outline key feminist critiques of law which can be found in dystopias and explored in later parts.

1.1. The Law and Literature Movement

There is no single purpose of the Law and Literature movement, with each scholar creating their own justification for their research. Robin West identifies two factions which these aims of Law and Literature can fall into. [30] The first is "the construction of the ideal literary

[28] Susan B. Boyd, "Can Law Challenge the Public/Private Divide - Women, Work, and Family" (1996) 15 Windsor Yearbook of Access to Justice 161, 163
[29] Houghton and O'Donoghue (n 12)
[30] West (n 14)

lawyer",[31] and the second is "the Critical Project", where literature can provide "a humanistic account of good legal criticism".[32] Ward also identifies two aims of Law and Literature, where the first is educative, specifically for the law student and teacher, and the second is the study of socio-political shortcomings of a legal order.[33] For Malloy, there are four separate approaches within the Law and Literature movement,[34] although his first, second and fourth approach seem to be subsections of Ward's educative purpose and West's construction of the ideal literary lawyer. The first approach looks to create a more "complete" lawyer and the second is a study of language and speech to aid a lawyer's development.[35] Malloy's third approach sees literature as providing "rich and nuanced hypotheticals" which facilitate discussion of important legal issues, and his fourth is that literature provides a reflection on the life of the law, specifically the responsibilities of a lawyer in their "political, social and personal environments".[36] Despite a diversity in terminology, there are evidently two main purposes of the Law and Literature movement which have emerged from the scholarship. The first faction is educative, with both Ward's and West's first faction originating from James Boyd White's original purpose of the movement, to teach and study the law.[37] Malloy's first, second and fourth approach are subcategories of this faction. We can also identify a second faction, finding a common ground between West's Critical Project, Ward's study of socio-political shortcomings and Malloy's study of hypotheticals. These approaches engage with the role of law within the text, the critiques that can be made about law and how those critiques can be useful to the role of law in the real world. While the educative faction bolsters, the critical faction criticises law and legal authority.[38]

This dissertation will explore dystopian fiction through the Critical Project. In an attempt expand upon the critical legal studies movement, Brook Thomas' analysis of literary works aligns firmly with the Critical Project of Law and Literature.[39] Placing Hawthorne and Melville in their historical context, Thomas seeks to criticise the legal orders at the time, suggesting literature in its historical context provided a utopian alternative to the current political and legal

[31] Ibid, 1188
[32] Ibid
[33] Ian Ward, "The educative ambition of Law and Literature" (1993) 13 Legal Studies 323, 329
[34] Malloy (n 11)
[35] Ibid, 3
[36] Ibid, 4
[37] James Boyd White, *The Legal Imagination* (University of Chicago Press 1985)
[38] West (n 14) 1188
[39] Brook Thomas, *Cross Examinations of Law and Literature* (Cambridge University Press 1987), 4

orders, at which a narrative can provide an "imaginary solution".[40] Shira Pavis Minton aligns with the Critical Project too,[41] with a focus on literature is a means of political study, using various texts as a tool of legal criticism to highlight the drawbacks of a legal order.[42] For Goodrich, the study of law within literature, what he calls "jurisliterature", provides an "antidote to the dust of filing cabinets and the smoke of pure law". [43] He is of the opinion that Law and Literature's long-term project should render the law "aesthetically pleasing" and "ethically appropriate", which should "bring imagination to the normative practices and decisional dictates of legal actors".[44] When literature act as a testing ground for law, it can demonstrate how fictitious laws and legal systems could play out. Utopias and dystopias provide that testing ground, bringing to life imaginary legal systems to assess their aesthetics and ethics.[45]

To maximise the utility of the analysis of dystopian fiction, it is argued that these narratives should be read without the author in mind. It is the view of Roland Barthes in *The Death of the Author* that "[w]riting is that neutral, composite, oblique space where our subject slips away, the negative where all identity is lost, starting with the very identity of the body writing".[46] Barthes is critical of the author's "reign" over their work,[47] and finds to separate an author from their work "transforms the modern text".[48] Burke opposes the notion of a Dead Author, finding it only functions as a defensive strategy against the overdetermination of a text, of which there is no basis in existing theories of hermeneutics.[49] Despite Ward's determination that adopting Barthes' approach is merely fashionable, [50] and to ignore the author would be "deliberately obtuse", [51] it is necessary method for this project as dystopian narratives are not being read to explore legal systems which the authors sought to comment on. Barthes' approach does have the potential to subvert the fidelity and integrity of a text written with an agenda in mind,[52] but it is a necessary route to take for this thesis as distance from the author's intention means limits

[40] Ibid, 7
[41] Minton (n 3) 45
[42] Ibid
[43] Peter Goodrich, *Advanced Introduction to Law and Literature* (Edward Elgar 2021), xiii-xiv
[44] Ibid, 109
[45] Ibid
[46] Roland Barthes, "Death of the Author" in Roland Barthes, *Image, Music, Text* (Fontana 1977), 142
[47] Ibid,143
[48] Ibid, 145
[49] Seán Burke, *The Death and Return of the Author: Criticism and Subjectivity in Barthes, Foucault and Derrida* (Edinburgh University Press 2008), 183
[50] Ian Ward, *Law and Literature: Possibilities and Perspectives* (Cambridge University Press 1995), 28
[51] Ibid, 36
[52] Ibid, 35-36

are not imposed upon the texts.[53] Law in dystopian fiction can be seen as complete, with any gaps and uncertainties demonstrating inadequacies in the law.[54]

1.2. Utopia and Dystopia

Utopia, translating from Greek as 'no place' or 'good place', finds its origins in Thomas More's work of fiction with the same name.[55] Utopian studies have since sought to visualise a better world as an essential element of political culture,[56] emphasising desire for a world which is far from "the paranoid readings of social life".[57] Ramzi identifies three forms of utopia, as a "distinct literary genre", "an affective impulse or desire" or "a fully formed blueprint of an ideal or perfected world".[58] Using utopia as a blueprint has become a much less favourable approach, with scholars using utopia as an ethos instead.[59] Utopias can "form richly productive and important sites for social change and politics, even as they also reveal the compromises, accommodations, and practical dilemmas of counternormative ways of living",[60] as scholars have chosen to reflect on lessons obtained from utopia instead.[61] The reason for this shift was the acknowledgement that utopias are an impossible, paradoxical pursuit.[62] Godin is critical of utopia, framing it as just a thought experiment used only by intellectuals to construct the perfect society,[63] a perfect society which cannot and never will exist.[64] Utopias are used to critique the present and create hope for the future,[65] which, for Bloch, "link[s] with the *potentiality within the world*".[66] Yet, even though there has been an attempt to depart from using utopia as a blueprint, a reliance on hope and forward-looking inevitably brings scholars back to the crystal ball, envisioning a future based on these utopias, a future which is 'better' than the world we live in now.[67] Cooper stresses there is still importance and value in utopia for "protecting and

[53] Roland Barthes, "Death of the Author" in Roland Barthes, *Image, Music, Text* (Fontana 1977), 147
[54] Raas Nabeel, "The Jurisprudence of Dystopian Fiction" (2021) 8 LUMS Law Journal 29, 30
[55] Thomas More and Paul Turner, *Utopia* (first published 1516, Penguin Books 1965)
[56] Ruth Leviatas, *The Concept of Utopia* (Peter Lang 2010) xiii
[57] Cooper (n 10) 217
[58] Ramzi Fawaz, Justin Hall and Helen M. Kinsella, "Discovering Paradise Islands: the politics and pleasures of feminist utopias, a conversation" (2017) 116(1) Feminist Review 1, 2
[59] Cooper (n 10) 3-4
[60] Ibid, 218
[61] Houghton and O'Donoghue (n 12) 43
[62] Cooper (n 10) 5-6
[63] Michael D Gordin et al, *Utopia/Dystopia: Conditions of Historical Possibility* (Princeton University Press 2010), 1
[64] Ruzbeh Babaee et al, "Critical Review on the Idea of Dystopia" (2015) 11(7) Review of European Studies 64, 64-66
[65] Houghton and O'Donoghue (n 12) 45
[66] Ernst Bloch, *On Karl Marx* (Herder and Herder 1971), 172
[67] Houghton and O'Donoghue (n 12)

maintaining more progressive practices" which already exist in the current landscape,[68] although it is difficult to see how utopia can critique the present and also protect it simultaneously. The study of utopias has revealed that they are impossible to obtain, hence we should look beyond them to visualise legal change.

In contrast, dystopia is utopia's "twentieth-century doppelganger".[69] The term 'dystopia' was first coined as a play on 'utopia' by John Stuart Mill in a speech to Parliament in 1868, meaning 'bad place' in Greek.[70] dystopian fiction enjoyed great success in the 1930s, although it is theorised that the first dystopias date back to the French Revolution.[71] Dystopias are "a kind of surrealism", so outrageous in their technological or environmental setting that they would never exist,[72] depicting a society which is significantly worse than contemporary society. [73] Dystopias must also be distinguished from anti-utopia, which is "a non-existent society … that the author intended a contemporaneous reader to view as a criticism of utopianism".[74] A dystopia can be "a utopia gone wrong",[75] contingent on the fact that the utopian aim has been corrupted by the bearer(s) of power, for example.

For Theiss, the "difference between utopia and dystopia finally comes down to a matter of point of view", as each author defines dystopia in their own way.[76] Malloy argues the term dystopia "has spread as a generic label for any literary depiction of an oppressive, brutal or dehumanizing society or state", which implies an extraordinary misleading distinction between utopias and dystopias.[77] Malloy rightly identifies *Utopia* as "a very scary space",[78] but misses the point that this is a criticism of utopia, and not a criticism of the line drawn between utopia and dystopia. The fact that similarities can be drawn between More's *Utopia* and Orwell's *1984*

[68] Cooper (n 10) 223
[69] Gordin et al, (n 63) 1
[70] John Stuart Mill, *The Collected Works of John Stuart Mill, Volume XXVIII: Public and Parliamentary Speeches Part 1*(John M Robson ed, University of Toronto Press 1850), 248
[71] Gregory Claeys, *Dystopia: A Natural History* (Oxford University Press 2017), 273
[72] Kim Stanley Robinson, "Dystopias Now" (Commune, 11 February 2018) <https://communemag.com/dystopias-now/ > accessed 11 February 2022
[73] Ibid
[74] Lyman Tower Sargent, "In Defence of Utopia" (2006) 53(1) Diogenes 11, 15
[75] Gordin et al, (n 63)1
[76] Derek Thiess, "Critical Reception" in M, Keith Booker (ed), *Critical Insights: Dystopia* (Salem Press 2012), 19
[77] Malloy (n 11) 8
[78] Ibid, 9

demonstrates utopia hides totalitarian tendencies behind the cloak of perfection. Dystopias satirise utopia, [79] rejecting the unrealistic desires and the paradoxical nature of it. [80]

It must therefore be asked whether dystopia should serve or respond to utopia? Moylan has been critical of the emergence of dystopian studies, as he is of the opinion that we live in dystopian times and need a "hopeful, transformative utopian impulse".[81] Moylan, along with Robinson, argue dystopia should serve the utopian project,[82] by searching for a glimmer of hope, a "utopian impulse", in the form of a happy ending.[83] Yet for Claeys, a happy ending is just a Hollywood trope.[84] Claeys defends himself against Moylan's criticism that he deprives dystopia "of its transformative potential",[85] suggesting that dystopia allows us to act logically, and not *impulsively*, when creating solutions to problems. [86] There is no obligation for dystopia to promote a narrative about utopia, [87] nor should there be. Crocker suggests dystopia does serve as a response to utopia, but this comes about organically, as to identify something as undesirable, and therefore dystopian, a legal actor "must provide a positive articulation of the values to be preserved", identifying an ideal, utopian conception of a legal system.[88] This positive articulation does not invoke a transformative approach like utopia does, but rather affirms existing desires or values,[89] preventing the descent of the "slippery slope" which has dystopia at the bottom of it. [90] Dystopia is therefore better conceptualised as a response to utopia, of which it is both critical and complementary, depending on the existence of a happy ending and a glimmer of hope.

[79] Milton Ehre, "Olesha's Zavist: Utopia and Dystopia" (1991) 50(3) Slavic Review 601, 605
[80] Ruzbeh Babaee et al, "Critical Review on the Idea of Dystopia" (2015) 11(7) Review of European Studies 64, 64-66
[81] Moylan (n 13) 165
[82] Kim Stanley Robinson, 'Dystopias Now' (Commune, 11 February 2018) <https://communemag.com/dystopias-now/ > accessed 11 February 2022
[83] Moylan (n 13) 171
[84] Gregory Claeys, "Moylan and Dystopia" (2020) 31(1) Utopian Studies 194, 202
[85] Moylan (n 13), 185
[86] Ibid, 200
[87] Ibid, 197
[88] Thomas P Crocker, "Dystopian Constitutionalism" (2015) 18(2) University of Pennsylvania Journal of Constitutional Law 593, 609
[89] Ibid
[90] Ibid, 610

Yet, dystopia is currently unable to act as a response to law and utopia. While utopia has been used to engage in areas of law such as constitutionalism[91] and global constitutionalism,[92] in legal scholarship dystopia is used as an adjective or buzzword, typically in reference to the development of law and technology such as surveillance and privacy.[93] The aim of this dissertation is to bridge the gap between utopia and dystopia in the study of law. Ramzi identifies that utopian fiction allows for "intellectual leaps of the imagination by conceiving how the world might look differently if this or that element of it was radically transformed".[94] This is in contrast to Nabeel's vision for dystopian literature, which invites critical analysis of "how political forces utilise their power in pursuance of an agenda", identifying a state's biggest weapon is the law.[95] The state's use of law to obtain and maintain power is a dominant motif in dystopian fiction,[96] providing an opportunity to examine and criticise the role of law in entrenching totalitarian regimes. An improved conceptualisation and theorisation of law and dystopia would mean dystopias could be taken more seriously and should be better able to respond to existing utopian legal scholarship.

Barriers to this conceptualisation can be attributed to the canonisation of the Law and Literature movement, which has excluded dystopian fiction. Scholars in this field, such as Posner, are drawn more to the 'great works', believing they have a special quality which makes their interrogation more useful.[97] For Posner, these great works "transcend boundaries of period and culture", as they have a certain "universality" to them, meaning they resonate with a wider audience.[98] In his response to Posner, Papke firmly disagrees with the Posner's "survival theory of literature … [where] only the strongest survive",[99] suggesting his understanding of the movement is "old-fashioned bordering on quaint".[100] Helibrun and Resnik identify that Law and Literature "missed an opportunity" ,[101] as early scholars like Wigmore created their own

[91] Susan N Herman, "Constitutional Utopianism: An Exercise in Law and Literature" (2016) 48 University of the Pacific Law Review 93 ,100
[92] Dianne Otto, "Feminist Approaches to International Law" in Anne Orford and Florian Hoffmann (eds) *The Oxford Handbook of the Theory of International Law* (Oxford University Press 2016)
[93] Natalia Menendez Gonzalez, "Development or dystopia? An introduction to the accountability challenges of data processing by Facial Recognition Technology" (2021) 26(2) Communications Law 81
[94] Fawaz et al., (n 58) 2
[95] Nabeel (n 54) 30
[96] Ibid
[97] Richard A Posner, "Law and Literature: A Relation Reargued" (1986) 72(8) Virginia Law Review 1351, 1369
[98] Ibid
[99] David Ray Papke, "Problems with an Uninvited Guest: Richard A Posner and the Law and Literature Movement" (1989) 69 Boston University Law Review 1067, 1080
[100] Ibid
[101] Heilbrun and Resnik (n 1) 1941-2

canon which mirrored the narrow, exclusionary nature of literature's canon.[102] Despite this, the Law and Literature movement can "reconstruct our normative environment" by reaching further than the canon,[103] and reaching to dystopia.

For Law and Literature to reach for dystopia, it must be properly defined what dystopian fiction is. As Vieira identifies in *Dystopia(n) Matters*, there are a variety of definitions of dystopia,[104] and there appears to be no common ground. This lack of cohesion poses a problem when defining and creating a taxonomy for dystopia.[105] In "Critical Review on the Idea of Dystopia", Babaee and others define dystopia as "a critical genre that makes us aware of human manipulation through technological advances in the twentieth and twenty-first centuries".[106] This definition is exclusionary in its focus on technological advances, overstating the importance of technology and understating the human role in the creation of a dystopia. For example, *The Handmaid's Tale* is undoubtedly a dystopian text,[107] despite its portrayal of a tech-phobic society. Claeys proposes an alternative: "literary dystopias are understood as primarily concerned to portray societies where the substantial majority suffer slavery and/or oppression as a result of human action".[108] In this definition, Claeys acknowledges that a dystopia may be a utopia for the individuals at the top, such as the Alphas in *Brave New World*, The Inner Party in *1984* or the Commanders in *The Handmaid's Tale*. He does not prescribe certain conventions or themes either, such as futuristic technological advances or environmental disaster or war. Claeys' definition also distinguishes dystopia from apocalyptic fiction, as while those features can exist in dystopian fiction, it is human endeavours which have resulted in dystopia.[109]

1.3. A Feminist Approach

[102] Richard Delgado and Jean Stefanic, "Norms and Narratives: can Judges avoid Serious Moral Error?" (1991) 69 Texas Law Review 1929, 1955
[103] Ibid
[104] Fátima Vieira (ed), *Dystopia(n) Matters: on the Page, on Screen, on Stage* (Cambridge Scholars Publishing 2013), 2
[105] Claeys, *Dystopia* (n 71), 273
[106] Ruzbeh Babaee et al., "Critical Review on the Idea of Dystopia" (2015) 11(7) Review of European Studies 64, 65
[107] Daný van Dam & Sara Polak, "Owning Gilead: franchising feminism through Margaret Atwood's *The Handmaid's Tale* and *The Testaments* (2021) European Journal of English Studies 172, 172
[108] Claeys, *Dystopia* (n 71) 290
[109] Claeys, *Dystopia*(n 71) 292

As already discussed, the study of Law and Literature has repeated the old canon, paying little attention to who is given voice. [110] This has not only resulted in the exclusion of dystopian fiction, but also the exclusion of women's experiences and the exclusion of feminist criticism,[111] meaning literature written by women and literature which challenges the historical pattern of women's victimisation has not been heard.[112] As well as this, there has been a tendency to gender the areas of 'law' and 'literature', with the literary being gendered as feminine, fostering "sweetness and justice", in comparison to masculine law which is hard and pragmatic.[113] This has contributed to a gendered understanding of Law and Literature and how these disciplines interact.[114] Both the canon and the gendering of Law and Literature has led to the exclusion of women's voices. Yet, Ward identifies a "coincidence of ambition" between feminist literary criticism and Law and Literature studies: the ambition to educate and to reveal.[115] In feminist literature such as *The Handmaid's Tale*, narrative and law dovetail, as women are presented as objects or property of men.[116] Of course, feminist literary criticism stretches further than feminist literature, uncovering the patriarchy in texts where it is not seen at first glance.[117] This is particularly useful to the study of Law and Literature, as similarities in feminist criticism can be identified between the alleged neutrality of law and the alleged neutrality of non-feminist literature.[118]

As "[f]eminists are constantly wondering what might be",[119] literary fantasies such as utopia and dystopia can provide a testing ground for these feminists, who seek to "expose injustices, amend the law, liberate women and reveal oppressive fictions and myths promoting a male superiority".[120] Ramzi suggests that "feminist utopian fiction often functions as a creative extension of these intellectual and theoretical critiques of the relationship between gender and sexual and class oppression",[121] providing an insight into feminists' critiques of current legal

[110] Heilbrun and Resnik (n 1) 1937
[111] Ibid, 1918-9
[112] Greta Olson, "Law is not Turgid and Literature is not Soft and Fleshy: Gendering and Heteronormativity in Law and Literature Scholarship" (2012) 36 Australian Feminist Law Journal 65, 78
[113] Ibid, 65-75
[114] Ibid, 65
[115] Ian Ward, "Law and Literature: A Feminist Perspective" (1994) 2(2) Feminist Legal Studies 133, 134
[116] Heilbrun and Resnik (n 1) 1942
[117] Josephine Donovan, *Feminist Literary Criticism: Explorations in Theory* (University Press of Kentucky 1989), xiii
[118] Lanae Holbrook, "Justice Barkett's Feminist Jurisprudence" (1992) 46 University of Miami Law Review 1161, 1161
[119] Adelaide H. Villmoare, "Feminist Jurisprudence and Political Vision" (1999) 24 Law & Social Inquiry 443, 447
[120] Ducan Spiers, *Jurisprudence Essentials* (Edinburgh University Press 2011), 120
[121] Fawaz et al., (n 58) 13

structures.[122] In particular, a developing body of literature on feminist approaches to Global Constitutionalism has looked to feminist utopian fiction to find new ways to think about law and governance.[123] Houghton and O'Donoghue point out "[f]eminist utopian texts offer a body of literature which has always been available to governance discourse but were largely ignored",[124] explaining Otto's unfruitful attempts in finding feminist utopias which have informed feminists' engagement in international law.[125] This scholarship attaches influence to feminist utopias in political theory and legal studies, encouraging these narratives to be "read alongside those utopian narratives written by men that are perceived as key political texts".[126]

The same influence has not been attached to dystopias or feminist dystopias. While Ramzi identifies that "feminist dystopias tend to be the place to look for extended mediations on the mutually reinforcing structures of gender, sexuality and class or labour",[127] dystopia has been, for the most part, overlooked as a tool for feminist legal criticism. Shira Pavis Minton, in her examination of *The Handmaid's Tale* and *The Scarlet Letter*, examines how the law in these dystopian texts is an oppressor of women, particularly the use of law as "the punisher of sexual expression and the judge of sexual deviance",[128] demonstrating the potential in dystopian fiction. While Nabeel also explores law in *The Handmaid's Tale*, in addition to *1984* and *Scythe*, [129] he does not engage in a feminist critique of these texts beyond his exploration of *The Handmaid's Tale*. This dissertation seeks to show that dystopias can influence political theory and legal studies alongside utopias and feminist utopias.

To adopt a feminist reading of law in dystopia, key themes of feminist jurisprudence must be identified. For Pateman, the dichotomy between the public and private divide "is, ultimately, what the feminist movement is about".[130] Law played a crucial role in constructing the public/private divide in the 19th Century, by excluding women from entering professions such as law and medicine, professions which had a high profile in the public sphere.[131] Therefore,

[122] Houghton and O'Donoghue (n 12) 75
[123] Ibid, 45
[124] Ibid, 42
[125] Otto(n 92) 492
[126] Houghton and O'Donoghue (n 12) 73
[127] Fawaz et al., (n 58)13
[128] Minton (n 3) 49
[129] Nabeel (n 54) 30
[130] Carole Pateman, "Feminist Critiques of the Public/Private Dichotomy" in *The Disorder of Women: Democracy, Feminism and Political Theory* (Stanford University Press 1989), 118
[131] Boyd (n 28) 166

men dominated the public sphere and women dominated the private sphere,[132] although this domination by women did not give them the power or authority in their sphere, as the patriarch was still the head of the household.[133] But, as identified by Wyatt, the pervasiveness of law across the public and private sphere means that the line between public and private is difficult to draw.[134] In dystopias, law's pervasiveness across the divide acts as an oppressor, keeping women out of the public sphere, whilst still regulating them within the private. The feminist slogan "The Personal is Political", which calls for law to intervene in the private sphere,[135] is utilised by the regimes in dystopia, but not in a way that feminists imagined.

A pervasive public/private divide re-enforces gender roles, as women perform "women's work" in the private sphere, such as taking on caring responsibilities and housework, which is undervalued in both spheres.[136] Feminists have sought to deconstruct these gender roles for two reasons. Firstly, gender roles perpetuate the narrative of essentialism, that there is an 'essence' to a woman which makes them more suited to labour in the home and not in the public sphere.[137] Secondly, for Mackinnon, the 'difference' between men and women is actually 'dominance', as to accept these differences "means to affirm the qualities and characteristics of powerlessness".[138] Dystopias utilise this dominance and difference as a way of dominating women, using law to maintain these gender roles as a method of control.

Feminist jurisprudence also challenges the cloak of neutrality in the construction of law.[139] Feminist legal theory identifies that "law reproduces economic and political power", and as a consequence of this, "law is far from being neutral, determinate or objective".[140] In patriarchal structures, men wield the economic and political power, using this neutrality to justify the maintenance of the status quo while the patriarchy has a monopoly over the law.[141] As

[132] Ibid, 163
[133] A. Duffy, "Struggling with Power: Feminist Critiques of Family Inequality" in N. Mandell & A. Duffy, (eds), *Reconstructing the Canadian Family: Feminist Perspectives* (Butterworths, 1988), 111
[134] Vashti Wyatt, "Feminism: a critique or refinement of modern liberal political theory?" (1998) 5 UCL Jurisprudence Review 42, 52
[135] Boyd (n 28) 170
[136] Ibid, 166
[137] Judith Butler, "Performative Acts and Gender Constitution: An Essay in Phenomenology and Feminist Theory (1998) 40(4) Theatre Journal 519
[138] Mackinnon, *Feminism Unmodified: Discourses on Life and Law* (n 27), 39
[139] Holbrook (n 118) 1161
[140] Janusz Cabaj, "Feminist Legal Theory: Outline of the Issue" (2010) 8 Bialstockie Studia Prawnicze 79, 79
[141] Cassandra Heugh, "Feminist Perspectives on the practice of law" (2010) 16 UCL Jurisprudence Review 94, 99

dystopias can be constructed based on the patriarchy, the apparent gender neutrality of law in dystopian fiction is also artificial.

By asking "The Woman Question" and consciousness-raising, the masculinity of law and its role in entrenching patriarchal structures can be exposed. As a feminist method, "The Woman Question" exposes how law has failed to consider the experiences and values more typical of women.[142] Consciousness-raising turn feminist theory into "the pursuit of consciousness", providing a way for women to realise their oppression.[143] For Harrison, women can and must form communities "if real change is to occur", helping women feel less alone in their oppression.[144] Dystopias, however, use law as a barrier to these feminist methods, by either isolating women and creating conflict between them, or by brainwashing the collective so there is no ability for women to become conscious and utilise their collectivity for rebellion.

1.4. Summary of Part One

To gather the strands of this part together, it is argued that dystopia has the potential to both complement and criticise utopia, existing alongside and working in conjunction with feminist utopian studies. By using the Critical approach to Law and Literature and asking "The Woman Question", feminist readings of dystopian fiction can be used to critique law and legal authority which entrenches the patriarchy.

The dystopian texts this dissertation seeks to rely on are Aldous Huxley's *Brave New World*, George Orwell's *1984* and Margaret Atwood's *The Handmaid's Tale* and *The Testaments*. These texts fit within Claeys' definition of dystopia.[145] Huxley depicts a dystopia called The Ford, where humans are confined to their social group due to their genetic engineering, which has been crafted in a laboratory.[146] The lower social groups suffer oppression because of this genetic engineering and subconscious brainwashing.[147] The majority of the population of Orwell's dystopia Oceania suffer oppression at the hands of Big Brother and the Inner Party,[148]

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[142] Ibid, 110
[143] MacKinnon, *Toward a Feminist Theory of the State* (n 26) 84
[144] Melissa Harrison, "A Time of Passionate Learning: Using Feminism, Law, and Literature to Create a Learning Community" (1993) 60 Tennessee Law Review 393, 411-412
[145] Claeys, *Dystopia*(n 71) 290
[146] Aldous Huxley, *Brave New World* (first published 1932, Vintage 1994, 10
[147] Ibid, 15
[148] George Orwell, *1984* (first published 1949, Polygon 2021), 202

while in Atwood's Gilead, all women and many men suffer oppression at the hands of an autocratic theocracy.[149] While these texts share themes of totalitarianism, oppression of the majority and a pervasive patriarchy, they each takes a different approach to each theme and to a different degree of severity. *Brave New World* illustrates a "softer form of totalitarianism" than Orwell's *1984*,[150] although it uses more extreme methods to control and oppress constituents. The patriarchy is the most pervasive in *The Handmaid's Tale* duology, as the regime commodifies women's bodies and exercises ownership over women's viable ovaries. But the patriarchy is still present and harnessed as a tool of control in *Brave New World* and *1984* too. Not only this, but in a way, these texts make up a canon within the genre of dystopia. Both *Brave New World* and *1984* are seen as *the* texts which define the genre of dystopia,[151] while *The Handmaid's Tale* is seen as the defining text of the genre's sub-category of feminist dystopias. While *The Testaments* has not been seen as ground-breaking as its prequel, it is included so that the Republic of Gilead can be analysed in its fullest conception. It is however acknowledged that this narrow choice of texts means this thesis provides a starting point for a feminist interrogation of law in dystopias.

2. Rule of Law

The rule of law is widely accepted as a cornerstone of liberal democracy, a political ideal to which every legal system must be judged.[152] Yet, what the rule of law is, and what it should be, is still contested. It is thought that Dicey originally coined the expression,[153] but varying definitions and characteristics that law must possess to comply with the rule of law have since emerged. Fuller, for example, contended that law must have certain values or qualities that mean it is capable of being followed, such as coherence, consistency, and accessibility.[154] Law must also be fair and apply equally to all.[155] Bingham also suggests that the rule of law requires that public officers act within their power assigned to them.[156] A focus on formal legality in respect of the rule of law does not go far enough for academics like Dworkin, who consider that law must have a moral element, protecting fundamental human rights and invalidating

[149] Margaret Atwood, *The Handmaid's Tale* (first published 1986, Vintage 1996
[150] Margaret Atwood in Aldous Huxley, *Brave New World* (first published 1932, Vintage 1994), vii
[151] Claeys, *Dystopia*(n 71) 360
[152] Michael P Foran, "The rule of law: form, substance and fundamental rights" (2019)78(3) Cambridge Law Journal 570, 570
[153] Bingham (n 20) 13
[154] Fuller (n 18)
[155] Dicey (n 17)
[156] Bingham (n 20)

discrimination.[157] It is ultimately for legislative bodies and the Courts to ensure that the rule of law is adhered to.

For feminists, the rule of law's need for coherence and consistency legitimises the status quo and existing power relationships.[158] Because the status quo and existing power relationships are drawn from the patriarchy, the rule of law reinforces gender inequality. The rule of law cannot fulfil its promise of equality.[159] Feminist jurisprudence, as highlighted by Holbrook, "exposes the limits" of the rule of law's objectivity, as "the underlying terms of many rules are not predefined or specific".[160] This part will address the tension between feminist approaches to the rule of law and how the subversion of the rule of law in these dystopias reinforces the patriarchy. It is argued by Nabeel that dystopian narratives "neglect the entire concept of the rule of law in its contemporary definition",[161] but this argument is too absolute. Rather, dystopian narratives pick and choose elements to create their own conception of the rule of law, which is used by the state to justify their actions and demonstrate their political legitimacy. It shall be explored how the conception of the rule of law in dystopian narratives legitimises and normalises patriarchal power relations.[162] To do this, a dystopia's conception of 'law' must be established, before examining the extent to which judicial bodies and public officers uphold the rule of law. This part will examine how these dystopias subvert the substantive conception of the rule of law, examining the extent to which law protects human rights and invalidates discrimination. Finally, this part will examine how these dystopias use the rule of law as a way of entrenching the patriarchy, and how this creates a tension with the typical feminist conception of the rule of law.

2.1. "Nothing was illegal, since there were no longer any laws".[163]

The principle of legality is a vital component for the rule of law, as it provides clarity, coherence, and predictability to law so it can be followed. As Bedner notes, "[f]ormal legality

[157] Ronald Dworkin, *A Matter of Principle* (Oxford University Press 1985), 11-13
[158] Leslie Francis and Patricia Smith, "Feminist Philosophy of Law" in *The Stanford Encyclopedia of Philosophy* (Edward N. Zalta (ed), Fall 2021 Edn Stanford University 2021)
[159] Katherine O'Donovan, "Engendering Justice: Women's Perspectives and the Rule of Law" (1989) 39(2) The University of Toronto Law Journal 127, 127
[160] Holbrook (n 118) 1183
[161] Nabeel (n 54) 49
[162] Sophie Charlotte Stuben, "Does the Rule of Law Operate to Legitimise and Normalise Dominant Patriarchal Power Relations" (2017) Freiburg Law Students Journal 56
[163] George Orwell, *1984* (first published 1949, Polygon 2021), 8

enables citizens to plan their behaviour, as they can predict how the state will respond". [164] Yet in dystopian narratives, it can be difficult to pinpoint exactly what law is, resulting in an incoherent legal system where law can be difficult to follow. In determining whether behaviour is according to law or not, it is common in dystopias that law in practice does not apply equally to all, as society is divided into social groups who possess separate social responsibilities and must abide by their own specific laws. The principle of legality also looks to fairness and is often embodied in the right to a fair trial,[165] a right which the constituents of these dystopias do not enjoy. Further, the rule of law is reconceptualised in these dystopias where there appears to be a contrast between a lack of certainty and too much rigidity in the law, which is harnessed to induce fear and entrench government power.

In *1984*, while Winston states there are no laws, and nothing is illegal in Oceania,[166] this cannot be the case. Boge submits instead that "the rule of law becomes unpredictable for those governed by it, because totalitarian governments change rules and regulations, even the constitution, at will".[167] Such changes of laws are guided by the construction of reality, which is tampered with by the Ministry of Truth upon orders from Big Brother and the Party; the laws are constantly changing, but they remain rigid as they must be followed. There is no acknowledgement of change, rather constituents are told to believe, and do believe, that law has always been that way. Laws are therefore not consistent, coherent, or predictable, unable to last long enough to adequately guide constituents.[168] Members of the Outer Party constantly live in fear of being found guilty of *thoughtcrimes*, especially those like Winston, who works in the Ministry of Truth and is therefore conscious of Big Brother's manipulation of reality as they cannot keep up with what is and is not law. Using Fuller's conceptualisation of the rule of law, the Inner Party have not followed the indispensable principles of law making and have therefore subverted the rule of law entirely,[169] yet using Dicey's conceptualisation, if the Inner Party have followed their legislative process to amend the law, the rule of law remains intact.[170] This demonstrates how the oppressors in *1984* have reconceptualised the rule of law to assert their power.

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[164] Adriaan Bedner, "An elementary approach to the rule of law" (2010) 2(1) Hague Journal on the Rule of Law 48, 60
[165] Bingham (n 20) 90
[166] George Orwell, *1984* (first published 1949, Polygon 2021), 8
[167] Chris Boge, ""There Were No Longer Any Laws": Voices of Authority, Complicity, and Resistance in Totalitarian Dystopias and Holocaust Imaginings" (2015) 9(2) *Pólemos* 265, 268
[168] Ibid
[169] Fuller (n 18
[170] Dicey (n 17)

The Republic of Gilead in *The Handmaid's Tale* has no regard for the predictability or certainty of law, as it seeks to use law as a tool of oppression. This dystopia is a theocracy, where the bible verses and commandments act as a basis for the State's power. Gilead has however manipulated the teaching of the bible, by making up new teachings like "blessed are the silent" to embed their authority and leaving out teachings which could challenge it.[171] There is also no way of checking, as the bible is locked away.[172] The law's basis, and therefore law itself, is unpredictable and inaccessible. This unpredictability is also demonstrated in the state's deviation from the typical definition of rape.[173] In Gilead, the ceremony is not rape in the eyes of the law, whereas sexual intercourse outside of the ceremony is. Rape is no longer contingent on the notion of consent, rendering the law unclear as citizens are left wondering what the crime of rape actually is. Furthermore, there are many laws in Gilead which are retroactive. Doctors who performed abortions prior to the Gileadean regime are treated like war criminals, "It's no excuse that what they did was legal at the time".[174] Women who received abortions are also punishable under this law.[175] Gilead subverts the rule of law when law when it is created, to entrench their power over all.

In contrast, the law in *Brave New World* does not change. In a world which is driven by scientific discovery, further scientific development is stifled and censored, with the World State believing it has achieved perfection. Because the Ford do not believe in the individual, law is constructed to protect the State's vision and regime.[176] Law in *Brave New World* is therefore selfish, not paternal, seeking to maintain the status quo. Constituents are *entrusted* to follow the teachings of the Ford, and betrayal of that trust deems an individual "an enemy of society".[177] The inhabitants of the Ford are "imprisoned" in this heavily regulated world and are trusted to follow their predefined plan.[178] Here, law's predictability and certainty has been utilised as a method of control by the World State, subverting the rule of law's positive conception of these terms.

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[171] Margaret Atwood, *The Handmaid's Tale* (first published 1986, Vintage 1996), 96
[172] Ibid
[173] Ibid, 101
[174] Margaret Atwood, *The Handmaid's Tale* (first published 1986, Vintage 1996), 39
[175] Margaret Atwood, *The Testaments* (Chatto & Windus 2019), 171
[176] Aldous Huxley, *Brave New World* (first published 1932, Vintage 1994, 128
[177] Ibid,129-30
[178] Bob Barr, "Aldous Huxley's *Brave New World* – still a chilling vision after all these years (2010) 108(6) Michigan Law Review 847, 856

Further, the separation of constituents into distinct groups allows for exceptions, class-specific law and restrictions on a group's interaction with broader society. In *The Handmaid's Tale*, law "is used to harness the power of female sexuality",[179] as "women are on the receiving end of restrictive law in a way men are not".[180] Women are unable to own property,[181] or read,[182] and are commodities, either to their household, specifically their husband or Commander, or the state, in the case of the Aunts. Women exist entirely in a separate sphere, to men[183] with the State believing that equality between men and women cannot be achieved due to their "nature".[184] Within the female sphere, women are split up even more, with each group enjoying a different number of rights and enduring different kinds of restrictions. As Nabeel identifies, "law is created by male figures to benefit male figures at the expense of the entire female population disenfranchised from controlling and questioning the law".[185] Law makers must therefore violate the rule of law's need for equality to oppress women and reinforce patriarchal power dynamics.

In *Brave New World*, the state is responsible for manufacturing a caste-system in the Hatcheries.[186] Each caste is genetically modified from their creation to fulfil a specific purpose in society.[187] Because of the physical, mental, and social differences, each group has different rules and laws to abide by. Each class is conditioned to think differently,[188] and the lower castes must earn their *soma* ration, and therefore must earn their happiness through hours of work, while the upper classes are freely given as much *soma* as they require.[189]

In *Brave New World* and *1984*, the lowest class, the outsiders of society, are not strictly governed by the laws which regulate the other constituents, contrasting with Dicey's conception of the rule of law which requires law to apply equally to all.[190] Inhabitants of the Savage Reservations, who are caged in by 5000 kilometres of electrified fencing,[191] are viewed

[179] Minton (n 3) 49
[180] Ibid, 73
[181] Margaret Atwood, *The Handmaid's Tale* (first published 1986, Vintage 1996) 183
[182] Ibid, 96
[183] Margaret Atwood, *The Testaments* (Chatto & Windus 2019), 175
[184] Ibid
[185] Nabeel (n 54) 35
[186] Aldous Huxley, *Brave New World* (first published 1932, Vintage 1994), 11
[187] Ibid
[188] Ibid, 15
[189] Ibid, 143
[190] AV Dicey, *Introduction to the Study of the Law of the Constitution* (by JWF Allison ed, first published 1885, Oxford University Press 2013)
[191] Aldous Huxley, *Brave New World* (first published 1932, Vintage 1994), 87

by the state as unworthy of the expense of civilising.[192] The 'Savages' live in poverty, with infectious diseases and no access to hot water. In *1984*, the Proles are ignored by the Party, with Thought Police deployed to keep the peace but not to actively enforce the law. Proles are put on par with animals, "Proles and animals are free",[193] and are not bound by restrictions on sexual acts or by intense surveillance of Telescreens. The lowest classes are free from the law's oppression, but do not have the power to harness their freedom to revolt; the law does not need to apply to them. The conception of the rule of law in these dystopias suggests that law does not need to apply equally to all: law just needs to apply to those who are able to use their power to challenge it.

Legality also requires that law is fair, with such fairness embodied in the fairness of a trial.[194] Right to a fair trial is absent from these dystopian narratives. In fact, law's traditional conception of a trial in the courtroom is only present in *The Handmaid's Tale* duology. Barriers to a fair trial are demonstrated through Gilead's law of evidence, as evidence from a single woman is inadmissible,[195] and the evidence of four women is equivalent to the evidence of one man. There is no concept of open justice though, as trials are held in secret,[196] although exceptions can be made to open the public gallery.[197] There is no open justice in *1984*'s Oceania either, as the Ministry of Love is a windowless building surrounded by barbed wire, steel doors, and armed guards.[198] There is no trial at all, but instead the Thought Police gather evidence to justify an arrest, and torture confessions out of perpetrators. Subjects do not have a trial and their punishment and reconditioning (which is again torturous) take place straight after. The trial in *Brave New World* does not take place in a court room or by a judge. Bernard's trial takes place at the Hatcheries and is conducted by the Director. The Director delivers his "judgement",[199] but asks Bernard if he can show any reason why his expulsion from Society should not be executed.[200] Bernard is therefore assumed guilty unless he can prove his

[192] Ibid, 141
[193] George Orwell, *1984* (first published 1949, Polygon 2021), 86
[194] T R S Allan, *Law, Liberty and Justice: The Legal Foundations of British Constitutionalism* (Oxford University Press 1995), 28
[195] Margaret Atwood, *The Handmaid's Tale* (first published 1986, Vintage 1996), 39
[196] Ibid, 318
[197] Margaret Atwood, *The Testaments* (Chatto & Windus 2019), 279. See Part 3.1
[198] George Orwell, *1984* (first published 1949, Polygon 2021), 6
[199] Aldous Huxley, *Brave New World* (first published 1932, Vintage 1994),130
[200] Ibid

innocence.[201] The lack of a fair trial in dystopian narratives means that the fairness of law cannot be tested, and the rule of law cannot be upheld.

2.2. "But as I make the laws here, I can also break them".[202]

A key element of the rule of law is that everyone is answerable to the law.[203] This means that public officers cannot avoid the law or break the law in the same way a constituent cannot avoid or break the law. These public officials are typically held to account by judiciary in judicial review proceedings. Yet in dystopian narratives, even if public officials should be acting within the confines of law, their failure to do so has no consequences as there is not an independent judiciary who conduct judicial review and make judicial determinations.

In *The Handmaid's Tale* duology, it is noted that Gileadean public officials are not above the law and should act according to the law. Fred Waterford, a Commander and one of the Sons of Jacob, is held accountable through criminal proceedings when he tried for "liberal tendencies", the possession of "heretical pictorial and literary materials" and "harbouring a subversive".[204] In *The Testaments*, Eye and Angels storm Ardua Hall, which through Aunt Lydia's reactions to this "The Eyes and Angels have greatly overstepped the bounds of decency, not to mention those of custom and law",[205] indicates that public officials should act within the law and possess a warrant for such searches. However, because there is no judicial review process, public officials who subvert the rule of law cannot be held accountable. Guardians who have shot innocent Marthas cannot be taken to court,[206] and the "unprecedented" storming of Ardua Hall is shrugged off by Commander Judd.[207] There are no lawyers or legal profession either.[208] While individuals such as Waterford can be tried for their crimes, there is no accountability through judicial review for public officials who do not commit crimes but are still outside of the realm of law.

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[201] See Part 3.1
[202] Aldous Huxley, *Brave New World* (first published 1932, Vintage 1994), 192
[203] Adriaan Bedner, "An elementary approach to the rule of law" (2010) 2(1) Hague Journal on the Rule of Law 48, 50
[204] Margaret Atwood, *The Handmaid's Tale* (first published 1986, Vintage 1996), 318
[205] Margaret Atwood, *The Testaments* (Chatto & Windus 2019), 347
[206] Margaret Atwood, *The Handmaid's Tale* (first published 1986, Vintage 1996), 26
[207] Margaret Atwood, *The Testaments* (Chatto & Windus 2019), 347
[208] Margaret Atwood, *The Handmaid's Tale* (first published 1986, Vintage 1996), 29

For *Brave New World* and *1984*, because the law seeks to condition and brainwash its subjects, the World Controllers and Inner Party cannot practicably be required to act within the law.[209] Rule of law for Oceania and the Ford is subverted so that the law can continue to oppress those who are subjects of it, reinforcing the power relationship between the individual and the State.

2.3. "Now you are being given freedom from. Don't underrate it".[210]

A substantive conception of the rule of law demands that law should have a moral element. For Allan, the rule of law without a substantive component is useless.[211] To comply with the substantive meaning of the rule of law, law must protect human rights and prevent discrimination. Yet these dystopian narratives present totalitarian states, in which there are no human rights. Constituents are 'protected' through the concept of negative freedom, which the state uses as a substitute for positive freedoms.

In these dystopian narratives, the State does not actively seek to protect or promote human rights, because to protect those rights would be counter to the state's aim of asserting their power. In *The Testaments*, it is revealed that Gilead had "genocide charges levied by international human rights organizations".[212]. In *1984*, while it appears that the right to assembly is protected and citizens can participate in "demonstrations", these demonstrations are just celebrations of Big Brother's achievements in line with the politics of Oceania, not against it.[213] The human right to life and the death penalty are incompatible,[214] indicating that such right is not protected in *1984* or *The Handmaid's Tale*, where the capital punishment exists. While there is no capital punishment in *Brave New World*, constituents are euthanised once they reach the age of 60, when they are no longer of use to the mechanism of Society.[215] The State crosses the public/private divide through constant surveillance, violating constituents' rights to privacy, and there is also no freedom to marry or to family life or to religion. In *The Handmaid's* Tale, homosexuality, known as gender treachery, is illegal.[216]

[209] Aldous Huxley, *Brave New World* (first published 1932, Vintage 1994), 192
[210] Margaret Atwood, *The Handmaid's Tale* (first published 1986, Vintage 1996), 30
[211] T R S Allan, "The rule of law as the rule of reason: consent and constitutionalism" (1999) 115 Law Quarterly Review 221, 222
[212] Margaret Atwood, *The Testaments* (Chatto & Windus 2019), 64
[213] George Orwell, *1984* (first published 1949, Polygon 2021), 69
[214] *Watson v R (Jamaica)* [2004] UKPC 34
[215] Aldous Huxley, *Brave New World* (first published 1932, Vintage 1994), 95
[216] Margaret Atwood, *The Handmaid's Tale* (first published 1986, Vintage 1996), 49

There is no right to freedom of thought in *1984* or *Brave New World*, where mind control techniques and conditioning seek to eradicate the individual.

To approach these dystopias from a human rights perspective, while positive rights are denied to constituents in these dystopias, there is the notion of negative freedom. In *The Handmaid's Tale*, Aunt Lydia tells the Handmaids "[t]here is more than one kind of freedom … freedom to and freedom from".[217] In Gilead, women are granted freedom from "rules" which women had to follow to protect themselves from sexual harassment, such as running at night, and ignoring catcalls.[218] The women are told not to "underrate it".[219] A similar reasoning for restricting constituents' freedom is put forward by Mustapha Bond in *Brave New World*.[220] The conditioning and *soma* distribution to individuals means that citizens have a freedom from unhappiness, freedom from growing old and freedom from illness.[221] As the World Controller describes, the constituents of the Ford are protected from "the right to be tortured by unspeakable pains of every kind".[222] Religion, art and scientific development have all been exchanged for universal happiness.[223] In dystopian narratives, the state uses the idea of negative freedom to the extreme, taking positive freedom away from constituents and using state paternalism to justify this, when in fact freedom is taken away as a method of control.[224]

2.4. Exacerbations of the Patriarchy

From the findings of this part thus far, a tension can be found between feminist approaches to the rule of law, and how the subversion of the rule of law in these dystopias reinforces the patriarchy. While feminists reject the dichotomy between theory and practice,[225] the exploration of law in dystopian fiction provides a visualisation of the oppression of women when the rule of law is undermined.

[217] Ibid, 30
[218] Ibid
[219] Ibid
[220] Aldous Huxley, *Brave New World* (first published 1932, Vintage 1994), 212
[221] Ibid, 212
[222] Ibid
[223] Ibid
[224] See also, George Orwell, *1984* (first published 1949, Polygon 2021), 19
[225] Melissa Harrison, "A Time of Passionate Learning: Using Feminism, Law, and Literature to Create a Learning Community" (1993) 60 Tennessee Law Review 393, 410

A key criticism of the rule of law by feminists is its demand for stability.[226] Yet, in *1984* and *The Handmaid's Tale*, where this stability does not exist, the patriarchy is pervasive. As these dystopias imagine oppressive regimes which construct law to maintain their power, it is in their interest to maintain already oppressive structures like the patriarchy.

The effect of the subversion of the rule of law in these dystopias is that women are excluded from the uppermost realms of society. In *Brave New World*, the uppermost caste are society's intellectuals, taking on the intellectual jobs of the Ford like lecturing or directing the Hatcheries and Conditioning Centres. Alphas are not only genetically optimised in the Hatcheries but are taught to be intelligent through the Ford's conditioning programmes.[227] There are no women in the Alpha caste, suggesting that women are not biologically or psychologically suited for the professions. This reinforces patriarchal ideas that gender equality is impossible and undesirable due to the biological differences between men and women. Science, just like law, is not gender neutral, and *Brave New World*'s caste system reinforces gender inequality.

It is therefore suggested that it is not the rule of law which is perpetuates the patriarchy, and is those in power who intend to use and subvert it to assert law's authority. The exclusion of women from the public sphere and law-making institutions means that the status quo and existing power relationships drawn from the patriarchy are unchanged. As Hirschmann points out, humans are socially constructed, and male domination has played a part in this construction. The result of this is that laws made by men "are imposed on women to restrict their opportunities, choices, actions and behaviours.".[228] This restricts not only can what women are allowed to do but are allowed to be.[229] In *Brave New World*, freedom from family life makes women's lives less free. While the abolition of the family and motherhood has the potential to be liberating, it is still women who must bear the burden of preventing pregnancy. It is 70% of women, not men, who are sterilised in the Hatcheries,[230] and the remaining 30% are encouraged to undergo a medical operation to harvest their eggs for "the good of Society".[231] Furthermore, the idea of fatherhood is viewed as laughable in the Ford, yet

[226] Holbrook (n 118) 1168
[227] Aldous Huxley, *Brave New World* (first published 1932, Vintage 1994), 22
[228] Nancy J Hirschmann, "Toward a Feminist Theory of Freedom" (1996) 24(1) Political Theory 46, 58
[229] Ibid, 52
[230] Aldous Huxley, *Brave New World* (first published 1932, Vintage 1994), 10
[231] Ibid, 3

motherhood is seen as obscene, due to the physical ties between mother and child.[232] The shame from motherhood is personified in the character of Linda.[233]

In contrast, the way law has been constructed in *The Handmaid's Tale* duology means that rule of law cannot be adhered to. Gilead has set up entirely separate spheres for men and women,[234] in which the women's sphere is run by the Aunts and the men's sphere is run by the Commanders. Aunt Lydia is specially selected because of her former experience as a judge and played an integral part in the creation of laws, uniforms, slogans, hymns and names.[235] Yet, these Aunts are still answerable to Commander Judd and must create laws which fit within the pre-existing values of the State created by men, namely the importance of a clear public/private divide and a the impossibility of equality because of differences in nature.[236] Here, even where women are participating in the legislative process, they are still restricted by the patriarchy which they are forced to perpetuate, betraying everything that women had been taught in their former lives and undoing all that had been achieved.[237] Just as legal critical feminists argue that the law can help dismantle patriarchal structures,[238] it is very easy for law to rebuild them too. The rule of law is reconceptualised in these dystopias, exposing and utilising the limitations of an objective conceptualisation of rule of law to entrench the patriarchy.

2.5. Summary of Part Two

In conclusion, the State in dystopian narratives reconceptualises the rule of law to assert its power and reinforce gender inequality. The concept of legality assists the regimes in these dystopias in asserting their authority. Where law is unpredictable and unquestionable, it can be used as a tool of oppression. Where law is so rigid it cannot change, it is also oppressive and self-serving for the state. As there is no judicial review, even in instances where state actors should be acting within the law, they do not because there are no consequences - there is law but no accountability. This part also found that a substantive rule of law is in direct contrast with totalitarianism, even when the state has constructed law in a way which appears to protect freedom. For the patriarchy, these subversions of the rule of law allow a state dominated by

[232] Ibid, 131
[233] Ibid, 102
[234] Margaret Atwood, *The Testaments* (Chatto & Windus 2019), 174
[235] Ibid, 175-7
[236] Ibid, 174-5
[237] Ibid, 178
[238] Ducan Spiers, *Jurisprudence Essentials* (Edinburgh University Press 2011), 120

male state actors to exacerbate the patriarchy by using women's 'biology' and 'nature', in relation to pre-existing legal structures, to their advantage

3. Law and Performance

Dystopian narratives provide an opportunity to observe the way law is performed, as a focus on law as words alone "elides, erases or represses certain aspects of law that bring in it into being".[239] Law and performance allows the reader to step away from the technicalities of law's creation and its language by placing abstract legal practices into the world they were made for.[240] Chambers-Letson, suggests it is through performance that an absurd legal fiction could be transformed into a reality,[241] complimenting the study of law in dystopian fiction, which "helps us to imagine and envisage how the present can change into something very nasty".[242] In these dystopian narratives, the performances of law in legal events as well as in rituals demonstrate that the law demands recognition and asserts control, [243] as there is less focus on law's production, and more focus on its reception by the legal subject who performs law's mandate.[244] While not all law happens in the courts,[245] it is where the performance of law is the most apparent.[246] In these dystopias, the performance of law in legal events and rituals demonstrates the brutal enforcement of law and instils a sense of fear in constituents, integral to the regime's dominance. The legal events which will be explored are the trial and the courtroom, policing, and punishment.

[239] Austin Sarat, Lawrence Douglas, Martha Merrill Umphrey, *Law and Performance* (University of Massachusetts Press 2018), 2
[240] Ibid
[241] Joshua Chambers-Letson "Twelve Notes of Ferguson: Black performance and Police Power" in Austin Sarat, Lawrence Douglas, Martha Merrill Umphrey, (eds) *Law and Performance* (University of Massachusetts Press 2018), 212
[242] Lucy Sargisson, "Dystopias Do Matter" in Fátima Vieira *Dystopia(n) Matters: On the Page, on Screen, On Stage* (Cambridge Scholars 2013), 40-42
[243] Austin Sarat, Lawrence Douglas, Martha Merrill Umphrey, *Law and Performance* (University of Massachusetts Press 2018), 2
[244] Julie Stone Peters, "Legal Performance Good and Bad" (2008) 4 Law, Culture and the Humanities 179, 190-1
[245] Lara D Nielson, "Thinking Theatre, Performance and "the Law""(2008) 4(2) Law, Culture and the Humanities 156, 161
[246] Joshua Chambers-Letson "Twelve Notes of Ferguson: Black performance and Police Power" in Austin Sarat, Lawrence Douglas, Martha Merrill Umphrey, (eds) *Law and Performance* (University of Massachusetts Press 2018), 216

In an exploration of the links between performance and gender, Judith Butler argues that "gender identity is a performative accomplishment compelled by social sanction and taboo".[247] The interaction between law and the performance of gender is not what this part will focus on. Rather, it will be explored how law's performance in these dystopias leads to the entrenchment of the patriarchy. Law's performance creates barriers to consciousness-raising, by isolating women so that they cannot (or do not) talk to each other, or by brainwashing women as a collective so that they cannot become conscious of patriarchal oppression.[248] The performance of law and its pervasiveness across the public/private divide reinforces gender roles,[249] as women are confined to the private sphere where they are heavily regulated. By asking the Woman Question,[250] It will be explored how these performances reinforce the patriarchy.

3.1. The Trial

The compelling nature of law through its enactment is typically most apparent in the courtroom.[251] When discussing the politics of the courtroom, Mulcahy points out that "the environment in which the trial takes place can be seen as a physical expression of our relationship with the ideals of justice",[252] challenging the vision of a neutral judicial space.[253] In these dystopian narratives, trials are held by the state so law can recognised by the spectators.

In *Brave New World*, the protagonist is called to a meeting with the Director in the fertilising room, "because it contains more high-caste workers than any other in the Centre".[254] There is no courtroom, no specific space set up for this trial. It is declared here that Bernard has "grossly betrayed the trust imposed upon him",[255] which will see him expelled from the Ford; the Director acts as the judge of fact, of law and of sentence. There is no evidence presented in support of this accusation, and Bernard is asked if he can present evidence to refute this

[247] Judith Butler, "Performative Acts and Gender Constitution: An Essay in Phenomenology and Theory (1988) 40(4) Theatre Journal 519, 520
[248] MacKinnon, *Toward a Feminist Theory of the State* (n 26) 84
[249] Wyatt (n 134) 52
[250] Cassandra Heugh, "Feminist Perspectives on the practice of law" (2010) 16 UCL Jurisprudence Review 94, 110
[251] Joshua Chambers-Letson "Twelve Notes of Ferguson: Black performance and Police Power" in Austin Sarat, Lawrence Douglas, Martha Merrill Umphrey, (eds) *Law and Performance* (University of Massachusetts Press 2018), 216
[252] Linda Mulcahy, "Architects of Justice: The Politics of Courtroom Design" (2007) 16(3) Social and Legal Studies 383, 383
[253] Ibid, 384
[254] Aldous Huxley, *Brave New World* (first published 1932, Vintage 1994), 128
[255] Ibid, 129

"judgement" .[256] There are no witnesses, except the workers who stop what they are doing to observe this hearing take place. The re-imagining of the role of the 'witness' in the trial by the State illustrates that the law demands recognition, not only by performing law as a constituent but watching it be performed by those in power. [257] Henry Foster provides a good character testimony for Bernard before the trial begins, but the Director has already made up his own mind.[258] Citizens of the Ford are merely spectators to this 'trial', spectating the law's demand for recognition and assertion of control.

In Gilead, trials at law are performative. Trials were initially internationally televised, although this stopped, and trials began to take place in secret. In *The Testaments,* Dr Grove is tried for the attempted rape of an Aunt.[259] The secrecy policy is waived for Dr Grove's trial, where the public gallery is opened to the entire population of Ardua Hall. [260] This exception is made, as the presence of those spectators symbolises that justice is administered to serve the broader community.[261] Where Gilead can maintain the storyline, it appears as though the overbearing laws protect women from the likes of Dr Grove. This hides the true use of law in Gilead, which is used to oppress women and reinforce the public/private divide. It is apparent from the start that this case is incredibly 'cut and dry', as the defendant has no defence other than a biblical quote, even though the testimony has been completely fabricated. Women are excluded from the legal profession and confined to the witness box and public gallery,[262] reflecting the exclusion of women from the public sphere in Gilead outside of the court room. But the State takes this one step further, instigating barriers for women's presence in the courtroom altogether, reflecting Gilead's intention to create a hard, unquestionable line between the public and private sphere.[263] To reflect on Mulcahy, Gilead's ideals of justice seek to exclude women from the courtroom as they do not belong in the public sphere.[264] Where women can be spectators, law's performance is used to falsely demonstrate that the law acts as something which protects women.

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[256] Ibid, 130
[257] Ibid, 128
[258] Ibid
[259] Margaret Atwood, *The Testaments* (Chatto & Windus 2019), 279
[260] Ibid
[261] Linda Mulcahy, "Watching Women: What Illustrations of Courtroom Scenes Tell Us about Women and the Public Sphere in the Nineteenth Century" (2015) 42(1) Journal of Law and Society 53, 58
[262] Ibid 54
[263] Margaret Atwood, *The Testaments* (Chatto & Windus 2019), 174
[264] Linda Mulcahy, "Architects of Justice: The Politics of Courtroom Design" (2007) 16(3) Social and Legal Studies 383, 383

3.2. Policing

Another legal event which must be explored is the policing of constituents in dystopian narratives. Enforcement of law through policing can be identified through surveillance, either by police or technology, and arrests. As they depict totalitarian regimes, policing can be particularly brutal in these dystopias, and constituents become paranoid and fearful of these events. This omnipresent performance of law means law constantly demands recognition, fostering fear and paranoia which turns constituents against each other. The methods of policing keep women isolated, confined to their homes, unable to unite with other women to realise the patriarchal oppression they are experiencing.

Gilead is a tech-phobic regime and is therefore reliant on individuals reporting lawbreakers to the Eyes, the secret policing organisation. Anyone and everyone could be an informant. The Eyes hide in plain sight, as any male citizen could be an Eye, whether they are strict followers of the law, or reject some of Gilead's strictures to test constituents' loyalties. Offred is suspicious that Nick, a low-ranking Guardian who works for her family, is an Eye. She is suspicious from her first interaction with him,[265] to her last,[266] even though they have been companions in crime.[267] There is further risk that everyday slip-ups could be reported to the Eyes by constituents, but specifically women, who are loyal to the regime. Handmaids must walk around in pairs for protection, but also so that they can be each other's spy.[268] By Gilead creating animosity between women, and between women in their social group, they are isolated from each other and oppressed by the law.[269] As the performance of law isolates women, they are unable to gather and participate in consciousness-raising and rally together to revolt against the regime.[270] There is no hope. For patriarchal oppression to be realised and resisted, women need to be able to talk to each other. [271]

[265] Margaret Atwood, *The Handmaid's Tale* (first published 1986, Vintage 1996, 24
[266] Ibid, 301-2
[267] Ibid, 211
[268] Ibid, 25
[269] Zahra Sadeghi & Narges Mirzapour "Women of Gilead as colonized subjects in Margaret Atwood's novel: A study of postcolonial and feminist aspects of The Handmaid's Tale" (2020) 7 Cogent Art and Humanities 1, 6
[270] MacKinnon, *Toward a Feminist Theory of the State* (n 26) 84
[271] Ibid

In comparison, Oceania in Orwell's *1984* relies heavily on technology in addition to secret police and civilian accountability to keep members of the Outer Party in line with the law. 'Telescreens' are present in almost all public and private spaces, being able to identify *thoughtcrime* or *facecrime,*[272] or other illegal acts. While members of the Inner Party are afforded the luxury of turning off the telescreens in their flats,[273] Winston, a member of the Outer Party has a telescreen which is always on and cannot be escaped except in an alcove where he writes in his diary.[274] Winston is only able to do this as the telescreen is placed un an unusual position.[275] It is also possible to conceal the telescreens, such as in the room above Mr Charrington's shop, which is deliberately hidden to trick Party members into thinking they are temporarily out of the earshot of Big Brother.[276] Even where there are no telescreens, such as in train carriages, there may still be hidden microphones.[277] The omnipresence of law's performance invades constituents' privacy, seeing that the law demands recognition in every act by the constituent. Citizens can also report each other to the Thought Police, and in Oceania it is noted that this is often done by children. There is a specific youth organisation called Spies, which encourages children to report disloyal behaviour of their parents to the Party.[278] Winston's neighbour, Parsons, for example, is reported by his daughter for *thoughtcrimes* committed in his sleep.[279] The invasion of privacy within the home puts women who are mothers at a special disadvantage. In Oceania it is for mother to stay at home and raise their children, while the father goes to work for the Party, reinforcing the public/private divide and gender roles. Confined to the home, mothers cannot escape the telescreens in their flats and are constantly monitored by their own children, making it more likely for them to be caught in a *thoughtcrime*. The rearing of children in a particular way is necessary to see the entrenchment of the regime, removing a mother's freedom to raise their child in their own way and providing another way women can be caught out. The surveillance in the home shows that performance of law is pervasive across the public/private divide and in the enforcement of gender roles,[280] entrenching the patriarchy.

[272] George Orwell, *1984* (first published 1949, Polygon 2021), 74
[273] Ibid, 201
[274] Ibid, 3
[275] Ibid, 7
[276] Ibid, 264
[277] Ibid, 138
[278] Ibid, 29
[279] Ibid, 278
[280] Wyatt (n 134) 52

While the surveillance of citizens of Oceania is seen by all, the arrests of *thoughtcriminals* are very secretive, as the Thought Police usually arrest their subjects in the night.[281]Arrests are not reported,[282] as Winston describes how everyone he has ever known, including his mother, has disappeared. In Orwell's dystopia, law is still performed without spectators, although the consequences of the performance, evidenced by the disappearance of individuals, are seen by all. This secrecy instigates fear among constituents, scaring them into compliance and demonstrating the pervasiveness of the State in constituents' private lives. In contrast, the Eyes in Gilead make public displays of arrests,[283] Offred witnesses a man get abducted right in front of her, although she is told she should not be watching.[284] Offred's relief that it was not her who was arrested indicates that women constantly live in fear of surveillance and arrest, fear which prevents them from coming together and sharing their experiences of patriarchal oppression.

There is one instance in Huxley's *Brave New World* where policing takes place. When John the Savage, who has been raised outside of the Ford, tries to tell some Delta citizens that *soma* is poison, the police are called to break up the commotion caused.[285] Bernard, Helmholtz and John are arrested and the situation is deescalated with *soma* gas and 'The Voice of Reason'.[286] The performance of such enforcement is an understated affair, in an attempt to underplay the level of social unrest caused and reinforce the positive collective thoughts of society. In Huxley's dystopia, it is not fear but manufactured happiness which controls citizens and forces them to conform to societal norms. The manufactured happiness in The Ford also acts as a barrier for women to realise their oppression, unable to partake in consciousness-raising as a collective. This contrasts *1984* and *The Handmaid's Tale*, where individuals are separated from each other through paranoia and fear of punishment, meaning constituents are unable to share their experiences of oppression. Collective and shared happiness, which is entirely manufactured, means that constituents do not have the opportunity to become conscious of their oppression individually.

[281] George Orwell, *1984* (first published 1949, Polygon 2021), 278
[282] Ibid, 22
[283] Margaret Atwood, *The Handmaid's Tale* (first published 1986, Vintage 1996), 174-175
[284] Ibid
[285] Aldous Huxley, *Brave New World* (first published 1932, Vintage 1994), 186 – 189
[286] Ibid

3.3. Punishment

In these dystopian narratives, law and performance can be studied by looking at the punishment of criminals. The totalitarian states in these narratives use punishment to demonstrate their power over their subjects, as well as isolating constituents from each other to prevent uprisings.

Public demonstrations of, and participation in, punishment in these dystopias can serve the purpose of re-affirming loyalty to the State. In *1984*, Eurasian prisoners, guilty of war crimes, are publicly hanged in the local park once a month, with Winston noting that children take a particular interest in this event.[287] In *The Handmaid's Tale*, individuals are executed at 'Salvagings' and are hung on "The Wall", marked with a symbol which demonstrates their crime.[288] Salvagings are segregated, where only men are executed at men's Salvagings, in contrast to women's Salvagings where women are hung, with the Handmaids holding the ropes for this performance of law.[289] At the Particution that Offred attends, it is announced the man has been found guilty of rape.[290] However, it is not shared by Aunt Lydia what the women upon the stage did wrong,[291] as Gilead fear that to do so would lead to copycat crimes. The women of Gilead fantasise about rebellion, and the State fears that what should be seen as a deterrent of crime could stir up revolution. To disclose what the women had done could be considered a form of consciousness raising,[292] highlighting the patriarchal oppression they experienced and how they rebelled against it. Yet Gilead seeks to maintain its patriarchal structures and the women are left in the dark.

Expulsion from society is another form of punishment prominent in these dystopian narratives. In Gilead, women incapable of social integration are declared Unwomen and exiled to the Colonies, to clean up toxic waste and eventually die of radiation exposure.[293] As the State strips the gender away from some women who cannot bear children, the have sought to create such a narrow criteria of what makes a woman so that they are able to better control the women who are still deemed 'women' while disposing of them who do not. Some women, such as Moira, may get the choice between the Colonies or Jezebels, a state-sanctioned brothel for the most

[287] George Orwell, *1984* (first published 1949, Polygon 2021), 28
[288] Margaret Atwood, *The Handmaid's Tale* (first published 1986, Vintage 1996), 37
[289] Ibid, 280
[290] Ibid, 286
[291] Ibid, 280
[292] Wyatt (n 134) 52
[293] Margaret Atwood, *The Handmaid's Tale* (first published 1986, Vintage 1996), 16

senior Commanders.[294] These are punishments especially reserved for women. Wives and Marthas, however, are exceptions to this expulsion. Despite being unable to bear children, these women are capable of social integration as they are still deemed useful to Gilead, fulfilling duties which reinforce gender roles. Wives, self-prescriptively fulfil the role of 'wife', conceptualised in Gilead as the matriarch of the household who supports their husband in their endeavours. Handmaids, who have committed gender or religious based crimes, are unsuitable for this position in the eyes of the State. Marthas are permitted to maintain their status of 'women' because they cook, clean, and maintain the house, a gendered role. Gilead, in their performance of law enforcement, seeks to strike a balance between preserving patriarchal gender roles and Christian values, while creating a state-sanctioned image of what a woman should be. As women are divided into social groups and there is no equality before the law,[295] the regime generate animosity and uses other women, Aunts, to control that oppression.[296] The states in these dystopias harness both its own conception of the rule of law and the performance of law to maintain patriarchal structures.

In *Brave New World,* citizens who do not share the collective thoughts of society are banished from the Ford as "[u]northodoxy threatens more than the life of a mere individual; it strikes at Society itself".[297] Bernard and Helmholtz are banished to the sub-centres in Iceland, where intellectuals can talk openly question the teachings of the Ford and conduct their own research. In contrast, Linda choses a form of self-punishment, as she falls pregnant while on a trip to the Savage Reservations and choses to live out there instead of facing citizens in the Ford who will look on her in disgust.[298] Linda's self-expulsion demonstrates that women in the Ford have been taught to feel shame because of their ability to produce children, even though she still believes in the teachings of the Ford and practices sexual promiscuity.[299] Because of the conditioning and brainwashing by the State, Linda is unable to become conscious of how the Ford's teachings oppress women. Men who escape the conditioning and break the rules are banished but not punished, but women who break the rules accidentally have been conditioned to exile themselves by the patriarchal State. The Ford denies women the opportunity of escape or redemption.

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[294] Ibid, 257
[295] Dicey (n 17)
[296] Zahra Sadeghi & Narges Mirzapour 'Women of Gilead as colonized subjects in Margaret Atwood's novel: A study of postcolonial and feminist aspects of The Handmaid's Tale' (2020) 7 Cogent Art and Humanities 1, 6
[297] Aldous Huxley, *Brave New World* (first published 1932, Vintage 1994), 128 – 129
[298] Ibid, 102
[299] Ibid, 104

The rehabilitation of criminals and integrating them back into society in these dystopias is performance of law, as the state seeks to secure the longevity of the regime. This rehabilitation is, still a punishment though. In *1984*, *thoughtcriminals* like Winston are continuously tortured into compliance in the Ministry of Love. This torture does not scare these criminals into compliance but brainwashes them to love Big Brother again. [300] Winston's reintroduction from society after his *thoughtcrimes* and his love for Big Brother demonstrates the success of The Party's brainwashing methods. But as discussed above, while Winston and Julia are rehabilitated, other constituents do just go missing, never to be seen again, sent to their death or to forced labour camp.[301] It is unknown how or why the State chooses rehabilitation over punishment, and such unpredictability creates fear and acts as a deterrent. It could be speculated that women, who have the role of bearing and raising children, the future Party members, would be more likely to be rehabilitated, objectifying women for their biological ability to carry children and reinforcing gender roles in the home. In *The Handmaid's Tale*, fertile women are the only constituents who are given a second chance and are 'rehabilitated'.[302] If a woman with viable ovaries has 'fallen from grace' and is deemed capable of rehabilitation, she is sent to a Red Centre, where she is taught shame for her crimes and how to be a good Handmaid by Aunts.[303] The fertility status of a woman is precious to the regime, which seeks justification for its methods by improving the birth rate. Handmaids do need to be submissive, submitting to their role in society, so even if a woman is fertile, they may still be seen as too disruptive to benefit the regime (Moira).[304] This performance of law through rehabilitation objectifies and commodifies women, their bodies and their temperament, as fertile women are not to be wasted.[305]

3.4. Ritual

Because these dystopias depict totalitarian dictatorships, constituents cannot participate in the performance of law through voting or political groups. Rather, constituents' active performance of law can be found in their performance of rituals, used by the State to as a method of control

[300] George Orwell, *1984* (first published 1949, Polygon 2021), 356
[301] Ibid, 78
[302] Margaret Atwood, *The Handmaid's Tale* (first published 1986, Vintage 1996), 312
[303] Ibid, 9-10
[304] Ibid, 257
[305] Ibid, 13

and as a reinforcement of the law's pervasiveness. While not strictly legal activities, these rituals are legally required by the State and carry disciplinary consequences in the event they are not followed. For women, these rituals can demonstrate the pervasiveness of law across the public/private divide, deny the opportunity of consciousness raising[306] and re-enforce strict gender roles,[307] in turn entrenching patriarchal values and structures.

The performance in law in public, participatory ceremonies act as a public display of the law. The daily "Two Minute Hate" in *1984* directs constituents' feelings away from the Party and towards the fictious external enemies with the explicit aim of reducing *thoughtcrime*.[308] The Two Minute Hate demonstrates the psychological manipulation of constituents, as the protagonist describes "a hideous ecstasy of fear and vindictiveness … seems to flow through the whole people like an electrical current".[309] Even though Winston works in the Ministry of Truth, which writes the speeches for this ritual, he is still able to actively participate, redirecting his anger at Big Brother and The Party to the broadcast. While this daily ritual brings constituents of Oceania together physically, constituents are captivated by the broadcast, their display of anger is directed towards it and is individualistic.[310] There is no collectiveness which could allow constituents to participate in consciousness-raising. Yet the Hate also has an implicit purpose, providing an opportunity for the Thought Police to identify opponents to the regime who choose not to engage in it.[311] The dual purpose of the Hate allows for the demonstration of the law's authority and the enforcement of the law.

Parallels can be drawn between The Hate and 'Particutions' in *The Handmaid's Tale*.[312] A Particution also involves a controlled environment for the release of anger, where the Handmaids are 'unleashed' upon a criminal to beat him to death. This ritual reinforces the 'untameable woman' stereotype,[313] justifying the restrictions imposed on them by the State. These women are seen as emotional and incapable of participating the public sphere other than when their emotions are required for this punishment. Like the Two Minute Hate in *1984*, Particutions also have an implicit role to identify objectors to the regime, as women who fail

[306] MacKinnon, *Toward a Feminist Theory of the State* (n 26) 83
[307] MacKinnon, *Feminism Unmodified: Discourses on Life and Law* (n 27) 39
[308] George Orwell, *1984* (first published 1949, Polygon 2021, 14-19
[309] Ibid, 17
[310] Ibid, 18
[311] Ibid, 14-19
[312] Margaret Atwood, *The Handmaid's Tale* (first published 1986, Vintage 1996), 286
[313] See Wendy Chan, Dorothy E. Chunn, Robert Menzies (eds), *Women, Madness and the Law: A Feminist Reader* (Routledge-Cavandish 2005)

to join in are punished. This public ritual allows the State to perpetuate the narrative that women need to be tamed and confined to the private sphere,[314] justifying the use of law as a tool of oppression[315] and as a method to entrench the patriarchy.

Prayvaganzas in *The Handmaid's Tale* also act to entrench the public private divide.[316] These ceremonies for women entrench the core purposes of the regime, by marrying girls as young as 14 to Angels and Guardians "to fulfil their biological destinies in peace".[317] This event also provides an opportunity to celebrate converted nuns, who become Handmaids to serve the State.[318] Prayvaganzas commodify women's fertility, treating them as livestock to be sold and traded, their worth determined by their ability to bear children and their Christian purity. By placing the sanctity of the family unit on a pedestal, women are forced to remain in the private sphere to rear and raise children.[319] The legal contract of marriage is used by Gilead as a tool of patriarchal oppression, and the Prayvaganza ritual allows the State to communicate and reinforce that oppression.

The rituals that take place in the home or in more private areas, while not strictly legal events, emphasise that law is present and necessary in the private as well as public sphere. The more intimate rituals in these dystopias and sex to entrench the doctrine of the regime. Where state involvement in the private sphere is viewed by feminists as a necessary step to dismantling the patriarchy,[320] these dystopias seek to reconceptualise this, interfering in the private sphere to perpetuate gender roles within the home and within the bedroom and to reiterate the law's oppression of women. In *1984*, "[s]exual intercourse was to be looked on as a slightly disgusting minor operation, like having an enema", removing all pleasure from the act.[321] Engaging in sexual intercourse for pleasure is "a political act",[322] a rebellion against the Party, which Winston and Julia are ultimately punished for. In *Brave New World*, Solidarity Groups conclude with the twelve members coming into one to form the "Greater Being",[323] intended to eliminate individuality and driving people's energy into serving the state instead of satisfying

[314] Boyd (n 28) –163
[315] Minton (n 3) 45
[316] Boyd (n 28) –163
[317] Margaret Atwood, *The Handmaid's Tale* (first published 1986, Vintage 1996), 221
[318] Ibid 228
[319] Boyd (n 28) –163-164
[320] –Ibid, 170
[321] George Orwell, *1984* (first published 1949, Polygon 2021), 78-79
[322] Ibid 140
[323] Aldous Huxley, *Brave New World* (first published 1932, Vintage 1994), 73

individual desire, returning to the narrative that women are the givers, not the receivers, of pleasure, a measure which is reflected in the law of the Ford. In *The Handmaid's Tale,* the Ceremony is undoubtedly the most important ritual in the Republic of Gilead, aligning the biblical teachings of the State with the public policy aim of improving birth rates.[324] It begins with a biblical reading, followed by sexual intercourse, where the Handmaid lies in the wife's lap while the Commander attempts to impregnate her.[325] The Handmaid is treated in the Ceremony and in broader society as an object belonging to the state for the purpose of recreation. State interference in the private sphere ensures that women are entirely unable to challenge the laws which oppress them.

3.5. Summary of Part Three

To conclude, the performance of law in these dystopias allows for law's authority to be asserted. Law's omnipresent nature creates a harrowing sense of paranoia for constituents, who live in fear of breaking the law and being caught. Where constituents are spectators of these legal performances, in the instances of the trial and punishment, the public/private divide is exacerbated as women's role in the court room is reflective of women's role in broader society. Women are kept out of the public sphere, but are still heavily regulated in their own, private sphere, through overbearing surveillance and being treated differently than men by law enforcement. Yet, it is most apparent that the performance of law seeks to quash the collective voice. Through the instigation of fear, women are denied the opportunity to come together and share their experience of oppression, unable to realise how the state utilises their gender against them to dominate them. The regimes use the performance of law to assert their control, harnessing the power of the patriarchy to exercise their control over women and placing them at a special disadvantage. These dystopias can tell us that law is a tool for which a state can weaponize the patriarchy, where law demands recognition and asserts control.

4. Conclusion

Utopias are still used by feminists to envision a better world, despite the fact that utopia "has become synonymous with pipe-dream, unrealistic ambitions and airy-fairy ideas".[326]

[324] Margaret Atwood, *The Handmaid's Tale* (first published 1986, Vintage 1996), 312
[325] Ibid100-102
[326] Fernando Aisa, "Do we need Utopia?" (1991) 2 The UNESCO Courier 13, 13

Dystopias, on the other hand, issue a warning.[327] While dystopias can inspire utopian hope, they predominantly affirm existing values, providing logic and reason for problem solving where utopias do not.[328] By adopting a Law and Literature approach to the feminist exploration of dystopian fiction, dystopias can influence political theory and legal studies alongside feminist utopias.

In parts two and three, a focus on four dystopian texts allowed us to explore the presence and the entrenchment of the patriarchy within these dystopias, with a particular focus on the rule of law in the construction of law and the performance of law in how law is received. *The Handmaid's Tale* and *The Testaments*, as a feminist dystopian duology, allowed for a direct focus on the role of law in oppression of women, as the regime creates an entirely separate sphere for women as a direct response to the blurring of the public/private divide.[329] Even though the patriarchy is not immediately apparent in *1984* and *Brave New World*, both dystopias use law as a means of controlling and oppressing the population. These dystopias use patriarchal methods to do this, by re-enforcing gender roles and confining women to the private sphere, brainwashing the population so they cannot become conscious of their oppression.

This dissertation provides a springboard for a wider feminist exploration of dystopian fiction, which would be able to respond to feminist readings of utopia which have asked "better for whom?".[330] Atwood has a problematic relationship with questions of race and intersectionality in *The Handmaid's Tale*, which usurps "African-American literary motifs for the writing of white femininity",[331] displacing the political discourse of the emancipation of slaves "onto that of white women's resistance to patriarchy".[332] Racist language and themes are also present in *1984*[333] and *Brave New World*.[334] This dissertation is limited by its singular focus on gender, rather than the intersection of patriarchy and racism.[335] Also, the limited number of dystopian

[327] Gregory Claeys, "Moylan and Dystopia" (2020) 31(1) Utopian Studies 194, 197
[328] Crocker (n 88)609
[329] Margaret Atwood, *The Testaments* (Chatto & Windus 2019), 174
[330] Houghton and O'Donoghue (n 12)
[331] Maria Lauret, *Liberating Literature: Feminist Fiction in America* (Routledge 1994), 177
[332] Karen Crawley, "Reproducing Whiteness: Feminist Genres, Legal Subjectivity and the Post-racial Dystopia of The Handmaid's Tale (2017-)" (2018) 29(3) Law and Critique 333, 343
[333] Douglas Kerr, "Law and Race in George Orwell" (2017) 29(2) Law & Literature 311
[334] Sean Collins Walsh, "Seattle School Board postpones decision on pulling "Brave New World"" *The Seattle Times* (Seattle, 17th November 2010) < https://www.seattletimes.com/seattle-news/seattle-school-board-postpones-decision-on-pulling-brave-new-world/ > < accessed 3rd May 2022 >
[335] Kimberlé Williams Crenshaw, "Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics" (1989) 1(8) University of Chicago Legal Forum 139

texts discussed cannot properly provide a holistic view of what law does in dystopias, and is, to an extent, unable to highlight the multi-various ways in which law in dystopia oppresses women and entrenches the patriarchy.

In summation, this dissertation argues that readings of dystopias need to be taken more seriously within legal scholarship. Otherwise, the problems which arise out of utopian studies, mainly the pursuit of a blueprint which will lead us to a state of perfection, cannot be challenged and will inevitably be perpetuated. While feminists have looked to utopias and feminist utopias to explore how the patriarchy could be dismantled, they have not looked to dystopias to explore ways the patriarchy can be ingrained and utilised by a totalitarian government through the use and construction of law. Through the exploration of the rule of law and the performance of law in four dystopian texts, this thesis uncovers how feminist readings of dystopias can help feminists better understand law's role in entrenching the patriarchy.

An Examination of the Private Enforcement of Japanese Competition Law: What does it Illustrate about the Rates of Litigation in Japan?

James Merryweather

Introduction

The debate surrounding Japanese litigiousness is one which has raged in legal scholarship for several decades now, and yet it is still one which is unsettled. Whilst scholars have put forward various theories for the comparatively low litigation rate compared to countries like the US, no singular theory has provided a complete and full explanation.[1] This article addresses the debate about Japanese attitudes to litigation. However, its aims are more modest than resolving a scholastic debate which appears to have no definitive end in sight. Instead, through the vehicle of Japanese Competition Law, the article sets out to illustrate the factors governing attitudes towards litigation in the context of the private enforcement of Competition Law. It also provides a brief introduction to Japanese Competition Law to contextualise this field and illustrate the means of action available to citizens.

Fundamental provisions regarding Japanese Competition Law are presented in the first section. The second section sheds light on theories about Japanese litigiousness, while an empirical analysis of Japanese private antitrust litigation is conducted in the third section to illustrate why institutional factors are the most influential on the rate of litigation. Following this, the fourth section aims to connect the normative theories and empirical data about Japanese litigiousness together.

1. Japanese competition law: key provisions

Japanese competition law is enshrined within the contents of the Act on Prohibition of Private Monopolization and Maintenance of Fair Trade 1947 (AMA),[2] and it contains three especially

[1] Takeyoshi Kawashima, 'Dispute Resolution in Contemporary Japan' in *Law in Japan: The Legal Order in a Changing Society* [2013] Harvard University Press 4; Dimitri Vanoverbeke, Jeroen Maesschalck, and David Nelken, *The changing Role of Law in Japan: Empirical Studies in Culture, Society and Policy Making* (Edward Elgar 2014).

[2] Act on Prohibition of Private Monopolization and Maintenance of Fair Trade 1947, Act No. 54. see above.

key provisions. These provisions provide for: the prohibition of unreasonable restraints of trade;[3] the prohibition of private monopolization;[4] and the prohibition of unfair trade practices.[5] This triumvirate of provisions essentially governs the entirety of Japanese competition law, and this is because Japan has never held the view that the law's core objective should be economic efficiency or consumer welfare.[6] Instead, the historical origins of the AMA mean that the political goal of economic democratisation (that there is an equal opportunity for everyone to engage in economic activity and there is not an excessive concentration of economic power) is the foremost goal behind the AMA's enactment.[7] As Vande Walle and Shiraishi note, at the time of the AMA's enactment, one of the major concerns of the US occupation authorities was to prevent the re-emergence of the "zaibatsu", the large conglomerates that oligopolised the Japanese economy before and during the Second World War.[8] Consequently, the occupying allied forces at the end of the Second World War, implemented the AMA and its objectives of economic democratisation, to make Japan a future trading partner of the allied powers (though predominantly this concerned the United State.) This background, therefore, illustrates that whilst some components of Japanese competition law are similar to that of Western nations, the jurisprudence ultimately differs as it was designed to achieve different goals.

The aforementioned goal also explains the reason behind two key provisions of Japanese competition law: resident actions,[9] and injunctions.[10] Resident actions are lawsuits filed by citizens on behalf of the city or local area that they reside in, and they predominantly targeted the practice of bid-rigging.[11] Bid-rigging occurs when a group of firms would agree to artificially inflate the prices for the goods or services they offered to the local Government. In this practice, for example, four out of five firms would bid for a project at an above market rate

[3] Act on Prohibition of Private Monopolization and Maintenance of Fair Trade 1947, Chapter II, Article 3; ibid, ?Chapter III, Article 8.
[4] ibid, Chapter II, Article 3.
[5] ibid, Chapter V, Article 19.
[6] Simon Vande Walle and Tandashi Shiraishi, 'Competition law in Japan' in John Duns, Arlen Duke, and Brendan Sweeney (eds), *Comparative Competition Law* (Edward Elgar 2015).
[7] Hiroshi Iyori, 'Competition Policy and Government Intervention in Developing Countries: An Examination of Japanese Economic Development' (2002) 1 Washington University Global Studies Law Review, 39.
[8] Simon Vande Walle and Tandashi Shiraishi, 'Competition law in Japan' in John Duns, Arlen Duke, and Brendan Sweeney (eds), *Comparative Competition Law* (Edward Elgar 2015).
[9] Article 242-2(1) Local Autonomy Act Law 1947.
[10] Act on Prohibition of Private Monopolization and Maintenance of Fair Trade 1947, Chapter VII, Article 24
[11] Simon Vande Walle, 'What keeps plaintiffs away from the court? An analysis of antitrust litigation in Japan, Europe, and the US' in Dimitri Vanoverbeke, Jeroen Maesschalck, and David Nelken (eds), *The Changing Role of Law in Japan – Empirical Studies in Culture, Society and Policy Making* (Edward Elgar 2014).

price. Firm five would then undercut the other four, whilst still maintaining a rate above the market value. This practice resulted in local governments paying a far higher price for goods or services, and it also constituted a violation of the Antimonopoly Act's prohibition on unfair trade practices.[12] As a consequence of the affected local government being unable to sue for damages, the citizens of the city would then sue on behalf of the local government to recover the taxpayer money that was wasted due to this practice of bid-rigging. What is worth noting about this mechanism of litigation, particularly in an article about Japanese litigiousness, is twofold. Firstly, this mechanism is borne out of the fear of a "zaibatsu" return. This is because a practice, whereby a group of firms can artificially manipulate the price in a market, is the same threat as was posed by "zaibatsu" conglomerates which oligopolised the Japanese market pre-AMA enactment.[13] Residents' actions are therefore a mechanism which directly targets this oligopolisation. The second noteworthy element is that claimants in a resident's action have minimal incentives to litigate. Any damages that are recovered by a resident's action go entirely to the city or local area, not to the individual citizens that initiated the action. They can, however, recover their legal fees,[14] whilst also avoiding having to pay the defendants' legal fees. The one exception to this is if the lawsuit was such a baseless claim that it amounted to tortious conduct. The final component worth noting about residents' actions is that they no longer exist. In 2002, an amendment to the statute removed the possibility for citizens to litigate on behalf of their city or local area, however, claims which were made on this basis still provide a useful insight into litigiousness.

The second core legal provision for private antitrust enforcement is the capacity of individuals to file for an injunction.[15] The law governing injunctions can be found in Chapter VII, Article 24 of the Antimonopoly Act 1947. The legislation here provides that, "A person whose interests are infringed upon or likely to be infringed upon by an act in violation of the provisions of Article 8, item (v) or Article 19 and who is thereby suffering or likely to suffer extreme damage is entitled to seek the suspension or prevention of such infringements from an enterprise or a trade association that infringes upon or is likely to infringe upon such interests."[16] The

[12] Act on Prohibition of Private Monopolization and Maintenance of Fair Trade 1947, Chapter V, Article 19.
[13] Simon Vande Walle and Tandashi Shiraishi, 'Competition law in Japan' in John Duns, Arlen Duke, and Brendan Sweeney (eds), *Comparative Competition Law* (Edward Elgar 2015).
[14] Local Autonomy Act 1947, Article 242-2(12).
[15] Act on Prohibition of Private Monopolization and Maintenance of Fair Trade 1947, Chapter VII, Article 24
[16] ibid, Chapter VII, Article 24.

references to a violation of Articles 8 and 19 are both referring to the aforementioned prohibition on unfair trading practices. What is apparent from the statutory definition, is that there are several conditions which must be satisfied before an individual can claim for an injunction. Chief amongst these conditions is that an injunction can only be sought for unfair trade practices, not against an unreasonable restraint of trade nor against private monopolisation. Some commentators argue that, whilst this appears like a substantial limitation on the face of it, it is actually a broader provision in practice because private monopolisation could also constitute an unfair trade practice.[17] Nevertheless, detractors of the narrow scope of this provision are still in the majority and they are critical of the limitation that this provision imposes on individuals.[18] The second condition is the need for there to be 'extreme damage'.[19] The claimant here needs to show that their interests are infringed, or likely to be infringed and that they will suffer, or are likely to suffer extreme damage as a result of the unfair trade practices. This is a measure designed to prevent frivolous lawsuits gaining traction and ensures that injunctive relief is only granted for meritorious cases.[20] This summary of litigation mechanisms under Japanese competition law therefore explains 'how' Japanese citizens turn to ligation, a necessary component to later explain the 'when' and 'why'.

2. What jurisprudentially underpins Japanese litigiousness?

As stated in the Introduction to this article the debate, scholarship, and academic discussion about Japanese litigiousness has been raging for decades now. This section aims to summarise some of the key theories within this debate, such as what influences whether Japanese citizens ultimately decide to litigate or not. The theories discussed below posit reasons for a low litigation rate in Japan, which is still true when compared to countries like the United States,[21] however the litigation rate is growing and consequently, it might not be strictly true that the Japanese are as averse to litigation as historically thought. Nevertheless, these theories still

[17] Simon Vande Walle, *Private antitrust litigation in the European Union and Japan* (Maklu 2013) ch. 3.
[18] Tadashi Shiraishi, *An Introduction to the Competition Law of Japan* (5th ed, 2010) p. 258; Masahiro Murakami & Takeo Yamada, *The Antimonopoly Act – Injunctive Relief and Damages Actions* (2nd ed, 2005) 45.
[19] Act on Prohibition of Private Monopolization and Maintenance of Fair Trade 1947, Chapter VII, Article 24.
[20] Eapotopuresusabisu K.K v. Kansai Kokusai Kuko Shinbun Hanbai K.K et al [2005] H.C 52 Shinketsunshu 856.
[21] Christian Wollschlager, 'Historical Trends of Civil Litigation in Japan, Arizona, Sweden, and Germany: Japanese Legal Culture in Light of Judicial Statistics' in Harald Baum (ed), *Japan: Economic Success and Legal System* (Walter de Gruyter 1997) 89.

suggest factors which influence litigation, and this discussion contextualises the empirical data analysed later.

The first theory proposed about Japanese litigiousness is that that the Japanese have a cultural aversion to litigation. The idea behind this was that, contrary to Western societies, Japan valued peace and getting along with others, rather than enforcing their rights and litigating.[22] The key proponent of this view was Takeyoshi Kawashima, who argued that Japan has a cultural preference for informal mechanisms of dispute resolution. This preference was based on the Japanese people's comfort with "particularistic, hierarchically defined roles and relationships," and not, as is the case in the West, with judicial decisions.[23] This view was first challenged by Haley who proposed an alternative influence governing litigation rates.[24] Instead of a cultural aversion to litigation, Haley instead posited that a better explanation for the Japanese litigation rate was the lack of institutional capacity in the legal system.[25] Japan, famously, has few lawyers and also few judges per capita compared with many Western countries.[26] Whilst Kawashima explained this away as just a lack of demand for legal services,[27] Haley argued that the attractiveness of litigation was limited by the fact that Japanese courts do not have any contempt power, or any adequate remedies, which are namely institutional factors.[28] Consequently, Haley concluded that there are little incentives for litigating in Japan due to institutional constraints.[29]

A similar, but ultimately different view to that of Haley, was brought forward by Ramseyer in a pair of articles.[30] In these articles, Ramseyer argued that the low litigation rate in Japan was a strength of the Japanese legal system, rather than a weakness, as suggested by Haley and

[22] Tom Ginsburg and Glenn Hoetker, 'The Unreluctant Litigant? An Empirical Analysis of Japan's Turn to Litigation' (2006) 35 The Journal of Legal Studies 31.
[23] ibid.
[24] John Haley, 'The Myth of the Reluctant Litigant" (1978) 4 Journal of Japanese Studies 359.
[25] ibid.
[26] Tom Ginsburg and Glenn Hoetker, 'The Unreluctant Litigant? An Empirical Analysis of Japan's Turn to Litigation' (2006) 35 The Journal of Legal Studies 31.
[27] Takeyoshi Kawashima, 'Dispute Resolution in Contemporary Japan' in *Law in Japan: The Legal Order in a Changing Society* (Harvard University Press 1963) 42.
[28] Tom Ginsburg and Glenn Hoetker, 'The Unreluctant Litigant? An Empirical Analysis of Japan's Turn to Litigation' (2006) 35 The Journal of Legal Studies 31.
[29] John Haley, 'The Myth of the Reluctant Litigant' (1978) 4 Journal of Japanese Studies 359.
[30] Mark Ramseyer, 'Reluctant Litigant Revisited: Rationality and Disputes in Japan' (1988) 14 Journal of Japanese Studies 111; Mark Ramseyer and Minoru Nakazato, 'The Rational Litigant: Settlement Amounts and Verdict Rates in Japan' (1989) 18 Journal of Legal Studies 263.

others. Ramseyer based this view on the fact that parties only go to Court when they do not know what judgment the Court will hand down. He argued that in situations where the Court's opinion is known by everybody, the rational conclusion of conflicting parties is to settle. This claim was supported by the fact that Japanese judges have common judicial training; court proceedings are without juries and so there is no additional unpredictability, and finally, damages in cases are calculated and awarded according to a public formula.[31] The combination of these three factors contributed to Ramseyer arguing that trial outcome is often predictable (or certainly more predictable than in many comparable jurisdictions), and this limits litigation. The final key addition to this debate on Japanese litigiousness comes from the contributions of Takao Tanase,[32] who argued that institutional and cultural accounts combined to create a "management" theory. Tanase argued that some in Japan have a low level of interest in litigation in order to insulate government policies from challenges. Aside from the political viewpoint within Tanase's theory, he also highlighted the prevalence of alternative forms of dispute resolution, besides litigation.[33] Tanase's view, therefore, was that given the prevalence of alternative dispute resolution, the levels of litigation in Japan are lower.

The conclusion of this discussion therefore is that there are at least four different influences on the litigation rate in Japan. This article does not claim to present all the possible reasons behind the Japanese litigation rate, but it details: one cultural reason, two institutional reasons, and one that is ultimately a political theory. The question therefore remains about how these various theories interact with the empirical data and what provides the best explanation for Japanese litigiousness. The answer to this lies, however, in an extension upon Haley's institutional theory. This is because Kawashima's culture theory has been extensively critiqued and the private enforcement of Japanese competition law has always been very clear and publicly known, yet the litigation rate (as shown below) has varied dramatically irrespective of this. So, it is therefore advanced that Ramseyer's theory of judicial predictability does not fully explain the rate of litigation in Japan. Furthermore, the political theory will not be discussed either as the focus of this article is private enforcement of competition law, not the public challenge of

[31] ibid.
[32] Takao Tanase, 'The Management of Disputes: Automobile Accident Compensation in Japan' [1990] 24 Law and Society Review 651; Takao Tanase, 'Theory of litigation as a reflection of modernization' in Tom Ginsburg (tr.) *Essays in honour of the 70th birthday of Professor Koji Shinde: New constructions in civil procedure law theory*, vol. 1 (Yuhikaku 2001) 289.
[33] ibid.

Government legislation. Consequently, Haley's institutional theory remains as the best explanation to Japan's attitude towards litigation.

3. An empirical analysis of Japanese private antitrust litigation

To draw any normative conclusions about Japanese litigiousness, it is necessary to conduct an empirical analysis to contextualise the debate which has raged about litigation in Japan. This article does not have capacity to engage in original empirical analysis, therefore the relevant statistics and data will be sourced from Professor Vande Walle's 2013 book, "Private antitrust litigation in the European Union and Japan."[34] Where this article will move past Professor Vande Walle's work, however, is by situating his empirical analysis within the broader context of an analysis on Japanese litigiousness.

There has been a substantial growth in the number of private antitrust litigation cases filed within Japan. Given the fact that, during the period from 1945 to 1970, there were only five cases filed in this fifteen-year period,[35] it can be said that since 1970, litigation in Japan steadily grew.

As the rate of litigation grew in the 1990's, and at the same time the institutional mechanisms of residents' actions and injunctions were introduced, it is advanced that the general growth in litigation is because of these institutional mechanisms. This empirical data is, nevertheless, sourced from a time when litigation in Japan was generally increasing,[36] for example, between 1990 and 2002 there was a 43.6% increase in cases across Japan.[37] This rise can also be attributed to a number of factors, such as an increase in lawyers, Judges and procedural reforms,[38] however it is still a smaller percentage increase than what was experienced in private antitrust cases (300% increase).[39] Therefore, what can be seen is the emerging importance of

[34] Simon Vande Walle, *Private antitrust litigation in the European Union and Japan* (Maklu 2013).
[35] ibid.
[36] Tom Ginsburg and Glenn Hoetker, 'The Unreluctant Litigant? An Empirical Analysis of Japan's Turn to Litigation' (2006) 35 The Journal of Legal Studies 31.
[37] ibid.
[38] ibid.
[39] Simon Vande Walle, *Private antitrust litigation in the European Union and Japan* (Maklu 2013).

institutional mechanisms for enabling litigation as the two most common causes of action for litigation in Japan are creatures of institutional reform.

The final piece of empirical analysis worth highlighting at this stage is the value of damages recovered in antitrust actions. The reasoning behind this is simple: one might suspect that litigation rates in Japan could be somewhat influenced by the value of damages awarded following a successful cause of action. If the value of damages awarded is high, then claimants will likely have a strong motivation to launch claims against antitrust violations. Alternatively, if the value of damages is low, then claimants will not be as likely to claim due to a lack of financial incentives attached to claims. What can be seen from the data on damages awarded, is that there is a comparatively tiny value of damages awarded, relative to JFTC surcharges and compared to other jurisdictions as well. In the entire post-war period, Japanese plaintiffs have recovered circa. sixty billion yen (or six hundred million dollars).[40] The value of damages claimed in Japan is, however, dwarfed by those recovered through US litigation. A study examining forty large private antitrust cases in the US between 1990 and 2010 detailed that, these cases alone, yielded around nineteen billion dollars.[41] That amount is close to thirty times what Japanese plaintiffs have recovered in the entirety of the post-war period.[42] The comparative insignificance of Japanese damages awards do, however, have outliers. In the years 2002 and 2003 the value of damages and JFTC Surcharges are comparable to one another. This remains to only be an outlier though and therefore strengthens the position that there is not a high financial incentive for litigating. This is only confirmed by another outlier, the year 2009, where there was over twenty billion yen awarded in damages. This is an outlier because it only comes because of a number of Supreme Court cases being resolved that year. This meant that several scheduled damages payments were only made that year, rather than in the year when the case was first heard.[43] Consequently, it can therefore be assumed that the value of

[40] Simon Vande Walle, 'What keeps plaintiffs away from the court? An analysis of antitrust litigation in Japan, Europe, and the US' in Dimitri Vanoverbeke, Jeroen Maesschalck, and David Nelken (eds), *The Changing Role of Law in Japan – Empirical Studies in Culture, Society and Policy Making* (Edward Elgar 2014); Simon Vande Walle, *Private antitrust litigation in the European Union and Japan* (Maklu 2013) 141.
[41] Robert H. Lande and Joshua P. Davis, 'Benefits from private antitrust enforcement: an analysis of forty cases' (2008) 42 University of San Francisco Law Review 891.
[42] Simon Vande Walle, 'What keeps plaintiffs away from the court? An analysis of antitrust litigation in Japan, Europe, and the US' in Dimitri Vanoverbeke, Jeroen Maesschalck, and David Nelken (eds), *The Changing Role of Law in Japan – Empirical Studies in Culture, Society and Policy Making* (Edward Elgar 2014).
[43] Simon Vande Walle, *Private antitrust litigation in the European Union and Japan* (Maklu 2013).

damages does not influence litigation rates in a big way as there is a low financial incentive to bring such a case to court.

4. What normative conclusions about Japanese litigiousness can be drawn from the empirical data?

This section aims to tie the normative theories and empirical data together. Ultimately, it is argued that institutional mechanisms contribute the most towards litigation rates in Japan. Nevertheless, it is not exclusively in the way that Haley argues for it. Whilst Haley focusses on institutional capacity (i.e., the number of lawyers and judges), the empirical data, especially for private antirust actions, but also more widely, indicate that the creation of causes of actions is more determinative of litigation rates than anything else.

This conclusion is primarily based on the empirical analysis which Ginsburg and Hoetker conducted regarding reforms in the whole of the Japanese legal system.[44] Through their analysis of the effects which a growth in lawyers, judges and institutional reforms had on the Japanese legal system, a much clearer picture on Japanese litigation emerges. Their paper concluded that "[the] results are consistent with the view that institutional constraints explain the relatively low rate of litigation in Japan,"[45] and this was specifically explained by virtue of the fact that the wider civil procedure reforms contributed to an estimated eight thousand nine hundred and ten more actions in 2001 than would have occurred otherwise.[46] Ginsburg and Hoetker went on to argue that "the procedural reforms have had approximately the same effect of all the lawyers that have entered the field since 1986."[47] In the context of the private enforcement of competition law, Ginsburg and Hoetker's theory can also be seen as the creation of residents actions and injunctions, institutional mechanisms, led to the greatest increase in litigation.[48] Through a macro lens on the whole Japanese legal system, civil procedure reformation and amendments to the institution of justice in Japan, there was more litigation

[44] Tom Ginsburg and Glenn Hoetker, 'The Unreluctant Litigant? An Empirical Analysis of Japan's Turn to Litigation' (2006) 35 JLS 31.
[45] ibid 49.
[46] ibid 50.
[47] ibid 31.
[48] Simon Vande Walle, 'What keeps plaintiffs away from the court? An analysis of antitrust litigation in Japan, Europe, and the US' in Dimitri Vanoverbeke, Jeroen Maesschalck, and David Nelken (eds), *The Changing Role of Law in Japan – Empirical Studies in Culture, Society and Policy Making* (Edward Elgar 2014).

compared to a decade and a half increase in legal professionals.[49] When it comes to Japanese litigiousness therefore, the micro (private competition law enforcement), very much supports the macro (Japanese litigation rates).

5. Conclusion

To conclude, it is apparent that institutional constraints within the Japanese legal system yield the greatest influence over the Japanese litigation rate. This is apparent when looking at the enforcement of Japanese Competition Law, and when analysing reforms in civil procedure, both institutional creatures by their nature. Consequently, through analysing the key components of Japanese competition law, theories positing what influences litigation in Japan, and then tying these to the empirical analysis conducted in academia, it has been shown that, on both a micro and macro level, what really influences litigiousness in Japan is the institutional factors. This finding can be used to develop Japanese competition law further as by broadening out the causes of action, both for public and private enforcement, it can help ensure the effective maintenance of competition caw objectives in Japanese society. Moreover, the author would suggest that by broadening out causes of action and bringing Japanese competition law more in line with the provisions found in Western countries, Japan would be seen as more economically attractive for international companies. This is because with the increasing globalisation of trade, and the desire for companies to expand into new markets, a competition law system which develops to further enhance competition, can only be seen as a positive for new entrants into the Japanese market.

[49] Tom Ginsburg and Glenn Hoetker, 'The Unreluctant Litigant? An Empirical Analysis of Japan's Turn to Litigation' (2006) 35 JLS 31.

Age-related legal and medical issues of gender self-identification: How old is old enough?

Charlotte Cheshire

Introduction

The Gender Recognition Act (GRA) 2004[1] was hailed as a pioneering piece of legislation, but now 'organisations seem to be ahead of the law'[2] with the outdated doctrine requiring amendment.[3] This analysis will focus on the legal treatment of children and adolescents navigating the difficulties of social acceptance,[4] *Gillick v West Norfolk and Wisbech AHA* [5] competency in consenting to gender affirming treatments and the future for young trans people. In the healthcare context, young trans people are diagnosed with gender dysphoria (GD) which is described as a complex 'whole person, whole body condition' according to Lord Carlile,[6] and is only just beginning to gain momentum in the legal world as an area demanding legislative change. It is a condition described by the Diagnostic and Statistical Manual of Mental Disorders as the 'difference between one's experienced gender and [birth] assigned gender',[7] resulting in social seclusion[8] and mental distress.[9] In 1990, Judge Martens acknowledges the 'ever-growing awareness' of legal transgender identity decisions in *Cossey v United Kingdom,* [10] with trans people calling for full legal acknowledgement.[11] The decision that Convention Rights[12] were not violated because reassignment does not result in the

[1] Gender Recognition Act 2004
[2] HoC Deb, *Self-identification of Gender*, 21 November 2018, Vol. 649, Col. 323WH
[3] Carolynn Gray, *Chapter 3: Goodwin v United Kingdom and its impact on UK Law: Towards Legal Recognition of Transexuals* in 'A Critique of the Legal Recognition of transexuals in UK Law' (2016) Glasgow University, 154; HoL Deb 18 December 2003, Vol. 415, Col. 1325; Grand Committee Report 13 January 2004 GC4
[4] Home Office *Report of the Interdepartmental Working Group on Transexual People* (2000), 2.7.2
[5] *Gillick v West Norfolk and Wisbech AHA* [1986] AC 112
[6] HoL Deb. 18 December 2003, Vol. 415, Col. 1300
[7] *R (on the application of) Quincy Bell and A vs Tavistock and Portman NHS Trust and others* [2020] EWHC 3274 (Admin) [12]
[8] Anita Ho, 'Relational Autonomy or Undue Pressure? Family's Role in Medical Decision-Making' (2008) 22 Scandinavian J Caring Sci 128, 131
[9] Duncan Osborne, 'Attack on Our Most Vulnerable: The Use and Abuse of Gender Identity Disorder' (1997) Lesbian and Gay New York, words of Dr Zucker, Head of the Child and Adolescent Gender Identity Clinic at Torotonto's Clarke Institute of Psychiatry <http://www.antijen.org/Articles/duncan/duncan.html > accessed 28 October 2020
[10] *Cossey v United Kingdom* [1990] ECHR 21, (1991) 13 EHRR 622 [156]
[11] Ibid
[12] European Convention on Human Rights 1950

procurement of the gametes of the opposite sex,[13] only 'inaugurated transgender jurisprudence in[to] the Common Law world' as late as the 1980s.[14]

This article will explore the advantages and disadvantages of allowing youths to determine their legal and medical gender and present a case study of the recently decided *R (on the application of) Quincy Bell and A.*[15] It will look at the effects of the relatively new emergence of mass media that considers the risks of medically changing gender for children is too great. While GD manifests itself as an 'overwhelming… drive for reassignment',[16] there is 'very limited knowledge'[17] surrounding gender affirming treatments and GD as a syndrome. The High Court in *Bell* considered that the effect of allowing treatments and full legal acceptance to minors are 'fundamental' and permanent,[18] and writers in the public media have considered the game of lottery with regards to regret in adulthood cannot be played.[19] Instead, it will be contended that partial doctrinal protection should be extended to transgender youths to validate their struggle but protect them from irreversibility concerns.[20] In the Court of Appeal decision in *Bell, a* competent child's right to choose was reinstated.[21] Therefore, as long as someone is competent, their age is not a central issue of concern and they can transition if they wish.

1. The Past: Mythology and Gender

[13] *Cossey v United Kingdom* [1990] ECHR 21, (1991) 13 EHRR 622 [40]; *R v Tan* [1983] QB 1053; Stephen Gilmore, '*Corbett v Corbett:* once a man, always a man?' in Stephen Gilmore, Jonathan Herring and Rebecca Probert (eds), *Landmark Cases in Family Law* (Bloomsbury Publishing2011), 42, 43, 45
[14] Christopher Hutton, *The Tyranny of Ordinary Meaning: Corbett v Corbett and the Invention of Legal Sex* (Palgrave Macmillan 2019), 4
[15] *R (on the application of) Quincy Bell and A vs Tavistock and Portman NHS Trust and others* [2020] EWHC 3274 (Admin)
[16] Home Office, *Report of the Interdepartmental Working Group on Transexual People* (2000), 3.3.1; Heather Brunskill-Evans, 'The medico-legal "making" of the "transgender child" (2019) 27(4) Medical Law Review, 640, 648, 650
[17] *R (on the application of) Quincy Bell and A vs Tavistock and Portman NHS Trust and others* [2020] EWHC 3274 (Admin) [143]
[18] Ibid [134]
[19] Harriet Johnston, 'Woman who regrets becoming a transgender male 17 years ago says medical professionals should NOT have helped her to transition - and claims lots of other transgender people are hiding their regrets' (*Daily Mail*, 29 November 2019) <https://www.dailymail.co.uk/femail/article-7738323/Woman-regrets-transitioning-says-considered-CUTTING-breasts-pair-scissors.html> accessed 5 October 2020; Sally Robertson, 'Hundreds of trans people regret changing their gender, says trans activist' (*Medical Life Science News*, 7 October 2019) <https://www.news-medical.net/news/20191007/Hundreds-of-trans-people-regret-changing-their-gender-says-trans-activist.aspx> accessed 5 October 2020
[20] HoC Deb, *Self-identification of Gender*, 21 November 2018, Vol. 649, Col. 323WH
[21] *R (on the application of) Quincy Bell and A vs Tavistock and Portman NHS Trust and others* [2021] EWCA Civ 1363

Gender fluidity emerged in classical mythology,[22] with vivid descriptions of 'full… bodily transformations across gender'.[23] With Ovid's *Metamorphoses*[24] propagating androgynous beings, the bounds of gender were also acknowledged in religious texts such as Jewish writings presenting Adam as a 'hermaphrodite'.[25] This shows that conceptions of gender, and its properties as a changing entity, have existed throughout history. Whilst children still remain unincluded in these narratives; it will be illustrated that English and Welsh common law has taken some steps towards accepting and protecting adult gender 'identity'[26] that, from history, can be seen as dependent upon contextual lived experiences.[27]

2. The Present Position of the Law

Currently, adults are able to consent to or refuse medical treatment, whether a wise decision or not,[28] under section 1 of the Mental Capacity Act[29] if they display sufficient competence.[30] It is also provided that the patient should be sufficiently informed, a standard of care threshold explored in *Montgomery*.[31] Lord Bristow's 'broad terms' requirement in *Chatterton*[32] was narrowed in scope by *Montgomery*,[33] with criticism from the Royal College of Surgeons directed at how it fundamentally altered the attainment of consent.[34] It created a patient-centred

[22] Hutton (n 14) 15
[23] Ibid; Luc Brisson, *Sexual Ambivalence: Androgyny and Hermaphroditism in Graeco-Roman Antiquity* (Trans. J. Lloyd. University of California Press 2002); Mark Masterson, Nancy Sorkin Rabinowitz and James Robson (eds), *Sex in Antiquity: Exploring Gender and Sexuality in the Ancient World* (London Routledge2014)
[24] Hutton (n 14)15; Anna Fausto-Sterling, 'The five sexes: why male and female are not enough' in Blythe Clinchy and Julie Norem (eds), *The Gender and Psychology Reader* (NYU Press 1998), 224; Alice Dreger, 'But My Good Woman, You Are a Man' in Alice Dreger, *Hermaphrodites and the Medical Invention of Sex* (Harvard University Press1998), 1, 3
[25] John Money, 'Hermaphroditism, gender and precocity in hyperadrenocorticism: psychological findings' (1955) 96 Bulletin of the John Hopkins Hospital Bulletin 253; Julius Preuss, 'Biblical and Talmudic Medicine' (Jason Aronson Inc., 1993, Reprint edition 2004) (translated by Dr F. Rosner); Jonathan Wiesen and David Kulak, 'Male and female He created them: Revisiting gender assignment and treatment in intersex children' (2007) 54 J. Halacha Contemp. Soc 5-30
[26] IGYLO in partnership with Trustlaw, Dentons Europe LLP, and the NextLaw Referral Network, 'Only Adults? Good Practices in Legal Gender Recognition for Youth: A Report on the Current State of Laws and NGO Advocacy in Eight Countries in Europe, with a Focus on Rights of Young People' (November 2019), 6, 12, 17; UNICEF, 'Eliminating Discrimination against Children and Parents based on Sexual Orientation and/or Gender Identity' (2014) Current Issues [9], 2-3
[27] Hutton (n 14) 22
[28] Mental Capacity Act 2005, Section 1(4)
[29] Mental Capacity Act 2005, Section 1
[30] John Coggon, 'Alcohol Dependence and Anorexia Nervosa: Individual Autonomy and the Jurisdiction of the Court of Protection' (2015) 23 Medical Law Review, 215, 216; *Mental Capacity and Deprivation of Liberty*, Law Com no. 372 (2017); Mental Capacity Act 2005, Section 1(3)
[31] *Montgomery v Lanarkshire Health Board* [2015] UKSC 11
[32] *Chatterton v Gerson* [1981] QB 432
[33] *Montgomery v Lanarkshire Health Board* [2015] UKSC 11
[34] Royal College of Surgeons, 'Consent: Supported Decision-Making – a good practice guide' (2016), 10

precedent, diverging from the foundational Hippocratic Oath,[35] and caused growing concern amongst clinicians of increased litigation. In fact, *Montgomery*[36] merely reflected the General Medical Council's 2008 Guidance[37] and did little to clarify or change doctors expected practising standard. However, this patient-focused narrative and 'fear'[38] amongst doctors displays a tension in the doctrine of consent for over-18s. Therefore, it is of little surprise that consent concerns are even more cogent amongst minors, particularly where there are concerns that 'gender reassignment' may be permanent.[39] Whilst adults under the GRA enjoyed a 'great leap forward',[40] this was not felt by the transgender youth.

Fundamentally 'disadvantag[ing] young trans teens',[41] by requiring that an individual lives for two years as their acquired gender[42] and intends to do so till death,[43] can produce a GD medical diagnosis[44] and a payment of £140,[45] the GRA[46] fosters a 'trans-hostile' environment.[47] This is felt particularly harshly by young people who struggle to meet the criteria because of limited life experience preventing them meeting the two year threshold, long NHS waiting lists and a lack of financial independence. Bailey noted that many trans-individuals feel 'very locked out of the healthcare system'[48] and Kerevan observes how the law is 'failing' when gender is a 'social construct',[49] malleable and responsive to acceptance, acknowledgement and growth. With forces such as the Women and Equalities Committee citing legal recognition as 'bureaucratic and costly',[50] the pace of legal change has been slow. It is even more so for children and adolescents, who pose as a secondary discussion. Government commentary has

[35] Helen Askitopolou and Antonios Vgontzas, 'The relevance of the Hippocratic Oath to the ethical and moral values of contemporary medicine. Part I: The Hippocratic Oath from antiquity to modern times' (2018) 27 European Spine Journal 1481-1490
[36] *Montgomery v Lanarkshire Health Board* [2015] UKSC 11
[37] Royal College of General Practitioners and the General Practitioners Committee, 'Good Medical Practice for General Practitioners' (July 2008)
[38] David Oliver, 'Fear in Medical Practice' (2018) British Medical Journal < https://www.bmj.com/content/367/bmj.l6030> accessed 15 November 2020
[39] *R (on the application of) Quincy Bell and A vs Tavistock and Portman NHS Trust and others* [2020] EWHC 3274 (Admin)
[40] Andrew Sharpe, 'Gender Recognition in the UK: A Great Leap Forward' (2009) 18(2) Social and Legal Studies: An International Journal241
[41] IGYLO (n 26) 62
[42] Gender Recognition Act 2004, Section 2(1)(b)
[43] Gender Recognition Act 2004, Section 2(1)(c)
[44] Gender Recognition Act 2004, Sections 2(1)(a), 3(1) and (2)
[45] HoC Deb, *Gender Recognition Act Consultation*, 24 September 2020, Vol. 680, Col. 1131
[46] Gender Recognition Act 2004
[47] IGYLO (n 26) 62
[48] HoC Deb, *Gender Recognition Act Consultation*, 24 September 2020, Vol. 680, Col. 1134
[49] HoC Deb, *Transgender Equality*, 1 December 2016, Vol. 617, Col. 1699
[50] HoC Deb, *Self-identification of Gender,* 21 November 2018, Vol. 649, Col. 331WH

been limited and, where it can be found, often cites Non-Governmental Organisations' activism, such as Stonewall.[51]

Case law has failed, up until very recently, to feature transgender recognition and where it does, it is presented as an issue alongside archaic doctrines such as marriage,[52] seen in *Bellinger,*[53] *Cossey*[54] and *Corbett*.[55] This shows a disjointed narrative that the GRA[56] promised to connect and rectify, but it did not succeed for younger individuals. Instead, the legislation perpetuated a façade of clarity and change but left the judiciary to navigate emerging adolescent trans case law, evidenced by *Bell.*[57] As part of the United Nations Development Programme,[58] it is noteworthy that the United Kingdom embarked on a 'project… to… empower LGBTI… groups… in China, Indonesia, the Philippines and Thailand'.[59] As a jurisdiction, we are advocating for movements to alter social perceptions and biases in other nations but not our own. Whilst this analysis will stand by its assertion that medical sex change and full legal recognition is not suitable for adolescents, a complete lack of doctrinal protection will not suffice for young trans people.[60] Although section 146 of the Criminal Justice Act (CJA) 2003[61] provides protection from gender identity hate crime and 4.12(c) of the Code for Crown Prosecutors[62] allows for prosecution hearings in the interest of justice, there are no statutory instruments that validate the existence of young transgender people. Hate crime, punished by Criminal Behaviour Orders[63] and Restraining Orders under the Protection from Harassment

[51] Ibid Col. 336WH
[52] Hutton, (n 14) 4; *Attorney General v Otahuhu Family Court* [1995] 1 NZLR 603; *Re Kevin (validity of marriage of transsexual)* [2001] Fam CA 1074
[53] *Bellinger v Bellinger (Attorney General Intervening)* [2001] EWCA Civ 1140; [2002] 2 W.L.R. 411
[54] *Cossey v United Kingdom* [1990] ECHR 21, (1991) 13 EHRR 622
[55] *Corbett v Corbett (Otherwise Ashley)* [1970] 2 W.L.R. 1306; [1971] P.83; Stephen Gilmore, '*Corbett v Corbett:* once a man, always a man?' in Stephen Gilmore, Jonathan Herring and Rebecca Probert (eds), *Landmark Cases in Family Law* (Bloomsbury Publishing2011), 42, 43, 45
[56] Gender Recognition Act 2004
[57] *R (on the application of) Quincy Bell and A vs Tavistock and Portman NHS Trust and others* [2020] EWHC 3274 (Admin)
[58] United Nations Development Programme, 'The 2020 Human Development Report. The next frontier: Human Development and the Anthropocene' (2020)
[59] Sarah Middleton Lee, A Report Commissioned by Plan UK and Plan Sweden, 'Strengthening Support to LGBTIQ Adolescents: Policy report on the rationale and scope for strengthening support to adolescents who are lesbian, gay, bisexual, transgender, intersex or questioning' (May 2015), 15
[60] HoL deb 18 December 2003, Vol. 415, Col. 1300; Home Office *Report of the Interdepartmental Working Group on Transexual People* (2000), 2.7.2; *R (on the application of) Quincy Bell and A vs Tavistock and Portman NHS Trust and others* [2020] EWHC 3274 (Admin) [143]
[61] Criminal Justice Act 2003
[62] Code for Crown Prosecutors 2018, 4.12(c)
[63] Youth Justice and Criminal Evidence Act 1999, Section 30 (1)

Act,[64] admirably prevents unwarranted criticism of an individual's existence but it does not expressly vindicate it.

Wider International legislation fails to mention transgender identity, such as Article 8 of the Convention on the Rights of a Child.[65] With codification repeatedly overlooking young transgender individuals, Harding comments on the emergence of a 'parental responsibility'[66] rhetoric in Conservative statute rule including the Children Act 1989[67] and the Criminal Justice Act 1991.[68] This displays the emerging view in the 1980's that trans people were a 'private' family matter, alienating them from doctrinal recognition and governmental protection. Eekelar has observed how 'early law curtailed children's autonomy'[69] regarding medical competence before the *Gillick*[70] case, that 'triumph[ed]' children's rights.[71] However, this curtailment of adolescent's rights remains a permeating problem for young trans people. There must be some doctrinal recognition, that this examination suggests should be a partial acknowledgement of legal identity before the age of sixteen, that can be acquired through less stringent measures. Partial legal status could be introduced under a 'social transition model',[72] discussed further below. This would allow for statutory and wider societal acceptance but delay irreversible medical and legal effects.[73]

[64] Protection from Harassment Act 1997, Section 5
[65] United Nations Convention on the Rights of a Child, Adopted and opened for signature, ratification and accession by General Assembly resolution 44/25 of 20 November 1989, Entry into force 2 September 1990, in accordance with article 49; Ana-Maria Bucataru, 'Using the Convention on the Rights of the Child to Project the Rights of Transgender Children and Adolescents: the Context of Education and Transition' (2016) 3(1) QMHRR 59, 60, 62
[66] Brid Featherstone 'Gender, rights, responsibilities and social policy' in Julie Wallbank, Shazia Choudhry, Jonathan Herring (eds), *Rights, gender and family law* (Routledge2010), 36
[67] Children Act 1989
[68] Criminal Justice Act 1991, replaced by the Criminal Justice Act 2003
[69] John Eekelaar, 'The emergence of children's rights' (1986) 6 Oxford Journal of Legal Studies 161, 177
[70] *Gillick v West Norfolk and Wisbech AHA* [1986] AC 112
[71] Andrew Bainham, 'Growing up in Britain: adolescence in the post-*Gillick* era' in John Eekealar and Petar Šarčević, *Parenthood in Modern Society: Legal and Social Issues for the Twenty-first Century* (Kluwer 1993) 501, 503
[72] Lily Durwood, Katie McLaughlin and Kristina Olson, 'Mental Health and Self-Worth in Socially Transitioned Transgender Youth' (2017) 56(2) Journal of the American Academy of Child and Adolescent Psychiatry 116, 136
[73] Heather Brunskell-Evans, 'Transgender children: limits on consent to permanent interventions' (2020) <https://blogs.bmj.com/medical-ethics/2020/01/16/transgender-children-limits-on-consent-to-permanent-interventions/ > accessed 7 October 2020

The European Convention on Human Rights (ECHR)[74] is enforced by the European Court of Human Rights (ECtHR)[75] and protects transgender people by its interpretive ability to reflect social change and priorities.[76] The *Goodwin*[77] judgment marked a retreat from *Corbett*[78], with a move away from 'physiological'[79] gender definitions to 'psychological', reflecting a change in social rational.[80] The effects of this decision were ground-breaking, penetrative and paradoxical. The courts adopted a 'modern medical' stance amidst anachronistic marital statutes, including the Matrimonial Causes Act 1973.[81] *Corbett's*[82] judgment cited the permanence of chromosomal make up as persistently indicative of gender identity[83] but *Goodwin* refused to accept this 'inevitability'.[84] Rudolph observed that this progression involved accepting the idea of self-identification[85] but these decisions, whilst successfully initiating discourse and progress for adults, still had not engaged with transgender youths. The *Goodwin* decision successfully rebutted the claims that the United Kingdom's failure to recognise 'post-operative' individuals in law fell within the 'margin of appreciation'[86] as seen in *Sheffield and Horsham.*[87] Although BREXIT casts doubt upon how progressive UK doctrine can be alone, every reformative decision by the courts brings young transgender jurisprudence ever closer to being at the forefront of non-statutory law, especially in England and Wales. This capability remains despite young trans people expressing medical rights only being determined in 2020[88] and the GRA[89] still failing to provide full or partial legal recognition.

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[74] European Convention on Human Rights 1950, as amended by Protocols Nos. 11 and 14, supplemented by Protocols Nos. 1, 4, 6, 7, 12, 13 and 16 < https://www.echr.coe.int/Documents/Convention_ENG.pdf > accessed 23 October 2020

[75] European Court of Human Rights < https://www.echr.coe.int/pages/home.aspx?p=home > accessed 23 October 2020

[76] *Goodwin v United Kingdom* (2002) 35 EHRR 18 [77]

[77] Ibid

[78] *Corbett v Corbett (Otherwise Ashley)* [1970] 2 W.L.R. 1306; [1971] P.83

[79] Ibid [99]

[80] *Goodwin v United Kingdom* (2002) 35 EHRR 18 [56]

[81] Matrimonial Causes Act 1973

[82] *Corbett v Corbett (Otherwise Ashley)* [1970] 2 W.L.R. 1306; [1971] P.83

[83] Ibid [106]

[84] *Goodwin v United Kingdom* (2002) 35 EHRR 18 [82]

[85] Beate Rudolph, 'European Court of Human Rights: Legal Status of Postoperative Transsexuals' (2003) 1(4) *International Journal of Constitutional Law* 716, 718; Jill Marshall, 'A Right to Personal Autonomy at the European Court of Human Rights' (2008) 3 European Court of Human Rights Law Review 337, 338

[86] *Bellinger (FC) v Bellinger* [2003] UKHL 21, on appeal from [2001] EWCA Civ 1140; [2002] 2 W.L.R. 411 [24];

[87] *Sheffield and Horsham v United Kingdom* (1998) App no 22985/93; App no 23390/94; ECHR 1998-V; [1998] ECHR 69

[88] *R (on the application of) Quincy Bell and A vs Tavistock and Portman NHS Trust and others* [2020] EWHC 3274 (Admin)

[89] Gender Recognition Act 2004

3. Why were Children's Transgender Rights not legally recognised in the United Kingdom?

From the preceding arguments, there has been a noticeable gap in the law catering to transgender youths, and the reason for this will be explored. Eekelaar stated that 'the language of rights [are] replete with ambiguity'[90] and, with the law only just encapsulating different interests[91] of individuals instead of merely conserving archaic social beliefs and organisational units,[92] progression has been slow. Instigating the 'Welfare Principle'[93] in the Children Act 1989[94] is practically challenging and contested, with case law tenuously trying to cohesively represent 'dependencies, reliance and trust'.[95] The best interests of a child[96] have been disputed, with subtle alterations in facts and circumstance often creating strain between the opinions of parents, medical professionals, the courts and academics.[97] An element of fragility has existed in determining what allows a child to make a well-educated decision[98] regarding their treatment because of the possibility of unsuitable coercion[99] and the possible lack of understanding within young people to appreciate '[their] own… life goals',[100] particularly in the long term. Under section 1 of the Children Act, when cases are taken to the courts 'the child's welfare shall be the… paramount consideration'[101] but little clarity has formerly been achieved. This is evidenced below by *Gillick* promising a shift in enshrining children's rights to make their own choices. This promise has failed to come to fruition until the recent Court of Appeal decision in *Bell*[102] because of a fearful movement away from the possible consequences for young patients.[103]

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[90] John Eekelaar, *Family Law and Personal Life* (Oxford University Press 2007), 30
[91] Ibid 9
[92] Ibid 9
[93] Jonathan Herring, 'The welfare principle and the rights of parents' in Andrew Bainham, Shelley Day Sclater and Martin Richards, *What is a parent?* (Hart Publishing 1989) 89, 91
[94] Children Act 1889
[95] Jo Bridgeman, 'Children with exceptional needs: Welfare, rights and caring responsibilities.' In Julie Wallbank, Shazia Choudhry, Jonathan Herring *Rights, gender and family law* (Routledge, Abingdon, 2010), 239
[96] Ibid 240
[97] Ibid, 240; Frances Légaré and Dawn Stacey, 'Shared Decision-Making: The Implications for Health Care Teams and Practice'Iin Adrian Edwards and Glyn Elwyn (trans), *Shared Decision-Making in Health Care* (2nd ed, OUP 2009), 23, 27, 29
[98] Roy Gilbrar, 'Family involvement, independence and patient autonomy in practice' (2011) 19 Med Law Rev 192, 193
[99] Eekelaar (n 90) 54
[100] John Eekelaar, *Family Law and Personal Life* (Oxford University Press 2007), 54
[101] Children Act 1989, Section 1
[102] *R (on the application of) Quincy Bell and A vs Tavistock and Portman NHS Trust and others* [2021] EWCA Civ 1363
[103] *Gillick v West Norfolk and Wisbech AHA* [1986] AC 112

Justice Laws decision in *ex parte B*[104] does not expressly state what is in the child's best interest. Instead, he argues that if substantial evidence is put forward to support one facet of interest, this could prevail as the most important factor. This case had possible lifelong repercussions, with Bowen[105] suffering from leukaemia, and on appeal Lord Bingham stressed the onerous decisions that medical professionals have to make involving 'limited budget[s]'.[106] This illustrated how other factors could influence governmental decisions in refusing to enshrine children's rights and withhold treatment, such as finite NHS resources. Withholding treatment arguably has the benefit of allowing more time to make a decision, whilst NHS supplies are not depleted.

4. *Gillick* Competency and Consent: Medical Law's Development in Transgender Doctrine

The *Gillick*[107] decision began a dialogue where parental rights over their children are placed as a secondary consideration to their child's own rights to make decisions.[108] The case involved contraception and began an intense dissection of the concept of competency, with Lord Scarman ordaining competence on some under sixteen-year-olds,[109] an extension to the competence already enjoyed by sixteen and seventeen-year-olds under section 1(1) of the Family Law Reform Act 1969.[110] This resulted in criticism, including the undue 'pressure' to make a choice that children could experience,[111] 'insufficient understanding'[112] and problems with 'isolat[ing]' children from the very people that help them come to resolutions.[113] Ho's assertion that 'autonomy' is a 'more complicated matter' than creating a 'standardised' ideal supports the incremental approach to nuanced facts in medico-legal disputes and decisions.[114]

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[104] *R v Cambridge District Health Authority ex parte B* [1995] WLR 898 [131]; Jo Bridgeman, 'Children with exceptional needs: Welfare, rights and caring responsibilities.' In Julie Wallbank, Shazia Choudhry, Jonathan Herring *Rights, gender and family law* (Routledge, Abingdon, 2010, 240

[105] *R v Cambridge District Health Authority ex parte B* [1995] EWCA Civ 49

[106] Ibid

[107] *Gillick v West Norfolk and Wisbech AHA* [1986] AC 112

[108] Andrew Bainham, 'Growing up in Britain: adolescence in the post-*Gillick* era' in John Eekealar and Petar Šarčević, *Parenthood in Modern Society: Legal and Social Issues for the Twenty-first Century* (Netherlands, Kluwer 1993) 501, 503, 508, 509; Insoo Hyun, 'Conceptions of Family-Centred Medical Decision-Making and their Difficulties' (2003) 12 Camb Q Healthcare Ethics 196, 200

[109] Ibid, 503

[110] Family Law Reform Act 1969, Section 1(1)

[111] Ho (n 8)134

[112] John Eekelaar, *Family Law and Personal Life* (Oxford University Press 2007), 54

[113] Jonathan Herring, *Relational Autonomy and Family Law* (Springer International Publishing 2014), 44

[114] Ho (n 8)130

Before the decision in *Bell,*[115] there remained a possibility that *Gillick*[116] competence could extend to gender affirming treatment, supported by Lord Fraser's assertion that someone should not '[lack] the power to give valid consent… merely on account of her/[his] age'.[117] The GRA 2004,[118] whilst refuting legal recognition for such adolescents, did not aid clarity on the question of medical interventions or research because of limited knowledge surrounding GD. Once more trans people's experiences went unnoticed with 'no statutory definition of when, and what kind of, research is possible with anyone – child or not'.[119] The Common Laws legal and medical navigation of trans adolescents has been painstakingly lengthy, despite extensive legislative debate.[120] It is tentative in allowing children to prescribe to Raz's definition of self-determination where they can decide their own circumstances.[121] *Bell*[122] could signal the beginning of more NHS-aimed litigation if childhood autonomy conflicts with future adulthood emotions.[123]

However, *Gillick's*[124] profound effect has not been felt, because later cases have reversed its precedent while masquerading under, now commonplace, 'exceptions'.[125] These were displayed in *Re W*[126] where Lord Donaldson MR determined consent can be provided by the courts and parents even if a competent child refuses life-saving treatment.[127] The generous effective consent provision in section 8(3) of the Family Law Reform Act 1969 supported this decision.[128] Similarly, Douglas Brown J refused to find *Gillick*[129] competency in *W and B,*[130]

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[115] *R (on the application of) Quincy Bell and A vs Tavistock and Portman NHS Trust and others* [2020] EWHC 3274 (Admin)
[116] *Gillick v West Norfolk and Wisbech AHA* [1986] AC 112
[117] *Gillick v West Norfolk and Wisbech AHA* [1986] AC 112 [169]; James Dwyer, *Moral Status and Human Life: The Case for Children's Superiority* (Cambridge University Press 2013), 199
[118] Gender Recognition Act 2004
[119] Sheila McLean, 'Medical experimentation with children' (1991) 9 *International Journal of Family Law* 173, 180
[120] HoC Deb, *Transgender Equality*, December 1 2016, Vol. 617; HoC Deb, *Self-identification of Gender*, 21 November 2018, Vol. 649;; HoC Deb, *Gender Recognition Act Consultation*, 24 September 2020, Vol. 680
[121] Jonathan Herring, *Relational Autonomy and Family Law* (Springer International Publishing 2014), 1
[122] *R (on the application of) Quincy Bell and A vs Tavistock and Portman NHS Trust and others* [2020] EWHC 3274 (Admin)
[123] *R (on the application of) Quincy Bell and A vs Tavistock and Portman NHS Trust and others* [2020] EWHC 3274 (Admin) [64]
[124] *Gillick v West Norfolk and Wisbech AHA* [1986] AC 112
[125] John Eekelaar, *Family Law and Personal Life* (Oxford University Press 2007), 163
[126] *Re W (A Minor) (Medical Treatment: Court's Jurisdiction)* [1992] 3 WLR 758, [1992] 4 All ER 627
[127] Ibid
[128] Family Law Reform Act 1969, Section 8(3)
[129] *Gillick v West Norfolk and Wisbech AHA* [1986] AC 112
[130] *South Glamorgan County Council v W and B* [1993] 1 FLR 574; Caroline Bridge, 'Beliefs and Teenage Refusal of Medical Treatment' (1999) 62(4) The Modern Law Review585, 589; See also *Re R (A Minor) (Wardship: Medical Treatment)* [1992] 1 FLR 190; *Re S (A Minor) (Consent to Medical Treatment)* [1994] 2 FLR 1065; *Re K, W and H (Minors) (Medical Treatment)* [1993] 1 FLR 854

suggesting that being *Gillick*[131] competent is not precedential. Despite these cases involving children who refuse to consent, rather than those seeking to consent, it is illustrative of the limited change in judicial decisions after *Gillick.*[132] With precedent shunning *Gillick*[133] in circumstances involving life-threatening conditions,[134] transgender youth not being deemed competent to consent alone to serious life-long medical treatment is neither surprising nor discriminatory. Before the *Gillick*[135] decision, Eekelaar expressed concern that children were on the edge of acquiring the 'most dangerous but most precious of rights: the right to make their own mistakes'.[136] *Gillick*[137] embodied the realisation of this and what quickly followed was a movement of fear and strengthened judicial protection.[138] Whilst Harris argues that 'paternalistic interference' in this way is falsely 'justified by [perceived] imperfections' in the exercise of children's autonomy,[139] the potential irreversibility of gender reassignment could be used to refute this criticism.

Gilbrar asserts that despite doctrines focus on individualism family members play a pivotal role in helping patients make informed decisions regarding consent.[140] This is especially relevant in the case of minors, however there can be tensions between support and involvement[141] with Beauchamp and Childress contending autonomy can only be achieved in the absence of the dominating impact of others.[142] Autonomy's 'sacred status'[143] requires contextual lived experiences to gain meaning and Marshall cites this to show how changing social ideologies and concepts can be mirrored in law.[144] Technological advances have changed and expose

[131] *Gillick v West Norfolk and Wisbech AHA* [1986] AC 112
[132] Ibid
[133] Ibid
[134] Heather Brunskell-Evans, 'Transgender children: limits on consent to permanent interventions' (2020) <https://blogs.bmj.com/medical-ethics/2020/01/16/transgender-children-limits-on-consent-to-permanent-interventions/ > accessed 7 October 2020; *Gillick v West Norfolk and Wisbech AHA* [1986] AC 112 [119]
[135] *Gillick v West Norfolk and Wisbech AHA* [1986] AC 112
[136] Eekelaar (n 69) 182
[137] *Gillick v West Norfolk and Wisbech AHA* [1986] AC 112
[138] *R (on the application of) Quincy Bell and A vs Tavistock and Portman NHS Trust and others* [2020] EWHC 3274 (Admin) [149]; Andrew Bainham, 'Growing up in Britain: adolescence in the post-*Gillick* era' in John Eekealar and Petar Šarčević (eds), *Parenthood in Modern Society: Legal and Social Issues for the Twenty-first Century* (Kluwer 1993) 501, 503
[139] Jo Bridgeman, 'Because we care? The medical treatment of children' in Sally Sheldon and Michael Thomson, *Feminist Perspectives on Health Care Law* (Cavendish Publishing 1998) 97, 104
[140] Roy Gilbar, 'Family involvement, independence, and patient autonomy in practice' (2011) 19 Med Law Rev 192, 193
[141] Ibid, 195
[142] Ibid 197
[143] Jonathan Herring, *Relational Autonomy and Family Law* (Springer International Publishing 2014), 2
[144] J Marshall, 'A Right to Personal Autonomy at the European Court of Human Rights' (2008) 3 *European Court of Human Rights Law Review* 337, 338

children to more complex, explicit and older content, heightening their maturity. Their reliance on parents 'lessen',[145] supporting the concept behind *Gillick*[146] competence. Although, the majority of transgender precedent and medical treatment only applies to adults. For example, Lord Ward's states in *S-T*[147] that there is an 'open… future' for the court with an opportunity 'to place greater emphasis on gender than… sex'[148] in support of adult gender affirming surgery. Even though the case does not expressly concern GD, it adds to volume of legal discourse that does little to focus on under sixteens being regarded as competent to consent to gender affirming surgery. Many suggest that rather than having permanent surgical intervention, 'self-definition'[149] is available for any individual, but particularly children. Whilst wider acceptance to self-identify is positive, it does not doctrinally support trans youths, emphasising a demand for a concrete place in statute law.

5. *Bell v Tavistock* in the High Court: Evaluation of Consent, Reassignment Regrets and the Mass Media

The 2020 High Court decision in *Bell*[150] to prevent under-13s from accessing puberty blockers because of 'significant grounds for concern'[151] about their catalytic abilities towards further stages of clinical transition,[152] signalled a retreat in allowing children to consent to medical reassignment. One of the conclusions reached was that the use of puberty blockers inherently prevents specific 'psychological changes' that could alter an individual's understanding of their identity.[153] This presents a paradox: an individual is put on puberty blockers to give them time to understand their identity by halting undesired sexual development, but this changes their thought processes with a greater chance that they will rebuke a body that they have not yet allowed to mature. This is where the court argued that the medication's catalytic abilities can be seen because it propels individuals further towards transition when its role is contradictory

[145] Jonathan Herring, 'The welfare principle and the rights of parents'in Andrew Bainham, Shelley Day Sclater and Martin Richards (eds), *What is a parent?* (Hart Publishing1989) 89, 103
[146] *Gillick v West Norfolk and Wisbech AHA* [1986] AC 112
[147] *S-T (formerly J) v J* [1998] Fam 103
[148] Ibid, [124]
[149] HoC Deb, *Self-identification of Gender*, 21 November 2018, Vol. 649, Col 323WH
[150] *R (on the application of) Quincy Bell and A vs Tavistock and Portman NHS Trust and others* [2020] EWHC 3274 (Admin)
[151] Ibid [143]
[152] Ibid [136]
[153] *R (on the application of) Quincy Bell and A vs Tavistock and Portman NHS Trust and others* [2020] EWHC 3274 (Admin) [137]; Jasmine Andersson, 'The medical, ethical, and legal complications surrounding the puberty blockers case' (*I-News*, 10 January 2020) <https://inews.co.uk/news/puberty-blockers-legal-case-experts-transgender-382047> accessed 26 November 2020

to this: it is supposed to give youths more time to decide. With the High Court citing puberty blockers fail to actually 'alleviate… a diagnosed… mental condition'[154] and criticism of a lower 'broad [understanding using] simple language' threshold from Chadwick LJ in *Masterman-Lister*,[155] the judgment explored the unique challenge posed by consent in youth 'gender reassignment'. The court made its opinion that appreciation of the facts,[156] even where these include a child actively seeking 'reassignment', will not suffice given the court's protective duties towards such children.[157] Due to this, the court proposed a higher threshold of authorisation.[158] The decision of the High Court illustrates the change in mentality that can occur between childhood and adulthood[159] and served as a warning from the courts on bestowing *Gillick*[160] competence on just any under 16-year-old.

Generating a wave of press coverage, including from the BBC[161] and the Guardian,[162] the *Bell*[163] judgment in the High Court created heated discourse about the nature of gender affirming treatments. Described as 'experimental'[164] and with statistical data revealing that GD clinical referrals contain a 'higher prevalence of autistic spectrum disorder conditions',[165] wider society began reflecting upon these issues.[166] Like in other jurisdictions, such the US, journalism focusing on transgender individuals has explored the complexities of growing up in

[154] *R (on the application of) Quincy Bell and A vs Tavistock and Portman NHS Trust and others* [2020] EWHC 3274 (Admin) [135]
[155] *Masterman-Lister v Brutton & Co* [2002] EWCA Civ 1889 [79]
[156] *R (on the application of) Quincy Bell and A vs Tavistock and Portman NHS Trust and others* [2020] EWHC 3274 (Admin) [131]
[157] Ibid [149]
[158] Ibid [152]
[159] Ibid [64]
[160] *Gillick v West Norfolk and Wisbech AHA* [1986] AC 112
[161] Alison Holt, 'Puberty Blockers: Under-16s 'unlikely to be able to give informed consent'' (*BBC News*, 1 December 2020) <https://www.bbc.co.uk/news/uk-england-cambridgeshire-55144148> accessed 19 December 2020
[162] Owen Bowcott, 'Puberty Blockers: Under-16s 'unlikely to be able to give informed consent' (*The Guardian*, 1 December 2020) <https://www.theguardian.com/world/2020/dec/01/children-who-want-puberty-blockers-must-understand-effects-high-court-rules> accessed 14 December 2020
[163] *R (on the application of) Quincy Bell and A vs Tavistock and Portman NHS Trust and others* [2020] EWHC 3274 (Admin)
[164] Ibid [28]
[165] Ibid [33]
[166] Libby Brooks, 'Puberty blockers ruling: curbing trans rights or a victory for common sense?' (*The Guardian*, 3 December 2020) <https://www.theguardian.com/society/2020/dec/03/puberty-blockers-ruling-curbing-trans-rights-or-a-victory-for-common-sense-> accessed 14 December 2020, citing 'professionals [being] scared of censure if they challenge' young transgender individuals; Bowcott (n 162); Libby Brooks and Severin Carrell, 'Joanna Cherry sacking brings SNP trans rights row off Twitter and into the light' (*The Guardian*, 5 February 2021) <https://www.theguardian.com/politics/2021/feb/05/joanna-cherry-sacking-brings-snp-trans-rights-row-off-twitter-and-into-the-light> accessed 15 February 2021

the wrong body, published in 'sensational' fashion.[167] Successful inauguration, specifically by 'white trans-women' in some areas of the media and society, has proliferated because of Skidmore observing their 'embodiment of the norms of white womanhood.'[168] This approximation that transgender individuals are only seen as acceptable because they are not perceived as threatening or unnatural under the gaze of 'whiteness' and womanhood,[169] perpetuates ostracism. The dynamism of race and ethnicity in determining LGBTQ+ acceptance in the media is troubling. Stories regarding the High Court decision in *Bell*[170] continue an overriding narrative of transgender exclusion hiding behind child competency concerns. Such media attention may present a practical aspect to children not being allowed to fully transition, because it takes an adult's tenacity and comfortableness in their identity to suffer through varying opinions amidst surgical intervention. Nevertheless, the High Court decision in *Bell* was appealed and in its judgment, the Court of Appeal reinstated the position prior to the High Courts' ruling, guaranteeing seismic shifts once more in access to gender affirming treatment for young people.[171]

6. *Bell v Tavistock* in the Court of Appeal

In its 2021 judgment the Court of Appeal was scathing of the High Court's decision.[172] They ruled that it was improper for the High Court to issue instructions to medical professionals that they may need to ask for permission to prescribe puberty blockers. The Court of Appeal made it clear that this would have the effect of mandating court applications in situations where the court had previously acknowledged that such action was not required by law.[173] The Court of Appeal judges acknowledged 'the difficulties and complexities'[174] of the case in their ruling, but they also stated that it was 'for the clinicians to exercise their judgement knowing how important it is that consent is obtained properly according to the particular individual

[167] Joanne Meyerowitz, 'Sex Change and the Popular Press: Historical notes on Transsexuality in the United States, 1930-1955' (1998) GLQ A Journal of Lesbian and Gay Studies 159, 164
[168] Emily Skidmore, 'Constructing the "Good Transsexual'. In Christine Jorgensen, Whiteness, and Heteronormativity in Mid-Twentieth-Century Press' (2011) 37(2) Race and Transgender Studies270, 271
[169] Ibid 286
[170] *R (on the application of) Quincy Bell and A vs Tavistock and Portman NHS Trust and others* [2020] EWHC 3274 (Admin)
[171] *R (on the application of) Quincy Bell and A vs Tavistock and Portman NHS Trust and others* [2021] EWCA Civ 1363
[172] Ibid [8], [63], [64] and [65]
[173] Ibid [87]
[174] Ibid [92]

circumstances'.[175] The High Court's ruling was thus overturned, and the legal status in place prior to December 2020 has been upheld. The Court of Appeal held that doctors, not judges, have the only authority to decide whether a child is old enough to consent to medical treatment. This indicates that, save from the most complicated instances, the courts will not be, and should not be, involved in the decision-making process.

Whilst the High Court fixated on Quincy Bell's[176] regret as a central and representative pillar of concern, the Court of Appeal placed a *Gillick* competent child's right to choose back at the heart of transgender adolescents legal and medical futures. The Court of Appeal criticised the High Court for making factual decisions that they were ill-prepared to make and should not have made, particularly regarding whether puberty blockers do have such life-long repercussions.[177] Puberty blockers were deemed to be safe, tested, and distinct from later hormonal treatments when the evidence was examined.[178] The Court of Appeal further objected to how the High Court handled the material that was presented to it, most of which was contentious and treated in a argumentative and confrontational manner in violation of the rules of evidence.[179] Ultimately, the Court of Appeal concluded that the *Gillick* test for competence applies to puberty blockers. If deemed competent, doctors can facilitate ac child's treatment with puberty blockers because no 'real distinction' exists between the aforementioned treatment and contraceptives as in *Gillick.*[180] With the High Court approaching puberty blockers as a novel issue, the Court of Appeal refused to differentiate their prescription from any other clinical decisions where the *Gillick* competency test is required.[181]

Practically, this means that the Tavistock can resume sending transgender children and young people to endocrinologists for treatment to prevent puberty without requiring court orders to do so. It implies that young trans people are viewed as equally capable as other young people when it comes to making decisions regarding their bodies' medical care.[182] Kiera Bell's appeal

[175] Ibid [93]
[176] The name Kiera Bell was predominantly referred to as in the Court Papers as this respects Kiera's gender preference at the time of writing
[177] *R (on the application of) Quincy Bell and A vs Tavistock and Portman NHS Trust and others* [2021] EWCA Civ 1363 [8], [63] and [64]
[178] Ibid [24-25]
[179] Ibid [38]
[180] Ibid [76]
[181] Ibid [92]
[182] Sandra Duffy, 'Bell v Tavistock overturned on appeal' (Sandra Duffy, 19 September 2021) <https://sandraduffy.wordpress.com/2021/09/19/bell-v-tavistock-overturned-on-appeal/> accessed 28 October 2022

to the Supreme Court failed as it did 'not raise an arguable point of law'.[183] It seems unlikely that this would be the case. For now, *Gillick* competent children will continue to be able to attend clinics such as Tavistock and receive puberty blockers.

7. Other Literature

Whilst the Government has tentatively engaged with transgender experiences, other organisations have championed the right of both transgender children and adults in a much more active way. Examples of such charities includes The Proud Trust[184] and Stonewall.[185] The latter has published blogs exploring the experiences of LGBTQ+ young people in the UK education system.[186] Eloise Stonborough's comment that 'teaching about LGBTQ+ subjects in schools was still illegal' at the beginning of the 21st century showcases how far the education sector and wider society has come in acceptance and understanding of different spectrums in identity and sexuality.[187] In turn, we have seen the law mirroring these attitudes in the *Bell* Court of Appeal decision.[188] In some areas of the modern world, we have seen the law drive innovation and interactions. Here, it is people forcing the law to respond to, and validate, their lived experiences.

8. The Future

[183] The Supreme Court, 'Permission to Appeal' (*The Supreme Court*, April and May 2022) <https://www.supremecourt.uk/news/permission-to-appeal-april-may-2022.html> accessed 3 November 2022; *R (on the application of Bell and another) (Appellants) v Tavistock and Portman NHS Foundation Trust (Respondent)* [2021] EWCA Civ 1363

[184] *The Proud Trust* <https://www.theproudtrust.org> accessed 3 November 2022

[185] *Stonewall* <https://www.stonewall.org.uk/our-work/campaigns/supporting-trans-children-and-young-people> accessed 30 October 2022

[186] Stonewall Staff, 'LGBT+ experiences in UK education improving, new study finds' (*Stonewall*, 23 September 2021) <https://www.stonewall.org.uk/about-us/news/lgbt-experiences-uk-education-improving-new-study-finds> accessed 5 November 2022

[187] Stonewall Staff, 'LGBT+ experiences in UK education improving, new study finds' (*Stonewall*, 23 September 2021) <https://www.stonewall.org.uk/about-us/news/lgbt-experiences-uk-education-improving-new-study-finds> accessed 5 November 2022

[188] *R (on the application of) Quincy Bell and A vs Tavistock and Portman NHS Trust and others* [2021] EWCA Civ 1363

A tumultuous political landscape, involving UK-specific BREXIT negotiations,[189] world-wide politics[190] and coronavirus concerns,[191] had firmly pushed transgender jurisprudence into the background until the Court of Appeal's overriding decision in *Bell*.[192] The Home Office's *Report of the Interdepartmental Working Group on Transexual People*[193] helped motivate the drafting of the GRA. Now, numerous recent parliamentary debates[194] and the Court of Appeal *Bell* decision has provided hope that young trans people will be ordained with greater doctrinal clarity.[195] Such change must involve limited emancipation to children who are non-*Gillick* competent, because of the life-long nature of transitioning.[196] Nevertheless, this movement aids increased awareness and acceptance,[197] and could successfully introduce the concept that there should be partial legal recognition for those transgender children and young adults who are non-*Gillick* competent.[198]

9. Partial Legal Recognition: A Token Gesture or Gratefully Received Statutory Law?

Now that we have established that full legal acknowledgement and medical intervention should be suitable for those who are below sixteen and competent, alternative avenues for social, personal and licit validation for non-*Gillick* competent youths should be investigated. Dunne has recognised that 'trans children can disentangle themselves from legal affirmation with greater ease than physical intervention'.[199] Earlier definitive decisions could be considered

[189] Mads Dagnis Jensen and Holly Snaith, 'When politics prevails: the political economy of a Brexit' (2016) 23(9) Journal of European Public Policy1302, 1304
[190] Laurent Dobuzinskis, 'Global Instability: Uncertainty and New Visions in Political Economy' in Sephen McBride et al., *Global Instability: Uncertainty and new visions in political economy* (Kluwer Academic Publishers 2002), 1
[191] Antonio Arturo Fernandez and Graham Paul Shaw, 'Academic Leadership in a Time of Crisis: The Coronavirus and COVID-19' (2020) 14(1) Journal of Leadership Studies39; Chloe Wang, 'To Cope with a New Coronavirus Pandemic: How Life May Be Changed Forever' (2020) 19(2) Chinese Journal of International Law221, 223
[192] *R (on the application of) Quincy Bell and A vs Tavistock and Portman NHS Trust and others* [2021] EWCA Civ 1363
[193] Home Office *Report of the Interdepartmental Working Group on Transexual People* (2000)
[194] HoC Deb, *Transgender Equality*, December 1 2016, Vol. 617; HoC Deb, *Self-identification of Gender*, 21 November 2018, Vol. 649; HoC Deb, *Gender Recognition Act Consultation*, 24 September 2020, Vol. 680 Gender Recognition Act 2004
[195] *R (on the application of) Quincy Bell and A vs Tavistock and Portman NHS Trust and others* [2021] EWCA Civ 1363
[196] Heather Brunskell-Evans, 'Transgender children: limits on consent to permanent interventions' (2020) <https://blogs.bmj.com/medical-ethics/2020/01/16/transgender-children-limits-on-consent-to-permanent-interventions/ > accessed 7 October 2020
[197] IGYLO (n 26) 8
[198] Durwood et., (n 72) 136
[199] Peter Dunne, 'The Legal Recognition of Transgender Children' (2018) University of Bristol 282, 327 < https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3270387> accessed 7 December 2020

unnecessary when adulthood is not, from an outsider's perspective, too far away. Instead, Durwood, MacLaughlin and Olson suggest that a 'social transition model'[200] could be instigated with necessary arrangements,[201] such as respecting chosen pronouns and dress code,[202] becoming established in law. Section 146 of the CJA 2003[203] can remain a protective instrument if these rights are not respected. Partial doctrinal acknowledgement helps to balance the risks of complete recognition with 'increasing numbers of [trans] youth presenting for care at gender centres throughout the world',[204] especially as Olson and Garofalo identify the 'average age of referral getting younger each year'.[205] Burke's assertion that young people are 'indoctrinated'[206] into gender role conformity[207] suggests that even partial recognition could help transgender youths break down social paradigms. The legislation would not merely be a token gesture, but active appreciation and protection of changing adolescent identities in black-and-white.

10. Conclusion

This analysis has critiqued the slow progress of transgender doctrine in general, citing recent governmental debates[208] but limited action since the GRA 2004,[209] and has particularly highlighted a blatant disregard for children in this area. Despite Laufer-Ukeles correct assertion that 'gender makes a difference',[210] this analysis has coherently presented the multi-faceted risks in ordaining complete legal recognition and beginning full medical reassignment for young trans people. The utilisation of the High Court *Bell*[211] case study, Eekelar's concerns with 'ambiguity'[212] in children's rights and the retreat from *Gillick*[213] perpetuate a narrative

[200] Durwood et al., (n 72) 136
[201] Dunne (n 199) 328
[202] Ibid
[203] Criminal Justice Act 2003, Section 146
[204] Johanna Olson and Robert Garofalo, 'The Peripubertal Gender-Dysphoric Child: Puberty Suppression and Treatment Paradigms (2014) 43(6) Paediatric Annals 132, 133
[205] Ibid, 133
[206] Dunne (n 199) 284
[207] Phyllis Burke, *Gender Shock: Exploding the Myths of Male and Female* (Anchor Books edition 1996), 3; Timothy Murphy, 'Adolescents and Body Modification for Gender Identity Expression' (2019) 27(4) Medical Law Review623, 625
[208] HoC Deb, *Transgender Equality*, December 1 2016, Vol. 617; HoC Deb, *Self-identification of Gender*, 21 November 2018, Vol. 649;; HoC Deb, *Gender Recognition Act Consultation*, 24 September 2020, Vol. 680
[209] Gender Recognition Act 2004
[210] Jonathan Herring, *Relational Autonomy and Family Law* (Springer International Publishing 2014), 18
[211] *R (on the application of) Quincy Bell and A vs Tavistock and Portman NHS Trust and others* [2020] EWHC 3274 (Admin)
[212] John Eekelaar, *Family Law and Personal Life* (Oxford University Press2007), 30
[213] *Gillick v West Norfolk and Wisbech AHA* [1986] AC 112

that the court's role became paternal and protective for a time. A stream of consciousness regarding transgender individuals can be seen in some statutory instruments, including section 146 of the Criminal Justice Act (CJA) 2003[214] but there is a lack of expressly written doctrine to validate youths' lived experiences. Nurturing the self-identification[215] of children, by wearing certain clothes or using specific pronouns, poses less risks than engaging with complex competency and consent issues.[216] Brazier, Bridges and Harris'[217] concerns about threats to autonomy are alleviated by the judiciary's 'open' approach to decision-making, displayed in *South Glamorgan*[218] and *Re W.*[219] These cases petitioned against the *Gillick*[220] argument that 'sufficient understanding… of the implications… [of] treatment'[221] is a threshold that young adults can reach. For the most part, this article has supported the lack of reform regarding transgender children, due to the frailty of gender self-identification, awareness and autonomy criticisms. However, it does wish to welcome some legal change in the form of partial legal recognition.

The question of 'how old is old enough?' has a threefold answer. Firstly, over-eighteens can acquire full legal recognition under the GRA[222] and consent to gender affirming treatment, as evidenced by Lord Bristow's 'broad terms' consent threshold in *Chatterton.*[223] The 'de-Bolamisation'[224] of *Montgomery*[225] by the Supreme Court presented a 'duty of care'[226] that doctors owe to patients to make an informed decision. Whether this decision is unwise or not, it should be respected.[227] This is enshrined as the third principle in section 1 of the Mental Capacity Act[228] and allows adults to consent to gender affirming treatment validly. Secondly, as sixteen and seventeen-year-olds are on the cusp of adulthood, their abilities to consent are

[214] Criminal Justice Act 2003, Section 146
[215] IGYLO (n 26) 16; A Ho, 'Relational Autonomy or Undue Pressure? Family's Role in Medical Decision-Making' (2008) 22 Scandinavian J Caring Sci 128, 130
[216] Durwood et al., (n 72)136
[217] Ibid, 136
[218] *South Glamorgan County Council v W and B* [1993] 1 FLR 574
[219] *Re W (A Minor) (Medical Treatment: Court's Jurisdiction)* [1992] 3 WLR 758, [1992] 4 All ER 627
[220] *Gillick v West Norfolk and Wisbech AHA* [1986] AC 112
[221] Ibid
[222] Gender Recognition Act 2004
[223] *Chatterton v Gerson* [1981] QB 432 [432(1)]
[224] Rob Heywood and José Miola, 'The changing face of pre-operative medical disclosure: placing the patient at the heart of the matter (2017) 133 (Apr) Law Quarterly Review296, 299; José Miola, 'Bolam: Medical Law's Accordion' in Jonathan Herring and Jesse Wall (eds), *Landmark Cases in Medical Law* (Hart Publishing 2015)
[225] *Montgomery v Lanarkshire Health Board* [2015] UKSC 11
[226] Ibid [1430]
[227] Mental Capacity Act 2005
[228] Mental Capacity Act 2005, Section 1

governed by section 1(1) of the Family Law Reform Act 1969[229] and remain uncontested in the High Court and Court of Appeal *Bell*[230] decisions.

Thirdly, whilst the High Court decision in *Bell*[231] initially paved the way for only using medical treatment on trans people below sixteen in exceptional circumstances determined by the judiciary, [232] the Court of Appeal overturned this. A competent child's right to choose was reinstated.[233] Therefore, as long as someone is competent, their age is not a central issue of concern and they can transition if they wish.

This analysis has also sought to explore avenues of recognition for non-*Gillick* competent children, or young individuals who feel surgical and medicinal transition is not yet right for them. In this case a statute facilitating partial legal recognition is advised to validate the lived experiences of young people.[234] Most likely consisting of the 'social transition model',[235] reinforced by hate crime protection,[236] this legislative move would unambiguously welcome transgender youths who are not *Gillick* competent into positive, actionable doctrinal recognition.

The commentary concerning non-*Gillick* competent children does not seek to dismiss the mental struggle of trans-adolescents in any way.[237] It instead presents the need to control the future dystopian reality of inconsistent medical steps being taken on vulnerable young people who cannot understand unforeseen repercussions, such as the true meaning and effect of infertility.[238] This analysis is not suggesting that a world of transgender individuals is dystopian, but that a totalitarian regime of autonomy with no competency thresholds would

[229] Family Law Reform Act 1969, Section 1(1)
[230] *R (on the application of) Quincy Bell and A vs Tavistock and Portman NHS Trust and others* [2020] EWHC 3274 (Admin)
[231] Ibid
[232] Ibid [64]
[233] *R (on the application of) Quincy Bell and A vs Tavistock and Portman NHS Trust and others* [2021] EWCA Civ 1363
[234] Dunne (n 119) 328
[235] Durwood et al., (n 72) 136
[236] Criminal Justice Act 2003; Code for Crown Prosecutors 2018, 4.12(c); Youth Justice and Criminal Evidence Act 1999, Section 30(1); Protection from Harassment Act 1997, Section 5
[237] Duncan Osborne, 'Attack on Our Most Vulnerable: The Use and Abuse of Gender Identity Disorder' (1997) Lesbian and Gay New York <http://www.antijen.org/Articles/duncan/duncan.html > accessed 28 October 2020; Jonathan Herring, 'Vulnerability, children and the law'. In Michael Freeman, *Law and Childhood Studies* (Oxford University Press, Oxford, 2012), 243, 245
[238] *R (on the application of) Quincy Bell and A vs Tavistock and Portman NHS Trust and others* [2020] EWHC 3274 (Admin) [46]

result in disarray. Reform has not happened quickly because of the pervading sense of weight attached to such decisions and possible life-long future repercussions.[239] This is evidenced by Sullivan and Urraro observing the power of claiming and utilising gender identity as transformative; changing an individual from 'incomplete to whole'.[240] Gender fluidity is a shifting and progressive entity,[241] but it cannot remain an omnipotent socially constructed sovereign, uncontained and unregulated by the law, particularly regarding vulnerable non-*Gillick* competent children.

[239] Ibid [134]
[240] Ashley Sullivan and Laurie Urraro, *Voices of Transgender Children in Early Childhood Education: Reflections on Resistance and Resiliency (Critical Cultural Studies of Childhood)* (Palgrave Macmillan 2019), 18
[241] HoC Deb, *Transgender Equality*, December 1 2016, Vol. 617, Col. 1699

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