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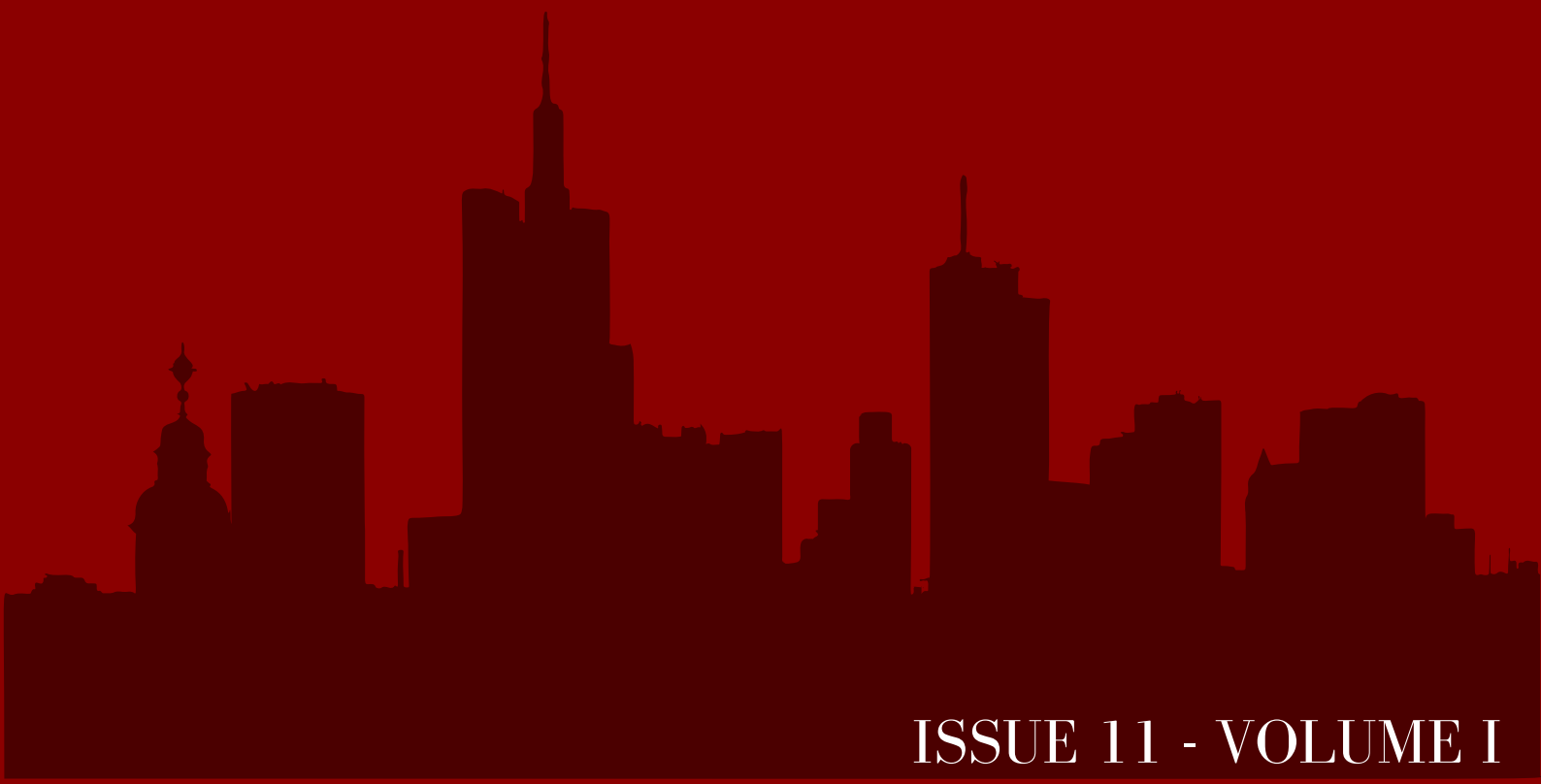
2021-2022



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NOTE FROM THE EDITORS-IN-CHIEF

The University of Leicester Law Review (LSLR) was established seven years ago as a collection of legal research essays written by students, for students, to broaden their engagement with legal academia. In past years, this was a compilation of student essays which were published in one annual issue. This year however, we have converted the structure into a two-volume issue, of which this is the first volume.

The articles in this journal were carefully selected from a pool of submissions, and represent some valuable insights into medical consent, compensation culture, racial inequalities in the English Criminal Justice system, political inequalities in the Canadian Vaccine Passport policies during COVID-19, and more. Furthermore, we have reserved a special portion of the Review for Competition-Winning Essays written by Leicester Law School's students, to celebrate their achievements and academic excellence.

At the start of the year, we acknowledged the difficulties inherent in navigating the busy law school environment amidst the ongoing global pandemic, and we had made a commitment to overcoming any hurdles that the new blended-learning approach might present for the publication process of this issue. However, any hindrances along the way were lightened substantially by the diligent and committed group of editors and committee members that have joined our team this year. Their hard work and dedication have effectively ensured this issue's success and growth and we could not have produced such fine work without them.

We are tremendously proud to present the 11th issue of the Law Review and hope that you will derive as much pleasure and insight in reading it as we did in producing it.

Camilia Amouzegar & Aarti Panchal
Editors-in-Chief, LSLR 2021-2022

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We have only the dearest appreciation for our supervising faculty members and supporting staff who have made this issue a possibility.

We would like to thank our faculty advisers, Dr. Ewa Zelazna and Dr. Melissa Bone, for all their valuable insights throughout the editing and publication process.

In addition, we would like to fondly acknowledge our Law librarian, Jackie Hanes, for her indispensable wisdom and support throughout the academic year.

Finally, we would like to congratulate every author who has contributed to this issue. Without your hard work and research, the pages of this review would be blank. We are only as successful as the writers whose work we present.

We thank you all sincerely.

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Competition-Winning Essays

The Implications of *Montgomery v Lanarkshire Health Board* [2015] on Standards of Care, Patient Autonomy and Informed Consent

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In English medical negligence litigation, judges have often been faced with the inevitable tension between protecting the interests of medical professionals by endorsing their professional expertise, whilst simultaneously protecting patient autonomy.[1] The standard of care for medical professionals is guided by *Bolam v Friern Hospital Management Committee,* which only required that a body of expert opinion endorse medical treatments for them to be legally permissible, affirming the 'doctor know best' presumption inherent in medical paternalism. [2] However, medical paternalism has begun to diminish in favour of patient autonomy, informed consent and the requirements around disclosure of material risk. This essay seeks to demonstrate that *Montgomery v Lanarkshire Health Board* [3] has created a higher standard of care for professionals because it has instilled a clear obligation that professionals must take the time to effectively disclose the availability of alternative treatments and the pre- or post-operative benefits or risk to a patient rather than proceeding on the basis of their own medical judgment.

Historical Developments in Medical Standards of Care

It is essential to first identify the historical developments in case law that have led to a higher standard of care. *Bolam* provides that the basic professional standard of care is the test of the ordinary skilled person exercising and professing to have that special skill, thus whether the professional has acted in a way that aligns with the actions of an ordinary skilled person in that profession. It is sufficient if he exercises the ordinary skill of an ordinary competent person exercising that particular skill, [4] which means the courts will examine an individual's conduct according to the standard of the reasonable skilled person. This objective test does not consider quirks or sensitivities which are unique to the individual and instead takes a normative approach.

The application of the *Bolam* test was confirmed in *Maynard v West Midlands RHA.*[5] In *Maynard*, the law advised that if there are conflicting bodies of opinion, the court will not take preference to one opinion over the other.[6] *Maynard* illustrated that the courts remain reluctant to interfere with the opinions and actions of professionals for different reasons, including some policy considerations. Primarily, judges recognise that they lack the specific expertise to govern in most professional fields and therefore, must rely on experts for their knowledge. The judgment in *Bolitho v City and Hackney Health Authority* illustrated a test of precaution when relying on experts in that individuals should be able to evidence their allegations and medical professionals must justify their protocols. [7] The courts had to

[1] Judy Laing, "Delivering informed consent post-*Montgomery*: Implications for medical practice and professionalism" [2017] TJPN 3.
[2] [1957] 1 WLR 582
[3] [2015] UKSC 11
[4] Ibid (no 3)
[5] [1984] 1 WLR 634
[6] ibid
[7] [1998] AC 232

guarantee that if differing opinions arose, the body of opinion that is relied upon is reputable. If it is not reputable, the court could then claim that a professional has acted negligently. From *Bolam* and *Bolitho*, the stricter standard emerged, which held that the law will not regard professional defendants as falling below the standard of care if it can be shown that the defendant's conduct is regarded as proper by a responsible, reasonable and logical body of opinion.[8]

The support for medical paternalism and medical professional autonomy at the expense of the patient continued in *Sidaway v Board of Governors of Bethlem*. In *Sidaway*, the surgeon failed to warn the patient of a procedure's associated risks, which resulted in the patient suffering severe injuries. The judge found that the surgeon had followed a sound mode of practice, which was accepted by a responsible body of medical opinion, in neglecting to warn the patient of the detailed risks the procedure could lead to.[9] The reasoning provided in *Sidaway* was that doctors could not be reasonably expected to educate every patient on every potential side effect or medical incongruity that may arise as a result of a procedure. *Sidaway* upheld the notion that a doctor's professional judgement in weighing the comparative risks and benefits should be conclusive yet neglected to address the fact that the doctor's transparency in discussing potential risks with the patient is the sole enabler of the patient's ability to exercise their freedom to grant or withhold consent to undergo the procedure. *Sidaway* no longer reflects the reality of healthcare provision, nor the relationship between medical professionals and their patients, and has instead attracted rather negative judicial consideration in following judgments. [10] The judicial decision in *Montgomery v Lanarkshire Health Board* ultimately confirms the assertion that there should be a disclosure of all risks involved in a procedure to guarantee that patients can provide informed consent.

In *Montgomery*, the patient was a former nurse who was heavily pregnant and vocally expressed her concern about encountering labour complications, namely the risk of shoulder dystocia. During the delivery, the aforementioned complications arose, and the newborn was born with several disabilities. As a result, the court held that there is a duty to take reasonable care to ensure that the patient is aware of any material risk involved in recommended treatment and of any reasonable alternative treatments.[11] The *Montgomery*-test posits that doctors have a duty to take reasonable care "that…[patients are] aware of any material risks" in treatments, both recommended and alternative[12]. The test of materiality asks whether "a reasonable person in the patient's position would be likely to attach significance to the risk", and whether the doctor is or ought to be reasonably aware that the patient would attach significance to the risk[13]. *Montgomery* asserts that material risk should be assessed through the lens of the patient, and demands a hybrid objective–subjective approach be taken in focusing not only on what the reasonable patient may find significant in the circumstances, but on what the specific patient may find significant in the relevant circumstances. [14] This means that professionals must have a considerable level of rapport with their patients to understand what material risk may mean to them. The *Montgomery* judgment allows the patient to conduct their own analysis of the risks and benefits of any treatment to then make an informed choice; it ultimately promotes patient autonomy and encourages professionals to decide treatments on a patient-by-patient basis.

[8] [1998] AC 232
[9] [1985] A.C. 871
[10] Paula Giliker, *Tort* (7th edn, Sweet & Maxwell 2020).
[11] *Montgomery* (n 3)
[12] *Montgomery* (n 3) [87]
[13] Ibid [87]
[14] Sarah Deaveney et al, "The far-reaching implications of Montgomery for risk disclosure in practice" (2019) 24 (1) Journal of Patient Safety and Risk Management (25-29).

The implications of *Montgomery* on medical professionals

The controversial upshot of *Montgomery* is that doctors who effectively disclose all risks of a procedure to their patient, regardless of remoteness, may unwittingly discourage a patient from undergoing the most effective route of treatment and could later be sued by the patient for failing to take reasonable steps to change their mind or to get them to see that the proposed course of treatment is the 'right' one.[15] Medical professionals must therefore ensure that the information disclosed to their patient is done so effectively so that they understand all potential outcomes, in addition to the route of treatment which is most strongly endorsed by modern medicine. This means a professional may have to spend more time on their patient to ensure there is informed consent than they would have done pre-*Montgomery*. Ultimately, a doctor's failure to explain the material risk properly could cause them to fall below the standard of care.

Consequently, in deciding medical negligence cases, the courts may also consider factors such as the risk of defensive practices and wastefulness of finite resources.[16] *Montgomery* could lead to defensive practice, where professionals make medical decisions in the interest of protecting themselves from the risk of litigation, such as ordering more exams or tests, which thus delays effective treatment and could have serious implications on a patient's health. The fear of litigation is prominent for professionals and their employers because where the tort is committed by the employee during the course of their employment in carrying out the responsibilities of their employment, the claimant can seek to hold the employer liable under the doctrine of vicarious liability. In the context of negligence claims, especially against public body authorities such as the National Health Service (NHS), courts are also mindful of the resource implications of imposing liability on a system that is extremely financially strained. [17]

The Limits of *Montgomery*

It should be noted that outside of these policy considerations by the courts, there are still well-established exceptions for doctors to withhold information from patients without fault. One such exception is the privilege of necessity, which arises where it may not be possible to disclose the risk to a patient, such as initiating emergency surgery on an unconscious patient. The other exception is that of therapeutic privilege, where the doctor may discern that disclosing information would be seriously detrimental to the patient's health. [18] For example, a doctor may not tell a patient who suffers from severe depression the worst-case scenario of medical intervention. Beside therapeutic and necessity privileges, there is another factor that limits the application of *Montgomery*, being the legal obstacle of causation. Causation leaves the burden of proof on the patient to illustrate that they would have changed their mind in hindsight. An evidential connection must be demonstrated by the patient to show that the disclosure of pre-operative risk would have led the patient to select an alternative treatment or not to proceed at all. If it is concluded, on a balance of probabilities, that the patient would have proceeded with the operation in any event, the claim will fail. [19] Significantly, in *Lane v Worcestershire Acute Hospitals NHS Trust,* it was highlighted that the question is not whether the patient could have received a better standard of care or whether, in hindsight, things could have been handled better, but whether the treatment given by these doctors is or is not supported by a responsible body of medical opinion and the causation test was used as a control mechanism to limit the

[15] Nicholas McBride, and Roderick Bagshaw, *Tort Law (*Pearson Education Limited 2018) 426.
[16] *Laing* (n 1)
[17] ibid
[18] *Giliker* (n 8)
[19] *Sarah Deaveney et al* (n 10)

amount of standard of care claims after *Montgomery*.[20]

It is evident that *Montgomery* affirmed that it is no longer appropriate to view patients as passive recipients of medical care, but to recognize that they should be actively involved in their own healthcare choices. The progression from *Bolam* to *Sidaway* to *Montgomery* illustrates that the courts have tried to create a balance between professional expertise and patient autonomy. The duty to disclose information allows patients to make their own informed choices when receiving medical care and to allot significance to any information provided on the basis of their own perception of the material risks. To ensure that effective care is provided while concurrently complying with the *Montgomery* rule, professionals may need to order more tests and scans for a patient to avoid the risk of liability for incomplete care. Professionals must also build a strong level of rapport with their patients to understand what material risk may mean to them. These obligations have led to a higher standard of care for patients because doctors must take the time to thoroughly explain the material risks of all treatments, as failure to do so may cause them to fall below the standard of care.

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Private Versus Public Policing and the Commodification of Social Control

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Since the 1970s, the realm of law enforcement has seen an exponential surge in its reliance on the private police sector, particularly in the UK where private security workers easily outnumber public police officers. Though this has largely been designated a modern phenomenon, it represents a retrogression towards the 1800s model, whereby prominent figures in the City of London could employ additional officers either by lobbying in the local ward vestry or paying them directly. This system was later replaced with the 'New Police' in 1829, denoting the successive transfer of policing from private to public hands.[1] The trend towards a system of 'plural policing' poses increasingly relevant questions regarding the public police sector as they exist now and whether the private police sector is established enough to entrust these responsibilities to. Academics in this field point out there is little research regarding the culture, powers, and methods of accountability for private police. With the research available, analysing the similarities and differences between public and private policing may be sufficient to expose their relevant shortcomings, including areas wherein one may surpass the other.

The public and private police sectors may share similar facets of occupational culture, but the two differ considerably in their powers and methods of accountability. Although the institution of private policing is designed to serve the public interest, the theory behind the 'commodification of social control' is regressive and does not negate the need for a publicly funded nonpartisan police force. This argument is established based on an analysis of salient literature regarding the occupational subculture of private police, their powers and safeguards, as well as their methods of accountability.

Occupational Culture

A significant study in policing can be more fully appreciated by analysing the underlying occupational culture. Police occupational culture represents an important social structure by framing behaviour and choices motivated by a myriad of values. In looking at the occupational culture of the public police, it is concluded that the key influencers of police culture are legal authority, danger to risk of harm, and the pressure to yield results.[2] These driving factors are also largely applicable to the private policing sector. One key imbalance of private policing is their lack of legal authority. While the public police enjoy an unfettered monopoly on force and authority, the private police essentially possess the same legal powers as any citizen. The private sector is largely driven by loss prevention, which is exacerbated in cases where an employer is constantly monitoring results, and where employees could face punishment if the results are

[1] Chris A. Williams, 'Constables For Hire: The History of Private 'Public' Policing In The UK' (2008) 18 Policing and Society 190.

[2] Benjamin Bowling and Robert Reiner and James W E Sheptycki, *The Politics of The Police* (5th edn, OUP 2019).

dissatisfactory.[3] Cooling et al. recognise that while discretion and power exist within the private sector, the same phenomenon also exist in public policing, whereby discretion increases as one moves down the hierarchical chain.[4] Regarding danger, there tends to be an overall belief that private policing does not carry the same risks as public policing. Indeed, the image of a docile night time watchman does not, for most, evoke images of dangerous confrontation with violent criminals. However, research conducted by Mark Button accounts for several instances of verbal abuse, threats of violence, and even assaults from the general public.[5]

Bethan Loftus, author of *'Police Occupational Culture: Classic Themes, Altered Times'*, attests to the significance of these driving factors, arguing that public police culture demonstrates remarkable continuity in terms of patterns. She points out that reform attempts are often unsuccessful in this area because change cannot be made in an underlying culture which is so consistent because the causes themselves are unchanging.[6] This idea of the impermeability of police occupational culture can be extended beyond the constraints of time and reform, to changes in title. Though the private police lack the level of legal title the public police have, the underlying causes remain intact, and therefore entirely relevant to their role, and arguably, just as unchanging. These causes yield similar results. Some key characteristics, as identified by Bowling et al., are an affinity for action, cynicism, pessimism, suspicion, isolation, and solidarity.[7] Group loyalty and isolation in the private sector is noted by Wood to be significant, specifically those operating in more dangerous environments. He attributes this to two reasons: mutual dependability in dangerous situations, and the willingness to cover each other's misconduct when discovered.[8] Paoline refers to this as a 'code of silence' and identifies a similar effect within the public sector.[9] Both Loyens and Button note a high level of solidarity amongst officers at the lowest organizational level, specifically within the UK.[10][11]

Machismo is another characteristic common to both cultures, though it is not as evident in the private sector. Machismo refers to an addiction to action and adrenaline and is identified as a common characteristic of public police officers.[12] Though this is identified as extremely common with bodyguards and bouncers, since the private sector is not driven by crime-fighting, but rather loss prevention, machismo is not as commonly denoted. Rigakos, author of *'The New Parapolice: Risk Markets And Commodified Social Control'*, performed one of the most seminal studies in this area on the Toronto security company 'Intelligrade', finding that there were significant levels of aggression in the bodyguards within the private sector, reinforced by on-the-job storytelling between guards.[13] Suspicion and pessimism are also extremely common to members of the private sector. Wakefield notes that this is exacerbated in the private sector, where the focus is put on risk management and potential loss. Guards were noted being encouraged in their training to be suspicious of

[3] Kim Loyens, 'Occupational Culture in Policing Reviewed: A Comparison of Values in The Public and Private Police' (2009) 32 International Journal of Public Administration 461 .
[4] James Q. Wilson, 'Varieties of Police Behaviour; The Management of Law And Order in Eight Communities.' (1970) 4 Sociology 283.
[5] Mark Button, *Security Officers and Policing: Powers, Culture, and Control in The Governance of Private Space* (1st edn, Routledge 2007).
[6] Bethan Loftus, 'Police Occupational Culture: Classic Themes, Altered Times' (2009) 20 Policing and Society 1
[7] Bowling (n 2)
[8] Jennifer Wood, 'Cultural Change in The Governance of Security' (2004) 14 Policing and Society 31.
[9] Eugene A Paoline, 'Taking Stock: Toward A Richer Understanding of Police Culture' (2003) 31 Journal of Criminal Justice 199.
[10] Loyens (n 3)
[11] Buttons (n 5)
[12] Bowling (n 2)
[13] George S. Rigakos, 'The New Parapolice: Risk Markets and Commodified Social Control' (2003) 32 Contemporary Sociology 640

unusual characters and occurrences, and to immediately address them.[14]

A distinguishing factor in private sector culture is the tendency towards poor working conditions. Button, in his study of two large UK security firms, found that many guards expressed dissatisfaction concerning the lack of breaks, poor facilities, and abysmal pay. The main trade union representing UK private guards, The Federation of Employed Door Supervisors and Security (FEDs), have long been campaigning for better pay and improved conditions; however, their public strength is weak.[15] Terpstra hypothesizes that this is a reason for fundamental differences in the culture—where public police, though working comparable hours, enjoy better conditions than those in the private sector.[16]

Status frustration is another significant contrast between the two sectors. Private police are often subject to affronts due to a general notion that they do not possess any significant power. This perceived lack of authority makes the general public look upon the private sector with a different brand of disdain.[17] Micucci, author of *'A Typology of Private policing Operations Systems',* theorizes that this stems from the assumption that many of those currently in the private sector have only joined after several failed attempts to join the public police force.[18] Academics identify this as leading to a disparity between the 'missions' of the two sectors. The private force attaches more significance to loss prevention and the need to satisfy clients, management, and tenants, rather than crime prevention. Loyens, author of *'Occupational Culture in Policing Reviewed: A Comparison of Values in The Public and Private Police',* calls this the problem of having "too many masters", where private security officers are required to please various patrons, each having different agendas and interests.[19] The emergence of what Rigakos coined 'wannabe culture' is a trend relevant to this discourse, as it highlights that many private officers seem to measure their success against what they perceive to be *real* police work. Contrarily, Button, author of '*Security Officers and Policing: Powers, Culture, And Control In The Governance Of Private Space',* found a trend in the UK dubbed as 'wannabe anywhere else' culture. This trend identifies that many private guards chose the job because they found it did not require much commitment and they simply could not find other work, coupled with evidence indicating that many private guards were actively seeking employment elsewhere.[20]

Though the two groups resemble each other in terms of loyalty, machismo, and suspicion, they differ in regard to working conditions, mission, status frustration, and the 'wannabe' cultures. Terpstra also points to the extent to which the private sector's culture may be responding to the public sector's culture; this alignment occurs where similarities are borne through the convergence between the two; private police adopting notions from the public sector and vice-versa.[21] Manzo, author of *'The Folk Devil Happens to Be Our Best Customer',* argues that there is not nearly as homogenous a culture within the private sector as there is in the public sector. This is because the private sector has a far greater amount of variability in the field, especially in the UK which has an extremely fragmented private sector.[22] Therefore, the culture between the two sectors is

[14] Alison Wakefield, 'Selling Security: The Private Policing of Public Space' (2004) 44 British Journal of Criminology 1001.
[15] Loyens (n 3)
[16] Jan Terpstra, 'Occupational Culture Of Private Security Officers In The Netherlands – Comparison With Police Officers' Culture' (2014) 26 Policing and Society 77.
[17] Loyens (n 3)
[18] Anthony Micucci, 'A Typology of Private Policing Operational Styles' (1998) 26 Journal of Criminal Justice 41.
[19] Buttons (n 5)
[20] Loyens (n 3)
[21] Terpstra (n 16)
[22] John Manzo, 'The Folk Devil Happens to Be Our Best Customer: Security Officers' Orientations To "Youth" in Three Canadian Shopping Malls' (2004) 32 International Journal of the Sociology of Law 243.

not parallel, as the private sector's culture is much more varied than the public sector.

Powers

Little attention is paid to the considerable powers at the disposal of the private sector. The common assertion is that private guards have no special powers beyond the average layperson. However, the powers of private guards must not be underestimated. Although they do not have the special legal competences to use force as public officers do, they do derive considerable power from other sources. In most westernized countries, the powers of the state (public police officers) are subject to legal and constitutional limits that are unequivocally enshrined in national legislation.[23] These safeguards are designed to protect citizens from falling victim to arbitrary uses of police powers. The UK is safeguarded by the Police and Criminal Evidence Act 1984 (PACE), as well as the Codes of Practice.[24] These statutes set out clear limitations and safeguards on the public police sector regarding general conduct, most notably stop and search, detention, and arrest powers. The exercise of the public police's powers must be necessary, justifiable, and reasonable. The rules surrounding the private sector, coined by Stenning, author of *'Powers And Accountability Of Private Police.', as* the 'tool-box' bears no resemblance to the public sector's, containing coercive powers that are also far less overt.[25] Additionally, constitutional and legal constraints are in no way applicable to the private police, whose actions do not constitute governmental actions. Though they do have access to some legal powers, the private sector derives its powers from non-governmental sources.

Button points out that private police enjoy rights that are available to any citizen, though the mirage of authority is exacerbated by the circumstantial implications of a security officer assuming a position of authority in social situations. Many powers enjoyed by private guards are contingent on consent coupled with the lack of public knowledge regarding individual rights and liberties. This usually results in private guards being able to command compliance with their orders.[26] The power to arrest, for example, is legally derived from the Police and Criminal Evidence Act, as amended by the Serious Organized Crime and Police Act 2005,[27] and the power to use force comes from the Criminal Law Act 1967.[28] When commands from private officers are consented to by members of the public, the officers receive a great deal more power than they would otherwise be entitled to demand.

Another notable source of power for private police is derived from being agents of property owners, for which the law extends certain powers. Being able to deny people access to properties when they are noncompliant is a significant power. Shearing et al. points out that where there is "mass private property" in urban environments, the ability to eject or exclude people from goods and services that are generally essential to lead a regular urban life is significant.[29] This results in a phenomenon unique to the private sector that Button calls 'policing by consent', whereby these coercive powers derive legitimacy only when the public wishes to gain access to certain places.[30]

Mopas and Stenning point out that the coercive powers of private police are often far less overt in securing compliance than those of their public counterparts. Private police are often quicker to resort to these tools than the public police, given that their mandate is less inclined towards crime-fighting, and more so towards loss prevention and purely commercial objectives. Though private police are

[23] Phillip Stenning, 'Powers and Accountability of Private Police.' (2000) 8 European Journal on Criminal Policy and Research 325.
[24] Police and Criminal Evidence Act 1984
[25] ibid
[26] Loyens (n 3)
[27] Serious Organized Crime and Police Act 2005
[28] Criminal Law Act 1967
[29] Clifford Shearing and Philip Stenning, 'Modern Private Security: Its Growth and Implications' (1981) 3 Crime & Justice 193.
[30] Loyens (n 3)

discouraged from exercising coercive tactics, they rarely face confrontation, as the authority that goes along with being an agent of property owners allows for 'policing by consent'. Thus private policing is socioeconomically much less stressful, costly, and dangerous.[31]

Despite the lack of legally binding authority, private officers enjoy a great deal more power than the ordinary citizen. Sarre, author of *'The Legal Powers Of Private Security Personnel: Some Policy Considerations And Legislative Options'* argues that the consequence of the public inattention paid to the actual powers of private police, is that rights are determined by a 'piecemeal array' of assumptions and privileges rather than the law itself.[32] This is especially true in the UK, which strongly endorses a system of self-regulation. These powers, coupled with a disparity in accountability for the private police, are a dangerous combination.

Accountability

Legal accountability of the public police sector is well-documented, unlike in the private sector where little is known about the mechanisms to hold private officers to account. Sarre points out that this lack of knowledge regarding the accountability of the private sector is of grave concern given the powers attached to them.[33] Indeed, there exists a common misconception that private police are subject to no accountability at all. Though they have nowhere near the same regulated methods of accountability as the public police, there are some notable methods of accountability for the private sector. The public sector's mechanisms for accountability is well-legislated and highly regulated. For complaints against public police, accountability can be ensured through the Professional Standard Departments, and the Independent Office for Police Conduct, who are responsible for investigating, resolving, and delegating the complaint if necessary. Public police officers are also held to account by Police and Crime Commissioners (PCCs). PCCs are elected bodies who are given governance and executive functions, including the ability to determine budgets, force priorities, and appoint Chief Constables.[34] Other significant safeguarding systems include the exclusion of evidence under the PACE Act and the option for the judicial review of police policy decision-making.[35]

Aside from the public sector having multiple methods of accountability, these methods are also inherently public, which is disparately juxtaposed to the private sector. Stenning argues that the most significant method of accountability for the private police is state regulation, with most western jurisdictions having state regulation of private policing operatives.[36] The UK is anomalous in this respect. The UK government has expressed hesitance to legislate on this body, instead allowing for industry self-regulation.[37] Johnston points out a distinctive issue with blind faith in industry self-regulation: it is completely voluntary, and often only self-serving. Customarily, the largest firms in the industry participate in this process, leading to allegations that this is done simply to dominate the market,

[31] Michael S. Mopas and Philip C. Stenning, 'Tools of The Trade: The Symbolic Power of Private Security - An Exploratory Study' (2001) 11 Policing and Society 67.
[32] Rick Sarre, 'The Legal Powers of Private Security Personnel: Some Policy Considerations and Legislative Options' (2008) 8 QUT Law Review 301.
[33] Rick Sarre, 'Accountability and The Private Sector: Putting Accountability of The Private Security Under The Spotlight' (1998) Security Journal 97.
[34] Rob Mawby and Alan Wright 'Police Accountability in the United Kingdom' (Written for the Commonwealth Human Rights Initiative 2005) <https://www.humanrightsinitiative.org/programs/aj/police/res_mat/police_accountability_in_uk.pdf> accessed 17 January 2020.
[35] ibid
[36] PACE (n 24)
[37] Home Office (1979) *The Private Security Industry: A Discussion Paper*. London: Home Office, p 17, quoted in Gill and Hart (1996) op cit, p 279.

which then instils public confidence in their clients.[38]

Similar to public police, private guards can be held accountable through criminal liability, each being subject to the laws of the jurisdiction in which they operate. This is reinforced for by the private sector, as authorities do not show the same level of reluctance to prosecute private officers that they show the public police, especially where private guards lack the recognised defences that police officers have (in exercising their public duties).[39] Civil liability and torts are far more significant for the private sector than the public. Public police enjoy substantial amounts of immunity from civil liability in many jurisdictions. In *Hill v Chief Constable of West Yorkshire*,[40] the House of Lords held that the police were not held liable for neglecting to protect the victim from the defendant, relieving public officers from any duty to the general public except where they themselves create the risk.

Contrarily, this level of immunity does not apply to private police, as Stenning identifies, oftentimes there are only a few witnesses aside from the plaintiff and defendants themselves in these cases. In testimonials, plaintiffs are often economically disadvantaged, and the police enjoy the benefit of the doubt resulting from absolved cases. However, awareness of civil liability in the private sector is significant in promoting awareness and conformity with civil standards.[41] A significant accountability method unique to the private sector is accountability through the market. Shearing et al. argue that though the accountability through the market notion is a largely informal method, it is extremely useful because companies are notorious for engaging in aggressive practices (and even in insufficient practices) that can result in the customer to redirect their patronage to another company.[42] This trend is particularly noted in high-crime areas, where landlords, for example, find that tenants in their buildings will seek to find accommodation elsewhere if they do not think security arrangements are sufficient.[43]

Although the private sector's systems of accountability are not formalized, they do exist. Despite the rate of growth in this field, the government has shown substantial reluctance to legislate in the private area in the same way they do for the public sector. Private police officers are increasingly given duties that have historically been entrusted to the public police, but the accountability methods are not migrating with them. The amount of coercive power they have is a reason for dependence on state-regulation rather than self-regulation.

The Theoretical Problem of Private Policing

The private police fulfil considerable public interests in areas of private ownership, people are guaranteed an added layer of protection where the private police are available along with the public police. It is undoubtedly in the interest of property owners to have a second layer of security enforcement guaranteeing safety, not only to them, but to the public that frequents these area. The private sector does not require public funding for specific security requirements that are not universal to all. However, there are issues with the fundamental idea of private policing.

Despite the implications of a lack of public knowledge and awareness as to the powers of private police, private policing is still considered regressive. It is important to note that the UK is unlikely to return to a completely private police force, but the institution of private policing nonetheless poses some logical concerns. Rigakos argues that private policing is fundamentally flawed because it commodifies

[38] Leslie Johnston and Phillip Stenning, 'The Rebirth of Private Policing' (1994) 19 Canadian Journal of Sociology 413.
[39] PACE (n 24)
[40] UKHL 12, [1989] AC 53
[41] PACE (n 24)
[42] Shearing (n 29)
[43] Ian Loader, 'Private Security and The Demand for Protection in Contemporary Britain' (1997) 7 Policing and Society 143.

social control.[44] The concept of a partisan and paid police force evokes images of an outdated system where only those who can afford protection will be afforded it those who cannot are left behind to fend for themselves. Democracy cannot allow for the commodification of what is a fundamental and elemental part of the state: the rule of law. Where peace and social order are contingent on citizens obeying laws created by the state, enforcement of these laws must be universal, equal, and guaranteed.

Loader, the author of '*Private Security and The Demand for Protection in Contemporary Britain*', argues private security to be an oxymoron. Loader points out that security is a shared concept that can be defined as a collectively and publicly generated state of affairs.[45] This state is derived from the citizen's trust and faith in social institutions. The concept of authority is therefore a product of "richly textured social relations".[46] Private security contradicts itself if security is itself a social concept, the notion of purchasing the right to security is flawed and unconstitutional.[47] If people begin to lose faith in policing institutions and begin perceiving security as something that they themselves are responsible for attaining to the exclusion of all others, this will result in public social division.

Hope, the author of '*Crime and Inequality in England and Wales*', points out that the trend towards private security will likely result in marked displacement. [48] While crime rates may be temporarily reduced in affluent and protected areas, the costs are simply borne elsewhere by less protected areas. If this trend of commodification continues, the affluent residential areas will thrive at the expense of the poorer areas and class divisions will become even more deeply entrenched.[49] Johnston et al. argue that the trend towards this commodification has coincided with a specific blend of social and political conditions in which the possibility of a safe and cohesive society has been largely undermined.[50] Rather than a civic ideal, there is a trend towards a society in which public problems, such as high crime rates, become personal rather than social problems. This is exacerbated where methods of accountability for the private sector are not as robust as they should be given their coercive power. As Loader argues, moving down this path towards private policing will result in "social polarization and social apartheid".[51] Security needs to be construed as a public right which is available to all equally and universally, with the precondition being citizenship, not sufficient funding. The trend of moving away from private police, such as is seen in the emergence of the 'New Police' in the City of London, coincided with a social progression away from oligarchy (and perhaps even aristocracy), towards democracy and equality. For the UK to return to a system in which the rich can protect themselves at the expense of the poor is deemed undesirable and undemocratic.

The institution of private policing differs greatly from that of public policing. It has been established that where occupational culture between the two have several similarities, their powers, and their methods of accountability differ significantly. Many academics have justified a lack of research into the institution of private policing, and its long-term consequences. From a purely democratic and legal standpoint, the theory of private policing has dangerous implications for democracy and social control, none of which are desirable nor conducive to a progressive nation.

[44] Wakefield (n 14)
[45] Loader (n 43)
[46] ibid (n 43)
[47] ibid (n 43)
[48] Tom Hope, 'Crime and Inequality in England and Wales' (1995) Cropwood Roundtable Conference, Institute of Criminology, University of Cambridge.
[49] ibid
[50] Johnston (n 38).
[51] Loader (n 43).

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Compensation Culture in the Tort of Negligence: Myth or Reality?

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There is a mindset inherent in humanity where every misfortune that befalls must be associated with a blameworthy agent, as a way to seek compensation for consequential detriments; this can be described as 'compensation culture'. The compensation culture problem alongside the 'litigation crisis' is frequently discussed in English law through publications, press reports and political debates. The perspective on the topic brings to light the question of the legitimacy of the issue and the validity of the term 'compensation culture'.[1]

Stephen Byers, former MP for the British Labour Party, criticised the detriment of 'excessive litigiousness' on the country's economy and citizens' mental state,[2] in response to the growing trend of compensation culture.[3] A Conservative Party politician, David Davis, promised to "cut out the cancer of litigation" if elected.[4] Politicians and ministers are highly influential figures in society; therefore, political acknowledgment of "compensation culture" illustrates the significance of this narrative. Informal political speeches have argued that compensation culture persists; however this article aims to analyse whether these claims can indeed be defended.

Myth or Reality

In 2002, the Institute of Actuaries published a report suggesting the growth of compensation culture, with the total cost of compensation claims amounting to £10 billion a year or 1% of GDP, including court fees and administration expenses.[5] Nevertheless, the data collected is inaccurate, as the calculated cost of compensation culture, according to Marshall, is mostly guesswork and "heroic assumptions".[6] The British Better Regulation Task Force reported in 2004 that the expenditure on compensation claims in 2002 stood at 0.6% of GDP, lower than several other countries including, Australia and the United States of America that reported figures of 1.1% and 1.9%, respectively.[7] The report denies that England is at risk of compensation culture, despite evidence supporting the opposite. The growth of compensation culture was framed to merely be a myth stemming from a public misperception of tortious litigation.

The Reasoning behind the Misperception

Among the many factors feeding into the misperception of compensation culture is the introduction of conditional fee agreements under the Courts and Legal Services Act 1990. Conditional fee arrangements, also known as the

[1] Kevin Williams, 'State of Fear: Britain's 'Compensation Culture' Reviewed' (2005) 25 Legal Stud 499.
[2] Manchester Evening News, 'Compensation Culture "Hitting Schools and NHS"', *Manchester Evening News* (13 August 2004) < https://www.manchestereveningnews.co.uk/news/greater-manchester-news/compensation-culture-hitting-schools-and-nhs-1103638> accessed 12 December 2021.
[3] Michael White, 'Curb Claims Culture, says Byers', *The Guardian* (10 March 2004) <https://www.theguardian.com/politics/2004/mar/10/uk.schools> accessed 12 December 2021.
[4] David Davis, 'Victim Nation', *The Spectator* (21 August 2004) <https://www.spectator.co.uk/article/victim-nation> accessed 12 December 2021.
[5] The Institute of Actuaries Working Party, 'The Cost of a Compensation Culture' (The Institute of Actuaries 2002)
[6] David Marshall, 'Compensation Culture' (2003) 2 JPIL 79.
[7] Great Britain Better Regulation Task Force, 'Better Routes to Redress' (Better Regulation Task Force 2004).

'no win, no fee' deal, replaced legal aid in personal injury claims. Contingency-based agreements give claimants the option withhold payment from their legal representatives in the event of failed claims. In return, legal representatives can charge a success fee in addition to the standard rates to compensate for the risk of not getting paid if they lose their case. Additionally, the Access to Justice Act 1999 introduced an insurance policy that enables the claimant to shift the success fee, known as an 'uplift' towards the defendant when the claimant wins the case. The introduction of conditional fee agreements and insurance policies encouraged the development of a compensation culture by making it easier for claimants to sue without worrying about financial strain.[8] It is important to note that only 93% of cases taken on a 'no win, no fee' basis were successful.[9] These figures demonstrate that contingency contracts were used for cases that were most likely to succeed on valid grounds, and the problem of vexatious litigants making a claim without worrying about the minimal consequences were likely to be inconsequentially small.[10] The government continues to believe that the conditional fee agreement does not contribute towards compensation culture, but rather that the introduction of such contracts were designed to increase access to justice. Although such contracts did not directly cause the perception of a compensation culture, the increased public awareness of the possibility to sue without personal financial risk, combined with the media brainwashing individuals with unmeritorious claims being brought, has nonetheless contributed to the myth of an existing compensation culture.[11]

Furthermore, the adversarial tactics of Claims Management companies and solicitors has also contributed greatly to the myth of the growing compensation culture. According to the Better Regulation Task Force,[12] Claims Management companies were at the source of various claims, as they would intervene between potential claimants and legal service providers to secure further cases. According to Actuaries' Report, Accident Management companies take on 60,000 cases per month.[13] The introduction of conditional fee arrangements and insurance policies led to the rapid growth of third-party management companies with increasing demand for private sector providers.[14] Even after the two leading companies in the sector went into liquidation in 2003, individuals are still encouraged by more unethical claims management companies to 'have a go', despite their claim having minimal chances of success.[15]

The media nevertheless participated in the birth of the myth. The press often reports many stories on significant claim cases without providing detailed information. The media falsely represents that huge pay-outs will be available if claimants sue in tort; however, these cases involving large sums are usually based on unjustifiable grounds. Tony Blair argued that, "People are entitled to sue, and often the most outlandish cases that are brought are dismissed. But their headlines live on, create a myth and the myth is acted upon."[16] The media continues to falsely portray "a culture in the UK of people making false claims for personal injuries" to the public.

The public misperception of compensation culture has a detrimental impact on the law. The threat of litigation seeking substantial compensation, even for dubious cases, has instilled fear among the public of potentially spending fortunes on defending unreasonable claims, with many believing themselves to be at risk of being unfairly sued.[17] This fear induces risk-averse behaviour in society

[8] Constitutional Affairs Committee, *Compensation Culture* (HC 2005-06, 754-I).
[9] Williams (n 1).
[10] ibid, 2.
[11] ibid.
[12] Better Regulation Task Force (n 7).
[13] The Institute of Actuaries Working Party (n 5).
[14] Constitutional Affairs Committee (n 8).
[15] Better Regulation Task Force (n 7).
[16] Tony Blair, 'Common sense Culture, not a compensation culture' (Speech at the Institute for Public Policy Research, London, 26 May 2005).
[17] British Institute of International and Comparative Law, Compensation Culture. (BIICL 2020).

which harms the nation socially and economically.[18] A Harvard study from 1990 suggested that the perceived risk of being sued was three times higher than the actual risk.[19] The unwillingness to take risks due to the compensation culture limits the economy's growth potential as it prevents creativity and innovation in the market. People will choose to settle for ordinary ideas instead of taking business risks in fear of being unjustly sued. Risk-averse behaviours cause an economic standstill, and as a result, the nation will be prevented from adapting to social changes, eventually falling behind international competitors. The misperception of compensation culture triggers the risk averse behaviours and forces parties to settle their disputes outside of courts, despite their claims being entirely baseless. As a result, individuals avoid the risk of paying a large sum if they lose their case. Giving in to the myth of compensation culture creates unfairness in legal proceedings because individuals give up their rights to defend themselves and are in a weaker position to settle their disputes. There are disadvantages of the false perception of compensation culture, however the fear of being sued leads to improved risk assessments in schools and public bodies, reducing the number of tortious behaviours.[20]

The Development of Negligence in Tort

The development of negligence in tort law is fundamental to the myth of compensation culture. For a claimant to sue under the tort of negligence, they must establish three elements: i) a duty of care owed by the defendant. ii) that the defendant breached their duty of care, and iii) the claimant must prove that as a result of the breach, they suffered a loss that is not remote.[21] Compensation culture reflects a public willingness to source the cause of misfortunes using the tort of negligence to claim damages. The growth of risk-aversive behaviour is due to the fear of being sued frivolously and spending unnecessary money on defending oneself. The law governing the tort of negligence seems to unwittingly promote a compensation culture.

The standard of establishing a breach of duty seem to have lowered in line with the development of the law. *Chester v Afshar* [2004] is a significant case because the court held that the failure to disclose risks associated with medical procedures would amount to medical negligence causing a breach of duty. It is irrelevant whether the knowledge of the risk would have influenced the patient's decision to undergo the operation because the failure of disclosing such risk will amount to a breach of duty.[22] In *Chester v Afshar*, the doctor performed the medical procedure flawlessly but was nonetheless liable in negligence due to his failure to disclose the risk of the operation, which materialised into reality. Another case illustrating the biases towards claimants is *Fairchild v Glenhaven* [2002].[23] The court allowed a "leap in evidentiary gap" by establishing a breach of duty as long as the claimant can show that the defendant negligently exposed them to asbestos and as a result, contracted mesothelioma. According to the 'leap in evidentiary burden', the claimant need not show a direct chain of causation because it is sometimes impossible to prove causation. Thus, the defendants can be liable even if their negligence in causing the exposure of asbestos was not the source of mesothelioma; the legal doctrine is referred to as the *Fairchild* doctrine. The case of *Barker v Corus* [2004] further developed the *Fairchild* doctrine.[24] The claimant contracting mesothelioma worked for multiple employers where the work conditions exposed him to

[18] Williams (n 1).
[19] Ann Lawthers, Russell Localio, Nan Laird, Stuart Lipsitz, Liesi Hebert, Troyen Brennan, 'Physicians' Perceptions of the Risk of Being Sued' (1992) 17 JHPPL 463.
[20] Lord Falconer, 'Risks and Redress: Preventing a Compensation Culture' (Speech at Risk and Redress Conference, London, 17 November 2005) <https://www.lgcplus.com/archive/risk-and-redress-preventing-a-compensation-culture-17-11-2005/> accessed 14 December 2021.
[21] *Donoghue v Stevenson* [1932] UKHL 100
[22] Ibid.
[23] [2002] UKHL 22
[24] [2004] UKHL 20

asbestos. It followed that the employers would only be held liable for the exposure period that aligned with the claimant's employment contracts. The employer would not be responsible in compensating the claimant for the entirety of their injury, but rather only a portion of employment as determined by the judgment. The development of the *Fairchild* doctrine indirectly promoted compensation culture. Businesses and insurers have faced financial decline with compensating employees for mesothelioma mainly because the disease takes a long time to develop, and such actions are unforeseeable by insurance companies. Williams suggests that these developments on liability insurance are "uncertain and disputed". Nevertheless, such claims caused a psychological impact on defendants and encouraged the perception of compensation culture.[25]

Attention has been given to the increasing concern over the growth of compensation culture, and judges feel the need to cut back on findings of liability, as illustrated in the case of *Tomlinson v Congleton Borough Council*,[26]. In this case, a person fell into a lake owned by the defendant and hit his head, resulting in severe neck injuries. The claimant attempted to claim compensation arguing that as occupiers of the park, the defendants breached their duties under the Occupiers' Liability Acts 1957 and 1984. The claim was successful in the Court of Appeal but overruled by the decision of the House of Lord upon further appeal. Lord Hoffman gave the final verdict and stated that the claimant was solely at fault because he was aware of the 'Dangerous Water. No Swimming' sign and ignored it. As a result of his actions, the claimant deliberately took the risk which does not give rise to a duty owed by the occupiers under the Occupiers' Liability Acts 1957 and 1984. It is evident that judges are hesitant to find defendants unreasonably liable to pay compensation, thus indicating a judicial affinity towards quelling any indication of compensation culture. In *Majrowski v Guy's & St. Thomas NHS Trust*,[27] Baroness Hale of Richmond articulated that, "There is already concern amongst some of our legislators that the scope for claiming compensation, even for recognised physical injuries, have gone too far."[28]

Compensation Act 2006

To tackle the problems of compensation culture, Parliament passed the Compensation Act 2006 to assure public protection by the law and reduce meaningless claims under the tort of negligence. The act i) specifies certain factors that may be considered by a court in determining a claim in negligence or a breach of duty; ii) set out provisions relating to damages for mesothelioma; and iii) make provisions for the regulation of claims management service.[29] The purpose of passing the bill was to discourage risk-averse behaviours and to eliminate the factors that perpetuate the perception of compensation culture, such as claims management services and a guide for cases concerning mesothelioma.

The Act has been criticised for whether it adequately addresses the main problem of compensation culture. Alan Gore QC argues that "[t]here is a real need for education to make it clear that compensation is only available where there has been an avoidable injury, and not for accidents."[30] To entirely eliminate the myth, individuals' state of mind should be given priority and not the law itself because the legislation does not demystify the rumours and fears of litigation. Defendants must be aware of spurious claims, and the media should cease fuelling the false perception of compensation culture. The Association of Personal Injury Lawyers has also criticised the Act for complicating the law on negligence and introducing an ambiguous notion of desirable activity. Nevertheless, the Act allows the state to designate a body to regulate claims management services and provide the regulatory framework

[25] Williams (n 1)
[26] [2003] 3 WLR 705
[27] [2006] 3 WLR 125.
[28] Ibid.
[29] Compensation Act 2006 (CA 2006).
[30] 'Responses to the Compensation Bill' (2005) NLJ 816.

for providers required to comply with rules and codes of practices.

Social Action, Responsibility and Heroism Act 2015

The Social Action, Responsibility and Heroism Act (SARAH) 2015 [31] was passed to mitigate compensation culture. Similar to the Compensation Act 2006, SARAH 2015 aims to reassure potential defendants that upon taking a responsible approach for the safety of others, courts are unwilling to allow a claim of compensation to be brought against them. In addition, SARAH 2015 provides additional factors to consider when establishing negligence under tort law. However, the act has been criticized as being unlikely to significantly impact compensation culture [32] because it will only apply to cases brought before English courts. The current public perception is that litigation will be costly due to the bias against claimants. Conversely, many defendants do not prefer risk involvement in proceedings and instead settle outside the court.[33]

It is merely a myth that England has a growing compensation culture. Evidence from the government's Better Regulation Task Force and the Institute of Actuaries eradicates the myth in their reports. The false perception of claims has led to an increase of public fear and risk-averse behaviour. These factors affect the societal and economic advancements of England. To eliminate compensation culture, attention should be given to the spread of false information and to educating citizens on the law. Given how the media portrays the tort of negligence, litigation should be monitored, and a system of checks and balances should be implemented to impose responsibilities on the press when spreading false information. The Compensation Act 2006 and SARAH Act 2015 alongside academic criticisms regarding legislation, indicate the government's awareness of the fear of trivial cases and reflect an attempt to provide a solution. The liability issues surrounding compensation culture are primarily political. Harlow expressed concern about the incidence of claims made against state actors accused of regulatory failure, and the lack of attention given by policymakers to the associated compensation issues, considering their impact on public resources and budgets. The tort of negligence requires detailed reform to exclude the possibility for the legislative and judicial branches to implement policies that benefit their political agendas.

[31] Social Action, Responsibility and Heroism Act 2015 (SARHA 2015)
[32] Ibid.
[33] Madeline Rees and Nicola Mallen 'New Act To Combat The So-Called "Compensation Culture"' (*Geldards Law Firm*, 2015)

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A Cycle of Mistrust: A Critical Examination of Government Race Reports as a contributor to cyclical mistrust amongst BAME communities towards the English Criminal Justice System

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In the wake of the murder of George Floyd on 25 May 2020 in Minneapolis (MI),[1] the Black Lives Matter movement which aimed to target systemic racism stridently through hundreds of protests, pop-up fundraisers, and a global demand for racial justice took the world by storm. In response, UK Prime Minister Boris Johnson launched an investigation by the Independent Office for Police Conduct (IOPC) and a separate report by the Independent Commission on Race and Ethnic Disparities, simultaneously denouncing his support for the vandalism of statutes and violence against police officers, yet still insisting on his sympathy for the cause. The data gathered from the reports have been overwhelmingly disappointing as they demonstrate cogent statistical proof of racial disparities but controversially conclude that "Britain is no longer a country where the system is deliberately rigged against ethnic minorities".[2] The English Criminal Justice System (CJS) has achieved consciousness of its perpetuation of institutionalized racism, where the identifiable issues are apparent both in scholarship and in practice but the policy reforms required to amend them have yet to be meaningfully mobilized, which consequently exacerbate social inequalities via a cycle of public distrust. This essay will first explore why a lack of trust has manifested between BAME-identifying groups and the English CJS, despite repetitive government commissioned reports geared towards combatting systemic racism.[3] Next, it will identify how this lack of trust cyclically exacerbates BAME experiences in the trial process through plea deals and through BAME overrepresentation in the prison system. Finally, it will explain how the lack of trust is worsened by policies re-educating society on race issues every time ethnic disparities are called to issue, rather than moving forward from where the last reform left off.

Sourcing the root of the Lack of Trust

The 2020 race riots were certainly not the first of their kind in Britain; reports in response to antiracist outcries have repeatedly been commissioned such as: The Scarman Report in 1981 which came shortly after the Brixton riots, the Macpherson Report which followed the "horrific murder of Stephen Lawrence" in 1993, and most recently the Commission on Race and Ethnic Disparities Report in 2021 which was published right off

[1] 'George Floyd: What happened in the final moments of his life', *BBC News* (London, 16 July 2020) <https://www.bbc.co.uk/news/world-us-canada-52861726> accessed 14 December 2021

[2] Paul Brand, 'Black Lives Matter report: System 'no longer rigged against ethnic minorities', says review', *ITV News* (London, 31 March 2021) < https://www.itv.com/news/2021-03-30/overt-racism-persists-but-issues-around-race-less-important--landmark-report>

[3] **Author's Note:** The Commission on Race and Ethnic Disparities Report (2021) highlighted the term 'BAME' as "no longer helpful", as it is "reductionist" [32]. This deduction was met with mixed reactions, some critics believing labelling issues ancillary to the issue of systemic racism, while others embraced the distance from umbrella terms which group ethnic minorities together. Most recently, the think tank British Future found that "ethnic minority" is the preferred umbrella term, although umbrella terms themselves have the potential to be problematic. See also Author's Note at end of essay.

the back of The Lammy Review in 2017.[4] All the reports before the most recent 2021 report came to a common conclusion—that racism was still being perpetuated in society through bias, "overt discrimination", covert discrimination, and institutional mediums which silence marginalised narratives.[5] The reports, although striving for transparency through comprehensive data collection and public accessibility, have in ways been instrumental in exacerbating the lack of trust between BAME communities and the English Criminal Justice System (CJS). These idealistic reform proposals consistently identify key issues causing the racial disparities but offer no legal solutions, only sets of recommendations which are more likely to get blockaded than implemented. The reports additionally comprise of hundreds of pages of convoluted research,[6] which aim to quell the growing unrest by showing the government is hard at work without rearing any tangible positive change.

Another fundamental source of distrust in the CJS "among BAME communities is the lack of diversity among those who wield power within it", which Lammy refers to as a "gulf between the backgrounds of defendants and judges".[7] In 2017, only 19% of the CJS staff were from BAME backgrounds: 7% in the Judiciary, 11% of Magistrates, and 6% of police officers.[8] The 2021 Commission report found that "no police services are fully ethnically representative of the population they serve", but withheld the statistics on BAME representation in the judicial and legal positions of the CJS. A 2020 report notes that the Judicial Appointment Commission (JAC) reported "only three High Court Judges and two Court of Appeal Judges are from BAME backgrounds…[and] there are no BAME Supreme Court Justices".[9] These statistics are chalked up as products of circumstance arising from the narrow distribution of BAME populations in densely-populated demographics, rather than as a race issue.[10]

The claim that "policing practice in the UK is institutionally racist was widely accepted after the Macpherson Report",[11] which exposed the disproportionate targeting of BAME citizens through stop-and-search. Stop-and-search was initially intended to be a non-discriminatory policy which required police officers to stop-and-search whomever they suspected to be in "possession of a weapon" or simply deemed suspicious.[12] Although sound in policy, in practice it was found "black people had the highest stop and search rates in every police force area for which there was data" between 2018-2019, despite "the 'find' rate for drugs [being] lower for Black than White people".[13] This showed that Black people were being suspected on weaker grounds of suspicion than White people, or that Black people were more likely deemed suspicious by police than White people without solid grounds. The Lammy Report (2017) reported that Black men were "more than three times more likely to be arrested than White men" and this exact statistic was reiterated in the March 2021 report.[14] [15] These statistics mark a trend of the CJS disproportionately targeting BAME citizens and, whether intentionally or not, the numbers alone

[4] David Ormerod, 'Racism in the Criminal Justice System' (2020) Crim LR 8 659, 659.
[5] David Lammy, 'The Lammy Review' (*UK Government*, 8 September 2019) < https://www.gov.uk/government/publications/lammy-review-final-report> accessed 20 April 2021. 69
[6] Joint Committee on Human Rights, *Black people, Racism, and Human Rights: (3) Failures to Secure Black people's Human Rights* (11 November 2020) <https://publications.parliament.uk/pa/jt5801/jtselect/jtrights/559/55906.htm> accessed 23 April 2021. [26]
[7] Lammy (n 5) 22
[8] Lammy (n 5) 23
[9] Ormerod (n 4) 662
[10] Commission on Race and Ethnic Disparities, *Commission on Race and Ethnic Disparities: The Report*, 1-258 (31 March 2021) < https://www.gov.uk/government/publications/the-report-of-the-commission-on-race-and-ethnic-disparities> accessed 20 April 2021. 37
[11] Jules Holroyd, 'Implicit Racial Bias and the Anatomy of Institutional Racism' (2015) 101 CJM 31, 30.
[12] ibid., 31.
[13] Ormerod (n 4) 659
[14] Lammy (n 5) 17
[15] Commission on Race and Ethnic Disparities (n 10) 148

perpetuate a growing perception of an 'us and them' division line.[16]

Cyclical Disadvantages

Unfortunately, the lack of trust from BAME individuals towards the CJS seems only to disadvantage them further as it promotes general scepticism towards legal aid advice which then leads to misinformed decision-making during court proceedings, and consequently contributes to the disproportionate imprisonment rate of BAME individuals. An example of this is identifiable through plea deals in litigation. The CJS offers incentives to defendants who plead guilty early on in court proceedings, as they "prevent the stress placed on victims" and save both public time and money for "investigations and trials";[17] The Sentencing Council has explained that an early admission of guilt can reduce sentences, or in some cases, allow defendants "gain access to interventions" to keep them out of prison altogether.[18] Despite these clear benefits, Black and Asian men are more than one and a half times more likely to enter a 'not guilty' plea over their White counterparts and BAME women are "all more likely than White women to enter 'not guilty' pleas at Crown Court".[19] The Lammy Review reported, in England and Wales between 2006-2014, 59% of Black defendants pleaded 'not guilty', meaning a larger number of Black defendants were systematically giving up their chance at a reduced sentence.[20] Lammy further attributed these disadvantages to the lack of trust by BAME individuals towards the CJS.[21]Another issue which perpetuates the estrangement of BAME individuals from the CJS are the massive gaps in data such as are found in Magistrates' Court records, which allegedly keep "no systematic information as to whether defendants plead 'guilty' or 'not guilty'".[22] Incomplete data discourages BAME individuals from trusting legal advice in a system which appears statistically hinged against them. The Lammy Report also infers that White defendants are treated more leniently than BAME defendants over similar offences.

The overrepresentation of BAME individuals is especially noticeable in the prison system, The Lammy Review reports that "Black people make up 3% of the general population but 12% of prisoners" and that "21% of children in custody are Black".[23] In the 2021 report, the Commission reiterated the 2017 data and stated that "Black people and people in Mixed ethnic groups" were still disproportionately represented.[24] Amongst 21,370 cases in a study regarding drug offences, "the odds of receiving a prison sentence were around 240% higher for BAME offenders, compared to White offenders" and often times similar offences would lead to more severe punishments for Black people than for their White counterparts.[25] [26]The subtle shifts in data suggests that little has changed in terms of BAME representation between the two reports. Despite this however, the 2021 Commission reaches a much different conclusion than the 2017 review.

Repetitive Policy Provisions

In the last five years alone, the UK government has commissioned over seven separate reports to investigate "structural racial inequalities in state institutions and processes, from the Home Office to the Youth system", such as the 'Windrush Lessons Learned Review' (2020), the Race Disparity Audit (2017), The McGregor Smith Review (2017), and the Angiolini Review (2017), in addition to those

[16] Lammy (n 5) 6.
[17] ibid., 25.
[18] ibid., 26.
[19] ibid., 26.
[20] Alexandra Jarvis, 'Systemic Racism in the UK Criminal Justice System: An Undeniable Reality', *The Norwich Radical* (Norwich, 24 September 2020), <https://thenorwichradical.com/2020/09/24/systemic-racism-uk-criminal-justice-reality/> accessed 23 April 2021.
[21] Lammy (n 4) 26.
[22] Lammy (n 4) 33.
[23] ibid., 45.
[24] Commission on Race and Ethnic Disparities (n 10) 148.
[25] ibid., 33.
[26] ibid., 46.

previously mentioned.[27] Evidently, this repetitive exercise is another source of frustration for BAME individuals. Baroness Lawrence asserted that "every time we have a report, they go back to the beginning again and keep repeating the same thing…The lessons are there already for us to implement. Until we start doing that, we will keep coming back…repeating the same thing over and over",[28] explaining that the same issues arise continually, but "the failure to act in response to reports and inquiries" is what is eroding the trust of Black people in the CJS.[29] This is apparent in the highly-criticised 2021 report which spends a significant portion re-explaining the history of racism in the UK, as well as a section titled "Why 'BAME' doesn't work", which very briefly addresses the implicit harms of using outdated nuanced identifiers like 'BAME', which are reductionist.[30] David Lammy MP himself publicly expressed a dissatisfaction over how his 2017 review was discounted by the very government who commissioned it, saying: "on my count, they have implemented six of the thirty-five recommendations I made", despite the Prime Minister suggesting they had implemented sixteen.[31] In a 2015 Crime Survey for England and Wales, "51% of people from BAME backgrounds…believe[d] that the criminal justice system discriminates against particular groups and individuals" and a 2020 report showed "85% of Black people do not believe that they would be treated the same as a white person by the police". [32] [33] The issue then apparently rests on the performative style of government advocacy that repeatedly commissions investigations on the same issues and rears new compelling recommendations in each iteration, while going on to implement enough of them to appear proactive.

The English CJS exacerbates social inequalities by commissioning government reports which promise change but only offer recommendations, and thus lead to an air of mistrust between the CJS and BAME communities. This is matched by the disproportionately high number of BAME individuals being targeted by the CJS, which exacerbates the lack of trust and disadvantages BAME groups in the court process and consequently, the prison system. Despite the UK government's antiracist front which assures the public that UK legislation is regularly amended to benefit all citizens equally, the contradictive nature of the published statistics which demonstrate that the odds are definitively stacked against BAME citizens, unwitting contributes to the burgeoning lack of trust and further disadvantages Black people in the English CJS.

Author's Note: At the time of writing, 'BAME' was the socially acceptable term for ethnic minority individuals, as evidenced by its use in the Lammy Report (2019) and the Joint Committee on Human Rights Report (2020). Consequently, most scholarship written since the term's inception in 2001will include the acronym. The UK government website's 'Style Guide', updated in December 2021, includes a section titled 'Writing about ethnicity', where they reject terms 'BAME' (black, Asian, and minority ethnic) and 'BME' (black and minority ethnic) as unhelpful "because they emphasise certain ethnic minority groups…and exclude others". Instead, they have put forth 'ethnic minorities' as the new acceptable term to refer to all ethnic groups, "except the white British group".[34] I have chosen not to amend the term in this essay, for the reason that this essay is about the legal complexities of systemic racism in a country which denies its very existence, and not racial labelling. The amendment of 'BAME' to 'ethnic minorities' results in the same divisive (reductionist) dynamic of 'us and them', which I consider more problematic than what society decides to label the 'them' in that dynamic. For the purposes of this essay, the term 'BAME' should be

[27] Joint Committee on Human Rights (n 6)
[28] Joint Committee on Human Rights (n 6) 1.
[29] ibid. 1.
[30] Commission on Race and Ethnic Disparities (n 10) 32.
[31] Joint Committee on Human Rights (n 6) 1.
[32] Lammy (n 5) 6.
[33] Joint Committee on Human Rights (n 6) 1.
[34] Race Disparity Unit, 'Writing about Ethnicity' (*UK Government*, December 2021) < https://www.ethnicity-facts-figures.service.gov.uk/style-guide/writing-about-ethnicity> accessed 10 January 2022.

regarded as a signifier of data analysis and not a identifying term. It is an acronym that has no place in verbal exchange, nor in any scholarship written past 2021, when the term was publicly condemned as a microaggression. However, I hope readers will bear in mind the relevance of the term during the time of writing as the government-accepted term which appears in the relevant data findings, and appreciate the value of maintaining the veracious integrity of accurately depicting the past, as it happened. Between 2000-2021, any person who fell outside the 'British White' category was labelled as 'BAME' and this essay reflects that reality. I do not think replacing every instance of the term 'BAME' in this essay would serve the purpose of accurately depicting Britain's racial past (including its missteps) in constructing a faithful depiction of the disadvantages of racialised people in the English CJS. The campaign leader of 'Abolish BAME' had reportedly reacted to the removal of the term with much enthusiasm, stating "putting all minority ethnic Britons in an 'other' category, no matter how stealthily, will always be deeply problematic and disrespectful".[35] This powerful sentiment is one that I agree with, but struggle to reconcile with the newly accepted term 'ethnic minorities' falling in its stead as inclusive. Runnymede Trust, an independent race equality think tank in the UK, was disappointed by the 2021 findings, having "hoped for more in the report than advice on the term BAME"; Dr Begum, Chief Executive at Runnymede, stated "Britain's ethnic minority communities are being insulted by this report and its authors" as it overlooks disparities in the mortality rate and Stop and Search rates in favour of inclusive terminology.[36] Social inclusion is more impactful than inclusionary terminology. This essay aims to accurately present objective data as it was formulated.

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[35] Ruchira Sharma. ''BAME is a problematic and disrespectful catch-all': Why the term is outdated, according to race organisations', *iNews* (London, 29 March 2021) <https://inews.co.uk/news/bame-term-meaning-catch-all-term-outdated-race-organisations-uk-explained-933805> accessed 11 January 2022.

[36] ibid

The Right to Bodily Autonomy under Section 7 of The Canadian Charter of Rights and Freedoms

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The *Canadian Charter of Rights and Freedoms* (*Charter*)[1] is a Bill of Rights in the Canadian Constitution which exists to protect all individual citizens' civil and political rights from being infringed upon by the government. Amongst the rights and freedoms specified, Section 7 of the *Charter* protects an individual's right to life, liberty, and security of the person [2]. This essay will unpack the specific Section 7 right to security of the person and the landmark Supreme Court case of *R. v. Morgentaler*[3] regarding the abortion provision in the Canadian Criminal Code. The *Morgentaler* judgment set a significant historical precedent by decriminalising abortion throughout Canada. This decision influenced the direction of women's rights in respect of choosing to have an abortion and is still upheld as good law over 40 years later. This foundational case has impacted the lives of countless Canadians and has ensured the prioritisation of protection for the mother of a fetus's personal rights over the fetus's right to life. *Morgentaler* affected a major socio-political paradigm shift within Canadian law as it related not only to women's autonomy, but to all citizen's rights in making decisions pertaining to their own bodily autonomy.

Historical Background and Development of Section 7 of the *Charter*

Section 7 of the *Charter* was purposely drafted using broad language to leave room for judges to interpret generously. The provision reads as follows: "*Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice*". [4] In practice, section 7 of the *Charter* is most commonly applied in criminal law cases, as they encompass situations where individuals are deprived of their liberty. To establish a s.7 *Charter*[5] violation, the applicant must be able to demonstrate they sufficiently qualify for standing in satisfying that they fit the description of "everyone" as outlined in the provision.[6] While this may appear to be relatively straightforward, there are many exceptions to who is legally recognised as a person in respect of section 7. For example, amidst those left unprotected under section 7 are corporations and fetuses, who cannot fall within the approved definition of "everyone". Corporations are excluded because they are not legally recognised persons and are thus incapable of benefiting from this provision or legally bringing forth a legitimate claim. Fetuses are excluded from section 7 because the law has withheld from declaring them as a legally recognised person.

Alongside proving sufficient standing to bring a claim under section 7, an applicant must also demonstrate that there has been a violation to their right to life, liberty or security of the person. The applicant must be able to show that

[1] *Canadian Charter of Rights and Freedoms*, Part 1 of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11.
[2] ibid
[3] R. v. Morgentaler, 1988 CanLII 90 (SCC), [1988] 1 SCR 30, <http://canlii.ca/t/1ftjt>, accessed on 18 November 2020
[4] *Canadian Charter of Rights and Freedoms* (n 1) s.7
[5] ibid
[6] ibid

the denial of their right to security of the person protected by section 7[7] is contrary to the principles of fundamental justice, which can be found in the Preamble of the *Charter* as an interpretive mechanism to assist litigants and courts to interpret the rights laid out thereafter. Even where all three requirements are satisfied, the infringement of an individual's section 7[8] rights may be overridden through section 1 of the *Charter* if the situation is deemed to have risen through exceptional circumstances.[9] Section 1 allows for reasonable limitations to be placed on the rights guaranteed in the *Charter*, in the exceptional circumstances where it would be undemocratic to do otherwise. *[10]*

Changes in Legislation

A strong attribute of the Canadian legal system is its ability to adapt to the changes within the dynamic society it governs. This can be referred to as the "Living Tree Doctrine", which stems from the *Edwards v. Attorney General[11]* decision, more famously known as the *Persons* case. *Edwards* was the landmark case which expanded the use of the word "persons" in the *British North America Act* 1867[12] to include women. The Committee of the Privy Council (the highest Court of Appeal at the time) decided the case and in their judgment, Lord Sankey memorably stated: "The British North America Act planted in Canada a living tree capable of growth and expansion within its natural limits"[13]. This quote set a largely influential precedent which can be rooted as the reason why the Canadian legal system has served citizens successfully over the years where major paradigm shifts throughout Canadian law and society have developed.

R. v. Morgentaler

Just as *Edwards* changed the meaning of the wording in the British North America Act 1867[14], the *Morgentaler[15]* decision helped to further refine the definition of "everyone" within section 7 of the *Charter[16]*. As a result of the landmark decision, fetuses were officially not included within the meaning of "everyone" set out in section 7[17]. A full overview of the *Morgentaler[18]* decision dates back to 1969, when Parliament first allowed abortions to take place in situations where the procedure was approved by therapeutic abortion committees. Therapeutic abortion committees existed in approved hospitals, and many hospitals simply chose not to set up these committees, as the need to do so was discretionary. This caused dangerous delays in the procedural implementation process which put women seeking abortions at a greater risk of health complications. Henry Morgentaler was an abortion activist and doctor, who defied the *Criminal Code[19]* by opening his own abortion clinic in Montreal, Canada in 1969. Dr. Morgentaler was subsequently charged with contravening the *Criminal Code[20]*, effectively marking the beginning of a 20-year fight for abortion rights in Canada. The Supreme Court of Canada held that the provision of the *Criminal Code[21]* deeming abortion a criminal offence was unconstitutional as it violated a woman's right to security of the person, which was supposedly guaranteed by section 7 of the *Charter[22]*. The court then gave Parliament the responsibility of re-legislating the parameters around abortion to effectively enable these rights without contravening the *Charter[23]*. The

[7] *supra* at note 5
[8] ibid
[9] Roach, Kent; J. Sharpe, Robert. The Charter of Rights and Freedoms
[10] *Canadian Charter of Rights and Freedoms* (n 1) s.1
[11] 1929 CanLII 438
[12] *British North America Act* 1867
[13] ibid
[14] *British North America Act* 1867
[15] *supra* at note 3
[16] *supra* at note 5
[17] Hogg, Peter Wardell. *Constitutional Law of Canada, 2020*
[18] *supra* at note 3
[19] *Criminal Code*, RSC 1985, c C-46.
[20] ibid
[21] *ibid*
[22] *supra* at note 5
[23] ibid

decision marked a historical paradigm shift within society[24]. By prioritising a woman's right to have an abortion, and thus protecting her right to security of the person, this has helped shape the free and democratic society that Canadians enjoy today. Canadian women are now able to elect to undergo legal abortions up until 23 weeks of pregnancy[25]. The *Morgentaler*[26] decision has helped reinforce the idea that the state does not have the jurisdiction to exercise control over an individual's bodily autonomy.

The Future of Canadian Law after *Morgentaler*

The *Morgentaler*[27] decision has gone on to influence numerous ground-breaking decisions before the Supreme Court of Canada, one of which being *Carter v. Canada*[28], which allowed for medically-assisted suicide for competent adults who give clear consent to the life-ending procedure and have a terminal medical condition which causes intolerable pain and suffering to the individual. In *Carter*, it was held that Sections 14 and 241(b) of the *Criminal Code*[29] were unconstitutional as both they breached section 7 of the *Charter*[30]. The *Morgentaler*[31] decision helped the Supreme Court judges to conclude that a person's body should be free from government interference that causes either psychological or physical suffering for the individual. As in the *Morgentaler*[32] decision, the Supreme Court ruled in *Carter*[33] that a doctor's decision of whether to participate in the procedure is their own personal choice.

The use of *Morgentaler*[34] as precedent has not always been successful in this area of law as is demonstrated in *Rodriguez v. British Columbia*[35], another decision regarding assisted suicide. The Supreme Court held, by a 5-4 majority, that the *Criminal Code*[36] provision which prevented medically-assisted suicide did not violate Rodriguez's *Charter* right under section 7[37]. The decision in *Rodriguez* signifies a significant disruption in legal development, where similar cases before the Supreme Court can yield opposite outcomes. The *Rodriguez*[38] decision arguably fell far too close to the *Morgentaler*[39] decision and thereby did not give society the chance to fully understand the important precedent that was born from the decision, that the state should have no control over an individual's personal choices pertaining to their own body. With time came the change in overall ideologies on the right to bodily autonomy in Canada, which facilitated change in many different areas of law as a result of the rationale exhibited in *Morgentaler*[40]. This shift in society showcases a resilience of the precedent set by the *Morgentaler*[41] case, as the law is still in strong standing and relevant to this day on issues that are seemingly unrelated.

To conclude, Section 7 of the *Charter*[42] protects a person's individual right to security of the person, which prioritizes their freedom to make decisions about their body as established in the *Morgentaler* decision and more recently

[24] Raskin, Maranda. "1988 R. v Morgentaler Supreme Court Decision Moments That Matter: Canadian History Since 1867"
[25] "Access at a Glance: Abortion Services in Canada", (19 September 2019), online: *Access at a Glance: Abortion Services in Canada | Action Canada for Sexual Health and Rights*
[26] *supra* at note 3
[27] ibid
[28] Carter v. Canada (Attorney General), 2015 SCC 5 (CanLII), [2015] 1 SCR 331
[29] *supra* at note 20
[30] *supra* at note 5
[31] *supra* at note 3
[32] *ibid*
[33] *supra* at note 29
[34] *Supra* at note 3
[35] *Rodriguez v. British Columbia (Attorney General)*, 1993 CanLII 75 (SCC), [1993] 3 SCR 519
[36] *supra* at note 20
[37] *supra* at note 5
[38] *supra* at note 36
[39] *supra* at note 3
[40] ibid
[41] ibid
[42] *supra* at note 5

applied in the *Carter*[43] decision. This framework developed originally from the *Morgentaler* decision ensures Canadian citizens are protected from unnecessary government interference regarding choices pertaining to an individual's body. The conflicting judgments in developing case law indicate a disruption in precedence, but also goes to demonstrate the court's exceptional use of limitations and a general reluctance of the Supreme Court to uphold the *Morgentaler* effect.

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[43] *supra* at note 29

Freedom of Conscience during the COVID-19 Pandemic: A Review of Ontario's Vaccine Passport Policy

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Since 23 March, 2020, the Ford government has restricted Ontarians' constitutional rights and freedoms in response to the COVID-19 pandemic. The restrictions imposed in Ontario reflect similar governmental responses from various common-law jurisdictions, despite notable exceptions within the United States. [1] Even amongst districts that have exercised an authoritarian approach towards managing the pandemic, Ontario's measures have been considered amongst the most strictly imposed worldwide. The City of Toronto alone has banned indoor eating for over 360 days between the spring of 2020 and 2021; in comparison to the 260-day ban in Paris and the 259-day ban in London.[2]

After declaring a state of emergency under the Emergency Management and Civil Protection Act (EMCPA) 1990, the province introduced a new Act in June 2020 through the passing of Bill 195, the Reopening Ontario Act (ROA) 2020.[3] Despite Ontario later ending the official state of emergency, provisions of the EMCPA 1990 were transposed into the ROA 2020; authorising emergency measures to be extended at 30-day intervals.[4] The power to amend or revoke orders rests exclusively with the Ford cabinet; thus no legislative approval is required to exercise such powers.[5] The ROA 2020 gives the Ford administration sweeping powers to regulate both public and private places by requiring Ontarians to act in accordance with mandates issued by newly empowered public health officials.[6] Under the EMCPA 1990 and the ROA 2020, the Ford government closed and maintained tight restrictions on church services[7], prioritising retail cannabis collection for recreational users, over personally attending church service for religious purposes.[8]

All COVID-19-related bills enacted before July 2020 were broadly introduced and passed on the same day.[9] Committee meetings did not take place between mid-March 2020 and early June 2020—the period during which the ROA 2020 was enacted.[10] The ROA 2020 authorizes

[1] Florida Exec. Order. No. 21-102 (May 3, 2021), https://www.flgov.com/wp-content/uploads/orders/2021/EO_21-102.pdf.

[2] Robin Levinson-King, 'Toronto Lockdown – one of the world's longest?' (*BBC News*, 24 May 2021) <https://www.bbc.co.uk/news/world-us-canada-57079577>.

[3] CM Flood, B Thomas, 'Canada: Legal Response to Covid-19', in Jeff King and Octávio LM Ferraz et al (eds), The Oxford Compendium of National Legal Responses to Covid-19 (OUP 2021) para 15.

[4] ibid para 15.

[5] ibid para 27.

[6] Richard J Charney and Stephane Erickson, 'Ontario's Enhanced Emergency Powers: What Employers Need to Know about Bill 195' (*Norton Rose Fulbright* 31 July 2020). <https://www.nortonrosefulbright.com/en-gb/knowledge/publications/47013af7/ontario-s-enhanced-emergency-powers-what-employers-need-to-know-about-bill-195>.

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[8] *Pick Up and Delivery of Cannabis*, O. Reg. 128/20. Under *Emergency Management and Civil Protection Act*, R.S.O 1990, c. E. 9.

[9] Flood (n 3).

[10] ibid para 28.

the Progressive Conservative government to rule by decree, bypassing ordinary institutional mechanisms of scrutiny and allowing for the imposition of regulations that directly impair Ontarians' constitutional rights and freedoms.

Following a brief historical analysis of how governments have responded to crises by limiting constitutional rights and freedoms, this essay will critically examine the constitutional implications generated by the ROA 2020 and the secondary legislation made thereunder. This article will then look to the Ford government's vaccine passport regime and the ways it conflicts with freedom of conscience under section 2(a) of the *Charter of Rights and Freedoms*.[11] Following a review of the relevant case law surrounding the meaning of *freedom of conscience*, this article will conclude by addressing wider concerns relating to responsible government and some of the harmful implications of vaccine passports.

Ontario's Vaccine Passport

Under Ontario's vaccine passport system, private businesses have found themselves compelled to discriminate against patrons based on their prior medical decisions. Businesses that refuse to discriminate against unvaccinated individuals are subject to severe financial penalties.[12] The Ford government's vaccine passport policy breaches section 2(a) of the *Charter* because it denies Ontarians basic humanity by coercing citizens to betray deeply held, regularly observed, non-theistic beliefs. Furthermore, Ontario's vaccine passport policy threatens the sacrosanct jurisdiction that individuals are entitled to, which establishes the state as the source of decision-making authority over citizens' medical choices.
Ontario's vaccine passport differs from other vaccination requirements in the following ways:

i. An individuals' prior medical decisions have never been legally relevant or considered for patronage of *private* services in Ontario, making this policy unprecedented both materially and in degree of severity.
ii. This policy applies to an arbitrary and limited area of activity, which controversially indicates a lack of rational connection to the stated objective of protecting Ontarians from exposure to COVID-19.
iii. This policy was implemented without urgency, gradually shifting and developing over the course of the pandemic, and for improper purposes.
iv. This policy significantly impairs s.2(a) of the *Charter* by failing to provide reasonable exemptions for conscientious objectors, despite providing for wide exceptions in areas of application mentioned in (ii).

Although justified on public health grounds, *coercion* and *segregation* are at the core of Ontario's vaccine passport policy. Harm, in the form of legal segregation, social exclusion, and ostracization from public life, are not ancillary aspects of this policy; they are transparent objectives.

Before discussing how the Ford government has regimented the private sector to violate Ontarians' section 2(a) right to freedom of conscience, it is crucial to understand the function of section 1 of the *Charter*. Section 1 provides that rights and freedoms are guaranteed, "subject only to such reasonable limits…as can be demonstrably justified in a free and democratic society."[13] In *R v Oakes*, the Supreme Court of Canada interpreted section 1 by creating a two-step balancing test: (1) the government must establish that the relevant law is *important* and *necessary*; and (2) the court must conduct a *proportionality* analysis. Part 2 is further broken down into three conditions: (a) the government must establish that the relevant law or provision is rationally connected to the

[11] *Canadian Charter of Rights and Freedoms*, s. 2(a), Part I of the *Constitution Act*, 1982, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11.

[12] *Reopening Ontario (A Flexible Response to COVID-19) Act*, S.O. 2020, c. 17, s.10(1) .

[13] *Canadian Charter of Rights and Freedoms* (n 11)

law's stated objective; (b) the relevant law or provision must impair the *Charter* right as little as possible or fall "within a range of reasonable alternatives"; (c) the court must examine the law's *proportionate effects*.[14] There must be proportionality between the laws' benefits and the harms created by the *Charter* interference. This article will bear in mind the *Oakes* test criteria when analysing how Ontario's vaccine passport policy was drafted and how it is being applied and enforced.

A Historical Perspective

Over the last century, Anglo-liberal democracies have experienced three crises that are comparable to the COVID-19 pandemic: World War I; The Pandemic of 1918; and World War II. Apart from the varying degrees that characterised the above world events, a further distinction can be made between 'foreign war' and 'global pandemic'; however, this distinction is secondary for the purposes of this article. What is relevant are the *measures* taken by governments in response to the relevant threat.

During World War I, the UK Parliament was swift to respond to the outbreak of war in France, often subjecting the British people to punitive measures in response to any breach of the newly imposed regulations. For example, in November 1914; under regulation 24 of the Defence of the Realm Act, a military official in Cardiff banned all women from public houses between 7:00 PM and 8:00 AM in fear that they were distracting his male soldiers.[15] Six women were arrested, court-martialed, and sentenced to 62 days imprisonment.[16] Public outrage provided the impetus for the Home Secretary to step in and quash the sentences.[17] On November 27, 1914, the Defence of the Realm Act was repealed and replaced with the Defence of the Realm (Consolidation) Act in response to the arbitrary and punitive measured which were authorised by the prior legislation.[18]

In Britain, summary arrest and detention were common during World War I. Under the new Defence of the Realm (Consolidation) Act, Regulation 14B was issued in June 1915, authorising the Home Secretary to "intern any person if on the recommendation of a competent naval or military authority" there was a risk to public safety.[19] Under this regulation, even British nationals; born and raised in England but who nevertheless had German ancestry, were targeted for arrest.[20]

Similarly, during World War II, the Emergency Powers (Defence) Act 1939 was passed by Parliament authorising *inter alia*; "indefinite detention on the order of the Home Secretary without charge and without trial."[21] This particular regulation resulted in a parliamentary revolt, forcing a revision of the regulation, authorising such power to be exercised only if the Home Secretary had *reasonable cause for his belief.*[22] Consequently, 30,000 individuals were detained; including 1847 British citizens, "at a time when the ordinary prison population stood between 8,000 and 9,000."[23] As it became evident that there was no fifth column within Britain, detainees were released, and only 11 remained in custody by the end of the war.[24] Despite the scaling back of the initial regulation due to pressure from Parliament, very few Members of Parliament publicly opposed the regulation and even fewer were willing to vote against it.[25]

During World War II, the United States government's persecution of Japanese-Americans in 1942 was one of the most

[14] *R* v *Oakes* [1986] 1 SCR 103, [1986] S.C.J. No. 7
[15] Jonathan Swan, 'Defence of Realm' (2017) 181 Criminal Law & Justice Weekly 249.
[16] ibid.
[17] ibid.
[18] ibid
[19] Tom Bingham, 'Personal Freedom and the Dilemma of Democracies' (2003) 52(4) The International and Comparative Law Quarterly 841, 846
[20] Ibid 846-847.
[21] ibid 849.
[22] Ibid 849-850.
[23] Ibid 850.
[24] ibid.
[25] ibid 851.

egregious recorded occasions of abuse and misgovernance during wartime.[26] Executive orders 9066 and 9102; neither of which made express provisions for executive detention, resulted in the internment under armed guard of 110,000 Japanese-Americans in the Western interior, in what President Roosevelt described as 'concentration camps'.[27] Most of the detainees were children born in the United States.[28] In addition to pressure from the Governor of California, there was strong public support for the federal government's actions against Japanese-Americans. A March 1942 poll found that 93% of respondents approved the actions taken.[29] Decades later, a congressional commission was launched to formally examine the exercise. The 1982 report found that:

> "*The promulgation of Executive Order 9066 was not justified by military necessity, and the decisions which followed from it … were not driven by analysis of military conditions. The broad historical causes which shaped these decisions were race prejudice, war hysteria, and a failure of political leadership…A grave injustice was done to American citizens and resident aliens of Japanese ancestry who, without individual review or any probative evidence against them, were excluded, removed and detained by the United States during World War II."*[30]

World War I and World War II are cogent examples of external threats duly generating legislation that directly interfered with core constitutional rights in Great Britain and the United States. The Canadian government's response to the Spanish Influenza Pandemic of 1918, is another historical antecedent that can be compared to the COVID-19 pandemic. In Canada, during the 1918 Influenza Pandemic, roughly 50,000 Canadians died from the disease[31], out of a population of 8 million. The Canadian federal government effectively played a minimal role in the response to the health emergency, as public health continues to primarily be a provincial jurisdiction.[32] The provincial government of Ontario delegated responsibility to local authorities, namely, municipalities.[33]

The city of Toronto's Medical Officer of Health between 1910 and 1929, Dr. Charles J. Hastings, realized that the standard approach to dealing with infectious diseases proved futile and that isolation measures were deemed impracticable.[34] Despite pressure from Mayor Thomas L. Church and the press, who called for swift action to restrict commercial activity and social gatherings, Hastings refused to implement quarantine and isolation measures because "the disease toll escalated so quickly as to render [those measures] ineffective…"[35] Fearing that nearly half of Toronto's 490,000 residents would become ill, Hastings and his provincial counterpart, Dr. John W.S. McCullough, increased hospital capacity and trained volunteer care-givers.[36] On "October 19, all theatres, moving-picture shows, pool and billiard rooms, and bowling alleys were closed".[37] Churches were urged; though not required, to hold only a single service on Sundays.[38] Neither Hastings nor McCullough believed the effectiveness of mask-wearing given the severity of the outbreak. Therefore, Ontario residents were not required to cover their airways with a mask, nor

[26] Bingham (n 19) 854.
[27] ibid 853.
[28] ibid.
[29] ibid 854.
[30] ibid.
[31] Parks Canada, 'The Spanish Flu in Canada (1918-1920) National Historic Event' (*Government of Canada* 8 September 2021) <https://www.pc.gc.ca/en/culture/clmhc-hsmbc/res/information-backgrounder/espagnole-spanish>.
[32] Heather MacDougall, 'Toronto's Health Department in Action: Influenza in 1918 and SARS in 2003' (2007) 62(1) *Journal of the History of Medicine and Allied Sciences* 56.
[33] ibid.
[34] ibid 64.
[35] ibid.
[36] ibid 65.
[37] ibid 67.
[38] ibid 67.

were any related mandates introduced.[39] By mid-November, hospitals were empty, schools resumed in-person teaching, and public sporting events resumed.[40]

The above crises demonstrate that governments have historically responded to crises by, *inter alia,* invoking rule by decree and implementing policies that future governments have deemed shameful.[41] The overreach of government power during times of emergency is no exception to the rule, rather it is a norm often fueled by panic, authoritative incompetence, public hysteria, and an overwhelming assumption that the government must *do something* whether or not if it is manifestly immoral.

There are legitimate circumstances under which constitutional freedoms and principles can be limited. Principles such as *habeas corpus*, the rule of law, consent of the governed and due process have historically been restricted to managing crises. Though distinct from one another, the above crises are instructive insofar as they allow the analysis of the Reopening Ontario Act 2020 within its proper legal and historical context. The ROA 2020 is not an aberrative piece of legislation, however its enactment was predictable and consistent with past legislative responses to crises. While this may be true, we must question whether the Ford government's vaccine passport policy and its incongruity with section 2 (a) of the *Charter* is justified under the current circumstances of the pandemic, or whether the government has gone too far. More importantly, whether the benefit of the vaccine passport policy outweighs the harms caused to *freedom of conscience* in a democratic society?

Freedom of Conscience According to the Case Law

Ontario's vaccine passport policy currently represents the apotheosis of government intrusion into the private sphere. Many Ontarians may refuse the vaccine on conscientious grounds arguing that the decision to inject medicine into one's body is a private decision which is integral to individual autonomy. The Ford government's regimentation of the private sector to enforce this policy highlights the conceptual problem with '*freedom of conscience'* as applied under the *Charter*. Unfortunately lacking any statutory definition, it is important to examine the jurisprudence to understand what constitutes '*freedom of conscience'* under Canadian law. It has been suggested that "[n]o clear meaning of conscience can be taken from the jurisprudence. There is a lack of consistency at best, and confusion at worst."[42] In acknowledgment of such inconsistencies, this article will supplement the gap using appropriate case law to interpret a definition of *freedom of conscience* and apply this common law definition to the analysis of Ontario's vaccine passport policy.

The Supreme Court of Canada's provisional definition of *freedom of conscience* has been developed in many cases. Academics Jocelyn Downie and Françoise Baylis note that in *R v Big M Drug Mart,* Justice Laycraft suggested that freedom of conscience under section 2(a) of the *Charter* "encompass[es] the rights of those whose fundamental principles are not founded on theistic belief."[43] Dickson J stated that freedom of conscience, "embraces both the absence of coercion and constraint…subject to such limitations as are necessary to protect public safety, order, health or morals…no one is to be forced to act in a way contrary to his beliefs or his conscience."[44]

Justice Laycraft fails to provide a complete definition of freedom of conscience; however, he did crucially distinguish it from religious

[39] MacDougall (n32) 68.
[40] ibid.
[41] Bingham (n 19) 854.
[42] Jocelyn Downie and Françoise Baylis, 'A Test for Freedom of Conscience under the Canadian Charter of Rights and Freedoms: Regulating and Litigating Conscientious Refusals in Health Care' (2017) 11(1) McGill Journal of Law and Health S2, S18.
[43] Downie (n 42) 9.
[44] ibid 10.

belief. Employing Laycraft J's description of freedom of conscience, it can be argued that *conscience* refers to deeply-held beliefs that are equally as valid as religious convictions.[45] Justice Dickson affirmed that individuals should not be compelled to behave in any way which betrays their deeply held, non-theistic beliefs.[46] However, restrictions on non-theistic beliefs can be justified in the interest of public health. This gives rise to the question: if Ontario's vaccine certificate system only applies to specific activities and populations, how much public protection does the vaccine passport system truly provide?

While the passport vaccine was instituted to protect public health and presumably save lives, the internal logic is incoherent because it does not apply to a considerably large field of activity. Questions regarding how many COVID-19 infections have been prevented by the vaccine passport and figures of how many lives have been saved by the government regulations, remain unanswered by the Ford government. Answers to these questions should be a priority for the Ford government, as they would increase government accountability and quell public unrest . The Ford government must establish a rational connection between (i) implementing the vaccine passport policy, and (ii) saving lives by preventing COVID-19 infections. Failure to do so renders the policy arbitrary and irrational.

Under the current policy, unvaccinated Ontarians can enter a grocery store, bank, barber, salon, drug store, medical clinic, restaurant patio, or any establishment where they only intend to use the bathroom.[47] The arbitrary scope of the policy's application indicates that it is purposefully designed to coerce the unvaccinated to get vaccinated, rather than protect them, through segregation and ostracization. The fact that vaccinated individuals can still contract and spread the virus; even at a lower rate than the unvaccinated, only reinforces the criticism that this policy is illogical and does more harm than good.[48] Needless imposition of medical segregation will effectuate the exact type of force that Justice Dickson warned against in *R v Big M Drug Mart.*

Ontario remains in an emergency; not an official "state of emergency" as defined by statute. Notably, the statutory provisions that authorise this policy were lifted directly from the EMCPA 1990. Thus, it is because Ontario ostensibly remains in an emergency that the vaccine passport policy is justified. Yet, if Ontarians are living through an ongoing crisis which demands vaccine passports in a limited and arbitrary field of activity, it begs the question: why did the Ford government wait twenty-one days between the initial announcement and following implementation?[49]

An emergency measure presupposes executive urgency; however, this policy was implemented only when considered administratively convenient. Either the emergency necessitates immediate executive action, or the relevant circumstances do not constitute an emergency. This degree of logical incoherence and capriciousness suggests two things: 1) Ontarians are not living through an ongoing emergency that requires vaccine passports; and 2) the Ford government was dishonest, using a false pretext to radically intrude on Ontarians' lives for unknown reasons. Ontario's vaccine passport policy is not designed to create safer conditions in Ontario,

[45] *R* v *Big M Drug Mart Ltd* (1983), 49AR194, 9 CCC (3d) 310 (CA) at [346]-[347].
[46] ibid., at [337].
[47] *Rules for Areas at Step 3 and at the Roadmap Exit Step*, O. Reg. 364/20. Under *Reopening Ontario (A Flexible Response to COVID-19) Act*, S.O. 2020, c. 17.
[48] 'COVID-19 Vaccine Effectiveness' (*Center for Disease Control and Prevention*, 10 November 2021) <https://www.cdc.gov/coronavirus/2019-ncov/vaccines/effectiveness/how-they-work.html>.
[49] Ryan Rocca, 'After Resisting Covid 19 vaccine passports, Doug Ford says feds should have created national system' (*Global News*, 1 September 2021) <https://globalnews.ca/news/8159143/covid-vaccine-certificate-doug-ford-federal-government/>.

rather it is designed to function as a naked exercise of power and compulsion to force Ontarians to submit to medical procedure instead of voluntary compliance.

Downie and Baylis highlight the case *R* v *Video flicks Ltd*, in which Justice Tarnopolsky stated that the fundamental "freedom of conscience protected in section 2(a) would not appear to be the mere decision of any individual on any particular occasion to act or not act in a certain way. To warrant constitutional protection, the behaviour or practice in question would have to be based upon a set of beliefs by which one feels bound to conduct most, if not all, of one's voluntary actions."[50] Justice Tarnopolsky further argued that for one to object government action on the grounds of section 2(a) freedom conscience, "one would have to demonstrate, based upon genuine beliefs and regular observance, that one holds" the relevant belief to be sacrosanct.[51]

Justice Tarnopolsky gave a more detailed definition of freedom of conscience than the one provided by Justice Laycraft and Justice Dickson in *R v Big M Drug Mart*, where he asserted the basic criteria required for a belief to be genuinely conscientious, as the requirements to demonstrate that a regularly observed belief is sufficiently fundamental to one's general conduct in society. The fact that there has never been a law requiring Ontarians to get vaccinated to eat at a restaurant, attend a concert or enjoy a film at the cinema is sufficient evidence to satisfy the *regular conduct* element outlined by Justice Tarnopolsky. This is because Ontarians have never had to contemplate, much less submit to, a medical intervention to access private services. Moreover, the relevant moral and constitutional issues in question are wholly novel and unprecedented, both factually and legally. Evidently, it has always been the regular conduct of Ontarians to not submit to medical intervention merely to access private services, because the conditions for such a requirement have never existed until now.

Based on Justice Tarnopolsky's criteria, it is difficult to suggest one's *medical decisions* are anything other than autonomously valuable. A decision to undergo a medical procedure is anchored in individuals' conscience as it is the only reasonable source of such authority. The Ford government has mobilised actions which are unprecedented in Canadian government, namely the lawful imposition of medical treatment against an unwilling citizen. Notwithstanding ethical and moral concerns, this action conflicts directly with the quintessential purpose of section 2(a) of the *Charter*.

The decision to undergo medical procedures is one that can only be made by individuals voluntarily. Surrendering that authority to the state transforms sovereign citizens into mere subjects with privileges rather than rights, rights that are dispensed by a government with *de facto* unrestricted power. Failure to safeguard this fundamental freedom results in the obliteration of other freedoms that emanate from the sovereign individual. This is not an argument positing that the human *body* is sacred; although section 7 may argue otherwise, it is an argument affirming that a *medical decision* is beyond the practical and moral reach of the state. This is particularly true where a medical procedure includes a potential risk, however minimal that risk may be. On this premise, personal medical decisions are derived from conscience and represent human freedom. Individuals should not be legally or morally coerced to submit to a medical procedure against their will on the basis that it incapacitates the most essential unit required for self-government: individual sovereignty.

The use of coercion and segregation enforced by implementing vaccine passports goes beyond violating Ontarians' conscience because it also constitutes a direct assault on the foundation of Canadian democracy. In the case of *Rodriguez* v *British Columbia (AG)*, Justice Lamer stated, "[A]n emphasis on… individual judgment also lies at the heart of our democratic

[50] Downie (n 42) S11.

[51] ibid.

political tradition. The ability of each citizen to make free and informed decisions is the absolute prerequisite for the legitimacy, acceptability, and efficacy of our system of self-government."[52] In breaching Ontarians' freedom of conscience under the *Charter*, the vaccine passport policy inverts our system of self-governance by re-ordering the relationship between the citizen and the state. Instead of the citizens' will legitimising the state, the state replaces citizens' choice with its own, creating a circular form of government that can no longer be perceived as *democratic.* Under this new definition, the Ford government can be regarded as substantively undemocratic and authoritarian.

In *R v Morgentaler,* the court ruled that *Section 251* of the *Criminal Code;* which prohibited abortion, violated Section 7 of the *Charter*, the person's right to life, liberty, and security.[53] However, in her judgment, Justice Wilson found that abortion provisions also breached section 2(a), stating that, "for the state to take sides on the issue of abortion, as it does in the impugned legislation by making it a criminal offence for the pregnant woman to exercise one of her options, is not only to endorse but also to enforce, on pain of a further loss of liberty through actual imprisonment, one conscientiously-held view at the expense of another. It is to deny freedom of conscience to some, to treat them as means to an end, to deprive them… of their 'essential humanity'."[54]

Justice Wilson's judgment illustrates that interference with this category of decisions constitutes an assault on the components which maintain the individual's *essential humanity*. Both cases demonstrate that when receiving or refusing medical treatment, it is one's conscience that is the source of decision-making. Ontario's vaccine passport policy violates this individual conscience because it expressly uses coercion through segregation to induce a desired medical outcome. Furthermore, Justice Wilson stated that Section 251 breached women's section 2(a) freedom of conscience because it punished women for exercising their medical options. Similarly, Ontario's vaccine passport policy punishes citizens for exercising one of their medical *options*, specifically, to forgo a government-endorsed procedure. This is a choice that should be regarded as an autonomous decision grounded in one's own conscientious beliefs.

Beyond the Pandemic

On October 18, 2021, the Justice Centre for Constitutional Freedoms filed a constitutional challenge against Ontario's vaccine passport mandate in Ontario's Superior Court of Justice. Interestingly, applicants challenged this mandate using section 7 of the *Charter* which guarantees the right to bodily autonomy and informed consent.[55] Constitutional challenges brought against the Ford government's vaccine passport policy remain to be seen. However, the vaccine passport policy may fail to satisfy the elements of *rational connection* and *minimal impairment* on these two pillars:

i. The limited scope of Ontario's vaccine passport policy *ensures* potential viral transmission in a considerably large field of social activity; the vaccine itself does not prevent infection or transmission; failing to establish a rational connection between this policy and the overarching objective of protecting Ontarians from covid-19.
ii. Although the Ford government permitted certain exemptions of vaccination proof to access private services in Ontario, no such deference was included for conscientious objectors, thus rendering this *Charter* interference as unreasonable.

The Ford government's response to the pandemic has presented more challenges to Ontario, the freedom of its people, and its democratic legitimacy than the virus has itself.

[52] [1993] 3 SCR 519.
[53] [1988] 1 SCR 30, 63 OR (2d) 281.
[54] Downie (n 42) S13; *Morgentaler* (n 52).

[55] *Canadian Charter of Rights and Freedoms*, s. 7, Part I of the *Constitution Act*, 1982, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11.

The Ford government seeks to transform private medical decisions into a public matter, the limitations of which have not yet been clearly defined. However, this challenge has also provided Canadian courts with a seminal opportunity to establish coherence and certainty of the *Charter* by interpreting freedom of conscience to mean the freedom to refuse a medical procedure without segregation from public life. Failure of the courts to exercise their jurisprudence will render section 2(a) of the *Charter* meaningless. The judiciary is the sole institutional check on a seemingly unrestricted government that is attempting to indirectly achieve what it could not directly achieve both politically and constitutionally.

Ontarians are being forced into adjusting to a society that enshrines segregation based on conscience and belief. The vaccine certificates compile personal identification data, but offer no indication of where the data is stored or whether it is dispensed to other sources. Whether these databases of personal information are accessible is unknown, along with what other potential uses it may have for the government and the market. Limits must be established. Presently, two vaccines are required. There is little indication of how many more will be required and how often these new boosters will be enforced. Additionally, it is unknown whether *other* medical procedures may be required to access private services, beyond the current vaccination requirement. Without any transparency regarding efficacy or timelines, the Ford government's temporary measure could potentially become a permanent and ever-expanding requirement.

While other jurisdictions lift restrictions without any increasing COVID-19 numbers, Ontarians languish in the hope that their government will give them their freedom back. In Florida, Governor Ron De Santis lifted all COVID-19 restrictions in early May 2021. As of November 16, 2021, Florida has recorded the lowest COVID death rate and case-positivity rate in the United States over the last several weeks.[56] There are seven other states with higher total per-capita mortality rates that have maintained COVID-19 restrictions and implemented vaccine passport systems.[57] Crucially, with a total vaccination rate of 73% for eligible Floridians and approximately a 90% rate of positive cases among those 65 and older, it is unclear that vaccine passport policies and lockdowns are necessary.[58]

Moreover, Statistics Canada reported that the average age of a COVID-19 deaths in Canada was 83.8 years of age, in 2020.[59] In Ontario, nearly two thirds of all COVID-19 deaths in 2020 occurred while victims were in the care of provincially-regulated Long-term Care facilities.[60] These figures reveal that differing age categories are disproportionately susceptible to COVID-19, but the Ford government bears significant responsibility for a large number of the deaths that have occurred. Furthermore, imposing a one-size-fits-all solution upon all Ontarians is unjustifiable, particularly where democratic traditions become collateral damage of such reckless policymaking. States that have instituted vaccine passport policies have a higher death toll and higher rates of positive cases. This suggests that vaccine passport policies fail to

[56] 'United States COVID-19 Cases, Deaths, and Laboratory Testing (NAATs) by State, Territory, and Jurisdiction' (*Center for Disease Control and Prevention,* 19 November 2021) <https://covid.cdc.gov/covid-data-tracker/#cases_deathsper100klast7days>.

[57] ibid.

[58] *Governor of Florida Staff, 'Florida Reaches Lowest Case Rate in the Nation' (Executive Office of the Governor, 27 October 2021) <https://www.flgov.com/2021/10/27/florida-reaches-lowest-case-rate-in-the-nation/>.*

[59] Hannah Jackson, 'COVID-19 Deaths Lowered Canadians' Average Life Expectancy 20 2013 Levels: StatsCan.' (*Global News* 2 June 2021) < https://globalnews.ca/news/7915634/covid-life-expectancy-stats-canada/>.

[60] Nathan Stall and others, 'COVID-19 and Ontario's Long Term-Care Homes' (*Ontario COVID-19 Science Advisory Table*, 20 January 2021) <https://covid19-sciencetable.ca/sciencebrief/covid-19-and-ontarios-long-term-care-homes-2/>.

sufficiently protect people from the virus, whilst simultaneously causing harm to democratic institutions and individual sovereignty.

In Ontario, the Ford government's refusal to allow conscience-based exemptions, notwithstanding certain exceptions, indicates a complete disregard for individual freedom and personal autonomy. Citizens are the source of power that legitimise the government. Without citizen consent and compliance, the laws enacted by the legislature or decreed by the executive are invalid. If Ontarians are to rid themselves of vaccine passports, it must be acknowledged that individuals are responsible for their health. Failure to do this ensures that the vaccine passport will become the crucible upon which inconceivable and terrifying future state intrusions into private medical decisions will manifest.

The Ford government's myopic policy calculations that underpin the vaccine passport system do not advance the public interest. Instead, they have created an environment in which the virus will continue to spread among both the vaccinated and unvaccinated, while also significantly undermining basic rights and freedoms. Maintaining constitutional order and allowing Ontarians to make medical decisions freely, voluntarily, and without duress is more important than attempting to police citizens' bodies by substituting individual conscience for state decree. Failure to safeguard democratic traditions and a culture of individual rights will continue to cause irreparable harm to citizens' ability to govern themselves today and in the future. All other rights emanate from freedom of conscience*;* without such liberty, citizens are denied freedom. More importantly, what is the purpose of section 2(a) of the *Charter* if not for these exact circumstances?

If experience has taught us anything, it is that during times of crisis, governments routinely behave in ways which future observers have viewed as illegal and immoral.[61] There is no reason to believe that history will not record the Ford government's vaccine passport policy as an unnecessary, harmful, abuse of power during a crisis. It is for these reasons that we cannot wait for reproach by future generations; Ontarians are within their rights to demand an immediate and independent investigation into the Ford government's pandemic response. In particular, the data and rationale used to justify Ontario's segregationist vaccine passport policy must be scrutinised and publicly debated. Finally, state segregation in all its forms should be formally and forcefully rejected on the basis of freedom of conscience or any other subjective or immutable quality. We must oppose segregation today, tomorrow, and forever *if* citizens of democratic states are to remain free people who value human dignity and justice. The greatest tyranny is that which waves the banner of law and justice.

[61] Bingham (n 19) 854.

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The Singapore and New York Conventions on International Mediation and Arbitration: A Comparative Analysis

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This article critically discusses the Singapore Convention on Mediation[1] (Singapore Convention) and analyses whether it will be as effective in promoting cross-border mediation as the New York Convention[2] (NY Convention) was in promoting international arbitration. Lord Mustill described the NY Convention as "the most successful international instrument in the field of arbitration, and perhaps … the most effective instance of international legislation in the entire history of commercial law."[3] Undoubtedly, international arbitration is a dominant choice for cross-border disputes. However, commercial parties may often opt for other, more cooperative methods of alternative dispute resolution (ADR), particularly international mediation.

It is important to note that, until recently, there has been a lack of a universally recognised enforcement mechanism for cross-border mediation. This stood in contrast with international arbitration, where a clear mechanism for enforcement of foreign arbitral awards has been provided by the NY Convention. Importantly, the United Nations Commission on International Trade Law (UNCITRAL) Working Group II (from 2014) was focusing on these concerns so as 'to promote the enforceability of international commercial settlement agreements reached through mediation in the same way that the [NY] Convention facilitates the recognition and enforcement of international arbitration awards.'[4] The final draft of the Singapore Convention was approved by UNCITRAL in June 2018 and came into force in September 2020. Although the Singapore Convention was met with appreciation, its effectiveness in promoting international mediation remains uncertain. In this article, I will consider the procedural requirements, defences and the mode of enforcement of the Singapore Convention. Further, I will critically analyse the main takeaway from the NY Convention and compare it with the Singapore Convention. To end, I will provide recommendations for improvements in effectiveness.

A. BACKGROUND

The increased importance of enforcement in mediation was highlighted by the Global Pound Conference Survey[5] (2016-2017). More than a half of the delegates expressed the view that in commercial dispute resolution, improvements to conventions which aimed to promote recognition and enforcement of settlements (as well as those reached through mediation) should be considered. Similarly, Eunice Chua noted (in a 2020 survey) that 84% of the responders admitted that they

[1] United Nations Convention on International Settlement Agreements Resulting from Mediation 2018 (Singapore Convention).
[2] United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1958 (NY Convention).
[3] Michael Mustill, 'Arbitration – History and Background' (1989) 6(2) J of International Arbitration 43.
[4] Eunice Chua, 'The Singapore Convention on Mediation - A Brighter Future for Asian Dispute Resolution' [2019] Asian Journal of International Law 195.
[5] Herbert Smith Freehills and PwC, 'Global Trends and Regional Difference' (Global Pound Conference Series, 24 October 2018) < https://imimediation.org/research/gpc/series-data-and-reports/ > accessed 13 April 2021.

would be more prone to using mediation in transnational disputes, provided a clear mechanism for enforcement of mediation settlement agreements is introduced.[6]
Clearly, there has been a demand for an international convention that could provide a solution to the needs mentioned earlier. This could potentially result in filling the gap of a universal enforcement mechanism for cross-border commercial parties involved in mediation. Such lack has had a deterring effect on promoting international mediation. This was highlighted by Stacie Strong, who noted that "mediation was used relatively infrequently in cross-border business disputes, as compared to other mechanisms."[7]

B. APPROVAL

At the time it was entered into force, the Singapore Convention had 52 signatories. This was 5 times more than the NY Convention had at a similar stage. Now, the NY Convention has 169 ratifying states. Yet, in the context of the Singapore Convention, Chua observed that "it will take time before there are enough signatories who have put in place measures to give effect to the Convention in order for a significant impact on the practice of international business to be felt."[8] Although the number of ratifying states for the Singapore Convention might, at the present time, be satisfactory, it is not yet enough for such legislation to have the same universal status as the NY Convention. Moreover, none of the European Union states have signed the Singapore Convention. The reason might be found in the EU Mediation Directive, which mandates Member States to accept and promote mediation in cross-border disputes. [9] Though some of the world's growing economies (USA, India, China) have signed the Singapore Convention. Thus it remains to be seen whether other countries will follow the lead of those economic giants and sign the Convention. For now, however, it could not be unequivocally stated that the Singapore Convention is fulfilling its purpose in promoting international mediation. Despite this, there *is* a future for the Singapore Convention. Since the NY Convention has been operating for more than 60 years, it is clear the Singapore Convention has built its foundations based on international legislation. It can be argued that if the Singapore Convention had been ratified in 1959, and the NY Convention in 2020, the signatory profile for both legislations would be reversed. It might also be argued that it is easier for the Singapore Convention, than it was for the NY Convention, to adapt to its parties' needs. It is a matter of time until the number of states approving the Singapore Convention reaches the level of the NY Convention. Hence, this trend may contribute to the promotion of international mediation.

THE SINGAPORE CONVENTION ON MEDIATION

A. PROCEDURAL REQUIREMENTS

Article 4 of the Singapore Convention "reflects a balance between the formalities that would be required to ascertain that the settlement agreement resulted from mediation and the need for the instrument to preserve the flexible nature of the mediation process."[10] Although this reflects a perfect scenario for the convention, in practice this ideal is not achieved. Article 4 reflects a minimum threshold for efficient operation of the Singapore Convention. The procedural requirements demand the party seeking enforcement to satisfy two necessities: (a) The settlement agreement signed by the parties;[11] and (b) evidence that the

[6] Eunice Chua, 'The Singapore Convention on Mediation and the New York Convention on Arbitration: Comparing Enforcement Mechanisms and Drawing Lessons for Asia' [2020] Asian International Arbitration Journal 113, 115.
[7] Stacie I Strong, 'Chapter 14: Promoting International Mediation Through the Singapore Convention on Mediation' in Shahla Ali, Bruno Jetin, Luke Nottage, et al. (eds) *New Frontiers in Asia-Pacific International Arbitration and Dispute Resolution* (Kluwer Law International BV 2020) 340.
[8] Chua (n 6) 116.
[9] Directive 2008/52/EC of the European Parliament and of the Council of 21 May 2008 on Certain Aspects of Mediation in Civil and Commercial Matters [2008] OJ L136/3 (EU Mediation Directive).
[10] Chua (n 6) 118.
[11] (n 1) Art.4.1(a).

settlement agreement resulted from mediation.[12] Additionally, the Singapore Convention adds three possible ways of providing evidence that is acceptable to indicate that the settlement agreement arose by way of mediation. In the absence of such evidence, the "competent authority of the Party to the Convention"[13] has the right to recognise "any other evidence."[14] It could be assumed that the Singapore Convention provides broad latitude to the parties by providing them with a chance of having their agreements enforced. The Singapore Convention is practical in its form, and by enabling parties to provide 'any' relevant evidence, it promotes international mediation.

These procedural requirements are critical as they contribute to the aim of the Singapore Convention by creating a clear mechanism for the enforcement of cross-border settlement agreements resulting from mediation. Masood Ahmed noted that "careful attention is required to ensure that the procedural steps that the party seeking enforcement must follow are clear, straightforward and achieve the objective of the Convention".[15] This would, as he mentioned, "avoid unnecessary and complex procedural burdens that may undermine the purpose of the Convention".[16] Thus, at first glance, the provisions of the Singapore Convention may be clear and straightforward, albeit vulnerable to flaws. However, before considering the main weaknesses of the Singapore Convention, it is important to discuss the NY Convention, to better analyse the effectiveness of both conventions in tandem.

Currently, parties who are applying for recognition and enforcement of an arbitral award must rely on Article IV(1) of the NY Convention. The NY Convention differs from the Singapore Convention in that it does not require evidence that an award was dispensed following the arbitration process. The only requirements that must be satisfied are the evidence of the original award (Article IV(1)(a) of the NY Convention) and the arbitration agreement (Article IV(1)(b) of the NY Convention). In contrast, the Singapore Convention "contains provisions to specify the evidence required to demonstrate that a mediation had taken place *without* [emphasis added] reference to an agreement to mediate".[17] This is the result of the Singapore Convention's decision not to consider the agreement to mediate nor disputing parties to provide such agreement. This formulation is confusing to many, and understandably so. The agreement to mediation might be of similar importance to the agreement to arbitration, which is dealt with under the NY Convention. Such an agreement includes party autonomy, thus all the rights that disputing parties agreed, prior to the arbitration process. The lack of such a clause, in relation to mediation agreements may complicate the work within the Singapore Convention.

Article 4(1) of the Singapore Convention is seemingly defective. This is because it does not mention the requirement to deliver the enforcing country with a copy (either original or certified) of the parties' agreement that they are willing to bring their dispute to mediation. Since mediation is voluntary, the lack of such a requirement (indication of the parties' need to prepare the mediation agreement) is absurd and may result in non-contribution under the Singapore Convention to the promotion of international mediation. Consequently, the Convention may arguably be futile. To draw a contrast, what if the Singapore Convention had included such conditions for mediation agreements, would the goal then be met? In this scenario, the Singapore Convention would clearly recognise the actuality and significance of practice within the international commercial context. This would confirm the purpose of the Singapore Convention to promote international mediation. Moreover, "[i]nternational commercial parties will typically have a written

[12] (n 1) Art.4.1(b).
[13] (n 1) Art.4.1.
[14] (n 1) Art.4.1(b).
[15] Masood Ahmed, 'Reflections on the UNCITRAL Convention on the Enforcement of Mediation Settlement Agreements and Model Law' [2019] Lloyd's Maritime and Commercial Law Quarterly 259, 265.
[16] Ibid 266.
[17] Chua (n 6) 118.

agreement to refer their dispute to mediation or some other form of ADR. This agreement may either form part of the original commercial contract … or it may be a stand-alone agreement concluded between the parties and after a dispute has arisen".[18] Hence, such a requirement would not deter the parties, but rather reassure parties that their mediation process will run smoothy and in accordance with the objective of promoting international mediation.

The Singapore Convention is distinct from the NY Convention. The latter legislation addresses the presence of an arbitration agreement (Article II of the NY Convention) and prescribes evidence of this agreement before enforcing an award (Article IV(1)(b) of the NY Convention). Additionally, an award might be refused if issues addressed therein had not been contained within the extent of an arbitration agreement (Article V(1)(c) of the NY Convention). The Singapore Convention precludes these settlement agreements from being raised after mediation. Thus, the convention requires evidence from a neutral source, whether it be a mediator or mediation institution, to safeguard the mediation process (settlement agreement procedure). Nevertheless, the lack of a clear mediation agreement negatively impacts on the idea of promoting international mediation by the Singapore Convention.

B. DEFENCES TO ENFORCEMENT

It is important to note that while the applicability and range of the Singapore Convention have been unambiguously outlined in Article 4 of the Singapore Convention, there is a problem with the grounds for refusing to grant relief. Article 5(1) of the Singapore Convention consists of a list of six circumstances in which a state may refuse relief when one of the enumerated circumstances is satisfied. Also, Article 5(2) of the Singapore Convention states that the relief may be rejected if it is "contrary to the public policy"[19] of the country in which enforcement is desired; or if the "subject matter of the dispute is not capable of settlement by mediation under the law of that Party".[20] It is necessary to highlight that some of those provisions were based in Article V of the NY Convention. Yet, they are not the same, as amendments must have been put in place in accordance with the concept of mediation.

Evidently, paragraphs 1(a) to 1(c) of the Singapore Convention are akin to Articles V(1)(a) and (e) of the NY Convention ("which deals with incapacity to enter into an arbitration agreement or other invalidity of the arbitration agreement, as well as when the arbitral award has not yet become binding on the parties or has been set aside or suspended").[21] Similarly, Article 5(2) of the Singapore Convention, as stated above, reflects Article V(2) of the NY Convention, but with a modification for the use of mediation. This alteration could not be seen in relation to Article 5(1)(d) of the Singapore Convention as it only relates to mediation. Such adjustments may arguably be a positive step towards promoting international mediation. It is apparent that the Singapore Convention aims to be the equal of the NY Convention for mediation: the latter of which undoubtedly succeeds in the promotion of international arbitration.

It is critical to identify that the defences to enforcement were prepared by the Working Group II to "be limited and not cumbersome to implement"[22], as well as "exhaustive and stated in general terms", [23] but they could be considered ambiguous. This is because a major discretion has been allotted for the enforcing state. Ahmed noted that "it provides the resisting party with an extensive list of grounds which it may seek to rely on to potentially frustrate the enforcement process and thereby undermine the aims of the Convention".[24] Therefore, on one hand, it could be assumed that the long list of such grounds can detract from the idea of promoting international

[18] Ahmed (n 15) 266.
[19] (n 1) Art.5(2)(a).
[20] (n 1) Art.5(2)(b).
[21] Chua (n 6) 120.
[22] UNCITRAL, 'Report of Working Group II (Arbitration and Conciliation) on the Work of its Sixty-third Session' (Vienna, 7-11 September 2015) UN Doc. A/CN.9/861 (2015) [para 93].
[23] Ibid.
[24] Ahmed (n 15) 267.

mediation. This is because parties may choose other ADR methods to enforce their settlements. On the other hand, those defences under the Singapore Convention to enforcement were based upon the NY Convention, and this convention showed that promotion of international arbitration is being achieved.

C. MODE OF ENFORCEMENT

The Singapore Convention has so far been silent on the mode of enforcement. The mode of enforcement provides conditions that the State must satisfy in order to enforce a settlement agreement. For example, Article 3(1) of the Singapore Convention underlines that each State Party "shall enforce a settlement agreement in accordance with its rules of procedure, and under the conditions laid down in this Convention".[25] Indeed, this expands the provisions of the EU Mediation Directive.

Further, the Singapore Convention provides a list of requirements; Article 3(2) of the Singapore Convention stipulates that a State shall allow a party to "invoke the settlement agreement in accordance with its rules of procedure and under the conditions laid down in [the Singapore Convention], in order to prove that the matter has been already resolved".[26] The Singapore Convention is not the only one that lays down these conditions. Article III of the NY Convention states that "[e]ach Contracting State shall recognise arbitral awards as binding and enforce them in accordance with the rules of procedure of the territory where the award is relied upon, under the conditions laid down in the [NY Convention]".[27] Thus, Articles 3(1) and (2) of the Singapore Convention are similar in nature of the NY Convention. Both preclude that "States are able to apply their own rules of procedure for the purposes of enforcement without the Convention prescribing a particular mode of method".[28] Specifically, there is a significant differentiation in relation to these conventions. The Singapore Convention avoids using the word 'recognition' – which has a different meaning under national and international law – and this has a practical effect as seen in Article 3(2) of the Singapore Convention, which allows a defence of settlement agreement.

In general, a failure to specify a clear method of enforcement for the Singapore Convention can be regarded as negative for promoting international mediation. The 60-odd years of the NY Convention's service reflect that the lack of "a single method of enforcement does not impede effective enforcement".[29] This could be explained from a business perspective: It can be reckless to suggest a single enforcement method since this could result in a deterioration of support for the Singapore Convention. This is because of significant difference in legislation between States (regarding the process of enforcement). Therefore, it could be presumed that such support for the Singapore Convention is important – and without it, it would be hard to promote mediation in cross-border disputes. Nonetheless, the fact that the Singapore Convention does not specify a clear method of enforcement might be argued as a positive quality for the Convention – more autonomy and flexibility could be given to the State Parties. Perhaps, by way of support for this argument, the EU states will eventually accept the Singapore Convention.

THE NEW YORK CONVENTION'S OUTLOOK ON THE SINGAPORE CONVENTION ON MEDIATION

The major lessons from the NY Convention for the Singapore Convention have been discussed throughout this paper. Yet, there is one more factor which is critical for promoting international mediation – the education of local judges about the benefits of an international treaty.

Chua[30] referenced George Bermann, who observed that notwithstanding the broad approval and wide coverage, the NY Convention is reliant for its effectiveness on the performance of national judges. Therefore, the NY Convention provides guidance for the application and interpretation of

[25] (n 1) Art.3(1).
[26] (n 1) Art.3(2).
[27] (n 2) Art. III.
[28] Chua (n 6) 121.
[29] Chua (n 6) 122.
[30] Chua (n 6) 136.

legislation through academic papers and, for example, the *UNCITRAL Guide to the New York Convention*[31] and *ICCA's Guide to the Interpretation of the 1958 New York Convention: A Handbook for Judges*[32]. The number of academic publications on the Singapore Convention has been thoroughly increasing every year. Regarding UNCITRAL, it could be prudent to create a clear, authoritative guide which could support national courts in exercising the application and interpretation of the Singapore Convention. Clearly, this could help in promoting international mediation. More people would be aware about benefits of resolving cross-border disputes through mediation and so the Singapore Convention might achieve its aim.

REMARKS

Even though the NY Convention has been successful in its work, it is not ideal. The Convention has received a fair amount of criticism and propositions for reform. The NY Convention has been operating for 60-plus years. Through the universal mechanism for the enforcement of foreign arbitral awards, the NY Convention has guaranteed international commercial arbitration a stable ground. There has been an increase in parties' preferences for the use of international arbitration. Something similar can be argued regarding the Singapore Convention as the legislation is new but already popular within the prosperous economies. Therefore, the Singapore Convention seems to be thriving and interesting for cross-border disputes. However, one of its weaknesses is silence as to the enforcement of agreements to mediate. Thus, this issue should be reviewed and amendments should be put in place. Article 4 of the Singapore Convention should clearly state that a mediation agreement is required. Another weakness may be visible in Article 5 of the Singapore Convention. It could be said these concerns regarding the scope and applicability of this Article are deterring for the purpose of the legislation since they are unclear.

Further, unlike the NY Convention, the Singapore Convention does not support hybrid methods of dispute resolution (for example, involving litigation and arbitration). However, adopting such hybrid methods could potentially contribute to the Singapore Convention's purpose of being more pro-international. This is because such a proposition would provide benefits to international businesses – for example, within the current outlook on the COVID-19 pandemic, it is likely for them to combine more than one method to reduce costs. Undoubtedly, such amendments are likely to happen in the near future. This is because the successful NY Convention was implemented by the International Arbitration Act (Chapter 143A). A similar approach for the Singapore Convention would be advantageous in promoting international mediation through continual revisions. I am not suggesting that the Singapore Convention is not contributing to this idea: because it is. With necessary amendments, the Singapore Convention would be promoting international mediation to a fuller extent, and perhaps more than the NY Convention was promoting international arbitration.

In this article, I have evidenced that the Singapore Convention on Mediation might well achieve its goal in promoting international mediation. This may result from the fact that the NY Convention has shown how to produce effective legislation. The NY Convention has more than 160 signatories and it may be confidently predicted that those states will also sign up to the relatively fresh Singapore Convention. The main weakness that the Singapore Convention may have, and which might negatively influence the promotion of international mediation, is its silence as regards enforcement of agreements to mediate. Future amendments may be put in place to combat this weakness in hopes of correcting the measure.

[31] UNCITRAL, *UNCITRAL Secretariat Guide on the Convention on the Recognition and Enforcement of Foreign Arbitral Awards* (United Nations 2016).

[32] ICCA, *ICCA's Guide to the Interpretation of the 1958 New York Convention: A Handbook for Judges* (ICCA 2011).

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Why the Right to Vote should be Extended to all Prisoners under New Laws

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Should the right to vote be extended to all prisoners under new laws? This question implies that, nowadays, only a limited number of prisoners (e.g.: on remand) in the UK retain their right to vote whilst serving their sentence. Indeed, the Representation of People Act 1983 (RPA), s.3(1), provides that convicted prisoners should be deprived of this right during their detention period.[277] The aim of this essay is therefore to assess whether prisoners' right to vote should be extended to all the prison population in future legislation.

In order to answer this question, we shall discuss three main reasons why most (if not all) prisoners should retain their right to vote during their sentence: firstly, we will consider the democratic issue in depriving prisoners from such a right; then we will evaluate the nature of this right known as "fundamentally human", and how depriving prisoners of it only satisfies a social bloodlust; finally we shall appraise the contradiction between the RPA provisions and the Purposes of Sentencing.

Taking first the democratic issue, depriving prisoners from their electoral voice has serious consequences in a democratic society.

Ethnic minorities are over-represented behind bars because of institutionalised racism: the Scarman report in 1981 upheaved evidence of racism in the judiciary; and it was found that 27% of the prison population last year were from ethnic minorities, compared to less than 11% if it reflected the ethnic make-up of England and Wales.[278] As well summarised in Unlock's "challenge of the electoral ban on prisoners" abridgement, "minority ethnic groups are disenfranchised" in this process.[279] So, depriving them of their electoral voice is preventing a fair proportion of already-underrepresented groups to have their say in elections. This is undoubtedly an infringement to democracy.

Also, political agendas affect prison population as much as they affect anyone else in society. Although physically segregated from society, prisoners are subject to the criminal justice system which figures in most political programs. For instance, PM Boris Johnson in 2019 proposed to make "tougher sentencing for criminals".[280] Hence, prisoner's life fluctuates according to decision made by politicians. So why should they not be allowed to contribute to the elections of such decision-makers? MP's work for the people and groups of people who elect them, not pro bono for politically mutes. Unlock's summary explains this as "political will is otherwise weak".[281] If prisoners are deprived from their right to vote, who would be devoted enough to move heaven and earth to help them? Nobody.

But the prison system is far from perfect. "Services need improving" says Unlock's

[277] Representation of People Act 1983, s 3(1).
[278] Lord Scarman, *The Scarman Report* (1981); Prison Reform Trust (PRT), *Bromley Briefings Prison Factfile* (2021).
[279] Unlock - the National Association of Ex-Offenders, and the PRT, *Barred From Voting: The Right to vote for Sentenced Prisoners* (2004).
[280] Conservatives, *Our Plan: Conservative Manifesto 2019*, 'Boris Johnson's Guarantee' (2019) <https://www.conservatives.com/our-plan> Accessed 30th March 2021.
[281] Unlock and PRT (n 3).

encapsulation.[282] Politicians can make it work again instead of cutting the necessary resources of the criminal justice system. But they will not because prisoners do not vote for them. The Secret Barrister in his eponymous book alludes to this recurrently, as on p.54: "the cost (…), the Ministry of Justice insists, is already too high".[283] Improving the prison system would probably become more of a priority if prisoners had the right to vote. We can parallel it with the NHS service. The NHS' struggle during the Covid-19 pandemic has been widely acknowledged and financed by the government because its electorate needed it: The Health Foundation's *Spending Review 2020*.[284] But if patients admitted to hospital were deprived from their right to vote, there is few doubts that government would be less keen to let go of millions of pounds as they did.

Thus, to ensure a fairer democracy, convicts should be allowed to vote in prison. However, some might say that patients admitted to hospital are not the same as prisoners convicted of an offence, because patients suffer unfairly while convicts "deserve it".

The social demand for retribution is a sensitive issue. A common misconception is that convicted prisoners cannot complain about how they are treated because "they deserve it". This misbelief is often used by political parties to support their projects. For example, Baroness Scotland of Asthal said to the Lords, in 2003 Parliamentary questions, that: "prisoners convicted of a crime serious enough to warrant imprisonment have lost the moral authority to vote."[285] But this statement seriously undermines the risk of a miscarriages of justice, such as the Belfast Six, being unjustly deprived from their rights for a crime they did not commit. Not to mention those who serve a very short prison sentence for minor offences. If miscarriages of justice are quite rare (29 cases referred to Appeal by the CCRC in 2019/20),[286] innocent people are still jailed and, although voting may be the least of their priority, we should not aggravate their sufferings by adding restrictions on their rights. Also, considering short prison sentences, does it seem proportionate that, for minor offences (e.g.: theft), someone can be deprived from their right to vote? Because there are not just horrible murderers and paedophiles behind bars, as reminded in Dr David Honeywell's talk on his experience in prison.[287] And if offenders miss an election whilst incarcerated for a short amount of time, once they return in society, the decision-makers have already been elected for the next five years with or without their opinion.

Moreover, asking for such retribution threatens fundamental human rights. Baroness Scotland of Asthal also said in her answer to the Lords that "[t]his temporary disenfranchisement pursues a legitimate aim and is proportionate and is considered a reasonable restriction within the terms of Article 25."[288] Article 25 here refers to the International Covenant on Civil and Political Rights that "recognizes and protects the right of every citizen to (…) vote".[289] The legitimacy question would parallel the political aim to please the electorate in their misconception (discussed above), and the proportionality aspect undermines potential miscarriages or the question of short sentencing. If depriving horrendous criminals from certain freedom is understandable, most prisoners are not guilty of such crimes and it would be unfair to restrict their

[282] Ibid.
[283] *The Secret Barrister: Stories of the Law and How It's Broken* (2018).
[284] Health Foundation, *Spending review 2020: Priorities for the NHS, Social Care and the Nation's Health* (2020).
[285] Parliament, *Lord Hansard Written Answers* (20th October 2003) WA143 <https://publications.parliament.uk/pa/ld200203/ldhansrd/vo031020/text/31020w01.htm> Accessed 30th March 2021.
[286] Criminal Cases Review Commission, *CCRC Annual Report and Accounts 2019/20 laid in Parliament* (2020).
[287] David Honeywell and Marianne Doherty, *Podcast: The Pains of Imprisonment* (2021).
[288] Parliament (n 9).
[289] High Commissioner for Human Rights, *General Comment No. 25: The right to participate in public affairs, voting rights and the right of equal access to public service (Art. 25)* (1996) CCPR/C/21/Rev.1/Add.7.

human right because of their offences. This violation of basic human right has also been condemn by the European Court on Human Rights in the 2006 case of *Hirst v UK (No.2)*.[290] But the misconception of "deserving their sufferings" is too deeply rooted in society to let go. Even PM David Cameron declared being "physically sick" at the idea of giving prisoners the right to vote, as reported in *The Times*. [291]

This shows that the balance between human right and social bloodlust now rules in favour of the latest. But isn't it time for a change?

It seems reasonable to ask for reform in this area of law, but not only for democratic or humanitarian reasons. The law must change because it does not fit with more understandable values such as the Purposes of Sentencing established in the Criminal Justice Act 2003 (CJA), s.142(1).[292] Restricting an offenders' rights and freedoms goes well only with the first of the five purposes of prison sentence: "the punishment of offenders".[293] Despite this legitimate aim, removing prisoners' right to vote is useless, and may even be antagonistic to many sentencing goals. Unlock gives three bullet points to this idea: depriving prisoners' right to vote "weakens community", "bears no relation to the cause of the crime", and "achieves little or nothing".[294]

They go even further by affirming "[i]t is an unjust additional punishment rather than a proportionate response to crime".[295] Indeed, the second limb of s.142(1) CJA, "reduction of crime" is not fulfilled either.[296] Have you ever heard someone beg for mercy a jury because they are terrified of losing their right to vote? They have many other issues to deal with first, such as their deprivation of liberty. So, the privation of their right to vote is only a useless additional burden we put on prisoners' shoulders. Not to mention that prison itself is not an adequate method to reduce crime, as we can compare the well-known prison system of Norway and their reoffending statistics to ours: 61% of convicts sentenced for less than a year in prison reoffended in the UK in 2018, compared to about 20% in Norway where prison sentences are less systematic.[297] This can be explained by the rehabilitation culture much more developed in the northern country.

Which leads us to our third Purpose of Sentencing.[298] Making prisoners understand that their acts have consequences, preventing them from reoffending by making them learn from their mistakes, and helping them reintroduce society with a fresh start are praiseworthy aims. But impoverishing their interest in politics and social life by denying their right to vote is not the right way to meet such aims. Unlock describes it as "civic death".[299]

Arguably, the right to vote could "protect the public" (fourth aim of s.142(1) CJA) from extremist ideas.[300] But, safe for terrorists, people are not sentenced to prison, nor found guilty of any offence, for supporting extremist parties. For instance, Tommy Robinson's trial in 2019 was for contempt of court, not for his extreme political ideas.[301] And it would be shocking to most in a democratic society to be imprisoned for such, because citizens are protected by their freedom of opinion and speech. Analogously, why should prisoners not be protected by their right to vote? Depriving them of such a right to protect the public would be meaningless as all prisoners are not extremists and all extremists are

[290] *Hirst v United Kingdom (No 2)* [2005] ECHR 681.
[291] 'Cameron sickened by prisoner vote', *The Times* (2010).
[292] Criminal Justice Act 2003, s 142(1) (CJA 2003).
[293] Ibid (a).
[294] Unlock and PRT (n 3).
[295] Ibid.
[296] CJA 2003 (n 16) (b).
[297] Ministry of Justice, *Proven Reoffending Statistics Quarterly Bulletin, October 2018 to December 2018* (2020); Emily Richards, 'Rehabilitation not recidivism: Norway's success in keeping re-offending rates low', *Prisoners Abroad* (2017).
[298] CJA 2003 (n 16) (c).
[299] Unlock and PRT (n 3).
[300] CJA 2003 (n 16) (d).
[301] *Attorney General v Yaxley-Lennon* [2019] EWHC 1791.

not in prison. So, here again, this punishment fails to complete the Purposes of Sentencing.

Last aim is the "making of reparation by offenders to persons affected by their offences".[302] Safe for the satisfaction of bloodlust of victims, the additional privation of prisoner's right to vote is completely unrelated to the purpose of reparation. This emotion from victims is understandable but unwholesome. And the fact that it not only contradicts human rights (as discussed above) but also opposes commendable legislation proves the wrongness of such deprivation.

To conclude, depriving prisoners the right to vote was probably a mistake from the start for democratic, humanitarian, and legislative/moral reasons. Hence why I would agree with the statement. Prisoners whose offences are directly related to their right to vote (e.g.: cheating in elections) are more likely to fulfil the Purposes of Sentencing, and therefore restricting such a right for a while might be meaningful. But all other prisoners should maintain their right to vote in prison.

This perspective might even take shape soon as reported in a BBC article in June 2019.[303]

[302] CJA 2003 (n 16) (e).

[303] 'Right to vote could be extended to prisoners under new laws', *BBC News* (2019).

Daly and Proportionality: The Expedition to a more Rights-Protective Standard of Review

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The Human Rights Act 1998 reshaped judicial review. Particularly to the doctrines of irrationality and proportionality. However, this essay does not examine the blurred lines between the two. Instead, it seeks to argue that *R (Daly) v Secretary of State for the Home Department* - which gave proportionality the seal of approval - made the most significant contribution to the law on judicial review, especially to cases concerning fundamental rights.[1] Accordingly, this essay examines the role of irrationality in protecting rights. It also explores the development of proportionality and the impact of *Daly* on judicial review. By doing so, this essay aims to highlight that without *Daly*, reviewing courts would have been slow to incorporate such vital protections into common law.

IRRATIONALITY AND FUNDAMENTAL RIGHTS

The House of Lords in *Wednesbury* established the much-debated principle of irrationality.[2] Lord Greene MR explained that a decision considered irrational is one that is 'so unreasonable that no reasonable authority would ever come to it'.[3] Similarly, Lord Diplock, in *GCHQ*, spoke of a decision 'so outrageous in its defiance of logic or accepted moral standards that no sensible person… could have arrived at'.[4]

At first glance, the principle appears to provide courts with wide-ranging powers to strike down any decision they deem unreasonable. Yet, their constitutional role makes it unlikely for intense scrutiny of executive decisions.[5] Consequently, applicants face a high threshold to satisfy, as illustrated by Lord Greene MR, who remarked that to 'prove a case of this kind would require something overwhelming'.[6] But as a result, reviewing courts are circumspect to quash decisions that infringe fundamental rights.[7]

In *Brind*, Lord Ackner acknowledged that where fundamental rights are at stake - in this case, the freedom of speech - 'close scrutiny must be given to the reasons provided as justification for interference with that right'.[8] Nevertheless, his Lordship placed more weight on the doctrine of Parliamentary sovereignty, remarking that it would be a '*wrongful* usurpation of power by the judiciary' to replace its view with that of the decision-maker.[9]

Furthermore, the Court of Appeal in *Smith*, although recognising that the 'applicants' rights as human beings are very much in issue', considered their constitutional role prevented them from adjudicating on matters concerning the defence of the realm.[10] Whereas the Strasbourg Court held the decision to dismiss the applicants from the armed

[1] [2001] UKHL 26, [2001] 2 AC 532.
[2] *Associated Provincial Picture Houses Ltd v Wednesbury Corporation* [1948] 1 KB 223.
[3] ibid, 230.
[4] *Council of Civil Service Unions v Minister for the Civil Service (GCHQ)* [1986] AC 374, 410.
[5] Mark Elliot and Robert Thomas, *Public Law* (4th edn, OUP 2020) 553; see also Mark Elliott, 'The HRA 1998 and the Standard of Substantive Review' (2002) 7 Jud Rev 97, 103.
[6] *Wednesbury* (n 2) 230.
[7] Richard Clayton and Karim Ghaly, 'Shifting Standards of Review' (2007) 12 Jud Rev 210, 212.
[8] *R v Secretary of State for the Home Department, ex p Brind* [1991] 1 AC 696, 757.
[9] ibid (emphasis added).
[10] *R v Ministry of Defence, ex p Smith* [1996] QB 517, 556 (Sir Thomas Bingham MR).

forces violated their Article 8 rights.[11] The reasons provided by the UK government could not of itself justify discrimination on grounds of sexual orientation.[12] Further, the European Court of Human Rights considered the Court of Appeal's judgment to have set the threshold so high it 'effectively excluded any consideration… of whether the interference with the applicants' rights answered a pressing social need or was proportionate to national security'.[13]

Therefore, on the reasoning of these cases, it becomes apparent that the principle of irrationality, as established in English common law, offers limited to no protection to one's fundamental rights. Or, as Elliot and Thomas argue, 'reserves considerable discretion to decision-makers', and in doing so, prevents judicial review save in extreme circumstances.[14] Yet, the development of proportionality challenged this position.

DEVELOPMENT OF PROPORTIONALITY

In *GCHQ*, Lord Diplock summarised three overarching grounds of review.[15] However, his Lordship did not rule out the potential for others, remarking that 'further development on a case by case basis may... add further grounds... particularly the possible adoption in the future of the principle of "proportionality"'.[16] As is familiar with 'several of our fellow members of the European Economic Community'.[17] As such, one would view Diplock's obiter as crucial in the move to incorporating sufficient protections at common law. However, the case law that followed reveals the judiciary's reluctance in embracing this doctrine. As Elliot notes, 'the attitude of English administrative law to the proportionality principle was ambiguous, to say the least'.[18]

As alluded to above, the House of Lords in *Brind* rejected proportionality as a separate head of review.[19] Lord Ackner reasoned this by arguing it would result in 'incorporating the Convention into English domestic law by the back door'.[20] But more pertinent was the reason that 'merits [review] cannot be avoided' - judges would ultimately replace their view with that of the decision-maker.[21] Lords Roskill and Templeman put forward similar reasons.[22] Their Lordships, therefore, saw the principle as warranting extreme judicial scrutiny into executive decisions, which Lord Lowry felt they remain ill-equipped to execute.[23]

Whereas in *Smith*, The Court of Appeal hinted at proportionality.[24] Although they failed to protect the applicants' rights, Sir Thomas Bingham MR remarked that the 'more substantial the interference with human rights, the more the courts will require by way of justification before it is satisfied that the decision is reasonable'.[25] Norris' commentary of the case highlights that such a standard would have allowed 'courts a greater opportunity for review' by effectively lowering the 'threshold of irrationality'.[26] But this was not the case until *Daly* implemented such a standard. In addition to this, Henry LJ echoed the point that the judiciary is unsuited to scrutinise executive discretion intensively.[27] Furthermore, his Lordship observed that even if the Convention were made part of our domestic law, the courts would still be in a 'novel constitutional position', which might well ask for 'more material then the adversarial system normally provides'.[28] Therefore, whilst *Smith* exhibits a greater step towards adopting vital protections into common law, the Law Lords remained reluctant to embrace the doctrine which would have propelled such a move.

[11] *Smith v United Kingdom* (2000) 29 EHRR 493.
[12] ibid.
[13] ibid [138].
[14] Elliot and Thomas (n 5) 554.
[15] *GCHQ* (n 4).
[16] ibid.
[17] ibid.
[18] Mark Elliot, 'The HRA 1998 and the Standard of Substantive Review' (2002) 7 Jud Rev 97.
[19] *Brind* (n 8).
[20] ibid 761-762.
[21] ibid 762.
[22] ibid 750 and 751.
[23] ibid 767.
[24] *Smith* (n 11) 554.
[25] ibid.
[26] Martin Norris, 'Ex parte *Smith*: irrationality and human rights' (1996) PL 590, 594.
[27] *Smith* (n 11) 564.
[28] ibid.

Daly, however, did firmly embrace the doctrine.[29] In doing so, Lord Steyn set out the three limbed test adopted by the Privy Council in *De Freitas*[30] that, inter alia, requires reviewing courts to balance the importance of the objective to the applicant's fundamental rights.[31] Lee notes that *Daly* finally 'provides the necessary constitutional justification for courts to intervene and assess the substance of decisions' where they adversely affect one's rights.[32] One is inclined to agree. *Daly* welcomed the step which the courts in *Smith* were reluctant to take. By doing so, Williams notes that *Daly* broadened the landscape to matters not covered under *Wednesbury*, viz where misuse of discretion transgresses one's fundamental rights.[33]

IMPACT OF *DALY*

Lord Steyn emphasised the importance of analysing cases involving convention rights correctly as they may 'yield different results'.[34] In *Kennedy*, Lord Mance listed the advantages of proportionality over *Wednesbury* irrationality.[35] These included introducing an 'element of structure' and allowing reviewing courts to balance necessity against infringement of fundamental rights.[36] Furthermore, Lord Sumption, in *Pham*, implied it to be arbitrary to deal with decisions infringing convention rights under *Wednesbury*.[37]

Reviewing courts are therefore more receptive to applying the principle where fundamental rights are at stake. Further, it is structured and permits an element of scrutiny into executive discretion, which *Wednesbury* fails to do. Ultimately, the seal of approval granted by *Daly* ensured that applicants receive adequate redress for the violation of their rights. A crucial layer that the common law had trouble providing.

Daly transformed the landscape of judicial review. It resulted in the common law distancing itself from the inadequate protections *Wednesbury* offered applicants. Courts now make evaluations on necessity over the infringement of rights, rather than merely stating whether a decision is reasonable. Critically, without *Daly*, there is scope to argue that courts would have been slow to adopt a more rights-protective standard of review. The case, therefore, stands as making the most significant contribution to developing the law on judicial review.

[29] *Daly* (n 1).
[30] *De Freitas v Permanent Secretary of Ministry of Agriculture, Fisheries, Lands and Housing* [1999] 1 AC 69.
[31] *Daly* (n 1) [27].
[32] Jonathan Lee, 'Substantiating substantive review' (2018) PL 632, 637.
[33] Rebecca Williams, 'Structuring substantive review' (2017) PL 99, 100.
[34] *Daly* (n 1) [28].
[35] *Kennedy v Information Commissioner* [2014] UKSC 20, [2015] AC 455, [54].
[36] ibid.
[37] *Pham v Secretary of State for the Home Department* [2015] UKSC 19, [2015] 1 WLR 1591, [106].

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