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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 second volume.

This term, we were again delighted by the quality of research and composition of our Spring submissions. Categorised by jurisdiction, this volume of the Review touches on such topics as the digital evolution of testamentary dispositions during the global pandemic, the need for reform in the current version of the Sexual Offences Act 2003, and the challenges of diversifying the Canadian Judicial Appointments system. Our award-winning essays include winners from the Victoria Fisher Memorial Prizes, the ELSA x Tech Law Essay Competition, and the Juliet Humphries and Michael Humphries QC Award.

Throughout this academic year, the Leicester Student Law Review launched its new podcast, 'Let's Review!', where members of our team host individual episodes interviewing solicitors, barristers, faculty members, and other students as an additional insight into the legal domain. We encourage our readers to look for our podcast on PodBay and Spotify. Moreover, this year's team has successfully traced all past physical copies of the Review and have begun the work towards digitising our archives. We are so proud of all the achievements and hard work of our team of editors and committee members, they are the oil that powers this intricate machine.

It is with heavy hearts that we leave behind our positions in the Law Review, but we could not be prouder of the legacy we leave behind. We hope that you will derive as much pleasure and insight in reading this volume as we did in producing it.

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

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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

To Dispense or Not to Dispense, That is the Question…

Meera Amari Chauhan

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A dispensing power is defined as "a statutory power to uphold expressions of testamentary wishes in alternative formats or that do not comply with all the formal requirements of a Will but where the testator's intentions are clear."[1] These powers are much broader than the current emergency measures for wills, such as remote witnessing, which were hastily introduced during the COVID-19 pandemic. Dispensing powers were initially introduced to tackle the marked increase in probate litigation during the pandemic, due to the increased amount of deaths intestate. English law strictly complies with the Wills Act 1837,[2] however courts in other jurisdictions have the discretion to dispense with statutory formalities. The question remains whether dispensing powers should become permanent. On one hand, there is the argument that dispensing powers were enacted as a failure by parliament to adequately review the potential legal repercussions. Contrastingly, the argument in favour of enactment urges the need to embrace electronic wills and push the law towards focus on the testator's intentions rather than formalities. This article will critically analyse both arguments and provide examples of the move towards dispensing powers in a wider context.

The Current Law

Section 9 of the *Wills Act* 1837 (amended by *section* 17 of the *Administration of Justice Act* 1982) states:
"*No Will shall be valid unless –*

a. it is in writing, and signed by the testator, or by some other person in his presence and by his direction; and
b. it appears that the testator intended by his signature to give effect to his Will; and
c. the signature is made or acknowledged by the testator in the presence of two or more witnesses present at the same time; and
d. each witness either –
  i. attests and signs the Will; or
  ii. acknowledges his signature,
  iii. *in the presence of the testator (but not necessarily in the presence of any other witness), but no form of attestation shall be necessary.*"[3]

The Physical Presence of Witnesses

The Electronic Communications Act 2000 (ECA 2000) established the power to modify subsequent legislation in order to authorise the use of electronic communications for a wide variety of purposes, including anything that requires a witness.[4] The ECA 2000 authorised The Wills Act 1837 (Electronic Communications) (Amendment) (Coronavirus) Order 2020, under which section 8(2) states that: *"*For the purposes of paragraphs (c) and (d) of subsection (1), in relation to wills made on or after 31 January 2020 and on or before 31 January 2022, *presence includes presence by means of videoconference or other visual transmissions*" [emphasis added].[5] The provision is backdated to 31 January 2020 and will last until 31 January 2022, or 'as long as deemed necessary.'[6] The question

[1] Charlotte John, 'Wills in the time of coronavirus: law reform, statutory dispensing powers and a recipe for chili sauce' (Gatehouse Chambers, 2020) <https://gatehouselaw.co.uk/wills-in-the-time-of-coronavirus-law-reform-statutory-dispensing-powers-and-a-receipe-for-chili-sauce/#:~:text=Dispensing%20powers.,the%20testator's%20intentions%20are%20clear > accessed 22 February 2022.

[2] Wills Act 1837.
[3] Wills Act (n 2) s 9.
[4] Electric Communications Act 2000, s8 ss2(c).
[5] The Wills Act 1837 (Electronic Communications) (Amendment) (Coronavirus) Order 2020 s8(2).
[6] Ministry of Justice, 'Video-witnessed wills to be made legal during coronavirus pandemic' (2020) <www.gov.uk/government/news/video-witnessed-wills-to-

remains whether this amendment will remain in place permanently, and furthermore, whether it should.[7] With the introduction and implementation of this dispensing power, new research suggests that the value of the 'Wills, Trusts and Probates' market topped £2 billion for the first time in 2021, with contentious work on the rise.[8] Whilst this figure is positive for Probate firms' case turnover, this stark increase undoubtedly poses a strain on the industry's workload and the associated caseload of the Probate Courts.

Due to the pandemic, the development of the law and the meaning of witnesses' 'presence' has been redefined. The Law Commission 2017 Report restates the current law's "clear line of sight" requirement.[9] In the older case of *Casson v Dade,*[10] the will of an asthmatic testatrix was held to be valid where her two witnesses sat in the carriage outside the window of the solicitor's office, within her line of vision as she signed her will. The decision in *Casson* was affirmed in *Couser v Couser*,[11] where the court stated that a valid acknowledgement of a signature under the Wills Act 1837 required that there should at least be possible visual contact. This principle was applied by Senior Judge Lush in *Re Clarke* [2011],[12] a case concerning the execution of a lasting power of attorney in circumstances where the donor was in one room and the witnesses in another, separated by a glass door.[13] In the digital age, corporeal presence is no longer a practical necessity. The current law suggests that presence can be either physical or virtual. As identified by the Law Reform Committee in 1980, one major pitfall in the law was that a dispensing power "could lead to litigation, expense and delay, often in cases where it could least be afforded, for it is the home-made wills which most often go wrong."[14] However, other sources indicate that will-making services have become more accessible to different socio-economic demographics, which is advantageous.[15]

Responses to the Law Commission's 2017 report suggest that video-witnessed wills should be permissible. As per the UK Government, video conferencing facilities are insignificant.[16] Although video conferencing platforms such as Zoom, Skype, and Teams are effective means of communication, numerous issues could arise when attempting the execution of a will via these methods. This has been demonstrated by the rise of probate litigation, post-COVID. As per the Society of Trust and Estate Practitioners (STEP), video wills should only be made as a last resort.[17]

The Requirement of a Wet Signature

Several factors must be considered when assessing whether to dispense with the formality of a signature. Whilst legal reform has permitted digital preparation of a will through software like *Arken*, there remains a narrow perception that a

be-made-legal-during-coronavirus-pandemic> accessed 21 February 2022.

[7] Ibid, **Note:** On 12 January 2022, the Ministry of Justice Department of the UK Government extended the legislative provision to last until 31 January 2024, but gave no indication of whether the provision will be embedded as a permanent fixture.

[8] Neil Rose, 'Wills and probate market tops £2bn with contentious work on the rise' (Legal Futures, 4 February 2022) <https://www.legalfutures.co.uk/latest-news/wills-and-probate-market-tops-2bn-with-contentious-work-on-the-rise> accessed 22 February 2022.

[9] Law Commission, *Making a Will* (No 231, 2017) para 6.32.

[10] [1781] 1 Bro C C 99.

[11] [1996] 1 W.L.R 1301.

[12] COP 19/9/11.

[13] Laura Abbott, 'Is witnessing wills via video legal in England and Wales?' (The Gazzette, 2022) <https://www.thegazette.co.uk/wills-and-probate/content/103547 > accessed 22 February 2022.

[14] Law Reform Committee, Twenty Second Report (The Making and Revocation of Wills) (1980) Cmnd 7902, 4.

[15] Kimberley Martin, 'Technology and the Wills – The Dawn of a New Era' (2020) <https://s3.amazonaws.com/tld-documents.llnassets.com/0024000/24126/technology%20and%20wills%20the%20dawn%20of%20a%20new%20era.pdf> accessed 22 February 2022, 30.

[16] Ministry of Justice, 'Guidance on making wills using video-conferencing' (2020) <www.gov.uk/guidance/guidance-on-making-wills-using-video-conferencing> accessed 22 February 2022.

[17] Emily Dean, 'Wills by Video' (2022) <https://www.newlawjournal.co.uk/content/wills-by-video> accessed 22 February 2022.

'written signatures' should be interpreted to mean 'handwritten' signatures, for the purposes of the Wills Act and English Law. In *Re Chalcraft's Goods*,[18] despite testatrix Chalcraft's deteriorating health, she had indicated that she was well enough to sign the codicil. Unfortunately, Chalcraft was physically unable to complete her signature and only reached as far as "E. Chal" before passing away mid-signature. Wilmer J held that this was sufficient as it was the best that could be done in the circumstances. In other words, the signature was valid because the mark had been made through the deliberate body movements of the testatrix. Arguably, there is potential for wet signatures to be dispensed with because logistically, marks could be made with body movement through alternative methods in the twenty-first century. Technological means may also solve issues arising when individuals must sign a will on their deathbed, as iPads and iPhones may be more accessible than pen and paper at hospitals.

If the requirement that signatures be handwritten by the testator can be dispensed with where an individual is illiterate or suffering from a severe physical disability that affects their ability to write, this should also be workable via electronic wills. Concurrently, people can still appoint someone to sign on their behalf as was the case in *Barrett*. In *Barrett v Bem*,[19] the testator was executing a deathbed will with the aid of the nurse's assistant who held his hand in place to help him write. However, the moment he became shaky, the nurse took over and completed the signature herself. Under section 9(a) of the *Wills Act* 1937, the court should not find that a will has been validly signed by a third party at the direction of the testator unless there is positive and discernible communication (verbal or non-verbal) by the testator that he wishes the will to be signed on his behalf by the third party. It is advisable to clarify in the attestation clause that the testator signed with his mark to make it clear that the mark was intended by the testator and that it is their signature. Here, the requirement for a signature could have been dispensed with because two other nurses were present as witnesses and could have attested whether the nurse was signing under the discernible direction of the testator. In practical terms, an e-signature could have saved years of financial and emotional investment in ensuing litigation to determine whether the nurse had in fact signed the will at the testator's discernible direction.

While there is no dispensing power in the law of England and Wales, there is a statutory power to rectify wills,[20] which inherently produces the same result. The case of *Marley v Rawlings*[21] concerned 'switched wills' where two testators (a married couple) had produced mirror wills containing identical terms but accidentally signed each other's wills when their solicitor handed them the incorrect wills to sign. The court ultimately rectified the interpretation of the clerical error, arguing that there is a degree of overlap between dispensing powers and a power to rectify wills, a point raised in the Law Commission's 2017 Report.[22] Regardless, this overlap remains incomplete because Lord Neuberger's judgement clarified that although the court has unlimited power to interpret the applicability of section 20(1)(b) of the Administration of Justice Act 1982, there may be a "potential limiting effect on the ambit of section 20(1)(a)" in the sense a clerical error should not be given a meaning which "significantly overlaps with, let alone subsumes" a failure to understand instructions[23]

The Law Commission's 2017 report indicated that handwritten signatures provide 'necessary security' and that they are "distinctive marks, made directly by the testator, amenable to forensic analysis".[24] It was also acknowledged that

[18] [1948] P 222.
[19] [2012] EWCA CIV 52.
[20] This power is contained in Administration of Justice Act (AJA) 1982, s.20 and enables the court to rectify a will that "is so expressed that it fails to carry out the testator's intentions, in consequence (a) of a clerical error; or (b) of a failure to understand his instructions".
[21] [2014] UKSC 2.
[22] Law Commission (n9) para 5.85.
[23] *Marley* (n 21) at [78].
[24] Law Commission (n 9) para 6.35.

the rising use of electronic signatures may present some advantages. Whilst typed signatures and photographs of signatures could nonetheless increase vulnerability to fraud, more complex alternative methods like biometric fingerprints could be developed. Older case law reflects the potential for this as demonstrated in *Estate of Finn*,[25] where a thumbprint was upheld as a valid signature. Recent case law also recognises an individual's thumbprint as a valid signature, as in *Re Parsons*.[26] Additionally, this was reaffirmed five years after *Re Parsons* when famous scientist Stephen Hawking left behind a £16.3m fortune in a will "which he signed with a thumbprint due to his motor neuron disease" which left him "completely wheelchair bound" and dependent on a computer for verbal communication.[27] The previous examples substantiate the claim that encryption methods could be developed to prevent the commission of fraud. At present, to validly execute a will, probate lawyers are still required to physically ascertain the signatures of the testator and witnesses.

Testamentary Intention vs Formalities in Jurisdictions Outside the UK

The standard of proof required in Australia is the criminal standard of proof weakened for a civil effect.[28] The Court must be satisfied that there is "no reasonable doubt that the deceased intended the document to constitute his will." The Australian *Nichol* cases[29] highlights the courts' powers when considering the validity of documents that purport to set out testamentary intentions. This can be contrasted from the position of the courts in England and Wales, where the requirements for creating a will remain strict. In *Nichol v Nichol* [2017],[30] an unsent text message typed on a man's mobile phone shortly before his death was held to have captured his testamentary intention. In turn, the Court dispensed with the normal execution requirements of a will and allowed the unsent text message to be admitted to probate. The Law Commission has argued dispensing powers are a 'double-edged sword', highlighting that electronic means may be preferred when formalities cannot be completed, but that they may lead to a "treasure trove for dissatisfied relatives". [31] Furthermore, the Law Commission indicated that modern methods of storing electronic documents could open the floodgates for contentious probate claims, concluding on balance that "electronic documents, audio and audio-visual recordings should fall within the scope of the dispensing power".[32]

In *Nichol*, Brown J encouraged greater reliance on technology in the wider context and recognised contemporary methods of communication as more convenient and accessible as the accepted form of modern day correspondence. Further emphasis should be placed on re-thinking the archaic language of the Wills Act 1837, which was comprehensive in its time when business correspondence was conducted by monarchs and Heads of State. However, it also points to the potential of increased disputes and the futility of litigation.

Another difficulty that may arise if dispensing powers are brought into effect is how the use of emojis, symbols and text abbreviations should be analysed.[33] The Court may need expert evidence on the general meanings and

[25] [1935] 105 L.J.P 36.
[26] *Re Parsons, Borman, and another v Lel* [2002] WTLR 237.
[27] PTI, 'Stephen Hawking Left behind over $20 mn will with a thumbprint', *The Economic Times* (Mumbai, 27 April 2020) <https://economictimes.indiatimes.com/magazines/panache/stephen-hawking-left-behind-over-20-mn-will-with-a-thumbprint/articleshow/75406001.cms> accessed 10 March 2022.
[28] N Peart, "Testamentary Formalities in Australia and New Zealand" in K G C Reid, MJ De Waal, and R Zimmermann (eds), Comparative Succession Law: Testamentary Formalities (2011) 349.
[29] *Re Nichol; Nichol v* Nichol [2017] QSC 220].
[30] Ibid.
[31] Law Commission (n 9) para 5.96.
[32] Ibid, para 5.96.
[33] Stephanie Kerr, 'Dispensing powers: Do we need a 'Making a Will' emoji?' (Brabners, 23 June 2020) <https://www.brabners.com/blogs/dispensing-powers-do-we-need-making-will-emoji> accessed 22 February 2022.

interpretations of emojis, but should also consider the subjective contextual evidence and the person's particular habits in their usage of emojis. A misused emoji in a text message or email could result in an invalid will. Whilst this may seem negative, it opens a gateway for new employment in such a field as symbol analysis.

In considering the dynamics of the Law of Equity, in the case of lifetime transfers, the courts have been able to give effect to the deceased's intentions through the 'every effort' test and the principle of unconscionability established in the case of *Re Rose (Deceased).*[34] The 'every effort' test asserts that the law will give effect to a settler's intentions if the settlor can be said to "have done everything which…was necessary to be done" within their power, short of meeting any formalities.[35] Arguably, courts could incorporate a similar variant for death-bed gifts by including dispensing powers to uphold testamentary intention. Following the judgment in *Nichol*, which coincides with the Law Commission's consultation paper and proposal,[36] an intention-based dispensing law should be considered. If the requirement for the testamentary intention in other jurisdictions has outweighed the requirement of formalities, this should also be revised and implemented in English Law.

To conclude, the mass of case law and jurisprudence supports the adoption of dispensing powers in English law. Whilst formality requirements are a 'means to an end,' they are not an end in themselves.[37] There are several unanswered questions concerning electronic will-drafting, including the lack of absolute certainty regarding whether e-signatures are indeed made by the testator, and whether the introduction of e-signing results in people no longer seeking legal advice, leading to less controlled will-making and a potential increase in Probate disputes. However, once these concerns have been addressed, viable solutions to mitigate the risk of fraud and undue influence, as well as the risk of unauthorized signing and the lack of knowledge and approval, can be thoroughly explored to develop an efficient system that gives effect to testamentary intention. Nevertheless, reformed dispensing powers will be subject to increased judicial scrutiny for several years before we can rely on them. The Law Commission's "Twelfth Programme of Law Reform" recommended a review of the formalities for will-making, to consider how to "facilitate will-making in the 21st century".[38] The outcome is awaited and will hopefully provide clarification surrounding dispensing powers and valid will execution. There should be no reason why dispensing powers would not be viable in English law, given their workability in such other jurisdictions as Australia, New Zealand, and Canada.

[34] [1952] EWCA Civ 4.
[35] Ibid, 512.
[36] Law Commission (n 9).
[37] Miller, "Substantial compliance and the Execution of Wills" 36 ICLQ (1987) 559 at 587, cited in Scottish Law Commission, (1990) Report on Succession Scot Law Com No 124, 41.
[38] Law Commission, *The Work of the Law Commission: Incorporating the Twelfth Programme*' (June 2016) < https://www.lawcom.gov.uk/app/uploads/2016/06/Work_of_the_Law_Com_English_June_2016_for_website.pdf>

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Deprivation of Citizenship: Discrimination Against Dual Citizens following the *Begum* Ruling

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The United Kingdom's (UK) law on deprivation of citizenship (the process of removing British citizenship) discriminates against individuals who have been naturalised (the legal process of converting nationality) in the UK, including those who hold dual citizenship. The law on deprivation has developed to become easier for the Secretary of State to denationalize a dual citizen on discriminatory grounds. The leading case of *Begum v SSHD* [2021][1] has infamously highlighted how being a naturalized UK citizen has lost its substantive meaning and instead can transform an individual into a target of political discrimination. Despite critical opposition to this argument, the following jurisprudence proves to be antithetical to human rights, thus inconsistent with what it means to be a citizen of the UK. This paper seeks to argue how the law of deprivation ought to be reformed to safeguard human rights more adequately, thereby preventing further discrimination against dual citizens in the UK.

Section 20 of the British Nationality Act 1948 (BNA) enables citizenship deprivation, provided the deprivation is "conducive to the public good" on grounds of disloyalty, trading and communicating with the enemy, or if the individual has received a criminal sentence of twelve months or more in the five years preceding the decision. Section 20 is limited to cases where the individual is a UK citizen through registration or naturalization, rather than individuals who received UK citizenship by birth or by descent. Additionally, Article 8 of the 1961 UN Convention on the Reduction of Statelessness operates to prevent the UK from depriving an individual of their nationality if such deprivation would render them stateless. As a result, there were very few cases of citizenship deprivation in the last half of the twentieth century.

The BNA conferred the power to deprive UK citizens of their citizenship upon the Secretary of State, if "conducive to the public good".[2] This conduciveness test was followed by the constrictive approach of the Nationality, Immigration and Asylum Act (NIAA) 2002, which allowed for the denationalisation of UK born citizens if they had done anything "seriously prejudicial to the vital interests of the United Kingdom".[3]

The conduciveness test was amended by the NIAA 2002 to widen the ambit of the test by allowing a threshold lower than "seriously prejudicial" to satisfy its conditions, listing such circumstances as involvement in terrorism, espionage, serious organised crime, a war crime or unacceptable behaviours.[4] Outlined in section 40 subsection 4 of the BNA 1981, the Secretary of State's power to denationalise a citizen is limited only to those citizens who become stateless as a result. Despite this restriction, all dual nationals remained at risk of deprivation merely because, in their cases, deprivation would not leave them stateless. Amongst the many dual nationals who were negatively impacted by the discriminatory

[1] EWCA Civ 1878.
[2] British North America Act 1948, s 20
[3] Nationality, Immigration and Asylum Act 2002, s 4
[4] UK Visas and Immigration, *Deprivation and nullity of British citizenship* (2017) Ch 55. <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/631643/deprivation-nullity-Chapter-55.pdf>

legislation, the Shamima Begum case remains significantly controversial.

After leaving the UK at the age of fifteen, London inhabitant born-and-raised, Shamima Begum went to Syria to allegedly join the Islamic State of Iraq and the Levant (ISIL) terrorist organisation. The current Secretary of State, Priti Patel, declared that 15-year-old Begum posed a threat to national security and ordered that she be stripped of her British citizenship. The deprivation order was upheld on the grounds that Begum held Bangladeshi citizenship and would therefore not be left stateless. As a result, Begum was forced to return to her parent's home country of Bangladesh. Home Office expert, Dr Hoque, analysed to The Citizenship Act 1951, which states that an individual born to any parent who is a Bangladeshi citizen is automatically deemed a Bangladeshi citizen.[5] However, the 1951 Bangladeshi Act limits this entitlement to the age of twenty-one if the individual in question holds citizenship to another country, thus Begum was unaffected by the provision and it was held that she would not be left stateless. Furthermore, Begum's expert observed that the Supreme Court of Bangladesh has often shown bias in favour of government decisions. This was evident when Begum was left *de facto* stateless, as Bangladesh's Home Affairs Minister declared: "this is a matter of the British government – Bangladesh has nothing to do with this".[6] Despite these developments, the Special Immigration Appeals Commission (SIAC) refused to allow the appeal. The SIAC's rejection is evidently based on discriminatory grounds because if Begum had held sole UK citizenship, she would not have been deported to Bangladesh.

The consequence of citizenship deprivation is remote from its deterrent aim of protecting the public interest in the face of threats to national security. A significant judgment such as *Begum* should be decided based on the act committed by the individual, rather than the individual's birthplace or citizenship status. Moreover, considering the government's defensive approach to citizenship deprivation by repeatedly relying on the 'threat to national security' argument, it is unmistakable that terrorism is unjustly associated with Muslim extremism, thereby affording non-Islamic terrorist groups to escape the label of 'terrorist'.

The rampant growth of Islamophobia within the UK government should be considered when analysing the discriminatory judgment in the *Begum* case. Recent data suggests that Muslims have been disproportionately impacted by citizenship deprivation.[7] Socially and politically, British Muslims are deemed less British than non-Muslims. This statement represents the public sentiment towards British Muslims since the Windrush generation, who were made to abide by laws that directly implied they were less British than the common white British person.[8]

A direct correlation between prejudicial biases against Muslim citizens and the use of the law of deprivation is evidenced by the government's application of the 2006 Act. Between 2010 and 2011, the UK government had deprived citizenship from at least six individuals and an additional thirty from 2011 to 2015.[9] When analysing the appeals of those who reached the SIAC, a notable pattern emerged, as most of these individuals originated from Muslim countries.[10] This further demonstrates the Secretary of State's

[5] The Citizenship Act 1951, s 5.
[6] Reuters Staff, 'Bangladesh on UK teenager in Syria: nothing to do with us' *Reuters* (Dhaka, February 20 2019) < https://www.reuters.com/article/us-mideast-crisis-britain-teenager-bangl-idUSKCN1Q929L> accessed 14 February 2022.
[7] Matthew J. Gibney, 'Denationalisation and discrimination' (2019) Volume 46 Issue 12 Journal of Ethnic and Migration Studies < https://doi.org/10.1080/1369183X.2018.1561065> accessed 14 February 2022.
[8] Isaac Selwyn, 'Shamima Begum: The UK's Racialised Approach To Citizenship' (2020) Human Rights Pulse < https://www.humanrightspulse.com/mastercontentblog/shamima-begum-the-uks-racialised-approach-to-citizenship> accessed 14 February 2022.
[9] HC Briefing Paper, 2017, p 5.
[10] Matthew J. Gibney, 'Denationalisation and discrimination' (2019) Volume 46 Issue 12 Journal of Ethnic and Migration Studies < https://doi.org/10.1080/1369183X.2018.1561065> accessed 14 February 2022.

clear discrimination against, not only dual citizens but, dual citizens with a Muslim background when authorising citizen deprivation.

The law on deprivation in the UK is discriminatory when evaluated through the lens of the European Convention on Human Rights (ECHR) due to its blatant mistreatment of citizens with multi-citizenship. Article 14 of the ECHR prohibits the discrimination of individuals based on their national or social origin, birth or other status.[11] The law on deprivation is contradictory to Article 14 as it distinguishes dual citizens from mono-citizens. Simply put, the 1981 Act discriminates against individuals who have dual citizenship and does not grant them the same security as an individual who only holds UK citizenship. The Secretary of State has taken advantage of their power by exploiting the broader scope of offences listed under the law of deprivation, making it substantially simpler to revoke an individual's citizenship.[12]

The Human Rights Joint Committee released a statement in 2014 establishing the connection between deprivation of citizenship and the breach of various human rights, stating that:
"Deprivation may, for example, [make one] liable to be removed or excluded from the UK, which engages, for example, the right to be free of degrading treatment (Article 3 ECHR), the right to liberty (Article 5 ECHR), the right to respect for family life (Article 8 ECHR), and the right not to be arbitrarily deprived of the right to enter one's own country (Article 12(4) International Covenant on Civil and Political Rights)".[13]

Shamima Begum's fundamental human rights were violated because her personal, intersectional circumstances were not fairly considered. The SIAC accepted that Begum's treatment at the Al Roj camp in Syria amounted to a breach of her right to protection against inhumane treatment and torture. Despite this, she was unable to rely on the ECHR. In the article 'Democracies and the Power to Revoke Citizenship', Patti Tamara Lenard states that democratic citizenship "is commonly understood to be egalitarian, that is, it protects an equal package of rights for all citizens", and "it is meant to be secure from unilateral withdrawal by the state".[14] Although Lenard argues that all revocatory laws are inconsistent with democratic citizenship, it is evident that dual citizens are burdened in a way mono-citizens are not.

A common defence for the law on deprivation is that citizenship is a privilege, rather than a right. This proposed privilege asserts that dual citizens can access another form of citizenship with all the associated rights and advantages, and they can live in another country without fear of deportation. However, this 'privilege' seems to leave dual citizens vulnerable to the law of deprivation.[15] Nevertheless, this argument does not carry much weight if there is an assumption that all countries have similar rights and advantages. A dual citizen's 'privilege' cannot be generalised and claimed merely because they hold the right to live in another country. Jacob Rees-Mogg MP states that: "once any one of us has a passport that says we are British, we are as British as anybody else, whether they were born here or got their passport five minutes ago. The right to attain and hold legal UK citizenship is equal for every citizen, irrespective of when they have acquired it and where else they may hold citizenship.

The category of dual citizens includes UK-born citizens and individuals who have immigrated from another country, naturalised in the UK, and later attained citizenship. These citizens have taken an oath to uphold British values and should behave according to those values. In a 2014 House of Commons debate, Home Secretary Theresa May

[11] European Convention on Human Rights, art 14.
[12] HM Government Counter Extremism Strategy 2015, para 104.
[13] Human Rights Joint Committee, Twelfth Report, Legislative Scrutiny: Immigration Bill (Second Report), February 2014, para 159. <https://publications.parliament.uk/pa/jt201314/jtselect/jtrights/142/142.pdf>
[14] Tamara Lenard P, "Democracies and the Power to Revoke Citizenship" (2016) 30 Ethics & International Affairs 73.
[15] Ibid.

stated that the behaviour which is expected of naturalised citizens is "encapsulated by the oath that [they] take when they attend their citizenship ceremonies".[16] Although individuals agree to comply with this oath, it does not render the oath fair and just. It is inferred that dual citizens are of second-class status, a problem raised in the 2002 House of Commons debate when discussing the justification of deprivation laws in the UK. Lord Filkin stated that "the present law discriminates against those who have acquired citizenship by registration or naturalisation [including the UK born dual citizens]. As such, it tends to devalue these processes by marking out people who became citizens in either of these ways as, potentially, second-class citizens".[17] The UK government is unable to claim that they hold all citizens on an equal footing. The law on deprivation in the UK must be reformed to avoid the unfair distinction between dual citizens and mono-citizens. Once an individual attains UK citizenship, it is unjust to deprive them of this right due to their dual nationality. The grounds upon which a deprivation order is made should not be determined on the basis of the individual's birthplace or citizenship status. This discrimination is further exacerbated when considering cases, such as *Begum*, where the dual national is a UK born-and-raised citizen. Shamima Begum was raised with the same British values as any other UK-born citizen. However, she was viewed through the discriminatory lens of the British government and deemed a second-class citizen due to her dual nationality.

The lasting effects of deprivation are severe as citizens lose their right of abode. In addition, they "suffer the loss of associated and consequential rights, duties and opportunities – particularly voting, standing for election, jury service, military service, eligibility for appointment to the Civil Service and access to state benefits, state-financed healthcare and state-sponsored education".[18] The essence of being a UK national is lost and the relationship established between the citizen and the UK is jeopardised. The law on deprivation of citizenship in the UK undoubtedly discriminates against dual citizens. This discrimination is evidenced in the case of *Begum* and has negatively affected many individuals like her, depriving them of their rightful UK citizenship. The law on deprivation in the UK has granted the Secretary of State increased powers to revoke UK citizenship of dual citizens based solely on their discretion. This increase in powers has led to dire consequences for dual citizens, particularly those of the Islamic faith. The essence of what it means to be a UK national, and a UK citizen is lost for many dual citizens.

[16] House of Common Debate 30 January 2014, col 1025. <https://publications.parliament.uk/pa/cm201314/cmhansrd/cm140130/debtext/140130-0002.htm>

[17] Ibid

[18] *Ahmed and others (deprivation of citizenship)* [2017] UKUT 00118 (IAC) para 27.

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Rape, Reform, and the Sexual Offences Act 2003

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Scenario

Doug lives in a shared housing arrangement with Maria. Unbeknownst to Doug, Maria is attracted to Doug. However, this attraction is not mutual. One night, Maria climbed into Doug's bed while he slept and cuddled him. Doug discovers Maria in his bed in the morning but thought nothing of it. The following night, Maria entered Doug's bed again and, this time, she performed fellatio on him and inserted his penis into her vagina whilst he slept. Doug wakes up to discover Maria on top of him. A few moments later, she finishes the act and says "thank you" to Doug, kisses him, and leaves the room. What is Maria's criminal liability?

Introduction

Rape conviction is a highly contentious area of English criminal law, which better accommodates the stereotypical scenario of a male aggressor violating an unsuspecting female victim. This paper will take an unorthodox approach of examining rape through a case study to adequately address the gaps in legislative protections, as a steppingstone towards formulating possible routes to reform. The above scenario is fictional and was created for the purposes of this analysis, any semblance to existing case law is purely coincidental and unintentional. This essay will serve three purposes: The first will be to examine Maria's culpability by outlining the statutory definitions of rape and causing a person to engage in sexual activity without consent, and their respective *actus reus* and *mens rea* elements. An application of these elements to the scenario will follow, leading to a conclusion that Maria cannot be held liable for rape and is instead, likely to be held liable for causing a person to engage in sexual activity without consent. Secondly, this paper will engage in a discussion on whether Maria should be held liable for rape, arguing that double standards between genders and mislabeling may be contributing to her offence as being deemed less serious by the reasonable layperson. Is her offence also deemed less serious in the eyes of the law? Finally, this essay will suggest ways in which the law can be reformed by perhaps abolishing the rape/assault differentiation to bring the Sexual Offences Act (SOA) 2003 into alignment with societal, moral, and ethical standards of equality.

Sexual Offences Act, History and Definitions

The SOA was enacted in 1956 to "consolidate…the statute law of England and Wales relating to sexual crimes."[1] The 2003 Act, put into force on 1 May 2004, was intended "to make new provision relating to sexual offences."[2] Under the 1956 Act, rape was defined as intercourse by force, intimidation, etc., by a man upon a woman. [3] This narrow statutory definition expressly indicated that rape may only occur if a man performs the act on a woman, not vice versa. In a similar manner, if a man was to rape another man, it was classified as buggery.[4.] The 2003 Act broadened definitions of rape from the 1956 Act and changed the law relating to consent and belief in consent, such as the inclusion of non-consensual oral sex. To assess culpability, the law will first focus on the most serious offence made available through the 2003

[1] Sexual Offences Act 1956 c 69.
[2] Sexual Offences Act 2003 c 42.
[3] Sexual Offences Act 1956, s 1.
[4] Ibid, s 12.

Act. It will then move down the hierarchy of offences until both the elements of the defendant's AR and MR are satisfied.

While the 2003 Act came a long way in reforming the law on sexual offences, it arguably continues to fall short. For the purposes of Doug's scenario, two offences from the 2003 Act will be considered, namely section 1 rape and section 4 causing a person to engage in sexual activity without consent. While on the surface, these offences seem identical, carry similar sentences, and are based on similar acts, they operate in completely different ways.

Rape is deemed to occur when "a person (A) intentionally penetrates the vagina, anus or mouth of another person (B) with his penis, where B does not consent to the penetration and where A does not reasonably believe that B consents."[5] Contrastingly, causing a person to engage in sexual activity without consent is deemed to occur when "a person (A) intentionally causes another person (B) to engage in an activity, the activity is sexual, B does not consent to engaging in the activity, and A does not reasonably believe that B consents."[6]

'Penetration' is defined as a continuing act from entry to withdrawal.[7] 'Sexual' is defined as "penetration, touching or any other activity … if a reasonable person would consider that (a) whatever its circumstances or any person's purpose in relation to it, it is because of its nature sexual, or (b) because of its nature it may be sexual and because of its circumstances or the purpose of any person in relation to it (or both) it is sexual".[8] Finally, "a person consents if he agrees by choice, and has the freedom and capacity to make that choice".[9]

Assessing Maria's Culpability

In assessing Maria's culpability, it is important to begin with the highest statutory offence—section 1 Rape, ensuring the relevant *actus reus* and *mens rea* elements are satisfied. With regard to the *actus reus* of rape, penetration must have occurred and may only be committed by a male with a penis.[10] As Maria is biologically female and does not have a penis, then, by law she is unable to satisfy the necessary *actus reus*. In our scenario, Maria does not penetrate Doug, instead she had Doug penetrate her, hence, the next statutory offence available to consider is section 4, of causing a person to engage in sexual activity without consent. This offence was created for the purposes of identifying a wider range of sexual activity, and to establish a female equivalent.[11] Therefore, unlike rape, which can only be committed by a man, causing a person to engage in sexual activity without their consent, can be committed by either a man or a woman. This offence can carry, based on the circumstances, the same level of punishment for what amounts to the same type of offending behaviour.[12]

The *actus reus* element of section 4 is non-consensual engagement in sexual activity. This section creates two separate offences, non-penetrative,[13] and penetrative.[14] Accordingly, Maria satisfies the *actus reus* penetrative requirement of section 4(4). The *mens rea* elements of section 4 require intention and an absence of reasonable belief in consent. To satisfy the first component, the act may be deliberate or voluntary, as per *R v Heard*[15] and *R v K*.[16] The second component of the *mens rea* asks whether the defendant reasonably believed that the complainant did not consent at the time of the penetration.

The Crown Prosecution Service considers consent in two stages: 1) Whether the victim had the capacity (i.e., the age and understanding) to make a

[5] Sexual Offences Act 2003, s 1.
[6] Ibid, s 4(1)(a-d).
[7] Ibid, s 79(2).
[8] Ibid, s 78.
[9] Ibid, s 74.
[10] Ibid, s 79(3).
[11] Crown Prosecution Service, 'Rape and Sexual Offences – Chapter 7: Key Legislation and Offences (21 May 2021)
[12] Crown Prosecution Service, 'Rape and Sexual Offences - Chapter 7: Key Legislation and Offences' (21 May 2021) <https://www.cps.gov.uk/legal-guidance/rape-and-sexual-offences-chapter-6-consent> accessed 7 Feb 2022.
[13] Sexual Offences Act 2003, s 4(1).
[14] Ibid, s 4(4)
[15] [2008] QB 43.
[16] [2009] 1 CR App R 331.

choice about whether or not to take part in the sexual activity; and 2) Whether the victim was in a position to make that choice freely, unconstrained in any way.[17]

If the complainant has the freedom and capacity to make their choice, the critical question becomes whether the complainant freely agreed to the activity. The 2003 Act established a two-fold test with a subjective and objective component therein. The subjective component of this test asks whether the defendant genuinely believes that the complainant consented. If so, the objective component is engaged to consider whether the defendant is reasonable in their belief.[18] Whether a belief is reasonable is to be determined having regard to all the circumstances, including any steps A has taken to ascertain whether B consents.[19]

Section 75 of the SOA 2003 provides evidential presumptions of consent, stating that "if in proceedings for this offence, it has been proven that the defendant did the relevant act, that any circumstance specified in subsection (2) existed, and that the defendant knew that those circumstances existed, the complainant is to be taken not to have consented to the relevant act",[20] unless sufficient evidence is adduced to raise an issue as to whether they reasonably believed it. The circumstances outlined in section 75(2) are as follows: Violence[21] or fear of violence,[22] unlawful detention,[23] complainant was asleep or unconscious,[24] complainant has a physical disability,[25] and where the complainant was administered a substance.[26] The conclusive presumptions in s.76 of the SOA 2003 are not relevant to our scenario and should not be discussed.

Maria holds the responsibility of ensuring Doug has consented to the act. If Maria is proven to have done the relevant act, and she knew Doug was asleep, section 75(2)(d) would apply and there would be a strong evidential presumption that Doug did not consent. Maria, at this point, would need to provide sufficient evidence to rebut the presumption. Following *R v Zhang*,[27] if the evidence Maria submits is sufficient, the trial judge will displace the presumption and return to s.74. Further, in *R v Ciccarelli*,[28] the evidence adduced must be 'beyond the fanciful or speculative' to support the reasonableness of her belief in consent. In practice, however, evidential presumptions found in s.75 are rarely used. Barristers are concerned that they merely serve to overcomplicate consent,[29] and are problematic at their core as they shift the burden of proof onto the defendant in order to win the case. If Doug's testimony alone was insufficient to satisfy s.74, this could indicate trouble for the prosecution.[30]

Although Doug woke up during penetration and did not verbally express his lack of consent, the Court of Appeal's decision in *R v Malone*[31] states that lack of consent need not be demonstrated. Applying the twofold test from the SOA 2003, Maria may have genuinely believed that Doug consented by arguing implied consent. Maria may be able to argue Doug's implied consent by virtue of his not asking her to leave his bedroom the previous morning or relying on Doug's erection during penetration as proof of consent, or alternately, that he did not verbally express lack of

[17] Crown Prosecution Service, 'Rape and Sexual Offences - Chapter 6: Consent' (21 May 2021) <https://www.cps.gov.uk/legal-guidance/rape-and-sexual-offences-chapter-6-consent> accessed 7 Feb 2022.
[18] Crown Prosecution Service, 'Rape and Sexual Offences - Chapter 6: Consent' (21 May 2021) <https://www.cps.gov.uk/legal-guidance/rape-and-sexual-offences-chapter-6-consent> accessed 7 Feb 2022.
[19] Sexual Offences Act 2003, s 2(2).
[20] Ibid, s 77(1-4).
[21] Ibid, s 75(2)(a).
[22] Ibid, s 75(2)(b).
[23] Ibid, s 75(2)(c).
[24] Ibid, s 75 (2)(d).
[25] Ibid, s 75 (2)(e).
[26] Ibid, s 75(2)(f).
[27] [2007] WL 2414843
[28] [2011] EWCA 2665
[29] Carline and Gunby (2011), 'How an ordinary jury makes sense of it is a mystery'. Barristers' Perspectives on Rape, Consent and the Sexual Offences Act 2003, Liverpool Law Review 32(3). 237.
[30] Ibid
[31] [1998] 2 CR App R 447

consent. At first glance, this defence may seem reasonable, however applying the principle from *Ciccarelli*, it would likely fail to rebut the presumption, as Maria's belief in Doug's consent is speculative and based on a single event, thus it is unlikely that her evidence is capable of supporting reasonable belief in Doug's consent. Although Doug did have maintain an erection through the act, many male victims—either because of involuntary physiological reflex or direct stimulation by their assailants—will maintain an erection or can even ejaculate (sometimes both) during assaults.[32] Maria may proceed on the assumption that evidence of Doug's erection will be misinterpreted in her favour by the justice system and the medical community as signifying consent by the victim,[33] and could have intended to rely on the proof of erection or ejaculation to fortify her defense in case she was caught. This defense is likely to fail because, as previously stated, penetration is a continual action from entry to withdrawal.

Maria forced Doug to penetrate her whilst he slept and any reasonable person is able to determine whether another person is sleeping or not. Therefore, since the evidential presumptions in section 75 are rarely used, context and the relevant circumstances are important. In this scenario, while Doug does in fact have the freedom to consent, as Maria is not in a position of power that she could abuse (teacher, caregiver, employer, etc…), he lacks the capacity to physically make a choice due to him being asleep. Both capacity *and* freedom must be present for section 74 to be satisfied.

In this scenario, the *actus reus* and *mens rea* elements for causing a person to engage in sexual activity without consent are satisfied and therefore the offence is complete. A charge contrary to section 4(4) of the SOA 2003, is appropriate, and it will be up to the jury to decide whether Maria's belief in consent is reasonable or not.

Should Maria be Charged with Rape?

In an extension of the scenario above, let us assume that when Doug relayed the experience to his friends and colleagues, they responded dismissively to the effect of "what do you care? You got lucky", "was she good looking", and "stop being a wuss". Conversely, if the victim were female, the rhetoric would be drastically different. Advice such as "did you call the police?", or "did you go to the hospital?" would surely follow. Although Doug was perturbed by the situation, he did not call the police or visit a rape crisis centre. Doug was also unable to contextualise his experience, placing him at emotional crossroads. Although he understands an offence has been committed and Maria needs to be held accountable for her actions, the reactions he has received by those closest to him have invalidated his feelings about the experience, and pressed home that he should simply "suck it up and move on" as to not waste valuable police and court resources.

Double Standards

Above is an example of the double standards inherent within the sexual paradigm that should be reconciled with the realities of contemporary societal norms. The offence Maria committed will have left long-lasting effects on Doug's emotional stability and self-worth. As it happens, Doug now finds it difficult to maintain sexual relationships and he treats sex as something more transactional in nature, a 'means to an end'.

Although the 2003 Act reformulated the victim category of rape to be gender-neutral, the same cannot be said for the perpetrators, as the requirement for penile penetration remains. This persisting requirement is evidently problematic as the diversity and dynamics of gender identity has considerably grown since the 2003 Act came into force. It is additionally problematic as it reinforces gender-based sexual stereotypes, such as the presumption that men are hypersexual beings who initiate sexual behaviours and conduct towards

[32] Clayon M. Bullock and Mace Beckson, 'Male Victims of Sexual Assault: Phenomenology, Psychology, Physiology' (2011) 39 Journal of the American Academy of Psychiatry and the Law Online 197-205.
[33] Bullock and Beckson (n 29).

women whereas, women's sexual purity is more important than men's and it is something that should be protected.

The categorically false stereotype that men always want sex is a commonly-held belief that no matter the circumstances, a man is incapable of not wanting sex. The stereotype goes so far as to question the masculinity of those men who do not conform to the stereotype. The consequence of this stereotype is that it further reinforces the belief that a woman's sexual purity must be protected, as men are assertive, aggressive, sexually adventurous, and emotionally restrained. At the same time, women are portrayed as docile, passive, sexually modest, and emotionally sensitive.[34] Traditionalist, paternalistic views hold that a woman's worth is tied more to her sexual integrity than her intellectual integrity. Harriet Baber in her article 'How Bad is Rape?' suggests that "whilst rape is a very serious act of violence, viewing it as the worst kind of harm that can happen to a woman confirms the idea that women should be seen as sex objects, with little value beyond their sexuality."[35] The idea that the male sex drive is equivalent to that of a 'raging bull' that must be tamed by a female is in itself a fallacy, which underpins the belief that sex is something men do to women, rather than being equal partners in the act. These ideas likely contribute to the fact that only 15% of male victims of sexual assault and rape report to police, as opposed to 30% of women. To further exacerbate this issue, when the perpetrator is a female, the report rate falls to 7%.[36]

Acknowledging that rape can be committed, in principle, by both men and women would challenge the myths that rape is a by-product of the uncontrollable nature of the male sex drive, the idea that men are active sexually and women are passive sexually,[37] and that men initiate sex while women are merely the gatekeepers, who either consent or not.[38]

Mislabeling Offences Potentially Reducing Perceived Seriousness

Typically, statutory offences in the UK are written in a hierarchical structure where offences are classed by degree of severity. Prosecutors begin 'at the top' and work their way down the ladder depending on the circumstances. One need only look at the SOA 2003 itself to see that Rape tops this structure, followed by assault by penetration, sexual assault, and causing a person to engage in sexual activity without consent. Since penetration occurred, Maria would face the same sentence and the same consequences upon release as a section 1 offence, however the two offences diverge on the point of what connotations are attached to their sentencing label. Arguably, if Doug sexually penetrated Maria without her consent, upon conviction, he would be labelled as a rapist simply by virtue of his male appendage. On the other hand, Maria, upon conviction, would not be guilty of the same offence. The label of 'rapist' would never be attached to her, even though the offence she committed is just as serious.

Appropriate labelling determines how the offence and the perpetrator are perceived and treated by society.[39] Sociological theories on labelling were popularised in the 1960s by American sociologist Howard S. Becker. In Becker's 1963 book, *Outsiders: Studies in the Sociology of Deviance*, he states after one has been labelled a 'deviant' (behaviour that has been ascertained as deviant by those in social groups formulating the rules on which infractions constitute deviance),[40] they then lead the life of a

[34] Karolyn's Siegel and Étienne Meunier, 'Traditional Sex and Gender Stereotypes in the Relationships of Non-Disclosing Behaviorally Bisexual Men' (2018) 48 Archives of Sexual Behavior 333-345.
[35] Harriet Baber, 'How Bad is Rape?' (1987) Hypatia 2(2), 136. 137.
[36] Karen Weiss, 'Male Sexual Victimization Examining Men's Experiences of Rape and Sexual Assault' 12 (2010) Men and Masculinities 284-286.
[37] Natasha McKeever, 'Can a Woman Rape a Man and Why Does It Matter?' (2019) 13 Criminal Law and Philosophy 599.
[38] Ibid.
[39] Ibid.
[40] Howard S. Becker: *Outsiders: Studies in the Sociology of Deviance* (1963)

deviant and have a 'deviant career', true to the label society has given them.[41] Further, he states that people come to identify with and accordingly behave in ways that reflect how others label them.[42] Labelling someone as a criminal, for example, can cause others to treat the person more apprehensively as if they were always on the verge of committing their next crime.[43] Applying Becker's theory to the scenario, if rape can only be committed by one gender and not the other, which gender is more likely to be treated differently by the layperson? Upon which criminal will the jury look to with socially induced disdain? Will it be the criminal who committed rape and must henceforth be burdened with the label of 'rapist', or will it be the criminal who caused someone to engage in sexual activity against their consent and must henceforth be burdened with the label of 'assailant'? Will it be Doug or Maria?

What Can be Done?

Repealing the current statute with an updated definition that aligns with, and more clearly reflects with, today's societal needs is surely the way forward. Statutory definitions of rape in other modern jurisdictions have proven more useful and could serve as a resource for reforming a newly amended Sexual Offences Act. Parliament could also take this opportunity to form a Parliamentary committee to address the modernisation of the Act, in respect to changing gender norms, shifting political acclimations, and the rise of sexual libertarianism in England and Wales' societal landscape to broaden or narrow the statutory provisions where necessary. Sweden, for example, uses gender-neutral terms in their criminal code where the definition of rape is given.[44] In Canada, Bill-C52 from 1983 eliminated the term rape from their criminal code altogether, in favour of a tiered system to parallel existing assault offences, and went on to dispose of the notion of spousal immunity for sexual offences.[45]

These divergent jurisdictional examples demonstrate that fundamental adjustments to the legal framework of sexual offences are required to create a gender-neutral offence of rape, or alternatively, the outright abolition of the rape/ causing someone to engage in sexual activity without their consent distinction to prevent any further mislabeling or procedural loopholes for a sole offence. Simply amending the wording of section 1(1)(a) to read "they" instead of "he", and "an object or part of their body" instead of "his penis", and including "or compelled another person to otherwise engage in any sexual activity without consent", removes the gender discrimination from the statutory provision altogether and does not appear too onerous a recommendation.

Additionally, this new statute would absorb the non-penetrative and penetrative subsections currently in s.74, creating a more streamlined Act. This revised statute would prove in favour of all-encompassing statutory offence that catches all forced penetration in its net, thus moving the law forward, and leaving both the *actus reus* and *mens rea* elements intact. This would provide minimum disruption to the judiciary, streamline investigations, act as a stronger deterrent, and go a long way in correcting the inherent double standard and mislabeling issues detailed above.

Conclusion

The analysis and application of the *actus reus* and *mens rea* elements of rape and causing a person to engage in sexual activity without consent established that Maria could not be liable for rape but could be held liable for causing a person to engage in sexual activity without consent. A discussion on whether Maria *should* be held liable for rape was presented by evaluating the gendered double standards in the law along with the labelling

[41] Ibid.
[42] Ibid.
[43] Ashley Crossman, 'An Overview of Labelling Theory' ThoughtCo., (03 Feb 2020) <https://www.thoughtco.com/labeling-theory-3026627> accessed 7 Feb 2022
[44] Swedish Criminal Code c 6 s 1.
[45] Criminal Code of Canada (R.S.C., 1985 C-46) s 265, 271, 272.

theory, which could lead the layperson to perceive causing a person to engage in sexual activity without consent as a lesser offence to rape. Lastly, reforms were suggested to move the law forward, bringing the SOA 2003 in alignment with modern societal needs.

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An Appraisal of Social Justice and Social Inequality Dilemmas Exacerbated by the English Criminal Justice System

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Stefan Hradil defines social inequality as the unequal "social positions of individuals in networks of social relations."[1] Some common indicators of social inequality include disparities in class, gender, or ethnicity.[2] Social justice is substantive, in that it provides individuals what is owed to them without discrimination. The essence of social justice is to correct injustices, such as discriminatory treatment, that are rooted within historical contexts but persist in modern times. This essay seeks to evaluate whether the criminal justice system (CJS) exacerbates both social inequalities and social justice problems, by first looking through the lens of gender inequality in rape trials and legal discourses, and then looking to racial inequalities within prisons. This essay will thus demonstrate how the English criminal justice system perpetuates social inequalities within the realm of social justice through inequitable trial outcomes which contradict its inherent objective of adequately providing substantive justice for victims.

Trial Processes – Gender

Since 2016, rape cases prosecuted by the Crown Prosecution Service (CPS) have fallen by 52% despite a 43% rise in allegations.[3] One of the main explanations for this drop is lack of resources, as the CJS has been pushed 'to its breaking point'.[4] The CPS have more recently erred towards the side of caution, as they are less likely to prosecute highly controversial cases as a strategic form of risk aversion, and tend to preserve their scarce resources for cases where they are most likely to succeed. The current procedures in place for rape trials appear inadequate, which was an issue explored in the case of *Evans v R.*[5] Using *Evans*, this essay will investigate legal discourses which "engage with […] rape myths *and* visuality",[6] evaluating "the capture of [the victim] within the [CJS] (male) gaze, and her consequent objectification by it."[7]

In *Evans*, the Court countermanded Evans' rape conviction following the emergence of fresh evidence of the victim's sexual history, which indicated casual sexual encounters between the victim ('X') and several other men (including a 'Mr. Owens'). Information about this surfaced post-conviction after campaigns offering a financial reward for new information and the unlawful sharing of X's identity. The online pillorying of X reveals how "media-frenzied cases elucidate, and to some extent shape, cultural standards of 'true' rape."[8] While influenced by society, this notion of

[1] Rasmus Hoffmann, 'Concepts of Social Inequality', in Rasmus Hoffmann (ed), *Socioeconomic Differences in Old Age Mortality* (Springer 2008) 30.
[2] Chiara Binelli, Matthew Loveless and Stephen Whitefield 'What is Social Inequality and Why Does It Matter? Evidence from Central and Eastern Europe' (2015) 70 World Development 239.
[3] HM Crown Prosecution Service Inspectorate, *Rape Inspection 2019* (17 December 2019) <www.justiceinspectorates.gov.uk/hmcpsi/inspections/rape-inspection-on-report-december-2019/> accessed 4 April 2021.
[4] House of Commons Committee of Public Accounts, *Efficiency in the criminal justice system* (27 May 2016) <https://publications.parliament.uk/pa/cm201617/cmselect/cmpubacc/72/72.pdf> accessed 4 April 2021.
[5] [2016] EWCA Crim 452.
[6] David Gurnham, 'Ched Evans, rape myths and Medusa's gaze: a story of mirrors and windows' (2018) 14 International Journal of Law in Context 454, 456.
[7] ibid 462.
[8] Aviva Orenstein, 'Special Issues Raised by Rape Trial' (2007) 76 Fordham L Rev 1585, 1592.

'true' rape[9] is arguably rooted within the courtroom. Rape trials reflect and perpetuate social values in response to rape culture, "setting the social (as opposed to necessarily legal) standard of what counts as rape."[10]

The social perception of 'rape' in rape trials is further illustrated by Mr. Owens's involvement, as he disclosed decisive evidence about his sexual encounter with X "two weeks after [the] alleged incident of rape".[11] X "had slept with [Owens] so soon after the rape (which he believed to be inconsistent with her narrative)".[12] Though the Court acknowledges "Mr. Owens' mistaken belief" that X "was motivated by greed",[13] Owens' discourse on rape is problematic. Perhaps Owens' compulsion to come forward was founded in "worry he might be accused of rape himself."[14] Owens' presumptions bolster the pervasiveness of rape-myths, aptly demonstrating that "women are particularly at [the] mercy" of law's mythology, which "is a triumph of belief over reality."[15] It may be argued that Owens' dialogue is separate from that of the CJS, that rape trials demonstrate law's "limited influence in a cultural milieu that distrusts, denies or dismisses women's accounts of rape."[16] However, it is submitted that despite this professed 'limited influence', the CJS exacerbates social inequality and justice problems through its legal discourse. Problems of this nature are evidenced in the *Evans* judgement, which seems to establish a hypocritical distinction between being positioned at the giving or receiving end of the male gaze.[17]

The graphic dissection of X's sexual past implicates readers of the judgement in 'collective voyeurism'.[18] Considering that X never alleged she had been raped and that her overall comportment throughout the criminal proceedings were of passive withdrawal, the impression readers get of X is that of the one-sided, male conception. X becomes an object of public attention and scrutiny, rather than a responsive subject in her own right.[19] This illustrates how "women's morality and sexuality […] become the subject of forensic *inspection*, [impacting] on how […] legal actors assess female complainants."[20] Jurors are granted the ability to exercise their (un/conscious) biases. Owens' explicit detailing of his and X's sexual history characterise the case, despite any futile attempt by the Court to dispel mythology. In this framing, the CJS permits intrusion of common-sense ideologies, operating as 'cul-de-sacs',[21] for society to filter information, conceptualising and justifying gender inequality while exacerbating social injustice.

While the press referred to *Evans* as "a disturbing precedent,"[22] *Evans* was unusual and "the Court of Appeal have been clear [that cases] must be considered on [their] own facts".[23] The issue lies perhaps, not in the use of legislation,[24] but in the court's emphatic focus on X's sex life and personal character than on Evans' relevant actions at the time of the alleged rape. Inferring consent from third-party evidence, *Evans* is testing consent as rooted in personal autonomy and freedom of

[9] Ibid.
[10] ibid 1590.
[11] *Evans* (n 5).
[12] Ibid.
[13] Ibid.
[14] Ibid.
[15] Helena Kennedy, *Eve Was Framed: Women and British Justice* (Vintage 1993) 32.
[16] Orenstein (n 8) 1608.
[17] Michelle Brown and Eamonn Carrabine, *Routledge International Handbook of Visual Criminology* (Routledge 2017).
[18] Gurnham (n 6) 456.
[19] Beth Quinn, 'Sexual Harassment and Masculinity: The Power and Meaning of "Girl Watching"' (2002) 16 Gender and Society 386.
[20] Gurnham (n 6) 458.
[21] Laurie Stoll, Terry Lilley and Kelly Pinter, 'Gender-Blind Sexism and Rape Myth Acceptance' (2017) 23(1) Violence Against Women 28.
[22] Steven Morris and Alexandra Topping, 'Ched Evans: footballer found not guilty of rape in retrial' *The Guardian* (14 October 2016) <www.theguardian.com/football/2016/oct/14/footballer-ched-evans-cleared-of-in-retrial> accessed 5 April 2021.
[23] Clare Walsh, 'The impact of the Ched Evans case on the law surrounding a Complainant's sexual history' (*Broadway House Chambers*, 15 May 2017) <https://broadwayhouse.co.uk/the-impact-of-the-ched-evans-case-on-the-law-surrounding-a-complainants-sexual-history/> accessed 5 April 2021.
[24] Youth Justice and Criminal Evidence Act 1999, s 41.

choice; "it is difficult to think of an activity […] more person and situation specific than sexual relations."[25] The Court appears paternalistic in this sense, as there seems to be inadequate provisions for substantive or rectificatory justice against misogynistic impulses. The CJS's approach may prove more successful if courts paid closer attention to 'visuality,' the narratology produced in trials. Otherwise the CJS will undoubtedly find itself colluding in exacerbating gender inequality and hindering social justice.

Sexuality

The Court's discourse on sexuality further exacerbates inequality and social justice problems, as evidenced by *R v Brown*,[26] a case concerning the criminalisation of sadomasochistic assaults. In this case, the court argued that "while BDSM and bondage has been prominent as a gay sub-culture […] and an underground niche within heterosexual culture, it has now entered the heterosexual mainstream."[27] The law in *Brown* is unrepresentative of this shifted 'Overton window',[28] forwarding instead a "(hetero)normative construction of certain […] sexual subjects as perverted and "risky"."[29]

The Court's dialogue in *Brown* is problematic because of its backwards conceptualisation of consent and apparent "moralistic distaste for homosexuality."[30] The court, though not denying the defendants' enthusiasm in sexual conduct, read these "acts as seriously violent", thereby incapable of 'ratification' by consent.[31] Lord Templeman goes further by disregarding consent and deeming it as 'worthless'.[32] In this case "the court's view of sex is obscured by its fixation on violence, [removing] the behaviour out of the normal category of touching and into the abnormal category of injury and violence."[33] The ratio in *Brown* is incongruent with the later decision of *R v Wilson.*[34]

In *Wilson*, the appellant branded his initials into his wife's buttocks with her consent, which she later sought medical treatment for. Lord Justice Russell held there was "no aggressive intent",[35] going on to add that "[f]ar from wishing [to injure his wife], [his desire] was to assist her in [acquiring personal adornment]."[36] Finally, Lord Justice Russell emphasised that "consensual activity […] in the privacy of the matrimonial home, [wasn't held] a proper matter for criminal investigation".[37] This juxtaposes with the majority in *Brown*, who refused to see the acts as private, regarding them as "[in]conducive to the welfare of society", despite both the acts in *Brown* and *Wilson* being in absolute privacy and fully consensual [38] The difference in language characterising *Brown* versus *Wilson* is deplorable; *Wilson* could just as well have been framed through the graphic detailing of the injuries sustained. The language could have echoed the judgment in *Brown*, emphasising physical risk and "suppressing the consensual element".[39] Instead, the CJS demonstrates its construction of "responsible hetero(sexual) citizens" rather than "dangerous sexual deviants".[40]

In removing consent as a determinant of legality, criminal law makes "prejudicial normative

[25] *R v C* [2009] UKHL 42.
[26] [1994] 1 AC 212.
[27] Jamie Fletcher and Samuel Walker, 'Guest post by Jamie Fletcher and Dr Samuel Walker: Sexual violence, the Overton Window and the limits imposed by the law' (*The Secret Barrister*, 17 July 2020) <https://thesecretbarrister.com/2020/07/17/guest-post-by-jamie-fletcher-and-dr-samuel-walker-sexual-violence-the-overton-window-and-the-limits-imposed-by-the-law/> accessed 6 April 2021.
[28] Ibid.
[29] Sharon Cowan, 'The Pain of Pleasure: Consent and the Criminalisation of Sado-Masochistic "Assaults"', in James Chalmers, Fiona Leverick and Lindsay Farmer (eds), *Essays in Criminal Law in Honour of Sir Gerald Gordon* (EUP 2010) 127.
[30] Ibid 129.
[31] Ibid 133.
[32] *Brown* (n 26).
[33] Cowan (n 29) 134.
[34] [1996] 3 WLR 125.
[35] Ibid.
[36] Ibid.
[37] Ibid.
[38] *Brown* (n 26).
[39] Fletcher (n 27).
[40] Cowan (n 29) 139.

assessments" denying sexual autonomy.[41] Therein, the CJS 'others' those non-conforming to (hetero)normative standards, further aggravating social inequalities. The law should be reimagined as "less gendered and heteronormative",[42] extending liberality and ceasing to use 'case-by-case' judicial interpretation as a basis to decide cases around gendered or sexuality-centric nuances. Otherwise, the CJS projects a problematic ideology as it imposes legal and philosophical implications on the rule of law's promise to deliver 'just desserts.

Prisons – Race

"If education is the engine of social mobility, it is also the engine of prisoner rehabilitation."[43] Yet, there are "pockets of blatant and malicious racism within the service."[44] It is questioned whether education may safely be described as an 'engine of social mobility' when it is disparately experienced by minorities.

A HM Inspectorate of Prisons Report (2020) found that ethnic minority prisoners "ha[ve] a strong appetite for prison education, training and work" but "[are] dissatisfied at not having as much opportunity to engage in it as they would have liked, [ascribing] this in part to discrimination."[45] Further, the report suggests that "[Ethnic minority] prisoners were less likely than white prisoners to say it was easy to get access to purposeful activity, and less likely to say that staff encouraged them to attend activities."[46] The perception of restricted access is in itself problematic, worsened by negative interpersonal relations with prison staff. The lack of encouragement that ethnic minority prisoners receive compared to white prisoners perhaps relates to the "lack of diversity among prison officers [which] perpetuate[s] a culture of 'us and them'".[47] Ultimately, "it contributes to an atmosphere [wherein] many rebel […] rather than begin a life without offending."[48] This dynamic intrudes on education as a model of desistance. The 2017 Lammy Review, while acknowledging a lack of diversity and the need to hold leadership "to account for the treatment and outcomes for [ethnic minority] prisoners",[49] omits any discussion of disparities in educational backgrounds. If racial inequality is to be tackled at all levels of the CJS, it is necessary to look into the operation of prisons, and at the opportunities they produce for minorities, or lack thereof. Ethnic minorities already share experiences of socio-economic hardship, discrimination in labour-markets and exclusion from education.[50] If educational discrepancies, as experienced by many prisons, go unaddressed and unresolved, then gaps in racial equality will continue to expand, restricting 'social mobility' for minorities post-release.

Some may argue that the restrictions to access in prisons relate to structural racism, which lies beyond the CJS's scope. However, any "failure to tackle deep-rooted race inequality [exacerbates] divisions".[51] Therefore, the CJS must be held accountable for its exacerbation of social inequalities and justice problems, irrespective of how small a part they play in the bigger picture. "Just as the prison may mirror external, macro-

[41] Ibid 136.
[42] Ibid.
[43] Sally Coates, 'Unlocking Potential: A review of education in prison' *Ministry of Justice* (May 2016) <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/524013/education-review-report.pdf >.
[44] Leonidas Cheliotis and Alison Liebling, 'Race Matters in British Prisons: Towards a Research Agenda' (2006) 46 British Journal of Criminology 286, (as cited in Martin Narey, 'Forward' in *HM Prison Service Annual Report and Accounts: April 2000- March 2001* (2001) 7).
[45] HM Inspectorate of Prisons, 'Minority ethnic prisoners' experiences of rehabilitation and release planning' (October 2020) <www.justiceinspectorates.gov.uk/hmiprisons/wp-content/uploads/sites/4/2020/10/Minority-ethnic-prisoners-and-rehabilitation-2020-web-1.pdf >.
[46] Ibid.
[47] David Lammy, *The Lammy Review* (2017) <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/643001/lammy-review-final-report.pdf> accessed 6 April 2021.
[48] Ibid.
[49] Ibid.
[50] Cheliotis and Liebling (n 44) 288.
[51] David Isaac, 'Race inequalities in the criminal justice system' (*Equality and Human Rights Commission* 29 November 2016) <www.equalityhumanrights.com/en/our-work/blogs/race-inequalities-criminal-justice-system> accessed 6 April 2021.

social trends, so too can it feed their existence by stigmatising and curtailing the life chances of ethnic minorities further."[52]

Conclusion

If racial difference is a marker for unequal experience in prison education, then more should be done to review whether this disparity correlates with recidivism rates and over-representation of minorities in prisons. A number of criticisms could be levelled at the CJS. In rape trial processes and legal discourse, the Court takes a seemingly paternalistic approach. With reference to consent and sexual autonomy, paternalistic impulses infringe on the equitable administration of law, exacerbating gender inequalities. Groups which are vulnerable to historically rooted and persistent injustice are denied substantive justice. Reform and matters for review have been suggested. For a system characterised as fair and impartial, there is an underswell of (un/conscious) bias entrenched within these institutions. Unchecked and unresolved, the CJS, perhaps unwittingly, exacerbates inequality and social justice problems.

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[52] Cheliotis and Liebling (n 44) 309.

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Canada's Commitment to A Clean Environment: How Climate Change Affects All

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Abstract

This article focuses on the efforts of non-government institutions and Indigenous Communities in Canada to meaningfully impact bodies of government towards alleviating the adverse effects of climate change through judicial litigation. Various individuals and organisations residing in Canada argue that Canada have breached their responsibility to adequately maintain the environment per the Charter of Rights and Freedoms. This essay will inspect section 7 and 15 of the Charter – the 'right to life, liberty and security of the person' and the 'right to equality', respectively.[1] Through a comparative lens, the breaches afflicting Canada will be compared to recent international jurisprudence, namely the Netherlands and the United States of America. Recent measures implemented by Canada to retain the title of a successful Supreme Court will be justified through reliance on the Charter of Rights and Freedoms. Over time, the urgency of climate change has grown to pose a series of climate-related, economic, and human security threats to Canada's vast population.[2] A critical assessment of whether Canadian policies are adequately sufficient requires scrutiny of various factors. Although thorough analysis of whether Canada's current policies rely upon the expertise of individuals in the field remains to be seen, for the purpose of this essay, it should be inferred the factual question regarding the reliability of Canada's climate policies is an ongoing concern.

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It is now largely accepted that climate change adversely impacts the global population and has had drastic consequences on the standard of living for millions. In the Alberta Court of Appeal judgment, which later reached the Canadian Supreme Court, of *Reference re Greenhouse Gas Pollution Pricing Act*, Chief Justice Fraser portrayed two things as undoubted: the dangers of climate change and the associated "risks flowing from failure to meet the essential challenge".[3] With the Canadian government occupying an authoritative role, solidifying the barrier which would allow risks to flow from administrative failure would require consistent authoritative action to be implemented and enforced across the Nation. In Canada, governmental power is not central to one body, rather it is divided federally and provincially as a way of "dispersing power and reducing [the] threat of domination";[4] hence, the necessity for adequate communication between all legislative branches. Feasby et al (2020) describe the global efforts to reduce greenhouse gas (GHG) emissions as "desultory" (GHG), crediting the "tepid governmental responses" for the public turn towards courts "to force governments to do the hard work of implementing GHG reduction measures". [5] Due to the hurdles faced by the Canadian government in mitigating the effects of climate change, it now seems up to the courts to address and enforce GHG reduction and force governments to "move more aggressively…through constitutional litigation".[6] This essay will analyse whether the actions taken by Canadian Citizens, environmental organisations, and governments can adequately

[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 7, 11.
[2] Wilfred Greaves, 'Climate Change and Security in Canada' (2021) 76 IJ 183.
[3] [2020] ABCA 74 (CanLII) at [1].
[4] Hoi L. Kong, 'Republicanism and the Division of Powers in Canada' (2014) 64 UTLJ 213, 364.
[5] Colin Feasby, David De Vlieger, and Matthew Huys, 'Climate Change and the Right to a Healthy Environment in the Canadian Constitution' (2020) 58 AltaLRev 213, 214.
[6] Feasby et al., (n 5) 214.

enforce measures to optimally reduce the harmful impacts of climate change through judicial litigation.

Canada & The Paris Agreement

More recently, multiple claims have been made against the Canadian Government for failing to implement satisfactory climate change policies for the protection of individuals' rights. Through a constitutional lens, this can be viewed as a breach of section 7 of the Charter of Rights and Freedoms – the right to life and security.[7] Globally, similar litigation claims have been brought forward in the Netherlands and the United States of America. These breaches of constitutional rights have led to government efforts to satisfy the requirements of the Paris Agreement's GHG reduction targets and decrease the global average temperature.[8]

Positive Change in the Netherlands

To compare the active measures that other countries are taking to reduce GHG emissions and reduce their overall carbon footprint, *The State of Netherlands v Urgenda Foundation* sets a compelling precedent. [9] In this case, a group of young advocates from the Netherlands who evidently would "bear the drastic effects of climate change in the twenty-first century" jointly filed a class action lawsuit against the Dutch government. The claim stipulated the Netherlands did not ensure reasonable care in action to limit GHG emissions per Articles 1, 2, and 8 of the European Convention on Human Rights (ECHR).[10] The claim succeeded and the judgement held that the authoritative body in the Netherlands must establish a new and reasonably effective framework, to satisfy the Paris Agreement criteria by 2020.

ECHR vs. The Charter

It is essential that countries set down rules and regulations to adequately protect the planet. Articles 2 and 8 of the ECHR refer to the 'positive obligations' placed on State and citizen to protect private life. In the ECHR, the scope of positive obligations have been expanded to include environmental disasters, asserting that a country must actively take necessary and reasonable steps to alleviate risks to the environment – as long as no adverse consequences are imposed on the country. Although the ECHR may differ from the Canadian Constitution in various respects, there are also significant similarities. The ECHR jurisprudence can be accessed by the Supreme Court of Canada when interpreting the Charter of Rights and Freedoms. For instance, the principles from *The State of Netherlands v Urgenda* can be used as instructive guidance by the government of Canada to combat climate change and ensure reasonably effective measures are put in place.[11]

United Nations Framework Convention on Climate Change (UNFCCC)

When determining whether a country's policies are effective in mitigating climate change, the Courts often turn to the United Nations Framework Convention on Climate Change (UNFCCC), which ensures signatory countries "adopt national policies and take corresponding measures on the mitigation of climate change", further allowing those countries to implement such policies jointly or to assist one another in "contributing to the achievement of the objective".[12] In *Netherlands v Urgenda*, the Dutch Court flexibly interpreted the UNFCCC principles by stating each country must "protect the climate system for the benefit of present and future generations"[13] and that countries are "individually liable for the obligation"[14] arising from the UNFCCC's 'no harm' principle. The *Netherlands v Urgenda* judgment concluded that the Dutch

[7] *Canadian Charter* (n 1).
[8] The Paris Agreement 2015 (adopted on 12 December 2015, entered into force 4 November 2016) UNFCCC Art 2.
[9] Case 19/0013, ECLI:NL:HR:2019:2006.
[10] European Convention on Human Rights, Articles 1, 2, & 8.
[11] The Paris Agreement (n 8) Article 6.2.
[12] United Nations Framework Convention on Climate Change, Article 4(2)(a).
[13] *The State of Netherlands* (n9) para 5.7.3.
[14] Ibid para 5.7.5.

government would be obliged to reduce GHG emissions by "at least 25% by 2020".[15] This decision would ensure that the Netherlands can meet the Paris Agreement's commitments towards reducing GHG, which the judgment stated they are "in any case obliged to" do, as an Annex I developed country under the UNFCCC classifications.[16] Although this may seem a minor stepping stone towards the overall aim of combatting climate change, it is these efforts that will prove most significant in implementing institutional and constitutional change from the top-down.

Justiciability

It is important to consider various jurisdictions when seeking appropriate outcomes for Canada's carbon goals. In *Juliana v United States*, the plaintiff attempted to invoke their constitutional Fifth Amendment right under Due Process to "a system capable of sustaining human life", to sue the State for their role in the climate crisis.[17] The majority decision in *Juliana v United States* did not find in favour of a definitive climate system in the United States Constitution, and the Courts held the issue was 'not justiciable' since no adequate remedies could be granted and "such relief" would be "beyond [its] constitutional power".[18] Similarly, the main legal issue in Canada is that of 'justiciability' – whether certain policies can be undertaken to initiate treaty obligations and whether reasonable remedies can be granted. If the answer to this compelling question is yes, then the next legal issue is whether the Charter grants sufficient protection of environmental rights. This issue connects to the larger question circulating the Canadian Charter, of whether the Charter provides positive rights to its Citizens.[19]

Canadian Climate Change Claims

In recent years, there have been a handful of claims arguing the Canadian Constitution requires the government to increase mitigating measures in committing to the reduction of GHG. Most of these claims stipulate that the lack of action against climate change violates section 7 of the Charter of Rights and Freedoms. Although Canada remains in its early stages of climate litigation, it can be assumed that, over time, compelling verdicts such as *Netherlands v Urgenda* and *Juliana v United State* will hold significant importance in Canada.

Environnement Jeunesse v Attorney General of Canada

In the 2018 case *Environnement Jeunesse (ENJEU) v Attorney General of Canada*, a claim was brought forth by a group of Québecois students below the age of thirty-five.[20] Canada's government at the time was facing various accusations for violating the rights of Citizens under the Canadian Charter and the Québec Charter of Human Rights and Freedoms by "failing to put in place the necessary measures to limit global warming",[21] particularly to reduce GHG emissions.[22] The *ENJEU* claim alleged breaches of sections 7 and 15 of the Charter, as well as section 46.1 of the Quebec Charter – the "right to live in a healthful environment in which biodiversity is preserved".[23] Justice Morrison considered the merits of these allegations and made a decision on the basis of (1) justiciability; and (2) if factual allegations would be in support of finding violation of rights that are protected by the Charter.[24] Ultimately, the court in *ENJEU* held that the collective issues raised were 'not justiciable', since they fell outside the competence of the Court and Environment Jeunesse was bringing forth a claim based on positive rights. Moreover, the court in *ENJEU* rationalised that it is

[15] Ibid para 8.3.4.
[16] Ibid para 8.3.5.
[17] 47 F.3d 1159 (9th Cir. 2020).
[18] Ibid, at [1165].
[19] Feasby et al (n 5).
[20] 2019 QCCS 2885.

Note: This case was appealed in 2021 and the appeal was dismissed.
[21] *ENJEU* (n 20) at [2].
[22] Quebec Charter of Rights and Freedoms 2006, c.3 s.19, 46.1.
[23] Ibid s 46.1.
[24] *ENJEU* (n 20).

not within Environment Jeunesse's power to tell the legislature what to do; it held that deference to the legislative power is necessary since they are better situated to counteract the consequences of global warming.[25] The issue, therefore, is only challengeable federally and not provincially.

A Compelling Case Against Canada

Amongst the growing list of climate-related litigation against the Canadian government, similar claims were brought forward in the cases of *La Rose v Her Majesty the Queen in Right of Canada* [26] and *Mathur v Her Majesty the Queen in Right of Ontario*,[27] where the federal government's climate policies were alleged to have infringed Canadian Constitutional rights and targeted Ontario's climate change policy. These claims alleged that GHG emission reduction targets in Canada are inadequate and do not impactfully mitigate climate change in the long run.

The plaintiffs in *La Rose v Her Majesty the Queen in Right of Canada* and *Mathur v Her Majesty the Queen in Right of Ontario* all came from unique circumstances which shaped their personal investments to the claim, from suffering from severe medical conditions, to living conditions that were heavily exposed to climate change, such as a rise in sea levels and insect-borne diseases. Furthermore, a quarter of the claimants were of Indigenous background, and claimed that climate change would disproportionately "increase in harms to Indigenous peoples, including increased impacts on health, access to essential supplies, ability to carry out traditional activities, loss of livelihood, and displacement".[28] Both claims sought a declaration to the effect that section 7 of the Charter—the right to "life, liberty, and security of the person"— should be expanded to include the "right to a stable climate system".[29] The claimants in *La Rose v Her Majesty The Queen in Right of Canada* stipulated that a stable system under the s.7 Charter is "profoundly connected to children's' basic health and development (or security of the person) and to a child's survival (or life interest)".[30] Additionally, *Mathur* stipulated that the failure to implement adequate measures to mitigate climate change contravenes section 15 of the Charter by way of the risks associated with climate change disproportionately falling upon children and future generations.[31] Collectively, *La Rose* and *Mathur v* urged Canada to "prepare an accurate and complete accounting of Canada's GHG emissions" to reduce GHG emissions, increase accountability by setting forth a realistic mitigation plan, and aim towards climate recovery.[32]

Next Steps for Canada

In Canada, policies for climate change are not yet aligned with the constitutionally protected rights to life and security of individuals, namely sections 7 and 15 of the Charter.[33] The direct application of strict measures to reduce GHG levels will ensure that Canada moves towards meeting the Paris Agreement's reduction commitments; however, Canada is seemingly falling behind on meeting its commitments towards a healthy environment. In this instance, Canada has the benefit of referring to judicial decisions rendered in various jurisdictions, despite any discrepancies that may arise between distinct Constitutions. For instance, decisions such as *Netherlands v Urgenda* and *Juliana v United States* are of utmost significance if Canada wishes to succeed in its efforts to reduce its carbon footprint.

Conclusion

In conclusion, the claims put forth against the Constitutional implications of climate change raise various issues worthy of judicial consideration. The claims mentioned in this essay assert that the Canadian government's inadequate

[25] Quebec Charter (n 22).
[26] 2020 FC 1008.
[27] 2020 ONSC 6918.
[28] Ibid, at [142].
[29] Ibid, at [31].
[30] *La Rose* (n 26) at [224].
[31] *Mathur* (n 27) at [31].
[32] *La Rose* (n 26) at [222e].
[33] Feasby et al (n 5) 248.

efforts to mitigate the climate crisis infringe the Charter rights of citizens, since no adequate action is taken in preventing climate change for the sustainable health of the planet and its inhabitants. The Canadian court's reluctance to support claims for breaches relating to sections 7 and 15 can be seen in the cases of *La Rose v. Her Majesty The Queen in Right of Canada* and *Mathur v Her Majesty the Queen in Right of Ontario*.[34] In referring to Canada's insufficient contribution towards mitigating climate change, this is not to imply the current policies exacerbate an existing threat to life or security of person, but rather that the policies are insufficient to meet the climate goals they have committed to in the Paris Agreement.[35] For Canada to be successful in the alleged claims, a greater degree of importance should be placed on the Supreme Court of Canada moving away from historical aversion, and towards adjudicating positive rights.[36] On a global scale, countries such as the Netherlands are moving towards positive change and evidential reduction in GHG emissions by conforming judgments to the standards of the Paris Agreement. Ultimately, Canada is aboard an ongoing journey towards mitigating climate change and reducing GHG emissions, however, without adequate policy enforcement, the Paris Agreement commitments will remain out of reach.

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[34] *La Rose* (n 26); *Mathur* (n 28).
[35] Feasby et al (n 5) 248.
[36] Jayanthi Naidu, 'Positive Rights in the Constitution?' (2003) 30 JMCL 1, 11.

Illusionary Protections: The Ostensible Victory of the *Sparrow* Case

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With a purported goal of reconciliation in mind, the Supreme Court of Canada's first ever application of section 35 of the *Constitution Act 1982*[1] in *R v Sparrow* demonstrated how infringements of Indigenous rights would fare in court.[2] Section 35 of the *Constitution Act 1982* states: "the existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognized and affirmed", where "'aboriginal peoples of Canada' includes the Indian, Inuit and Métis peoples of Canada".[3] While section 35 was touted to safeguard 'Aboriginal rights,' it failed to sufficiently define aboriginal rights. Without any formal definition, it was left open for judicial interpretation. In 1990, this issue was publicly scrutinised, resulting in an ostensible victory for indigenous rights in the *Sparrow* case. Although *Sparrow* established traditional aboriginal fishing rights under section 35, it raised questions about what qualifies as an 'existing aboriginal right' and what constitutes an adequate duty to consult or to fairly compensate for expropriation of an aboriginal right. The formulation of the *Sparrow* test marked a significant step towards addressing Indigenous rights; however, its narrow scope and indeterminate requirements posed a limitation in whether Indigenous people could establish sufficient standing to legally claim those rights. The *Sparrow* test became the method upon which future cases would rely, to test the limits of Indigenous rights claimed under section 35. However, this singular prospect of reliance is problematic if the requirements of the test are only scarcely protective of Indigenous rights. If appropriately applied, the *Sparrow* test can provide certain protections for Indigenous rights. However, the scope of the test's requirements would need to be significantly expanded by future courts to adequately protect Indigenous rights and prevent the infringement of those rights.

The Sparrow Test

R v Sparrow addressed the fishing rights of the Musqueam Band, an aboriginal community of over 1,300 members living on a riverside Reserve in British Columbia,[4] and considered whether limiting the length of fishing nets on the Band's fishing licence was an infringement of section 35. Section 35(1) of the *Constitution Act 1982* only applies "to rights in existence when the [Act] came into effect; it does not revive extinguished rights", but an "aboriginal right is not extinguished merely by its being controlled in great detail by the regulations under the *Fisheries Act*".[5] The *Sparrow* test examined whether an existing Aboriginal right such as a practice, custom or tradition was previously established within the relevant Indigenous community. Since both parties in *Sparrow* agreed the Musqueam Band possessed a pre-existing Aboriginal right to fish for food and ceremony, the question for the court then became, what is an 'existing aboriginal right' and what are the implications of this right? These further

[1] s35, The Constitution Act 1982, Schedule B to the Canada Act 1982 (UK), 1982, c 11.
[2] *R v Sparrow* [1990] 1 SCR 1075.
[3] Constitution Act 1982 (n 1) s35(1);(2).
[4] Musqueam, 'Musqueam's Story', *Musqueam Indian Band*, (Vancouver, Canada) < https://www.musqueam.bc.ca/our-story/>
[5] *Sparrow* (n 2) at [1076h];[1077a].

questions were not addressed in a court of law until *R v Van der Peet*.[6]

The Sparrow test determines if legislation infringes upon a right under section 35 which is deemed to be protected under the *Constitution Act 1982*. The test initially looks for an 'existing aboriginal right' as defined by section 35.[7] If there is a '*prima facie* infringement', the test subsequently determines if there is a justified and 'valid legislative objective' for infringing the right.[8] Other elements to consider are the following: a) whether the infringement was as limited as possible while still reaching the result intended, b) whether the legislation poses an undue hardship on Indigenous people, c) if compensation provided was fair (if required), and d) if there was proper consultation.[9] The *Sparrow* test acknowledges the 'honour of the Crown', which refers to the principle that the test of justification had to adhere to the unique nature of the relationship between the Crown and Indigenous people.[10] While initially established to address existing rights, the *Sparrow* test was also used by courts for cases concerning treaty rights.

Once an aboriginal right is established, the onus of proving a prima facie infringement falls on the claimant.[11] To determine this, the court considers three questions: Firstly, whether the limitation is unreasonable. Secondly, whether the regulation of that right imposes undue hardship. Thirdly, whether the regulation denies the right-holders of their preferred means of exercising their right.[12] If interference is found, the Crown bears responsibility in justifying their infringement by asking if it serves a 'valid legislative objective'.[13] In the *Sparrow* case, the Crown attempted to justify their infringement by arguing that it was for the greater aim of protecting a natural resource. If there is a valid legislative objective, the analysis proceeds to ask whether there was as little infringement as possible to effect the desired result, whether fair compensation was provided if expropriation occurred and whether Aboriginal groups were consulted with conservation measures.[14]

In the *Sparrow* case, the courts found that food and ceremony rights outweighed the justification of the infringement because the Musqueam Band had minimal impact on the natural resource that required protection.[15] As a result, the Supreme Court of Canada upheld the Aboriginal rights, marking a victory for Ronald Sparrow and his Band. However, the judgment limited the scope of traditional Aboriginal rights that Indigenous people held.

The government of Canada established their fiduciary relationship with Indigenous peoples under section 35 and their constitutional duty to uphold certain Indigenous rights with the *Sparrow* test. Despite this, the *Sparrow* test confirms that although indigenous rights are given priority consideration, the government can justify the infringement of those rights. The meaning of 'recognized and affirmed' aboriginal rights, which the courts have adopted, establish that while these rights are crucial, they are not absolute and can be infringed upon with sufficient reason.[16]

Limits of the Sparrow Test

The *Sparrow* test outlines how to assess whether legislation infringes upon the rights laid out in section 35. While the test addresses Aboriginal rights in the context of section 35, the *Sparrow* test was treated restrictively in subsequent case law, such as *Van der Peet.*[17] The test established in *Van der Peet* narrowed existing Indigenous rights by requiring they be "integral to

[6] *R v Van der Peet*, 1996 CanLII 216 (SCC), [1996] 2 SCR 507.
[7] Constitution Act 1982 (n 1) s.35(1).
[8] Ibid, at [1079a].
[9] *Sparrow* (n 2) at [1078g].
[10] Craig Forcese and Adam Dodek, *Public Law: Cases, Commentary, and Analysis* (3rd edn, Emond Montgomery Publications Limited 2015) 64.
[11] *Sparrow* (n 2) at [1078g].
[12] Ibid.
[13] Forcese (n 10); *Sparrow* (n 2) at [1079a].
[14] Forcese (n 10).
[15] *Sparrow* (n 2) at [1078i)
[16] Forcese (n 10).
[17] *Van der Peet* (n 6).

a distinctive culture".[18] *Van der Peet* noted that the *Sparrow* test established that the rights protected under section 35 could be violated if the infringement was justified.[19] If the test of justification is not stringent, then the protections under section 35 are illusionary and ineffective.

The onus of proving the necessary elements of the test falls upon the individual challenging the legislation.[20] Such a requirement limits the ability to successfully claim rights because they can be challenging to prove. The *Sparrow* case noted that the test posed difficulties for the Crown in providing justification since Indigenous rights are prioritised. Similarly, the requirement to prove existing rights proves to be a burden, as noted by Kirsten Anker in 'Reconciliation in Translation'. Anker criticises the state's method of utilising established criterion for Indigenous legal outcomes, based on "European epistemological framework".[21] Such framework further burdens claimants since the requirements of the Sparrow test are not designed for the benefit of Indigenous people to preserve their rights.

While both the *Sparrow* test and section 35 focus on existing Indigenous rights, the claimants must prove that modern activities fit within their traditional rights, thus limiting Indigenous peoples' ability to claim rights. As with the other aspects of the Constitution, the Supreme Court found that legislation should be translated flexibly enough to allow evolution.[22] However, the *Sparrow* test fails to demonstrate this sense of progression or development. This is further evidenced in *R v Marshall; R v Bernard* where it was found that commercial logging was not a distinctive central feature of the Mi'Kmaq culture pre-contact.[23] Furthermore, in *Mitchell v MNR*, there were no Aboriginal rights that allowed duty-free importing.[24] In both cases, the Crown was justified in their restrictions because it could not be shown that modern activities constituted exercising existing rights; a principle that stemmed from the *Sparrow* test, despite it not being the only test applied in this circumstance.

There have been successful claims for Indigenous rights under the *Sparrow* test, suggesting that the limits imposed by the test are not always fatal to a case. In *R v Powley,* a blanket ban on Métis' right to hunt moose for conservation purposes was found unjustifiable under the *Sparrow* test.[25] Likewise, in *R v Sappier; R v Gray,* Maliseet and Mi'kmaq respondents were allowed to harvest wood for survival purposes because the Crown's infringement could not be justified.[26] Despite these victories, the nature of the *Sparrow* test exemplifies the courts' capacity to define Indigenous culture in legal terms.

Clarity of the Sparrow Test

One of the primary issues of the *Sparrow* test is that it lacked clarity on the process of consultation. While the Supreme Court of Canada established that consultation was adequate in the case of *Chippeaws of the Thames First Nation v Enbridge Pipelines*, there is still a long way to go if the Crown wishes to seek reconciliation.[27] Consultation does not grant decision-making power, thereby rendering Indigenous peoples effectively powerless when discussing issues that directly affect them. To be compatible with the principles established under the 'honour of the Crown', the Supreme Court of Canada must reform the consultation process in a way that respects, favours and upholds Indigenous rights.

[18] Ibid, at [509].
[19] ibid, at [520].
[20] *Sparrow* (n 2), at [1078g].
[21] Kirsten Anker, 'Reconciliation in Translation: Indigenous Legal Traditions and Canada's Truth and Reconciliation Commission' (2017) 33(2) Windsor Yearbook Access to Justice 15, 27.
[22] *Sparrow* (n 2) at [1076h].
[23] *R v Marshall; R. v. Bernard*, 2005 SCC 43 (CanLII), [2005] 2 SCR 220.
[24] *Mitchell v MNR*, 2001 SCC 33 (CanLII), [2001] 1 SCR 911.
[25] *R v Powley*, 2003 SCC 43 (CanLII), [2003] 2 SCR 207.
[26] *R v Sappier; R. v. Gray*, 2006 SCC 54 (CanLII), [2006] 2 SCR 686.
[27] *Chippewas of the Thames First Nation v. Enbridge Pipelines Inc*., 2017 SCC 41 (CanLII), [2017] 1 SCR 1099.

Such a modification would be a step towards reconciliation by allocating legal space for Indigenous rights in Canadian law.

Compensation

The issue of financial compensation as reparations for the expropriation of rights is another critical concern in the wake of the *Sparrow* ruling. Any new test should seek to reach fair compensation for any expropriation of rights, considering previous actions by the Canadian government in curtailing these rights. If a right must be expropriated, the compensation should reflect a willingness to reconcile with Indigenous peoples. Additionally, compensation should be sufficient to incentivize future governments not to exploit this resolution.

Defining 'Existing Aboriginal Rights'

The *Van der Peet* case demonstrated how concerns regarding what constitutes an 'existing aboriginal right' could have implications beyond the scope of a single case. Any new test should seek to rectify this issue because it is difficult for an Indigenous group to prove an existing right given the undocumented traditions and treaties; as seen in *R v Bernard*.[28] If a traditional right must be an existing legal right, it runs the risk of becoming frozen from the time it was established in law. The inability for rights to adapt with the passing of time was evident in *Bernard*; in that case, the Mi'kmaqs' right to commercial usage of Crown land was challenged when they attempted to commercially log the land.[29] The challenge was based on the original wording of the 1760 Treaty which did not include the specific right for commercial logging; despite the fact that the treaty existed long before commercial logging developed in Canada.

Expanding the Test

Expanding the scope of the *Sparrow* test would enable greater access to justice for Aboriginal peoples living in Canada. To address the limitations inherent within the *Sparrow* test, a revised test should include an expanded acknowledgement of Indigenous rights that could be flexibly transferred to modern activities. The *Sparrow* test may also benefit from limitations regarding justification. If applied as it was written, the test could allow Indigenous people easier access to their rights, however the current case law application renders infringement even more justifiable.

Conclusion

The Sparrow test was a move in the right direction in terms of the acknowledgement of Indigenous rights. However, due to its narrow scope for standing and the weighty onus of proof which rests on Indigenous people, it has limited the rights of those Indigenous peoples to which the test concerns, attempting to claim those rights. The test could be amended to fix current deficiencies and become a comprehensive victory for Indigenous rights; enhancing clarity for consultation, compensation, and the ability to reform their rights to adapt to modern times.

[28] *Bernard* (n 23).

[29] ibid.

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Is Canada's Judicial Appointment System Lacking Transparency and Diversity? Judicial Appointments: A Partisan Reward

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Prior to 2004, the closed-door appointment process of the Supreme Court of Canada (SCC) was unknown to most Canadians.[1] The judicial appointment process was considered a partisan reward for loyalty. There has been an array of reforms attempted to make the process more transparent and less partisan. However, the lack of diversity is prominent across the majority of courts, including the SCC. This means most Canadian judges comprise a homogenous group of older, white males who do not adequately represent nor reflect the modern diversification of Canada's population.

Overview of Judicial Appointments

Before 2006, the SCC Justices were appointed by the Governor General on the Prime Minister's recommendation, with no input from an Advisory Committee. The former Prime Minister, Stephen Harper, attempted to reform the appointment process by fortifying the Advisory Committees' functional framework and introducing a House of Commons Public Committee. These committees demonstrate a shift in the appointment process, but without any solid legal standing, the Prime Minister and Cabinet retain the ultimate decision-making power, without consulting those committees or conducting public hearings. As such, during Prime Minister Harper's tenure, three Supreme Court nominees (Cromwell, Gascon, and Côté) were appointed without consulting an advisory committee or conducting a public hearing.[2]

Current Prime Minister Justin Trudeau's government has since achieved Judicial Appointment reform in 2016. As a result, every judge is federally appointed by the governor general on the advice of a judicial advisory committee, with exception of provincial courts. The Judicial Advisory Committee comprises seven members representing the bar, bench, and the general public; the requirement for one member specialising in law enforcement was removed by the 2016 reforms. The Minister of Justice must forward a recommendation to the Cabinet, which has the effect of influencing the Governor General's decision.[3]

The Independent Advisory Board and Judicial Advisory Committees both consist of a seven-member panel. The Independent Advisory Board is composed of one retired Canadian Judicial Council judge, a Canadian Bar Association lawyer, a Federation of Law Societies lawyer, and a legal scholar nominated by the Council of Canadian Law Deans, along with three additional members, of which at least two must be external to the legal discipline and are appointed by the Minister of Justice. The Minister of Justice will consult with relevant authorities including the House of Commons Standing Sommittee and Standing Senate Committee on the short-list, followed by a list of nominee recommendations for the Prime Minister. [4]

The expansion of officials in independent committees has overall increased nominee scrutiny, however, their recommendations have no binding effect and therefore the decision ultimately lies with

[1] Craig Forcese and Adam Dodek, *Public Law: Cases, Commentary, and Analysis* (3rd edn, Emond Montgomery Publications Limited 2015) 374.

[2] Ibid, 374.
[3] Ibid, 379.
[4] ibid, 379.

the Prime Minister, who also appoints the Chief Justice of the Supreme Court of Canada.[5] One important question which then arises is whether the current judicial appointment scheme is truly transparent.

Transparency and Comparative Judicial Appointment Processes

The case *Re Remuneration of Judges* showcases the importance of appointment transparency. Impartiality is a key characteristic of judges, meaning they should be free of party loyalty and partiality when examining cases.[6] Judicial salaries are an important factor in impartiality and must not become mechanisms for ruling-based reward and punishment. A neutral appointment process, free of partisanship, rewards or punishments ensures Canadian judicial independence with due process governing judicial salary adjustments.

Many methods have been mobilised to ensure democratic accountability. Elections and confirmation hearings are used in the US, and while this accountability is essential, judicial elections are potential threats to impartiality. Allowing judges to participate in politics by campaigning, receiving donations, and being influenced to adopt popular, often harsher stances on crime detracts from the concept of judicial impartiality.[7]

Despite this, US-style confirmation hearings may yet have merit for the public perception of judicial appointment. Currently, the Canadian Bar Association is opposed to this process, claiming politicisation of the discussion disincentivizes good candidates from stepping forward for consideration, as it requires putting their preferences and beliefs on public trial for politicians to vigorously examine. Yet, this may equally attract new candidates from outside the Canadian Bar Association's like-minded cliques, favouring instead nominees with legal ideologies differing from the current governmental standard.

In South Africa, the nomination process was entrenched within their constitution, ensuring that political leaders do not overstep their authority by appointing judges without committee meetings, unlike Canada's track record of Judicial Appointments.[8] Similarly, the UK established a statute outlining the roles and responsibilities of the Judicial Appointments Commission to ensure mandatory committee usage for nominations.[9]

Transparency Recommendations

The Independent Advisory Board and Judicial Advisory Committees should form part of the Judicial Appointment process by law to disallow future Prime Ministers from deviating from it to rush a judicial appointment. Additionally, the Prime Minister should retain the power to offer guidance for appointments, but should not hold the sole authority to take the final decision. Regardless of intent, the partisan pressures acting on the Prime Minister are an inherent risk to their impartiality, a risk best managed by the involvement of a non-partisan independent committee in the decision, possibly including Prime Minister veto power, if necessary.

This council should also be as public as possible in taking initiatives such as publishing applicant profiles and rationale for shortlisting candidates and selecting nominees. Releasing this information concurrent with the Judicial Appointment process will go a long way towards establishing public trust in the appointment process' impartiality. Once an appointee is selected and presented to the House of Commons, then ideally, a televised hearing should be held to take public opinion into consideration before an appointment is made to all federal judiciary positions.

Diversity Recommendations

Diversity in the Supreme Court of Canada can be improved by both addressing regional disparity issues and appointing an Indigenous

[5] Forcese (n 1) 379.
[6] *Reference re Remuneration of Judges of the Provincial Court of Prince Edward Island* [1997] 3 SCR 3.
[7] Forcese (n 1) 383.
[8] Constitution of South Africa, s174(1)-(8).
[9] The Judicial Appointments Regulations 2013

Supreme Justice. This would be an important appointment for equal representation of Canadian Indigenous communities and would improve relations between Indigenous peoples and the Canadian government. This would suffice as an honest attempt at reconciliation and acknowledgement of Indigenous traditional land rights by having allowing the community a larger say in the Federal law which governs them.

Moreover, contemporary systemic hurdles prevent minority groups from attaining judicial appointments. The Indigenous Bar Association referred to the strict bilingualism requirement as a form of systemic discrimination.[10] The "gatekeeping functions" of educational institutions are intertwined with achieving judicial appointments, leaving many that do not come from higher socioeconomic backgrounds from attending these schools, which disproportionately affects marginalised groups.[11] It is paramount that marginalised communities receive further support to enter the legal field and subsequently, the judiciary.

Conclusion

Focusing on integrating accountability mechanisms into Canadian law ensures impartial appointments, which will subsequently help achieve transparency by enhancing public trust in the system, which is paramount to Canadian democracy. It is of vital importance that work be done to address, at ground level, the encouragement of marginalised groups within Canadians towards entering the legal field so the judicial system can undergo sufficient diversification to equally represent the Canadian people.

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The Effective Enforcement of EU Law Through the Preliminary Ruling Procedure – Article 267 TFEU

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The main mechanisms by which effective enforcement of European Union (EU) law is achieved are: the preliminary ruling procedure, the principles developed within this procedure's case law, and the application mechanisms under which they are made available to EU citizens. This essay will analyse the above through case law to prove that the preliminary ruling procedure is necessary for the EU to have effective enforcement and why it would not have been possible to achieve effective enforcement without it.

The preliminary ruling procedure can be found in Article 267 of the Treaty on the Functioning of the European Union (TFEU)[1] as a mechanism through which a national court or tribunal refers questions of EU law to the Court of Justice of the European Union (CJEU) for a preliminary ruling. This procedure ensures all member states have access to the uniform interpretation and application of EU law, thereby enforcing the principle of non-discrimination by ensuring that all citizens are treated equally, and that national courts apply EU law correctly to comply with effective enforcement. Once the CJEU provides a preliminary ruling back to a national court, the national court incorporates it into their judgment and it is thereupon binding on all member states.

According to the 2020 Annual Report,[2] there have been 534 preliminary ruling proceedings so far, highlighting the importance of these proceedings. Preliminary rulings are amongst the main functions of the CJEU. The Article 267 procedure is needed for national courts to better understand the application of EU law and continue to have a uniform application of EU law throughout all members states.

For the CJEU to accept a question in preliminary ruling, the court or tribunal must satisfy the criteria set out in *Case C-54/96 Dorsch Consult Ingenieurgesellschaft mbH v Bundesbaugesellschaft mbH.*[3] Once the conditions are met, the national court either has a discretion as per *Bulmer v. Bollinger*[4] or an obligation, as per *Case 10/76 Hoffmann-La Roche v Centrafarm Vertriebsgesellschaft Pharmazeutischer Erzeugnisse mbH*, [5] to refer a question before the CJEU.

In *Case 6/64 Costa v Ente Nazionale per l'Energia Elettrica (ENEL)*[6] two lawsuits, due to "their limited value, had to be handled by the Giudice Conciliatore as a court of last instance, thus triggering the obligation to make a preliminary reference under Article 177(3) of the EEC Treaty."[7] This case demonstrated that any court can refer questions to the CJEU and confirms that if it is a

[1] Consolidated versions of the Treaty on the Functioning of the European Union [2012] OJ C326/47.
[2] Court of Justice of the European Union, The year in Review, Annual Report 2020 <https://curia.europa.eu/jcms/upload/docs/application/pdf/2021-04/ra_pan_2020_en.pdf> accessed 3 January 2022.
[3] [1997] ECR I-496.
[4] [1974] 2 CMLR 113.
[5] [1977] ECR 957.
[6] [1964] ECR 585.
[7] Amedeo Arena, 'From an Unpaid Electricity Bill to the Primacy of EU law: Gian Galeazzo Stendardi and the making of *Costa v ENEL*' (2019) 30(3) European Journal of International Law 1017 <https://uk.westlaw.com/Document/ID2544380238D11EABBC8DCB4F0A74C98/ > accessed 3 January 2022.

court of last instance, they are obliged to refer any doubt or uncertainty on how to apply EU law to the CJEU.

The preliminary ruling procedure has an exception known as the doctrine of *Acte Clair*, a doctrine with a narrow scope of application. It is an exception to the duty to refer, where previous CJEU decisions covered the point. In *Case 283/81 CILFIT and Lanificio di Gavardo SpA v Ministry of Health*,[8] the CJEU stated a preliminary ruling was unnecessary where the question posed was clear and without doubt. However, even if this exception may seem efficient, the disadvantage could negatively impact the uniform application of EU law.

Through this dialogue between national courts and the CJEU, many cornerstone principles of EU law have been established, such as direct effect, indirect effect, and member state liability. These mechanisms are used by the CJEU to protect treaty rights for individuals and guarantee aspects of effective enforcement like the rule of law and institutional balance.

As a starting point, in *Case 26/62 Van Gend en Loos v. Nederlandse Administratie de Belastingen*,[9] the CJEU refers to EU law as a 'new legal order', where the recipients are not just member states but also individuals who can directly enforce their rights. In the cases of *Van Gend en Loos*[10] and *ENEL*,[11] "…the Court laid down the foundations of Community law by holding that its provisions are capable of direct effect in the legal order of the member states and that they take precedence over national law".[12] Through the preliminary ruling procedure, it was confirmed that individuals could directly enforce rights guaranteed to them under EU law, and these judgments essentially guaranteed supremacy when establishing that EU law takes precedent over national law.

Another essential principle developed through the preliminary ruling procedure was the supremacy of EU law, which guarantees its effective enforcement. EU law supremacy was confirmed in *Joined Cases C-46/93 and C-48/93 Brasserie du Pêcheur SA v Bundesrepublik Deutschland; The Queen v Secretary of State for Transport, ex parte Factortame Ltd and others* ('*Factortame III*'),[13] where the CJEU said: "…the purpose of direct effect is to ensure that provisions of Community law prevail over national provisions."[14] This demonstrates the power of supremacy by indicating that EU law will always override domestic law, even if a member state deliberately legislated against it to avoid their obligations. Subsequently, in the leading case of *Factortame III*, the CJEU held that the concerned member state had to withdraw the national law which was conflicting with EU law, making this case a clear example of EU law's supremacy and, ultimately, its effective enforcement.

Effective enforcement of EU law is essential for the CJEU because it plays a crucial role in EU integration by ensuring the integrity of the EU legal order as a whole. The principle of indirect effect fills the gaps left by direct effect to ensure that individuals can fully benefit from their EU rights by allowing national courts to interpret national law consistently with EU law as per *Case C-14/83 Von Colson and Kamann v Land Nordrhein-Westfalen*.[15]

There are times when neither direct effect nor indirect effect are available, and that is when the principle of member state liability may arise. This principle was developed in the *Cases C-6 & 9/90 Francovich and others v Italy*,[16] where the court

[8] [1982] ECR 3415.
[9] [1963] ECR 1.
[10] Ibid.
[11] *ENEL* (n 6).
[12] Carl Otto Lenz and Gerhard Grill, 'The Preliminary Ruling Procedure and the United Kingdom' (1995) 19 Fordham International Law Journal <https://ir.lawnet.fordham.edu/cgi/viewcontent.cgi?referer=&httpsredir=1&article=1470&context=ilj> accessed 2 January 2022.
[13] [1996] ECR I-1029.
[14] Danny Nicol, 'Democracy, Supremacy and the "Intergovernmental" Pillars of the European Union' (P.L. April 2009) Public Law 218 <https://uk.westlaw.com/Document/IFC22F000231F11DEBA18CA797BE6038F/View/FullText.html?> accessed 3 January 2022.
[15] [1984] ECR 1891.
[16] [1991] ECR I-5357.

held the "Member State [was] required to make good loss and damage caused to individuals by failure to transpose Directive 80/987."[17] A member state had to compensate individuals where an EU right has not been made available to them, evidencing how effective enforcement of EU law benefits citizens directly.

This principle of member state liability has proven to impose real consequences on member states for their actions, such as in *Factortame III*,[18] where the UK had to compensate Spanish fisherman for limiting their rights to the internal market, a fundamental freedom provided by the EU Treaty. Essentially, any failure of a member state will suffice for this principle to apply. Despite this, the test is still very narrow because the CJEU believes some limits must be imposed on this type of public liability. Nevertheless, the CJEU strongly believes that this principle is necessary to ensure effective enforcement of EU law and, for the preliminary ruling procedure to operate effectively by guaranteeing that member states are fulfilling their duty to refer questions of EU law to the CJEU when necessary.

In *Case C-224/01 Köbler v Austria*,[19] and *Case C-173/03 Traghetti del Mediterraneo SpA v Italy*,[20] the member states were held to be obligated to make a reference under Article 267 TFEU to the CJEU. When the national court does not fulfill the duty to refer, they can be held liable to pay compensation to the individual for failure to allow them the full benefit of their EU rights, linking the principle of member state liability.

Through the preliminary ruling procedure, this system of remedies for breach of EU laws established by the CJEU ensures effective enforcement, guaranteeing remedies for individuals when their treaty rights are infringed. The principles of direct effect, indirect effect, and member state liability have derived from a request from a national court to the CJEU to interpret EU law, which makes it clear that asking questions to the CJEU assists with Europeanisation and maintaining effective enforcement of EU rights. The preliminary ruling procedure established many cornerstone principles of EU Law, which, from an absolutist interpretation of supremacy, results in effective enforcement of EU Law, confirming that the application of Article 267 TFEU ensures effective enforcement, which would not have been possible without it.

[17] Ibid.
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Family Matters – Women, Queerness, and the (Nuclear) Family Law

***Anonymous*, Winner of the Victoria Fisher Memorial Prize (2021)**

When I turned twenty, my father said to me: 'the next decade will be the most important period of your life'.

At first, I agreed with him. I was a young woman just coming into my own back then. Not long before I had discovered that I was queer, and it seemed that the turning of the decade was to be a new start in many ways. This realization, an admittance finally uttered, encased me in a state of mania, restlessness and relief. The struggles along the years against conventionality and traditionalism, previously passed as a typical pubescent sensitivity, now could be redeemed as an innate part of my identity. And it explained the unprecedented radical interest (at least, radical amongst my immigrant family) in feminist discourse and women's liberation. So when my father told me my twenties will be important — I wholeheartedly agreed. I wanted to make something of myself, 'To right the wrongs of the world', a trite adage but so fitting to the spirit at the time and of the time, even now.

But what my father referred to, as made clear by his next sentence, was that my twenties would be important because I would have my own family. Stability in one's life began when one started their own family, he said, while sporting that grin parents so often wore when they thought they were imparting sagacious knowledge on the young ones. Remembering this conversation now I find it a sardonically humorous case of inter-generational misunderstanding — the inevitable clash of old and new ideology. Justly so, my twenty-year-old self was not amused with this observation and I suppose even now the bitterness never quite left my person. The statement was invariably coated with a gendered lens: when my brother turns twenty would my father deliver the same speech or would he instead tell him to focus on his career? By framing age, stability, and the gendered ideals of success together in a parent-knows-the-best pontification, I was reduced to my functionality as a woman defined by social roles and biological functions. Moreover, the clucking patronage over a woman's private life highlighted an emphasis on where women *ought* to focus their energies on, or, put in another way, an arena where it is acceptable to police a woman's choices.

This essay, thus, will be on the woman and the family. This essay will by no means be an academic analysis but rather my own feminist take on the intersection between family, the law, and the autonomous queer woman. I will first comment on the public-private divide favoured by our neoliberal society, how a purported 'respect for private family life' often plays to the detriment of women, and how this divide ultimately severs women from accessing public help in domestic disputes. Then, I will exact critique on the legal structuring of 'family' in its continuous and relentless grip on traditional nuclear family ideas, which delegitimizes and villainizes non-traditional family arrangements critical to intersectional (and especially queer) rights. Finally, I will attempt to deconstruct the myth of autonomy of choice in the realm of familyhood, against a social background of inequality.

In law, the dichotomies of public-private divide are ever present. The European Convention of Human Rights explicitly lists 'Respect for Private and Family Life' as a core right. Reading

from the ECHR guide[1], this right is to protect against 'arbitrary interference' by a public authority. It includes both a positive obligation for the state to ensure that such respect is upheld between private parties, and a negative obligation for the state to refrain from infringing on protected rights to family privacy. The scope for the right is broad, and judicial review for claims of breached rights often fall under a test of proportionality of justification and 'best approach considered'. There is a very careful tiptoeing by public bodies around private citizen affairs which, in this neoliberal individualistic society, is fully justified.

Or is it? The State's negative obligation to refrain from interference could turn into an *avoidance* of inquiry into a private citizen's life. Behind closed doors, relationships break down. Physical and psychological harm sustained by abuse and violence, coercion and threats. There is an assumption that domestic disputes arose out of personal conflict and so resolution can be reached within the same private intra-family unit. But what this assumption neglects to consider is that often domestic violence, being a gendered phenomenon, is very much a product of patriarchal dominance and economic inequality perpetuated by this capitalist neoliberal society. So to conflate 'respect' for private life with 'refrain' from a citizen's private life puts women in danger of disproportionate violence.

One of my friends, a smart, posh, affluent woman completing her PhD in America, once dated a man who was physically violent when he got angry. He never laid a hand on her but the furniture in the house were victims to his outbursts. My friend was not a private person — she shared promptly when asked and was of the endearing trait to update her close circles on the happenings of her life. Yet despite this, she did not reveal her partner's violence until much later on. When she finally confided in me, the relationship was already half-ended and I never saw her partner again. What I remember vividly was the cast-down glance of her eyes, the abashed tip of the head, voices spoken in hushed tones as if she really should not be telling me this highly private matter between partners. He punched a hole in the dining table, she told me. It was after some heated argument over the preparation of dinner and not much more detail was shared after that. Her reticence spoke volume: if even among closest friends domestic cases are considered to be a matter best kept private, how can victims be persuaded to turn to public bodies to reliably seek redress for serious harm they sustained?

Let's turn to the case of *Michael v Chief Constable of South Wales Police*[2], where a woman was killed by her ex-partner despite calls to the police right before the murder. The man had threatened to be at the victim's house 'any minute literally' and that he was going to 'f*cking kill [her]'. Due to negligent oversight by the police, they arrived too late to save the woman. The judges, on the premise of public policy reasons, held that the police were not liable for negligence because it would detrimentally affect the working practices of the police. In his judgement, Lord Hope commented:

> "S*o-called domestic cases that are brought to the attention of the police all too frequently are a product of [the breakdown of relationships]. One party tells the police that he or she is being threatened. The other party may say, when challenged, that his or her actions have been wrongly reported or misinterpreted… Not every complaint of this kind is genuine.'*[3]

What can be effectively concluded from the judgement and Lord Hope's disparaging remark is that victims of 'domestic cases' will not find solutions in law enforcement or the court. Private matters are best to be resolved privately as public bodies could not afford to use precious resources

[1] European Court of Human Rights, *Guide on Article 8 of the European Convention on Human Rights* (updated 31 August 2021).

[2] [2015] UKSC 2.

[3] Ibid [76]

to adjudicate on these matters. Domestic cases result from a 'breakdown of relationships', which are internal and confined to the private spheres of family life, independent of external social factors or flaws of the law. This is false. To make it clear, deadly quarrels between couples such as one in *Michael* extend *beyond* mere personal conflicts. Multitudinous social issues such as stigmatization of mental health, gendered inequality in liveable wage and the reliance developed from this economic inequities, and a violence coded into the form of masculinity of a patriarchal society, all contribute to the 'breakdown of relationship'. This is what Okin (1989) referred to as a 'cycle of vulnerability'; where work and family create an infinite loop that perpetuates gender injustice. Furthermore, while it may indeed be unrealistic to expect the police to decipher the truthfulness of every statement received about domestic abuse cases, the approaches taken should always be from a place of trust and support, not of doubt and suspicion.

This is a crisis. Of law, of women living with abusers and socialized to think that private matters should be withheld from the public sphere, that it should be dealt with on their own, that it should be concealed from the public eye and an inability to resolve such matters would end in public shame. To respect private family life does not mean public oversight; action and policies need to be adopted on a wider scale in order to truly empower the vulnerable members of society.

There is, indeed, a branch of law which brings together the public and the private. Family law, as explained by Diduck, is the 'public enforcement of private responsibilities of individual family members'.[4] The starting point for family law is the definition of 'family', a highly nuanced term and specific to one's culture, religion, and sexuality; it is thus required that family law should approach the legal concept with a pluralistic and flexible scope in mind. However this is not the case. The family unit has always, and will likely continue to be, defined by the nuclear family structure.

As I was preparing for this essay I came across this wonderfully romantic quote by Cheal: 'A family is considered to be any group which consists of people in intimate relationships which are believed to endure over time and across generations'.[5] This definition paints a picture of enduring platonic bonds between friends, between communities, all intricately bound together by a genuine care and love for each other. I thought about my queer friends who often joke about getting a communal farm and raising foster children together. We would grow our own gardens and harvest our own produce, and the children will be raised by a plethora of personalities, all bringing their unique beliefs and perspectives to the table. It would be a chosen family bursting with love and care, bonded not by contractual obligations but by a freedom of choice.

I suspect that my conjured image of family runs contrary to the typical 'family unit' envisioned by the majority. Certainly, when my father spoke of family he definitely was not referring to a communal farm inhabited by a group of unmarried, leftist, queer women. Like how the law defines the family, his premise of a family formed upon the idealized definition of a conjugal relationship and the parent/child relationship — the nuclear family. As Bernardes portrays the archetypal family unit: 'a young, similarly aged, white, married heterosexual couple with a small number of healthy children living in an adequate home'.[6] The nuclear family maintains a strong pillar in family law for its precise endorsement of legal certainty and moral cohesion: marriage, cohabitation, children; all adhering to the puritan social order favoured by 'civilized' neoliberal societies. The potency of the nuclear family clearly endured through time and rooted itself as

[4] Alison Diduck, 'Shifting Familiarity' [2005] Current Legal Problems 235.
[5] David Cheal, Sociology of Family Life (Basingstoke, Palgrave, 2002) 4.
[6] Jon Bernardes, *Family Studies: An Introduction* (London, Routledge, 1997).

the 'standard' which all forms of relationship derive their legitimacy.

To tell a story: I have an aunt who was the first in my extended family to immigrate West. She moved to the United States in the 80's and made a life for herself there. I remember meeting her very briefly when my family went on holiday in America. She was thoroughly American — a savoir-faire gracefulness in her manners, the quiet confidence of a woman self-possessed. She spoke to us in Mandarin and switched just as easily to English. She owned a little house in California and taught at a local community college; on her off-days she painted and went on hikes. Despite her success, she was the black sheep of the family simply because she never married and had children. It was said in passing conversations that her flight to America was seen as an escape, in shame, of her inability to attract a husband, and her time spent in the vast loneliness of her house was to punish her for her avoidance of such basic, womanly, obligation. I don't know what they would have said if she chose to cohabit with a partner or opted for a non-traditional family, but I assume disapproval of similar or greater magnitude. My aunt, the modern autonomous woman ahead of her time, became the cautionary tale parents told their children about the intransigence of the rebellious woman, just because she chose *not* to have a traditional family.

When same-sex marriage was legalized in England and Wales in 2013, Maria Miller, Minister of Women and Equalities, proclaimed:

> "*Marriage is the bedrock of our society… Making marriage available to all couples demonstrates our society's respect for all individuals regardless of their sexuality. It demonstrates the importance we attach to being able to live freely. It says so much about the society that we are and the society that we want to live in.*"[7]

Indeed, the legalization of same-sex marriage via the Marriage (Same Sex Couples) Act 2013 marked a point of progress and deserves the celebratory twirl for championing diversity and inclusion. However as feminist legal scholars have argued: formal equality only resolves the problem of treating people different, it does not address systems of dominance or exploitation, and does not allow for equitable treatment for nuanced challenges created by structural conditions.[8]An even more damning analysis by Stychin asserted that these formal inclusion flattens out the multidimensional facets of queer family structures into a single sheet of legal doctrine, recognizable and disciplinable, modelled after the heterosexual marriage model. This further marginalizes non-traditional arrangements and enacts 'legal violence' which delegitimizes and shames structures which it does not recognize.[9] Queer theorists questioned the same thing: why do relationships mirroring the most traditional elements of the nuclear family enjoy more privileges and are typically more readily accepted? Other forms of relationships, such as promiscuous love, polyamory, open relationships and platonic partnerships, are generally trivialized, subordinated, and hostilely resisted against.[10] Remember that queer love has navigated (and continues to navigate) through decades of bigotry and intolerance by taking on a variety of isotopes of family architecture in order to survive. Same-sex marriage may be legal, but it only serves queer couples who adopts the nuclear family unit. The law is still the most powerful tool to take nouveau ideals and shape them into a concrete, tangible

[7] Statement retrieved from UK Government website <https://www.gov.uk/government/news/same-sex-marriage-becomes-law> accessed 26 Nov 2021.

[8] Alison Diduck and Katherine O'Donovan, 'Feminism and Families: Plus ça change?'in *Feminist Perspective on Family Law* (Routledge-Cavendish, 2006)

[9] Carly Stychin, 'Family Friendly? Rights, Responsibilities and Relationship Recognition' in Alison Diduck and Katherine O'Donovan (eds), *Feminist Perspective on Family Law* (Routledge-Cavendish, 2006)

[10] S Roseneil 'Why we should care about friends: An argument for queering the care imaginary in social policy' (2004) Social Policy and Society 409

doctrine, encouraging tolerance and changes in social attitude.

There is something to be said for the laziness of imagination of folks who cling to ideals of the nuclear family, despite evidence all around us saying that perhaps this model does not work for everyone. The condemnation takes on a more serious note when it comes to legislators. Wallbank remarked that 'relying on established norms and traditions about the family saves the legislators, users and wider society from having to rethink, revise, let alone *challenge* the assumptions which are held about what constitutes a family'.[11] It can easily be dismissed that 'if it ain't broken don't fix it', but the nuclear family model is broken — it does not serve the majority of UK family[12] and its continuity will further disenfranchise those who do not wish to be bound by its rigidity.

Contemporary families may have moved beyond the fixed status of hierarchical deference where freedom to choose was limited, but gender injustice still pervades within the nuclear family structure. Issues like labour division, childcare, reproductive choices, and inequitable wages continue to place women in a vulnerable position. There is the delusion that modern family formation consists of autonomous choices made by individuals without (or, with very little) undue influence from external sources. This is not true. Given the unequal background social conditions, there already exists an unequal bargaining power between heterosexual partners. This cannot be fixed until the entire patriarchal capitalist system is upheaved. Furthermore, some choices cannot ever be fully informed. Marriage and childbearing are long-term contracts with unpredictable endings; the burdens of responsibilities these contracts carry can render a woman completely subordinate against the background of gender injustice.

Take division of domestic labour as an example. Before my brother and I were old enough to take care of ourselves, we were the entire responsibility of my mother. My family adhered to a strict separation of roles: dad went off to earn money and mum took care of us (even though she also had a full-time role at a senior home albeit earning much less than my father). My mother would leave home for work every morning at 6:00am and return by 3:30pm where, without fail, she prepared dinner for the whole family. On occasions where mum had to stay late at work, dad would cook dinner. On each of these occasions his efforts were applauded with extra gratitude, as if he performed a deed that was beyond what was required of him. We thanked our mother too, but what struck me was that dad never enforced us to show extra gratitude to mum, while mum was always on us about thanking dad for his 'hard work'. My parent's marriage is full of love and respect — it is a marriage of voluntary consent and loving intentions. But the gender injustice is so apparent, so *loud*, that it renders the autonomous choice of the woman within the family to suspect circumstances.

Autonomy has always been at the forefront of feminist thinking. Autonomy of the body, autonomy of choice, of economic independence and, ultimately, autonomy of existence. I have always been greatly moved by Simone de Beauvoir's quote (as overly used as it is), 'One is not born, but rather becomes, a woman'.[13] To choose how we want to live as women is, I believe, the final steps for full gender justice. We are still so far from this goal; feminism right now has only just begun to address intersectionality and the need to make space for indigenous women, transwomen, and women of colour to speak their experiences. Feminism must seek to serve all concerns of all women; it cannot simply stop once

[11] Julie Wallbank, 'Channeling the Messiness of Diverse Family Lives: Resisting the Calls to Order and De-Centering the Hetero-Normative Family' (2010) 32(4) Journal of Social Welfare and Family Law 353. (emphasis my own)

[12] Only 15% of families in the UK are nuclear family units. Retrieved from <https://www.ons.gov.uk/peoplepopulationandcommunity/birthsdeathsandmarriages/families/bulletins/familiesandhouseholds/2018> accessed 25 Nov 2021.

[13] Simone de Beauvoir, 'The Second Sex' (1st edn, 1949)

the top echelon have been satisfied. When it comes to family, an intersectional approach becomes even more pertinent — there needs to be consideration for cultural and religious beliefs. Autonomy within the family needs to be considered in the context of the family unit, the individual, and the socio-political backdrop of the time. The law has been both an enemy and an ally in the progress to achieve the full range of rights for women. But while legal precedents have value on paper, law's inherent desire for certainty and clarity undermines the need for nuanced approach to serve all women.

I am in my mid-twenties now. The queries about family and marriage still make its annual round during holiday gatherings. I still have no concrete replies to these innocuous interrogations; the prevarications I usually give are on facts of my age, my studies, and a concern for the climate crisis. These instances are good-humoured and ceremonial, but nevertheless jolt me awake to the inadequacies of traditional family structures and the urgent need for the law to address these shortcomings. The law is always playing catch-up with the times, what we consider radical now may become the status quo of tomorrow, and the mechanisms of law will always be one step behind. It is pertinent, extremely so, to not become complacent, to not dismiss advocacy and education because of a fear that new values will come to supplant old ones. That when we ask women about themselves, we do so without carrying the parochial expectation about what a 'right' answer should be. A respect for private and family life means to respect a woman's choices, respect her voice, and respect that she does not have an obligation to conform to any traditional structures of family, marriage, or childbearing. It is time for a complete re-evaluation and overhaul of what family means, what family *ought* to mean.

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'Feeble Minded' Women with Prostitute Minds' – The Case for Decriminalising Abortion and Female Self-Rule

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Introduction

Women do not have the right to an abortion in the UK.[1] In fact, the current legal framework criminalises it.[2] Even on an international scale, no binding UN treaty has ever codified an express right to access treatment.[3] Whilst greater liberalisation in the 1960s led to abortion being permitted,[4] women were still required to satisfy one of the defences outlined in the Abortion Act 1967.[5] Yet, more than 50 years on, women are still required to comply with this legislation.[6] Moreover, the narrative on abortion still comes from a place of privilege and lacks an awareness of the impact such outdated legislation has on women.[7] Indeed, it appears that the current statutory framework aligns closer with religious views on the sanctity of life, rather than female self-rule.[8] In its current form, the law surrounding abortion frames women as incompetent, stripping them of their autonomy and requiring doctors to make decisions on their behalf.[9] Yet, at the same time, the framework leaves both doctor and patient vulnerable to criminal liability for these decisions.[10] However, with one in three women in the UK estimated to have an abortion in their lifetime,[11] such legislative hurdles provide more of a symbolic resistance than a reflection of the status quo.[12] Whilst few women are charged with committing a criminal act,[13] the very fact that the law *has* the capacity to limit female access to abortion, at any time in their gestational cycle, perpetuates the notion that pregnant women should sacrifice their autonomy.[14] Thus, this essay will argue that recent calls for reform of abortion law are

[1] Rosamund Scott, 'Risks, Reasons and Rights: The European Convention on Human Rights and English Abortion Law' (2015) 24(1) MLR 1, 1.
[2] Offences Against the Person Act 1861, s 58; s 59; Sally Sheldon, 'The Decriminalisation of Abortion: An Argument for Modernisation' (2016) 36(2) OJLS 334, 334.
[3] Frances Raday, 'Sacralising the patriarchal family in the monotheistic religions: "To no form of religion is woman indebted for one impulse of freedom"' (2012) 8(2) Int JLC 211, 223.
[4] British Library, 'Timeline of the Women's Liberation Movement' (*British Library)* <https://www.bl.uk/sisterhood/timeline#> accessed 29 December 2020.
[5] Abortion Act 1967, s 1 (1).
[6] Alisa Ryan, '50 years on from the Abortion Act, pro-choice campaign calls for renewed push' (*Abortion Rights,* 27 October 2018) < http://abortionrights.org.uk/50-years-on-from-the-abortion-act-pro-choice-campaign-calls-for-renewed-push/ -:~:text=50%20years%20on%20from%20the%20Abortion%20Act%2C%20pro,that%20allowed%20women%20access%20to%20a%20legal%20abortion.> accessed 21 December 2020.
[7] Nicky Priaulx, 'The social life of abortion law: on personal and political pedagogy' (2017) 25(1) MLR 73, 74.
[8] Raday (n 3), 220.
[9] Sally Sheldon, '"Who is the Mother to make the Judgment?": The Constructions of Woman in English Abortion Law' [1993] 1(1) FLS 3.
[10] OAPA (n 2), s 58; s59.
[11] Edna Astbury-Ward, Odette Parry and Ros Carnwell, 'Stigma, Abortion and Disclosure-Findings from a Qualitative Study (2012) 9 J Sex Med 3137, 3137 reported in Priaulx (n 7), 86.
[12] Nathan Davis, 'Decriminalising a Fundamental Right' (2017) 181 JPN 676, 677.
[13] *R v Catt* [2013] EWCA Crim 1187*; R v Mohamed* (unreported), see Nick Britten, 'Jury Convicts Mother who Destroyed Foetus' *Telegraph* (26 May 2007)< https://www.telegraph.co.uk/news/uknews/1552651/Jury-convicts-mother-who-destroyed-foetus.html> accessed 29 December 2020 reported in Sheldon 2016 (n 2), 340.
[14] *Montgomery v Lanarkshire Health Board* [2015] UKSC 11 [116] (Lady Hale).

supported.[15] Indeed, particularly in the first trimester, an abortion is far safer for women than carrying a child to term.[16] Therefore, the process of abortion should be viewed as a medical decision, focusing on the presence of informed consent, rather than criminal liability.[17] Whilst some argue that the decriminalisation of abortion may lead to women making socially questionable decisions, such as abortion on the grounds of sex or disability,[18] as with other medical procedures, if the patient has capacity, then problematic choices should not detract from any woman's right to decide for themselves.[19]

The depiction of women in Legislation

Under the Offences Against the Person Act 1861 (hereinafter: OAPA), the procurement of a miscarriage is a criminal offence.[20] This carries the potential for a life sentence, meaning the UK has the highest sanction for self-procured abortion in Europe.[21] The only way to avoid liability is to satisfy one of the defences outlined in s.1(1) Abortion Act 1967.[22] Indeed, the majority of women seeking an abortion (99.9%), are required to comply with s.1(1)(a).[23] For this, two doctors must confirm, in good faith, that the woman is less than 24 weeks pregnant and 'the continuance of the pregnancy would involve risk, greater than if the pregnancy were terminated, of injury to the physical or mental health of the pregnant woman'.[24] Yet, at no point within this framework are the opinions of the woman, as to her capabilities, considered. As Sheldon notes, the current structure depicts women in two distinct forms; either the selfish and impulsive woman, who is not mature enough to adequately care for a child; or the victim, punished by society and unable to cope with the birth of another child.[25] Yet, this mentality can be seen in case law, well before it was codified in the Abortion Act. In *Bourne* for example, a 16-year-old rape victim was 'alleviated' from her suffering and differentiated from other 'feeble minded' women with 'prostitute minds' who sought abortions.[26] Yet, this portrayal of female decision-making fails to take into account the multitude of reasons women might seek an abortion.[27] Instead, such choices are based on a balanced self-reflection of their current

[15] 'Time to Modernise Abortion Law' *The Times* (London, 17 October 2008); Cf 'Abortion: Response to a Letter to the Times, 17th October 2008' (*Medical Humanities,* 17 October 2008) < https://blogs.bmj.com/medical-humanities/2008/10/17/abortion-response-to-a-letter-to-the-times-17th-october-2008/> accessed 19 December 2020.
[16] Royal College of Obstetricians & Gynaecologists, '"The Care of Women Requesting Induced Abortion": Evidence-Based Clinical Guideline No 7' (November 2011) < https://www.rcog.org.uk/globalassets/documents/guidelines/abortion-guideline_web_1.pdf> accessed 20 December 2020 [2.2] in Sheldon 2016 (n 2), 348.
[17] British Medical Association, *First Trimester Abortion: A briefing Paper by the BMA's Medical Ethics Committee* (ARM: London, 2007) 4; British Medical Association, 'The removal of criminal sanctions for abortion: BMA Position Paper' (July 2019) < https://www.bma.org.uk/media/1963/bma-removal-of-criminal-sanctions-for-abortion-position-paper-july-2019.pdf> accessed 18 December 2020, 3.
[18] Sally Sheldon and Stephen Wilkinson, 'Termination of Pregnancy for Reason of Foetal Disability: Are There Grounds for a Special Exception in Law?' (2001) 9 MLR 85; Sheelagh McGuinness, 'Law, Reproduction, and Disability: Fatally "Handicapped"?' (2012) 21(2) MLR 213; Kate Greasley, 'Is Sex Selective Abortion against the Law?' (2016) 36(3) OJLS 535; Kristina Swift and Michelle Robson, 'Why doctors need not fear prosecution for gender-related abortions' (2012) 76(4) J Crim L 348.
[19] *Kings College Hospital NHS Foundation trust v C and V* [2015] EWCOP 80.
[20] OAPA (n 2), s58; s59.
[21] Kerstin Nebel and Steffen Hurja, 'Abortion: Finding the Impossible Compromise' in Christoph Knill, Christian Adam and Steffen Hyrka (eds), *On the Road to permissiveness? Change and Convergence of Moral Regulation in Europe* (OUP 2015).
[22] Abortion Act (n 5), s 1(1).
[23] Department of Health and Social Care, 'Abortion Statistics, England and Wales: 2018' (13 June 2019) < https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/808556/Abortion_Statistics__England_and_Wales_2018__1_.pdf> accessed 15 December 2020 [2.15].
[24] Abortion Act (n 5) s 1(1)(a).
[25] Sheldon 1993 (n 9).
[26] *R v Bourne* [1939] 1 KB 687, 688.
[27] Maggie Kirkman, Doreen Rosenthal, Shelley Mallett, Heather Rowe and Annarella Hardiman, 'Reasons women give for contemplating or undergoing abortion: A qualitative investigation in Victoria, Australia' (2010) 1 S&RH 149.

capabilities as a parent, rather than, as once suggested, the potential for a forthcoming holiday.[28] Under the current legislation, doctors are the 'gatekeepers of abortion'[29] and women are forced to rely on their 'beneficent exercise of medical discretion'.[30] Yet, it should be questioned how a doctor, completing on average a 10.6 minute consultation, is in a better place to judge a woman's capabilities than she is herself.[31] As Lady Hale noted, under the current law, 'the availability of legal abortion depends upon the opinions of others'.[32]

Therefore, it is questioned whether subjecting almost all women to the requirements of s.1(1)(a) disproportionately infringes upon their right to bodily autonomy under Article 8 of the European Convention on Human Rights (hereinafter ECHR).[33] As a signatory nation, the UK is obligated to prevent arbitrary state intervention.[34] Additionally, whilst it was previously considered on an international level that 'pregnancy cannot be said to pertain uniquely to the sphere of private life',[35] since *RR v Poland* it is understood that 'the decision of a pregnant woman to continue her pregnancy… belongs to the sphere of… autonomy'.[36] Yet, in an English law context there is no framework to appeal medical decisions refusing an abortion, either due to conscientious objection or because doctors can interpret the Act in different ways.[37] Therefore, whilst patients can get a second opinion,[38] it must be questioned whether autonomy is truly being exercised, or whether it is merely being facilitated by a benevolent doctor.[39] Nevertheless, it appears we cannot expect reform to come from the European Courts. As Scott suggests, 'abortion jurisprudence has…paid little more than lip service to women's autonomy'.[40] This is demonstrated in *A, B and C v Ireland*, where it was established that states have a wide margin of appreciation when it comes to laws governing ethical decisions.[41] However, simply because our legal framework permits abortion, thus aligning with ECHR guidelines, does not mean it is safe from reform.[42]

The current framework surrounding abortion does not value a woman's right to autonomy. The outdated notion of 'doctor knows best' should not be permitted to govern what is more accurately viewed as a private medical decision.[43] Indeed, as the British Pregnancy Advisory Service notes, 'we are a society that trusts women to make their own decisions' and thus it is imperative that our

[28] Sheldon 1993 (n 9), 7.
[29] Sheldon 2016 (n 2), 343.
[30] Emily Jackson, *Regulating Reproduction* (Hart Publishing 2003), 71-78 reported in Ellie Lee, 'Young Women, Pregnancy and Abortion in Britain: A Discussion of Law "In Practice"' (2004) 18(3) IJLPF 283.
[31] Sara Martin, Edward Davies, Ben Gershlick, 'Under Pressure: What the Commonwealth Fund's 2015 international survey of general practitioners means for the UK' (*The Health Foundation*, February 2016) < http://www.health.org.uk/publications/under-pressure> accessed 21 December 2020 reported in Pamela Duncan and Cath Levett, 'How long do you get with your GP? Doctor's consultation times – in data' *The Guardian* (London, 10 Feb 2017) <https://www.theguardian.com/society/datablog/2017/feb/10/how-long-do-you-get-with-your-gp-doctors-consultation-times-in-data> accessed 21 December 2020.
[32] *Parkinson v St James & Seacroft University Hospital NHS Trust* [2002] QB 266 [66] (Lady Hale).
[33] European Convention on Human Rights (ECHR), art 8.
[34] Rosamund Scott, 'Reproductive Health: Morals, Margins and Rights' (2018) 81(3) MLR 422, 425; Scott 2015 (n 1), 1.
[35] *Bruggemann and Scheuten v Germany* (1981) 3 EHRR 244 [59].
[36] *RR v Poland* App no 27617/04 (ECHR, 26 May 2011) [181].
[37] Scott 2015 (n 1), 24.
[38] General Medical Council, *Personal Beliefs and Medical Practice* (2013) <https://www.gmc-uk.org/-/media/documents/personal-beliefs-and-medical-practice-20200217_pdf-58833376.pdf?la=en&hash=04618088FF22E6D3C766CB73A0F54D278319C8A8> accessed 29 December 2020, para 12.
[39] Scott 2015 (n 1), 24.
[40] Scott 2018 (n 34), 441; Daniel Fenwick, 'The Modern Abortion Jurisprudence under Article 8 of the European Convention on Human Rights' (2013) 12 Med L Int 249.
[41] *A, B and C v Ireland*, App no 25579/05 (ECHR, 16 December 2010).
[42] Scott 2015 (n 1), 2.
[43] Sheldon 2016 (n 2), 345.

legislation reflects this notion.[44] By placing barriers on the access of medical treatment, we are telling women that they are incapable of making their own reproductive decisions. Additionally, subjecting all women to these requirements, regardless of their position in the gestational cycle, infringes upon their right to bodily integrity under Article 8.[45] The ECtHR might hold that, since the option of abortion is available, women's rights are merely limited by the ethical boundaries of their jurisdiction. However, it should be considered whether women are really able to exercise their own autonomy in an 'effective' way, as suggested by the Council of Europe, when they can only enforce their right to self-rule on the permission of a medical professional.[46]

The case for Decriminalisation

Thus, there is scope for reform. As suggested by the British Medical Association (BMA), decriminalisation, or the removal of all requirements for medical defences under the Abortion Act, for women seeking an abortion, at least in the first trimester, would provide a welcome solution; placing autonomy back into the hands of the person most impacted by the process. Instead, the focus would be on establishing the existence of informed consent.[47] This proposal finds support in the House of Commons, who agreed, contrary to Parliament's initial intentions,[48] that the current safeguards do not protect women.[49] Moreover, this is not as extreme a reform as anticipated. It will be established that criminalisation of abortion has little impact on abortion rates, especially in the UK where, particularly in the first trimester, legislation serves to be little more than a 'paper tiger'. Ultimately, this reform would place abortion in line with the multitude of other medical procedures which put patient autonomy at the forefront.

Firstly, numerous studies have demonstrated that criminalisation does little to impact abortion rates.[50] Indeed, even in the most conservative jurisdictions, where abortion is strictly prohibited, women are still able to access them, albeit in more dangerous environments.[51] As Grimes notes, 'when abortion is made legal… women's health rapidly improves. By contrast, women's health deteriorates when access to safe abortion is made more difficult'.[52]

Focusing on the UK, the broad requirements of s.1(1)(a), also known as the 'social ground',[53] means that, at least in the first trimester, abortion is *de facto* decriminalised.[54] Furthermore, due to scientific advancement, it is now considered far safer, from a medical perspective, to abort a child in the first trimester than to carry to term, and therefore easily satisfies the defence.[55] Thus, whilst Parliament might have initially intended that abortions should not be available 'on demand', it is

[44] British Pregnancy Advisory Service, 'Abortion rate stable, changes in procedure highlight need for abortion law reform' (*BPAS*, 13 June 2017) < https://www.bpas.org/about-our-charity/press-office/press-releases/abortion-rate-stable-changes-in-procedure-highlight-need-for-abortion-law-reform/> accessed 21 December 2020.
[45] ECHR (n 33), art 8.
[46] Council of Europe, *Access to Safe and Legal Abortion in Europe*, Resolution 1607 (2008), art 6.
[47] British Medical Association, *Memorandum of Evidence to the Science and Technology Committee Inquiry into the Scientific Developments Relating to the Abortion Act 1967* (2007) para 2; BMA, 'The removal of criminal sanctions' (n 17), 3.
[48] Medical Termination of Pregnancy Bill Deb 22 July 1966, vol 732, col 1067 (David Steel).
[49] House of Commons Science and Technology Committee, *Scientific Developments Relating to the Abortion Act 1967* (2006-07, HC 1045-I) para 99.
[50] Dr Gilda Sedgh et al, 'Abortion incidence between 1990 and 2014: global, regional and subregional levels and trends' (2016) 388(10041) Lancet 258 < https://www.thelancet.com/journals/lancet/article/PIIS0140-6736(16)30380-4/fulltext> accessed 21 December 2020; J Erdman, 'Access to Information on Safe Abortion: A Hard Reduction and Human Rights Approach' (2011) 34 Harv JL & Gen 413, 445.
[51] Sheldon 2016 (n 2), 352; BMA, 'The removal of criminal sanctions' (n 17), 2.
[52] Dr David Grimes et al, 'Unsafe Abortions: the Preventable Pandemic' (2006) 368(9550) Lancet 1908, 1908.
[53] Swift and Robson (n 18), 349.
[54] Davis (n 12), 677.
[55] RCOG 2011 (n 16).

clear that, at least in the early stages, this is now a reality.[56]

It could then be argued, why is decriminalisation necessary, if it would only carry symbolic weight? Yet, as in the state of Victoria, Australia, where these reforms were implemented in 2008, decriminalisation 'changes both nothing and everything'.[57] Whilst few women are charged with the procurement of miscarriage,[58] the case of Sarah Catt demonstrates that criminal liability is still a very real prospect,[59] even in cases where, arguably, the abortion framework had already let her down.[60] Additionally, the very fact that hospitals can, and sometimes do, refuse to perform abortions for non-medical reasons,[61] places needless strain on women who are already going through one of the hardest decisions of their lives.[62] However, whilst decriminalisation would be welcomed, akin to BMA guidance and common practice in other nations where abortion is decriminalised, criminal liability should still arise in cases where procurement of a miscarriage is completed without the consent of the woman.[63] This again reframes the narrative around the consent of the woman, rather than focusing on difficult, ethical questions about sanctity of life of an unborn foetus.

Yet, despite the positives of decriminalisation, as Maria Caulfield MP highlighted, there are concerns that this might encourage a greater number of backstreet abortions,[64] especially when our NHS is already underfunded, overburdened and may not always be able to provide prompt treatment.[65] Yet, it is important to note that decriminalisation does not mean deregulation.[66] Akin to all clinical procedures, this process would be subject to a 'range of criminal, civil, administrative and disciplinary regulations'; although the focus would be placed on the woman choosing to have an abortion, rather than an overt criminal act. [67] Indeed, if we compare the current situation to that of plastic surgery, a far more unregulated area of medical practice, we do not criminalise the women who use it, but rather seek to regulate the procedures more.[68] It must be questioned what then, apart from ethical

[56] Medical Termination of Pregnancy Bill (n 48).
[57] J Wainer, 'Celebrate Sisters, The Battle is Won' (*New Matilda*, 25 November 2008) <https://newmatilda.com/2008/11/25/celebrate-sisters-battle-won/#:~:text=Celebrate%20Sisters%2C%20The%20Battle%20Is%20Won.%200.%20By,it%20trusts%20them%20with%20the%20decision%20to%20mother> accessed 18 December 2020.
[58] (n 13).
[59] *Catt* (n 13).
[60] Simon Jenkins, 'It's judicial machismo that jails women like Sarah Catt' *The Guardian* (London, 18 September 2012) <https://www.theguardian.com/commentisfree/2012/sep/18/judicial-machismo-sarah-catt-britain-medieval> accessed 19 December.
[61] GMC 2013 (n 38).
[62] Thomas L T Lewis, 'The Abortion Act' (1969) 1 Brit Med J 241, 242.
[63] BMA, 'The removal of criminal sanctions for abortion' (n 17), 3; British Medical Association, 'How will abortion be regulated in the United Kingdom if the criminal sanctions for abortion are removed?' (2019) < https://www.bma.org.uk/media/1141/bma-guidance-on-the-regulation-of-abortion-in-the-uk-2019.pdf> accessed 18 December 2020.
[64] Reproductive Health (Access to Terminations) Deb 13 March 2017, vol 623 (Maria Caulfield); Richard Hartley-Parkinson, '"Back-street" abortions could return to the UK after MPs vote in favour of decriminalisation' *The Metro* (London, 14 March 2017) <https://metro.co.uk/2017/03/14/back-street-abortions-could-return-to-uk-after-mps-vote-in-favour-of-decriminalisation-6508072/> accessed 21 December 2020 reported in Davis (n 12), 678.
[65] Dr Judy M Laing, 'Delivering informed consent post-Montgomery: implications for medical practice and professionalism' (2017) 33(2) PN 128, 128-9; Ruth Robertson, 'Six ways in which NHS financial pressures can affect patient care' (*The King's Fund,* 31 March 2016) < https://www.kingsfund.org.uk/publications/six-ways> accessed 21 December 2020.
[66] BMA 'The removal of criminal sanctions for abortion' (n 17), 1.
[67] Sheldon 2016 (n 2), 337; British Medical Association, *The law and ethics of abortion* (2020) <https://www.bma.org.uk/media/3307/bma-view-on-the-law-and-ethics-of-abortion-sept-2020.pdf > accessed 29 December 2020, 3.
[68] Department of Health and Social Care, *Review of the Regulation of Cosmetic Intervention* (April 2013) in Sheldon 2016 (n 2), 349.

and religious sensibilities, separates these two areas of medical practice?[69]

Ultimately, decriminalisation of abortion would align this procedure with the growing ethos in the medical field away from paternalism.[70] As Lady Hale highlights in *Montgomery, '*Gone are the days when it was thought that, on becoming pregnant, a woman lost, not only her capacity, but also her right to act as a genuinely autonomous human being'.[71] It seems ironic that we allow women with legal capacity to refuse treatment which may kill both them and their unborn child, despite her decision being labelled 'morally repugnant',[72] yet we grant women little autonomy to make decisions on abortion. Thus, by allowing decriminalisation, we are promoting much-needed patient autonomy in another area of medical law. Additionally, it should be considered that, aside from promoting autonomy, decriminalisation in the first trimester would serve a clear public policy aim, by encouraging women to have earlier and less medically invasive abortions.[73]

The issue of selective termination

Before concluding, it is important to note one aspect of autonomous decision-making which is more controversial. When we allow women to self-rule, this also means that, on occasion, they may make decisions which we believe to be unethical; for instance, abortions on the grounds of disability or sex. Whilst under the current law abortions on the grounds of disability or sex have occurred, doctors have been able (albeit not that effectively) to stop such procedures when such preferences are explicitly highlighted. Decriminalisation risks abandoning this final barrier preventing socially questionable decisions. However, this does not necessarily defeat an argument for female autonomy.

Firstly, those who seek an abortion on the grounds of foetal disability must comply with the Abortion Act s.1(1)(d).[74] On paper, the 'disability provision' is particularly stringent, requiring that 'there is a substantial risk that if the child were born it would suffer from such physical or mental abnormalities as to be seriously handicapped'.[75] Whilst it was previously considered that this defence focused solely on the capabilities of the foetus,[76] Sheldon argues that, in reality, the focus is on the interests of the parent.[77] Thus, in the first 24 weeks, s.1(1)(d) could be read alongside the 'social ground' in s.1(1)(a), if it was held that the pressure of potentially giving birth to a disabled child would have a detrimental impact on a woman's mental health, regardless of the severity of the disability.[78] Therefore, a woman can effectively 'sidestep' these strict requirements.[79] Consequently, some argue that the legal framework surrounding abortions has grown too liberal, as there are few occasions where it can be safely agreed that a child born with a disability is better off dead than alive.[80] For instance, 'a blind person may have a less favourable start in life than a normal person, but it would be absurd to say that his life is likely not to be worth living'.[81] Thus, it has been argued by Lord Shinkwin in a Private Members Bill that a legal framework allowing almost unlimited abortions on the grounds of disability violates our national and international human rights obligations; under both the Equality Act 2000 and the UN Convention on the Rights of Persons with Disabilities; particularly Article 10, the right to life.[82] Equally, there is

[69] Raday (n 3).
[70] Sheldon 2016 (n 2), 345.
[71] *Montgomery* (n 14) [116] (Lady Hale).
[72] *S v St George's Healthcare Trust* [1999] Fam 26, 27.
[73] HoC Science and Technology Committee (n 49) para 99.
[74] Abortion Act (n 5), s 1(1)(d).
[75] Ibid.
[76] Sheldon and Wilkinson (n 18), 88.
[77] Ibid, 99.
[78] Royal College of Obstetricians and Gynaecologists, 'Termination of Pregnancy for Foetal Abnormality in England, Wales and Scotland' (January 1996) [3.4] reported in Rosamund Scott, 'Interpreting the disability ground of the Abortion Act' (2005) 64 CLJ 388, 391.
[79] Ibid, 390-391.
[80] Sheldon and Wilkinson (n 18), 88.
[81] Johnathan Glover, *Causing Death and Saving Lives* (Penguin 1977), 147 reported in Sheldon and Wilkinson (n 18), 90.
[82] Abortion (Disability Equality) Bill HL Deb 21 October 2016, vol 774 (Lord Shinkwin); Equality Act 2010, s 6; Convention on the Rights of Persons with Disabilities, art 10.

concern that medical practice is now a form of private eugenics, replacing a 'less able' foetus with a more socially acceptable counterpart.[83] Thus, some argue that the time limit for abortions on the grounds of disability should be brought forward.[84] However, this is more difficult than it might appear. Many disabilities are only discovered at the 20-week anomaly scan, thus bringing women close to the 24 week cut-off.[85] Therefore, bringing forward the time limit for abortions on the grounds of disability is not only impractical, but would not increase female autonomy.

Secondly, in western society sex-selective abortions are, generally, viewed as morally reprehensible. Yet, under current legislation, there are no set regulations against this,[86] nor outright prohibition within the law.[87] Moreover, due to the phrasing of s.1(1)(a), many doctors are able to find defences for sex-selective abortion, as it may well be that a women's mental health could be severely impacted if she was made to give birth to a girl.[88] It is clear that sex-selective abortions routinely occur[89] and it is argued that more stringent safeguards should be implemented in order to discourage what is, clearly, gender discrimination.[90]

Yet, autonomy must always be our paramount concern. Whilst it is possible that some women may make decisions that we do not agree with,[91] akin to other medical procedures,[92] this does not take away their right to choose whether or not to take on the burden of raising a child.[93] For example, the law would be considered unjust if it allowed women to have an abortion because the child might impact her career or because she feared putting on weight, as is currently the case, but then condemned a woman who does not wish to care for a disabled child.[94] The ability to choose should not come with caveats. Indeed, in many situations where sex-selective or disability-selective terminations are made, these decisions are largely impacted by the cultural and social experiences of women.[95] For example, as Sheldon notes, many women are far more concerned about the social stigma of raising a child with a disability, rather than the caring requirements.[96] Worryingly, it has even been suggested in one parliamentary inquiry that, following a discovery of foetal disability, there was a strong steer towards abortion from the medical professionals.[97] Therefore, it is suggested that society would be better placed if we educated both our doctors and potential parents about disability and gender discrimination, rather than limiting a woman's right to choose, simply because it does not align with our beliefs.[98]

Conclusion

[83] Sheldon and Wilkinson (n 18), 93-98; Jonathan Herring, *Medical Law and Ethics* (8th edn, OUP 2020) [20.2].
[84] Letitia Egan and Nicholas Whitehorn, 'The law on abortion – time to re-think?' (2020) NLJ 13; Sheldon and Wilkinson (n 18).
[85] Public Health England, '11 Physical Conditions (20 week scan)' (*Gov.uk*, 17 December 2020) < https://www.gov.uk/government/publications/screening-tests-for-you-and-your-baby/11-physical-conditions-20-week-scan> accessed 29 December 2020.
[86] Greasley (n 18), 539; Swift and Robson (n 18), 354.
[87] Swift and Robson (n 18), 354.
[88] Abortion Act (n 5), s 1(1)(a); Swift and Robson (n 18), 350; Scott 2015 (n 1), 16.
[89] Claire Newell and Holly Watt, 'Sex-selection abortions are "widespread"' (*The Telegraph*, 24 February 2012) <https://www.telegraph.co.uk/news/health/news/9104994/Sex-selection-abortions-are-widespread.html> accessed 16 December 2012; Claire Newell and Holly Watt, 'Abortion Investigation: doctors filmed agreeing illegal abortions "no questions asked"' (*The Telegraph*, 22 February 2012) <https://www.telegraph.co.uk/news/health/news/9099511/Abortion-investigation-doctors-filmed-agreeing-illegal-abortions-no-questions-asked.html> accessed 16 December 2020.
[90] Sheldon and Wilkinson (n 18).
[91] Swift and Robson (n 18), 356.
[92] *Kings College Hospital* (n 19).
[93] Sheldon and Wilkinson (n 18), 106.
[94] Swift and Robson (n 18), 355.
[95] British Pregnancy Advisory Service, 'Britain's Abortion Law: What it says and why' (*BPAS*, 2012) <http://www.reproductivereview.org/images/uploads/Britains_abortion_law.pdf> accessed 29 December 2020, 12.
[96] Sheldon and Wilkinson (n 18), 100-107.
[97] Fiona Bruce MP, *Parliamentary Inquiry into Abortion on the Grounds of Disability* (2013) para 50.
[98] James Nelson, 'The meaning of the act: Reflections on the expressive force of reproductive decision making and policies' (1998) 8(2) KIEJ 165, 176; Cf Swift and Robson (n 18).

In conclusion, the current legislative framework fails to adequately reflect our social values. In reality, OAPA does little more than 'snapshot…the anxieties and realities of Victorian Britain',[99] and seeks to protect society from 'feeble minded' women with 'prostitute minds'. Women are depicted as incapable of making decisions without the assistance of a medical professional and barriers are placed to make securing treatment more difficult than it needs to be.[100] Women's ability to self-rule is restricted and only facilitated with the consent of a doctor.[101] Whilst the ECtHR might believe that the current framework is adequate, the blanket restrictions on access to an abortion for all women, combined with the threat of criminal liability, must be viewed as an unjustified interference.[102] As Lady Hale notes, 'for many women, becoming pregnant is an expression of… autonomy, the fulfilment of a deep-felt desire. But for those… obliged to carry a pregnancy to term against their will, there can be few greater invasions of their autonomy and bodily integrity.'[103] Thus, there is a pressing need for reform. Professional practice, medical care and societal attitudes have changed considerably since 1861, when abortion was criminalised and thus codified standards should be open to interpretation and reform, when changes in society call for this.[104] Abortions are quicker, safer and less invasive than ever before and women should not be vulnerable to criminal liability for making such decisions.[105] Instead, abortion should be considered a medical issue, aligning with the vast majority of medical procedures performed today, and should be assessed on the grounds of informed consent.[106] Whilst this might result in abortion decisions being made which are viewed as socially problematic, this should not detract from the inherent right that those with capacity have to make choices about their own medical treatment. Looking to the future, in light of the COVID-19 pandemic, it should be considered whether the relaxation of medical abortion requirements, which can now be self-administered from home, might facilitate greater debate around other unnecessarily restrictive features of the abortion law framework.[107]

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[99] Sheldon 2016 (n 2), 363.
[100] Sheldon 1993 (n 9).
[101] (n 30).
[102] Scott 2015 (n 1).
[103] *Re Northern Ireland Human Rights Commission's Application for Judicial Review (Northern Ireland)* [2018] UKSC 27 [6] (Lady Hale).
[104] Julia Black, 'Regulating Conversations' (2002) 29(1) JLS 163, 172.
[105] RCOG 2011 (n 16).
[106] BMA, 'The removal of criminal sanctions' (n 17), 3.
[107] Elizabeth Romanis, Jordan Parsons and Nathan Hodson, 'COVID-19 and reproductive justice in Great Britain and the United States: ensuring access to abortion care during a global pandemic' (2020) JLB 1, 7.

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The Common Sense of Law

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The Common Sense of Law

Without any formal legal education prior to beginning my degree, I was left with common sense understandings of law, which is the belief that the law must be obeyed simply because it is the law. By camouflaging itself as neutral, we are falsely led into legal positivist thinking and becoming supporters of the Rule of Law. [1]

Law Serves a Purpose

My previously conceived notions boasted that the law ensures equality among society. This belief was quickly demystified within the first week of teaching. Social facts become irrelevant in legal disputes which simply shows the law's disregard for the idiosyncrasies of people within society[2], all while claiming to be working *for* those people and ensuring equal application of the law. This can either exclude or include depending on the position a person holds[3], meaning that typically educated, white, heterosexual men[4] are at the top of the hierarchy which we are made to believe does not exist.

Law Protects Us

The common sense of law wants us to believe that the law protects us from chaos[5]. This was a view that I held prior to undertaking my legal studies. This assertion has since been dismantled, as law does not see us as autonomous human beings and therefore does not protect us. With the concept of intersectionality, we are disregarded completely as law fails to see us as autonomous individuals[6]. Shamima Begum's case[7] demonstrates this. The courts assigned her identity as a follower of Islam by constant reference to Article 9 of the Human Rights Act 1998: freedom of religion. The Feminist Judgment's Project however recognised Begum's autonomy and emphasised individuality by reference to Article 8: right to private and family life[8]. This is an example of colonialism which has been and is currently taking place. Taking the French Law 2010-1192 for example, which criminalises full face coverings in public space, can be said to be an example of 'pursuit of neo-colonial aspirations'[9]. As was done years ago, those in power will look only for what they expect to find by using a western anthropology lens[10] to seek legitimate reasons for actions that fail to recognise humans.

One must act in accordance with law to not be an outcast

We live out our days following laws to ensure that we do not get into trouble and follow the status quo to stay on the safe side. The Windrush generation under the 1948 Nationality

[1] Wade Mansell, 'The Common Sense of Law', in *A Critical Introduction to Law* (4th edn, Routledge 2015) 5.
[2] Ibid 4.
[3] Margaret Davies, 'Limited and Unlimited Law', in *Law Unlimited* (1st edn, Taylor & Francis Group 2017) 31.
[4] Ibid 24.
[5] Mansell (n1) 3.
[6] Kimberle Crenshaw, 'Mapping the Margins: Intersectionality, Identity Politics and Violence Against Women of Color' (1991) 43(6) SLR 1242.
[7] R (Begum) v Governors of Denbigh High School [2006] UKHL 15.
[8] Rosemary Hunter, Clare McGlynn and Erika Rackley, Feminist Judgments: from Theory to Practice (1st edn, Hart 2010) 335.
[9] Kimberley Brayson, 'Of Bodies and Burkinis: Institutional Islamophobia, Islamic Dress, and the Colonial Condition' (2019) 46 J Law Soc 57.
[10] Wade Mansell, 'Reality, Anthropology and Dispute Resolution', in *A Critical Introduction to Law* (4th edn, Routledge 2015) 31.

Act were seen as British citizens when arriving in Britain. However, now under the 2014 and 2016 Immigration Acts, they are being told they no longer have rights to stay in the UK. This has led to 11 being wrongfully, yet somehow legally deported whom have subsequently died.[11] This illustrates how colonialism is a contemporary problem. The Windrush generation was serving the purpose of rebuilding Britain which illustrates Britain's growth on colonial theft[12]. Even though they were abiding the law of the time, due to not being white, they will find themselves on the wrong side of law. The Windrush generation is an example of how law treats people in society; how simple it is to dispose of them when no longer needed.

Equates to Justice

Formerly, I believed that law was the foundation of a successful society, ensuring that justice is served. Upon engaging in my legal studies, it has become apparent that the justice system is lacking meaningful access to justice for those who need it the most. It was appalling to find out that the BAME community in Leicester have been paid as little as £3 per hour compared to the national minimum wage at the time being over £5 higher. Calling Leicester the 'sweatshop capital of Europe' exposes the lack of law existing for those who are in desperate need of justice.[13] Immigration policies make it difficult for workers to access the rights they are entitled to. Human rights and employment legislation that protect become irrelevant when capitalism dominates over justice. It shows pure exploitation, much like what is observed in colonialism, where wealth is derived by force[14] in the pursuit of capitalism. Law therefore cannot be a foundation to a successful society if it cannot be accessed by the ordinary people that form the society rather than the rules we must obey by.

To Conclude

Law is a tool used by those in power as a means to an end- without the concern for those who are beneath them. In one respect, it can be said that law colonises our lives, as it is not us, the ordinary people, that determine law, it is those privileged enough to have access to the institution of law.

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[14] El-Enany (n11) 25.

Mitigating Algorithmic Manipulation

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Introduction

Technological advances in the modern era are quickly raising questions and concerns around data collection, privacy, and information dispersal. While many of these areas have been drawing queries since before the internet age the increase in data gathering is getting particular focus due to the impact it can have on individual choices and viewpoints. General data collection and use has prompted the creation of privacy protection legislation, like the General Data Protection Regulation (GDPR), in an attempt to safeguard what is left of individual rights in a tech-driven world. Does there need to be protection for an individual's point of view though? While it may be generally accepted that social media algorithms use data to generate individualized content for commercial purposes[1], an important question is does the data gathered have a serious enough impact on the way algorithms operate to construct an individual's perception and actions? This essay aims to argue that data gathered does have a profound impact on the information that social media algorithms generate for their users, and this stream of information can shape opinions and actions, however, there are both legal and societal options for containing the most detrimental aspects of the impact. This can be seen in the manipulation of social media's outward goal of connection by both users and algorithms, how targeted marketing disrupts and constructs information cycles, and how legislation is being created to address growing concerns of data-generated social media influence. The more data an algorithm has access to the greater its ability to manipulate its users' perspectives, the more aware users are of this though, the greater ability they have to counteract it.

Forced Connections

Data is essential to the functioning of algorithms, with social media algorithms the data that assists in generating individualized content can heavily influence actions, decisions, and connections. Social Media Algorithms sort through the vast amounts of content to help users find what may interest them, while also providing "a means to know what there is to know and how to know it", thereby facilitating how its users interact with the world.[2] Social media sites are marketed as places to engage, communicate, and connect, the value being the creation and continuation of connections.[3] If the goal is connection it should follow that the way information is presented fosters that aim. However, just as connections outside of the technical world rely on shared interests and commonalities, connections online require the same. Attempts to create online communities via algorithms (therefore data) "can be compromised by forced connections, with outcomes as potentially serious as compromising politics".[4] The risk comes in the form of presenting users with information designed to connect them to

[1] Armin Beverungen, Steffen Bohm and Chris Land. 'Free Labour, Social Media Management: Challenging Marxist Organization Studies' (2015) 36(4) OS 473, 483.
[2] Tarleton Gillespie, 'The relevance of algorithms' in Tarelton Gillespie, PJ Boczkowski and KA Foot (eds), *Media Technologies: Essays on Communication, Materiality, and Society* (MIT Press 2013) 167.
[3] Emily Van Der Nagel, 'Networks that work too well: intervening in algorithmic connections' (2018) 168(1) MIA 81, 83.
[4] Ibid 85.

a group or viewpoint the algorithm believes they already have, but unintentionally creates for them.

If data gathering and algorithms are not adjusting viewpoints, they may be detrimentally supporting them. There is a risk that algorithms could use data in a way that causes individuals to fall into an endless cycle of information that supports the viewpoint they have leaned into instead of creating access to alternatives. If your behaviour decides the content, then the information you receive will only add to your existing behaviour. Social media is manipulative by design though and can alter "our perception of self and our relational being-in-the-world." [5] An example of this can be seen in how Twitter removes profanity from "their algorithmic evaluation of which terms are "Trending"[6], doing so inherently changes what information users have access too, thereby impacting their information cycle. There is a dark side to algorithms in the sense that they create systems of control and allow "'algorithmic management' by commercially exploiting user data." [7] The control social media sites have allowed for information that could be persuasive in nature to be fed directly to users, without them realizing what is happening.

Both perspectives, user data creating perpetuating existing information cycles, or creating new ones, discount the human element though. It is important to note that many users "hold a perceived knowledge" of algorithms on social media sites, and while they may not understand how they work, and might have alternative theories as to their functioning, the knowledge alone can be useful.[8] The average social media user knows enough about how algorithms work to intervene in the outcomes they are trying to force.[9] As technology advances, users adapt and some adjust how they use technology "by anticipating how algorithms work".[10] Assuming an algorithm's intention can be noticed and stalled by the average user, it seems there is a chance to break out of a cycle of information that is directly persuading a specific viewpoint. This is evidenced by users engaging in tactics to manipulate algorithms,[11] doing so gives back partial control of information. When the users can manipulate the algorithms in their own way, it is no longer just Twitter or Facebook that controls what the public sees. As impactful as social media can be, the information given to users is based on what they are already interested in, so it may increase their emotional output towards a certain subject but does not necessarily change their overall opinion of it, especially if they are aware of its attempts at manipulation.

Monetizing Viewpoints

One of the most prevalent uses of gathered data is targeted advertising. The information fed through technology comes in many forms and while information cycles could include new stories and societal information, they can also include advertisements. This can have a substantial impact on viewpoint, especially regarding advertising that encourages involvement rather than just product purchases. While data is currency for advertising, directly impacting viewpoints has been a perception social media sites fight against (see Facebook's "Commitment to Safety and Integrity").[12] Despite their assurances to the contrary social media directs user behaviour "in such a way that it is more likely to create marketable data, or generate content that will draw other users' attention, which can subsequently be commodified via advertising" [13] While the way the algorithms work is not always clear, the goal the platform is trying to achieve is profit-based and

[5] Stefania Milan, 'From social movements to cloud protesting: the evolution of collective identity' (2015) 18(8) Information, Communication & Society 887, 889.
[6] Gillespie (n 2) 173.
[7] Michael Etter and Oana Brindusa Albu, 'Activists in the dark: Social Media algorithms and collective action in two social movement organizations' (2021) 28(1) 68, 69.
[8] Van Der Nagal (n 3) 87.
[9] Ibid 81.
[10] Etter (n 7) 71.
[11] Van Der Nagel (n 3) 87.
[12] Meta for Business (*Facebook* 19 May 2021) <https://www.facebook.com/business/news/facebooks-commitment-to-safety-and-integrity> accessed 10 February 2022
[13] Beverungen (n 1) 483.

data collection allows for "more comprehensive personal profiles that platforms can sell to advertisers" which in turn advertisers can use to target those most likely to purchase their products.[14] The impact the goal of monetization of data has on algorithms, information, and viewpoints is twofold. Firstly, social media leaning so heavily into advertising inevitably intertwines the connections being made with items being sold, so instead of friends connecting over shared non-commercial interests, they may be connecting over similar purchases and other specifically commercialized interests. That could have a profound impact on the information a user seeks out. Secondly, data-based predictions can be used to manipulate what users desire as "detecting specific patterns in consumer habits often results in simultaneous attempts to create demand".[15] Creating demand can switch a user from one desire to another as they follow the stream of information provided to them, they may be pushed more in a direction of what algorithms believe should interest them as opposed to what does interest them.

Mitigating Risks of Manipulation Through Law

Is the impact of gathered data on social media algorithms substantial enough to greatly impact viewpoints? While large amounts of data can fuel the way information is presented to users, there are legal limits in place that whether by accident or design, assist in cutting down the data algorithms have access to. Most of Europe is governed by the General Data Protection Regulation (GDPR), a regulation designed to protect the fundamental rights associated with the processing of data.[16] Many countries have specific legislation dealing with privacy laws and data protection, all of which would be relevant to the discussion of how data gathering impacts effects social media algorithms. The reason for focusing specifically on the GDPR is that the restrictions and requirements of the GDPR apply to all those digitally interacting with EU citizens, hence American social media giant Facebook still needs to follow the legislation if it wants to operate in Europe, showing the global scope of the GDPR.[17] As far as legally protecting privacy is concerned the GDPR has placed "the EU at the forefront of data protection in the digital era". [18] Advancements in technology, along with data-based business models becoming more prevalent mean that privacy rights are at risk.[19] Legally protecting those rights is one way to throw a wrench into the power that algorithms have over users because it limits the amount of information available to those algorithms. It is not a way to eradicate the risk of influence and manipulation, as many users have become accustomed to, and comfortable with, paying for services with data.[20] Clicking yes to a consent inquiry and moving on without a second thought is commonplace for many. The option being there is still important as it reminds users that their data is being collected and can facilitate the type of algorithm adaptation tactics that allow for control over individual information cycles.

Issues do arise though in how the GDPR can unintentionally provide large platforms with access to data while cutting off smaller companies. Complying with the GDPR costs money, sometimes enough to force small businesses out of the conversation, leaving more data and access open to larger entities.[21] This can also allow large

[14] Van Der Nagel (n 3) 82.
[15] Jose van Dijck, 'Datafication, dataism and dataveillance: Big Data between scientific paradigm and ideology' (2014) 12(2) Surveillance & Society 197, 200.
[16] *EU General Data Protection Regulation (GDPR):* Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation), OJ 2016 L 119/1
[17] Aysem Diker Vanberg, 'Informational Privacy post GDPR – end of the road or the start of a long journey?' (2021) 25(1) IJHR 52, 61.
[18] Damien Geradin, Theano Karanikioti and Dimitrios Katsifis, 'GDPR Myopia: How a well-intended regulation ended up favouring large online platforms – the case of ad tech.' (2021) 17(1) ECJ 47, 62.
[19] Vanberg (n 17) 52
[20] van Dijck (n 15) 197.
[21] Geradin (n 18) 64.

platforms like Facebook to create "unique user super-profiles" which, when coupled with their vague privacy policies can allow them to use those profiles "for a number of unspecific data processing activities." [22] In theory, there can be legal solutions to risks associated with data gathering and algorithms, however, the law still has a long way to go to catch up with the existing technology.

While this is not a discussion of the seemingly increasing prevalence of misinformation, it is worth noting the impact of an information cycle containing information that might be irrelevant. The Court of Justice of the European Union has addressed the issue of Google providing access to information that was no longer relevant and the result of the case law was subsequently incorporated into the GDPR.[23] If social media algorithms and data-based algorithms on all platforms are providing outdated information to users it can impact said users' point of view.

Conclusion

With more data becoming available, and legislation having trouble controlling the way it gets used, algorithmic influence will only grow. Targeted ads, news articles, and individualized content present concerns of heavily dictated viewpoints the users may not realize they have been conditioned to form. Data-powered social media algorithms do impact information cycles and points of view, however, legislation is learning how to adapt, and users are learning how to anticipate influence, so the impact, especially in the future, may not be as great as it seems.

[22] Geradin (n 18) 76.

[23] Vanberg (n 17) 64.

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