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Editorial

A Forum for Students

Rachel Dunn, Northumbria Law School

Welcome to the first issue of Student Journal of Professional Practice and Academic Research! The aim of this journal is to provide students, undergraduate and postgraduate alike, the opportunity to publish the hard work they produce during their studies. Often students write and create excellent pieces of work during an academic year and do not have the means to share them with the wider field. This journal does just that and the first issue demonstrates the brilliant work of a range of students across different programmes.

In 2016, the Higher Education Academy (now Advance HE) awarded the inaugural Collaborative Award for Teaching Excellence (CATE) to the Student Law Office at Northumbria University. The journal is one of our funded CATE projects. In the spirit of the award, we wanted to continue our tradition of students and staff working together to enhance and showcase our students' work. We have a fabulous team of staff who work with students to review their pieces and get the publication ready. If you are interested in becoming a reviewer for the student journal, email us and we will add you to the list.

Even though CATE was awarded to Northumbria Law School, this does not mean that the journal is exclusive to law students in our school. We are willing to review pieces from other disciplines and universities, so send them in!

Unlike many traditional academic journals, we welcome a variety of different formats. You will see in this issue we have included both undergraduate and postgraduate posters, some accompanied with research reports. The journal prides itself on being a forum for visual and creative pieces, so if you have an idea of something you would like to publish, please get in contact with me! We also welcome reflective pieces from both students and those in the training stages of their career, audio pieces and dissertations.

This issue showcases some excellent work produced in Northumbria Law School. Our articles cover a range of topics, starting with Jade Watts exploring the ethics of eating meat, discussing philosophical arguments from Peter Singer and Richard Posner. A timely piece just after the conclusion of Veganuary 2019!

Speaking of animals, PhD Candidate Alexander Maine explores lambs, hyenas and law as an oppressive force in Charlotte Brontë's *Jane Eyre*.

We have then engaged in something slightly different for a journal. We have two articles, submitted by Rebecca Wallace and Lauren Wharton, both discussing euthanasia in the context of John Stuart Mill's harm principle. We invite readers to compare and contrast both of these articles, analysing a topic which is revisited often in law.

A range of posters are appearing in this first issue. The undergraduate posters created by first year law students at Northumbria University, cover a wide variety of legal issues, from murder to surrogacy. All students on our Approaches the Law module work in groups to produce a research report and poster. We host a poster fair every year, where staff and students can peruse posters and ask students questions on their research. The posters in this issue were selected by staff as some of the best and we really wanted to share them with our readers. Alongside each poster is a short research report, for further information on the visual piece.

Finally, we also have two posters created by Solicitor Apprentices. Northumbria Law School's Solicitor Apprenticeship Degree is designed for those looking for a stimulating law degree combined with work-based learning. These posters were also part of an Approaches to Law Module and demonstrate the creativity of our Apprentices. One explores the legal protections of vulnerable adults and the other the 24 week limit imposed by the Abortion Act 1967.

We are thrilled to be sharing this first issue with you and hope you enjoy reading it as much as we have creating it. We have some exciting issues to share with you in the future, so watch this space. We are open to guest editorials and special issues, so if you are running a student event and would like to publish pieces developed during it with us, let us know!

An exploration of Peter Singer and Richard Posner's ethical arguments regarding the moral status of animals, with a specific focus on the use of animals for the consumption of food

Jade Eloise Eva Watts, Northumbria University, 4th Year MLaw

The use of animals for the consumption of food is becoming a focus in recent times, due to environmental and animal welfare concerns. There has been an increase in research around the environmental concerns of the mass scale of the production of meat, with meat production in 2018 estimated at 330.51 million metric tons.¹ In the UK alone, 182,000 cows were slaughtered in November 2018² and 108.4 million broiler chickens were slaughtered in October 2018.³ Many animal welfare groups argue against the inhumane conditions animals go through before they reach our plate.⁴ Due to this, a record number of people are reducing meat and animal product consumption, with some research indicating over 1.6 million people in the UK are vegan or vegetarian in 2016.⁵ With the questions and concerns around eating meat becoming so prominent today, it seems like the perfect time to revisit the philosophical arguments. This article will explore the global scale of using animals for the consumption of food, through the ethical arguments advocated by philosopher Peter Singer, author of *Animal Liberation*,⁶ of affording animals an equal moral status to humans. It will then consider the arguments advanced by Judge Richard Posner, as a tool to offer a critical analysis of Singer's ideas.

¹ Statistica, *Production of meat worldwide from 2016 to 2018* <<https://www.statista.com/statistics/237644/global-meat-production-since-1990/>> Accessed 13th January 2019

² DEFRA, *United Kingdom Slaughter Statistics – November 2018*, 13th December 2018 <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/763961/slaughter-statsnotice-13dec18.pdf> accessed 14th January 2019

³ DEFRA, *United Kingdom Poultry and Poultry Meat Statistics – October 2018*, 22nd November 2018 <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/758289/poultry-statsnotice-22nov18.pdf> accessed 14th January 2019

⁴ For example, please see Viva, *Slaughter Fact Sheet: Their Last Moments*, May 2017 <<https://www.viva.org.uk/resources/campaign-materials/fact-sheets/slaughter-factsheet-their-last-moments>> accessed 14th January 2019

⁵ The Vegan Society, *There are three and a half times as many vegans as there were in 2006, making it the fastest growing lifestyle movement*, 17th May 2016 <<https://www.vegansociety.com/whats-new/news/find-out-how-many-vegans-are-great-britain>> accessed 14th January 2019

⁶ Peter Singer, *Animal Liberation* (2nd edn, Pimlico 1995)

Peter Singer, ‘father’ of the animal liberation movement,⁷ advocated for the application of a somewhat Bentham-inspired, consequential, utilitarian approach to the understanding of the moral status of animals. Jeremy Bentham, a utilitarian philosopher, famously stated: “the question is not, can they reason? nor, can they talk? but, can they *suffer*?”.⁸ Singer acknowledges the notion that human beings are believed to be inherently superior and more valuable than any animal. He stated, quite simply, that if a conflict arose between the interests of a human and the interests of an animal, ‘we’ would always triumph.⁹ Instead, Singer proposes the argument that “all animals are equal”¹⁰ and belong on an equal footing; this has been referred to as the ‘principle of equal consideration of interests’.¹¹ Singer explained that the feature, which entitles an animal to have their interests valued equally, lies not with its existence as a ‘homo sapiens’, nor its intelligence, rationality or self-awareness; rather, it is dependent upon *sentient*: the ability to feel pain and pleasure; if it were to depend on anything narrower, it would be arbitrary.¹² In short, Singer argued that the pain of an animal is equal to, and as important as, the pain experienced by a human.¹³ He stated that the ability of humans to develop language, self-awareness and autonomy cannot be the distinguishing feature that divides the ‘insuperable line’¹⁴ between all human beings and animals. This is because there are human beings that are not capable (such as an infant), nor will they ever be capable (such as a child born with a serious brain injury) of developing these skills; yet, they are still afforded moral concern. Singer stated that this is a product of speciesism (as coined by Richard Ryder).¹⁵ It is essentially the idea that we, as humans, participate in the practice of valuing and privileging humans over any other animal, and use the fact that they are of a different species as justification for their exploitation. Singer compared this to the ideology embodied by those who are sexist or racist; the fact that some individuals are not of the same race does not entitle us to exploit them, nor to discount their interests.¹⁶

⁷ Ibid (Title of chapter 1)

⁸ Jeremy Bentham, *An Introduction to the Principles of Morals and Legislation* (1st edn, Dover Publications 1989)

⁹ Peter Singer, *Animal Liberation* (2nd edn, Pimlico 1995) 1- 23

¹⁰ Tom Regan and Peter Singer, *Animal Rights and Human Obligations* (2nd edn, Prentice Hall 1989)

¹¹ Peter Singer, *Animal Liberation* (2nd edn, Pimlico 1995) 7

¹² Ibid 1- 23

¹³ Ibid

¹⁴ Ibid

¹⁵ Ibid 9; For information on speciesism see Richard Ryder, *Speciesism Again: the original leaflet* <<http://janegerhard.com/wp-content/uploads/2017/01/Speciesism-1970.pdf>> accessed 13th January 2019

¹⁶ Ibid 9

It is useful to understand the practical application of his principle of equal consideration, especially in the context of farming animals for the production of food, which Singer notes is a matter of international concern. Singer has discussed the fact that this industry is vastly increasing in terms of global demand, and has led to the unnatural growth of the population of some farm animals as a result, such as pigs.¹⁷ He soberly recounts the reality of the lives of pigs which are used for meat, stating that they live in extreme confinement, in which these complex, intelligent and sentient animals are kept on bare concrete, without any basic comforts or mental stimulation,¹⁸ which causes severe mental stress and frustration.¹⁹ In short, Singer asserts that, in an industrialised society, where an adequate diet can be easily sourced, the “flesh of an animal is a luxury”: their suffering is endured, simply because it pleases human taste buds, not because it offers better health or longevity.²⁰ Singer explains that the principle of equal consideration does not allow for the major interests of an animal (such as a pig’s life and well-being) to be sacrificed for the minor interests of another (such as a human’s taste buds).²¹ Thus, in order to put an end to speciesism, and equally account for the interests of all factory farmed animals, “we must stop these practices”. By this, he means that we must stop buying meat and other animal produce.²² He acknowledges to the reader that this may be difficult, but proposes that the decision will be no “less difficult than it would have been for a white southerner to go against the values of his community and free his slaves”.²³ He asks, if we cannot abstain from buying these products, thus funding the suffering of millions of farmed animals, how can we pass judgement on those slave-holders who could not change their own way of living?²⁴ Whilst being a somewhat uncomfortable comparison, or rather, an uncomfortable realisation, this is a particularly powerful and persuasive moment in his book, *‘Animal Rights and Human Obligations’*.²⁵ The abstinence in buying meat and other animal products is something which we now see happening throughout the Western world. People are becoming more likely to question where their food has come from and the conditions which

¹⁷ Peter Singer and Miyun Park, 'The Globalization of Animal Welfare: More Food Does Not Require More Suffering' (2012) 91 Foreign Affairs.

¹⁸ Peter Singer, *Animal Liberation* (2nd edn, Pimlico 1995) 119 -128

¹⁹ Ibid

²⁰ Ibid

²¹ Peter Singer, *In Defense of Animals: The Second Wave* (2nd edn, Blackwell Publishing 2006) 20-22

²² Ibid

²³ Tom Regan and Peter Singer, *Animal Rights and Human Obligations* (2nd edn, Prentice Hall 1989) 152

²⁴ Ibid 152

²⁵ Ibid 152

the animals went through to get to their plate. The decision to stop eating meat has now become less difficult, with the rise of education in farming conditions and campaigns, such as Veganuary.²⁶

Richard Posner remarks that Singer proposes a “lucid and forceful argument,”²⁷ and agrees that humans are not inherently more valuable or superior than any other animals. However, Posner stated that, whether we like it or not, humans will always be speciesist, and we will always discriminate in favour of our own kind. He argued that a duty is not imposed on humans to treat other animals equally, on the basis that they are a member of a universal community that comprises of those who can feel pain.²⁸ He simply declares that, like other animals, we ‘prefer our own’. He exemplifies this by stating that Americans, for example, are generally less sympathetic to pain endured by foreigners, never mind that experienced by animals. He argued that this preference does have normative significance, and this is because it is reflective of a basic moral intuition.²⁹ However, Singer expresses concern over this argument; citing the grave tragedies that have occurred as a result of reactions based on ‘moral’ intuitions, such as Nazi law, which was said to be reflective of the “healthy sensibility of the people”.³⁰ Singer questions why we have to give such reactions any probative weight, arguing that, whilst people may share this common reaction of speciesism, it does not mean that this is the one which they ought to have. Singer stated that if this is Posner’s logic, he must therefore defend those who are racist to other ethnic groups, on the grounds that their moral intuition has normative significance.³¹

A focal point of Posner’s criticism of Singer was that his ethical arguments were simply obsolete, in the presence of our overarching moral intuition, which he believes is incapable of being disregarded. To demonstrate this, he expands on Singer’s argument that there are in fact animals which possess greater capabilities than humans with severe mental difficulties, such as those in the late stages of Alzheimer’s. He explains that, morally, it would be very difficult

²⁶ For more information, please see <<https://veganuary.com>>

²⁷ Peter Singer and Richard Posner, 'The Debate between Peter Singer and Richard Posner via email' (*Utilitarian.net*, 2001) <<https://www.utilitarian.net/singer/interviews-debates/200106--.htm> (accessed 11 April 2018)

²⁸ Peter Singer and Richard Posner, 'The Debate between Peter Singer and Richard Posner via email' (*Utilitarian.net*, 2001) <<https://www.utilitarian.net/singer/interviews-debates/200106--.htm> (accessed 11 April 2018)

²⁹ *Ibid*

³⁰ *Ibid*

³¹ *Ibid*

to consider the murder of a human to be of equal significance to the killing of an elderly dog.³² However, Singer argued that this stance is not predicated on a notion of moral intuition, but rather as a result of self-preservation borne out of concern about how they themselves could be treated in future, should they develop such a condition. Nevertheless, Posner argued that, even if the life of a human is said to be only 100 times more valuable than one chimpanzee, for example, it would still be contrary to our deepest instincts and intuition to sacrifice the life of one human, if it meant saving 101 chimpanzees.³³

Singer advanced his philosophical argument to Posner in an exchange that took place in *Slate Magazine* in 2001, in the hope of persuading him that there is an ethical case for changing the moral status of animals, to allow them to have their interests considered as equal to those of a human. However, Posner stated that, whilst we must have a greater commitment to reducing the suffering of animals, especially those raised for food, he argued that the most effective way in which we can bring about real progression for the animal rights movement is not by reducing the value of a human life to the status of an animal, whilst approaching the subject in a philosophical manner, but rather, through *facts*.³⁴ Posner argued that it is not so much an ethical case but a factual one, as the more factual information we can obtain about animals and their treatment, the more we can encourage a shift in our moral intuition to a greater empathetic response to their suffering, and in turn commit to a more serious consideration of the alternative, low-cost methods for farming animals for human consumption.

Singer, in *Animal Liberation*, explains that our relationship with non-humans is founded on speciesism, which has resulted in gross exploitation, due to the discounting of their interests. However, the question that Singer perhaps fails to address is, *why* are we so prepared to accept this moral asymmetry? Yes, he explains that it is speciesism that has made us biased, but what is holding the prejudices resulting from speciesism so strongly in place? This is what Posner's concern is with Singer's argument, which he believes to be a very radical ethical vision. Posner contended that Singer has failed to recognise how crucial our moral intuition is to the answering of this question; arguing that the spreading of compelling factual information, rather than philosophical arguments, is our leading hope for being able to inspire a change in our moral intuition, with regards to how we respond to the standard and treatment of animal welfare. Whilst Singer agrees that Posner undeniably offers a pragmatic approach (perhaps reflective

³² Ibid

³³ Ibid

³⁴ Ibid

of his role as a judge), he nevertheless defends the role that a “little philosophy”³⁵ can have, and has had, in the pursuit of persuading his readers to take a more serious look into the status and treatment of animals.

In conclusion, it is obvious why Singer is referred to as the founder of the modern philosophical animal rights movement,³⁶ as he has made invaluable contributions to our understanding of animal welfare. The arguments advanced by both Singer and Posner have offered thought-provoking and pragmatic options as to how best we can take active steps to relieve the suffering of animals and improve the methods involved in farming animals for human consumption. Singer favoured a philosophical approach, arguing that the interests of animals should be considered equal to that of humans. Therefore, his view of the farming of animals for food is simple, in order to adhere to this principle of equal consideration, and to defeat speciesism: stop supporting the meat industry and other animal farming practices. However, Posner is very critical of this approach, arguing that Singer has failed to see how radical this ethical argument is when you consider its practical implications. Posner ultimately concludes that, in order to allow for development and invigoration of the law regarding this epidemic, we should address this situation, not through forceful philosophical arguments, but rather through facts that can stimulate a more pro-active approach, which he states were the most persuasive parts of *Animal Liberation*. However, I think it would be unfair to disregard the role which philosophy has taken, and will always take, in the progression of the welfare of animals; to this end, I find myself favouring an approach that allows for the combination of both philosophical and factual efforts in the pursuit of better treatment of farmed animals.

³⁵ Ibid

³⁶ Julian Franklin, 'Killing and Replacing Animals.' (2007) 2 J Animal L & Ethics 77

Pet Lamb and Clothed Hyena: Law as an Oppressive Force in *Jane Eyre*

Alexander Maine, Northumbria University PhD Candidate

Introduction

Writing in 1864, the literary critic Justin M'Carthy stated that 'the greatest social difficulty in England today is the relationship between men and women.'¹ This came at a time of unprecedented social and legal change of the status of women in the 19th Century. A prominent novel of the time concerning such social difficulty is Charlotte Brontë's *Jane Eyre: An Autobiography* which attempts to reflect these social difficulties as often resulting from law. As such, the novel may be used as a reflection of the condition of nineteenth century English law as an oppressive force against women. This force is one that enacts morality through legality, and has particular resonance in literature concerning social issues. *Jane Eyre* will be discussed as a novel that provides insights into women's experiences in the mid-nineteenth century. Law is represented within the novel as an oppressive force that directly subjugates women, and as such the novel may be regarded as an early liberal feminist work that challenges the condition of law. This article will explore the link between good moral behaviour, and moral madness, the latter being perceived as a threat to the domestic and the law's response to this threat. It will pick upon certain themes presented by Brontë, such as injustice towards women, wrongful confinement, insanity and adulterous immoral behaviour, to come to the conclusion that the novelist presented law as a method of constructing immorality and injustice, representing inequality and repression.

Brontë's novel *Jane Eyre: An Autobiography*, a bildungsroman and written in the testamentary style, is a leading 19th century example of literature concerning societal anxieties, women's position in Victorian society and the implications of the condition of law. Brontë uses Jane Eyre as a narrator with a self-identified perspective of a 'rebel slave'² in order to construct a character inherently critical of the patriarchal societal structures which continuously hinder her struggle for independence.³ The novel seeks to demonstrate and lament the injustices perpetuated by law,

¹ J M'Carthy, 'Novels with a Purpose' (1864) 26(1) Westminster Review 24, 27.

² C Brontë, *Jane Eyre: An Autobiography* (9th Edn, London: Chatto & Windus, 1972), 6

³ H Glen, *Charlotte Brontë: The Imagination in History*, (Oxford University Press, 2002) 25

notably in regard the inequality of women in marriage and the treatment of insanity. Jane may be interpreted as a evangelical liberal feminist (to modern audiences) who wishes for domestic equality. Her antithesis in the novel, Bertha Mason, is hidden away and presented as animalistic, as she transgresses the traditional notion of the wife. Mason is used to show the extent to which the law and society at the time rejected the mad, while implicitly criticising the restrictive structure of marriage. Therefore the novel concerns itself with the lack of equality in the condition of English law and the construction of marriage, reflecting a social and religious desire to conform. The conformist attitude of the protagonist shows the inexorable link in nineteenth century attitudes between the healthy ideal family and good moral behaviour.

Rebel Slave

Heralded as a literary forerunner of female empowerment, Brontë represents Jane Eyre as a bold, independently minded character whose is treated as an equal by her husband, and thus represents the author's political view on the treatment of women. We may interpret Brontë as taking what Eagleton has dubbed the 'Anglo-American' stance of feminist writing which seeks to position the woman in the public arena⁴ as a reliable narrator. This can be then used to assess the credibility of the novelist reflecting the condition of the law. As a female novelist, Brontë sought to place her characters in positions which allowed her to observe society, in order to reflect the way in which women were treated in the 19th century. Jane states that:

“Nobody knows how many rebellions besides political rebellions ferment in the masses of life which people the earth [...] [women] suffer from too rigid a restraint, too absolute a stagnation, precisely as men would suffer; it is narrow-minded in their more privileged fellow creatures to say that they ought to confine themselves.”⁵

This statement alludes to the notion of rebellion against the patriarchal nature of society, whilst noting the fact that men and women may suffer similar injustices, yet women bear the brunt and are destined to suffer theirs unless there is substantial social change, in keeping with her status as a rebel slave. As we will see, Jane and Bertha come to represent two radically different approaches to this rebellion. The notion of a fermenting rebellion offers images of resentment boiling within

⁴ M Eagleton, *Feminist Literary Criticism* (London: Longman, 1991) 1-21

⁵ C Brontë, *Jane Eyre: An Autobiography* (9th Edn, London: Chatto & Windus, 1972), 105

the minds of many, particularly prominent in those women who are confined within their gender role. This notion perpetuates the theme of wrongful confinement which echoes throughout the novel, through the protagonist's firsthand experiences and that of Bertha's. Jane is literally confined in the 'red room' of Gateshead Hall by her aunt after the death of her parents, and her isolation within Thornfield as a governess serves to represent her as a woman confined by her maternal profession and her transgression of the behaviour expected of a young girl. Her engagement to Rochester presents a social and legal transgression as he is already married, subsuming the importance of family as defined by the sacred marriage. Acts such as Hardwicke's 1753 Marriage Act sought to uphold this principle by the prevention of clandestine, immoral marriages, and bastardy.⁶ This statute aimed to rectify the ailing marital system and its prevailing proscriptive legislative attitudes are also evident in the Marriage Act 1822. It is from this that we may examine the social backlash against the immorality presented in the novel.

Famed as of 'horrid taste', as it was described by Brontë's contemporary writer Elizabeth Rigby, Jane Eyre 'is a proof how deeply the love for illegitimate romance is implanted in our nature'⁷, as the novelist plays to the vices and taboos of society. Jane initially objects to Rochester's proposal as she believes he is engaged to Miss Ingram, in order to preserve Jane's standing as an impartial moral character: "for that fate you have already made your choice, and must abide by it".⁸ The use of 'fate' represents notions of destiny and the sacred element of marriage, a rule which must be abided by, but is flouted by Rochester because of his first wife's transgression of her own sexuality. Jane states that his bride stands between them, yet Rochester refutes this as Jane would be his equal and likeness, contrasting the equality between them and the savagery of Bertha in his eyes.

Pet Lamb

Brontë uses pathetic fallacy as a representation of natural law in order to contrast the legal system, and natural divinity. Rochester states that he will be judged by God as a storm begins; Rochester explicitly stating his belief in divine judgement as a storm begins, as an immediate natural reaction

⁶ D Lemmings, *Marriage and the law in the eighteenth century: Hardwicke's Marriage Act of 1753* (Cambridge 1996) *The Historical Journal*, 39, 339-360

⁷ E Rigby, *Vanity Fair and Jane Eyre* (1849, Quarterly Review)

⁸ C Brontë, *Jane Eyre: An Autobiography* (9th Edn, London: Chatto & Windus, 1972), 250

against his moral turpitude, with a lightning strike representing divine wrath over Thornfield. This reinforces the principle Bunyanesque theme of holy judgement taking precedence over legal manmade constructions, demonstrating a critical view of the condition of law which affords so much power to mere men. This consideration of natural law demonstrates Brontë's representation of the condition of law as inherently moralistic.

The principle of coverture⁹ demonstrates how marriage was an instrument for confining and regulating female sexuality and legal autonomy; coverture would strip the woman of all legal rights and ownership, as she became her husband's property. Rochester alludes to this principle as he calls her his "pet lamb"¹⁰ which not only carries gendered masculine/feminine connotations but implies ownership of Jane far before they had even married, providing a critique of the ways women were transferred from one household to another. This is reflected in the confinement of Mrs Fairfax and Adele, yet contrasting the physical confinement of the wildly animalistic Bertha. The attempt of the law to proscribe marriage meant the reinforcing of Christian ideals, severely imposing gendered roles on women. *Jane Eyre* may be seen as a rejection and criticism of this, with the effects of family and marriage laws, particularly the culture of the private family being one of the driving forces behind social anxiety and personal hardship within the novel.

Drawing on the conflict between perceptions of manmade law and divine law, Jane states: "The human and fallible should not arrogate a power with which the divine and perfect alone can be safely entrusted"¹¹. This may be read as a critique of the law and its nature as it unjustifiably takes away from God and enforces the will of the ruling classes. This critique is notably gendered and class-based as lawmakers are historically wealthy and male, embodied in Jane's statement that Rochester is "human and fallible"¹², emblematic of the problem of man-made law. Despite his family having fallen from grace; he himself seeks to make his own law. We see this critique imposed on marital law, and may read her abrogation of the subjective moral tendencies of the law as facilitating ill-conceived forms of justice within the novel. This allows characters such as Lord Ingram to act within their own perceived judicial capacity:

⁹ K O'Donovan, *Family Law Matters* (Pluto, 1993) 59

¹⁰ C Brontë, *Jane Eyre: An Autobiography* (9th Edn, London: Chatto & Windus, 1972), 211

¹¹ *Ibid.*, p. 134

¹² *Ibid.*, p. 134

“I helped you in prosecuting (or persecuting) your tutor, whey-faced Mr. Vining [...] He and Miss Wilson took the liberty of falling in love with each other [...] which we interpreted as tokens of ‘la belle passion’ and I promise you the public soon had the benefit of our discovery; we employed it as a sort of lever to hoist our dead-weights from the house. Dear mama, there, as soon as she got an inkling of the business, found out that it was of an immoral tendency.”¹³

Here we see a member of the aristocracy taking it to be his duty to protect the public from the moral crime of pre-marital sex. Taking the liberty of falling in love and committing sexual intercourse to then be expelled from the house shows the law’s function in preserving not only moral standards but the integrity of unmarried women in order to make their marriage profitable. From this, a public/private distinction is fostered and applied to the central themes of family, moral madness and lunacy: sexual immorality between the two partners was deemed to be public knowledge, yet lunacy, that is to say moral madness, often a highly gendered and discriminatory ‘crime’, was hidden away, as was the case of Bertha Mason. Here we see the hypocrisy that perpetuates Brontë’s view of the English condition of law and its fostered hierarchy, evident in the Ingram’s and Mr Brocklehurst. Brocklehurst’s postulation that his school should “render [girls] hardy, patient, self-denying”¹⁴ is key to understanding perceptions of women and female sexuality of the time, yet Brocklehurst did not treat his own daughters that way. We may also see that Bertha is in fact denied so much human interaction that she turns feral. From this, the implications of marital law, particularly those that kept the woman desexualised within the home, show the condition of the English law to be inherently misogynistic and patriarchal.

Clothed Hyena

Bertha Mason, Rochester’s hidden away wife, is the iconic and disturbing antithesis of Victorian moral norms. Bertha is a rampantly aggressive sexual character, capable of destroying the ‘domestic’ quiet of Thornfield, which, as argued by Armstrong, is used by Brontë to critique the fragility of the Victorian domestic ideal.¹⁵ It is from this critique that we see the importance of noting the imputations of ‘moral madness’ in English law. Throughout, Bertha is demonised as the

¹³ Ibid., p. 173

¹⁴ C Brontë, *Jane Eyre: An Autobiography* (9th Edn, London: Chatto & Windus, 1972), 57

¹⁵ N Armstrong, *Desire and Domestic Fiction: A Political History of the Novel* (Oxford University Press, 1987) 164

antithesis of Jane; Jane is a lamb, while Bertha is a savage “clothed hyena”. Jane foreshadows the theme of the madness within the novel, while implying that madness may arise through the social construction of the desexualised woman:

“it is madness in all women to let a secret love kindle within them, which, if unreturned and unknown, must devour the life that feeds it; and, if discovered and responded to, must lead, ignis-fatuus-like, into miry wilds whence there is no extrication.”¹⁶

Jane’s collective assertion of all women is typical of her conformist ideals, however this statement foreshadows the destruction of Thornfield as Bertha burns it down and fire devours the house, while Jane leaves and wanders the wilds as an outcast. Brontë uses Bertha as an obvious symbol of destruction and madness, yet she has become this way because of the way society has treated her and how her marriage has imprisoned her. The most prevalent solution to the madness of a family member at the time was to hide them away in order to save family reputation and avoid the Lunacy Commission. The Commission developed as a means of committing the mad, and protecting moral values, yet was self-fashioned and had little legitimacy or regulation. The culture regarding lunacy and madness may therefore have been founded in this uncertainty in the law and a lack of justice for those deemed to be mad. Loss of autonomy and misrepresentation are key to the anxiety over the commission and the ease with which someone could be committed, as a judicator was not required to observe the subject beforehand and the law provided little in the way of protection for the individuals. This shows the fear of misrepresentation in the Victorian society, as respectability and profitability were of the utmost importance, being particularly noticeable in the 1802 case of *Ridgway v Darwin*¹⁷ in which the ability to manage an estate and therefore benefit one’s family was deemed to be the standard of a sound mind.¹⁸ The increased interest in madness and the emergence of psychiatry led to a tension between lawyers and medics of who was best suited to commit an insane person, indicative of the unsure place of law and its presumption of dominance. The domestic imprisonment of Bertha is used to represent the enforcement of gendered preconceptions, Bertha may have been undomesticated, yet she was still maintained within the confines of her marital home.

¹⁶ C Brontë, *Jane Eyre: An Autobiography* (9th Edn, London: Chatto & Windus, 1972), 156

¹⁷ *Ridgway v Darwin* [1802] 32 ER 164

¹⁸ I Ward, *Law and the Brontës* (Palgrave Macmillan, 2011) 75

The representations of madness within the novel, however, do not take a legal or medical basis, yet depend on the strongly evangelical moralism perceived by Jane and by Rochester's disgust. Bertha comes to typify many of the fears of the Victorians: a fear of sexual women, the wrongfully confined, and the foreign; a West Indian woman, married to a wealthy English aristocrat. Her marriage into the aristocracy is indicative of changing society and social mobility, something which the guests of Thornfield fear, while the theme of slavery resonates in the prevalence of racially inflected images of submission.¹⁹ Racial themes may be developed in order to understand Bertha's madness; the 'germs of insanity'²⁰ are inherited from her Creole mother, a reference which may give understanding to Bertha as 'the racial Other incarnate'²¹: her status as mixed-race emerges as not just black or white, but a form of familiar fraternising with the unfamiliar. Rochester recalls her as "coarse and trite, perverse and imbecile", using this paradoxical discourse to impart madness²² that is cunning and yet unresponsive and in complete contrast to the plain and evangelical Jane. Therefore her morality is plainly opposed and foreign to English morality, on which common law rests. Not only is she the antithesis of the model Victorian wife, she is related to the hyena, the biblical devourer of corpses and representative of gender disturbances: 'The ancients said that the hyena is able to change its sex, and used it as a symbol of the unstable man'²³. This clearly resonates with Bertha's unfeminine character, whilst the unstable man reflects Rochester as the bigamous, unholy man. This may be read as Brontë's attempt to underpin the centrality and significance of a valid and moral marriage and the importance of the relationship between man and woman.

Bertha's madness is not just representative of her own immorality, but a parallel of Rochester's abusive character, exhibited by the "virile force" of her insanity contrasting 'the uncontrollable violence of his desires, and its implications'.²⁴ This virility again reinforces the parallels drawn between Jane and Bertha and also contrasts the virginity of Jane and her distrust of sexual behaviour. The violence within Rochester is consolidated and serves to emphasise the lack of legal protection afforded to abused women when the symbolic slave/master lexicon is re-examined. The

¹⁹ I Ward, *Law and the Brontës* (Palgrave Macmillan, 2011) 90

²⁰ C Brontë, *Jane Eyre: An Autobiography* (9th Edn, London: Chatto & Windus, 1972), 304

²¹ S Perera, *Reaches of Empire: The English Novel from Edgeworth to Dickens* (New York: Columbia UP, 1991) 82

²² S Thomas, 'The Tropical Extravagance of Bertha Mason' (1999) *Victorian Literature and Culture* Vol 27, 6

²³ F Webber, *Church Symbolism: An Explanation of the More Important Symbols of the Old and New Testament, the Primitive, the Medieval and the Modern Church* (2nd ed. 1938. Detroit: Gale, 1971)

²⁴ S Thomas, 'The Tropical Extravagance of Bertha Mason' (1999) *Victorian Literature and Culture* Vol 27, 11

theme of constraint; physical, emotional and gendered, dominates *Jane Eyre*.²⁵ The comparisons of Jane to the concubines of seraglios in the East serve to mirror Thornfield and its inmates, ‘all enduring different forms of confinement and alienation’.²⁶ This subjugation is emphasised when Rochester attempts to buy her clothes after their engagement and she abhors his despotism and demanding behaviour. The language used throughout the chapter when referring to Rochester is dangerous and intimidating as she recoils against his touch and his ‘falcon eye’, though despite this, she is attracted to his ‘imperial masculinity’²⁷ and proceeds to idolise him as she “could not in those days, see God for His creature, of whom I had made an idol”²⁸. This clearly represents Jane’s descent into moral turpitude²⁹ as she is engaged and may then be interpreted to reflect Brontë’s thoughts on the condition of English law; lacking fundamental adherence to divine law. This in turn reflects divorce and the difficulty in obtaining one, with the fate of the inescapable marriage acting as a representation of unjust law. The Matrimonial Causes Act 1857 allowed divorce under the terms of ‘cruelty’, yet mere spousal abuse did not amount to such. The act ‘reinscribed both class and sexual double standards, and its passage effectively foreclosed substantive action on these inequities until the 1880s.’³⁰ Therefore we see Brontë’s use of pejorative language throughout the course of Jane’s proposal as a means to comment on the nature of legal marriage and the gender struggles within. However, as Poovey notes, the unfair terms of marriage remained unchanged until the 1880s: Brontë’s writings may have been incredibly influential and still resonates within today’s society, yet they did not bring around revolutionary legal change that would assist the plight of women, something which *Jane Eyre* aspires to. Jane presents herself as a missionary, sent to assist the women in the seraglios, yet through liberal feminist ideals, she predominantly focuses on the bettering of her own life, rather than attempting to bring significant change for others.

²⁵ S Shuttleworth, *Charlotte Brontë and Modern Psychology* (Cambridge University Press, 1996) 148

²⁶ I Ward, *Law and the Brontës* (Palgrave Macmillan, 2011) 86

²⁷ S Thomas, ‘The Tropical Extravagance of Bertha Mason’ (1999) *Victorian Literature and Culture* Vol 27, 6

²⁸ C Brontë, *Jane Eyre: An Autobiography* (9th Edn, London: Chatto & Windus, 1972), 271

²⁹ M Williams, *Secrets and Laws* (London: University College London Press) 116

³⁰ M Poovey, *Covered but not bound: Caroline Norton and the 1857 Matrimonial Causes Act* (1988 Vol 14 *Feminist Studies*) 468

Conclusion

It is important to consider Brontë's most telling representation of her own perceived condition of the law, through Jane as the narrator. Rochester asks whether to be driven to despair is better than the transgression of a 'mere human law'. Jane responds:

"I will keep the law given by God; sanctioned by man."³¹

This constructs the clear distinction in *Jane Eyre* between law and justice, in order to provide a vision of Victorian English law that manipulates Christian morality and therefore is lacking in divine justice. This is primarily presented through the perspective of a woman's struggle and therefore allows for the presentation of *Jane Eyre* as a feminist novel through the continual tension between genders from the injustices fostered through law's manipulation. This tension can then be used to show how the nineteenth century novel is utilised by the novelist in order to present distaste and dissatisfaction with the condition of English law as it stood, failing to preserve Christian morals and allowing for the abuse of women by men and the masculine construction of law.

³¹ C Brontë, *Jane Eyre: An Autobiography* (9th Edn, London: Chatto & Windus, 1972), 315

‘Dying for Assistance’ - Euthanasia according to Mill

Rebecca Wallace, Northumbria University, 4th Year MLaw

The term ‘liberty’ is open to several different interpretations. In a legal context it means freedom from restraint, i.e. the freedom to make choices for one’s self without unwelcome interference. Many people crave it, wars have been fought over it, yet today it would appear there is no universal agreement on what acts the individual should be ‘free’ to carry out, and on those which should be controlled or even prohibited altogether. Liberty itself, is controlled largely by society, made up of both the public and government. Rightly or wrongly society exercises a high degree of control over all individuals whom live within its parameters. It is not disputed that society requires governance to provide stability and protection to individuals and their rights, this has been proven throughout history. That said, one is left wondering what the appropriate limit on this governance should be. One interesting theory was introduced by the work of John Stuart Mill, a British Philosopher in the 19th century. Mill is regarded as one of the most influential thinkers in the history of liberalism.¹ In actual fact, Mill’s principle would appear particularly relevant at present, that is, today’s society works to promote freedom of expression, individuality and freedom of choice whilst at the same time, it prohibits acts which many, would assert, individuals should be free to perform. Faced with these facts, one cannot help but ask the all-important question which Mill himself once asked... “What, then, is the rightful limit to the sovereignty of the individual over himself?”

John Stuart Mill ‘On Liberty’

Back in the 19th Century John Stuart Mill wrote a famous essay ‘On Liberty’ which has become very influential throughout the years, receiving both appraisal and critique from many different sources. It is remarkable to note, that St. Thomas Aquinas, came up with this idea almost 600 years before Mill himself,² highlighting the relevance and agelessness of the liberty principle. The essay put forward by Mill focuses on what Mill himself described as “a very simple principle”³ which overtime has become known as the ‘harm principle.’ In simple terms, Mill believed that each individual should be able to live their lives freely, independent from control

¹ Michael Freeman FBA, *Lloyd’s Introduction to Jurisprudence* (9th edn, Sweet & Maxwell 2014) 1368

² Mavroghenis, ‘Mill’s Concept of Harm Redefined’ (1994) 1 UCL Jurisprudence Review 155-172

³ John Stuart Mill, *On Liberty* (2nd edn, John W. Parker & Son, 1859) 17

and interference from society, so long as the acts they were carrying out did not ‘harm’ another.⁴ Mill believed that all individuals should enjoy freedom of both speech and action, in order to promote diversity in society and allow for social flourishing.⁵

Further to this, Mill believed all actions could be condensed into two categories, the first category consisted of what Mill labeled ‘self-regarding actions.’ Actions such as these consist of any act carried out by an individual which effect only himself. The second category consisted of what Mill titled ‘other regarding actions,’ i.e. those which ‘effect’ and bring ‘harm’ to another person. According to Mill, the latter category would warrant appropriate interference from society, and the individual would be subject to either social or legal punishment.⁶ To quote Mill directly “...the sole end for which mankind are warranted, individually or collectively, in interfering with the liberty of action of any of their number, is self-protection.”⁷ In other words, if no harm befalls anyone other than the individual himself, interference from society is completely unjustifiable, and the independence of the individual remains absolute.⁸

A Critical Account of the ‘Harm Principle’

The ‘harm principle’ has been the subject of much criticism, for example, Bollinger has dismissed Mill’s theory as “Pollyannaish,”⁹ yet equally, there are many who see great value in his work. For example, Luke Harris has described Mill’s theory as a “brilliant and seminal essay,”¹⁰ whilst John Morley has stated that ‘On Liberty’ was “one of the most aristocratic books ever written.”¹¹ In actual fact, as society develops his theory becomes ever more relevant. In today’s society, it would appear to be particularly relevant, as Mill himself predicted it would be... “a question seldom asked and hardly ever discussed, ...and is likely soon to make itself recognized in the vital question of the future.”¹²

⁴ *ibid* 17

⁵ *ibid* 84

⁶ *ibid*

⁷ Michael Freeman FBA, *Lloyd’s Introduction to Jurisprudence* (9th edn, Sweet & Maxwell 2014) 1368

⁸ John Stuart Mill, *On Liberty* (2nd edn, John W. Parker & Son, 1859) 18

⁹ Wrag, Mill’s dead dogma: The value of truth to free speech jurisprudence’ (2013) Public Law 363-385

¹⁰ Mavroghenis, ‘Mill’s Concept of Harm Redefined’ (1994) 1 UCL Jurisprudence Review 155-172

¹¹ R.J. Halliday, *John Stuart Mill* (George Allen & Unwin Publishers Ltd, 1976) 114

¹² John Stuart Mill, *On Liberty* (2nd edn, John W. Parker & Son, 1859) 1

The principle itself appears rather simple and one would assume, is quite easy to apply, however, upon closer inspection, issues tend to arise. For example, Mill himself asserted that no individual is a completely isolated being.¹³ This admission somewhat confuses people, after all, if no one is truly separate from another, how would it be possible to carry out what Mill has labeled a ‘self-regarding act’ i.e. an act performed without touching anyone else? This begs the question, is there any such act which would not at least in part, have this effect? Another main issue with Mill’s theory is his lack of clarity, for example, to quote Stephen C. Mavroghenis, “what does Mill mean by harm” or more broadly... “what is harm?”¹⁴ For example, could it be argued that emotional distress falls within Mill’s scope of harm, thus legitimatising social or government intervention?¹⁵ What about financial harm in an indirect sense? Suppose a man were to try and end his life at home, the emergency services and hospital treatment he may require could certainly consume NHS time and resources, thus indirectly effecting the individual tax payer. If the examples provided were to be included within the definition, would there be a severity threshold that must be met for it to constitute ‘harm’ according to Mill? If clear answers to the questions raised above were provided, it would allow for a better understanding of the principle and could even see it work in practice.

Mill’s view on liberty can be contrasted with those of Aristotle and Plato, whom both held the view that the law should control actions of the individual and should also decide which things are “noble and good.”¹⁶ Plato held the belief that men who enjoyed “unbridled liberty in a democratic society” would in turn, become “enslaved by their unrestrained and undisciplined desires.”¹⁷ Plato’s opinion may be valid, however, Mill does not state that ‘all acts’ should be free from restraint, merely those which have no harmful effect on another. Therefore, Plato’s theory would appear to offer little assistance in this context.

Criticism of the principle does not end here. Mill adhered to the doctrine of utilitarianism, which some philosophers believe contradicts his liberty principle,¹⁸ as the principle itself focuses on the rights of the individual. This is a valid point and one which is difficult to dispute. Nonetheless, according to John Gray, Mill “did not suppose utility or happiness to be as distinct

¹³ *ibid* 150

¹⁴ Mavroghenis, ‘Mill’s Concept of Harm Redefined’ (1994) 1 UCL Jurisprudence Review 155-172

¹⁵ *ibid*

¹⁶ *ibid*

¹⁷ *ibid*

¹⁸ John Gray, *Mill on Liberty, A Defence* (2nd ed, Routledge 1996) 57

from liberty” as some suppose it to be.¹⁹ Mill himself explains that the utility he speaks of is “in the largest sense, grounded on the permanent interests of man as a progressive being.”²⁰ Despite Mill’s attempt at self-defence, many would still hold that this contradiction betrays his liberty principle. Conversely, one might argue that although the principle itself focuses on individuality, viewed on a wider scale, it would provide benefits to everyone.

Mill himself stated that his liberty principle is a “very simple principle”²¹ yet it would appear on closer inspection this ceases to be the case. Rather, in the face of any criticism the principle is pushed to its limit, leading to what many would dub, unsatisfactory answers.²²

Although Luke Harris has referred to Mill’s work as ‘brilliant’ he himself has held it is notoriously difficult to understand.²³ This being said, perhaps too much is expected of Mill, surely there is a level of genius and common sense in this theory. After all, ‘On Liberty’ was published in the 19th century and remains the focal point of many journal articles and legal writings to this day. It could be said that many criticisms of his theory come from a misconception that Mill himself was seeking to define ‘harm,’ however, this is clearly not the case. Mill’s ‘harm principle’ is based around the idea of ‘harm’ just as many legal writings are based on ‘justice.’ The issue here is that both ‘harm’ and ‘justice’ are open to subjective interpretations, thus, there is no definitive definition available which might be applied. The principle may find successful application by applying a common-sense approach, by making decisions on a case by case basis as Mill himself suggests.²⁴

A Defence - According to Rees

The criticism raised previously cannot be ignored, that is, the principle cannot be properly applied until it is fully understood. That being said, all is not lost. Assistance comes via a paper written by Rees, in ‘A re-reading of Mill on Liberty.’²⁵ Rees extends a sort of olive branch to Mill’s theory, stating that “it is acts that affect others’ interests, rather than simply acts affecting other individuals, that are the subject-matter of Mill’s principle.”²⁶ At first glance this may

¹⁹ *ibid* 5

²⁰ *ibid* 6

²¹ John Stuart Mill, *On Liberty* (2nd edn, John W. Parker & Son, 1859) 17

²² Mavroghenis, ‘Mill’s Concept of Harm Redefined’ (1994) 1 UCL Jurisprudence Review 155-172

²³ *ibid*

²⁴ John Stuart Mill, *On Liberty* (2nd edn, John W. Parker & Son, 1859) 101

²⁵ Rees, ‘A re-reading of Mill on liberty’ (1960) 8 Political Studies 8 115-129

²⁶ Mavroghenis, ‘Mill’s Concept of Harm Redefined’ (1994) 1 UCL Jurisprudence Review 155-172

appear just as confusing as Mill's principle itself, however, after examining it more closely one finds a degree of clarity in his idea. Rees seeks to make an important distinction between normative and positive actions. For example, there are positive actions which can be seen to 'factually' affect another person.²⁷ Meanwhile, in the normative sense, Rees explains that an action must be seen in terms of its interests, which means that it is these interests not their effects which are of central importance.²⁸

Thus according to Rees, it is not enough to merely bring 'harm' to another, the action in question must effect a person's interest before it can be classified as being harmful, and thus warrant protection from society.²⁹ Rees explains that it will be the value society places upon such interests which will determine whether they are affected or not.³⁰ Decisions such as these would be made by applying certain standards or values, and judging whether according to these values, another's interest has been 'harmed.'³¹ If this input is applied to Mill's theory, it produces a yardstick by which society can successfully 'measure' harm, resulting in a better application of Mill's principle. Therefore, it would be for society to ask, what type of harm would it be willing to accept for the benefits that liberty can provide i.e. where to draw the line between having an 'effect' on someone and 'harming' them. Once the decision was made, Mill's principle would be ready for application. This may be described as a significant step towards certainty and ease of application, most criticism of Mill's 'harm principle' centers at his lack of clarity, thus, if Rees's work is to be given any weight at all, it would see Mill's principle become much stronger.

Assisted Suicide and Euthanasia

Most individuals comply with the law throughout their lives, in consequence they forfeit much of their personal liberty to a higher power i.e. the government. Although there is common sense in this approach, as it provides for a certain degree of self-protection and order in society, many wonder if this 'higher power' has taken on too significant a role. One must ask, has society taken from the individual too much personal freedom? A person likely to answer yes is Noel

²⁷ *ibid*

²⁸ *ibid*

²⁹ *ibid*

³⁰ *ibid*

³¹ *ibid*

Conway, a 67-year-old retired lecturer whom suffers from motor neurons disease.³² Mr. Conway recently launched a right to die campaign as he “fears being entombed in his body”³³ and has been left with no alternative but to consider assisted dying. Mr. Conway’s recent interview with the BBC has left many wondering if a change in the law is necessary, and whether or not his case will be the one to bring about this change.

Currently, under the Suicide Act 1961 for England and Wales, assisted suicide i.e. encouraging or assisting someone to end their own life, is punishable by up to 14 year's imprisonment.³⁴ There have of course been many challenges brought to the courts in recent years, all of which have failed, with the courts stating that any new changes to UK law must go through Parliament.³⁵ These cases led to a debate within Parliament itself, with the proposal being rejected by the House of Commons in September 2015 by 118 to 330 votes.³⁶

It is clear that assisted dying and euthanasia remain very controversial, with each individual holding their own personal belief on the subject. There are many people whom believe that it is immoral to allow a person to suffer needlessly when an alternative option is available. For example, according to the campaign group ‘Dignity in Dying’ a recent study showed that 82% of the public support the choice of assisted dying for terminally ill adults.³⁷ Alternatively, there are many whom disagree, whether for personal or religious reasons, many categorise acts such as this as unjustifiable. Pope Francis has stated that euthanasia is always wrong, however, according to recent figures this does not reflect the belief of all religious people, recent statistics show that 79% of religious people support the idea of assisted dying legislation.³⁸

These figures evidence that the majority of people would welcome a change in the law, even if there are others whom would disagree. With any ‘taboo’ subject you will find those who support it and those who oppose it completely. Judgements already mentioned can be

³² Walsh F, ‘Terminally ill man in right-to-die fight’ (17 July 2017) <<http://www.bbc.co.uk/news/health-40615778>> accessed 8 December 2017

³³ *ibid*

³⁴ *ibid*

³⁵ *ibid*

³⁶ Papadopoulou N, ‘Assisted dying laws are progressing some places - the UK isn’t one of them’ (15 April 2017) <<http://www.independent.co.uk/news/health/assisted-dying-laws-are-progressing-in-some-places-the-uk-isn-t-one-of-them-a7679846.html>> accessed 24 December

³⁷ *ibid*

³⁸ ‘Campaign for Dignity in Dying’ <<https://www.dignityindying.org.uk/assisted-dying/international-examples/>> accessed 16 December

contrasted with those people hold on many other 'taboo' subjects, for example, take into consideration the views on smoking. For instance, it is a well-known fact that smoking drastically increases a person's chance of developing many different health complications, but nonetheless it remains legal. It is accepted that this is a decision for the individual to make, society provides everyone with the freedom to weigh up the risks and live with any consequences. When one makes a contrast such as this, it seems difficult to draw a distinction between the harmful acts permitted and those which are prohibited, one wonders what justification there is for dictating which decisions the individual should be 'free' to make himself, and which should be restrained altogether.

Although the UK refuses to legalize assisted dying and euthanasia, the same cannot be said for all other jurisdictions. For example, there are other countries whom permit these acts by offering assistance to their residents and any international citizens able to travel overseas. Suicide tourism continues to become more popular, for example, in 2008-2012 one fifth of visitors to Swiss assisted dying clinics were British residents.³⁹ Currently there are six US states and four countries in Europe which have legalised some form of assisted dying⁴⁰ with developments being made across the world. In 2016 Canada made history by being the first Commonwealth country to legalise assisted dying.⁴¹ The result came after an historic legal case named *Carter v Canada*,⁴² in which the Supreme Court of Canada struck down the long-standing ban on assisted dying. Recently, Australia followed suit by legalising assisted dying in one state for its residents.⁴³

Essentially, there is an option available, but only to the limited few who have sufficient means to travel. The former Lord Chancellor Charles Falconer previously stated, the current situation "leaves the rich able to go to Switzerland, the majority reliant on amateur assistance and the

³⁹ Siddique H, 'One in five visitors to Swiss assisted-dying clinics from Britain' (20 August 2014) <<https://www.theguardian.com/society/2014/aug/20/one-in-five-visitors-swiss-suicide-clinics-britain-uk-germany>> accessed 19 December

⁴⁰ Papadopoulou N, 'Assisted-Dying laws are progressing in some places – the UK isn't one of them' (15 April 2017) <<http://www.independent.co.uk/news/health/assisted-dying-laws-are-progressing-in-some-places-the-uk-isn-t-one-of-them-a7679846.html>> accessed 7 December

⁴¹ 'Campaign for Dignity in Dying' <<https://www.dignityindying.org.uk/assisted-dying/international-examples/>> accessed 16 December

⁴² *Carter v Canada* *Carter v Canada* (AG), 2015 SCC 5

⁴³ Davey M, 'Victoria becomes first state to legalise assisted dying as Parliament passes bill' (29 November 2017) <<https://www.theguardian.com/society/2017/nov/29/victoria-becomes-first-state-to-legalise-assisted-dying-as-parliament-passes-bill>> accessed 12 December

compassionate treated like criminals."⁴⁴ It seems unlikely that suffering individuals will stop attempting suicide, many believe it is a task better carried out in a controlled environment, rather than one having to be reliant on what Charles Falconer referred to as 'amateur assistance.' It appears clear that developments are being made at a quicker rate than ever before, mainly on the grounds of human rights violations. That being said, Mr Conway has not been as lucky. In October of this year, judges rejected his argument that the Suicide Act of 1961 violated his human rights, Articles 8 and 14 specifically.⁴⁵

This judgement came as a devastating blow to many, but to Peter Saunders from the 'Care Not Killing Alliance,' the decision was a relief.⁴⁶ Peter stated that the decision was right "because of the concern that vulnerable people might be exploited or abused by those who have a financial or emotional interest".⁴⁷ This is perhaps the strongest argument for those who oppose such a shift in the law, fears of misuse and abuse are plausible. Others may argue that fears such as this may be eased by the use of appropriate safeguards. For example, assisted dying may appear more attractive if it were to be judged on a case by case basis, offered only to those who are terminally ill with capacity to make the decision on their own, free from any pressure. It could be said that fears such as this, although relevant, should not rule out the principle altogether.

Applying Mill

The act of assisted suicide is, most obviously, an act carried out by the patient or rather, the individual wishing to end his own life. In practice, drugs are supplied by a medical professional to that individual for them to administer at their convenience.⁴⁸ As the act is being carried out by the individual himself, one could see logic in categorizing these types of acts as 'self-regarding acts.' Applying Mill's harm principle in the context of assisted suicide, it would seem plausible to suggest that as long as taking one's own life does not 'harm' another individual, the state has no legitimate power to interfere. It is true that people would be free to speak with

⁴⁴ *ibid*

⁴⁵ Walsh F, 'Terminally ill man in right-to-die fight' (17 July 2017) <<http://www.bbc.co.uk/news/health-40615778>> accessed 18 December 2017

⁴⁶ *ibid*

⁴⁷ *ibid*

⁴⁸ NHS UK, 'Euthanasia and assisted suicide' <<https://www.nhs.uk/conditions/euthanasia-and-assisted-suicide/>> accessed 21 December

him, offer advice and convey their disapproval⁴⁹ but according to Mill, society should refrain from using either law or moral condemnation to prevent their actions and pattern of behaviour. After all, “restrictions on individual liberty based on harm to others has remained a more acceptable basis for intervention than the risk of harm to self.”⁵⁰

James Fitzjames Stephen has stated that Mill’s views on liberty were a “too favorable view of human nature.”⁵¹ It is true that Mill’s principle could be described as ‘idealistic,’ yet one could argue that Mill merely defends that which others would themselves wish to have protected, i.e. the liberty to make important decisions for themselves. It is not disputed that assisted dying may cause emotional upset for other people i.e. friends and family, yet according to both Mill and Rees, this is a factor that society would have to ‘measure’ according to the standards and values it finds most worthy. Therefore, Parliament might legitimately ban assisted suicide on these grounds but to do so for any other reason i.e. a personal dislike of the act, according to Mill, is an illegitimate use and abuse of power.

Assisted dying can be contrasted with euthanasia, as here, one might be inclined to argue the opposite. Many would state the inclusion of another person has the effect of taking the act outside of what is known as ‘self-regarding actions’ and into the realm of ‘other regarding actions.’ Here, euthanasia, requires a doctor to physically administer the lethal dose,⁵² which clearly muddies the water when applying Mill’s ‘harm principle.’ The whole justification for such acts is that harm only befalls the person carrying out the act, yet here this is not the case, as the person acting is not the one being ‘harmed.’ This distinction leads to two opposing arguments, on the one hand you could argue that this is completely unjustifiable and that permitting euthanasia into the category of ‘self-regarding actions’ is a total misuse of the principle and betrays its intended purpose, i.e. the protection of individuals from acts of another.

At the other end of the scale you could go beyond the principle itself to explore the purpose behind it in further detail. Mill created the principle with an intention to prevent harm to

⁴⁹ John Stuart Mill, *On Liberty* (2nd edn, John W. Parker & Son, 1859) 18

⁵⁰ Flynn & Arstein-Kerslake, ‘State intervention in the lives of people with disabilities: the case for a disability-neutral framework’ (2017) 13(1) *International Journal of Law in Context* 39-57

⁵¹ R. J. Halliday, *John Stuart Mill* (George Allen & Unwin Publishers Ltd, 1976) 144

⁵² NHS UK, ‘Euthanasia and assisted suicide’ <<https://www.nhs.uk/conditions/euthanasia-and-assisted-suicide/>> accessed 30 December 2017

befalling ‘innocent’ individuals, yet here, it is those very individuals who are requesting assistance in the first place. Any assistance they receive is carried out on a voluntary basis by an informed medical expert, merely acting as an advocate for those unable to perform the act themselves.⁵³ Both arguments are strong, yet it would appear more likely that euthanasia, at least for the moment, pushes the boundaries of ‘self-regarding’ actions to a place many would find uncomfortable. That being said, to limit the application of the principle to assisted dying, would see many individuals whom are unable to act for themselves left to suffer in awful conditions based purely on a technicality.

Conclusion

After applying Mill’s ‘harm principle’ in the context of assisted suicide it would appear likely, that according to Mill, the act should be permitted and that any interference from society would be unwarrantable. Whether the same could be said for euthanasia remains unclear, this would be something for society to evaluate based on the values it finds most important, as Rees suggests. Mill first introduced the harm principle in the 19th Century, in a time when it was thought impractical to educate women or when homosexual relationships were the subject of legal discrimination. It would appear unrealistic to expect a society such as this to permit the changes which the principle would call for. Today however, individuality is celebrated across the world, society has developed at a rapid rate since Mill’s theory was first presented. Surely in an advanced society such is the one we have today, one would welcome the principle and show respect for individual freedoms, especially in the context of health. As Mill himself asserted, “each is the proper guardian of his own health,”⁵⁴ and “he himself is the final judge.”⁵⁵

⁵³ BBC news, ‘Forms of euthanasia’ <<http://www.bbc.co.uk/ethics/euthanasia/overview/forms.shtml>> accessed 30 December

⁵⁴ John Stuart Mill, *On Liberty* (2nd edn, John W. Parker & Son, 1859) 23

⁵⁵ *ibid* 145

Should Euthanasia be legalised in England and Wales? Interpreting John Stuart Mill's Harm Principle

Lauren Wharton, Northumbria University, 4th Year MLaw

Introduction

In September 2017, Margaret Somerville wrote a powerful article in *The Guardian* arguing that euthanasia offered individuals death rather than loving care.¹ She cautioned against normalising assisted dying and the unavoidable “slippery slope”.² This article will explore the arguments put forward in Somerville’s piece, against John Stuart Mill’s harm principle. The author will argue that the harm principle is preferred for the following reasons; an individual’s autonomy is central to a liberal society, individuals should also be free to make their own choices about their life, and the law should be equal to all. The article will look at criticisms and support for the harm principle and will finally reach a conclusion on whether or not assisted suicide and euthanasia should be legalised.

The harm principle

The boundary between individual freedom and state intervention has always been a hard one to place. John Stuart Mill was a very influential theorist on liberalism in the 19th century. His harm principle still remains influential on public debate including arguments involving euthanasia and assisted suicide as it is seen as an argument for liberty.³ The harm principle states ‘the only purpose for which power can be rightfully exercised over any member of a civilised community, against his will, is to prevent harm to others. His own good, either physical or moral, is not such a warrant.’⁴ At the heart of the harm principle is the concern for individual liberty and toleration. This is

¹ Margaret Somerville ‘Legalising assisted dying would be a failure of collective human memory and imagination’, *The Guardian* (2017) <<https://www.theguardian.com/commentisfree/2017/sep/20/legalising-assisted-dying-would-be-a-failure-of-collective-human-memory-and-imagination>> accessed 21 March 2018

² Ibid.

³ Steven D Smith ‘Is the harm principle illiberal’ (2006) 51 *American Journal of Jurisprudence*, 25

⁴ John Stuart Mill, *On Liberty* (2nd edn, London: John W Parker & Son West Strand 1859) 22

why it is suited to reflect the liberal attitudes of some citizens and policy makers towards the treatment of an individual.⁵

According to Mill liberty means that individuals are free to set their own course of life to suit their own characteristics. We should be free to do as we wish without judgement from others even if they disagree with our choices. As long as we do not cause them harm we should be free to live life as we wish.⁶ It is the autonomy of the individual that Mill believed is central to liberty. The harm principle aims to restrict the intervention by the state and society in an individual's private life.⁷

Mill did recognise that there will be state imposed restrictions and that is part of society. However these restraints are only justified if they are to promote individual autonomy.⁸ 'What is right in politics is not the will of the people but the good of the people.'⁹ The role of the government in the eyes of Mill is to promote an individual's capacity to remain autonomous.¹⁰ In the next section, this article will elaborate on why the current law regarding assisted suicide and euthanasia in the UK infringes a persons autonomy and how the premises of the decision is not for the law but for the individual who wants to seek assisted suicide or euthanasia.

The article and the harm principle

'Euthanasia is the act of deliberately ending a person's life to relieve suffering'¹¹ and assisted suicide is 'the act of deliberately assisting or encouraging another person to kill themselves.'¹² In the UK assisted suicide and euthanasia are illegal. Euthanasia falls into the category of murder or manslaughter and can result in a maximum penalty of life imprisonment.¹³ Under the Suicide Act of 1961 assisting or encouraging someone to commit suicide can result in a 14 years prison sentence.¹⁴ However killing or trying

⁵ Nils Holtug 'The Harm Principle' (2002) 5(4) Ethical Theory and Moral Practice, 357

⁶ John Stuart Mill, *On Liberty* (2nd edn, London: John W Parker & Son West Strand 1859) 26-27

⁷ Ben Saunders 'Reformulating Mill's Harm Principle' (2016) 125(500) Mind

⁸ John Stuart Mill, *On Liberty* (2nd edn, London: John W Parker & Son West Strand 1859)

⁹ Richard Reeves *John Stuart Mill: a Victorian Firebrand* (Atlantic Books 2007)

¹⁰ John Stuart Mill, *On Liberty* (2nd edn, London: John W Parker & Son West Strand 1859)

¹¹ National Health Service 'Euthanasia and assisted suicide', NHS Choices <<https://www.nhs.uk/conditions/euthanasia-and-assisted-suicide/>> accessed 28th March 2018

¹² Ibid

¹³ Op cit, n. 11

¹⁴ The Suicide Act 1961, s.1.

to kill yourself is not illegal. In recent years there has been much debate as to whether assisted suicide and euthanasia should be considered a crime.

When questioning whether or not euthanasia and assisted suicide should be legalised it is not easy to come across the answer. Many have conflicting opinions regarding this matter. In her article in *The Guardian*, Somerville is strongly against legalising euthanasia and assisted suicide. She states that euthanasia proponents only look at the individual and the discussion is based around the present society. Those against euthanasia, according to Somerville, do not just look at the individual's wants and needs but the future implications and protection of the 'common good'.¹⁵ Legalising assisted suicide and euthanasia would, Somerville's view, 'sanction a view of autonomy holding that individuals may, in the name of their own private, idiosyncratic view of the good life, call upon others, including such institutions as medicine, to help them pursue that life, even at the risk of harm to the common good'.¹⁶ This view would seem to support the harm principle in indicating that deciding what is good in a person's private life is the individual's choice and has little concern for the overall societal consequences which result from this self-governance.¹⁷

The harm principle aims to defend self-governance; freedom means an individual should be allowed to pursue their own good in their own way. This includes different experiments of living and as long as you do not cause harm to someone else you can pursue your own vision of what is good even if others oppose it.¹⁸ 'If resistance waits till life is reduced to nearly one uniform type, all deviations from that type will come to be considered impious, immoral and even monstrous and contrary to nature.'¹⁹ Despite Somerville's article arguing the illegality of euthanasia is for the common good, it is clear that if you look at this from a Millian liberalistic view, there are different interpretations of what is good and to limit this to one type is to deem all

¹⁵ Margaret Somerville 'Legalising assisted dying would be a failure of collective human memory and imagination', *The Guardian* (2017) <<https://www.theguardian.com/commentisfree/2017/sep/20/legalising-assisted-dying-would-be-a-failure-of-collective-human-memory-and-imagination>> accessed 21 March 2018

¹⁶ Daniel Callahan 'When Self Determination Runs Amok' *Hastings Center Report* (March/April 1992), 52

¹⁷ Mary Donnelly and Claire Murray, *Ethical and legal debates in Irish healthcare* (Manchester University Press 2016) 60

¹⁸ John Stuart Mill, *On Liberty* (2nd edn, London: John W Parker & Son West Strand 1859)

¹⁹ *Ibid* page 113

deviations immoral. It would be unfair to those who deviate from the norm to be punished for it.²⁰

Somerville's article also addresses her concerns about how the ethical tones of society can be perceived if euthanasia is legalised. She states that euthanasia is offering the weak and most in need 'death instead of loving care.'²¹ However Mill's harm principle provides that it is paramount that the individual is given a choice. If someone finds them self in a situation that causes risk to their life the state can intervene to offer support although it is crucial that they do not override an individual's autonomy if they refuse to accept help.²² The support is there if an individual wants to take it, there is still the option of care, but fundamentally that option lies with the individual. If the state were to legalise euthanasia it does not show the state supporting suicide, it is stating assisted suicide falls in the realm of personal morality and the decision lies with the individual not the law.²³

It could be argued that it is unfair that a perfectly able person could commit suicide and not be punished for it. Whereas when someone wants to die because of their suffering from an incurable illness they are unable to do so as they do not have the ability to do it themselves.²⁴ A modern liberal state in the eyes of someone like Mill should provide a law that is equal to all. This would mean that all individuals would have this right to exit life, provided the law was protected from abuse.²⁵ If we are judging the ethical tone of society by the way we treat the most vulnerable then the state actually puts them at a disadvantage and it is unfair that they are not provided with the same options as a physically able person.

²⁰ Ibid

²¹ Margaret Somerville 'Legalising assisted dying would be a failure of collective human memory and imagination', The Guardian (2017) <<https://www.theguardian.com/commentisfree/2017/sep/20/legalising-assisted-dying-would-be-a-failure-of-collective-human-memory-and-imagination>> accessed 23 March 2018

²² Eilionóir Flynn and Anna Arstein-Kerslake 'State intervention in the lives of people with disabilities: The case for a disability-neutral framework' (2017) 13(1) International Journal of Law in Context, 54

²³ Ibid

²⁴ Nigel Warbuton 'Suicide is legal – why are those who need assistance denied this right?', The Guardian (2014) <<https://www.theguardian.com/commentisfree/2014/jun/26/suicide-legal-assistance-kill-themselves>> accessed 30th March 2018

²⁵ Ibid

A statistic that is thought to cause alarm in the article is that only ‘5% of people mention pain as a reason for wanting euthanasia, around 48% of people give feeling like a burden on others’²⁶. Mill, however, did address the limits of his principle. He states that ‘those who are still in a state to require being taken care of by others must be protected against their own actions as well as external injury.’²⁷ Somerville’s article echoes this by stating in other countries euthanasia is ‘now available to children, newborn babies with serious disabilities and people with dementia and mental illness... euthanasia puts the lives of individuals, especially vulnerable people, such as those with disabilities, at risk.’²⁸ Mill did appreciate that those who have not achieved autonomy can be interfered with.²⁹ This would imply that if euthanasia and assisted dying were to be legalised safeguards would need to be put in place to protect those who have not achieved autonomy and are influenced by the wishes or pressures of others. These safeguards could include the fact the patient must be an adult and they must also be mentally competent when making the decision.³⁰ Following the harm principle the 5% of people who want to die to relieve their pain should be allowed to do so as not allowing them to die is restricting their liberty. They should be allowed to take responsibility for their own lives as long as they cause no harm to others.³¹ Whereas it could be argued that the 48% have not achieved autonomy and restraints are justified to protect them.³² Euthanasia and assisted suicide should be there for an option for those who need it to achieve their liberty.

However Somerville’s article argues that ‘once euthanasia becomes normalised slippery slopes are unavoidable and the number of deaths resulting from euthanasia

²⁶ Margaret Somerville ‘Legalising assisted dying would be a failure of collective human memory and imagination’, The Guardian (2017) <<https://www.theguardian.com/commentisfree/2017/sep/20/legalising-assisted-dying-would-be-a-failure-of-collective-human-memory-and-imagination>> accessed 23 March 2018

²⁷ John Stuart Mill, *On Liberty* (2nd edn, London: John W Parker & Son West Strand 1859) 22-23

²⁸ Margaret Somerville ‘Legalising assisted dying would be a failure of collective human memory and imagination’, The Guardian (2017) <<https://www.theguardian.com/commentisfree/2017/sep/20/legalising-assisted-dying-would-be-a-failure-of-collective-human-memory-and-imagination>> accessed 21 March 2018

²⁹ John Stuart Mill, *On Liberty* (2nd edn, London: John W Parker & Son West Strand 1859)

³⁰ Joe Public Bloggs ‘Assisted Dying’, The Guardian (2009) <<https://www.theguardian.com/society/joepublic/2009/jul/01/euthanasia-assisted-suicide-uk>> accessed 27th March 2018

³¹ John Stuart Mill, *On Liberty* (2nd edn, London: John W Parker & Son West Strand 1859)

³² Ibid

constantly substantially increases.³³ This argument propels that voluntary euthanasia will lead to involuntary euthanasia. Those who feel they are not valuable to society or are vulnerable to abuse will feel there is no other option and legalising voluntary euthanasia opens them up to this risk.³⁴ However euthanasia and assisted suicide cannot be refused just because of a mere possibility. If that were the case it would be fair to address the same slippery slope argument to ensure a dignified death of a competent individual.³⁵ It must be taken into consideration how likely this is to happen. Somerville notes that ‘opponents of voluntary euthanasia on slippery slope grounds have not provided the data or evidence necessary to turn their speculative concerns into well-grounded likelihoods.’³⁶ It would be unfair on the grounds of a mere possibility to restrict competent individuals from achieving liberty by seeking assisted suicide or euthanasia, they should be allowed to do as they wish as long as it causes no harm to anyone else.

One of the messages of Somerville’s article is that euthanasia and assisted suicide provide a depersonalised and dehumanised death.³⁷ There have been cases where individuals have fought for their liberty and their right to die in a more humane way than the suffering they are going through.³⁸ In the case of *Pretty v United Kingdom* Mrs Diane Pretty suffered from motor neurone disease and was paralysed. She wanted to ensure that if her husband accompanied her to seek assisted suicide he would not be prosecuted. Mrs Pretty wanted to be in control of when and how she died and wanted to be spared the suffering and indignity of the disease. However Mrs Pretty was denied this.³⁹ Despite Somerville’s concern for death being dehumanised and depersonalised, it would appear that refusing to allow Mrs Pretty to seek assisted suicide resulted in

³³ Margaret Somerville ‘Legalising assisted dying would be a failure of collective human memory and imagination’, *The Guardian* (2017) <<https://www.theguardian.com/commentisfree/2017/sep/20/legalising-assisted-dying-would-be-a-failure-of-collective-human-memory-and-imagination>> accessed 24 March 2018

³⁴ Ellen Verbakel and Eva Jaspers ‘A Comparative study on permissiveness toward Euthanasia: Religiosity, slippery slope, Autonomy, and Death with Dignity’ (2010) 74(1) *The Public Opinion Quarterly*, 113

³⁵ Dan W Brock ‘Voluntary Active Euthanasia’ (1992) 22(2) *The Hastings Center Report*, 19

³⁶ *Ibid* page 20

³⁷ Margaret Somerville ‘Legalising assisted dying would be a failure of collective human memory and imagination’, *The Guardian* (2017) <<https://www.theguardian.com/commentisfree/2017/sep/20/legalising-assisted-dying-would-be-a-failure-of-collective-human-memory-and-imagination>> accessed 24th March 2018

³⁸ *Pretty v United Kingdom* (App no 2346/02) - [2002] ECHR 2346/02

³⁹ *Ibid*

Mrs Pretty suffering more and her death was less dignified. If the courts were to follow the approach of the harm principle then Mrs Pretty would have been able to achieve her wishes and avoid a situation that caused her and her family great stress.⁴⁰ Mrs Pretty's autonomy was taken away from her, something the harm principle greatly condemns. It is situations like this where refusing assisted suicide actually causes more pain and suffering than allowing it ever would.

It is clear there is ambiguity with the global views of whether or not assisted suicide and euthanasia should be illegal, it is now legal in places like the Netherlands and Belgium.⁴¹ UK citizens can travel abroad to a jurisdiction where it is legal to seek an end to their life. However normally due to illness like in Mrs Pretty's case the issue is getting there and family members like Mrs Pretty's husband are put in an awful position of facing the crime of assisting suicide if they help.⁴² Despite this predicament 'one in five people who travel to Switzerland to end their lives are from the UK.'⁴³ This shows how individuals are getting around the state restrictions imposed on them to achieve individual liberty anyways. This predicament indicates that if the Government want to be in more control they should legalise euthanasia and assisted suicide and govern it themselves, rather than allowing other jurisdictions to give individuals that option and taking it away from those who simply can not travel. If they were to govern this area in a way that is less restrictive to autonomy then members of the UK would not feel the need to travel abroad to achieve freedom.⁴⁴

Criticism of the harm principle

However despite the harm principle's main aim being to protect a person's liberty and reduce state intervention, its approach does not come without criticism.. One of the biggest criticisms of the harm principle is that Mill is not clear on what is actually meant

⁴⁰ Ibid

⁴¹ Margaret Somerville 'Legalising assisted dying would be a failure of collective human memory and imagination', The Guardian (2017) <<https://www.theguardian.com/commentisfree/2017/sep/20/legalising-assisted-dying-would-be-a-failure-of-collective-human-memory-and-imagination>> accessed 24 March 2018

⁴² Pretty v United Kingdom (App no 2346/02) - [2002] ECHR 2346/02

⁴³ Haroon Siddique 'One in five visitors to Swiss assisted-dying clinics from Britain', The Guardian (2014) <<https://www.theguardian.com/society/2014/aug/20/one-in-five-visitors-swiss-suicide-clinics-britain-uk-germany>> accessed 26th March 2018

⁴⁴ Joe Public Bloggs 'Assisted Dying', The Guardian (2009) <<https://www.theguardian.com/society/joepublic/2009/jul/01/euthanasia-assisted-suicide-uk>> accessed 26th March 2018

by harm or what acts are to be prescribed.⁴⁵ At the core of the principle, harm has to be thought of as anything that interferes with a person's autonomy.⁴⁶ Mill did make a distinction between self-regarding actions that are those that affect only yourself and other regarding actions that are those that affect others.⁴⁷ However almost any actions could be said to have a negative consequence on others so in that aspect the harm principle fails as a protection mechanism against state instruction.⁴⁸ Some scholars would argue that it is this regular reference to indirect harm that has caused the harm principle to somewhat collapse.⁴⁹ Mill did consider harm to 'certain interests which either by express provision or tacit understanding, ought to be considered as rights'⁵⁰ as constituting harm. It could be argued that euthanasia and assisted suicide inflict indirect harm upon the individual's friends and family. However Mill did appreciate that if it does affect 'others, only with their free, voluntary and undeceived consent and participation.'⁵¹ It was clear when looking at the *Pretty* case that her family were supportive of her choice.⁵² When those around have voluntarily consented to the indirect harm there should be even less reason to restrict someone. When it is clear that no harm is caused the principle should be applied. Reference to possible clarification on what can be classed as harm is discussed below.

Another common critique of the harm principle is that it is too permissive. It is instrumental to a permissive society where an individual can do things others disapprove of.⁵³ Lord Patrick Devlin would also seem to disagree with the elements behind the harm principle and believe it makes society too permissive. His thoughts are basically that criminal law is to protect society as well as the individual and should not be limited to acts that cause harm to another individual.⁵⁴ Following the article discussed above a point is raised that euthanasia and assisted suicide should not be

⁴⁵ John P Safranek, 'Autonomy and Assisted Suicide The Execution of Freedom', (1998) 28(4) Hastings Center Report 28, 33

⁴⁶ John Stuart Mill, *On Liberty* (2nd edn, London: John W Parker & Son West Strand 1859) 134

⁴⁷ John Stuart Mill, *On Liberty* (2nd edn, London: John W Parker & Son West Strand 1859)

⁴⁸ Piers Norris Turner, "'Harm" and Mill's Harm Principle' (2014) 124(2)

⁴⁹ Bernard Harcourt 'The collapse of the Harm Principle' (1999) 90 Journal of Criminal Law and Criminology 109

⁵⁰ John Stuart Mill, *On Liberty* (2nd edn, London: John W Parker & Son West Strand 1859) 134

⁵¹ John Stuart Mill, *On Liberty* (2nd edn, London: John W Parker & Son West Strand 1859) 26

⁵² *Pretty v United Kingdom* (App no 2346/02) - [2002] ECHR 2346/02

⁵³ Daniel Jacobson 'Mill on Liberty, Speech, and the Free Society' (2000) 29(3) *Philosophy & Public Affairs*, 278

⁵⁴ Peter Cane 'Taking Law Seriously: Starting Point of the Hart/Devlin debate' (2006) 10(1) *the Journal of Ethics*, 22

legalised because of the potential damage to the ethical tones of society⁵⁵, Lord Devlin would seem to agree with this. Devlin believes it is an offence against society to threaten the social cohesion made possible by the common view on morality.⁵⁶ As there are those who strongly oppose euthanasia and assisted suicide, Lord Devlin would seem to believe that it should remain illegal on grounds of social morality.

However Herbert Hart famously disagrees with Lord Devlin. He states ‘to punish people for causing this form of distress would be tantamount to punishing them simply because others object to what they do and the only liberty that could coexist with this... is the liberty to do things to which no one seriously objects.’⁵⁷ The critics of Mill seem to think it is justifiable to punish departures from social morality even if it does not cause harm to others.⁵⁸ But Hart appreciates on the ‘narrower issue relevant to the enforcement of morality Mill seems to be right.’⁵⁹ While Hart is a liberal like Mill he is a different kind of liberal. Hart can be described as a Paternalistic Millsian.⁶⁰ He ‘suggests a modified principle of liberty which accommodates paternalism by protecting consenting victims without condoning the legal moralism of Devlin.’⁶¹ Hart acknowledges that the law should protect individuals from physically harming themselves.⁶² Mill’s view is that neither physical or moral grounds are acceptable for state intervention.⁶³ This would indicate that despite generally agreeing with Mill, Hart would be opposed to legalising euthanasia and assisted suicide. It would indicate that legal coercion in these circumstances is justified.⁶⁴

⁵⁵ Margaret Somerville ‘Legalising assisted dying would be a failure of collective human memory and imagination’, The Guardian (2017) <<https://www.theguardian.com/commentisfree/2017/sep/20/legalising-assisted-dying-would-be-a-failure-of-collective-human-memory-and-imagination>> accessed 24th March 2018

⁵⁶ Robert P George ‘Social Cohesion and the Legal Enforcement of Morals: A Reconsideration of the Hart-Devlin Debate’ (1990) 35 American Journal of Jurisprudence, 19

⁵⁷ H.L.A Hart, *Law, Liberty and Morality* (Stanford University Press 1963) 47

⁵⁸ *Ibid*, 5

⁵⁹ *Ibid*, 5

⁶⁰ Christine Pierce ‘Hart on Paternalism’ (1975) 35(6) *Analysis*, 205

⁶¹ *Ibid*, 205

⁶² Raymond Wacks, *Understanding Jurisprudence an Introduction to Legal theory* (3rd edn Oxford University Press 2012) 36

⁶³ John Stuart Mill, *On Liberty* (2nd edn, London: John W Parker & Son West Strand 1859) 22

⁶⁴ H.L.A Hart, *Law, Liberty and Morality* (Stanford University Press 1963) 5

Support for the harm principle

Despite the criticisms of the harm principle discussed above, there is strong evidence to indicate Mill's harm principle is still fundamental to what a liberal society is perceived to be. In the judgment of *R v Brown* the judges considered Mill's harm principle in their judgment to conclude that the sado-masochistic group should be free to pursue their own vision, if they are not free to pursue it their autonomy is being prevented.⁶⁵ This is also a common critique on the illegality of euthanasia, that it violates an individual's autonomy.⁶⁶ Central to Mill's interpretation on freedom is the necessity of autonomy and how an individual should be free to take responsibility of their own lives as long as they cause no harm to others.⁶⁷ It is an indefensible encroachment upon an individual's liberty to stop a competent terminally ill person from seeking assisted suicide. The desire to end life with dignity comes from a right to individual autonomy.⁶⁸

The Wolfenden Report also valued individual autonomy when stating 'there must be a realm of private morality and immorality which is, in brief and crude terms, not the law's business.'⁶⁹ This reflects the view of the harm principle that in private people should be able to pursue private acts that are not harmful to others. It does not matter if others disapprove of it, are offended by it or find it immoral.⁷⁰ Herbert Hart pointed out that the foundation of this report had striking similarities to Mill's harm principle.⁷¹ Although the Wolfenden Report was with regards to homosexuality and prostitution these points could also be regarded for euthanasia and assisted suicide. It is up to the individual to decide what is moral in his private life and hence when to end his life. Looking at this view from 'a liberal society based on the principle of moral autonomy of the individual the law should not be concerned with preventing people

⁶⁵ *R v Brown* [1994] 1 A.C. 212

⁶⁶ John P Safranek, 'Autonomy and Assisted Suicide The Execution of Freedom', (1998) 28(4) *Hastings Center Report* 28, 32

⁶⁷ Bruce Baum 'J. S. Mill on Freedom and Power' (1998) 31(2) *Polity*, 187

⁶⁸ Mirko Bagaric 'Euthanasia: Patient Autonomy Versus the Public Good' (1999) 18(1) *University of Tasmania Law Review*, 152

⁶⁹ The Report of the Committee on Homosexual Offences and Prostitution, Cmnd 247, HMSO, 1957 ('Wolfenden Report')

⁷⁰ Christine Pierce 'Hart on Paternalism' (1975) 35(6) *Analysis*, 205

⁷¹ H.L.A Hart, *Law, Liberty and Morality* (Stanford University Press 1963) 14

from taking their lives'.⁷² For the law to intervene it would have to show that suicide involved direct harm to others.⁷³ The aim of authorised state intervention should not be to restrict the individual's liberty or force protection on them it should be only to provide support in the individuals circumstances.⁷⁴

Conclusion

Mill predicted that his work *On Liberty* would last longer than anything he has ever written and he was right.⁷⁵ It is clear his harm principle is still central to modern day debate. It would appear that the foundations of the harm principle would support legalising euthanasia and assisted suicide. An individual should be allowed to make their own choices regarding their private life and death is a very personal. For the state to intervene and take this away from an individual is infringing on their autonomy, something Mill was very clear is essential to an individual's liberty. It is also very unfair that an individual is put at a legal disadvantage simply for not being able to physically commit suicide on their own, the law should be equal for all. Somerville's article raises some valuable points and it is easy to see why there are concerns, however, as long as the new law would be adapted to protect those who have not yet achieved autonomy there is no issue with making it an option for those who have. After all 'over himself, over his own body and mind, the individual is sovereign.'⁷⁶

⁷² Max Charlesworth, *Bioethics in a Liberal Society* (Cambridge: Cambridge University Press 1993) 39

⁷³ *Ibid*

⁷⁴ Eilionóir Flynn and Anna Arstein-Kerslake 'State intervention in the lives of people with disabilities: The case for a disability-neutral framework' (2017) 13(1) *International Journal of Law in Context*, 54

⁷⁵ John Stuart Mill, *On Liberty* (2nd edn, London: John W Parker & Son West Strand 1859)

⁷⁶ John Stuart Mill, *On Liberty* (2nd edn, London: John W Parker & Son West Strand 1859)

Assisted dying and Lord Falconer's recommendations; to what extent should medical and public opinion be considered when amending the law regarding assisted dying?

Dein Lowdon, Iseult McGrory, Calvin Rowley, Colm Taylor

INTRODUCTION

Assisted dying is a matter of dispute in the UK due to public interest based on landmark cases such as Debbie Purdy and Tony Nicklinson.

The biggest ever contest to the current law was Lord Falconer's Bill: Assisted Dying (2014) which was further amended by Rob Marris' attempt in parliament in 2015. We are looking at how medical and public opinion should be considered when amending the law.

CONCLUSION

The general consensus from medical professionals is that **reform in assisted dying is wrong** and it would damage the doctor-patient relationship. On the other hand, the cases of Debbie Purdy and Tony Nicklinson illustrate the **public outcry for reform** stating that it's a violation of their human rights.

As a group we align ourselves with the opinions of medical professionals due to their experience and ethical neutrality. However, the public opinion should not be disregarded, as this is the democratic rule.

PUBLIC OPINION

Public opinion was massively influenced by two landmark cases Debbie Purdy and Tony Nicklinson,

Debbie Purdy was successful in her case where she sought out the criteria of which the DPP takes into consideration before deciding whether or not to prosecute someone with regards to assisted suicide. She successfully argued that it was a breach of her human rights not to know whether or not her husband would be prosecuted which led to the publishing of the Interim Report by the DPP.

Tony Nicklinson suffered from a stroke and was paralysed from the neck down, he began the legal proceedings in 2010 taking the case on whether or not his wife would be prosecuted if she assisted him with his suicide as he did not want to live this way for another 20 years. He gave evidence before the commission of human rights saying that there is a "fundamental injustice with the present law".

CURRENT LAW

The Suicide Act 1961 details where one is criminally liable for complicity in another's suicide.

- ◊ S.2(1) states "A person ("D") commits an offence if:
- ◊ a) D does an act capable of encouraging or assisting the suicide or attempted suicide, and
- ◊ (b) D's act was intended to encourage or assist suicide or an attempt at suicide."
- ◊ S.2(1)(C) goes on to identify that this is an offence triable by indictment with a potential maximum sentence of 14 years imprisonment.

Under s.2(4) it states that DPP must consent to the possible prosecutions. The DPP released his prosecution guidelines following the case of Debbie Purdy.

Debbie Purdy



Tony Nicklinson

MEDICAL OPINIONS

The main argument in the medical debate for assisted dying is whether it would affect the relationship between the doctor and the patient.

On one hand, the British Medical Association disagrees with all forms of assisted dying saying that it will have a "profound and detrimental" effect, causing patients to have less trust in their doctors.

On the other hand, polls generated by a charity called Dignity in Dying states that 54% of GP doctors are supportive to assisted dying.

ISSUES WITH THE LAW

The main issue with this law is that the public believe it is outdated for modern society. Modern society has become far more liberal; and similarly to other issues of public policy, such as abortion, divorce, etc. the public has expressed a desire for a change in the law—one that respects the individual and gives them choice about ending their life with dignity where they have a terminal illness.

Up until 2010, s.2(4) SA61 brought with it an inherent issue, as there was no indication as to whether or not a person would be prosecuted for assisting a loved one in dying.

PROPOSED REFORMS

Under **Lord Falconer's** proposal; "A person who is terminally ill may request and lawfully be provided with assistance to end his or her own life."

This was only applicable where:

1. The person has a clear and settled intention to end his or her own life.
2. The person has made a declaration to that effect...
3. And on the day the declaration is made the person is aged 18 or over and has been ordinarily resident in the UK for at least 1 year.

Rob Marris proposed a bill which is an extension of this which made it to the second reading.

OUR OPINION: We think that the proposals gave a realistic and justified change to the law which would be effective in providing a dignified death for people with terminal illnesses. However, these reforms do not cover those who have a particularly low standard of living (e.g. paralysis).

WHAT DO DOCTORS THINK?

54%

of GPs are supportive or neutral to law change on assisted dying

KEY QUESTION

How will assisted dying impact the relationship between doctors and patients?

Assisted dying and Lord Falconer's recommendations; to what extent should medical and public opinion be considered when amending the law relating to assisted dying?

Introduction

Assisted dying in the UK is a controversial topic, this is due to a massive peak in public and medical interest in the topic. This is because of two recent Landmark cases Tony Nicklinson and Debbie Purdy. These campaigners for the right to die were arguing cases associated with the prosecution of their spouses assisting in their suicide which is illegal under the Suicide Act 1961.

The biggest debate on assisted dying is whether you should have the right to be assisted in dying. This is a very controversial topic which has been contested by new bills presented to parliament such as Lord Falconer's Bill: Assisted Dying (2014).¹ This was the biggest contest ever to the law on assisted dying. The aim for our research project is to highlight issues with the law; analysing where the law that could be reformed. We will look specifically at how medical and public opinions could be considered when amending the law relating to assisted dying.

Current law / Issues with the law

The current law on assisted dying comes from s.2 Suicide Act 1961² which details where one is criminally liable for complicity in another's suicide. S.2(1) states "A person ("D") commits an offence if- (a) D does an act capable of encouraging or assisting the suicide or attempted suicide, and (b) D's act was intended to encourage or assist suicide or an attempt at suicide." S.2(1)(C) goes on to identify that this an offence triable by indictment with a potential maximum sentence of 14 years imprisonment.

Interestingly however, s.2(4) states that "no proceedings shall be instituted for an offence under this section except by or with consent of the Director of Public Prosecutions" suggesting that this crime will not be prosecuted except where it is in the interest of the public to do so.

S.2(4) brings with it an inherent issue – when will this crime be prosecuted? This question was brought before the courts during the case of Debbie Purdy, whom argued that it was within her

¹ 'Assisted Dying Bill [HL] 2014-15' <<https://services.parliament.uk/bills/2014-15/assisteddying.html>> accessed 22 November 2018.

² Suicide Act 1961

human rights to know whether or not her husband was likely to face prosecution should he help her to end her life. In 2009 the House of Lords ruled in favour of Purdy, stating that the law here was unclear. This led to an order for the DPP to release a set of guidelines detailing what factors influence whether a person would be prosecuted – he was to “to clarify what his position is as to the factors that he regards as relevant for and against prosecution”³.

In the following February 2010, DPP Kier Starmer, released the prosecution guidelines for this offence. They are as follows:

Prosecution is more likely if the person committing suicide was:

Under 18

Lacked capacity to make an informed decision to end their life or

Physically able to end their life without assistance.

The assister is more likely to be prosecuted if they:

Had a history of violence or abuse against the person they assisted

Were unknown to the person

Were paid by the person committing suicide or

Were acting as a medical doctor, nurse or other healthcare professional.

Many people in the UK find issue with this law, and believe we are in need of change. Many believe that the act is now outdated for a more secular era. With increasing access to new medical technologies, we now have options to ease the terminally ill into end of life.⁴

Proposed Reforms

Lord Falconer first brought the issue of assisted dying to the House of Lords in June 2013 and was debated for a period of over two years until time constraints due to the 2015 General Election caused the progress of the bill to be put on hold.

³ Dignity in Dying, *Prosecution policy*. Available at: <<https://www.dignityindying.org.uk/assisted-dying/the-law/prosecution-policy/>> accessed 19 November 2018

⁴ibid

Lord Falconer's bill was inspired by, and partly based on, the Death with Dignity Act which was passed in the US state of Oregon in 1997, and proposed, among other things, to legalise assisted dying for "terminally ill but mentally competent" adults in England and Wales.

Under Lord Falconer's proposal "A person who is terminally ill may request and lawfully be provided with assistance to end his or her own life." However this was subject to stringent conditions. This was only applicable where:

The person has a clear and settled intention to end his or her own life;

The person has made a declaration to that effect; and

On the day the declaration is made the person is aged 18 or over and has been ordinarily resident in the UK for at least 1 year.

For the purposes of this bill, the term "terminally ill" refers to an illness that "has been diagnosed by a registered medical practitioner as having an inevitably progressive condition what cannot be reversed by treatment, and as a consequence of that terminal illness, is reasonably expected to die within six months." It should also be noted that treatment which relieves symptoms is not to be considered treatment which is reversible.

Rob Marris' bill proposed in 2015, was an extension of this – proposing the same ideas as Falconer, this made it to a second reading where it was defeated after a four hour debate.

We believe these proposals provided a realistic and reasonable change to the current law, which would be effective in providing a just and dignified end for those who are terminally ill, whilst still being grounded within reality, and not unnecessarily opening proverbial flood gates that would make the law too liberal.

There is however a slight discrepancy as to whether this should be considered significant change. Cases where the individual seeking help to die is completely paralysed and has a very low standard of living are not accommodated for by these proposals.

Medical

In terms of medical opinions on assisted dying, they are varied. Statistics show that "54% of GPs are supportive or neutral to reform on assisted dying"⁵. Stemming from that poll, it was

⁵ Dignity In Dying, *Public Opinion*. <<https://www.dignityindying.org.uk/assisted-dying/public-opinion/>> accessed 23 November 2018.

also said that “87% of people say an assisted dying law would increase or have no effect on their trust in doctors”⁶.

Building from this “The BMA - the union which represents thousands of doctors – officially opposes all forms of assisted dying, which it says would have a ‘profound and detrimental’ effect on the doctor-patient relationship”⁷.

If we consider medical opinions paramount, this could be used as an argument against reforming the law. Despite the slight majority supporting reform, the potential impact on the doctor-client relationship could be considered to do more harm than good.

Adversely, in the book *Death, Dying and the Law*, assisted dying is referred to in both positive and negative lights. It states “Death is perceived by some medical staff as a failure of their skills. If, however, they merely prolong the inevitable and the patient is not allowed to die with dignity, they are clearly not acting in the best interests of the patient”⁸. This provides an insight as to why doctors may be against a reform – although the reasoning could be considered selfish. More importantly, this quote suggests that in certain scenarios it is within the best interest of the patient for assisted dying to be an option, providing an argument in favour of reform.

As you would expect with all such morally ambiguous topics, the question surrounding the law on assisted dying has been subject to many reflective articles presenting arguments from both sides about the need for reform in this subject.

Sheila McLean, a Professor of Law and Ethics in Medicine provides a well-reasoned and detailed analysis on both sides of the debate on the need for state control over assisted dying in her article: *Assisted dying: Reflections on the need for law reform*.⁹ McLean details the basis for both sides, those whom believe that sanctity of life should prevail over all else, and on the other hand those who believe that an individual’s quality of life is more important than this, and that their freedom as an individual should grant them the right to do as they see fit. She then further goes on to analyse the reasons behind both of these standpoints; eventually drawing to the conclusion that “The primary consequence of this is that we must try to identify how we

⁶ Dignity In Dying, *How Will Assisted Dying Impact The Relationship Between Doctors And Patients?* <<https://www.dignityindying.org.uk/key-question/assisted-dying-impact-relationship-doctors-patients/>> accessed 23 November 2018.

⁷ ‘Should You Have The Right To Die?’ (*BBC Guides*, 2018) <<http://www.bbc.co.uk/guides/z849cwx>> accessed 23 November 2018.

⁸ Nicholas A. Pace, ‘The Practitioner’s View, in Sheila A.M. McLean (ed) *Death, Dying and the Law* (Dartmouth Publishing Company Limited 1996) 6

⁹ Sheila McLean, *Assisted dying: Reflections on the need for law reform* (Routledge 2007)

can accommodate the views of each side of this debate – and those somewhere in the middle. At the same time, I have argued that we must strive to minimise harm and maximise liberty.” In summary she believes that the individual’s freedom should win out, and that there is a need for reform on the current law of assisted dying in the UK.¹⁰

Public

There remain a vast array of public opinions on assisted dying reform. We should begin by recognising that social attitudes to such stigmatised issues such as this are becoming increasingly liberal. To the majority of the public, the ideas around assisted dying in the Suicide Act 1961 are becoming increasingly outdated.

It has been shown in recent polls carried out by the charity organisation ‘*Dignity in Dying*’ that the public are massively in favour of a change in the law. These opinion polls show that 82% of the public support the choice of assisted dying for terminally ill adults¹¹ - an overwhelming majority, especially when compared to the 54% of GPs – this begins to raise the question: whose opinions should be respected more when approaching proposed reforms? Public or professional.

One of the reasons for this change in attitude could be attributed to religion. All mainstream religions reject assisted dying outright, in all of its forms. When the act was passed in 1961 a large amount of the public may have opposed the idea of assisted dying on religious grounds. In the modern day the UK has undergone a large amount of secularisation, and the religious influence over this topic has been diluted. This too suggests that the law on assisted dying is somewhat archaic and in need of reformation.

A comparative example to this could be the law on abortion, and how it was reformed to match changing public opinions. Similarly to the assisted dying law, this was a largely taboo subject during the 20th century. In accordance with changing public attitudes however, abortion was legalised under the Abortion Act 1967.¹² This could set somewhat of a precedent for how the law on how we should go about reforming the law on assisted dying to match the public’s interest.

¹⁰ *ibid*

¹¹ Dignity In Dying, *Largest Ever Poll on Assisted Dying Shows 82% of Public Support Lord Falconer’s Proposed Change in the Law*, (4th April 2015) < <https://www.dignityindying.org.uk/news/poll-assisted-dying/> > accessed 15 November 2018

¹² Abortion Act 1967

There are two cases within the last decade that attracted a lot of media attention and evoked an emotive response around this issue from the general public.

Debbie Purdy's case was one of the most successful of its kind, as detailed earlier she successfully won a legal battle with regards to the guidelines on assisted suicide. Debbie Purdy who herself suffered from primary progressive multiple sclerosis required this information so she could make an informed decision on whether to ask for her husband's assistance in travelling to the Dignitas clinic in Switzerland where it was lawful.¹³ The case was one in the House of Lords where she argued that it was a breach of her human rights not to know whether or not her husband would be prosecuted.¹⁴ The publishing of the Interim Report by the DPP followed this victory.

Tony Nicklinson's case however was not as successful but still attracted mass amounts of media and public attention. Nicklinson's case brought to light one of the key issues of reform.

Tony Nicklinson suffered from a stroke and was paralysed from the neck down, he began the legal proceedings in 2010 taking the case on whether or not his wife would be prosecuted if she injected him with a lethal dose of drugs as he did not want to live this way for another 20 years. He gave evidence before the commission of human rights saying that there is a "fundamental injustice with the present law".¹⁵

Conclusion

To summarise, it is indisputable that there is an exigent need for reform on the current law on assisted dying. The friction within our group arises when debating whether Lord Falconer's proposals are adequate in giving those in need dignity in death, or should they be further expanded to encompass all those with a such a low quality of life, they consider it no life, a second class life, rather than just those with a "terminal illness" as defined in Falconer's/Marris' bill.

Weighing up the arguments presented by medical professionals against the prominent opinions of the general public, there is an obvious and clear division.

¹³ R. v DPP [2009] UKHL 45

¹⁴ Afua Hirsch, "Debbie Purdy Wins "Significant Legal Victory" On Assisted Suicide" (*The Guardian*, 2009) <<https://www.theguardian.com/society/2009/jul/30/debbie-purdy-assisted-suicide-legal-victory>> accessed 16 November 2018.

¹⁵ "Tony Nicklinson's Legal Fight For Right To Die" (*BBC news*, 2012) <<https://www.bbc.co.uk/news/uk-england-wiltshire-19341571>> accessed 16 November 2018.

The general consensus of medical professionals is that reform is the wrong call in terms of assisted dying. This is made evident by the BMAs outright opposition of assisted dying, and the fact that GPs generally believe that allowing this reform would damage the doctor-patient relationship, and many doctors could perceive this as a failure of their skills.

On the other hand, there is the clear outcry for change in favour of reform coming from the general public. With more prevalent and emotive cases, such as those of Debbie Purdy and Tony Nicklinson, surrounding the issue at the forefront of the mainstream media. Regardless of the relative success of these cases, they highlighted the abundantly obvious change in the attitudes of today's society.

The question becomes whose opinions do we consider more valuable? The reasoned and experienced views of medical professionals, or the democratic rule of the general public. For whose views should we provide greater accommodation?

As a group we align ourselves more with the well-reasoned opinions of medical professionals, through years of experience and a wealth of knowledge, they can view the argument from both an ethical standpoint, and from what will be in the patient's best interest – a more educated standpoint. However this is not to say that we disagree with the public view that reform is needed, and this opinion should still be held to a high regard when considering to what extent medical and public opinion should be considered when amending the law relating to assisted dying.

What does the fox say?

Ethics

- The Hunting Act 2004 helps maintain my welfare as hunting 'seriously compromises' it. The act recognises that causing me to suffer for sport is unethical and should, as far as it is practical, be stopped.
- Fox hunting is a blood sport which involves inflicting unnecessary suffering on my kind for human entertainment.
- This is unethical as hunts consist of hounds being directed to seriously injure me.
- However, the Hunting Act does not fully help to maintain my welfare as it 'does not impose a complete blanket ban, on hunting'. Exemptions to hunting specified in Schedule 1 of the Hunting Act enables hunters to kill me if they hunt for purposes specified such as to flush me out to prevent me from damaging your livestock.
- Although my family may cause damage, to react by hunting me surely is extremely unethical? Other methods could be used to keep me away. The Hunting Act does help maintain my welfare, but the act does not specifically mention why hunting me is unethical as it is not Parliament's duty to impose their moral views.

Recommended reforms

- To more adequately prevent the killing of foxes, we recommend that the Hunting Act 2004 should be amended as follows:
- Sentencing powers should be increased to reflect other animal welfare legislation penalties, such as the Wild Mammals Protection Act 1996. By having a maximum penalty of 6 months imprisonment for committing an offence, this will help successfully deter wealthy hunters from continuing to hunt.
 - An attempted hunting offence should be implemented into the act. This will deter hunters from killing us if they know that they could be prosecuted for attempting to hunt, even if they do not end up hunting.
 - Regarding the exemptions to hunting specified in Schedule 1, such as hunting to protect livestock, it should be specified that hunting shall be the last resort. By forcing landowners to use alternative methods to keep us away, this can reduce the unnecessary killing of foxes. We believe that these reforms will help deter active hunters from killing us.

History

- I just want to give a big thank you to groups such as the RSPCA and IFAW, who pressured the government into implementing the Hunting Act of 2004 which 'prevents or reduces unnecessary suffering to wild mammals'. This is a piece of legislation which helps save the lives of me and many other innocent foxes.
 - Let me take you back on a little journey:
- Early 16th Century: My ancestors were regarded as vermin and were often hunted by farmers and other landowners as a form of pest control and for our highly prized fur. I'm no pest!
- Early 18th Century: The killing of my ancestors developed into a sport, we were being hunted on a daily basis for human pleasure.
 - 19th Century: The killing continues and becomes even more popular.
 - We've been through many struggles, hunted by the rich and the poor for entertainment purposes. But I am thankful to those who began to oppose this degrading and barbaric treatment and as a result, the hunting of foxes with hounds is now illegal.
- We have a lot of support from the public. These statistics from 2017 show that 85% of people think that fox hunting should remain illegal which is an increase from a poll that was conducted prior to the act, where 61% were in favour.
- This shows that public perception has changed towards me which could show a correlation between the law and its effects on social attitudes.

Cases

- Although we would prefer to be hidden away from humans, it does come in handy to be protected by cameras, especially when there are hunters around. There have been many successful prosecutions by our supporters such as the RSPCA and IFAW using the Hunting Act 2004.
- In September 2013, D pleaded guilty to hunting a fox with dogs contrary to S.1 after being caught on camera by the IFAW and faced a £500 fine. Similarly, in August 2013, 4 members of a hunting group pleaded guilty under S.1 after being filmed by the LACS hunting foxes with dogs and faced financial penalties. These cases suggest the Hunting Act 2004 effectively prosecutes those caught hunting us foxes.
- In DPP v Wright (2009), D was convicted under S.1 for hunting foxes with the use of dogs. He claimed that he was doing it to flush the fox out, which is one of the exemptions to the act and that he was not at the time of arrest hunting any foxes and so was not criminally liable. Therefore they were unable to disprove that D's hunting was exempt.
- This proves that there is loopholes in the law where hunters can avoid prosecution so we believe this act needs reforming to protect all wild mammals.

The Act itself

- The Hunting Act 2004 is my favourite wildlife legislation in the UK. It was created to protect my rights and came in the force in 18th February 2005. Under S.1 of the Hunting Act 2004, hunting me or my family with dogs is a criminal offence.
- There are four specific sections that relate to me:
 - S.1 - Makes illegal to hunt us or any other wild mammal with use of dogs
 - S.2 - Specifies exemptions to hunting are specified in Schedule 1
 - S.3(1) - Prohibits permitting land to be used for hunting purposes
 - S.3(2) - Prohibits permitting a dog to be used for hunting purposes
 - S.6 - Punishes horrible hunters which have killed us can lead to a summary offence which does not exceed the level 5 standard scale of a fine which is up to £5000.
- We believe that S.6 is not a big enough deterrent as it is predominantly an upper class sport. Therefore we believe that S.6 should be reformed to enforce a higher penalty which will deter the humans.

References

- Hunting Act 2004,
- Wild Mammals Protection Act 1996,
- DPP v Wright (2009) EWHC 105 (Admin); [2010] QB 224
- Home Office, Report of Committee of Inquiry into Hunting with Dogs in England & Wales (Cm 4763, 2000),
- Iona Cheyne and John Alder, 'Environmental Ethics and Proportionality: Hunting for a Balance', [2007], Env L. Rev., 9(3), 171-189,
- Historic UK, 'Fox hunting in Britain', <<https://www.historic-uk.com/CulturesUK/Fox-Hunting-in-Britain/>>, accessed 10 November 2018,
- IFAW, 'Successful prosecutions', <<https://www.ifaw.org/united-kingdom/our-work/banning-hunting-dogs/successful-prosecutions>>, accessed 21 November 2018
- League Against Cruel Sports, 'The Hunting Act 2004: Ten years on', November 2014, <<https://www.league.org.uk/Handlers/Download.ashx?DMF=ae3b8c54-0896-44e8-8165-e47b0730532c>>, accessed 19 November 2018, pg 11
- League Against Cruel Sports, 'Opposition to fox-hunting remains at an all-time high' (26 December 2017), <<https://www.league.org.uk/News/opposition-to-fox-hunting-remains-at-an-all-time-high>>, accessed 10 November 2018



Does the Hunting Act 2004 adequately prevent the killing of foxes?

Foxes have been hunted for decades in the United Kingdom due to it being an essential part of British culture. However, nowadays the public are strongly against fox hunting. This is evident from The Hunting Act 2004 (Act 04) being enforced to protect wild mammals. Despite the Act being in effect there have been cases where suspected hunters have gotten away with being convicted of hunting as a result of loopholes within the current legislation. Therefore in order to improve the effectiveness of the Act it must be built upon. Through analysing the Act itself alongside cases, ethical issues of hunting and changing social attitudes, we will consider whether the Act can be altered so that it can adequately prevent the killing of foxes.

The Act 04 came into force in February 2005 and became a popular and controversial piece of legislation in the UK. It was influenced by the Scottish law: Protection of Wild Mammals Act 2002. The Act 04 was designed to make chasing and deliberately killing wild mammals with use of dogs illegal (S.1) and to improve wildlife in England and Wales.

The offences are specified in following sections:

S.1 states that a person commits an offence if he hunts a wild mammal with dogs.

S.3 makes it illegal to permit land to be used for hunting and to use dogs for hunting.

S.6 any person found guilty under Act 04 will be subject to penalties. The maximum available penalty is a fine up to £5000¹.

¹ *Friend V United Kingdom [2009]* 11 WLUK 569; (2010) 50 EHRR SE6, at 70

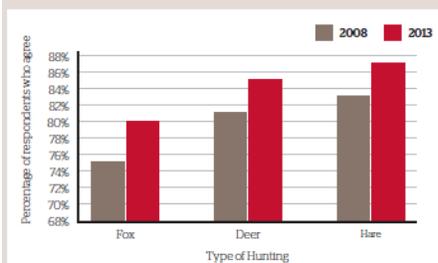
This research report focuses mainly on fox hunting. As presented in the diagram² it has been influenced by public pressure. Although Act 04 consists of 17 sections, only 4 sections relates to fox hunting which leaves an extensive gap in the law. This suggests that creation of this act was rushed as it does not cover all types of hunting used to kill foxes. Such exemptions to unlawful hunting is specified in S.2 Schedule 1 as follows:

- Flushing out foxes to prevent or reduce serious damage to livestock³
- Falconry⁴ (using birds to hunt)
- Rescue of wild mammal⁵
- Research and observation⁶ (hunting for research)

Therefore the Act 04 has contributed towards preventing fox killings as shown by the number of successful prosecutions e.g. 52 people were convicted in 2017⁷. However to ensure that Act 04 prevents hunters from avoiding prosecution through loopholes, it must be amended to make the

Figure 2. Figures from Ipsos Mori polls commissioned by the League in 2008 and 2013. Unweighted sample sizes: 2008 = 2,032; 2013 = 1,983.

Hunting with dogs should remain illegal



League Against Cruel Sports, 'The Hunting Act 2004: Ten years on', November 2014 <<https://www.league.org.uk/Handlers/Download.ashx?IDMF=ae3b8c54-0896-44e8-8165-e47b0730532c>> accessed 19 November 2018, pg 11

³ Hunting Act 2004, Sch 1, para.1

⁴ Ibid. para.6

⁵ n.3, para.8

⁶ n.3, para.9

⁷ Parliament UK, Lucy Frazer, <<https://www.parliament.uk/business/publications/written-questions-answers-statements/written-question/Commons/2018-06-06/150579/>> accessed 19 November 2018

criteria for criminal liability more strict. Furthermore, as hunting is predominantly an upper class sport, the maximum penalty does not effectively prevent fox-hunting as this is not a major deterrent to them because of their wealth. Therefore the punishment for being convicted under Act 04 must be increased. The League Against Cruel Sports (LACS) suggests that sentencing powers should be increased to ‘*be in line with the Protection of Badgers Act and Wild Mammals Protection Act, with a maximum penalty of six months imprisonment*’⁸. This reform to S.6 of Act 04 is reasonable as it would put a bigger deterrent in place to prevent upper class hunters from continuing to kill foxes.

Recent hunting cases have had different outcomes, suggesting that the effectiveness of Act 04 in adequately preventing fox killings varies according to the facts of the case. In a case brought privately by RSPCA in September 2013, D pleaded guilty to hunting a fox with dogs contrary to S.1 after being caught on camera by the IFAW⁹ and faced a £500 fine. Similarly, in August 2013, 4 members of a hunting group pleaded guilty under S.1 after being filmed by the LACS hunting foxes with dogs¹⁰ and faced financial penalties. These cases suggest that Act 04 quite effectively prosecutes those caught hunting foxes.

The *RSPCA V McCormick [2016]*¹¹ case suggests that penalties under Act 04 should be increased. D was convicted under the Animal Welfare Act 2006. However, his conviction was dropped using a loophole as to be held liable the dogs had to be in the presence of mammals, which was not the case here. The court stated that the penalty for animal fighting is harsher under the 2006 Act than

⁸ League Against Cruel Sports, ‘Strengthening the Hunting Act’, <<https://www.league.org.uk/hunting-act>> accessed 19 November 2018

⁹ BBC, ‘Somerset man pleads guilty to hunting fox with dogs’, <<https://www.bbc.co.uk/news/uk-england-24077013>> accessed 21 November 2018

¹⁰ IFAW, ‘Successful prosecutions’, <<https://www.ifaw.org/united-kingdom/our-work/banning-hunting-dogs/successful-prosecutions>> accessed 21 November 2018

¹¹ *RSPCA V McCormick* [2016] EWHC 928 (Admin); [2016] 1 WLR 2641

Act 04 as ‘D can be imprisoned for up to six months and disqualified from keeping animals for life. Under the Hunting Act, only financial penalties are available, with no risk of disqualification’¹². This suggests that having stricter penalties for hunting will make Act 04 more effective as it will be a stronger deterrent to wealthy hunters.

However, by relying on loopholes and hunting exemptions, hunters can avoid prosecution. In *DPP v Wright [2009]*¹³, D was convicted under S.1 for hunting foxes with dogs, which he claimed he was doing to flush the fox out, one of the exemptions to hunting. D appealed on the basis that although he may have had the intent to hunt, he was not, at the time of arrest, hunting any foxes and so was not criminally liable. Consequently, the appeal was allowed as the prosecution failed to disprove that D’s hunting was exempt. The literal approach to statutory interpretation allowed D to avoid liability as the wording of ‘Stalking a wild animal or flushing it out’¹⁴. The Crown Court ruled that ‘you do not...stalk an unidentified wild mammal by merely searching for it...the use of the words “it” requires that the wild mammal has been identified’¹⁵. Here D had not identified a fox to hunt so his charges were dropped because ‘hunting’ implies pursuing a fox, which D had not done. It was also said that ‘A person who left home intending to search for a fox might in a sense be going hunting, but he was not at that moment hunting because the wild animal had not yet been found’¹⁶.

This case implies that Act 04 is not fully effective in preventing fox killings because by allowing D’s appeal, the court provided D with another chance to kill foxes. It is evident that attempted

¹² *ibid.* At 2647

¹³ *DPP V Wright* [2009] EWHC 105 (Admin); [2010] QB 224

¹⁴ n.3

¹⁵ n.13 at 234

¹⁶ *Ibid.*

hunting is not a criminal offence under Act 04 which is problematic as it gives hunters a loophole, a chance to avoid conviction in a situation where, if they had not been caught, would have hunted the fox anyways. This gap in Act 04 must be reformed to include an attempted hunting offence. This proposed reform would be likely to work as it will deter hunters from killing foxes if they know they will be held criminally liable for attempting to hunt even if they do not end up hunting.

There are several reasons as to why Act 04 was introduced. Years of pressure from groups such as the RSPCA and IFAW forced the government into implementing an act which would '*prevent or reduce unnecessary suffering to wild mammals*'¹⁷. However, farmers and landowners may still protect their livestock by eliminating wild mammals which may be a threat.

Prior to the introduction of the Act, animals such as foxes were regarded as 'vermin' and were often hunted by farmers and other landowners as a '*form of pest control (both to curb their attacks on farm animals and for their highly prized fur)*'¹⁸. It wasn't until the eighteenth century where fox hunting developed into its most modern incarnation and '*was considered a sport*'¹⁹; as a result of the decline in the deer population. Foxhunting continued to grow in popularity throughout the nineteenth century. Hunting became associated with kingship where '*large tracts of land were preserved for the king's pleasure as they would hunt a variety of game and even exotic animals imported from abroad*'²⁰. Some historians believe that hunting was critical in displaying royal

¹⁷ The Hunting Act for enforcement professionals, 'The Hunting Act', <<http://www.huntingact.org/hunting/hunting-in-the-uk/>> accessed 21 November 2018

¹⁸ Historic UK, 'Fox hunting in Britain', <<https://www.historic-uk.com/CultureUK/Fox-Hunting-in-Britain/>> accessed 10 November 2018

¹⁹ Ibid.

²⁰ 'How did hunting become a symbol of royalty', <https://dailyhistory.org/How_did_hunting_become_a_symbol_of_the_royalty%3F> accessed 19 November 2018

authority. It was far more than pleasure or sport; it had '*an important social function in establishing not only the kings' power but demonstrating the vitality of the state*'²¹.

These points above highlights social attitudes towards animals throughout time; prior to the implementation of the Hunting Act. Up until this period, there was no consideration to the welfare of an animal but innocent 'creatures' were merely used as a source of entertainment for a large proportion of society. But since the implementation of the Act, have social attitudes changed? Has the Act been successful in preventing and reducing 'unnecessary suffering to mammals'?

Statistics from a poll conducted in 2017²² show that 85% of people think that fox hunting should remain illegal which is an increase from a poll that was conducted prior to the Act, where 61% were in favor. This shows that public perception has changed slightly and could show a correlation between the law and its effects on social attitudes. However, there are still those who still support the hunting of animals E.G trail hunters; which highlights the inconsistencies within the current law. Trail hunters mimic traditional hunting by '*following an animal-based scent trail which has been laid in areas where foxes or hares are likely to be*'²³ and use this as a grey area around the law. Recent news reports²⁴ show that many hunters can get around the Act by replicating live quarry hunting to allow huntsman to train hounds on animal-based scents in anticipation that the

²¹ Ibid.

²² League Against Cruel Sports, 'Opposition to fox-hunting remains at an all-time high' (26 December 2017), <<https://www.league.org.uk/News/opposition-to-fox-hunting-remains-at-an-all-time-high>> accessed 10 November 2018

²³ League against Cruel Sports, 'Trail hunting – the truth', <<https://www.league.org.uk/trail-hunting>> accessed 10 November 2018

²⁴Mattha Busby (26th December 2017), 'Fox hunting: activists claim trail-hunts are a cover for continued blood sport', <<https://www.theguardian.com/uk-news/2017/dec/26/fox-hunting-activists-claim-trail-hunts-are-a-cover-for-continued-bloodsport>> accessed 21st November 2018

Act 04 will eventually be repealed, and if they come across a fox by accident then they are not liable.

Others that support the hunting of animals include high-profile figures such as Theresa May, who recently attempted to legalise fox hunting. This could show a link between social backgrounds and their attitudes in society. It is apparent that those who are pro-hunters are mostly from upper-class backgrounds and in previous decades were the ones that hunted for daily entertainment E.G Kings and Dukes.

So, the Act has been successful in reducing the amount of people that kill foxes, however it has not successfully prevented hunting which is evident as foxes are still being hunted by trail hunters. This could be because the Act has not been successful in changing social attitudes and therefore it will never be fully effective until social attitudes change. Whilst most of the public are against fox hunting the attitudes of the upper class have supposedly not changed, as evident in the number of prosecutions each year²⁵.

The ethical issue which surrounds fox hunting is maintaining animal welfare. As YouTube videos²⁶ provides guidance on how to hunt while avoiding the law, this suggests that Act 04 requires more restrictions to reduce fox killing. In the report following the Burns Inquiry, a government inquiry set up to discuss hunting with dogs, the committee found that hunting foxes with dogs '*seriously compromises the welfare of the fox*'²⁷. Anti-hunting groups, such as the LACS, discourages hunting because it is a blood sport. During hunts, foxes suffer death from the

²⁵ n.7

²⁶ YouTube, 'How to break the hunting act and get away with it', <<https://www.youtube.com/watch?v=iNHrLWiqxqk>> accessed 21 November 2018

²⁷ Home Office, *Report of Committee of Inquiry into Hunting with Dogs in England & Wales* (Cm 4763, 2000) para 56

infliction of serious injuries from hounds. Recent statistics²⁸ on public opinions of hunting corroborates the view that fox-hunting is unethical because it causes unnecessary suffering.

A problem that Act 04 presents is that it does not impose a complete ban on hunting, as schedule 1 of the Act provides nine exemptions. This can be explained by the fact that the statutory aim of the Act 04 is *'to prevent or reduce unnecessary suffering to wild mammals'* and that *'causing suffering to animals for sport is unethical and should, so far as practicable and proportionate, be stopped'*²⁹. As schedule 1 highlights the practical aspects of exempt hunting, such as pest control, *'the exemptions seem to dilute the ethical standpoint of the Act with a utilitarian element'*³⁰. This view is reasonable as the Burns inquiry was not set up to *'consider moral or ethical issues'*³¹ of hunting. The main purpose was to explore the practical aspects of hunting regarding the rural economy, countryside culture and the management of wildlife³². This suggests that Parliament did not consider it reasonable to explore the ethical issues of hunting in detail in the Act³³. This implies that The Hunting Act does not adequately prevent the killing of foxes as it does not fully emphasise the importance of protecting foxes from harm. Rather the exemptions seem to promote an increase in using different methods to kill foxes such as trail hunting. On the other hand, the idea that the Act does not focus solely on enforcing the ethical implications of fox-hunting is beneficial as the role of the Parliament is to create legislation without imposing their own moral values into it.³⁴

²⁸ n.22

²⁹ n.2, at pg 5

³⁰ Ilona Cheyne and John Alder, 'Environmental Ethics and Proportionality: Hunting for a Balance', (2007) 9(3), Env L. Rev. 171, 174

³¹ n.27, at para 2

³² *ibid.*

³³ n.30 at 183

³⁴ n.30, at 188

The exemptions to hunting are reasonable as protecting livestock is essential for farmers to make their livelihood.

However, in order to adequately prevent the killing of foxes, a compromise should be implemented in the Act 04 between the utilitarian aspect of hunting foxes and the ethical value of preventing fox cruelty. Farmers who want to protect their livestock from foxes should ensure that alternative methods are used to keep foxes away. The LACS suggest that secure electric fences can be used to protect livestock³⁵. This alternative may ensure that animal cruelty is reduced, thus fulfilling the statutory aim of the hunting act.

To conclude, the Act 04 is an effective law as there were 52 successful prosecutions in 2017³⁶. IFAW has contributed to this by filming the hunts which has acted as a deterrent ensuring that people abide by the law³⁷. However, the burden of proof is difficult because cases require video footage where a fox is in plain sight and the hounds are being encouraged by the huntsman to hunt by not calling the hounds back or sounding the horn, which makes it difficult to even stand a chance for a prosecution.

Also there are still issues with enforcement as loopholes in Act 04 are consequently exploited so people can avoid prosecution. In order for Act 04 to adequately prevent the killing of foxes the Act needs to be amended to lessen exploitation of the Act. Recommended amendments include: making attempted hunting unlawful as this is not specified in Act 04; make the penalties stricter and to re-write hunting exemptions (s.2) while removing the research and observation exemption.

³⁵ League Against Cruel Sports, 'Fox-Hunting', <<https://www.league.org.uk/fox-hunting>> accessed 10 November 2018

³⁶ n.7

³⁷ n.10

These reforms are essential as stricter criteria for criminal liability and higher penalties may help to deter those who actively partake in hunts.

The Surrogacy Arrangements Act 1985

To what extent does the current law on surrogacy infringe on parental rights?

Current law

The woman who gives birth is always treated as the mother in UK and has the right to keep the child, even if they're not genetically related.

A parental order is applied for through the family courts and it transfers parenthood from the surrogate to the intended parents with the surrogates

consent. Until parental orders are granted, which is not done until six weeks after the birth, the parents are not permitted to make any medical decisions.

Due to the law in the UK restricting commercial surrogacy, parents may turn to international surrogacy agreements, which leads to the exploitation of international surrogates as they are often being paid as low as 1/10th of the price than those in the UK.

Another way the law infringes on parental rights it that there are no laws in place to provide guidance when the child is refused by intended parents.

Reform

One way the law has been reformed is by the introduction of legislation which has enabled a single person to apply for a parental order if they are an intended parent in respect of a surrogacy arrangement.

In the 13th programme of the Law Reform, the Law Commission have identified possible issues surrounding the law on surrogacy, these include, how the law is regulated, the exploitation of surrogates and parental orders.

Changes to the Human Fertilisation and Embryology Act 2008 allows for the surrogate and intended parents to grant legal parenthood to the IP immediately at birth. Therefore, narrowing the gap of 12 months which is what the IP's would normally have to wait before they are the legal parents.

In conclusion, our research found that the surrogacy rules that were first introduced 30 years ago are not fit for purpose. Due to the growing concerns the government have agreed to fund independent bodies and attempt to make sure that the UK has laws which work for the modern world.

All information cited in our report
Image from:
Surrogacy. (2016, June 29).
Retrieved from
CBC:
<http://www.cbc-network.org/2016/06/writing-a-book-on-surrogacy/>

Annabelle Poole, Hannah Pearman, Ellie Pook, Gledisa Qokthi, Jasmine Rushworth

Surrogacy is the act of a woman bearing a child for another person/couple who are unable to carry a child themselves¹. Sometimes this can be the only way for people to have a child genetically and therefore is commonly used. This process is governed by The Surrogacy Arrangements Act 1985² and some provisions of the Human Fertilisation and Embryology Act 1990-2008³. This is an area of law which has provoked controversy and is in need of being critically examined. The Law Commission have identified possible issues surrounding the law on surrogacy, these include, how the law is regulated, the exploitation of surrogates and parental orders⁴. Until parental orders are granted, which is not done until six weeks after the birth of the child, the parents are not permitted to make any medical decisions about their child. The Law Commission have looked into these areas in the Law Commissions 13th programme of law reform⁵. As a group, we have researched into these areas but also expanded our research to see what happens if the surrogate mother or parents die, if the surrogate mother changes her mind and wants to keep the child and if the parents refuse the child/abortion rights.

The woman who gives birth is always treated as the mother in UK law and has the right to keep the child, even if they're not genetically related⁶. An example being in the case of *AB v CD*⁷, the surrogate mother and her husband remained the legal parents to the child despite the baby living with the biological mother and her new husband. This was because the biological parents didn't know they had to apply for a parental order before they divorced. This therefore infringes on their rights as parents because despite being the biological and intended parents, agreed by both them and the surrogate, legally they are not due to a misunderstanding. The court was frustrated that it was prevented from making parental orders which explicitly recognised the biological parents as the legal parents⁸. Surrogacy contracts are not enforceable in the UK⁹ so if the surrogate changes her mind before a parental order has been signed, she is the legal parent. A parental order is applied for through the family courts and it transfers

¹ Law Commission, *Making Surrogacy Laws that work for the parents, the surrogate and, most importantly, the child* (Law Commission consultation paper to be published in 2019)

² The Surrogacy Arrangements Act 1985

³ The Human and Fertilisation Act 1990-2008

⁴ Law Commission, *Surrogacy laws set for reform as Law Commissions get Government backing* (4th May 2018) <<https://www.lawcom.gov.uk/surrogacy-laws-set-for-reform-as-law-commissions-get-government-backing/>> accessed 09/11/2018

⁵ Law Commission, *Making surrogacy laws that work for the parents, the surrogate and, most importantly, the child*, available at <<https://www.lawcom.gov.uk/project/surrogacy/>> accessed 09/11/2018

⁶ Home Office, 'Surrogacy: legal rights of parents and surrogates' <<https://www.gov.uk/legal-rights-when-using-surrogates-and-donors>> accessed 09/11/2018

⁷ [2018] 4 WLUK 178

⁸ Ibid [Summary]

parenthood from the surrogate to the intended parents with the surrogates consent¹⁰. In the case of C, D v E, F, A, B¹¹ the surrogate changed her mind and did not want to hand over consent to the intended parents. Without the respondent's consent the application for a parental order comes to a juddering halt. The result is that these children are left in a state of legal uncertainty, where, contrary to what was agreed by the parties at the time of the arrangement, the respondents will remain their legal parents even though they are not biologically related to them and they expressly wish to play no part in the children's lives¹². The Law Commission has recently announced that surrogacy may be included in their next programme of law reform and have invited responses as to whether this should be an area that is included¹³. The intended parents are a couple who can not have children so turn to surrogacy as a way to start a family. At least one of the intended parent's in the couple must be a genetic parent to the child¹⁴. The Government has introduced legislation to change the law, so that a single person will also be able to apply for a parental order to transfer legal parenthood to them if they are an IP in respect of a surrogacy arrangement¹⁵. Once the child is born and a parental order has been granted, the intended parents are now the legal parents of the child and have the right to parental leave. In 2014 the government passed legislation to give IPs in a surrogacy arrangement the right to adoption leave and pay¹⁶. After the child is born, it is up to the legal parents, whether this be the intended parents or the surrogate, to tell the child about the surrogacy. The most recent change to the law was brought in by changes to the Human Fertilisation and Embryology Act 2008 on October 1st, 2013. This change allows for the surrogate and intended parents to grant legal parenthood to either of the intended parents immediately at birth. This is made possible through completion of various parental order forms, however, this has to be before the surrogate undergoes the fertility treatment. This gap between birth and Parental Order is normally a gap of up to twelve months, this latest change has narrowed this, but, has not replaced Parental Orders. This is because it cannot grant legal parenthood to the intended parents or terminate the surrogate's legal parenthood¹⁷.

¹⁰ Health Ethics, Population Health, Global & Public Health, cost centre 10800, 'The Surrogacy Pathway: Surrogacy and the legal process for intended parents and surrogates in England and Wales' (2018), 19

¹¹ [2016] EWHC 2643 (Fam)

¹² Ibid [paragraph 9]

¹³ Ibid [paragraph 12]

¹⁴ Health Ethics, Population Health, Global & Public Health, cost centre 10800, 'The Surrogacy Pathway: Surrogacy and the legal process for intended parents and surrogates in England and Wales' (2018), 5

¹⁵ Ibid [page 5]

¹⁶ Ibid [page 22]

¹⁷ Robin Charrot, 'What do you need to know about surrogacy?' (2014) 1 P.C.B. 2014 39-43

Another issue regarding the law on surrogacy is the exploitation of surrogates. In the UK, commercial surrogacy has been made illegal under the Surrogacy Arrangements Act 1985, which states that surrogacy may only be carried out “informally, unregulated, and without any support from a third party”¹⁸. This area of law is also dealt with by some provisions of the Human Fertilisation and Embryology Act 2008. The law states that surrogacy arrangements must be negotiated solely by the surrogate and commissioning parents¹⁹. Due to the law in the UK restricting commercial surrogacy, parents may turn to international surrogacy agreements²⁰. This can then lead to the exploitation of the international and often poorer surrogates. As low as 1/10th of the price that intended parents would have been willing to pay in their originating country is paid to international surrogates²¹. For example, research has shown that around 1000 babies are born in India to UK parents per year²². This means the underprivileged women are risking their health – and lives possibly – through exploitation²³. One way in which surrogate mothers in the UK are protected is that they have the freedom to change their mind about giving the child to the intended parents, because they are the legal parent until they have signed to hand over parental orders²⁴. However, it may be argued that this is exploiting the intended parents as they are the biological parents but aren’t legally allowed custody of the baby if the surrogate just changes her mind. Another way in which the intended parents may be exploited is if the surrogate fakes the pregnancy. A British woman ‘Louise Pollard’ was charged with fraud after being paid thousands of pounds to go through the surrogacy process for different couples and then claiming she had miscarriages. Again, this shows that the law surrounding surrogacy needs to be regulated and be clear for all parties involved to avoid exploitations like this²⁵.

One of the more controversial issues that is raised in regards to surrogacy infringement is the possibility of the parents refusing the child or requesting an abortion of the embryo/foetus. In

¹⁸ Surrogacy Arrangements Act 1985

¹⁹ Ruth Cabeza *et al*, *Surrogacy: Law, Practice and Policy in England and Wales: Chapter 9 The Case for Surrogacy Law Reform Does UK surrogacy law protect surrogates, intended parents and/or children born through surrogacy?* (Family Law 2018)

²⁰ Ruth Cabeza *et al*, *Surrogacy: Law, Practice and Policy in England and Wales: Chapter 7 International Surrogacy and British Nationality and Immigration Law* (Family Law 2018)

²¹ Mrinal Vijay, ‘Commercial surrogacy arrangements: the unresolved dilemmas’ (2014) 3(1) 173 UCL Journal of Law and Jurisprudence

²² Stephen Wilkinson, ‘Exploitation in International Paid Surrogacy Arrangements’ (2016) 33(2) Journal of Applied Philosophy <<https://onlinelibrary.wiley.com/doi/pdf/10.1111/japp.12138>> accessed 29th October 2018

²³ Mrinal Vijay, ‘Commercial surrogacy arrangements: the unresolved dilemmas’ (2014) 3(1) 173 UCL Journal of Law and Jurisprudence

²⁴ Home Office, ‘Rights for surrogate mothers’ <<https://www.gov.uk/rights-for-surrogate-mothers>> accessed 26th October 2018

²⁵ BBC News ‘Fake surrogate mother Louise Pollard jailed’ (June 2014)

most cases this is mainly due to the conception of more than one child or more than what the intended parents desired. The problem therefore is who is responsible for the child as lawfully the surrogate is the mother, however, she may not be biologically related to the child in any way. Prior to the child/children being born an agreement will have been made between the parents and surrogate. Although, in the UK it is not permissible to devise a legally binding surrogacy contract between the two parties involved. Therefore, if the intended parents then refuse the child the surrogate is left the legal mother of a child which she did not intend to be her own nor intent to have to care of. In 2014, a British surrogate was left with a child after it was refused by the intended parents due to the child having a medical condition. Baby Amy was born with Congenital Myotonic Dystrophy which caused breathing difficulties and lack of head control and facial expression. The parents refused to accept Amy yet took home her healthy twin brother a month later. The surrogate is now caring for the child with her partner alongside her other children. Due to the law, the surrogate is the lawful mother of the child so therefore had no option but to care for the child that was not biologically related to her²⁶. Furthermore, there is also the possibility that the intended parents may seek an abortion of the surrogate child before it is born. This could be due to the several different reasons such as medical conditions or refusal due to the financial aspect of caring for the child. The most thought provoking factor of this scenario is whether the autonomy of the mother's body is more significant and therefore it is up to the surrogate to decide whether to terminate the pregnancy, or, if it should be up to the intended parents as the baby is biologically theirs. There is the argument that if the child is disabled, the surrogate can most likely just walk away whereas the intended parents have to care for the child not only physically but socially as the weight of caring for a disabled child can often cause large strain on the parents who care for the surrogate child²⁷. This therefore infringes on parental rights as there are no laws in place to provide guidance when the child is refused by the intended parents.

Another way in which the law on surrogacy infringes on parental rights is if a situation arises whereby the surrogate changes her mind and wants to keep the child. Without a parental order the surrogate is entitled to change her mind and keep the baby at any time. In one case, a surrogate mother changed her mind about handing over the baby to a gay couple but the Court

²⁶ Inderdeep Bains, 'I don't want a dribbling cabbage for a daughter': What mother told her surrogate before rejecting disabled baby girl' (August 26) 2014 <<https://www.dailymail.co.uk/news/article-2734374/Surrogate-mother-twins-gave-birth-disabled-girl-told-woman-intended-child-didnt-want-dribbling-cabbage.html>> accessed 09/11/2018

²⁷ Emily Contreras, 'Surrogacy and Abortion: Whose body, whose baby?' (6 December 2017) <<http://www.publicseminar.org/2017/12/surrogacy-and-abortion/>> accessed 09/11/2018

of Appeal granted the gay couple custody of the baby. Even though the surrogate had the right to change her mind, it was held that this did not mean that the surrogate should keep the child²⁸. This shows the surrogate's rights had been infringed and that the law surrounding surrogacy needs to be clarified. The Human Fertilisation and Embryology Act 1990²⁹ was amended in 2008 which now allows surrogate mothers to keep the child if they wish to do so before the parental order is signed.

Surrogacy is one of the oldest solutions to infertility and in the UK surrogacy laws were written in the 1980's. People who want to become mothers today recognise that the law is out of date and needs to be changed due to its impracticalities.³⁰ In the UK altruistic surrogacy is legal whereas commercial surrogacy is not compared to overseas such as India. Before the change in 2013, the intended parents are transferred their rights under a court process which takes up to a year after the birth. This shown to be problematic and outdated criteria has been reformed. The current law also restricts payments to surrogates to 'reasonable expenses' but in reality, authorise compensation³¹ Furthermore, the law does not show to support a surrogate's commitment to carry a child for someone else. Many organisations have had to close their doors to new intended parents due to the shortage of UK surrogates. In 2005, a surrogate in the UK died shortly after giving birth. Natasha Caltabiano, was 29 and already a mother of two, suffered a ruptured aorta and died from a heart attack. The healthy baby was handed to the parents after the surrogate's death. Critics argue that the 'surrogate has risked her life to gift a couple with a child'. Perhaps if there was a fixed law or a contract to ensure that all parties are cared for in the surrogacy process, these issues would not arise.³² Furthermore, Sarah Jones has been a surrogate for four years. Sarah from Epworth has been back by MP's Brigg and Goole Andrew Percy have said that the current laws that have been set up since the 1980's are 'outdated and inadequate'.³³

²⁸ Olivia Rudgard 'Surrogate mother who changed her mind must hand baby to gay couple, court rules' Telegraph (November 2017)

²⁹ The Human and Fertilisation Act 1990-2008

³⁰ Michael Rose, 'Surrogate mother calls for 'old-fashioned' laws on births to be changed' The Guardian (18th January 2018) <<https://www.theguardian.com/lifeandstyle/2018/jan/18/surrogate-mother-calls-for-old-fashioned-laws-on-births-to-be-changed>> accessed 12 November 2018

³¹ NGA Law, 'How UK surrogacy law needs to change' (2014) <<https://www.nataliegambleassociates.co.uk/knowledge-centre/how-uk-surrogacy-law-needs-to-change>> accessed 12 November

³² Andrew Norfolk 'Surrogate baby battle' The Times (5 February 2005) <<https://www.thetimes.co.uk/article/surrogate-baby-battle-xzdcbcxp3ph>> accessed 12 November 2018

³³ BBC News, 'Surrogate mother and MP: UK surrogacy law 'outdated and inadequate'' (17 January 2018) <<https://www.bbc.co.uk/news/uk-england-humber-42721906>> accessed 12 November 2018

Surrogacy arrangements are continuing to be a popular choice for couples who are unable to start a family on their own. In consequence, the current law is being stretched to a breaking point. High Court judges have described the law as 'irreconcilably conflicting' and 'the very antithesis of sensible' and, in case after case, have called for 'better regulation' of surrogacy in the UK³⁴.

In conclusion, in this research report the aim was to determine if the current law on surrogacy infringes on parental rights. In consequence, it has shown in numerous ways how it does but also how it does not. Thus being, that if the intended parent no longer wants their baby the surrogate has no choice but to be the legal mother. Despite this, ways in which statutes have attempted to solve these issues are also identified, an example being the changes to the Human Fertilisation and Embryology Act 2008 on October 1st, 2013, allowing for the surrogate and intended parents to grant legal parenthood to either of the intended parents immediately at birth. Nevertheless, there are still inconsistencies and more work and reform is certainly needed to ensure that everyone's rights involved in the surrogacy process are protected. From our findings in the report, the surrogacy rules that were first introduced 30 years ago are not fit for purpose and surrogacy is becoming more common. Due to the growing concerns the government have agreed to fund independent bodies and attempt to make sure that the UK has laws which work for the modern world.

³⁴ Brilliant Beginnings, 'UK surrogacy law reform' (2019)
<<https://www.brilliantbeginnings.co.uk/campaigning/simplify-surrogacy-law>> accessed 12 November 2018

Should the laws on involuntary manslaughter in England and Wales be reformed?

Group 3

By L.Todd, K.Usman, F.Tyler, L.Toffolo, A.Temple

Introduction

The Group research focuses on the prevalent issues and the necessary reforms surrounding involuntary manslaughter. There was a general consensus in basing our research question upon the area of criminal law.

Whilst there are 3 distinct categories to involuntary manslaughter these being; Constructive, Gross Negligence, and Reckless manslaughter, the group decided to also provide a separate category for corporate manslaughter a section clearly under the umbrella of all 3 sections.



Research Findings

The law in this area is often ambiguous and therefore unpredictable.

Possible reforms include better sentencing/broader sentencing discretion and codification of the law.

BUT there may be resistance to reform due to the flexibility afforded by current offences.

Results

Constructive Manslaughter

The issues found within constructive manslaughter is the lack of set statute offering definitions or legal principles. Having been developed through common law, leading to uncertainty of the law. An area that exemplifies this issue is the matter of 'one-punch killers', graphically illustrating the common objection that the defendant lacks sufficient moral culpability.

Gross negligence manslaughter

The lack of a clear and precise definition of the law on gross manslaughter has led to issues within gross negligence manslaughter. The issues that prevail is the uncertainty and inconsistency that is failing the justice system, setting unpredictable precedents for defendants. Moreover case law such as Adomako "offers very little guidance as to what is meant by the elusive principle of 'grossness'.

Reckless manslaughter

There is an ongoing academic debate over the term 'reckless'. The Law Commission has stated that whilst 'reckless' causes confusion, they also state that 'there is no other word equally suitable to serve as a label'. Whilst it allows flexibility within the common law, it removes the element of predictability within the law.

Corporate manslaughter

Corporate Manslaughter and Corporate Homicide Act 2007 creates two laws, the corporation is prosecuted under the Act, but managers or directors are still charged with the common law of gross negligence manslaughter which has a very high threshold. Creating two separate trials. If the organisation is found guilty, there are few punishments that are in place, as one individual is not held responsible. This has created an inefficient part of the system.

Reforms & Conclusions

Discretion in sentencing, can reflect nature, context, and seriousness of the unlawful act which caused the death. Moreover by codifying the law, it would allow for clearer definitions for defendants to understand. Furthermore, there must be reform on current legislation which have created ineffective trials. However, some schools of thought believe that the lack of definitions allows for greater flexibility when dealing with such offences, this causes apprehension to change.



R v Adomako [1994] 3 WLR 288

The appellant was an anaesthetist, who, during an eye operation failed to notice the oxygen pipe had disconnected. Due to this the patient died. Adomako was convicted of the manslaughter of the patient by breach of duty.



References

- Corporate Manslaughter and Corporate Homicide Act 2007
- R v Coleman* (Anthony Neville) (1992) 95 Cr. App R 159
- Fenton* [1830] 1 Lew CC 179
- Franklin* (1883) 15 Cox CC 163
- R v Furby* (Andrew) [2005] EWCA Crim 3147
- Larkin* [1943] KB 174
- Law Commission
- Ashworth A, 'Manslaughter by Omission and the Rule of Law' [2015] Crim LR 563
- Mitchell B, 'Minding the gap in unlawful and dangerous act manslaughter: a moral defence for one-punch killers' [2008] J. Crim. L.
- Finch E and Fafinski S, 'Criminal Law' (6th edn, Pearson, 2016)
- Martin J and Storey T, 'Unlocking Criminal Law' (5th edn, 2015)
- Bar Council, 'When Clinical becomes Criminal: Reforming Medical Manslaughter', (The Bar Council) Crown Prosecution Service

Should the laws on involuntary manslaughter in England and Wales be reformed?

Introduction

The laws surrounding involuntary manslaughter construct a confused picture of accountability to possible defendants, with many areas to the spectrum of involuntary manslaughter being created within the law, different branches begin to face varying critiques. With issues ranging from high thresholds resulting in low successful prosecution rates, to lack of definitions within the law depriving the people of certainty and predictability. However, current laws offer unique benefits for the purpose of these crimes, moreover, the criminal justice system may even become damaged through unnecessary reforms.

Constructive Manslaughter

Present Law

The current law on constructive manslaughter lies with the simple definition of an unlawful, positive, criminal act, which caused the death and was dangerous.¹ The requirement of an unlawful act has not always been in place, once being sufficient to only commit a civil wrong, as demonstrated in *Fenton* [1830].² However, this approach has changed and a criminal offence must be committed, 'The mere fact of a civil wrong committed by one person against another ought not to be used as an incident which is necessary step in a criminal case'.³ Furthermore, as it specifies a positive 'act', omissions cannot be used to find the defendant guilty. Finally, the dangerousness of the act must be 'an act which is likely to injure another person'.⁴ The mens rea of constructive manslaughter is explained in *DPP v Newbury and Jones* (1977) and specifies that whilst it must be proved that the defendant intended to commit the unlawful act, there is no requirement that the defendant foresaw that his act may cause death or even harm.

Issues found within present laws

¹ Crown Prosecution Service, 'Homicide: Murder and Manslaughter- Legal Guidance, Violent crime' (The Crown Prosecution Service)

<www.cps.gov.uk/legal-guidance/homicide-murder-and-manslaughter> accessed 14 November 2018

² *Fenton* [1830] 1 Lew CC 179

³ *Franklin* (1883) 15 Cox CC 163

⁴ *Larkin* [1943] KB 174

The issues that constructive manslaughter presents to the modern law include the lack of set statute to offer definitions or legal principles. Having been developed haphazardly through common law, leading to uncertainty over what actually constitutes constructive manslaughter, and whether it should still be used for the full extent of crimes resulting in death, that it currently is. A topic area which exemplifies these issues is the matter of 'one-punch killers' - a current dispute within the area of constructive manslaughter which demonstrates the need for reform. Barry Mitchell argues in the *Journal of Criminal Law* 'the current law on UDA manslaughter is an example of constructive liability, and the case of the one punch killers graphically illustrates the common objection that the defendant lacks sufficient moral culpability for causing the victim's death; the gap between moral blame and death is simply too great'.⁵

Reforms

Whilst variations in the culpability of offences of constructive manslaughter is a controversial problem, it can be said that discretion in sentencing can be a way of resolving this issue. Sentencing can reflect the nature, context and seriousness of the unlawful act which caused the death, to create a fairer justice system that punishes defendants accordingly. However, troubles with sentencing for convictions of constructive manslaughter have been demonstrated in the case of *Furby* 2005.⁶ The case involved a man who struck a single blow to his friend (V) on the cheek with moderate force, over altercations involving D's girlfriend, which resulted in V's death. D was sentenced to two and a half years' imprisonment. The case was appealed, and the court recognised the principle that 'the circumstances in which the punch was delivered would have a significant effect on the length of sentence, but where the consequences of the punch were not reasonably foreseeable, care must be taken to see that the effect was not disproportionate'.⁷ Lord Lane CJ decided by looking at the previous case of *Coleman* 1992,⁸ that the starting point for the offence of manslaughter of this kind was 12 months' imprisonment on a plea of guilty, and D's sentence was substituted to 12 months' imprisonment on a plea of guilty.

Moreover, the Law Commission 2006 Murder, Manslaughter and Infanticide Report stated 'the over and under-inclusiveness of murder's current definition inevitably has the undesirable consequence of making it unduly difficult to devise a fair sentencing structure for

⁵ Barry Mitchell, 'Minding the gap in unlawful and dangerous act manslaughter: a moral defence for one-punch killers' [2008] J. Crim. L.

⁶ *R v Furby* (Andrew) [2005] EWCA Crim 3147

⁷ *Ibid*

⁸ *R v Coleman* (Anthony Neville) (1992) 95 Cr. App R 159

both murder and manslaughter. We believe that the introduction of a further tier to the general law of homicide will do great to resolve this problem'.⁹ Since Coleman was decided in 1992, 19 cases involving one punch deaths have been presented to the Court of Appeal. This statistic, along with the facts of the case of Furby, involving clear confusion and uncertainty of sentencing that involved costly and time-consuming intervention of the Court of Appeal to rectify, supports the Law Commission's suggestion that if the law on involuntary manslaughter became statute, then issues involving sentencing guidelines would be resolved, or at least less common.

Gross negligence

Present Laws

Gross negligence manslaughter specifies that "where death is a result of grossly negligent act or omission on the part of the defendant".¹⁰ In gross negligence manslaughter cases, the jury is directed to Lord Mackay's Speech in *Adomako*, which involved the duty owed by a hospital anaesthetist towards a patient. In the case of *R v Adomako*, Lord Mackay outlines the direction in which the jury is to use in deciding the outcome of cases involving gross negligence manslaughter, the case developed the legal principle that 'The defendant's conduct must have 'departed from the proper standard of care incumbent upon him'. Where a person holds themselves out as possessing some special skill or knowledge, then their conduct will be judged against the reasonably competent professional in the field'.¹¹ Due to the circumstances that surround Gross negligence laws, many medical law cases have been shaped through this common law.

Issues found within present laws

Collectively many of the journals and articles produced surrounding medical negligence states that there is a lack of a clear and precise definition of the law on gross negligence manslaughter. An article published by The Bar Council states that the law "fails to make the critical distinction between flagrant negligence and fleeting mistake".¹² The issues that prevail is the uncertainty and inconsistency that is failing the justice system and sets a concerning unpredictable precedent for defendants, and as stated by Andrew Ashworth

⁹ Law Commission, 'Murder, Manslaughter and Infanticide' (Law Com No 304, p.27, 2006)

¹⁰ Crown Prosecution Service, 'Homicide: Murder and Manslaughter- Legal Guidance, Violent crime' (The Crown Prosecution Service)

<www.cps.gov.uk/legal-guidance/homicide-murder-and-manslaughter> accessed 11 November 2018

¹¹ Emily Finch and Stefan Fafinski, 'Criminal Law' (6th edn, Pearson, 2016)

¹² Bar Council, 'When Clinical becomes Criminal: Reforming Medical Manslaughter', (The Bar Council) <https://www.barcouncil.org.uk/media/627460/35_law_reform_essay.pdf> accessed 10 November 2018

“People must be able to find out what the law is, and to factor it into their practical deliberations”.¹³

In the same article produced by The Bar Council, it stated that the test set out in the case of *Adomako* “offers very little guidance as to what is meant by the elusive principle of ‘grossness’”. The same issue arises in a report written by the Law Commission, which was outlining the faults of the current law on manslaughter, in the report it states that reckless indifference and gross negligence is currently defined as essentially the same crime, they suggest that there should be ‘clear and robust differences between offences of different degrees of gravity’.¹⁴

Reforms

The elusive nature of the term ‘gross’, is a common problem within the entire spectrum of law, and whilst academics may look for enlightenment from higher courts such as the Supreme Court, insight only extends to the disappointing circular answer, as demonstrated in *R v Adomako* (1994) in which the Supreme Court (previously House of Lords) explained gross meant ‘bad’. As suggested previously, this confusion could be reformed with a clear distinction of degrees of ‘grossness’. If this was to be through statute it would avoid a controversial reversal on previous judgements through the courts. Whilst the Law Commission proposes a new offence of Killing by Gross Carelessness, which would require three forms of proof. ‘The defendant’s conduct involved an obvious risk of causing death or serious injury, of which he need not actually have been aware, as long as he was capable of appreciating it. Secondly, that his conduct fell far below what could be expected of him in all the circumstances, or that he intended to cause some unlawful injury to another or was reckless whether he did so. And, thirdly, that he caused death.’¹⁵

Reckless Manslaughter

Present Laws

Reckless manslaughter can also be known as ‘subjective manslaughter’ whereby the accused has caused the victim’s (V) death and is aware that their actions involve a risk of causing death (or at least serious harm) and unreasonably takes that risk.¹⁶ Established to fill

¹³ Andrew Ashworth, ‘Manslaughter by Omission and the Rule of Law’ [2015] Crim LR 563

¹⁴ Law Commission, ‘A new Homicide Act for England and Wales’ (Law Com No 177, p.91, 2005)

¹⁵ Law Commission, ‘Legislating the Criminal Code, Involuntary Manslaughter’, (Law Commission No.237, 1996)

¹⁶ Ibid p.20-21

the gap between unlawful dangerous act and gross negligence manslaughter, its existence operates on an uncertain basis. A recent case is *R v Brown* (2010) which demonstrates reckless manslaughter but also gross negligence manslaughter. The case was reckless manslaughter, as the defendant knew that her actions (or inaction) would worsen the victim's condition, however, she still took the risk, resulting in the victim's death.

Issues found within present laws

A main issue which reckless manslaughter presents is an ongoing academic debate over the term of 'reckless' used in modern law. The Law Commission has stated that although the word 'reckless' causes confusion in previous case law, they believe that, 'there is no other word equally suitable to serve as a label for 'unreasonably taking a risk of which the defendant is aware...' meaning that they do not want to change the offence by removing/adding a new word as it is simply a label.¹⁷ However, this label has condemned the legal practitioners to confusion. And whilst it allows for flexibility within the common law, it removes the element of certain predictability within the law, a dangerous symptom of a failing law.

Reforms

There have been proposals for a new subsection to be added into reckless manslaughter to make it more clear. This recommendation is added onto the original two as aforementioned which is 'it is unreasonable for him or her to take that risk, having regard to the circumstances as he or she knows or believes them to be'.¹⁸ Furthermore, the Law Commission recommended that a defendant should only be held responsible to what they intended to cause and that the current law disproportionately punishes people who lack the intent, a view in opposition with an orthodox subjectivist theory.¹⁹

Corporate

Present Laws

Whilst the law separates involuntary manslaughter into three distinct areas, there is, in fact, an essential section which is often umbrellaed under many aspects of the three other sections, and this is corporate manslaughter. Corporate manslaughter is an offence that organisations can be held accountable for if how their activities are managed causes a person's death or result in a gross breach of a duty of care. This is how it is defined by

¹⁷ Law Commission, 'Involuntary Manslaughter' (Law Commission No.237, p.44, 1996)

¹⁸ Ibid p.46

¹⁹ Law Commission, 'Legislating the Criminal Code' (Law Commission No.218, 1993)

Section 1 of the Corporate Manslaughter and Corporate Homicide Act 2007 which came into force on April 6th, 2008.²⁰ It replaces previous common law and is much wider in the ground it covers. It now focuses on the offence of the whole management rather than on any individuals, therefore, overcoming the 'identification principle'.²¹ This principle meant that a senior individual had to be guilty of gross negligence in order for the company to be guilty and this is no longer the case.

Issues found within present laws

It is firstly important to clarify the benefit that this new law covers, as it covers a much wider aspect of corporate manslaughter allowing for justice to be delivered in more cases. However, the downside of this Act is that it creates two laws, the corporation is prosecuted under the Act but managers or directors are still charged with the common law of gross negligence manslaughter which has a very high threshold. It can then create two separate trials which are ineffective.²² If the organisation is found guilty of this then there are few punishments that are in place, as it is not one person that is responsible, there are no custodial sentences. The most common penalty is that of a fine which can range from £180,000 to £20 million.²³ There is also a remedial order where it is required that the company take steps to fix the error that had resulted in death, along with this there is a publicity order meaning that the company has to publicise that it has been convicted of the offence which includes the details of the remedial order, the offence and the amount of fine given.

Reform

In terms of reform, one big area is lowering the threshold of being convicted of gross negligence to allow more prosecution to take place and to hold more senior figures to account for their mistakes.

Conclusion

In conclusion, many concerns around involuntary manslaughter are rooted from the lack of clarity of law. These range from the common law not addressing the circular statements

²⁰ Corporate Manslaughter and Corporate Homicide Act 2007

²¹ Crown Prosecution Service, 'Corporate Prosecutions' (The Crown Prosecution Service) <<https://www.cps.gov.uk/legal-guidance/corporate-prosecutions> > Accessed 10 November 2018

²² Jacqueline Martin and Tony Storey, 'Unlocking Criminal Law' (5th edn, 2015)

²³ Crown Prosecution Service, 'Corporate Prosecutions' (The Crown Prosecution Service) <<https://www.cps.gov.uk/legal-guidance/corporate-prosecutions> > Accessed 14 November 2018

made within the courts over what is in fact 'gross'. Moreover, with the lack of statute, the flexibility of sentencing to the gravity of the offence is not proportionately represented. And finally, when it comes to corporate manslaughter, the thresholds are set to such a high standard, individuals are not receiving a fair and equal position before the courts, compared to large corporations. Whilst there are concerns over setting fundamental definitions of law, the current law has resulted in a failure of the justice system to provide a predictable legal system when it comes to involuntary manslaughter.

Bibliography

Legislation

Corporate Manslaughter and Corporate Homicide Act 2007

Cases

R v Coleman (Anthony Neville) (1992) 95 Cr. App R 159

Fenton [1830] 1 Lew CC 179

Franklin (1883) 15 Cox CC 163

R v Furby (Andrew) [2005] EWCA Crim 3147

Larkin [1943] KB 174

Law Commission Reports

Law Commission, 'A new Homicide Act for England and Wales' (Law Com No 177, p.91, 2005)

Law Commission, 'Involuntary Manslaughter' (Law Commission No.237, p.44, 1996)

Law Commission, 'Legislating the Criminal Code' (Law Commission No.218, 1993)

Law Commission, 'Legislating the Criminal Code, Involuntary Manslaughter', (Law Commission No.237, 1996)

Law Commission, 'Murder, Manslaughter and Infanticide' (Law Com No 304, p.27, 2006)

Journals

Ashworth A, 'Manslaughter by Omission and the Rule of Law' [2015] Crim LR 563

Mitchell B, 'Minding the gap in unlawful and dangerous act manslaughter: a moral defence for one-punch killers' [2008] J. Crim. L.

Textbooks

Finch E and Fafinski S, 'Criminal Law' (6th edn, Pearson, 2016)

Martin J and Storey T, 'Unlocking Criminal Law' (5th edn, 2015)

Online

Bar Council, 'When Clinical becomes Criminal: Reforming Medical Manslaughter', (The Bar Council)

Crown Prosecution Service, 'Homicide: Murder and Manslaughter- Legal Guidance, Violent crime' (The Crown Prosecution Service)

Crown Prosecution Service, 'Corporate Prosecutions' (The Crown Prosecution Service)



Defendant

"I didn't know that my mate was going to kill her! He said that we were just going to confront her about the trouble that she has caused this gang. I didn't agree to kill her. Why should I be convicted of murder when I didn't pull the trigger! Is it because I'm young and black"

Victim

"Joint enterprise makes me feel safe knowing that everyone who was involved in the crime are no longer on the street."

The issue of foresight in regards to Joint Enterprise

Co-Defendant

"My mate doesn't know that I am going to kill her, but I'm sure he will be happy when I shoot her. All she has done is cause us trouble."

"I'm going to get us out of this trouble and take one for the gang by killing her."

Prosecutor

"Foresight of a crime is sufficient evidence and the judgement in Chan Wing-Siu [1985] should be upheld. This is because foresight by the defendant that the co-defendant was going to commit a murder was enough to charge the defendant with murder under joint enterprise legislation."

Defence

"Joint enterprise is an outdated point of law, as a person should not be convicted for simply foreseeing the possibility of a crime."

Leading case- R v Jogee [2016] overturned Chan Wing-Siu v The Queen [1985]. It was argued successfully that foresight a risk might come about was far too low a level of fault for secondary liability. There are 5 main reasons for this judgment. The most important being that foresight of what happened was ordinarily no more than evidence that the jury may infer requisite intention from and it could not be said that the law after Chan was well established and working satisfactorily- joint enterprise remained a highly controversial area of law.

Juhi Mubarak,
Alex Mullen, James McGauley,
Lauren McDonald & Regan Melngalvis

Why did the Supreme Court rule that the issue of foresight had been misinterpreted for the past 30 years with regards to joint enterprise?

Introduction

Joint enterprise is an area of law that has no statutory definition; instead being developed through the common law. It involves situations where more than one defendant can be convicted of the same crime, even if the co-defendant did not play an active role in the crime and, since it is common law based, many would argue (including Ben Crewe, a scholar) that the laws surrounding it have been created in a ‘hazardous way’.¹ This has ultimately resulted in the Supreme Court ruling in 2016 that the law had been misinterpreted for the past 30 years- and judges had been using the law to wrongfully convict people², with a major factor being the issue of foresight had been misunderstood. In the past the jury had been able to use proof of foresight of a crime as a suitable mens rea for joint enterprise, a lower mens rea threshold than for other convictions of murder³ and post 2016 this is no longer the case. This essay will therefore explore the leading case where the decision to overturn the law was made, what happened prior to 2016 and any appeal cases and the social context of joint enterprise legislation.

Leading Case

In 2016, the law surrounding joint enterprise was turned on its head when the Supreme Court, in the case of *R v Jogee (Ameen Hassan)*⁴, was asked to review the doctrine of parasitic accessory liability that had been laid down by the Privy Council 30 years earlier in the case of *Chan Wing-Siu v The Queen*⁵. Ultimately, the Court decided it could not support the Chan Wing-Siu principle, since the introduction of the principle was based on “an incomplete, and in some respects erroneous, reading of the previous case law, coupled with generalised and questionable policy arguments”⁶ - a decision that would likely have big consequences for past and future rulings in the area of joint enterprise alike.

¹ Ben Crewe *et al* ‘Joint enterprise: the implications of an unfair and unclear law’ (2015) Issue 4 Criminal law Review 252

² *R v Jogee (Ameen Hassan)* [2016] UKSC 8; [2017] AC 387

³ *Ibid*

⁴ [2016] UKSC 8; [2017] AC 387

⁵ [1985] 1 AC 168

⁶ *R v Jogee (Ameen Hassan)* [2016] UKSC 8; [2017] AC 387

In the case it was alleged by the prosecution that the defendant had participated in joint enterprise with his co-defendant to commit an act which resulted in the victim's death.⁷ The judge advised the jury that the defendant was guilty of murder if he had participated in the attack and "realised" that his co-defendant might stab the victim with intent to cause him "really serious harm".⁸ The defendant was found guilty and sentenced to life imprisonment, with the Court of Appeal later dismissing the defendant's appeal against conviction. The defendant appealed to the Supreme Court on the grounds that the judge's directions to the jury on joint enterprise were incorrect and that the case law, which was binding on trial judges in regard to the directions given to the jury, needed to be reviewed. It was argued that foresight that a risk might come about was far too low a level of fault for secondary liability.⁹ The appeal was allowed as it was stated that the Chan Wing-Siu principle could not be supported and the judgement was overturned.

Although reversing a statement of principle, which had been made and followed by the Privy Council and House of Lords on numerous occasions over many years, was undoubtedly a big (and rare) step, it was the right decision for several reasons. The first of these is that the court, in 2016, arguably had the benefit of a 'much deeper and extensive analysis of the topic of so-called "joint enterprise" liability than on previous occasions when the topic was considered.'¹⁰ When reviewing the authorities, there is now little doubt that the Privy Council laid down a new principle in Chan when it held that if two people set out to commit an offence (crime A), and in the course of it one of them commits another offence (crime B), the second person is guilty as an accessory to crime B if he foresaw it as a possibility, but did not necessarily intend it.¹¹ Some of the authorities the Privy Council relied upon in laying down this principle was *Davies v DPP*¹² and *R v Anderson; R v Morris*¹³. In *R v Anderson; R v Morris* the Court of Appeal affirmed *R v Smith (Wesley)*¹⁴ including the rule that "if an adventurer departed completely from what had been tacitly agreed as part of an agreed joined enterprise then his co-adventurer would not be liable for the consequences of the unauthorised act. In such a situation the effect of the overwhelming supervening act is that any assistance is spent."¹⁵ The

⁷ *R v Jogee (Ameen Hassan)* [2013] EWCA Crim 1433, [2013] 7 WLUK 365

⁸ *R v Jogee (Ameen Hassan)* [2016] UKSC 8; [2017] AC 387

⁹ *Ibid*

¹⁰ *Ibid* [61]

¹¹ *Ibid* [62]

¹² [1954] AC 378; [1954] 2 WLR 343

¹³ [1966] 2 QB 110; [1966] 2 WLR 1195

¹⁴ [1963] 1 WLR 1200; [1963] 3 All ER 597

¹⁵ *R v Anderson (Lascelles Fitzalbert)* [1966] 2 QB 110; [1966] 2 WLR 1195

Court did not otherwise address the question of what is necessary to establish joint responsibility, and specifically what is required is intention to assist or mere foresight of what D1 might do. Still less did it address the meaning of foresight or authorisation, so it provided no foundation to the rule in *Chan*.¹⁶ Also, as pointed out by Lord Brown of Eaton-under-Heywood in *R v Rahman (Islamur)*¹⁷ “the rule in *Chan* makes guilty those who foresee crime B but never intended it/ wanted it to happen. Although there can be no doubt that if D2 continues to participate in crime A with foresight that D1 may commit crime B, that is evidence, and sometimes powerful evidence, of an intent to assist D1 in crime B. But it is evidence of such intent, not conclusive of it.”¹⁸ Additionally, a second reason for this change in direction can be argued to be due to the fact that it could not be said that the law was now well established and working satisfactorily; joint enterprise had remained a highly controversial area of law and a continuing source of difficulty for trial judges.¹⁹ It has hence led to a number of appeals, some of which will be mentioned later on in this essay. Furthermore, a third reason why it was decided that a change to the law was necessary was that, since secondary liability was an important part of the common law, if the judges felt that a wrong turn had been taken it should be corrected.²⁰ In the language of criminal law ‘a person who assists or encourages another to commit a crime is known as an accessory/secondary party, with the actual perpetrator known as a principal. It is a fundamental principle of criminal law that the accessory is guilty of the same offence as the principal- he shares the same physical act because even if it was not his hand that struck the blow, he has encouraged or assisted the physical act. These principals are well established and uncontroversial.’²¹ It is only within the last 20 years that a new term, “parasitic accessory liability” has entered the realm of criminal lawyers, first coined by Professor Sir John Smith in 1997 to describe the doctrine laid down in *Chan* and developed in later cases, including most importantly, in the decision of the House of Lords in *R v Powell (Anthony Glassford)*; *R v English*^{22, 23} Therefore, as to the argument that, even if the court was satisfied that the law took the wrong turn, any correction should now be left to Parliament, the doctrine of secondary liability is a common law doctrine and, if it has been unduly widened by the courts, it was proper for the courts to correct the error.²⁴ Another reason for this change is

¹⁶ *R v Jogee (Ameen Hassan)* [2016] UKSC 8; [2017] AC 387 [64]

¹⁷ [2008] UKHL 45; [2009] 1 AC 129 [63]

¹⁸ *R v Jogee (Ameen Hassan)* [2016] UKSC 8; [2017] AC 387 [66]

¹⁹ *Ibid* [81]

²⁰ *Ibid* [82]

²¹ *Ibid* [1]

²² [1999] 1 AC 1; [1997] 3 WLR 959

²³ *R v Jogee (Ameen Hassan)* [2016] UKSC 8; [2017] AC 387 [2]

²⁴ *Ibid* [85]

that, in the common law, ‘foresight’ of what happened was ordinarily no more than evidence that the jury may infer requisite intention from. It might be strong evidence but its adoption as a test for the mental element of murder in the case of a secondary party was a ‘serious and anomalous’ departure from the basic rule resulting in an overextension of the law of murder and a reduction of the law of manslaughter.²⁵ Murder already has a relatively low mens rea threshold (only an intention to cause serious injury) and the Chan principle extended liability for murder to a secondary party on the basis of an even lesser degree of culpability (foresight of the possibility that the principle might commit murder, with no need for an intention to assist him).²⁶ Finally, the rule had a striking anomaly of requiring a lower mental threshold for guilt in the case of the accessory than the principal, the cases of Chan and Powell superseded.²⁷ Therefore the Supreme Court correctly decided that the proper course of action was to restate the principles that had been established over the course of many years before the court took a wrong turn in Chan. The error was ‘to equate foresight with the intent to assist, as a matter of law; the correct approach is to treat foresight as evidence of intent’²⁸ and nothing more.

Before and After 1985

One of the most famous cases involving joint enterprise before the Chan ruling was a case surrounding a burglary in 1953. Within this case, the police arrived at the scene and restrained both Derek Bentley²⁹ and Christopher Craig; asking Craig to hand over the gun he was in possession of. Once PC Sydney Miles asked this, Bentley shouted out the ambiguous phrase “let him have it”, which was overheard by three other policemen at the scene and this evidence was given in court as a means of encouragement and hence the basis of the court’s judgement when deciding joint enterprise. The role of foresight within this case was Bentley not only knowing that there was going to be a crime committed, but also inciting Craig to shoot the policeman by using that phrase.

A more modern case (after the Chan judgement) involves Jordan Cunliffe³⁰ who was convicted alongside others of the murder of Gary Newlove and sentenced to a minimum of 12 years in prison. Due to this being gang related, and that he had already caused damage and behaved aggressively, these were both aggravating factors within the law. He watched and took part in

²⁵ *R v Jogee (Ameen Hassan)* [2016] UKSC 8; [2017] AC 387 [83]

²⁶ *Ibid*

²⁷ *Ibid* [84]

²⁸ *Ibid* [87]

²⁹ *R v Bentley (Deceased)* [1998] 7 WLUK 610

³⁰ *R v Cunliffe (Jordan)* [2010] EWCA crim 2483

the beating up of the victim, therefore this was the role of foresight as he knew there was a risk of serious injury and did nothing to avoid it. Although, this has been seen as controversial as it was witnessed by Cunliffe, he did not deliver the fatal kick, however the courts saw it fitting to convict him of murder.

*R v Smith*³¹ is a case, shortly after the Chan ruling, concerning grievous bodily harm, where both people agreed to do some harm, but not serious harm. However, the other defendant changed his mind and decided to inflict really serious bodily harm on the victim. Due to joint enterprise, Smith was also convicted of causing grievous bodily harm with intent. It was decided in court that Smith had ‘foreseen’ that his partner might have attacked him viciously and did nothing to prevent this. It was found to be highly controversial as he should not have been convicted of the crime another committed just because he was there to witness it. These cases, along with many others, were vital in the decision made by the Supreme Court around the issue of foresight being misinterpreted.

Appeals

As for where the law currently stands and how judges examine who was wrongfully convicted, the new law states that the correct approach should have been to treat foresight as evidence rather than assuming that it was intent, but what about those who have been wrongfully convicted? The case of *R v Johnson* gives us a much clearer understanding of how the new law works and how judges decide on new appeals. *R v Johnson*³² reveals “Section 2(2) (of the Criminal Appeal Act 1868) emphasised that...the court should only allow the appeal if it thought that the conviction was unsafe”³³. The meaning of unsafe in this context is “a legal decision that someone is guilty may be wrong because it is based on bad evidence”³⁴.

R v Johnson emphasises that for an appeal to be upheld, a “substantial injustice” must have been done. This corroborates *R v Jogee* which states that “Courts have the power to grant such leave, and may do so if substantial injustice be demonstrated, but it will not do so simply because the law applied has now been declared to have been mistaken”³⁵. This hence reveals why there have been very few appeal cases, as even if convicted under an incorrect law, your appeal will not succeed unless there was substantial injustice. The courts expand on this during

³¹ *R v Smith* [1988] 4 WLUK 131

³² [2016] EWCA Crim 1613

³³ *Ibid*

³⁴ ‘Unsafe’ Cambridge Dictionary <<https://dictionary.cambridge.org/dictionary/english/unsafe>>

³⁵ *R v Jogee (Ameen Hassan)* [2016] UKSC 8; [2017] AC 387 [100]

the case of *R v Burton*,³⁶ stating that “it was not appropriate to reduce an otherwise appropriate minimum term because a co-accused might have been treated leniently, unless the difference in sentencing would cause right-thinking members of the public to consider that the offender had a justified sense of grievance.”. In short, this means an appeal would only be appropriate if the general public thought the offender had been handed a grossly unjust sentence.

Of the appeals that have taken place, the majority have been dismissed by the courts including the aforementioned *R v Johnson*³⁷ and *R v Burton*³⁸ as the courts believed there had been no substantial injustice. However, one of the few appeals that have been successful was that of *R v Crilly*³⁹. Crilly was convicted of murder when he and his friends broke into the flat of a 71 year old man who they believed to be out of the flat. In reality, the victim was in the flat but could not hear the doorbell due to a hearing impairment. When Crilly found that there was a man inside, he insisted that he and his friends leave the flat and he went outside whereas his friends stayed to rob the victim and then punched him in the face which caused his death. The courts allowed his appeal on the premise that if it was denied then substantial injustice would have been caused as the foresight that Crilly may have had did not equate to intent as he was not aware the victim was in the flat beforehand.

Social Context

As for the social context of joint enterprise, it was found that few media sources such as newspapers and documentaries, have focused on the misinterpretation of foresight, the majority of sources predominantly focusing on the negative impact of joint enterprise within the law by looking at the offender’s perspective. Many newspapers believe ‘that the law has been used to target young people from black, Asian and minority ethnic backgrounds by associating them unjustifiably with ‘gangs’.⁴⁰ An academic from Manchester Metropolitan University conducted a survey which showed that ‘87 percent of those on the Metropolitan Police ‘gang matrix’ (Trident) were black and minority ethnic...half of those convicted of serious youth violence were black and minority ethnic people’⁴¹. This reinforces the argument that joint

³⁶ [2017] EWCA Crim 107; [2017] 1 WLUK 446;

³⁷ [2016] EWCA Crim 1613

³⁸ [2017] EWCA Crim 107; [2017] 1 WLUK 466;

³⁹ [2018] EWCA Crim 168

⁴⁰Owen Bowcott, ‘Senior Tories urge government to review joint enterprise laws’ *The Guardian* (25 January 2018)

⁴¹Patrick Williams and Becky Clark, ‘Are joint enterprise convictions racially motivated?’ (2016) 1 (1) MMU <<https://www2.mmu.ac.uk/news-and-events/news/story/?id=4088>> accessed 21 November 2018

enterprise is; ‘the lazy prosecutor’s dream’⁴² as it can be used by judges as a tool to remove all potential offenders even if they did not participate substantially. However, this is controversial as many gangs (potential offenders) happen to be of an ethnic background, which has given the public a bad perception of the law on joint enterprise (explaining why many media sources have written about the bad implications of joint enterprise only).

Nevertheless, away from the negative portrayal of joint enterprise, one particular media source did discuss why joint enterprise is beneficial to society. For instance for ‘young women that have been so traumatised or drugged that they are unable to provide an account of exactly which suspect did what to them during a sexual assault but their testimony, and other corroborating evidence, can demonstrate that a number of people were involved.’⁴³ Here, the need for joint enterprise is definitely essential from the victim’s perspective as this allows the victim to feel safe and reassured that all potential offenders have been convicted. This source was unusual however in that it looked at the victim’s perspective and why they believe that joint enterprise is necessary- this could be because many believe that using joint enterprise as a tool to convict black and ethnic minority gangs outweighs the victim’s perspective. Therefore, it is clear to say that joint enterprise is a highly controversial topic within the media and will likely remain so due to the conflicting perspectives of the offender and the victim.

Conclusion

To conclude the Courts had been misinterpreting joint enterprise for the last 30 years. The courts showed the reason for this in *R v Jogee*, however despite this there have been very few successful appeals. More research would need to be undertaken in order to conclude that a true bias exists for males for minority backgrounds, for these types of convictions.

⁴²Sandra Paul, ‘why joint enterprise is unfair and needs changing’ (Law Society Gazette, 23 December 2014)

⁴³Carlene Firmin, ‘Joint enterprise law seem to unfairly target young people’ *The Guardian*, (22 July 2014)

Bibliography

Primary Sources

Cases

Chan Wing-Siu v The Queen [1985] 1 AC 168

Davies v DPP [1954] AC 378; [1954] 2 WLR 343

R v Anderson (Lascelles Fitzalbert) [1966] 2 QB 110; [1966] 2 WLR 1195

R v Bentley (Deceased) [1998] 7 WLUK 610

R v Burton [2017] EWCA Crim 107; [2017] 1 WLUK 446

R v Crilly [2018] EWCA Crim 168

R v Cunliffe (Jordan) [2010] EWCA Crim 2483

R v Dobson (Gary); R v Norris (David) [2012] 1 WLUK 5

R v Jogee (Ameen Hassan) [2013] EWCA Crim 1433, [2013] 7 WLUK 365

R v Jogee (Ameen Hassan) [2016] UKSC 8; [2017] AC 387

R v Johnson [2016] EWCA Crim 1613

R v Powell (Anthony Glassford); R v English [1999] 1 AC 1; [1997] 3 WLR 959

R v Rahman (Islamur) [2008] UKHL 45; [2009] 1 AC 129 [63]

Secondary Sources

Newspaper articles

Bowcott, O. (2018). Senior Tories urge government to review joint enterprise laws. *The Guardian*. [online] Available at: <<https://www.theguardian.com/law/2018/jan/25/senior-tories-urge-government-to-review-joint-enterprise-laws>> Accessed 5 Nov. 2018

Firmin, C. (2014). Joint enterprise law seem to unfairly target young people. *The Guardian*, [online] p.single page. Available at: <<https://www.theguardian.com/society/2014/jul/22/joint-enterprise-law-targeting-young-people>> Accessed 5 Nov. 2018

Online Journals

Crewe, B. *et al* 'Joint enterprise: the implications of an unfair and unclear law' (2015) Issue 4 Criminal law Review 252

Paul, S. (2014). *Why joint enterprise is unfair and needs changing*. [online] Law Society Gazette. Available at: <<https://www.lawgazette.co.uk/practice-points/why-joint-enterprise-is-unfair-and-needs-changing/5045748.article>> Accessed 5 Nov. 2018

Williams, P. and Clarke, B. (2016). Are joint enterprise convictions racially motivated?. *MMU*, [online] p.1. Available at: <<https://www2.mmu.ac.uk/news-and-events/news/story/?id=4088>> Accessed 21 November 2018

Websites

BBC News, 'Joint Enterprise Law wrongly interpreted for 30 years, Supreme Court rules' (UK, 18th February 2016) <<https://www.bbc.co.uk/news/uk-35598896>> accessed on 24th October 2018

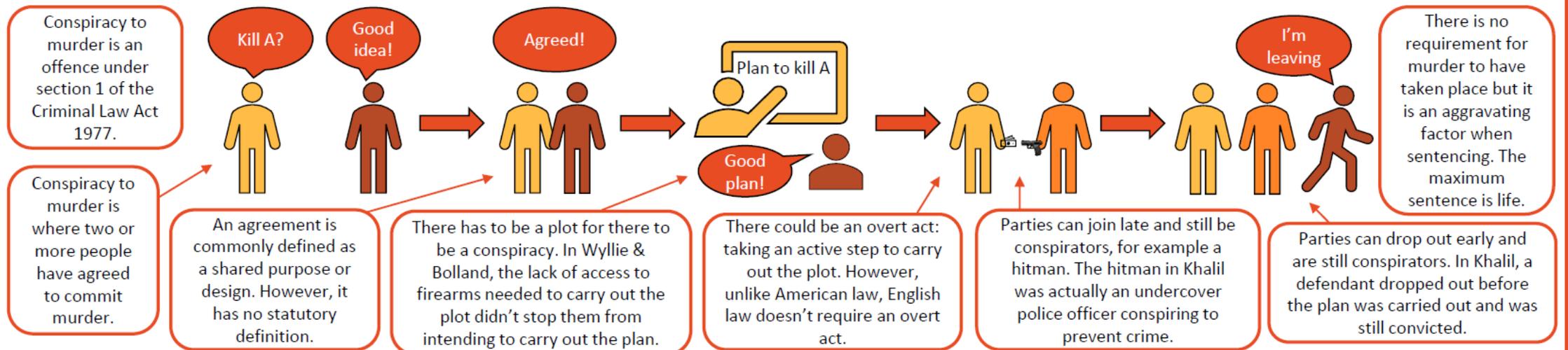
'Unsafe', Cambridge Dictionary <<https://dictionary.cambridge.org/dictionary/english/unsafe>>

Other Media

Common. (2014). [film] Directed by D. Blair. UK: BBC.

Is the current law on Conspiracy to commit Murder effective and fair?

Chloe Collins, Chelsie Rapley, Brian Chia, Luke Smith, Ben Middlemass



The need to protect the public outweighs the individual rights of the defendant. Does this mean the law is fair and effective?

Philosophical theories of punishment

There are two ways of viewing aims of punishment.

- Kant's retribution: "One must deserve punishment in order to be punished justifiably..."
- Bentham's consequentialism: "All punishment is evil" unless "it promises to exclude some greater evil."

In *McNee*, a life sentence was mandatory for the greater good of society.

Terrorism

R v Barot (2007), Barot had planned a range of terror attacks on both the UK and US. Barot was sentenced to life imprisonment, with a recommendation he serve at least 40 years but was lowered to 30 years. This decision may have been fair on Barot's behalf but could outrage the public.

Conspirators are treated like Murderers

In the case of *Wyllie & Bolland*, the 14 year old defendants were both given over 10 year sentences. It was almost identical to the sentences Jon Venables and Robert Thompson received after brutally murdering a 2 year old child. Clearly such harsh sentencing is an injustice as conspiring to murder is not murder.

Reform

Law Commission produced a report on Conspiracy & Attempts in 2009. Regarding their recommendations, reform we suggest is:

- Abolishment of the spousal immunity exception
- Abolish the exception for conspiracies for intended victims and those including children so that the other conspirators can still be liable.
- Introduce a requirement for an overt act to simplify the law and make it less harsh on the defendant
- Provide a statutory definition for the term "agreement"
- Add the defence for prevention of crime to be in line with other inchoate offences.

References:

R v Dhiren Barot [2007] EWCA Crim 1119; *R v Khalil and Others* [2003] EWCA Crim 3467; *R v Mehta* [2012] EWCA Crim 2824; Criminal Law Act 1977; Kavanagh A and Oberdiek J, 'Arguing About Law' (Taylor and Francis 2013); Arnheim M, 'A conspiracy too far?' (2018) 168 The New Law Journal; Jarvis P and Bisgrove M, 'The Use And Abuse Of Conspiracy' (2014) 4 Criminal Law Review; Law Commission, 'Conspiracy And Attempts | Law Commission' (Lawcom.gov.uk, 2018); <<https://www.judiciary.uk/wp-content/uploads/2018/07/r-v-wyllie-and-bolland-sentencing.pdf>> accessed; [Publications.parliament.uk](https://publications.parliament.uk), 2018)<<https://publications.parliament.uk/pa/ld199798/ldjudgmt/jd970612/vandt01.htm>>

Is the current law on Conspiracy to commit Murder effective and fair?

*Brian Chia
Chelsie Rapley
Chloe Collins
Luke Smith
Ben Middlemass*

Introduction

“Conspirators be they that...bind themselves by Oath...or other Alliance, that every of them shall aid and support the Enterprise of each other falsely and maliciously to indite.”¹ Established in the Third Ordinance of Conspirators in 1304; the first definition of conspiracy was to prevent and punish those who would plan to use children to present their false accusations in court on their behalf (as children could not be criminally liable). The aim of the law on conspiracy, although widening the scope, has been clear from the thirteenth century: to prevent and punish the planning of a criminal offence. However, since expanding, the law on conspiracy has been criticised especially in regard to sentencing as “unduly harsh.”² This is the result of numerous problems with the current law on conspiracy to murder, which is in urgent need of reform. “On the 10th of October 2007, the law commission proposed many recommendations on reforms of statutory conspiracy.”³ The focus of this legal research is to explore the current state of law regarding conspiracy to murder and the legislation, case law, scholarly and media articles discussed in this report will evaluate the effectiveness and fairness of the law on conspiracy to murder. Thus, the question to sum up our legal research **“Is the current law on conspiracy to commit murder effective and fair?”**

Current law on Conspiracy to Murder

“Conspiracy” derives from the Latin words “con” and “spirare” meaning “to breathe together”⁴ and can be defined as an act where two or more people have agreed to commit a crime⁵, but is also defined within the Criminal Law Act 1977.⁶ Murder can be defined as “the unlawful killing of another human being, under the Queen’s peace, with malice aforethought.”⁷ Combining these two offences creates the offence of conspiracy to murder which essentially is an agreement to commit the unlawful killing of another human being. It is an offence for any

¹ JF Stephen, *A History of the Criminal Law of England*, 2 228-229

See also: CR Snyman, 'The History And Rationale Of Criminal Conspiracy' (1984) 17 *The Comparative and International Law Journal of Southern Africa*.

² Dr Michael Arnheim, 'A conspiracy too far?' (2018) 168 *The New Law Journal*

³ Law Commission, 'Conspiracy And Attempts | Law Commission' (2018)

⁴ Paul Jarvis and Michael Bisgrove, 'The Use And Abuse Of Conspiracy' (2014) 4 *Criminal Law Review*.

⁵ Jacqueline Martin and Tony Storey, *Unlocking Criminal Law* (6th edn Routledge) chapter 6.3

⁶ Criminal Law Act 1977, S.1

⁷ Sir Edward Coke, *Institutes of the Laws of England* (1797)

party to conspire to murder.⁸ There are some exceptions as to who can commit conspiracy as a person cannot be convicted if the only other party is an intended victim, spouse, or child under the age of criminal responsibility (10 years old)⁹.

In *Khalil*¹⁰ the appellants were charged with conspiring to murder Qayum, the victim. An undercover police officer disguised as “Mick” acted as a hitman, Hussain went to Mick in order to have Qayum murdered for having an affair with his daughter. LJ Tuskey clarified that it is a criminal offence for two or more persons to agree with one another to commit an offence and that the actual conspiracy is the agreement made between those parties. However, the judgement gives no definition of what an “agreement” is. It has been left to courts to define this term. This could be to allow flexibility in the law, however the understood definition is that “agreement” is where “the parties to it have a common unlawful purpose or design.”¹¹

Khalil also confirmed; it does not matter where a conspirator’s involvement appears on the scale of seriousness or precisely where they became involved, they are still guilty. This is a clear example of how harsh convictions can be in conspiracy cases especially in this case for Nazar, who dropped out before the crime had been carried out, yet still faced conviction.¹²

The sentencing of conspiracy to murder has always carried a maximum sentence of imprisonment for life¹³ and this remains in the new legislation.¹⁴ However, judges are allowed to decide if life imprisonment is necessary. There is a code of sentencing that judges use and examples of this are *Raw*¹⁵ and *Daddow*¹⁶. The court concluded that a sentence of eighteen years for conspiracy to murder is not excessive, since murder was carried out. It is important to note that, murder itself is not a requirement for the offence of conspiracy to murder however is an aggravating factor.

⁸ Criminal Law Act 1977 S 1(1)

⁹ Criminal Law Act 1977 S 2

¹⁰ *R v Khalil and Others* [2003] EWCA Crim 3467

¹¹ *R v Mehta (Subhash)* [2012] EWCA Crim 2824

¹² *Khalil* (n 10)

¹³ Offences Against the Person Act 1861 c 100 (Regnal 24 and 25 Vict) S 4

¹⁴ Criminal Law Act 1977 S 3(2)(a)

¹⁵ *R v Raw* (1983) 5 Cr App R (S) 229

¹⁶ *R v Daddow* [1996] 2 Cr App R (S) 10

Problems with the Current law:

Philosophical aspects of Sentencing

There are two types of criminal law theories on punishment: Immanuel Kant's retribution view and Jeremy Bentham's consequentialism view. From the perspective of Kant, a criminal must deserve punishment; "thus, one must deserve punishment in order to be punished justifiably..."¹⁷ Conversely, the perspective of Bentham, "all punishment is evil" unless "it promises to exclude some greater evil."¹⁸ A life sentence will deter the criminal to commit the crime again. Therefore, deserving to be punished is "neither necessary nor sufficient for punishment."¹⁹ In Kant's view, punishment will still be insisted even though there is no positive outcome but "the importance of desert to the justification of punishment is hard to deny."²⁰ In a modern working society, it can seem slightly pointless imprisoning someone. If there is no positive effect on society, or the prisoner then, it would be a waste of financial resources.

In contrast, Bentham acknowledges the fact that punishment must be counter-balanced by some greater social good.²¹ This balance is important to maintain fairness in the criminal law as although society need protecting, criminals still have rights and need to be punished deservingly; not just to keep them away from society. Without a doubt, Parliament should consider these legal theories when reforming the sentencing procedure in criminal offences, especially in offences for conspiring to murder.

*McNee*²² which posed the question "are discretionary life sentence appropriate"²³ in conspiracy to murder cases? The appellants: McNee, Gunn and Russell were convicted for conspiracy to murder and were "sentenced to life imprisonment, with minimum terms fixed at 25 years, 35

¹⁷ 'IX. CRIMINAL LAW THEORY: PUNISHMENT' Aileen Kavanagh and John Oberdiek, *Arguing About Law* (Taylor and Francis 2013) 469

¹⁸ Bentham as cited by Aileen Kavanagh and John Oberdiek, *Arguing About Law* (Taylor and Francis 2013) 469

¹⁹ Kavanagh and Oberdiek, (n 17) 469-470

²⁰ *ibid* 470

²¹ *ibid* 470

²² *R v McNee* [2007] EWCA Crim 1529; [2008] 1 Cr App R (S) 24

²³ *ibid* [H1]

years and 30 years respectively.”²⁴ In their appeal, the appellants stated, accepting it is the maximum penalty, their imposition of a discretionary life sentence was wrong in principle. It is important to note that as the offence was committed in August 2004 and life sentences for second list offences could only be imposed if the offence was committed after the section came into force.²⁵ Therefore, it was submitted that s224A(1)(b) was inappropriate unless there was ‘some imponderable feature which would make it impossible to forecast the future if the offender were ever were to be released.’²⁶ Judges stated that Gunn would still “pose a serious danger to the public.” This was valid reason to protect the public in the future following Bentham’s theory to “punish evil.”²⁷

Furthermore, “McNee had never been convicted of any offence of violence in his past...(but)... He still was a vital member of the conspiracy, fully in the know, and giving essential help right up to the very point of the shooting.”²⁸ In this case, there would be “uncertainty, unpredictability, instability”²⁹ of the future if a discretionary life sentence was not imposed. The appellants clearly committed a grave offence; therefore, it was accepted to impose the sentence as there was a greater need to protect the public.

Public Protection and Sentencing

It is common knowledge that a dangerous person’s imprisonment is partly for the protection of the public. In the UK, since the abolition of capital punishment, incapacitation of dangerous offenders – especially those with an extremely low chance of rehabilitation – has been utilised to contain offenders and therefore reduce crime. However, the Carter Report 2003, attributed only a 5% decrease in crime between 1997 and 2003 to higher custodial rates.³⁰ This suggests that although it is important to protect society from dangerous criminals, incapacitation alone

²⁴ *ibid* [H3]

²⁵ Criminal Justice Act 2003 S 224A(1)(b)

²⁶ *McNee*, (n 22) [H4]

²⁷ Bentham, (n 18)

²⁸ *ibid* [20]

²⁹ *ibid* [25]

³⁰ Susan Easton and Christine Piper, *Sentencing and punishment: the quest for justice*, vol 3 (Oxford University Press 2012) 137

is not enough to prevent crime. The law attempts to use punishment as a deterrent to prevent others from committing crime however it clearly does not deter as many as it should.

Protection of the public is a major aim of punishment in regard to conspiracy, especially conspiracy to murder. The agreement to commit a crime suggests punishment would be used to prevent the crime agreed upon from occurring. It is necessary to point out that unlike murder, the mens rea for conspiracy to murder must include an intention to murder – not malice aforethought. This provides an explanation as to why there is such strict sentencing for conspiracy to murder as it is to punish the guilty mind not just a guilty act.

*Barot*³¹ brought sentencing into the spotlight regarding conspiracy to murder offences. He planned a range of terror attacks on both the UK and USA, His intent was to re-enact 9/11 which was a terrorist attack which resulted in 2,996 lives lost which “horrified and angered the nation.”³² Terrorism is arguably one of the gravest crimes in the UK and it is a crime that the public need protecting from the most. Reforming the law on conspiracy to murder is imperative to prevent terrorist attacks.

Initially, Barot was sentenced to life imprisonment, with a recommendation to serve at least 40 years. However, was lowered to a minimum of 30 years in 2007. Lord Phillips said Barot’s plans did not amount to an actual attempt, and it was not clear if these plans would succeed.³³ This decision may have been fair on Barot’s behalf but could outrage the public. Due to the court not understanding societies need to be protected from such crimes. This is where there is a struggle to balance the rights of the defendant against protection of the public – an aspect which must be strongly considered when reforming the law on conspiracy to murder.

Co-conspirators and Sentencing

³¹ *R v Dhiren Barot* [2007] EWCA Crim 1119

³² Charles Lane, 'We Expected The War On Terror To Unite Us. What Went Wrong?' (*Washington Post*, 2018) <https://www.washingtonpost.com/opinions/we-expected-the-war-on-terror-to-unite-us-what-went-wrong/2018/09/10/5fb58c38-b4ff-11e8-a7b5-adaaa5b2a57f_story.html?noredirect=on&utm_term=.5fba7de06623> accessed 23 November 2018.

³³ 'Dirty bomb man's sentence cut' <<http://news.bbc.co.uk/1/hi/uk/6661371.stm>> accessed 17th November 2018

When a conspiracy case involves more than one conspirator, it can be unfair that they all receive the same sentence when ultimately there is always one more guilty than another. This can be seen in *Khalil*³⁴. Co-conspirators are given strict sentences to act as a deterrent to others and to protect the public from organised crimes like in *Barot*.³⁵ The case of *Wyllie and Bolland*³⁶ gives an example of co-conspirators being sentenced unfairly. Although Wyllie received a longer sentence than Bolland; Wyllie was the main instigator and targeted Bolland to help him with his plot as he seemed vulnerable. Bolland still received 10 years imprisonment even though he was not the main party. Nevertheless, the court decided that it was important for both boys to receive a large sentence as their plot was so evil that they needed punishing and rehabilitating as they posed a threat to society.

Their case reflected on the 1999 Columbine school massacre where two boys of similar age killed thirteen staff and teachers and intended to kill more. It was clear to the court that the way in which the boys “hero worshipped”³⁷ this case made them dangerous and the plot needed to be prevented. Arnheim criticises the sentence as “unduly harsh” suggesting that the lack of access to firearms or explosives to carry out the plan meant arguably there was no conspiracy. But, in the eyes of the jury “it was a real plot”³⁸ and they fully intended to carry the plan out. This can seem harsh, however unlike American law, the English law does not require an overt act for there to be a conspiracy.

Wyllie and Bolland can also be compared to the largely publicised case of *Venables and Thompson*³⁹ where two 10 year old boys brutally murdered a 2 year old. The defendants were murderers yet had to serve the same 10 year sentence as Wyllie and Bolland. Although this is not an exact comparison as Venables and Thompson were younger, it still shows how harsh the sentencing is against conspiracy to murder for youths. It is clear from this case and many

³⁴ See page 10 lines 8-21

See also *R v Khalil and Others* [2003] EWCA Crim 3467

³⁵ See page 7 lines 7-26

See also *R v Dihren Barot* [2007] EWCA Crim 1119

³⁶ Judiciary of England and Wales, *Sentencing remarks of Mrs Justice Cheema-Grubb DBE* (2018)

<<https://www.judiciary.uk/wp-content/uploads/2018/07/r-v-wyllie-and-bolland-sentencing.pdf>> accessed 15 November 2018

³⁷ *ibid* para 1

³⁸ *ibid* para 5

³⁹ House Of Lords - Reg. V. Secretary Of State For The Home Department, Ex Parte V. And Reg. V. Secretary Of State For The Home Department, Ex Parte T.' (*Publications.parliament.uk*, 2018)

<<https://publications.parliament.uk/pa/ld199798/ldjudgmt/jd970612/vandt01.htm>> accessed 23 November 2018.

others that the law on conspiracy to murder especially on sentencing for conspiracy to murder, needs reform.

Recommendations and Reforms

The Law Commission produced a report of recommendations on Conspiracy and Attempts⁴⁰, in 2009. A consultation paper⁴¹ was published on the 10th October 2007 and a Draft Bill was published on the 10th of December 2009. The recommendations were triggered by a House of Lords decision in the case of *criminal*⁴² where the defendant could not be guilty of conspiracy as he only suspected the activity was criminal and the mens rea for conspiracy specifically requires intent to commit an offence. The injustice of this case made it clear the law on conspiracy was unfair and needed reform. Subsequently, the Law Commission reviewed and concluded the law to be defective. The consultation papers produced by the Law Commission outline that conspiracy to murder can be charged, whether the murder was successful or if the defendant had not yet attempted or successfully committed the murder.

Some of the recommendations made consisted of clarification to the law in relation to the agreement between co-conspirators to conspire to an offence and commit the offence conspired upon. The term “agreement” has only been defined in common law and in reforming the law, it would be useful to provide an interpretation of the word “agreement”. Jarvis suggests that an agreement is where “the parties share the same design or purpose so it can be said they truly breathe together.”⁴³ This includes the accepted interpretation established in *Mehta*⁴⁴ and is a suggestion of the interpretation that should be included in reform.

The law currently states that spouses will not be liable for conspiracy⁴⁵. The exemption for spouses is said, by the Law Commission, to be an embarrassment to a civilised system of law and therefore, should be abolished as it is an anomaly that they were exempt in the first place⁴⁶:

⁴⁰ Law Commission, *Conspiracy and Attempts* (Law Com No 318, 2007)

⁴¹ Law Commission, *Conspiracy and Attempts* (Law Com No 183, 2009)

⁴² *R v Saik (Abdulrahman)* [2007] 2 WLR 993

⁴³ Paul Jarvis and Michael Bisgrove, 'The Use And Abuse Of Conspiracy' (2014) 4 Criminal Law Review

⁴⁴ See page 3 line 16

See also *R v Mehta (Subhash)* [2012] EWCA Crim 2824

⁴⁵ Criminal Law Act 1977, s 2(2)

⁴⁶ Law Commission, *Conspiracy and Attempts*, (Consultation Paper No 183, 2007) Paras 1.42-1.44

spouses can commit conspiracy the same as anyone else. It also means that if a couple are engaged but not married, they are liable which would clearly lead to an injustice as the nature of the relationship between spouses is the same as between betrothed couples. Therefore, exemption for spouses should be abolished in reforming the law.

Currently, a co-conspirator will not be guilty of conspiracy if the other co-conspirator is the intended victim⁴⁷, the Law Commission's recommendation is that the co-conspirator only should still be liable⁴⁸. This is a necessary reform to keep fairness in the law; one of the aims of the law of conspiracy is to punish the guilty mind. Therefore, in a case where a co-conspirator is an intended victim, the mental element is no different than any other conspiracy. Therefore, should still be convicted in the same manner as well as providing protection for the victim.

Also, recommending adding a defence of crime prevention to be consistent with other inchoate offences.⁴⁹ This would mean that if a conspirator acted for the purpose of preventing crime or limit the occurrence of harm, they would have a full defence to conspiracy. This would be an effective recommendation especially in cases with undercover police officers, for example, who may conspire but in order to prevent crime from taking place.

Arnheim suggests that the law on conspiracy to murder allows too many convictions as the term "agreement" is interpreted to widely and recommends that like American law, conspiracy should require an "overt act" to consolidate the agreement to conspire.⁵⁰ This would simplify the law on conspiracy as it adds a clear actus reus element to the offence. However, this would make it harder to convict conspiracy offences and therefore contradicts the aim to have strict law on conspiracy to deter people from committing the offence. Also, adding this element would require an interpretation of what an "overt act" is, which would then complicate the law which it had intended to simplify.

⁴⁷ *ibid*

⁴⁸ Law Commission, *Conspiracy and Attempts* (Consultation Paper No 183, 2007) paras 1.49-1.50

⁴⁹ Serious Crime Act 2007, s 50

⁵⁰ Dr Michael Arnheim, 'A conspiracy too far?' (2018) 168 *The New Law Journal*

Conclusion

Without question, it is evident that the current law on conspiracy to murder is not precise and in desperate need of reform. The current statutory law on conspiracy is too broad which has led to confusion and injustice. The fact that conspiracy to murder can be given the same sentence to murder is evidently harsh and unfair, however this may have been the aim of Parliament in order to deter those from conspiring to commit murder. In order to reform the law, there must be a counter-balance between the rights of the defendant and protecting society. Recommendations provided should be considered to make the law more effective and fair. Expanding the offence so that it must include an “overt act” would be fairer on the defendant as they would only be prosecuted if they had made an active act to conspire. There are also recommendations to abolish exemptions which would broaden who could be convicted. This would allow for more convictions and therefore allow better protection for society. In conclusion, the current law on conspiracy to commit murder is not always effective and fair which means reform is required.

Bibliography

Cases

R v Daddow [1996] 2 Cr App R (S) 10

R v Dihren Barot [2007] EWCA Crim 1119

R v Khalil and Others [2003] EWCA Crim 3467

R v McNee [2007] EWCA Crim 1529; [2008] 1 Cr App R (S) 24

R v Mehta (Subhash) [2012] EWCA Crim 2824

R v Raw (1983) 5 Cr App R (S) 229

R v Saik (Abdulrahman) [2007] 2 WLR 993

Statutes

Criminal Justice Act 2003

Criminal Law Act 1977

Offences Against the Person Act 1861

Serious Crime Act 2007

Books

Coke E, *Institutes of the Laws of England* 1797

Easton S and Piper C, *Sentencing and punishment: the quest for justice*, vol 3 (Oxford University Press, 2012) p 137

Kavanagh A and Oberdiek J, *'Arguing About Law'* (Taylor and Francis 2013)

Martin J and Storey T, *Unlocking Criminal Law*, chapter 6.3

Journal articles

Stephen JF, *A History of the Criminal Law of England*, 2 228-229

Arnheim M, 'A conspiracy too far?' (2018) 168 *The New Law Journal*

Jarvis P and Bisgrove M, 'The Use And Abuse Of Conspiracy' (2014) 4 *Criminal Law Review*

Snyman CR, 'The History And Rationale Of Criminal Conspiracy' (1984) 17 *The Comparative and International Law Journal of Southern Africa*

Law Commission Reports

Law Commission, 'Conspiracy And Attempts | Law Commission' (*Lawcom.gov.uk*, 2018)

Law Commission, *Conspiracy and Attempts* (Law Com No 318, 2007)

Law Commission, *Conspiracy and Attempts* (Law Com No 183, 2009)

Websites

--'Dirty bomb man's sentence cut' <<http://news.bbc.co.uk/1/hi/uk/6661371.stm>> Accessed 17th November 2018

--(*Judiciary.uk*, 2018) <<https://www.judiciary.uk/wp-content/uploads/2018/07/r-v-wylie-and-bolland-sentencing.pdf>> accessed 15 November 2018

Lane C, 'We Expected The War On Terror To Unite Us. What Went Wrong?' (*Washington Post*, 2018) <<https://www.washingtonpost.com/opinions/we-expected-the-war-on-terror-to-unite-us-what-went-wrong/2018/09/10/5fb58c38-b4ff-11e8-a7b5->

--'House Of Lords - Reg. V. Secretary Of State For The Home Department, Ex Parte V. And Reg. V. Secretary Of State For The Home Department, Ex Parte T.'

(*Publications.parliament.uk*, 2018)

<<https://publications.parliament.uk/pa/ld199798/ldjudgmt/jd970612/vandt01.htm>> accessed 23 November 2018

How can the law in England and Wales be reformed in order to regulate offensive online communications with the respect to the right of freedom of expression?

Reforming the language

Grossly offensive should be given its 'ordinary' meaning.
- Connolly³

The criminal law is vague and unclear.
- CPS²

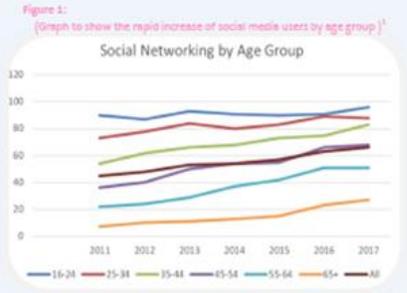
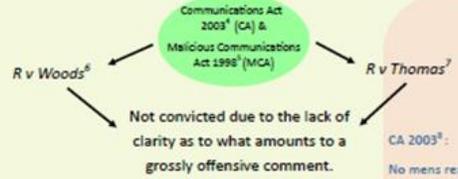
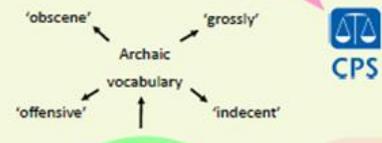


Figure 1 shows the need to regulate offensive online communications due to the rapid increase in social networking users.

Mens rea elements

The mens rea in the MCA 1998 should be able to narrow down the intentionally broad actus reus.
The mens rea in the CA 2003 allows private conversations to still occur which are grossly offensive.¹⁰
- Chara Bakalis

CA 2003⁸:
No mens rea is stated in the act. Intent had to be confirmed through case law

MCA 1998⁹:
Intent stated in the act. However, definition of intent is unclear

Chamber V DDP-- confirmed mens rea in CA 2003¹¹
Logan v Sycamore Community School Bd. Of Educ.¹²
Example of legislation being implemented



Freedom of Expression

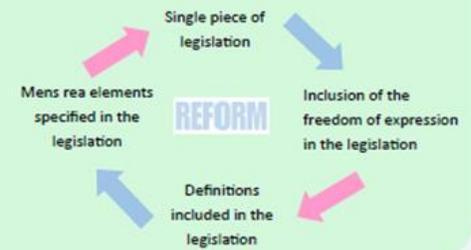
'Freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers'
- Article 10 of ECHR¹³



In the case of Chabloy it was illustrated the right to freedom of expression is a qualified right and is not absolute.¹⁴

In Collins, the defendant tried to use Article 10 as a defence but was unsuccessful as the need to protect public safety overruled the qualified right.¹⁵

Our suggestions for reform



How can the law in England and Wales be reformed in order to regulate offensive online communications with respect to the right of freedom of expression?

WORD COUNT: 2496

ESTELLE CHAMBERS, LAURA CARR, CHARLOTTE BUSHBY, REBECCA
EVERSON, SARAH CURRAN, JASKARAN CHATHA

Introduction

The evolution of social media in recent years has significantly changed the way society interacts and engages with each other. Research has shown that there has been a 21% increase in social media usage by UK adults from 2011 to 2017¹. This drastic shift regarding the way we communicate can be said to bring many benefits; however, it can also impose serious legal issues. Such legal issues include ‘revenge porn’, online blackmail and ‘trolling’. For the purpose of this investigation, the main focus of the research will be on the area of offensive online communications.

The investigation will cover the effectiveness of the current criminal law in terms of offensive online communications. In addition to this, the research will be highlighting any gaps within the current law in regard to overcoming this problem. When considering potential reforms, the right to freedom of expression will remain at the forefront of the research to prevent any alienation of human rights.

How is the existing language in the Communications Act 2003 and the Malicious Communications Act 1988 in need of reform?

Many legal writers and official bodies such as the Law Commission and the Crown Prosecution Service (CPS) have acknowledged the problems the archaic nature of the Malicious Communications Act 1988² and the Communications Act 2003³ create in criminalising offensive online communications. This concern has heightened recently as more people access social media⁴. Despite this, there has been no statutory reform and instead judges and the CPS are left to interpret the ambiguous and outdated terms in the Acts. This suggests the law is ‘fragmented’⁵, due to the ‘scattergun’ approach used by parliament when creating the law. Academics across the field agree that this is a highly relevant issue as an increasing number of

¹ Office for national statistics, 'Social Networking by age group, 2011 to 2017' (*Office for National Statistics*, 24 August 2017)

<<https://www.ons.gov.uk/peoplepopulationandcommunity/householdcharacteristics/homeinternetandsocialmediausage/adhocs/007401socialnetworkingbyagegroup2011to2017>> accessed 6 November 2018

² Malicious Communications Act 1998, s.1

³ Communications Act 2003, s.127

⁴ n.1 Refer back to the statistics stated in the introduction

⁵ Chara Bakalis, “Rethinking cyberhate laws” (2017) 27(1) *Information & Communications Technology Law* 86-110

defendants are self-represented and inappropriate technical and obsolete language only further alienates the public from our system, which damages the profession.⁶

In their 2013 guidelines on ‘Prosecuting cases involving communications sent via social media’⁷, the CPS stress the need to interpret the meaning of terms such as ‘grossly offensive’ in compliance with the right to freedom of expression. It was decided in *Connolly v DPP*⁸ that ‘grossly’ should be given its ‘ordinary’⁹ meaning, as well as words included in the 2003 act such as ‘indecent’ and ‘obscene’. Although the courts declared this, there remains an element of ambiguity in what the ‘ordinary’ meaning is. Considering the context of the acts, with the 1988 Act created for postal communications and the 2003 Act for broadcasts, it is questionable whether the ordinary meaning of grossly offensive remains the same in relation to the internet and social media or whether the standard differs. Furthermore, this lack of clarity means it can never be clear when a comment said online crosses the line from being ‘merely offensive’¹⁰ to something that is ‘so grossly offensive it should be criminalised’¹¹ meaning there is a lack of certainty in the law.

Although the CPS have attempted to improve this understanding it remains questionable whether it is effective in practice, with many academic writers including Laura Bliss, as well as the Law Commission, criticising the current law. This is shown through the different outcomes of cases such as the unreported case of *R v Woods* in 2012¹² when the defendant made comments online about missing April Jones, and the homophobic comments made by the defendant in *Thomas*¹³. Thomas was not convicted which emphasises the lack of clarity as to ‘what amounts to a grossly offensive comment’¹⁴.

It seems apparent that reform of the law on offensive communications is necessary to be effective in modern society, with many arguing that ‘guidelines are no substitute for clearer

⁶ Alexandra-Maria Eugenicos, 'Should we reform the Offences Against the Person Act 1861?' (2017) 81(1) *Journal of Criminal Law*

⁷ Crown Prosecution Service, “Social Media – Guidelines on prosecuting cases involving communications sent via social media” (revised 21 August 2018)

⁸ *Connolly v DPP* (2007) EWHC 237; (2008) 1 W.L.R. 276

⁹ *Ibid* [3]

¹⁰ Laura Bliss, “The crown Prosecution guidelines and grossly offensive comments: an analysis” (2017) 9(2) *Journal of Media Law* 173-188

¹¹ *ibid*

¹² *R v Woods* case stated in n.10

¹³ *R v Thomas* case stated in n.10

¹⁴ n.10

law'¹⁵. The Law Commission has for years encouraged the codification of the criminal law¹⁶, describing it as 'vague and unclear'¹⁷.

Are the mens rea elements clear in the Malicious Communications Act 1988 and the Communications Act 2003?

For a defendant to be prosecuted of an offensive online communication, the *mens rea* element of intention must be proven. In criminal cases, the concept of intention can be described in two distinct ways through the clarification in cases. Firstly, as oblique intent; this is where the consequence of the defendant's action is "virtually certain"¹⁸. Secondly as direct intent, meaning the defendant wants to complete a desired aim or purpose¹⁹.

In addition to this, offences can be described as either a basic intent crime or a specific intent crime. Like these previous concepts of intention, these terms have been defined using common law. The main difference between the two is crimes which only have the *mens rea* as intention is of specific intent, whereas the *mens rea* could be recklessness, which is "D taking an unjustifiable risk of a particular consequence occurring"²⁰ or intention for basic intent crimes.²¹

The issue surrounding the *mens rea* elements in the Malicious Communications Act 1988²² and the Communications Act 2003²³ is that the meaning is unclear. In the Malicious Communications Act, it is stated that the defendant must have the intention to "cause distress or anxiety"²⁴ when sending an online communication. This idea is confirmed in *Chambers*²⁵, in which the defendant must have "acted with a specific purpose in mind"²⁶. Therefore, it must be proven that the defendant is trying to send the communication with the thought of the recipient being disturbed by the message. Even if the person does not feel this way, the

¹⁵ Kat Shields and Katie Jones, "Tackling online trolling" (2016) 180(37) Criminal Law & Justice Weekly

¹⁶ Mary Arden, 'Criminal law at the crossroads: the impact of human rights from the Law Commission's perspective and the need for a code' (1999) 1(1) Criminal Law Review

¹⁷ Law Commission, "Abusive and Offensive Online Communications: A Scoping Report" (Law Com No 381, 2018) 113, para 5.95

¹⁸ *R v Nedrick* [1986] 3 All ER 47 - Case was used to provide a test for a distinction between direct intent and oblique intent

¹⁹ Tony Storey, *Unlocking Criminal Law* (6 edn, Routledge 2017) 62

²⁰ *Ibid* 67

²¹ *Ibid* 296

²² n.2

²³ n.3

²⁴ n.2 [s.1(1b)]

²⁵ *DDP v Chambers* [2012] EWHC 2157

²⁶ *ibid* [36]

defendant could still be charged, as “the sender of the grossly offensive message must intend it to cause distress or anxiety to its immediate or eventual recipient”²⁷, thus making it not a ‘constitutional element’²⁸ of the crime. However in the relevant section of the Communications Act²⁹, it does not mention intention at all. Therefore, in *Collins*³⁰, it needed to be clarified that intent was a necessary *mens rea* element.

Despite both acts needing intention to be a necessary *mens rea* element, the intention is different in each act. *Chambers* mentions the Malicious Communications Act is “a specific intent [crime, whilst] no express provision is made in [the Communications Act] section 127(1)(a) for *mens rea*. It is therefore an offence of basic intent.”³¹ This suggests that recklessness can be a contributing factor, to be charged under the communications act, which is not stated in the statute like ‘intention’ is. By clearly stating this, it can help distinguish what offences can be charged under which act as there is much confusion due to the overlap of the two. Additionally, as there is some distinction between the two intents through the common law, it can be argued that the Malicious Communication Act requires direct intent because the ‘intention’ is necessary for a crime to occur. Furthermore, oblique intent is the element in the Communications Act as recklessness can be in the *mens rea*.

Academic Chara Bakalis discusses the consequences of the *mens rea* elements of both acts in detail. When discussing the *mens rea* for the Malicious Communications Act, Bakalis highlights that the *actus reus* is broad, and for the act to be concise, the *mens rea* needs to be able to narrow this down. Nevertheless, due to the *mens rea* being intention, it does not correctly limit the offence, as a defendant can just state that they did not mean to create “distress or anxiety”. Therefore, the Malicious Communications Act is not fulfilling its aim, when it comes to regulating online communications. Furthermore, Bakalis discusses the importance of the *mens rea* element in the Communications Act, by using an example of an “online but private conversation of two racists on holocaust denial as the discussion could plausibly be characterised as ‘grossly offensive’”³². As the conversation was private and the comments were not used to create disgust amongst a wider audience, this would not be a crime as the *mens rea*

²⁷ *Collins v DDP* [2006] 1 WLR 2223 (UKHL) [26]

²⁸ Q Hunt, 'Striking a balance - Malicious Communication Act and free speech' (Criminal Defence Barrister Blog, 28 May) <<http://www.bestcriminaldefencebarrister.co.uk/criminal-defence-barrister-blog/2018/striking-a-balance-malicious-communication-act-and-free-speech.aspx>> accessed 14 November 2018

²⁹ n.2

³⁰ n.27

³¹ n.25 [36]

³² n.5

would not be present.³³ This illustrates the need for a clearer definition of the *mens rea* element within the legislation, which could withstand evolution of social media.

Finally, the need to prove intention could become difficult in the essence of online communication cases, involving children and young adults. It is already hard to prove intention, but it becomes more difficult if a serious crime occurs and the person prosecuted is not fully capable of understanding words that “cause distress or anxiety”³⁴. Many young people use offensive language online towards other individuals, due to the accessibility of social media³⁵. One case which highlights this, which occurred in America, was *Logan v Sycamore Community School*³⁶. From this case it can be determined that it is difficult to judge whether the defendants intended to say those words in an offensive manner, as they were young adults. The case was settled and led to the “Jessica Logan Act”, being implemented into Ohio state law³⁷. This law revises the laws within schools regarding harassment through an electronic act. In areas of the world which online offensive communications are also a major issue, legislation is being introduced to adjust with the advances to prevent situations like the example from occurring. This, however, is not occurring in England and Wales and shows that reforms regarding the *mens rea*, are urgent, primarily due to the last update being in 2003.

Will reforming the law restrict freedom of expression?

Although many academic writers state that current legislation needs to be reformed, a possible reason why this has not occurred is the fear of breaching the freedom of expression. The freedom of expression proposed by Article 10 of the European Convention on Human Rights³⁸ is protected by common law and is arguably one of the most important fundamental freedoms that stabilises democratic society. This includes the ‘freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers’³⁹.

³³ *ibid*

³⁴ n.2

³⁵ D Watkins, 'Where do I stand? Assessing children's capabilities under English law' (2016) 28(1) Child and Family Law Quarterly 25-44

³⁶ *Logan v. Sycamore Community School Bd. Of Educ.*, 780 F. Supp. 2d 594 (S.D. Ohio 2011) - facts of this case can be found in the judgement

³⁷ Substitute House Bill Number 116, 129th General Assembly, (Ohio 2012)

³⁸ Convention for the Protection of Human Rights and Fundamental Freedoms, Article 10

³⁹ Human Rights Act 1998 Article 10 s 1

Although the act exercises that this right is universal, meaning it applies to everyone, there are however restrictions which are executed by the law. These restrictions ‘are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime.’⁴⁰ When trying to justify the freedom of expression, numerous factors are to be considered. For example, these may include ‘the identity of the speaker, the context of the speech and its purpose, as well as the actual words spoken or written’.⁴¹

Regarding the Malicious Communications Act a person will therefore be found guilty if they send ‘any letter, email, photograph or recording which is indecent, grossly offensive or which conveys a threat is an offence if the sender intends to cause distress or anxiety to the recipient’⁴². Once convicted under this act it could be said that an individual’s right to the freedom to expression was breached. However, it is important to note that Article 10 of the Human Rights Act is a ‘qualified right’ meaning that it is used in proportion within society to achieve its telos.

The same principle applies under the Communications Act 2003. The case of *R v Chabloz*⁴³ can be used to illustrate how the freedom of expression can somewhat be limited when meeting the demands of the law. The Defendant in this case made several anti-Semitic comments online. Prosecuted under s.127, Chabloz attempted to use Article 10 as her defence which ‘illustrate(s) the continued difficulties the criminal justice system experiences’⁴⁴ in understanding when the law should limit an individual’s freedom of expression. Article 10 is not an absolute right and can be restricted if certain criteria are met but it remains unclear as to when the law should intervene.

A specific case, similar to *Chabloz*, is *Collins*, as mentioned prior. This case involved a man who made several phone calls to Westminster offices. ‘In these telephone calls and recorded messages the respondent, who held strong views on immigration and asylum policy and the provision of public support to immigrants and applicants for asylum, ranted and shouted and made reference to “Wogs”, “Pakis”, “Black bastards” and (according to the

⁴⁰ *ibid* ss.2

⁴¹ ‘Freedom of expression Legal Framework’ (*Equality and Human Rights Commission*, 25th May 2016) <https://www.equalityhumanrights.com/sites/default/files/20150318_foe_legal_framework_guidance_revised_final.pdf> accessed 14 November 2018

⁴² n.2

⁴³ *R v Chabloz* case cited in article “Social Media; ‘A theme park just for fools’ – R v Alison Chabloz” (n.44)

⁴⁴ Laura Bliss, “Social Media; ‘A theme park just for fools’ – R v Alison Chabloz” (2018) *J. Crim. L.* 82(4), 301-304

statement of facts agreed between the parties for purposes of this appeal but not the case stated by the Justices) "Niggers"⁴⁵. When prosecuted, he tried to use Article 10 to his defence, but was unsuccessful because the need to protect public safety overruled the qualified right to freedom of expression.

If the Malicious Communications Act and the Communications Act are to be reformed, there needs to be clarity in what is deemed freedom of expression and offensive language. Academics such as Chara Bakalis reiterates this as she states "the underlying purpose of each piece of legislation will need to be articulated and subsequently examined to determine whether the mischief it is protecting does indeed fall into the Article 10(2) exceptions."⁴⁶ As freedom of expression is such a fundamental right, it should always be considered in order to stabilise a democratic society.

Conclusion

After careful consideration and extensive research on this topic, it is clear that reforms are necessary in order to codify and consolidate the law. As a result, this will help regulate offensive online communications.

A way that could be suggested to consolidate the law would be to combine the relevant areas of the two existing Acts to create a single piece of legislation. This would make the law regarding offensive online communications more accessible. Therefore, removing the 'scattergun' approach used by parliament when creating the current law, making it easier to prosecute in future. However, this single piece of legislation could prove to be too narrow as it has the potential to brush over significant parts of the two existing Acts. To prevent this, a significant amount of time should be allocated reviewing the proposed reform.

As well as consolidating the law, codification of the law is also necessary. This would relate to the use of archaic vocabulary in the current legislation, such as 'grossly offensive' and 'obscene'. The use of these words is outdated in modern society. To update the law, more articulated vocabulary should replace the archaic phrasing used previously, with definitions included in the reformed Act.

⁴⁵ n.27 [40]

⁴⁶ n.5

Another important element to consider is the transparency of the *mens rea* in the reformed legislation. For the two separate offences, intention and/or recklessness should be clearly specified. The new law should try to identify what actions, or lack of them, would determine the culpability of the crime.

The freedom of expression should not be ignored when reforming this law, as it is vital to human rights. A clear distinction should be made in order to clarify when an expression becomes a criminal offence. The inclusion of this right in the reformed law should highlight key aspects of the human rights act, making it clear when offensive online communications is no longer an opinion, but a criminal act.

With the suggested reforms taken into consideration, it is likely that it will become easier to regulate offensive online communications with respect to the freedom of expression.

Bibliography

Table of cases

UK Jurisdiction

Chambers v DDP [2012] EWHC 2157

Collins v DDP [2006] 1 W.L.R 2223 UKHL

Connolly v DDP [2007] EWHC 237; [2008] 1 W.L.R 276

Nedrick v R [1986] 3 All ER 47

Other Jurisdiction

Logan v. Sycamore Community School Bd. Of Educ., 780 F. Supp. 2d 594 (S.D. Ohio 2011)

Table of Legislation

UK Jurisdiction

Communications Act 2003

Human Rights Act 1998

Malicious Communications Act 1988

European treaties

Convention for the Protection of Human Rights and Fundamental Freedoms

Other Jurisdiction

Substitute House Bill Number 116, 129th General Assembly, (Ohio 2012)

Secondary Sources

Articles

Arden M, 'Criminal law at the crossroads: the impact of human rights from the Law Commission's perspective and the need for a code' [1999] 1(1) Criminal Law Review

Bakalis C, "Rethinking cyberhate laws" (2017) Information & Communications Technology Law, 27(1) 86-110

Bliss L, "Social Media; 'A theme park just for fools' – R v Alison Chabloz" (2018) J. Crim. L. 82(4), 301-304

Bliss L, "The Crown Prosecution guidelines and grossly offensive comments: an analysis" (2017) Journal of Media Law 9(2), 173-188

Eugenicos AM, 'Should we reform the Offences against the Person Act 1861?' [2017] 81(1) Journal of Criminal Law

Shields K and Jones K, "Tackling online trolling" (2016) Criminal Law & Justice Weekly 180(37)

Watkins D, 'Where do I stand? Assessing children's capabilities under English law' [2016] 28(1) Child and Family Law Quarterly 25-44

Books

Storey T, *Unlocking Criminal Law* (6 edn, Routledge 2017)

Reports

Crown Prosecution Service, "Social Media – Guidelines on prosecuting cases involving communications sent via social media" (revised 21 August 2018)

'Freedom of expression Legal Framework' (Equality and Human Rights Commission, 25th May 2016)

<https://www.equalityhumanrights.com/sites/default/files/20150318_foe_legal_framework_guidance_revised_final.pdf> accessed 14 November 2018

Law Commission, "Abusive and Offensive Online Communications: A Scoping Report" (Law Com No 381, 2018) 113, para 5.95

Office for national statistics, 'Social Networking by age group, 2011 to 2017' (Office for National Statistics, 24 August 2017)

<<https://www.ons.gov.uk/peoplepopulationandcommunity/householdcharacteristics/home>

internetandsocialmediausage/adhocs/007401socialnetworkingbyagegroup2011to2017>
accessed 6 November 2018

Websites and Blogs

Hunt Q, 'Striking a balance - Malicious Communication Act and free speech' (Criminal Defence Barrister Blog, 28 May) <http://www.bestcriminaldefencebarrister.co.uk/criminal-defence-barrister-blog/2018/striking-a-balance-malicious-communication-act-and-free-speech.aspx> accessed 14 November 2018

What is Sex Trafficking?

Sex trafficking is force, fraud or compulsion to perform sexual activity including prostitution, and pornography in exchange for, money, drugs, and other valuable items. The subject is allied to both human trafficking and slavery, as they follow the same legislation. Human trafficking is defined as illegally transporting individuals from one country to another, which is forced upon the person. The Modern Slavery Act defines slavery, 'If a person requires another to perform forced or compulsory labour and the circumstances are such that the person knows or ought to know that the other person is being required to perform forced or compulsory labour.'¹

History

Slave trade was significantly contributing to the British economy until its abolition in late 19th century, with the Slave Abolition Act 1833.² In addition, Britons formed the Anti-Slavery International in 1839 to help abolish slavery in other countries too. However, even though slavery was abolished, human trafficking remains to be an issue for modern society. Parliament passed a series of legislation including the Modern Slavery Act 2015 among other in order to protect individuals from sex enslavement.

Legislation

In the UK, the subject of sex trafficking was seriously addressed in recent years, which resulted in the creation of the document Modern Slavery Act 2015. This document introduced: the office of the Independent Anti-slavery Commissioner, whose sole task is to fight sex trafficking, high penalties for committing a crime in this branch of law, such as life imprisonment or protection of victims who are forced by criminals to commit crimes so that they can not be held responsible for these acts.³ Most importantly, the document also introduces preventive measures to protect victims from harm both physically and mentally.

To What Extent Do Laws throughout England and Wales Protect Women against

SEX TRAFFICKING

by Grace Fashanu, Leah Lauderdale, Caitlin McCauley, Amanda Puszc, Anastasia Vakoula

Current law

Law-making bodies are in the constant process of adapting laws and introducing new legislation to prosecute sex traffickers effectively and protect society from such offenders. Both the Sexual Offences Act 2003 and the Asylum and Immigration Act 2004 have received strong feedback, with the Home Secretary admitting in the 'UK Action Plan on Tackling Human Trafficking' that "there has been a number of successful prosecutions for trafficking for sexual exploitation using the new legislation."⁴ Particularly the Asylum and Immigration Act 2004 considers a much broader scope in trafficking, making it easier for prosecutors to take legal action against traffickers for a range of exploitative conduct. Despite this, the law must still ensure that these offences are punishable and women are protected in doing so.

Case Law & Eastern Europe

Not all sentences are appropriate for the severity of the crime, as shown in Attorney General's Reference (No.6 of 2004) where the defendant received a 10 year sentence, later increased to 23 years.⁵ This sentence was more appropriate due to the development of legislation and shows justice is being served.

WestLaw highlights how many appeals are made where often a lighter sentence is given, such as the case of R v Roci 2005. However, UK law making bodies have advanced much more than other countries, particularly Ukraine where they still lack much needed legislation to protect victims, especially since sex trafficking is a major problem in that country.

¹The Shared Hope Foundation, 'What is Sex Trafficking (2018),' > accessed on 2nd November 2018

²'How did the Abolition Acts of 1807 and 1833 affect the slave trade?', National Archives, accessed 11 November 2018

³Modern Slavery Act 2015

⁴Home Office & Scottish Executive, 'UK Action Plan on Tackling Human Trafficking' (2007)> accessed 12 November 2018

⁵Attorney General's Reference (No.6 of 2004) Also known as: R. v Plakici (Luan), Court of Appeal (Criminal Division)

To What Extent Do Laws throughout England and Wales Protect Women against Sex Trafficking?

Despite somewhat extensive legislation that reduce the number of offences connected to human trafficking for sexual exploitation throughout England and Wales, all circumstances are not fully elaborated upon. Sex trafficking, according to the Shared Hope International Group, is when ‘*someone uses force, fraud or compulsion to cause a profitable sex act with an adult which includes prostitution, pornography and sexual performance done in exchange for items of value, all including, money, drugs, shelter, food and clothes.*’¹ Whilst undertaking this research report to consider the chosen topic, sex trafficking is closely allied to human trafficking and slavery, as they link together under the same legislation guidelines. We believe that it is best to address this matter in the opening of our report as sex trafficking has only recently converted into an issue within England and Wales as it was previously perceived solely as human trafficking and slavery. Human trafficking is the action of illegally transporting people from one country or area to another and this action is usually forced. Section 1 of the Modern Slavery Act then defines slavery to be ‘If a person requires another to perform forced or compulsory labour and the circumstances are such that the person knows or ought to know that the other person is being required to perform forced or compulsory labour’²

History of the Law Regarding Sex Trafficking from 17th Century

Slave trade has had an active role in the British economy, especially during the early 17th century when Britons developed their own colonies and needed people to work for plantations³. During the Industrial Revolution, the proceeds from slave trade and the West Indies estates totalled 5% of the British Economy. Enslaved Africans and indentured poor English slaves

¹ The Shared Hope International, ‘What is Sex Trafficking’ (2018) <<https://sharedhope.org/the-problem/what-is-sex-trafficking/>> accessed on 2nd November 2018.

² The Modern Slavery Act, 2015, s.1

³ National Archives , “How did the Abolition Acts of 1807 and 1833 affect the slave trade?” <<http://www.nationalarchives.gov.uk/education/resources/slavery/>> accessed 11 November 2018

controlled the hard labour either to pay off debts or because they were property of their slave owners. The campaign to abolish slavery began in the 1760's supported by both white and black abolitionists⁴.

In 1772, the case of *Somerset v Stewart*⁵ held that slavery was unfounded by the common law and that it had never been legal by ruling in England and Wales, therefore it became unlawful. Following the abolitionist movement, initially led by William Wilberforce and Thomas Clarkson⁶, slave trade was voted to be illegal within the British Empire with the Slave Trade Act 1807. From then on, Britons opposed slave trade, since slavery itself was abolished within the British Empire, with the exception of India, with the Slavery Abolition Act 1833, which freed 800,000 slaves owned by Britons. In 1839, the Anti-Slavery International was formed in Britain with its aim to make slavery illegal in other countries too.

Even though slavery was abolished in the 19th century, there is no doubt that we are still fighting against it in the 21st century. It has taken the form of human trafficking, the illegal trading of human beings for the purposes of sexual exploitation or forced labour. Following the Slavery Abolition Act 1833, the legislation in England and Wales did not act to protect individuals from trafficking during the 20th century. Before the Modern Slavery Act 2015 came into force, the anti-trafficking legislation in England and Wales was a combination of different rules including the Nationality, Immigration and Asylum Act 2006, which made trafficking of people for reasons of prostitution unlawful as well as the Sexual Offences Act 2003, which made trafficking for all forms of sexual exploitation unlawful. In addition, the Asylum and Immigration Act 2004 outlawed human trafficking for all purposes, including forced labour while the Coroners and Justice Act 2009 made it unlawful for a person to force another person into forced labour.

Apart from UK legislation there are conventions and protocols that are dealing with human trafficking and have been adopted by England and Wales. These include the Convention on Action against Trafficking in Human Beings which was formed by the Council of Europe in 2015 and protects people who have been victims of trafficking. The convention was adopted by England and Wales in 2009 and following that the UK Human Trafficking centre was

⁴ David Olusoga, 'Slavery: The history of British slave ownership has been buried: now its scale can be revealed' *The Guardian* (12th July 2015) <<https://www.theguardian.com/world/2015/jul/12/british-history-slavery-buried-scale-revealed>> accessed 11th November 2018

⁵ *Somerset v Stewart* (1772) 98 ER 499

⁶ BBC History, 'William Wilberforce (1759 - 1833)' (2014) <http://www.bbc.co.uk/history/historic_figures/wilberforce_william.shtml> accessed 17th November 2018

created to ensure that both regions is complying with obligations under the Convention. They have also signed and approved the United Nation's Protocol to Prevent, Suppress, and Punish Trafficking in Persons, Especially Women and Children reinforcing the United Nation Convention against Transnational Organised Crime 2000⁷.

Legislation in Effect to Protect Women from Sex Trafficking

Since then, laws have been modernised and altered to suit the nature of sex trafficking crime due to the number of offences increasing. The vital acts, protecting women from sex trafficking in both England and Wales, include the Sexual Offences Act 2003, Asylum and Immigration Act 2004 and Modern Slavery Act 2015.

The Sexual Offences Act 2003

The Sexual Offences Act 2003 is one of the most important documents in the United Kingdom. In addition to crimes such as rape or child abuse, it also contains sections on sex trafficking. The first section that deals with this topic is part 1 subsections 51A - 54 which discusses prostitution. According to these records, a person commits a crime if he deliberately persuades another person to provide sexual services in order to gain benefits. The highest possible punishment from this article is a deprivation of liberty for up to 7 years. A subsection that explicitly addresses the subject of sex trafficking is the "*Trafficking*" (57-60C). The maximum penalty for bringing a person in England or Wales by doing anything or being aware that someone else will commit a crime is a deprivation of liberty for up to 14 years, hence deterring offenders and protecting women. The Sexual Offences Act of 2003 does not contain comprehensive information on sex trafficking, only a small part of the document is devoted to this subject, which does not constitute sufficient protection for victims or prevention of such crimes. It is not specified what kind of penalty threatens to force or psychological violence to provide sexual services.⁸

Asylum and Immigration (Treatment of Claimants) Act 2004

The Asylum and Immigration Act criminalised human trafficking for all purposes, including forced labour. Its main purpose, to unify immigration and asylum appeals into a single level of appeal with restricted forward review, the asylum and immigration tribunal. If parties wish to

⁷ In Brief, 'UK anti-trafficking laws' <<https://www.inbrief.co.uk/offences/human-trafficking-uk-law/>> accessed 11th November 2018

⁸ The Sexual Offences Act 2003

further appeal to the High Court, it can only be made on the basis that the tribunal made a mistake of law. The aim of the act is to create criminal sanctions in order to penalise individuals who come to England and Wales without valid travel documents or who don't work with the authorities to get new travel documents when a previous claim has not been successful. The Act also provides with accommodation individuals in need of asylum who are not able to return home immediately with the condition that they contribute in activities of the community. In addition, it pinpoints "sham marriages" and demands foreign nationals from outside the European Economic Area to provide the authorities with written permission from the Home Office in order to be given approval to get married in Britain.

Modern Slavery Act 2015

The document that best protects victims of sex trafficking is the Modern Slavery Act 2015. The first subsection says, "A person commits a crime if he keeps a second person in captivity while being aware of his actions." The maximum penalty for doing so is life imprisonment, a punishment which is bound to ward off offenders and consequently protect women who are victims. In addition, the subsequent section of the document is preventive measures. They are used to prevent a potential perpetrator from harming victims in any physical or psychological method.

This is an important aspect because the essence of mental health is perceived. Victims are also protected through part 5, section 45, which talks about defence in the event of crime, for example as a result of coercion. The act (part 4) also introduces the existence of the Independent Anti-slavery Commissioner, which is appointed by the Secretary of State. Its most imperative fact is his position is independent and the most important parts of his tasks are: creating reports for the Secretary of State, Scottish Ministers and the Department of Justice in Northern Ireland, making recommendations for any public authorities, supporting (financial or any needed) to conduct research, providing information, education and training, government consultations and non-governmental, cooperation with government organisations (e.g. the Commissioner for Victims and Witnesses), voluntary and other people. This office can be a potential breakthrough in protecting the rights of modern slaves as victims because it is one of the first offices of this type.

For the first time, people who have been harmed by the crimes of sections 1, 2 and 4 of this act have an advocate who is solely interested in their affairs. Therefore, The Modern Slavery Act 2015 is a great example of how the state should fight sex trafficking and protect women.

However, this is a relatively new document, since there was no adequate protection in this matter before. Nevertheless, it can serve as an example for other countries too.

How Current Law has been Adapted to Sex Trafficking Cases

With the ongoing issue of sex trafficking in England and Wales, the law-making bodies have found themselves in the constant process of adapting laws and introducing new legislation to prosecute sex traffickers more effectively and protect society from such offenders. The Sexual Offences Act 2003⁹ forbids all forms of human trafficking, whilst the Asylum and Immigration Act 2004¹⁰ criminalises trafficking into, within, and out of, England and Wales for not only sex trafficking, but also all other forms of exploitation. Both pieces of legislation have received a very strong response, with the Home Secretary admitting in the 'UK Action Plan on Tackling Human Trafficking'¹¹ that "*there has been a number of successful prosecutions for trafficking for sexual exploitation using the new legislation.*"¹² Such statement is indeed true to much extent, particularly through looking at the Asylum and Immigration Act 2004¹³ which, because of its consideration of a much broader scope in trafficking, has made it substantially easier for prosecutors to take legal action against traffickers for a range of exploitative conduct. Despite this, sex trafficking offences continue to remain an issue in England and Wales, the law needs to be updated to ensure that these offences are punishable under legislation and women are thus protected in doing so.

The UK Borders Bill¹⁴, which is currently continuing its journey through parliamentary process, covers a substantial amount of trafficking legislation, and it is this that is presently being amended "to extend the territorial application of trafficking offences,"¹⁵ highlighting how and why the law is adapting in regard to sex trafficking offences. More recently in regard to this, The Modern Slavery Act 2015,¹⁶ aims to combat modern trafficking and slavery within England and Wales as a whole, and this has already inflicted change in society, with "12 slavery

⁹ Sexual Offences Act 2003 (s. 42)

¹⁰ Asylum and Immigration (Treatment of Claimants, etc.) Act 2004, s. 19

¹¹ Home Office & Scottish Executive, 'UK Action Plan on Tackling Human Trafficking' (2007) <https://ec.europa.eu/antitrafficking/sites/antitrafficking/files/uk_action_plan_on_tackling_human_trafficking_en_1.pdf> accessed 12th November 2018.

¹²*ibid*, 8

¹³ Asylum and Immigration (Treatment of Claimants, etc.) Act 2004, s. 19

¹⁴ UK Borders Act 2007, s.30

¹⁵ Home Office & Scottish Executive, 'UK Action Plan on Tackling Human Trafficking' (2007) 8 <https://ec.europa.eu/antitrafficking/sites/antitrafficking/files/uk_action_plan_on_tackling_human_trafficking_en_1.pdf> accessed 12th November 2018.

¹⁶ Modern Slavery Act 2015, s.30

and trafficking prevention orders put in place and 183 people taken to court between April and December”¹⁷ when the Act was just introduced. This adaption in legislation therefore acts as a deterrent to sex trafficking offenders, especially as maximum sentences have not only been increased, but the courts have also been given the powers to restrict the activities of suspected traffickers and gang-masters.¹⁸ Thus, it can be said that the law is continually adapting in response to developing sex trafficking offences, and this has produced slightly positive results in protecting women in England and Wales, however minimal these results may be.

Case Law Regarding Sex Trafficking

A particular case which reflects changes to the law on sex trafficking and how far sentencing has increased over the years is Attorney General’s Reference (No.6 of 2004) R v Plakici 2004¹⁹.

In this case, the defendant received an extremely lenient sentence of 10 years imprisonment following a guilty plea to charges of facilitating illegal entry, living on the earnings of prostitution, kidnapping and incitement to rape²⁰ after bringing girls from Romania to the England under the impression they were going to ‘work in a bar’.

It was later recognised by the Attorney General that this sentence was far too lenient for the nature and seriousness of the crime, he then referenced it and appealed to the Courts. The Attorney General’s reference was allowed by the Courts and the sentence was increased to a more suitable sentence of 23 years imprisonment for the string of offences committed by Plakici. This demonstrates how sentencing guidelines are slowly adapting to recognise the seriousness of human trafficking for sexual exploitation is and how more protection is provided to victims, by putting the accused away for a longer period of time. Shortly after, in May 2005, the Council of Europe adopted the Convention on Action against Trafficking in Human Beings²¹ which provides legal protection and minimum standards of care for victims of human trafficking. This includes temporary residence permits for victims who may be in danger if they return to their original country and access to specialist support, medical care and legal advice

¹⁷ BBC News, 'Trafficking Prosecutions Rise Following New Laws' (26th February 2016) <<https://www.bbc.co.uk/news/uk-35665503>> accessed 14th November 2018

¹⁸ *ibid*

¹⁹ Attorney General's Reference (No.6 of 2004) Also known as: R. v Plakici (Luan), Court of Appeal (Criminal Division), 29 April 2004.

²⁰ Attorney General's Reference (No.6 of 2004) Also known as: R. v Plakici (Luan), Court of Appeal (Criminal Division), 29 April 2004.

²¹ HM Government, *Human Trafficking: The Government's Strategy* (2011) <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/97845/human-trafficking-strategy.pdf> accessed 15th November 2018.

which ultimately protects them from being involved in trafficking crime and reduce risks associated with their origin countries and health problems from the actual offence committed against them, such as contracting diseases from the sexual exploitation they were involved with.

Comparison to Eastern Europe Law Regarding Sex Trafficking

Even though Ukraine has been making efforts to eliminate trafficking, the national government does not fully comply with the minimum effort that should be in place to eradicate this offence in comparison to England and Wales. Even though the issue in England and Wales is not as vast as that of Ukraine, it is fair to say that our law-making bodies have made progress drafting new legislation to protect victims.

Conclusion

Concluding our findings, our group decided that laws throughout England and Wales protect women from sex trafficking to a certain extent. This is because though additional laws and statutes being recently created to provide more protection to victims and deter people from committing sex trafficking offences, the courts have still given more lenient or reduced sentences. This became evident through our research on WestLaw, multiple cases from 2005 onwards showed a large number of appeals being accepted. This signifies the fact that the legal system does not consider sex trafficking offences as significant to other offences. We concluded that the law is very tolerant towards sex traffickers and the legal system should prioritise the protection of women from such offenders.

How has the treatment of vulnerable adults evolved and are current legal protections fit for purpose?

The Lunacy Act 1890

This was the initial step towards a shift from the 'delegalisation' of treatment towards the mentally ill to the importance of safeguarding

The Mental Health Act 1959

This was the first major reform and arguably the first wholly significant shift towards the growth of an appropriate legal foundation for mental health services

The Mental Health Act 1983

This was designed to give health professionals the powers, in certain circumstances, to detain, assess and treat people with mental disorders in the interests of their health and safety or for public safety

The Mental Health Act 2007

The 1983 Act was reformed to tackle concerns about risks to the public posed by people with a serious mental disorder living in the community

The Equality Act 2010

This protects individuals with a mental health condition from discrimination when at work, buying or renting property, using services and using public functions



IS THE 24 WEEK LIMIT IMPOSED BY THE ABORTION ACT 1967 FIT FOR PURPOSE?



WEEK 1

The secular and religious opposition to abortion at any stage of foetal development is grounded in the concept of sanctity of life. However, the spiritual and moral view has been aligned with the scientific view which is that from the “moment of conception when a single-cell embryo is created, a new human being or organism exist”.

WEEK 13

The Department of Health and Social Care’s report shows that 90% of abortions in 2017 were carried out within the first 13 weeks.

WEEK 20

The 20-week scan is also known as the ‘anomaly’ scan and, where risks of a potential condition (such as Down’s Syndrome) are identified, the woman is given the option to terminate the pregnancy. Some critics say that this has led to the unintentional practice of eugenics; for example, Down’s syndrome has all but been eliminated in Iceland.

WEEK 20

Where the gender of the foetus can be found out at week 20, 4 weeks prior to the legal cut-off for an abortion, it is argued that this creates an opportunity for prospective parents to make a decision in relation to abortion on the basis of gender. Commentators have stated that “...a gender-related abortion [could] ‘fit’ within the grounds for abortion permitted under the [Act]”.

WEEK 24

“a person shall not be guilty of an offence if... the pregnancy has not exceeded its twenty-fourth week...”

WEEK 38

The R v Catt (a termination at 38 weeks) case led to one judge, a member of the Lawyers Christian Fellowship, making the statement that the Abortion Act 1967 was “wrongly” and “liberally” construed to make abortion available “essentially on demand” prior to 24 weeks.