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FOREWORD
by Professor Caroline Hunter
Head of York Law School

It gives me great pleasure to provide this Foreword to the first edition of the York Law Review. The Review has been set up in order to showcase the best work of our students, from first year undergraduate to PhD. In particular, we are able to present the best dissertations from our final year LLB students and our LLM programmes. Each edition will also include articles based on student competitions or themes.

It is less than 10 years since our first students graduated. In that time the number of students at York Law School has more than doubled. We like to think that we have managed to maintain the quality of students, teaching, and the culture of the Law School throughout that period. The starting principle in our culture is that *YLS is a learning community* in which staff and students are active participants. The Review is a new venture that reflects this culture: it is a collaboration between students and staff, and shows the active learning of our students, particularly through the research that goes into producing a substantial piece of work, such as a dissertation.

This first edition includes four edited versions of undergraduate dissertations. All our final year LLB students are required to complete a dissertation. The Law School provides no limits in terms of legal subject matter for dissertations and encourages students to follow their interests, legal and personal. The four here provide an eclectic mix of subject matter: Alexander Stewart-Moreno on e-commerce and EU regulation; Kathryn Chick on social media and harmful communications; Rachel Adam-Smith on the tensions between abortion and the disabled foetus; and Deric Lui, Benjamin Thompson, and Carter Rich on gambling regulation and virtual gaming. This final paper requires an explanation: it is a 'mash-up' of three individual dissertations. The students recognised that their dissertations focused

on the same issues and took the time to collaboratively turn them into a single paper for the Review. It is part of the culture of YLS to encourage students to work collectively on the basis that we can always learn from each other. It is great to see students putting this into practice.

What links all the papers is academic curiosity and rigour. They do not just describe the law, they set up an argument and follow it through. They demonstrate the best of what our students can achieve.

The other two papers are the best responses from two competitions. One of the defining elements of York Law School is the use of problem-based learning (PBL) for all of our undergraduate core modules. We wanted to encourage our LLB students to respond to that in our first essay competition. Accordingly, we asked students to reflect on their experience of PBL. I am very happy that the winning essay is from a first-year student: Lauryn Clarke. She explains how PBL works in the Law School but then reflects on how the loss of staff to strike action impacted on PBL. As she says:

> There is a heavy focus on reflective learning throughout the LLB course at YLS. In the Legal Skills module, which is aimed at developing practical vocational skills that are particularly useful in a legal profession, we are encouraged to keep a journal for the reflective portfolio coursework.

Her essay is a great example of reflective writing.

At the post-graduate level, we have a number of programmes, with students both new to YLS and returners who know the school well. The essay competition for these students sought to offer an opportunity for all students across all programmes. They were asked simply to discuss a recent legal issue – whether case, legislation, treaty or other legal development. So a broad canvas. The winning essay was from Elinor Coombs – a student on our general LLM. The essay looks at the decision in the case *Lucasfilm Limited v Ainsworth*, which Elinor first

encountered in our module 'Art: A Problematic Life Cycle', which is part of the LLM in Art Law. The module provides students with a wide-ranging understanding of the main pressure points in artists' creative rights and the requirements for their subsistence (or registration) of intellectual property rights, and the scope of protection of each. In the case, the court had to decide whether the Stormtrooper helmets from the Star Wars franchise were sculptures protected by the Copyright, Design and Patents Act 1988. Elinor concludes that the court failed to untangle the previous inconsistent case law.

This first edition of the Review does, in my view, achieve our aim to showcase the great work of our students.

Finally, I want to acknowledge the work of five people without whom the York Law Review would not have happened. Three are members of staff: Sue Westwood and Jed Meers, lecturers in the Law School, and Martin Philip, our academic liaison librarian. But most of all, I would like to congratulate our student editors: Carl Makin and Isabel Ringrose. They have put a huge amount of work into setting up the Review and ensuring this first edition has made it to press. Any academic who has been involved with editing a journal is aware of the time required to make it happen. Carl and Isabel have made the Review happen while continuing their studies respectively as a PhD student and a final year undergraduate. The Law School is grateful and proud of them.

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EDITORIAL: A WHOLE NEW WORLD

Carl Makin and Isabel Ringrose

We are extremely pleased to introduce the inaugural volume of the York Law Review. As the first student editors of this exciting new journal, we have spent the first half of this academic year supporting the authors in shaping and pruning their work. As 'pioneers' for this new publication, we were given free reign by the Editorial Board to develop the journal's trajectory – something which has proved both exciting and challenging. We have spent many hours poring over timelines, plans, and templates to build the foundations necessary for a modern student legal publication. We have had to create new processes, systems, and ways of working where none previously existed and have had to expand and develop our personal skill sets immensely, on what has been a steep team learning curve. All of this was done with one eye on the future. Through our work, we have set a future vision for the journal – one based on growth and expansion, with the aim of showcasing the excellent calibre of academic writing produced by students at York Law School.

As many of these papers were selected prior to our recruitment, it was our job to impose some order and structure on these diverse writings. Whilst working through the various papers, two themes seemed to recur. The first was the need for and ability of the law to adapt to new challenges, whether that be new technologies, such as algorithms affecting the competitive pricing of goods, or new social frontiers, such as the conflict between the disability rights movement and the treatment of disabled foetuses under abortion law.

Secondly, the papers illustrate the limits of the law as a tool to achieve certain ends. Though calls are often made for further regulation and reform, some of the authors touch upon the need for wider social action to bring about systemic change. Changes to the law can be a force for good, but legality does not always equate to social advancement, and so the law is limited in what it can do to address different challenges. The techno-legal capabilities of many large corporations now far surpass the capacity of regional or national legislatures, meaning that corporate buy-in or negotiated solutions are the only effective means through which policymakers can change behaviour. Social media giants or video game producers, for example, can easily innovate and program around rigid legislative frameworks. Regulation must cast a wider net and take on new forms in order to protect social media users from harmful comments and protect children from the dangers of online gambling.

In the first article of this volume, Deric Lui and his colleagues explore the grey areas that exist at the intersection between video games and gambling law. Through a well-informed and thoughtful analysis of the failure of the law to properly regulate 'loot boxes', a growing phenomenon in game development, the authors highlight the potential gap in protection for vulnerable groups. Though their analysis illustrates the inability of the law to keep apace with technological innovations, it is alert to the limits of law. It recognises that legal regulation often triggers a response on the part of industry, which can act to engineer around unwanted or cumbersome intervention.

Keeping with the theme of interactive media, Elinor Coombs' paper tackles the recent UK Supreme Court decision in *Lucasfilm*, which considered whether Stormtrooper helmets from the Star Wars franchise amount to sculptures under copyright law. Elinor's thesis is that although a just outcome was reached in this case, the reasoning was suspect. This significant case has provided no answer to the question: What is a sculpture? Instead, it simply muddies the waters of a seemingly unnecessarily complicated area of intellectual property law.

Alexander Stewart-Moreno engages with a new frontier of EU competition law: algorithmic collusion. Though the mention of a cartel often conjures images of smoky rooms and organised crime, Alexander's piece engages with more nuanced forms of illegal activity, whereby corporate entities employ new technologies, which have as their aim or consequence anti-competitive effects such as price fixing. It deploys intriguing modes of analysis, drawing on both legal and economic theories to critique current EU competition policies. He argues that prioritising consumer welfare over economic orthodoxy may be short-sighted, and that a more balanced 'ordoliberal' approach must be taken to ensure healthy competition in the digital single market.

Kathryn Chick's paper argues that the balance between freedom of expression and protection from harm is not met by current Crown Prosecution Service (CPS) Guidelines on the Malicious Communications Act 1988 and the Communications Act 2003, which regulate harmful online communication. The paper looks at the growing prevalence of online communication platforms and their intrusion into our daily lives. It contends the balance between protecting freedom of expression and protecting the public from online abuse ought to swing in favour of the latter – with the primary aim being to prevent harm. Although freedom of expression is a human right and is fundamental to a democratic society, the benefits conferred by freedom of expression should not be deployed as justification for online posts intending to cause harm. Kathryn suggests that the CPS Guidelines should take a more proactive approach to the protection of victims from online communications that cause harm.

In the penultimate paper of this volume, Rachel Adam-Smith takes aim at the Abortion Act 1967. She contends that the Act has failed to keep apace with significant social and medical advancements. Focusing in particular on the position of the disabled foetus, her thesis is that there exists a disparity in the law, whereby non-disabled foetuses are afforded an additional level of protection, in the form of a time-limit on abortion.

This differential treatment, Rachel argues, is without a rational basis. Given advances in genetic testing and the time at which those tests are carried out, the ongoing distinction made in abortion law serves to undermine the value placed on disabled lives. Her most potent argument, in our view, is that too often choices around abortion are made not because of a conscious wish on the part of mothers to select against certain disabilities, but instead because of wider social issues which disempower families of disabled children and cause unnecessary and avoidable hardship and difficulty. Rachel makes a passionate and convincing call for reforms in this area, arguing *inter alia* for parity in time limits for both disabled and non-disabled foetuses.

Lauryn Clarke writes from her perspective as a first-year LLB student exposed to York Law School's problem-based learning approach for the first time. She explores how this approach to learning law not only provides students with the necessary substantive legal knowledge, but also promotes the development of a strong work ethic and an understanding of the professional conduct and ethics necessary for a future career both within and outside the legal professions. Other modules on the course, such as Legal Skills, emphasise the importance of group dynamics, and the role of individuals within a group working environment. Lauryn suggests that through reflective learning, the curriculum encourages students to take a proactive approach to their own professional development, both as individuals and as part of their wider 'student law firm'. By reflecting on the impact of recent strike action, Lauryn emphasises the necessity of each 'cog' in the problem-based learning system in enabling students to effectively tackle the legal problem scenarios they are presented with.

Many thanks are owed to the individuals who played a part in bringing this first volume to print. Our first thanks must go to the Editorial Board of the Review. The Chair, Professor Caroline Hunter, has provided unwavering support to the editors of the journal, enabling us at every stage to realise the passionate vision that we had for this publication. We would like to extend our special thanks to the school's Academic

Lead for the journal, Dr Sue Westwood. Not only has Sue provided us with strategic support, guidance, and clarity throughout our tenure, she has also been an invaluable source of sanity-checking and encouragement on our journey to publication. We also thank Dr Jed Meers for his unparalleled optimism, enthusiasm, and motivation throughout this process, especially at times when, as an editorial team, we were unable to 'see the wood for the trees'. On a final note, we would like to thank Martin Philip, our academic librarian, for his responsiveness to the many questions we have sent whilst trying to support authors to refine their work, to ensure that their work was of the highest quality.

Outside of the Editorial Board, we also extend our thanks to Petronel Geyser, who spent many hours reviewing and polishing rough drafts of all of the papers. Without her exemplary knowledge of OSCOLA, the referencing within this volume would not have reached such an impeccable standard. Our thanks also go to Rhiannon Griffiths, who very kindly lent her time and expertise as a guest reviewer. We have also received a significant amount of administrative and logistical support throughout our tenure, and for this we would like to thank Louise Prendergast and Salwa Eweis. We also thank our copy editor, Jen Moore, for her flexibility and understanding throughout the process.

As the contents of the following articles shows, the authors have put a significant amount of time and energy into developing strong papers in their areas of interest. We would like to thank them for their sincere co-operation and support throughout the editing process.

On a final note, as the editors of a journal emanating from a school that prides itself on reflective learning, we want to reflect a little on our personal journey in putting this publication together. When we were initially asked to work together on the York Law Review, both of us thought that it would be a low-level commitment that would entail reviewing a limited number of papers for a student-led academic publication. In hindsight, we were wrong, but gladly so. The level of

collegiality, camaraderie, and indeed friendship that we have developed over the year of our tenure has provided us both with entertainment and companionship through every stage of establishing the journal and publishing this first volume. We have, invariably, been each other's first port of call and most recent contact over the past weeks and months, which is something completely unexpected but most certainly welcomed. It is hard to tell at this stage what reception this journal may receive, but we hope that the following pages illustrate the enormous efforts of the authors in working to our tight schedule and sometimes demanding deadlines, which has meant that despite everything (including a pandemic) we were able to publish our first volume in line with the timescales we established at our very first meeting.

Blurring Lines: Loot Boxes and Gambling in the Video Game Industry

Deric Lui, Benjamin Thompson, and Carter Rich

Abstract

A loot box is a consumable virtual item which, upon redemption, provides the player with a randomised assortment of further virtual items within a video game. They have been adopted by highly popular multiplayer games as an alternative source of revenue, but have been criticised. The controversy lies in the fact that the precise virtual item that is awarded to the player is solely dependent upon an element of chance, which suggests a strong similarity with traditional gambling services. This paper examines a specific subset of loot boxes, the 'closed-loop' mechanic (which effectively excludes the loot box from constituting a form of gambling under the Gambling Act 2005) and explores the impact this has on children and young people. We address the current regulatory framework governing the gambling industry in England and Wales and how loot boxes fit in, before examining why the use of loot boxes might be considered gambling activity. We outline the psychological landscape of loot box consumption and the effects it has on young people, before finally examining whether or not the current approach in England and Wales provides sufficient protection. We conclude that legislative reform in this area must be based on evidence-led policies.

1 Introduction

Loot box mechanics in video games allow consumers to acquire an unknown quantity and quality of virtual in-game items such as abilities, weapons, and cosmetics.[1] Since its implementation in popular video games such as *Overwatch*[2] or, more famously, *Star-Wars Battlefront II*,[3] the loot box business model has sparked international debate amongst the gaming community and gambling regulators alike due to its controversial similarities to traditional gambling services.[4] This was made apparent by Chris Lee, an influential American politician, who described *Star-Wars Battlefront II* as a 'Star Wars-themed online casino designed to lure kids into spending money'.[5]

This prompted international calls for a regulatory response, with much of the global audience demanding that loot boxes be classified legally as gambling.[6] The video game industry is often associated with children and young people and, according to gambling literature, this demographic is the most vulnerable subpopulation to gambling.[7] It is therefore disconcerting that a comparison between loot box consumption and traditional gambling is being drawn.

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[1] Sebastian Schwiddessen and Philipp Karius, 'Watch your Loot Boxes! – Recent Developments and Legal Assessment in Selected Key Jurisdictions from a Gambling Law Perspective' (2018) Interactive Entertainment Law Review 18.
[2] Blizzard Entertainment, *Overwatch* (2019).
[3] Electronic Arts Inc., *Star Wars Battlefront II* (2019).
[4] Patrick Lum, 'Video Game Loot Boxes Addictive and a Form of "Simulated Gambling", Senate Inquiry Told' *The Guardian* (London, 16 August 2018). <https://www.theguardian.com/games/2018/aug/17/video-game-loot-boxes-addictive-and-a-form-of-simulated-gambling-senate-inquiry-told> accessed 13 December 2018.
[5] Chris Lee, 'Highlights of the Predatory Gaming Announcement' (21 November 2017) <www.youtube.com/watch?v=_akwfRuL4os> accessed 6 May 2019.
[6] Lum (n 4).
[7] Daniel King, Paul Delfabbro, and Mark Griffiths, 'The Convergence of Gambling and Digital Media: Implications for Gambling in Young People' (2010) 26(2) Journal of Gambling Studies 180.

Section 45 of the Gambling Act 2005 (the 2005 Act) defines children and young people as individuals who are 'less than 16 years old' and those 'who [are] not a child but who [are] less than 18 years old' respectively.[8] Section 1 of the 2005 Act requires the Gambling Commission in England and Wales (the GC) to take action where such a person may be 'harmed or exploited by gambling'.[9] However, of the two types of loot boxes currently available on the market, one has effectively evaded regulation through its technical definition.

The loot box is currently understood as a consumable virtual item which, upon redemption, provides the consumer with a randomised assortment of further virtual items.[10] It exists in two forms: closed-loop and cashing-in, both of which have structural similarities to traditional gambling services.[11] This includes the variable-ratio reinforcement schedule which underpins the reward structure of many forms of traditional gambling and is what makes gambling addictive.[12] The major difference between the two types of loot boxes, however, is that the contents of the closed-loop loot box cannot, in theory, be transferred to another consumer legitimately, whilst the cashing-in loot box can. This inability to transfer means that the latter satisfies the definition of gambling under the 2005 Act, and the former does not.[13] Given that closed-loop mechanics are excluded from the definition of gambling under the 2005 Act, children and young people have unimpeded access to this form of loot box consumption.

This article will explore the impact of loot boxes in video games on children and young people in order to consider whether or not the 2005

[8] Gambling Act 2005, s 45.
[9] ibid.
[10] Schwiddessen and Karius (n 1).
[11] Christopher Arvidsson, 'The Gambling Act 2005 and Loot Box Mechanics in Video Games' (2018) 29(4) Entertainment law Review 113.
[12] Kendra Cherry, 'Variable-Ratio Schedules Characteristics' (*VeryWellMind*, 7 October 2019) <https://www.verywellmind.com/what-is-a-variable-ratio-schedule-2796012> accessed 12 December 2019.
[13] Lum (n 4).

Act in England and Wales should be reformed to include closed-loop loot boxes as a form of gambling. It will first address the current regulatory position of England and Wales in relation to gambling and loot box consumption before considering why the use of loot boxes might be considered as gambling activity. It will then outline the consequences of gambling and loot box consumption in relation to children and young people. A critical analysis will then be undertaken to determine whether the current approach to regulation affords sufficient protection to this demographic.

2 The current regulatory framework

The current legislative framework governing the gambling industry in England and Wales is set out in the 2005 Act. Its tripartite licensing objectives are outlined within section 1 of the Act and include the prevention of gambling from becoming a source of crime or disorder; the maintenance of an open and fair gambling environment; and the implementation of safeguards to prevent children and vulnerable persons from being harmed or exploited by gambling.[14] Three forms of gambling are recognised by the Act: gaming, betting, and participating in a lottery.[15] This article will focus on gaming because the definition is most applicable to loot box consumption. Under section 6 of the Act, gaming is defined as 'playing a game of chance for a prize'.[16]

The general offences are set out in Part 3 of the 2005 Act and section 33(2) states that it is an offence to provide facilities for gambling services without a gambling licence.[17] An additional layer of protection is offered to children and young people within Part 4, under section 46 of the Act, which states that a 'person commits an offence if he, invites, causes or permits a child or young person to gamble'.[18] The GC is an independent, non-departmental public body which licenses those who

[14] Gambling Act, s 1.
[15] ibid ss 6, 9, 14.
[16] ibid s 6.
[17] ibid s 33.
[18] ibid s 46.

wish to provide consumers with gambling services while regulating the entire gambling industry in England and Wales. It is the responsibility of the GC to regulate and take action on these offences under its powers set out in Part 2 of the Act.

The GC's willingness to uphold the 2005 Act with regards to emergent forms of gambling has been shown most obviously by the *FutGalaxy* case, where the founders of a website were prosecuted and fined in excess of £200,000 for facilitating underage gambling for the popular football video game *FIFA*.[19] This is important for two reasons: first, it illustrates that the GC can and will use the full range of their statutory powers to 'investigate and prosecute individuals and companies that try to operate illegally';[20] and secondly, it shows that the infringement of the tripartite licensing objectives, especially the harmful effects of gambling on children and vulnerable persons, was acknowledged to be both 'horrific*'* and 'serious' by District Judge McGarva.[21]

2.1 How do loot boxes fit in?

As Christopher Arvidsson explains, section 6 of the 2005 Act defines gaming as an activity made up of three core elements: a game, a chance and a prize.[22] Although the concept of a closed-loop loot box seemingly fits with this definition – opening the loot box (game) to acquire a randomised assortment (chance) of virtual in-game goods (prize) – a minute detail within section 6(5) has helped closed-loop loot boxes escape regulatory capture. Section 6(5) stresses that the prize obtained must consist of 'money or money's worth'[23] and as closed-loop mechanics restrict items generated from loot box consumption from being traded or sold to other consumers, the lack of a market has

[19] Hilary Stewart-Jones and Greg Mason, 'FutGalaxy and "Skin Betting"' (2017) 28(5) Entertainment Law Review 181.
[20] Gambling Commission, 'Virtual Currencies, eSports and Social Casino Gaming – Position Paper' (March 2017) <www.gamblingcommission.gov.uk/PDF/Virtual-currencies-eSports-and-social-casino-gaming.pdf> accessed 6 May 2019.
[21] Stewart-Jones and Mason (n 19).
[22] Arvidsson (n 11).
[23] Gambling Act, s 6.

prevented such items from being associated with a monetary value. This was reaffirmed by a position paper published in 2017 by the GC, which emphasised that only where 'in-game items can be traded or exchanged for money or money's worth outside a video game' are they 'themselves considered money or money's worth'.[24]

3 Loot boxes and gambling

Although closed-loop mechanic loot boxes are legally excluded from being a form of gambling, this section and the next explore why loot boxes should be considered as gambling. This section demonstrates why, save for the legal technicality of section 6(5) of the 2005 Act on paper, closed-loop loot boxes fulfil all other requirements to be considered gambling.

3.1 The fundamental flaws

Stakeholders within the video game industry that employ the loot box business model are quick to convey the message that loot boxes are not and should not be considered gambling. The motivations behind such arguments are clear, as loot boxes generate enormous profits. Sales of loot boxes and other micro-transactions alone reached upwards of US$2.1 billion for *Electronic Arts* (*EA*) in 2018[25] and US$1.2 billion just in Q4 of that year for *Activision Blizzard*.[26] Given that 93% of children play video games in the UK alone,[27] it is therefore clear that industry stakeholders would stand to lose a significant amount of their annual returns if closed-loop loot boxes were to be legally regulated as

[24] Gambling Commission (n 20).
[25] Electronic Arts, 'Reports Q4 FY18 and Full Year FY18 Financial Results' (2018) <https://s22.q4cdn.com/894350492/files/doc_financials/2018/q4/Q4_FY18_Earnings_Release_-_Final.pdf> accessed 30 March 2019.
[26] Activision Blizzard, 'Fourth Quarter 2018 Results' (2019) <https://investor.activision.com/static-files/aef20fcf-3b72-44a5-bcd4-6ce49695bec4> accessed 1 April 2019.
[27] Children's Commissioner, 'Gaming the System' (*Children's Commissioner,* October 2019) <https://www.childrenscommissioner.gov.uk/wp-content/uploads/2019/10/CCO-Gaming-the-System-2019.pdf> accessed 16 December 2019.

gambling.

One of the most influential individuals to express such an opinion includes Andrew Wilson, the CEO of *EA.* After the popular video game *FIFA 18* was found to be in violation of national gambling laws in Belgium by the Belgium Gaming Commission, Wilson stated that:

> We don't believe that FIFA Ultimate Team or loot boxes are gambling firstly because players always receive a specified number of items in each pack, and secondly we don't provide or authorize any way to cash out or sell items or virtual currency for real money. And there is no real-world value assigned to in-game items.[28]

This has been reinforced by the American video game regulator, the Entertainment Software Ratings Board (ESRB), a representative of which justified the sale of loot boxes on the basis that while 'there's an element of chance in these mechanics, the player is always guaranteed to receive in-game content (even if the player unfortunately receives something they don't want)'.[29] This was likened to opening a pack of trading cards like *Pokémon* where sometimes 'you'll open a pack and get a brand new holographic card you've had your eye on for a while' whereas 'other times you'll end up with a pack of cards you already have'.[30]

These statements contain two main arguments: that because players are guaranteed to receive a 'specified number of items', the element of chance does not exist; and that because these items are unable to attain

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[28] Tom Hoggins, 'EA Faces Prosecution in Belgium over FIFA 19 Loot Boxes' *The Telegraph* (London, 11 September 2018) <www.telegraph.co.uk/gaming/news/ea-faces-prosecution-belgium-fifa-19-loot-boxes/> accessed 6 May 2019.
[29] Eric Kain, 'The ESRB is Wrong about Loot Boxes and Gambling' (*Forbes*, 12 October 2017) <https://www.forbes.com/sites/erikkain/2017/10/12/the-esrb-is-wrong-about-loot-boxes-and-gambling/#72a56b572a64> accessed 22 September 2019.
[30] ibid.

'real-world value', loot boxes cannot legally be defined as gambling.

Wilson's first argument, that loot boxes do not involve an element of chance exhibits either a clear lack of understanding of what loot boxes are or intentional ignorance on the part of industry stakeholders towards what constitutes gambling. Skill and luck lie upon two opposite ends of a spectrum[31] and to determine whether an activity is considered as gambling is 'largely determined by an assessment of whether the underlying game is a game of skill, where the element of chance is so insignificant as not to matter'.[32] It is true that consumers will, one 100% of the time, receive a specified number of prizes from a loot box, but the element of chance remains, as the consumer does not know what kind of prize they will receive. Therefore, unless the consumer knows exactly what it is that they will receive as a result of opening a loot box, chance will always be a factor.

Wilson's second argument is that because prizes obtained from closed-loop mechanic loot boxes have no 'real-world value', they are not considered 'money or money's worth', as required by the 2005 Act. The prizes are unable to constitute real-world value because *EA* does not permit the conversion of the consumer's in-game items to real-world cash. However, there are two main reasons why this element of convertibility should not protect closed-loop mechanic loot boxes from being classified as gambling.

Firstly, the argument is based on the false assumption that just because the prize obtained from the loot box is restricted to the game and the consumer, a 'real-world value' is unobtainable. Lauren Foye, a senior analyst at Juniper Research, has suggested that while loot boxes may not be assigned an official monetary value, regulators have often

[31] Stephen Dubner, 'The Economics of Sports Gambling (Ep.388)' (*Freakonomics*, 4 September 2019) <http://freakonomics.com/podcast/sports-gambling/> accessed 3 March 2020.
[32] Gambling Commission (n 20).

underestimated the value consumers place on them.[33]

Secondly, just because there exists no internal cashing-in mechanism within the game, this does not necessarily mean that consumers are unable to acquire 'money or money's worth' for loot box items. Wilson's claim displays ignorance on the part of industry stakeholders as to how third parties are exploiting the open nature of their games to convert virtual items into real-world money. Through websites such as *G2G*, and *PlayerAuctions*, individuals can effectively circumvent the trade restraint of closed-loop mechanic loot boxes and sell or purchase the entirety of another player's account. As a result of these third-party websites, these theoretically untradeable virtual items derived from closed-loop loot boxes have been converted into real-world cash and thus constitute 'money or money's worth' under the 2005 Act.

It is therefore doubtful that any game can truly be considered closed-loop in practice. However, the lack of proximity between game developers and third-party trading platforms has meant that no single party is providing the facilities for all three elements needed to constitute gaming under the 2005 Act and has consequently meant that no party is being held accountable.

4 Psychological consequences

Due to the structural similarities between traditional gambling and loot box consumption, it is important that this article addresses not only the legal landscape but also the relevant psychological impact. For the purposes of this section, the following definition of problem gambling will be utilised:

> A pattern of gambling activity which is so extreme that it causes an individual to have problems in their personal, family, and

[33] Mike Wright, 'Video Gamers will be Spending $50 Billion on "Gambling-like" Loot Box Features by 2022, According to Analysts', *The Telegraph* (London, 17 April 2018) <www.telegraph.co.uk/technology/2018/04/17/video-gamers-will-spending-50-billion-gambling-like-loot-box/> accessed 6 May 2019.

> vocational life. These issues range from domestic abuse and intimate partner violence to involvement in illegal activities, increased medical costs, and suicidality.[34]

It must be kept in mind, however, that the loot box debate currently lacks any truly conclusive forms of evidence and further research concerning the long-term effects of loot box consumption on the behaviours of children and young people is necessary to ensure that any regulation has an empirical evidence base.[35]

4.1 Psychological addiction

Loot box consumption has been shown to have operated in a similar way to gambling activities, which suggests that its consequences could potentially be comparable.[36] A study carried out by Drummond and Sauer of twenty-two video games that employed the loot box business model found that 45.45% of the games assessed met all five of Griffiths' criteria for gambling.[37] These are: 1) the exchange of money or valuable goods; 2) an unknown future event determining the exchange; 3) chance at least partly determining the outcome; 4) non-participation can avoid incurring losses; and 5) winners gaining at the sole expense of losers.[38] The same study found that most games, even those that did not meet legal or psychological definitions of gambling, included mechanisms that initiated and maintained player engagement through psychological principles which are associated with gambling behaviour.[39] The most important of these is the variable-ratio reinforcement schedule (VRRS). VRRS is defined by Skinner and Ferster as 'a mode of reinforcement where rewards are provided after a given number of responses, with the

[34] David Zendle and Paul Cairns, 'Video Game Loot Boxes are Linked to Problem Gambling: Results of a Large-scale Survey' (2018) 13(11) PLoS ONE <https://dx.doi.org/10.1371%2Fjournal.pone.0206767> accessed 25 April 2020.
[35] ibid.
[36] Aaron Drummond and James Sauer, 'Video Game Loot Boxes are Psychologically Akin to Gambling' (2018) 2 Nature Human Behaviour 530.
[37] ibid.
[38] ibid 530–532.
[39] ibid.

number of responses required to gain a reward varying unpredictably from reinforcement to reinforcement'.[40]

Traditional gambling services like slot machines are underpinned by the VRRS[41] and, in the context of loot boxes, the possibility of the consumer receiving a desirable item when consuming loot boxes is unpredictable and thus reinforces the behaviour of making further purchases. Experts believe that this repetitive behaviour, motivated by the hope of eliciting a reward, biologically stems from the operation of the dopamine system which responds most actively when there is 'maximum uncertainty'.[42]

The level of harm on children and young people from gambling is different to that experienced by adults not simply because their cognitive functions are not as developed, but also because of their lack of social experience.[43] Combined with a higher 'propensity for risk taking' and a relatively 'poor impulse control',[44] young people's vulnerability is considerably higher when consuming gambling or gambling-like goods.

Furthermore, with the rapid advancement of technology, the internet has made video games and related materials more accessible. With 90%

[40] Charles B Ferster and Burrhus F Skinner, *Schedules of Reinforcement* (1st edn, Appleton-Century-Crofts, 1957) 469.
[41] John Haw, 'Random-ratio Schedules of Reinforcement: The Role of Early Wins and Unreinforced Trials' (2008) 21 Journal of Gambling Issues 57.
[42] Alex Wiltshire, 'Behind the Addictive Psychology and Seductive Art of Loot Boxes' (*PC Gamer*, 28 September 2017) <www.pcgamer.com/behind-the-addictive-psychology-and-seductive-art-of-loot-boxes/> accessed 6 May 2019.
[43] Responsible Gambling Strategy Board, 'Children, Young People and Gambling: A Case for Action' (Gambling Commission, 2018) <https://www.gamblingcommission.gov.uk/PDF/RGSB-Gambling-and-children-and-young-people-2018.pdf> accessed 24 March 2020.
[44] ibid.

of 13- to 18-year-olds playing video games online in the UK,[45] it is worrying that Drummond and Sauer's study found that all of the games they studied allowed for, if not actively encouraged, underage players to engage with gambling and gambling-like mechanics.[46] With age and gender presenting significant risk factors in developing problematic gambling, and those specifically at risk being overrepresented in the gaming population,[47] it has been suggested that this makes such games a 'ripe breeding ground' for problem gambling.[48]

4.2 Risk factors

In addition to the VRRS, additional risk factors increase the likelihood of individuals, especially children and young people, consuming loot boxes. These factors include the in-game environment, the near-miss phenomenon, and different sensory-related characteristics. These factors are explored below.

Taking the popular online multiplayer game *Overwatch* as an example, the in-game environment is one of the major ways in which consumers can be encouraged to purchase more loot boxes. Within the game, players may either purchase or earn loot boxes. Purchasing a loot box is quick and can easily provide players with desirable items, such as rare in-game cosmetics or stronger abilities that can improve the consumer's overall experience of the game. Earning a loot box, on the other hand, could take hours upon hours of tedious, repetitive gameplay. As such, combined with the time-limited events where the virtual rewards are only available during a fixed time frame that may or may not be disclosed to the public, passionate video gamers may feel pressured to purchase loot boxes.

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[45] ParentZone, 'Skin Gambling: Teenage Britain's Secret Habit' (*ParentZone*, 2018) <https://parentzone.org.uk/system/files/attachments/Skin_Gambling_Report_June_2018.pdf> accessed 24 March 2020.

[46] Drummond and Sauer (n 36).

[47] Anders Johansson and others, 'Risk Factors for Problematic Gambling: A Critical Literature Review' (2009) 25(1) Journal of Gambling Studies 67.

[48] Zendle and Cairns (n 34).

Another significant risk factor is the near-miss phenomenon that gives players the illusion of control. It is capable of potentially causing or further developing problem gambling and is present within a number of loot boxes.[49] The near-miss phenomenon deceives consumers into believing that they are closer to winning the more desirable item than they actually are. The most obvious example of this can be seen in the game *Counter-Strike: Global Offensive*, where the process of consuming pre-determined loot boxes involves an animation of a carousel of virtual prizes being cycled through before landing on the consumer's reward.[50] The animation has no practical purpose other than showing the consumer that if the carousel had stopped a little earlier or later, then the consumer would have won a completely different prize, often more valuable in terms of its rarity compared to the prize won. The animation is illusory as the actual reward was determined the moment the consumer consumed the loot box.

Sensory-related characteristics such as sounds or images also contribute towards encouraging individuals to spend more. Audio-visual cues, such as bright colours and suspenseful music work in tandem to produce an immersive and exciting environment for the consumer when purchasing loot boxes.[51] An example can be seen within *Overwatch*, where different loot boxes light up the screen with a golden, purple, or blue glow. As Loba and others' study suggests, such cues cause players to have a real sense of excitement and achievement.[52] Keith Whyte, Executive Director of the American National Council on Problem Gambling, has drawn a parallel with slot machines. He argues that the importance of audio-visual cues is highlighted by the maintained use of

[49] Mark Griffiths, 'Psychobiology of the Near Miss in Fruit Machine Gambling' (1991) 125(1) Journal of Psychology 347.
[50] Valve, *Counter-Strike: Global-Offensive* (2019).
[51] Pamela Loba and others, 'Manipulations of the Features of Standard Video Lottery Terminal (VLT) Games: Effects in Pathological and Non-pathological Gamblers' (2001) 17(4) Journal of Gambling Studies 297.
[52] ibid.

the sound of crashing coins even though slot machine winnings now come on slips of paper.[53]

This section has explored the psychological impact of loot box consumption through its addictive nature coupled with an environment in which consumption is implicitly encouraged or even pressured. It concludes that as a form of 'weaponized behavioural psychology' that aims to exploit the cognitive weakness of the person,[54] the loot box is similar, if not identical, to traditional gambling services.

5 Is the current approach sufficient?

Having drawn similarities between loot box consumption and traditional gambling as well as its effects on children and young people, a case must be made to demonstrate whether or not the current approach to closed-loop loot boxes in England and Wales complies with the general licensing objectives set out in section 1(c) of the 2005 Act.

5.1 The tripartite licensing objectives

Of the three licensing objectives outlined within section 1 of the 2005 Act, subsection (c) sets out the protection of 'children and other vulnerable persons from being harmed or exploited by gambling' and is an essential guiding objective for the work of the GC.[55] Although Abarbanel is correct in arguing that the GC is 'accurately doing its job in interpreting the set regulation within the scope of the law, rather than stepping outside the bounds of their scope of responsibility to become

[53] Jason Bailey, 'A Video Game "Loot Box" Offers Coveted Rewards, but is it Gambling?', *The New York Times* (New York, 24 April 2018) <www.nytimes.com/2018/04/24/business/loot-boxes-video-games.html> accessed 6 May 2019.
[54] Alex Hern, 'Video Games are Unlocking Child Gambling. This has to be Reined In', *The Guardian* (London, 28 December 2017) <https://www.theguardian.com/commentisfree/2017/dec/28/video-games-unlock-child-gambling-loot-box-addiction> accessed 11 January 2019.
[55] Gambling Act, s 1.

a moral arbiter',[56] the current regulatory approach is insufficient in upholding the licensing objectives of protecting children and young persons from gambling or gambling-related harms.

This must be understood through the rationale behind the legal gambling age, which in England and Wales is set at 18 years of age.[57] The reason for a blanket-ban approach to gambling and gambling-related services is because gambling is understood to be capable of causing severe psychological harm, which can adversely affect children and young people in the future. Yet, having established that the closed-loop loot box is in essence a legal form of underage gambling, the sole reliance on the technicality of its definition under the 2005 Act is effectively allowing unimpeded, unrestricted, and unregulated access to potentially harmful activities for children and young people. To put it bluntly, both the GC and the 2005 Act have failed to uphold a crucial component of the tripartite licensing objectives. Regardless of how effective it may have been in regulating traditional forms of gambling while generating revenue for the state, they have failed to adapt to emergent forms of gambling.

5.2 The failure of the Gambling Act 2005

The two factors underpinning the failure of the 2005 Act as it applies to closed-loop loot boxes are: the monetary loss for the consumer and the potentially predatory nature of loot boxes.

Excessive monetary loss for consumers who purchase loot boxes is the first route to demonstrating the failure of the 2005 Act. Closed-loop loot boxes are attractive not only because each and every possible prize is constantly being advertised to the consumer in-game, but also because of their low price points, which tempt players into spending more frequently. It is also possible to disconnect the consumer from the real

[56] Brett Abarbanel, 'Gambling vs Gaming: A Commentary on the Role of Regulatory, Industry and Community Stakeholders in the Loot Box Debate' (2018) 22(4) Gaming Law Review 231.
[57] Gambling Act, s 46.

costs of loot box spending through the introduction of in-game fictional currencies, which cannot be converted back into real money. As an example, a box of 1,500 pieces of fictional, in-game currency may be equivalent to approximately £5.00. By converting real money into fictional currency, minor transactions will feel less important.[58] While it may be argued that responsible financial planning is the responsibility of the consumer, the psychologically addictive nature of loot boxes may mask the actual costs of purchases and may result in excessive and potentially unnoticed spending.

Daniel Ziechner, a Labour MP, has requested that governmental interventions be put in place to ensure that vulnerable parties avoid losing excessive sums of money due to their lack of self-control.[59] The current lack of such regulation is without a doubt a failure of the 2005 Act.

Furthermore, loot boxes may also be considered predatory, in the sense that players may feel pressured to purchase them in order to enjoy the game. While the nature of loot boxes is not in itself unfair or predatory, there may be situations in which they can be. Where consumers are faced with an abnormally difficult in-game stage or overwhelmingly strong opponents, they may feel pressured to purchase loot boxes that could enable them to compete effectively and enjoy the game. Such purchases could include additional bonuses to the consumer, such as a stronger weapon or a more durable shield. Under these circumstances, the loot box could constitute a predatory monetisation scheme, which revolves around withholding the 'true long-term costs of the activity' until their players are either financially or psychologically committed

[58] Daniel King and Paul Delfabbro, 'Predatory Monetization Schemes in Video Games (e.g. "loot boxes") and Internet Gaming Disorder' (2018) 113(11) Addiction 1967.

[59] Mattha Busby, '"Easy Trap to Fall Into": Why Video-game Loot Boxes Need Regulation', *The Guardian* (London, 29 May 2018) <https://www.theguardian.com/games/2018/may/29/gamers-politicians-regulation-video-game-loot-boxes> accessed 16 January 2019.

to spending more.[60]

If we were to examine *Overwatch*, the conditions required to earn a single loot box without payment become exponentially more difficult and time-consuming as the player advances through the levels in the game. By enabling players to earn a relatively higher number of free loot boxes at the beginning of their game experience, the consumer slowly and without noticing, to varying degrees, becomes psychologically addicted to the random nature of loot box rewards. The harsh conditions to earn loot boxes late into the game further pressures players to purchase loot boxes, as the manual way takes far too long, and can therefore be considered a predatory monetisation scheme. This is made even more obvious during special events, such as Christmas, when special items are only available from loot boxes during a specific timeframe. Consumers earning loot boxes manually may feel even more pressured to purchase than usual, for fear that they might run out of time to get the exclusive items.

Coupled with the information asymmetry between the consumer and the loot box itself, such as the odds of acquiring a more desirable item versus acquiring a less desirable item, the predatory monetisation scheme is able to trap players into thinking they have invested far too much on trying to attain their desired item to justify quitting. This is also known as the sunk-cost effect, which irrationally justifies continuous spending because the player feels that the more they put in, the higher the likelihood of them securing their desired item.[61] However, this is typically not the case, as the odds of the loot box do not change; whereas the perception of the player with regards to the odds of the loot box does. As the Belgian Gaming Commission's Director Peter Naessens suggested, 'loot boxes are not an innocent part of video games that present themselves as games of skill … players are

[60] Daniel King and Paul Delfabbro, 'Video Game Monetization (e.g., 'Loot Boxes'): a Blueprint for Practical Social Responsibility Measures' (2019) 17(1) International Journal of Mental Health and Addiction 168.
[61] ibid.

tempted and misled, and none of the protective measures for gambling are applied'.[62]

6 Reform

Having addressed the shortcomings of the 2005 Act and its ability to protect children and young people from the harms of excessive loot box consumption, this section makes pragmatic proposals for reform of the 2005 Act.

6.1 The legislative reform of the Gambling Act 2005

The call for the legislative reform of the 2005 Act to incorporate closed-loop mechanic loot boxes as a form of gambling arises from international public outcry and media coverage of academic studies which suggest that loot boxes share the same structural traits as traditional gambling services and may, in fact, facilitate or exacerbate gambling-related harms.[63]

A different approach to England and Wales has been adopted in Belgium. The Gaming Act of 7 May 1999 provides a similar regulatory framework to that adopted domestically in the 2005 Act. Article 4 of the Belgian Act states that:

> It is prohibited for anyone to operate in any form, in any place and in any direct or indirect manner whatsoever, a game of chance or gaming establishment, without a licence obtained in advance from the Gaming Commission as governed by the present Act and by the exceptions as governed by the Act.[64]

Under Belgian law, all games of chance are considered gambling and

[62] Koen Geens, 'Loot Boxen in drie videogames in strijd met kansspelwetgeving', *Koen Geens* (Brussels, 2018) <https://www.koengeens.be/news/2018/04/25/loot-boxen-in-drie-videogames-in-strijd-met-kansspelwetgeving> cited in Busby (n 59).
[63] BBC News, 'Loot Boxes should be Banned', *The BBC* (London, 9 May 2019) <https://www.bbc.com/news/technology-48214293> accessed 20 December 2019.
[64] Gaming Act of 7 May 1999 (BE).

are prohibited unless licensed or otherwise permitted by the Kansspelcommissie (the Belgian Gaming Commission). A game of chance under Belgian law is defined as:

> …any game by which a stake of any kind is committed, the consequence of which is either loss of the stake by at least one of the players or a gain of any kind in favour of at least one of the players, or organisers of the game and in which chance is a factor…[65]

From this definition, a distinction can be drawn between UK and Belgian gambling laws. While the three key elements of a game, chance, and prize are present in both, Belgian law requires not that the prize attained from the game of chance constitute 'money or money's worth' for it to be classed as gambling, as it does in UK law, but that the consequence of the game is a 'gain of any kind'.

However, while the authors of this article understand the concerns surrounding loot box consumption in relation to children and young people, we consider the legislative reform to incorporate closed-loop loot boxes as a form of gambling under the definitions provided in the 2005 Act not only inappropriate to counteract the problems arising from excessive loot box consumption, but also impractical. This article will outline why the approach adopted by Belgium is ineffective before suggesting what the GC could potentially do to remedy the issue at hand.

A blanket-ban approach would be severely impractical and short-sighted. While it may result in some form of prevention, the root of the problem lies not just within the unimpeded access of children and young people to loot boxes, but rather the logistics involved with the enforcement of a nation-wide ban by imposing a legal gambling age on loot boxes in video games. If children and young people really wished

[65] ibid.

to consume loot boxes, the geographical limits of any domestic legislation could easily be bypassed through different channels, such as the use of a virtual private network, which tricks game servers into thinking that the console is accessing the game from another location.

Furthermore, the current lack of a conclusive evidence base to prove that loot boxes can lead to problematic gambling must be considered. A legislative response to ban loot boxes would require game developers, such as *Activision Blizzard* and *EA* to acquire operating licences that comply with gambling regulations in England and Wales. While this is not a blacklist, it would place an onerous burden upon game companies that are historically unfamiliar with the gambling industry. In line with Zendle and Cairns, it is also important that further research is carried out about loot boxes before we can determine whether loot boxes are causing harmful gambling behaviours.[66] To rush into a legislative response may only exacerbate the situation. Gainsbury has argued that because technology rapidly outpaces research, there is 'tension between rushing to implement protectionist policies based on limited data, and avoidance of issues through outdated policy, which may fail to offer adequate protections'.[67]

A rush to legally classify loot boxes as gambling has also led to concerns that it would open a Pandora's Box of sorts,[68] leading to other, less harmful elements of games being considered as gambling simply because they contain an element of chance to keep the games exciting for consumers. However, while this article considers a legal classification under the 2005 Act to be unnecessary, the GC's current position in maintaining the status quo is also unreasonable given that the potential level of harm to children and young people is so obvious.

[66] Zendle and Cairns (n 34).
[67] Sally Gainsbury, 'Gambling and Gaming are Converging: "Won't Someone Think of the Children!"?' (*BASIS*, 13 February 2017) <www.basisonline.org/2017/02/gambling-and-gaming-are-converging-wont-someone-think-of-the-children-.html> accessed 6 May 2019.
[68] Abarbanel (n 56).

Rather than monitoring developments in the video game industry, the GC should actively commission relevant research into the gambling harms caused by closed-loop loot box consumption and base their future approach on an evidential basis.

6.2 Alternative proposals

There are three proposals the authors of this article believe to be appropriate: consumer protection, corporate social responsibility (CSR), and parental responsibility. The following have been constructed as alternatives to the legislative reform of the definitions of gambling under the 2005 Act. Our proposals address the issues of information asymmetry between consumer and corporation in relation to loot box consumption, introduce standardised industry self-regulation and peer-regulation, and offer a bottom-up approach to educate parents on loot boxes to prevent children and young people from experiencing gambling activity or gambling-related harms.

(A) Consumer protection

Information asymmetry between consumers and corporations with regards to loot box consumption has been a deficiency that the 2005 Act has failed to resolve. One solution may be to require companies to specify the odds of winning specific items and provide clear descriptions of their products. Within England and Wales, this could be achieved via the Consumer Rights Act 2015 (the 2015 Act),[69] as it is capable of reducing the information asymmetry by ensuring that game developers provide sufficient information regarding loot boxes to their consumers.

In employing this solution, there are four main steps that must be followed. Firstly, we must address the essential features of a valid contract when purchasing a loot box through the video game platform in order to establish that a binding agreement exists between the

[69] Consumer Rights Act 2015.

consumer and the corporation. There must first be an *offer* of a loot box, the *acceptance* of the loot box through the act of purchasing, the provision of *consideration* in terms of money paid and the *intention to create legal relations* in terms of wanting to purchase the loot box from the vendor (video game company), and the *certainty of terms* as it is clear that one party wishes to sell and the other to buy.

Secondly, having established that a valid contract exists, we must refer to section 37 of the 2015 Act. This provision states that any of the *pre-contract information* which is listed in Regulation 9, 10, or 13 of the Consumer Contracts (Information, Cancellation and Additional Charges) Regulations 2013 (the 2013 Regulations) that was provided by the trader 'is to be treated as included as a term of the contract'.[70] This means that any pre-contract information listed in Regulation 9, 10, or 13 is to be treated as being a term of the contract between the seller and the buyer.

Thirdly, Regulations 9 and 13 state that the trader must 'give or make available to the consumer the information' that is listed in Schedule 1 and Schedule 2 respectively. This means that the seller must provide to the consumer any information about the consumption of the loot box that is listed in Schedule 1 or 2.

Lastly, Schedules 1 and 2 of the 2013 Regulations state that the information that must be disclosed includes 'the main characteristics of the goods or services, to the extent appropriate to the medium of communication and to the goods or services.' This means that the seller must disclose what are considered to be the main characteristics of loot boxes to the consumer in a manner that is appropriate.

As the odds of winning, the description of what a loot box is, as well as how the prize can be determined can be argued to be some of the main characteristics of loot box consumption, such requirements could

[70] Consumer Rights Act, s 37.

potentially pressure video game companies to go further and clearly disclose the odds of winning specific items. This solution is therefore capable of remedying the information asymmetry and potentially stopping the sunk-cost effect by showing that the odds of winning specific items do not change regardless of how much money is invested.

(B) Corporate social responsibility (CSR)

CSR is a business approach in which enterprises take it upon themselves to ensure the sustainable development of economic, social, or environmental factors is taken into account in their business model.[71] It is not philanthropy, but rather the integration of social responsibility in the manner in which businesses make profit.[72] Within the context of the video game industry, CSR is capable of facilitating the sustainable development of social factors, including the prevention of gambling-related harm to children and young people. This could take the form of industry-standardised limitations on loot box consumption or the greater exchange of information with regard to loot boxes from the corporation to the consumer.

The authors believe there are two reasons why CSR and self-regulation can be voluntarily implemented in the video game industry: the suitability of industry leaders in assuming the role of regulators and the importance of brand recognition in an increasingly globalised market.

Firstly, the reason why industry leaders are best suited to take up the role of regulators in the video game industry is that they are in the best position possible to handle regulation that strikes the right balance between the protection of vulnerable subpopulations in their consumer

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[71] Thomas Jones, 'Corporate Social Responsibility Revisited, Redefined' (1980) 22(2) California Management Review 59.

[72] Doreen McBarnet, 'Corporate Social Responsibility Beyond Law, Through Law, for Law' (2009) University of Edinburgh School of Law Working Paper 3/2009 <https://ssrn.com/abstract=1369305> accessed 16 March 2020.

base and the advancement of game development.[73] With innovative games and business models constantly under development, the advancement of technology vastly outpaces research and implementation of safety measures.[74] As Gainsbury describes, 'this gap creates tension between rushing to implement protectionist policies based on limited data and avoidance of issues through outdated policies, which may fail to offer adequate protections'.[75] If the regulation of loot box consumption was left to the government, there is a very real fear of governmental overreach that could result in unintended consequences for the video game industry.[76] As the development costs of AAA games has increased tenfold over the past decade[77] while retail prices of said games have remained unchanged,[78] the loot box business model is an integral component which seeks to increase the life span of the game itself. [79] Legislative reform to classify loot box consumption as gambling would effectively remove a major way in which game developers currently produce returns. In fact, there is evidence to further suggest that regulation within the video game industry works best when it is voluntary, rather than being forced via legislative intervention. For example, China required game developers to publish information with regards to loot box consumption in 2017 and made it clear that the odds of the loot box must be published whenever a product is sold to the consumer that uses an element of chance in deciding its

[73] Abarbanel (n 58).
[74] ibid.
[75] ibid.
[76] ibid.
[77] Keza MacDonald, 'Belgium is Right to Class Video Game Loot Boxes as Child Gambling', *The Guardian* (London, 26 April 2018) <https://www.theguardian.com/games/2018/apr/26/belgium-is-right-to-legislate-against-video-game-loot-boxes> accessed 13 December 2018.
[78] Raph Koster, 'The Cost of Games' (*Raph Koster*, 17 January 2018) <https://www.raphkoster.com/2018/01/17/the-cost-of-games/> accessed 13 December 2018.
[79] Leo Lewis, 'The "Loot Box" Showdown Facing Investors in Video Games', *Financial Times* (London, 21 December 2017) <https://www.ft.com/content/81b2c328-e642-11e7-97e2-916d4fbac0da> accessed 10 December 2019.

prize.[80] In response, *Activision Blizzard* utilised a loophole and began charging money for in-game currency while providing loot boxes as an added bonus to the currency, rendering the loot box free of charge to comply with the law in theory, but not in practice.[81]

Secondly, in an increasingly globalised market with advancements in technology, global communication systems have made the exchange of information incredibly simple between consumers. [82] Brand recognition, or the relatively vulnerable state of it, facilitated by the internet through 'a ready forum for instant criticism and publicity, with websites on all kinds of issues pointing fingers at specific companies' has been a key driver for the corporation's engagement with CSR.[83] Why this form of external stakeholder pressure in the form of consumers is effective in getting corporations to engage with CSR is because, as McBarnet suggests, the proportion of 'corporate value that comes not from tangible assets … but from "intangibles" has risen'.[84] A relevant example would include *Star Wars Battlefront II*, where *EA* faced international criticism and media coverage for their use of loot boxes in a manner that was deemed unfair and exploitative to consumers.[85] This is reinforced by McCaffrey, who suggests that global communication 'facilitates accountability and encourages developers to be open and honest, while also spreading valuable information between consumers'.[86] A responsible manner adopted by corporations that takes social factors into account is therefore 'necessary to ensure [the

[80] Matthew Handrahan, 'Blizzard Avoids China's Loot Laws by Selling Overwatch In-game Currency' (*Games Industry*, 6 June 2017) <www.gamesindustry.biz/articles/2017-06-06-blizzard-avoids-chinas-loot-box-laws-by-selling-in-game-currency> accessed 6 May 2019.
[81] ibid.
[82] McBarnet (n 72).
[83] ibid.
[84] ibid.
[85] Matthew McCaffrey, 'The Macro Problem of Microtransactions: The Self-Regulatory Challenges of Video Game Loot Boxes' (2019) Business Horizons 62(4) 483 <https://ssrn.com/abstract=3309612>.
[86] ibid 15.

corporation's] longevity in terms of both resources and public opinion'.[87]

(C) Parental responsibility

In the prevention and reduction of gambling-related harms to children and young people, parents play a significant factor. Abarbanel has stated that:

> Consumers, and parents of those consumers, hold equally valuable roles in this process, contributing toward best practices in responsible gaming and holding game developers, gambling entities, regulators, and themselves accountable.[88]

While parents may not necessarily be interested in whether or not an activity reaches the legal threshold for gambling, the GC has recognised that their main concern is 'whether there is a product out there that could present a risk to their children'.[89] Parental oversight is therefore a valuable resource which could effectively protect vulnerable subpopulations in the video game industry. However, while it is more flexible than government intervention or industry self-regulation, consumer research carried out by the Entertainment Software Ratings Board in America has found that a large number of parents are not fully aware of what loot boxes are, how they work, and what controversies surround them.[90] As parents are often the primary source of money for children and young people to purchase and consume loot boxes, they

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[87] Daniele Giovannucci, Oliver Von Hagen, and Joseph Wozniak, 'Corporate Social Responsibility and the Role of Voluntary Sustainability Standards' (2014) 1 NRMT 359.
[88] Abarbanel (n 56).
[89] T Miller, 'Loot Boxes within Video Games' (*Gambling Commission*, 24 November 2017) <www.gamblingcommission.gov.uk/news-action-and-statistics/news/2017/Loot-boxes-within-video-games.aspx> accessed 6 May 2019.
[90] Paul Tassi, 'The ESRB Is Being Willfully Obtuse about Loot Boxes, and Will Never Be Any Help' (*Forbes*, 28 February 2018) <www.forbes.com/sites/insertcoin/2018/02/28/the-esrb-is-being-willfully-obtuse-about-loot-boxes-and-will-never-be-any-help/#a184fa76877a> accessed 6 May 2019.

must be given adequate information on the subject to fully understand what it is that their children are consuming. Aside from information given by industry leaders as suggested under the consumer rights solution in this article, parents are also able to self-educate on the issue through a variety of different free educational platforms. Such platforms include AskAboutGames, which is a joint venture between the VSC Rating Board and games trade body Ukie, which provides up-to-date answers about age ratings, tips about safe and beneficial play, and on-going debates. [91] AskAboutGames has created a guide specifically for parents and legal guardians about loot boxes and simplifies the relevant definitions and information into a succinct and digestible format.[92]

AskAboutGames has also educated concerned parents and other relevant stakeholders about the available payment channels and has offered advice and information about parental control options within devices to help reduce and prevent further undesired in-game purchases from being made.[93] In addition, parents may also prevent excessive, unnoticed spending by their children by preventing the storage of credit card details on their children's video game accounts. It is recommended that educational programmes must support parents to be more aware of the available payment channels available and to keep regular tabs on them.[94]

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[91] AskAboutGames, 'About' (*AskAboutGames*, 2017) <https://www.askaboutgames.com/contact-links/> accessed 20 December 2019.
[92] Will Freeman, 'Loot Boxes: A Guide for Parents and Guardians' (*AskAboutGames*, 2019) <https://www.askaboutgames.com/loot-boxes-a-guide-for-parents-and-guardians/> accessed 20 December 2019.
[93] ibid.
[94] Georgios Floros and others, 'Adolescent Online Gambling: The Impact of Parental Practices and Correlates with Online Activities' (2013) 29(1) Journal of Gambling Studies 131.

7 Conclusion

This paper has carried out a critical appraisal of the 2005 Act as it applies to closed-loop loot boxes. It has illustrated that the legal definition of gambling where rewards can be converted for 'money or money's worth' fails to cover closed-loop loot box consumption and, as such, the law is shown to remain unable to keep pace with emergent forms of gambling. It has exposed how the current operational framework of gambling regulation in England and Wales is flawed in practice. While the tripartite licensing objectives of the 2005 Act are reasonable, the circumvention of the legal definition of gambling (via the fragmentation of the process where loot boxes are purchased, used, and then converted into real money) and the subsequent exploitation of this process by industry stakeholders and third-party websites have shown that the present legal framework for gambling does not appear to be effective in protecting children and young people. As a result, the GC as a regulator for the gambling industry has failed both in upholding the tripartite licensing objectives and holding individual game companies accountable.

However, as a causal connection between loot boxes and problematic gambling in children has not been conclusively established, the authors recommend a patient and cautious approach. Technological advances that outpace research and regulation in the video game industry have led to rushed, impractical, and short-sighted legislative frameworks seen in both Belgium and China. Until the government is sufficiently satisfied that loot boxes are harmful, drastic legislative reforms are not advised.

This does not mean that the potential harm that loot box consumption could be causing to children and young people currently should be ignored, however, but in the interim, more proportionate solutions must be pursued instead. This includes consumer protection strategies to reduce information asymmetry between consumer and corporation, standardised industry self-regulation to introduce sustainable social

development, and the provision of sufficient educational information to allow parents and other stakeholders to become more aware of the current topic. Any legislative intervention must be based on the potential and actual severity of harm.

Moving forward, a research agenda must be established with respect to loot box consumption by children and young people. This would involve research into both the short-term and long-term impacts of loot box consumption such as excessive spending, psychological addiction, gateway products into traditional gambling services, and problematic gambling.

May the farce be with you: confusing sculptures post-*Lucasfilm*

Elinor Coombs

Abstract
This paper examines the copyright law relating to sculptures, particularly focusing on the UK's decision in *Lucasfilm v Ainsworth*, which concerns Stormtrooper helmets from the Star Wars franchise, and whether they constituted sculptures under the Copyright, Designs and Patents Act 1988. The UK Supreme Court ruled the helmets not to be sculptures because of their utilitarian purpose as props in a film, meaning the helmets were unprotected by copyright law. This was a high-profile case for intellectual property law, but it unfortunately failed to clarify the already confused area. This paper discusses the statute and case law surrounding sculptures, and to what extent the UK courts successfully applied the law. It is concluded that whilst a great attempt was made to untangle the previously inconsistent case law, the *Lucasfilm* decision failed to do so.

1 Introduction

Lucasfilm v Ainsworth[1] is an exceptionally significant intellectual property (IP) case, not only because of UK precedent and the impact it will have on future copyright cases,[2] but also because it had an opportunity to clarify a substantially confused area of law. There were two core matters at issue in *Lucasfilm,* the first being whether the UK

[1] [2011] UKSC 39.
[2] Henry Lydiate, 'What is Art: A Brief Review of International Judicial Interpretations of Art in the Light of the UK Supreme Court's 2011 Judgment in the Star Wars Case: Lucasfilm Limited v. Ainsworth' (2012) 4 Journal of International Media and Entertainment Law 111, 135.

had jurisdictional claim to hear the case, considering its origin was the US. However, substantial work has been undertaken in this area, and this paper shall therefore make no further comment on this. Instead, it analyses the second issue – the ruling and judgments of the case, and its consequences for the law of copyright concerning sculptures. The first part of the paper addresses the relevant statute concerning copyright law, before chronologically examining the history of cases related to sculptures specifically. The second part then discusses the facts of *Lucasfilm*, with an analysis of its judgment, before concluding that *Lucasfilm* had an ideal opportunity to clarify an already confused area of law, but failed to do so comprehensively.

2 Copyright, Designs and Patents Act 1988

The main question arising from *Lucasfilm* was whether the Stormtrooper helmets from the Star Wars franchise constituted sculptures. Sculptures are a sub-category of copyright-protectable work, and it is therefore necessary to examine the law of copyright in the UK, which currently subsists in the Copyright, Designs and Patents Act 1988 (CDPA). Section 1 outlines the different types of protectable work, with Section 1(a) including artistic works. Section 4 defines what constitutes an artistic work, with (1)(a) including sculptures. Section 2(b) vaguely defines a sculpture in the inclusive sense – it 'includes a cast or model made for purposes of sculpture' – but the definition does not extend beyond this. What is equally important to note is that section 4(1)(a) states these works obtain protection 'irrespective of artistic quality', which was originally brought into copyright law by the Copyright Act 1956.[3] In other words, a judgment cannot be passed on the artistic quality of the piece in question, for that is an irrelevant factor in the enquiry of whether it constitutes copyright-protectable art.

Sections 51 and 52 are also essential when discussing copyright protection.[4] Section 51 provides a defence for copyright infringement

[3] Copyright Act 1956, s 3(1)(a).
[4] Copyright, Designs and Patents Act 1988, ss 51, 55.

if the end result of a design document was not an artistic work. Section 51(3) defines a design document as 'any record of a design, whether in the form of a drawing, a written description, a photograph, data stored in a computer or otherwise.' The reference to a design document in this provision simply indicates the document containing the original industrial design of an article, and is included within the Act to ensure that a drawing is not subject to both copyright protection and design right protection. In *Lucasfilm,* the design document would therefore refer to the original documents containing the drawings of the Stormtrooper helmets. Section 52 reduces the length of copyright protection to a mere 25 years if items of the copyright-protectable material were mass produced and available for the public to purchase. These sections will be integral to the analysis of *Lucasfilm* later in the paper.

3 Case law

Identifying artistic works of literature, music or dance under the CDPA is relatively unproblematic, but recognising sculptures is far more troublesome.[5] There have been numerous cases concerning copyright protection of sculptures, and it is rather challenging to detect a consistent logical trend in the judgments. This being said, there seems to be an increasing number of rulings indicating that the visual appeal, or the artistic significance of the item in question, holds weight in whether an item is deemed a sculpture, subsequently raising the bar for obtaining copyright protection, contrary to the CDPA.[6]

One of the earliest decisions regarding the definition of a sculpture rests with *Britain v Hanks*, which concerned hand-painted toy soldiers.[7] They were held to be artistic objects, and were thus protected under the Sculpture Copyright Act 1814. This seems a sensible and rational

[5] Lydiate (n 2) 111.
[6] David Langwallner, 'Copyright Protection for Works of Sculpture and Artistic Craftsmanship: Recent Developments in Australia and the United Kingdom' (2009) 3 Irish Business Law Quarterly 13, 13.
[7] [1902] 86 LT 765.

decision, with no clouding of the term 'sculpture'.[8] However, in subsequent cases, this logical position was increasingly obscured and the case law repeatedly unsettled.

The Court of Appeal in New Zealand ruled in *Wham-O*[9] that the wooden models used to make the moulds of Frisbees constituted sculptures under the Copyright Act 1962, which is exceedingly similar to the CDPA. An interesting distinction was made between the Frisbee discs themselves and the moulds that produced them. The Court of Appeal rightly decided that it would stretch the definition of sculpture too far to rule the Frisbees themselves as sculptures, but this was made on the basis that they were manufactured by an injection moulding process.[10] This has been deemed an odd distinction to make, because the Court ruled against Frisbees constituting sculptures purely based on the manufacturing process, which is not a statutory requirement in need of consideration.[11] Additionally, in spite of the Court of Appeal not wanting to stretch the definition too far beyond its original meaning, it still ruled that moulds for the Frisbees constituted sculptures, even though moulds designed for industrial purposes would not traditionally be viewed as artistic sculptures considering the ordinary use of the term. Therefore, the Court of Appeal may still have inadvertently widened the definition of a sculpture in spite of their intentions not to do so. This ruling clearly displays, however, the Court's lack of judgment on the artistic quality of the objects in question, which aligns with the required statutory criteria.

After the decision in *Wham-O*, *J & S Davis* attempted to rationalise domestic copyright law by ruling that dental impression trays cannot constitute a sculpture.[12] Initially, this decision appears logical: to ensure

[8] Langwallner (n 6).
[9] *Wham-O Manufacturing v Lincoln Industries Ltd* [1985] RPC 127 (NZ CoA).
[10] ibid.
[11] Anthony Misquitta, 'What Is Art: Artistic Craftsmanship Revisited *Lucasfilm Ltd. v Ainsworth'* (2009) 14 Art Antiquity and Law 281, 282.
[12] *J & S Davis (Holdings) Ltd v Wright Health Group Ltd* [1988] RPC 403.

the definition of sculptures is not construed too broadly, it sensibly ruled that dental impression trays cannot constitute artistic works. The decision in *J & S Davis* subsequently appears more coherent than *Wham-O's* decision to rule Frisbee moulds as sculptures, which broadened the definition. However, an issue arises from *J & S Davis*. The judgment is incompatible with the CDPA, because the main justification for the decision concerned the manufacturing process and the fact that the trays were temporary. These considerations are not a requirement of the Act.[13] Thus, as with the *Wham-O* judgment, the judges were focusing on unnecessary factors in determining whether an object constitutes a copyright-protectable work. Therefore, even though *J &S Davis* ruled correctly in judging dental impression trays not to be sculptures, so that its definition remains rightly narrow, their justification was still flawed.

Next came *Breville,* and its judgment resembles *Wham-O* more so than *J & S Davis* in its ruling that plaster shapes for sandwich-maker appliances constituted sculptures.[14] The similarities between *Breville* and *Wham-O* arise from the decision to label items as sculptures, despite them falling outside of the common use of the term, thus broadening its definition, whereas *J & S Davis* attempted to narrow it. Plus, despite the intuitively outlandish nature of these decisions, these two cases were decided in accordance with the historical and doctrinal view that artistic quality is irrelevant in determining artistic work, as it is clear that the judges were not making a judgment on the artistic nature of these 'sculptures' in accordance with statutory requirements.[15]

Just two years later, IP law was called to the stand again in *Metix,*[16] in which Laddie J found that the moulds of cartridges used to mix chemicals did not constitute sculptures, contrasting the decisions of *Wham-O* and *Breville*, and following *J & S Davis*. It was ruled that,

[13] Misquitta (n 11) 283.
[14] *Breville Europe plc v Thorn EMI Domestic Appliances Ltd* [1995] FSR 77.
[15] Langwallner (n 6) 13.
[16] *Metix (UK) Ltd v GH Maughan (Plastics) Ltd* [1997] FSR 718.

'there is no reason why the word "sculpture" in the 1988 Act should be extended far beyond the meaning which that word has to ordinary members of the public,'[17] and the term should therefore be construed narrowly. A similar approach was taken in *Wildash v Klein*,[18] in which it was ruled that craftworks made of out of wire, glass rods, glass nuggets, copper foil and other materials did constitute sculptures. Angel J cited Laddie J in *Metix,* arguing once again that the term 'sculpture' should not be stretched too far past its original meaning.

This diverse understanding of sculptures presented by recent case law still leaves the definitional issue unresolved. In *Metix,* Laddie J asserted the impossibility of specifically defining whether an item constitutes a sculpture.[19] Although, he simultaneously found that a sculpture must be created by the hand of an artist, which significantly raises the standard for obtaining copyright protection. Such a narrowing of the meaning of a sculpture appears unjust when a comprehensive definition of a sculpture is not yet to be provided by the courts.

4 *Lucasfilm v Ainsworth*

Lucasfilm concerns the Stormtrooper helmets designed and produced for the first Star Wars film released in 1977, renamed as Star Wars Episode IV: A New Hope. George Lucas created the plotline and the characters, and Ralph McQuarrie designed two-dimensional versions of the costumes he envisaged for the Stormtroopers, including their armour and a helmet. Andrew Ainsworth then produced the three-dimensional vacuum moulds for the helmets that were used in the films. The issue arose in 2004, when Ainsworth started reproducing the helmets using his original tools and selling them to the public. In doing so, he made at least US$8,000 but no more than US$30,000. Upon discovering Ainsworth's business venture, Lucas sued him in the US District Court in California for breach of copyright of the helmets. The

[17] ibid 722.
[18] (2004) 61 IPR 324.
[19] *Metix* (n 16).

Court ruled in Lucas's favour, granting him US$20 million in damages, but with Ainsworth's lack of assets in the US, three claims were initiated in the UK – one to enforce the US ruling, one under US copyright law, and a final one for UK infringement of copyright.[20]

The debate in the UK over whether the Stormtrooper helmets constituted sculptures was important in relation to sections 51 and 52 of the CDPA. It was in Lucasfilm's interest to prove that the helmets were artistic works, specifically sculptures, because then the helmets would be exempt from the section 51 defence. As mentioned previously, section 51 provides that copyright is not infringed if one copies a design document, unless the copied design documents lead to artistic works, such as sculptures. Therefore, if Lucasfilm successfully argued that the helmets constituted sculptures, Ainsworth would have been unable to access the section 51 defence, and thus would have been infringing Lucasfilm's copyright by copying the original design documents of the helmets to recreate and sell them. Then, under section 52, Lucasfilm would also wish to prove that the helmets constituted sculptures, because otherwise the mass production and selling of the Stormtrooper merchandise would have invalidated the entire period of protection of their copyright; it would only last 25 years as opposed to the whole life of the author plus 70 years, and would therefore have expired by the time the case was heard, meaning Ainsworth would not be in breach of any copyright.[21] It was therefore of paramount importance for Lucasfilm to prove that the helmets constituted sculptures.

In the UK High Court, Mann J dismissed the enforceability of the US judgment, and also ruled the helmets were not sculptures under the CDPA because of their utilitarian purpose, and therefore no copyright protection applied. In his judgment, Mann J disagreed with the rulings

[20] Kristen Elisabeth Bollinger, 'A New Hope for Copyright: The U.K. Supreme Court Ruling in Lucasfilm Ltd. v. Ainsworth and Why Congress Should Follow Suit' (2012) 20 Journal of Intellectual Property Law 87, 90.
[21] Copyright Act, s 12(3)(a).

in *Wham-O* and *Breville,* instead agreeing with *Metix*'s narrow reading of the CDPA*,* and therefore argued that the helmets were not sculptures based on the fact that, '[i]t would not accord with the normal use of language to apply the term "sculpture"' to the items.[22] However, the High Court did rule that the US copyright law claims were justiciable in the UK, and therefore Ainsworth was in breach of Lucas's copyright when the relevant US copyright legislation was applied.[23] The Court of Appeal subsequently agreed that the helmets could not be protected under UK copyright law, and similarly asserted that the rulings of *Wham-O* and *Breville* produced 'a result which offends common sense and in our view is wrong'.[24] The Court of Appeal also agreed with Mann J in that the US judgment was unenforceable, but overturned the decision that the US copyright claim could succeed, ruling that the enforcement of a foreign copyright claim was not within an English Court's power.[25] The UK Supreme Court (UKSC) agreed with the Court of Appeal, and therefore Lucas lost to Ainsworth, and was left with no way to recover any damages.[26]

5 Analysis of the judgments

In *Lucasfilm,* the UK courts were faced yet again with the awkward question of 'what is an artistic work?' Or, more specifically, 'what is a sculpture?'[27] This raises a challenging point of law, as the CDPA is extremely clear that no judgment should be passed on the artistic quality of the pieces in question, so any judgment on the Stormtrooper helmets must be made on a purely objective level.

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[22] *Lucasfilm Ltd and Others (Appellants) v Ainsworth and Another (Respondents)* [2011] UKSC 39.
[23] Bollinger (n 20).
[24] *Lucasfilm Ltd and Others (Appellants) v Ainsworth and Another (Respondents*) [2009] EWCA Civ 1328, [2010] Ch 503 [66].
[25] Bollinger (n 20).
[26] ibid.
[27] Ron Moscona, 'Stormtroopers Suffer Crushing Defeat in English Court: Star Wars Copyright Decision Serves as a Reminder to the Creative Industries' (2010) 22(6) Intellectual Property &Technology Law Journal 19, 19.

Mann J described the Stormtrooper helmets as:

> one of the most abiding images in the film ... The purpose of the helmet was that it was to be worn as an item of costume in a film, to identify a character, but in addition to portray something about that character – its allegiance, force, menace, purpose and, to some extent, probably its anonymity. It was a mixture of costume and prop.[28]

Mann J used this definition to establish that the helmets were utilitarian and functional only as props within the film, but his in-depth, descriptive summary implies the opposite – that the helmets were works of art that had a visual appeal and an effect on the audience, and therefore cannot be confined to functional use as props. It also reveals that, whether consciously or not, a judgment was being made upon their artistic quality. These descriptive statements should be irrelevant to the argument that they are not sculptures because they have a utilitarian purpose as costumes. Instead one is left feeling that, if Mann J is capable of offering such an artistic description of the helmets, surely they are sculptures.

Mann J went on to list nine guidelines to consider when identifying whether an object constitutes a sculpture, as follows:[29]

1. the normal use of the word sculpture has to be considered;
2. the concept could extend beyond what would normally be understood as a sculpture in the sense of a work in an art gallery;
3. it would be inappropriate to stray too far from normal considerations of what is a sculpture;
4. no judgment may be made about artistic merits;
5. not every three-dimensional representation of a concept is a

[28] *Lucasfilm Ltd and Others (Appellants) v Ainsworth and Another (Respondents)* [2008] EWHC 1878 (Ch), [2009] FSR 103, [2] and [121].
[29] ibid [118].

sculpture;
6. a sculpture has visual appeal as part of its purpose;
7. an object having an additional use may also qualify as a sculpture but it must still have a visual appeal to qualify;
8. the purpose for which the object was created should be considered; and
9. the process of fabrication is relevant but not determinative.[30]

Some of these criteria seem very reasonable and reflect previous judgments handed down by Laddie J and Angel J, such as the first three requiring the use of the word 'sculpture' not to be stretched too far from its original meaning,[31] and the fourth requiring that no judgment be made on the artistic quality of the piece.[32] However, some criteria appear to overstep the judiciary's legitimate role in applying IP law, delimiting its scope in a manner potentially incompatible with the CDPA. For example, criterion six requiring that a sculpture must have some visual appeal as part of its purpose necessitates an assessment of aesthetic quality of the item. This criterion is controversial because it could encourage a judgment upon artistic quality, which is strictly prohibited under the CDPA, and which is in direct contrast to Mann J's fourth criterion.[33] Thus, if a court were to deem an item as too visually unattractive, they would consequently be denying it the status of sculpture based on a judgment of its artistic quality, contrary to the statutory requirements.

However, even if these requirements are not overstepping the mark and one believes Mann J is not suggesting a judgment on artistic quality, it seems the Stormtrooper helmets could meet these guidelines regardless. As *Lucasfilm* argued:

> in the present case, the question of functionality does not arise,

[30] ibid.
[31] *Metix* (n 16).
[32] *Breville* (n 14).
[33] CDPA, s 4(1)(a).

> because the articles in question have no functional purpose whatever. The Stormtroopers' helmets and armour did not exist in order to keep their wearers warm or decent or to protect them from injury in an inter-planetary war. Their sole purpose was to make a visual impression on the filmgoer. They are therefore artistic works.[34]

Thus, the purpose of the helmets was artistic, as they were designed for the purpose of visual appeal. It therefore seems unjust for the UKSC to agree with Mann J in that the helmets cannot constitute sculptures based on the idea that, '[I]t was the Star Wars film that was the work of art that Lucas and his companies created. The helmet was utilitarian in the sense that it was an element in the process of production of the film.'[35] The UKSC admits that the film is clearly a work of art, but deem the helmets themselves as simply a process within the creation of the artistic film. This reverts back to cases such as *Wham-O*[36] and *J & S Davis*[37] which controversially argued for or against sculptures based on the manufacturing processes. The nature of this reasoning is dangerously close to the UKSC's ruling, as it takes into account unnecessary factors which are risking overly ambitious judicial interpretation that is incompatible with the CDPA.

Ultimately, copyright is primarily concerned with balancing the exclusive protection of the proprietor of the copyright, and allowing others to reproduce the works under fair dealing or another statutory defence outlined in the CDPA. Within that balance, both parties' financial interests are held in tension.[38] It therefore seems *Lucasfilm*

[34] *Lucasfilm* (n 22) [39].
[35] ibid [44].
[36] *Wham-O Manufacturing* (n 9).
[37] *J & S Davis* (n 12).
[38] Tim Vollans, 'Empire Strikes Back: Lessons from the Supreme Court's Judgment in *Lucasfilm Limited and Others (Appellants) v. Ainsworth and Another (Respondents)* [2011] UKSC 39, July 2011' (2012) 7 International Journal of Law and Information Technology 276, 277.

was less concerned about the issue of art, and much more about the issue of finances, given Lucas wanted to claim his US$20 million in damages for Ainsworth's profit making of up to US$30,000.[39]

Considering the parties' drastically unequal financial situations, it is entirely possible that upon the case reaching the UK, Mann J in the High Court, the Court of Appeal, and the UKSC all recognised the economic weight of the proceedings and deemed it an extremely harsh judgment for Ainsworth to have been found guilty of infringing UK copyright law. One is therefore forced to ask: did the judges sympathise with Ainsworth, who would have owed substantial sums to the Lucasfilm corporation, so altered their interpretation of the statute to reach a just outcome in order to restrict the severe effects of a formalistic interpretation of the CDPA? This appears plausible, given a logical application of the CDPA would result in finding in favour of Lucasfilm. While a desire to protect an individual from substantial liability to a corporation would be understandable, this decision has come at the expense of a sensible application of legislation, compounding the confused and unsettled status of IP law in this area.

6 Conclusion

It seems clear that the ruling in *Lucasfilm* fails to clarify, and may further obscure, an already muddled area of IP law. Mann J was faced with a very difficult task of assessing all the previous case law concerning copyright and sculptures, which have been shown to be inconsistent and confusing, and his attempt to resolve the issues of IP law must be commended. Unfortunately, not only is the conclusion of the case logically suspect, with the Stormtrooper helmets ruled not to be sculptures, but the added element of considerable financial gains for Lucasfilm and an almost incomprehensible loss for Ainsworth creates an atmosphere of uncertainty surrounding the rationale of the decision. The UKSC has paved the way for future copyright claims, but it is unfortunate that *Lucasfilm* was unable to clearly provide the long-

[39] Misquitta (n 11) 289.

awaited answer to the question of ‘what is a sculpture?’ It is inevitable that the issue will arise again, and one must simply hope that the next occasion results in a comprehensive and satisfactory ruling resolving this lengthy discussion of copyright law and sculptures, although the case law’s history indicates this is unlikely.

EU Competition Policy: Algorithmic Collusion in the Digital Single Market

Alexander Stewart-Moreno

Abstract

E-commerce promises a digital environment with 'more perfect' market characteristics. Although consumers may benefit from digital efficiencies, firms' exploitation of such benefits may require new policy to regulate in line with the European Commission's Digital Single Market Strategy. Price-setting algorithms are central to this dichotomy, as faster and more transparent pricing strategies could conceivably maintain algorithmic price-fixing cartels – which Article 101 of the Treaty on the Functioning of the European Union may prove inadequate in tackling. This paper looks to remedy a perceived failure in the literature to appreciate the legal and economic analysis necessary to inform an alternative policy. It will assess the anti-competitive impact of pricing algorithms by contrasting the online and offline economic environments against which policy is set. It will evaluate the effectiveness of current policy in tackling explicit and tacit algorithmic collusion, accounting for its impact upon reasonable business practices, consumer welfare, liability and enforcement, and legal concepts which can be difficult to apply to the digital market. As long-term consumer welfare could be sacrificed by enforcing short-term remedies, it is advised that policy returns to its ordoliberal roots: prioritising the maintenance of healthy competition over current *welfare-first* economics which lack sufficient clarity to regulate algorithms.

1 Introduction

In 2015, the Juncker Commission announced a 'connected digital single market'[1] (DSM) to promote access to goods, facilitate networks, and maximise economic growth.[2] Requiring the 'rapid removal of key differences between the online and offline worlds to break down barriers to cross-border online activity',[3] it looked to promote and protect businesses and consumers. Predictably, competition policy will enjoy a digital transmutation as the free market remains prone to failure.

Pricing algorithms may expedite this failure, as their structural characteristics could facilitate anti-competitive behaviour in e-commerce. An Organisation for Economic Co-operation and Development (OECD) report broadly outlined potential policy directions to protect consumer welfare,[4] but the literature does not substantively develop legal, economic, and commercial depth. This paper looks to fulfil this gap, to advocate a single policy direction for the European Union.

In Section 2 of this article, the legal and economic definitions of collusion are outlined – applying them to the offline and online economies. It explores their respective characteristics, within which pricing algorithms illustrate and facilitate the latter in being 'more perfect'. Sections 3 and 4 apply the two relevant models of collusive behaviour: *explicit* and *tacit*. These sections define both models and outline if and how these models should be captured by competition policy, accounting for commercial and consumer welfare and the applicability of existing legal concepts to them. In each case, a relevant policy direction will be proposed.

[1] European Commission, 'A Digital Single Market Strategy for Europe' (COM 2015) 192.
[2] ibid.
[3] ibid.
[4] OECD, 'Algorithms and Collusion: Competition Policy in the Digital Age' (OECD, 2017).

2 The Digital Economic Foundation

As competition lawyers must understand economic concepts, the legal impact of pricing algorithms could not be reasonably analysed without first examining the economic foundations of online and offline markets. The DSM presumes an initial distinction between markets to harmonise, requiring a comparative analysis of them to distinguish how collusion manifests in each instance, and expose the legal challenges to resolve.

2.1 Defining collusion

Article 101 of the Treaty on the Functioning of the European Union (TFEU) prohibits

> all agreements between undertakings, decisions by associations of undertakings and concerted practices which may affect trade between Member States and which have as their object or effect the prevention, restriction or distortion of competition.[5]

This includes, most importantly for the purposes of this paper, agreements having the object or effect of 'directly or indirectly fixing … selling prices' in the form of price-fixing cartels.[6] This invites the attention of competition authorities to impose heavy sanctions without the need to prove the existence, or extent, of market impact as a matter of policy.

Nevertheless, collusion is a fundamentally economic policy described by economists as 'co-ordination … among competing firms with the objective of raising profits to a higher level than the non-cooperative equilibrium.'[7] To coordinate in this way, cartelists must agree to a common policy, monitoring their mutual adherence, and consequently

[5] Treaty on the Functioning of the European Union (entered into force on 1 December 2009), art 101(1).
[6] ibid art 101(1)(a).
[7] OECD (n 4).

punishing firms who deviate.[8] Conceptualised by Merrill Flood and Melvin Dresher at the RAND Corporation, this may be understood with reference to the Prisoners' Dilemma:[9] a game theory model with two separately interrogated prisoners. Each are presented the option to defect, reducing their sentence whilst increasing that of the other, or to cooperate. The caveat is that, if both defect, the sentence will be worse than had they both cooperated.[10] *Figure 1* expresses this.

	Cooperate		**Defect**	
Cooperate	-1	-1	-3	0
Defect	0	-3	-2	-2

Figure 1. Prisoners' Dilemma

Game theory dictates that as defecting offers a greater reward than cooperating, rational parties will each do so (i.e. a defect–defect scenario). This is defined as the Nash Equilibrium, being the strategy in which neither player is incentivised to deviate from their strategic decision having considered their opponent's likely choice, which we have established is to defect.[11] This is considered the dominant strategy. Nevertheless, the cooperate–cooperate scenario is logically the superior choice: the outcome cannot be improved without causing detriment to the other player – known as pareto optimality.[12] This illustrates the achievement of a common, collusive policy. It is apparent that players in a non-oligopolistic market – that is, one not dominated by only a very small number of firms – are unlikely to cooperate 'naturally' at the risk of being worse off – unless they are able to communicate between

[8] ibid.
[9] Merrill Flood, 'Some Experimental Games' (1958) 5(1) Management Science 5.
[10] Albert Tucker, 'The Mathematics of Tucker: A Sampler' (1983) 14(3) The Two-Year College Mathematics Journal 228, 228.
[11] Flood (n 9) 11–17.
[12] Tucker (n 10).

'rounds' of the game to establish this pareto-optimal common policy.[13] Consequently, the TFEU does not make illegal pareto optimality, but the means by which it is achieved. To this end, in practice, the European Commission has expansively defined communication, the means of forming an agreement contrary to the TFEU, as 'the existence of a concurrence of wills … the form in which it is manifested being unimportant so long as it constitutes the faithful expression of the parties' intention'[14] – significantly broader than its counterpart in contract law.

Cartels are inherently unstable. The Prisoners' Dilemma demonstrates that by defecting in a cooperate–cooperate scenario, a firm can maximise individual profits in the short-term by decreasing its price to attract consumers.[15] Observing a multiple-round Prisoners' Dilemma, Rapoport developed the tit-for-tat model to illustrate consequent behaviour. Upon defection from a cooperative equilibrium, co-cartelists will mimic this action by also defecting, causing Nash Equilibrium to be restored (defect–defect) and the cheating party being punished with reduced profits.[16] This creates a punishment scheme to maintain a collusive equilibrium. Accordingly, cartelists will return to the cooperate–cooperate scenario producing the *mutually* more favourable outcome.[17] Nevertheless, competition authorities will typically seek to exploit these transient instabilities: observing them through market changes or expediting defections with the promise of leniency programmes if firms agree to 'blow the whistle' on cartel activities.[18]

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[13] Flood (n 9) 24–26.
[14] Case T-41/96 *Bayer v Commission* [2000] II-03383 [69].
[15] Jurgen Jaspers, 'Managing Cartels: how Cartel Participants Create Stability in the Absence of law' (2016) 23(3) European Journal on Criminal Policy and Research 319, 321.
[16] Anatol Rapoport, 'Escape from Paradox' (1967) 217(1) Scientific American 50, practicably applied in Robert Axelrod, 'Effective Choice in the Prisoner's Dilemma' (1980) 24(2) The Journal of Conflict Resolution 3, 7–8.
[17] ibid.
[18] Jaspers (n 15) 320.

2.2 Imperfect competition and offline collusion

The traditional conception of perfect competition in an offline market is one in which buyers and sellers each have perfect knowledge and rational decision-making, with businesses maximising profits and consumers maximising utility.[19] This is achieved from a homogenous product market of countless firms individually unable to influence market conditions due to the rapidity at which reactions occur to sustain the equilibrium.[20] It is apparent that offline markets are *not* perfect, for which reason regulation exists; but *more* competitive behaviour may be observed from firms competing to lower prices, improve quality and choice, and innovate to attract demand. Consequently, perfect competition may be better framed in terms of maximising allocative and productive efficiency.

Allocative efficiency refers to the point in which it is impossible to benefit any one party without causing detriment to another. If goods are allocated to consumers according to the price they are willing to pay, price equals marginal cost. The supplier will continue to earn more by producing an additional unit of its good until the production cost exceeds the gained revenue. On a supply and demand curve, this would correspond to *supply equals demand*.[21]

Long term, markets must also be productively efficient, with goods produced at the lowest cost. Competitors entering a market may compete by undercutting. The more efficient a business is, the lower it can set its prices until they coincide with average costs.[22] At this point, allocative and productive efficiency are equal, indicating perfect competition.[23]

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[19] Libby Rittenberg, *Principles of Microeconomics* (1st edn, Flat World Knowledge 2008) 140.
[20] Nathalie Berta and others, 'On Perfect Competition: Definitions, Usages and Foundations' (2012) 63(2) Papers in Political Economy 7, 10–13.
[21] Richard Whish and David Bailey, *Competition Law* (9th edn, OUP 2018) 5–6.
[22] ibid 6.
[23] ibid.

EU competition policy has demonstrated its preference towards short-term allocative efficiency 'as a means of enhancing consumer welfare and ensuring an efficient allocation of resources',[24] from which productive efficiencies will presumably derive. Consumer welfare is negatively impacted where goods are allocated and maintained as a collusive equilibrium, above the prices consumers would be willing to pay – resulting in a producer surplus referred to as supra-competitive profits. Accordingly, competition law looks to ensure that firms cannot reach a common price-fixing policy, and instead focuses their attention on individual profits in competition with each other.

2.3 Perfect competition and algorithmic collusion

Pricing algorithms are indicative and symptomatic of the efficiencies presented by the online market. The OECD defines numerous forms of the technology. Pricing algorithms are here understood as automated digital tools able to monitor market data and optimise pricing strategies by reacting faster to changes, thereby incurring lower costs than human agents.[25] With the right optimisation, they can be not only reactive, but *anticipatory*.

Two characteristics must be drawn from this: market transparency and reaction speeds. These are conducive to achieving a 'more perfect' model of competition according to the types of efficiency mentioned above, taking the form of *dynamic pricing*. On the demand-side, algorithms are able to monitor changes in consumer demand to adjust prices accordingly.[26] On the supply side, companies are able to efficiently react to changes – such as availability, capacity, and competitors' prices – reducing overall costs compared to brick-and-

[24] Neelie Kroes, 'European Competition Policy – Delivering Better Markets and Better Choices' (Speech/05/512, 15 September 2005) <http://europa.eu/rapid/press-release_SPEECH-05-512_en.htm?locale=en> accessed 5 February 2019.
[25] OECD (n 4) 8–12.
[26] ibid 17–18.

mortar operations.[27] Consequently, the online market is brought closer to perfect competition as supply satisfies demand, and equilibrium is maintained in line with changing market conditions.

The facilitation of perfect competition presumes firms' goodwill towards allocative efficiency; supra-competitive profits may still be achieved where a common policy is established between competitors. Indeed, pricing algorithms do nothing to *disincentivise* the establishment of a collusive equilibrium. Rather, they can stabilise cartels by monitoring co-cartelists' adherence to common policy. This enables cartelists to retaliate in real-time to restore or maintain supra-competitive equilibrium.[28] Consequently, cartelists can more easily circumvent authorities' market observations. The legal implications of this will be explored with reference to the two relevant models of collusion which are relevant to this paper and competition policy: explicit and tacit.

Consequently, under a formulaic comparison of the online and offline markets, the former seems nearer to 'perfect' market conditions. The characteristics applied via pricing algorithms, which may conceive perfect competition, can easily be exploited towards collusive ends, which may exacerbate existing problems in the offline market. A careful balance between policy that is too stringent or too lax must be struck in order to regulate pricing algorithms. Indeed, the former may negatively impact the functioning and efficiency of the free market and long-term consumer benefit, whilst the latter risks consumer welfare in the short term. This paper will examine each model of collusion, relevant to the behaviour between direct competitors, to discern how the negative impact of each may be mitigated whilst ensuring the dynamic benefits promised to consumers.

[27] ibid 15–16.
[28] ibid.

3 Explicit collusion

Judicial treatment of pricing algorithms in the EU has proven tame. The few cases considered by competition authorities and the courts have involved challenges where collusion is *explicitly* apparent. These cases are useful for two reasons, however: they are indicative of current policy in application and they present arguments that call into question the viability of policymakers' discretion. This section will illustrate these limitations and issues with reference to the most relevant case to-date: the UK's Competition and Market Authority's (CMA) investigation into *Trod Ltd.*[29]

3.1 Judicial review of *Trod Ltd*

Trod Ltd was fined £163,371 for colluding with GB Posters to fix prices on Amazon Marketplace. Discovered only due to the latter's whistleblowing, the case is not controversial in its legal application. Employees from both companies had agreed to not undercut each other's prices, and to "raise maxi posters to £3.94 or 25p below cheapest seller [sic]" and set the 'lowest maxi posters price to £2.59'.[30] Soon, they each began to employ third-party pricing algorithms to streamline the process. Communication further demonstrated failures between parties to adhere to their common policy,[31] and the threat that deviation could be punished by ceasing use of the algorithm to 'go back to square 1 and sell all [of your] posters at a loss'.[32] Consequently, it seems that the requirements of supra-competitive equilibrium were present and were easily captured and penalised by the CMA under their otherwise 'offline' competition policy. The ease of this approach veils significant concern – wherein superficial analysis is at odds with the effective enforcement of competition policy for even the most simplistic of algorithmic cartels.

[29] Competition and Markets Authority, 'Online Sales of Posters and Frames' (2016) Case 50223.
[30] ibid [3.58].
[31] ibid [3.82].
[32] ibid [3.60].

3.2 Agreement and concerted practices

There is no doubting in *Trod* that common policy can be established just as well online as offline. The LIBOR Scandal, which came to its peak in 2008, saw several financial institutions fraudulently manipulate the daily interest rates at which they borrow from each other. As these rates underpin derivatives trading, the banks could profit by artificially inflating or deflating the LIBOR rate – in the process, distorting the market. They did so by communicating over an online chatroom.[33] Consequently, whether firms are communicating in person or online is not an issue, so much as there being evidence that common policy has been explicitly agreed, as it was in *Trod* via email correspondence.

The CMA also perceived in *Trod* 'a coordination of conduct between them in which they knowingly substituted practical cooperation between them for the risks of competition'.[34] Frequently adopting a dual-classification with agreement, *concerted practices* lack individual definition.[35] Indeed, it has been treated more as a 'catch-all' where 'the Commission cannot be expected to classify the infringement precisely'.[36] Nevertheless, *Suiker Unie v Commission*[37] established that a plan is not required, provided there has been sufficient contact that could influence market conduct. Although the dual classification was adopted in *Trod* – suggesting the court errs towards the clarity of 'agreement' – the capacity for algorithms to facilitate concerted practices may necessitate its proper definition, or at least an understanding as to when it may apply alone.

[33] Ricardo Cardoso and Yizhou Ren, 'Antitrust: Commission Fines Crédit Agricole, HSBC and JPMorgan Chase €485 Million for Euro Interest Rate Derivatives Cartel' (*European Commission*, 7 December 2016) <http://europa.eu/rapid/press-release_IP-16-4304_en.htm> accessed 26 November 2018.
[34] *Trod Ltd* (n 29) [5.17].
[35] See, for example, Whish and Bailey (n 21) 532, in which concerted practices are considered only by their dual classification with agreement.
[36] *PVC* (Case IV/31.865) Commission Decision 89/190/EEC [1989] OJ L 74/1.
[37] Case C-40/73 *Suiker Unie v Commission* [1975] I-01663, 1697–1698.

One example of how concerted practice may arise was noted by the European Commission in its contributory notes to the OECD, noting that signalling pricing strategies to competitors through algorithms may fall within the scope of Article 101.[38] This was raised in *Container Shipping*, wherein carriers would issue announcements of their pricing intentions weeks before their implementation. The Commission held that this was of little use to consumers, but 'may constitute … a more subtle way for competitors to collude and replace competition with practical cooperation'.[39] Having been settled outside of proceedings, the Commission was unable to definitively rule upon this issue, although Camesaca and Grelier argue that this case represents the 'next step' in its expansionism towards stricter treatment of price signalling and concertation.[40]

However, Camesaca and Grelier fail to distinguish between public and private pricing transparency. The unilateral nature of public transparency – due to its accessibility by consumers and lack of direct communication between competitors – is difficult to hold as explicit collusion (although will be relevant to tacit collusion).[41] In contrast, encoding and decoding hidden data is a *de facto* bilateral exchange of private information,[42] removing consumers from the market equation. Thus, whereas Camesaca and Grelier are suspicious of the Commission's widening regulatory exposure against the tide of previous case law, it is likely that *Container Shipping* merely offers a recalibration of the careful balance to be drawn. Short of conclusions actually being made, its relevance to public price announcements is

[38] OECD, 'Algorithms and Collusion - Note from the European Union', (OECD, 2017) [27].
[39] *Container Shipping* (Case AT.39850) Commission Decision 2016/C 327/04 [2016] OJ C 327/4.
[40] Peter Camesasca and Laurie-Anne Grelier, 'Close Your Eyes? Navigating the Tortuous Waters of Conscious Parallelism and Signalling in the European Union' (2016) 7(9) Journal of European Competition Law & Practice 599, 605.
[41] OECD, 'Unilateral Disclosure of Information with Anticompetitive Effects' (OECD, 2012) [58].
[42] ibid [33].

questionable. Nevertheless, though public announcements may therefore escape liability, the same cannot be said for covert bilateral exchanges.

This is demonstrable from a US Department of Justice case in 1992: suing eight carriers for price-fixing through digital and algorithmic means. The Airline Tariff Publishing Company collected fare information from the airlines and disseminated it to all other airlines and reservation systems that would serve travel agents.[43] As this system was publicly available, from a consumer perspective, at first glance it appears very similar to unilateral transparency. The facts of the case saw airlines communicating through encoded footnote designators, employing algorithms to process presented fare information, monitor competitors' responses, and consequently negotiate higher fares, retaliating against any airlines who would diverge from them. Such communication was relatively costless and could neither be said to present an agreement in the same way as direct communication, nor benefit consumers through public transparency.

Economists refer to this costless, private communication as 'cheap talks'. Evidently, it has been captured under US antitrust policy, so it is not inconceivable that it would be caught by Article 101 TFEU in the same way. Nevertheless, economists disagree as to the extent to which this method in fact engenders collusion. In *T-Mobile Netherlands* it was suggested "that the exchange of information between competitors is liable to be incompatible with the competition rules if it reduces or removes the degree of uncertainty as to the operation of the market in question."[44] By their nature, cheap talks are costless, non-binding, and unverifiable.[45] Baliga and Morris therefore suggest that they are self-defeating to the ends of establishing or maintaining coordination. When applied to the Prisoners' Dilemma, cheap talks are likely to be ignored

[43] *United States v Airline Tariff Publishing Company* 836 F Supp 9 (1993).
[44] Case C-8/08 *T-Mobile Netherlands and Others* [2009] I-04529 [35].
[45] Joseph Farrell, 'Cheap Talk, Coordination, and Entry' (1987) 18(1) The RAND Journal of Economics 34, 34.

(resulting in a defect–defect scenario) in favour of Nash Equilibrium. In most instances, there is little to suggest cheap talks will result in collusion, as they fail to reduce uncertainty. Cooper and others note the applicability of cheap talks to the Battle of the Sexes, a coordination game illustrative of the presumption towards collusive behaviour in this scenario. The game imagines that a husband and wife would each prefer a different activity but would rather do something together (i.e. the same activity) than apart (i.e. two different activities). Demonstrated in *Figure 2*, the *two* Nash Equilibria (0,0) demonstrate how cheap talks, as *ex ante* communication, may allow firms to indicate a preferred focus, towards which others are inclined to create a common policy.[46]

	Opera		**Football**	
Opera	3	2	0	0
Football	0	0	2	3

Figure 2. Battle of the Sexes

Whilst the Battle of the Sexes is a likely model for oligopolistic markets, with few competitors, Farrell notes that parties' motivations in this game would 'apply equally [when] … bargaining under complete information'.[47] These conditions are fulfilled with pricing algorithms, as their ability to monitor an increasingly transparent digital market means that cheap talks become more verifiable – and so trusted by would-be cartelists. In this instance, verification would be tantamount to a bilateral exchange. Cooper and others corroborated this. In simulations of the Battle of the Sexes, they had one player express their intentions to the other: suggesting a *focal equilibrium*. The other player would frequently select that option, apparently resolving the coordination problem in the Prisonner's Dilemma. To better simulate the 'real' markets, however, they then allowed *both* players to

[46] Russel Cooper and others, 'Communication in the Battle of the Sexes Game: Some Experimental Results' (1989) 20(4) The RAND Journal of Economics 568, 569.
[47] Farrell (n 45).

communicate simultaneously. This resulted in some confusion amongst players to establish a focal equilibrium, but after a series of messages to-and-from resulted in consistent coordination.[48] Where the ECJ in *Dole Food Company*[49] ruled that behaviour which 'reduces … the degree of uncertainty … of the market' would be incompatible with competition rules, algorithms' ability to verify cheap talks would fall well within this threshold. The conduct of competitors cannot be privately foreseeable at the expense of public accessibility.

With offline policy sufficient in most respects, agreement and its dual classification with concerted practices retain their low thresholds for capture. It is the latter, when treated in isolation such as with respect to price signalling, that must be better defined by competition policy. Although unilateral signals are a matter best confined to discussions on tacit collusion, bilateral exchanges of information facilitated by algorithms comply more readily with the economic rationale underpinning Article 101 TFEU and the *Dole Food Company* criterion. Current policy in this respect is adequate, but the procedural issues around detecting such practices remain open to question.

3.3 Agency and liability

VM Remonts[50] extended the single economic unit doctrine from *Becu*,[51] wherein the anti-competitive actions of employees were sufficient to trigger Article 101 as they are incorporated within the same entity, to include independent service providers acting under an undertaking's direction. Consequently, establishing liability in this instance is uncontroversial *even if* an algorithm were said to be a separate actor to the firm. Nevertheless, the CMA admitted to being unable to determine the extent to which cartelists in *Trod* had benefited due to the

[48] Cooper and others (n 46).
[49] Case C-286/13 P *Dole Food and Dole Fresh Fruit Europe v Commission* [2015] ECLI:EU:C 184.
[50] Case C-542/14 *VM Remonts and Others v Konkurences padome* [2016] ECLI:EU:C [33].
[51] Case C-22/98 *Becu and Others* [1999] I-05665.

algorithms' intermediary position.[52] Although it was suggested that prices had increased by 20% over the relevant period,[53] automation ensured that cartelists need not monitor price changes short of a failure to adhere to their common policy. Although the EU Fines Notice omits the calculation of firms' benefit, it implies a 'profits-plus' approach as disgorging profitability, reflecting seriousness of the infringement, plus a deterrent amount. It was admitted in *KME Germany v Commission* that current turnover-based fines are 'vague and imperfect'.[54] Nevertheless, it upheld its adequacy, which Riley lambasts: 'turnover is an inadequate proxy for assessing the damage done by price-fixing or the gain acquired by undertakings'.[55] Indeed, the Commission's approach has been to impose up to 30% of turnover in the relevant markets as the basic fine, which it argues captures cartels' overcharge typically being within a 15–25% 'entry fee'.[56] Ehmer and Rosati have challenged this estimate, with a breadth of gains significantly above and below these overcharges. They suggest that less-complex cartels may be deterred by lower fines;[57] but as algorithmic collusion is more complex and more sustainable, higher penalties are required to offset greater profitability and ensure deterrent effect.

Trod's consequent fall into administration may veil the insufficiency of current policy, particularly where proportionality must be considered. It is difficult to suggest what may have occurred under alternative policy, particularly where its basic fine of £50,000–£100,000 enjoyed a

[52] *viz* ibid [6.2.1]; Mark Tricker and others, 'Online Retailers should Tread Carefully after Trod' (*Norton Rose Fulbright Knowledge*, November 2016) <https://www.nortonrosefulbright.com:443/en-us/knowledge/publications/7e7bdcca/online-retailers-should-tread-carefully-after-trod> accessed 29 November 2019.
[53] *Trod Ltd* (n 29) [6.21].
[54] Case T-127/04 *KME Germany and Others v Commission* [2009] ECLI:EU:T 142.
[55] Alan Riley, Modernising Cartel Sanctions: Effective Sanctions for Price Fixing in the European Union (2011) 32(11) European Competition Law Review 551, 553.
[56] Neelie Kroes, 'Private and Public Enforcement of EU Competition Law' (IBA Conference, Brussels, March 2009).
[57] Christian Ehmer and Francesco Rosati, 'Science, Myth and Fines: Do Cartels Typically Raise Prices by 25%?' (2009) 4 Concurrences 4, [20].

40–60% reduction, but it inarguably falls victim to a 'mechanistic' process.[58] Nevertheless, accounting for the failures of turnover-based fines, a more forensic, audited approach would treat proportionality holistically. Thus, where an assessment of company assets, liability, equity, income, and cash flows is considered, a more effective framework could be constructed to disgorge supra-competitive profits whilst achieving optimal deterrence within undertakings' capacities to pay. This retains the spirit of the Fines Notice whilst accounting for the issues of monitoring algorithms' real-time gains.

Additionally, it brings the Fines Notice under the purview of *certainty*. Current policy sees the basic fine capable of being increased or decreased taking into account gravity, duration, and any other relevant factors. To this end, the 'assessment of fines, rather than being a mathematical exercise based on an abstract formula, involves a legal and economic appraisal', lacking a specific methodology by which to justify fines, which are subject to change at any time.[59] This is not novel; the court's judgment in *BPB v Commission*[60] suggests that by wilfully propagating uncertainty, consumer welfare is protected by undertakings' aversion to an inability to make a cost-benefit analysis. This approach is highly suspect, as risk aversion and consumer welfare are not inextricably linked. A Bank of Greece working paper suggested that uncertainty would see undeterred cartels pricing *higher* than they would have otherwise, whilst others are deterred from socially benign actions for fear of punishment.[61] This would be tantamount to deeming algorithms anti-competitive *suo jure*. Consequently, certainty in punishment is concerning; uncertainty is likely to incentivise algorithmic cartels whilst deterring algorithms' economic benefits in the DSM.

[58] Riley (n 55) 554.
[59] Ivo Van Bael, 'Fining à la Carte: The Lottery of EU Competition Law' (1995) 16(4) European Competition Law Review 237.
[60] Case T-53/03 *BPB v Commission* [2008] II-01333 [336].
[61] Vasiliki Bageri and others, 'The Distortive Effects of Antitrust Fines Based on Revenue' (2013) 123(572) The Economic Journal 545, 556.

The suitability of an audited approach to algorithmic cartels cannot be understated. *Trod*'s experience, being the singular example, may prove an effective deterrence. Equally, it may offer authorities a false sense of security in the adequacy of current policy. Companies may tighten their regulatory compliance and promote awareness where initial liability cannot be removed by degrees of separation, but so must legislators more effectively scrutinise cartels to realistically and proportionally deter them. Although *Trod* was an open-and-shut case, current policy may be damned where cartels perfect their separation through more stable algorithms requiring less intervention. If detection and profitability enjoy an inversely proportional relationship, authorities must have the capacity to improve their monitoring of price fluctuations and, to ensure compliance, adopt a penalty framework with a certain cost-benefit analysis, whereby supra-competitive prices are punished.

4 Tacit collusion

As explicit collusion is illegal in the offline markets, this paper could analyse its transplantation to the digital economy with a presumption of illegality. The same cannot be said of tacit collusion. The phenomenon is sufficiently rare that EU competition policy has not been compelled to tackle it: it is presently legal (or not illegal). As pricing algorithms risk tacit collusion becoming a mainstream issue, this paper will explore if, and how, it may be brought within the scope of competition policy. It will do so with reference to the *oligopoly problem* from which tacit collusion derives and which pricing algorithms emulate. It will consider the solutions proposed by academics from various schools of economic thought to resolving this problem. Deeming them insufficient to solving the issue presented by pricing algorithms, however, this paper will advocate an ordoliberal approach to empower both competition authorities and commercial parties. Simultaneously, the burden of proof can be shifted to ensure their structural symmetry in the proposed legal landscape.

4.1 The economics of the oligopology problem

The OECD outlines that pricing algorithms will widen the scope of tacit collusion from 'oligopolistic markets with high barriers to entry and a high degree of transparency' to those for which it would be otherwise unsustainable.[62] Typically, an oligopolistic market is one characterised by few competitors, naturally reducing competition. This is not problematic *per se*, but their proximity can inform their pricing strategies towards common policy without bilateral communication or concertation – and so, without any agreement or concerted practice, cannot fall within the scope of the TFEU.[63] Pricing algorithms emulate oligopolies' salient features: high transparency resulting in mutual self-awareness and the expectation of swift retaliation. The problem is exacerbated by a market of many interdependent suppliers, in which it may be commercially illogical to not account for competitors' prices, thus creating an inherent cooperate–cooperate scenario. To ignore competitors' prices may be tantamount to defection, inviting tit-for-tat fluctuations between profit and loss. Consequently, the market functions as though there were collusion, albeit inadvertently given the absence of an agreement or bilateral process by which to reach it. As pricing algorithms possess these same salient features, the risk is that supra-competitive profits become a 'normal' market condition within the DSM.

The inaction and indecision of the law towards the oligopoly problem is due to the lack of viable remedies, being inescapable under present market conditions. The Commission and ECJ have been more prone to *disproving* oligopolies, as a defence, than attaching liability to them.[64] Although algorithms offer comparable structural concerns, such a widespread issue cannot be ignored, necessitating an appropriate remedial scheme in the DSM.

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[62] OECD (n 4).

[63] Whish and Bailey (n 21) 572.

[64] Case 48-69 *Imperial Chemical Industries Ltd v European Commission* [1972] ECLI:EU:C 70; Case C-89/85 *Ahlström Osakeyhtiö and Others v Commission* [1994] I-00099; Case C-359/01 *British Sugar plc v European Commission* [2004] I-04933.

4.2 Proposals from the Harvard and Chicago schools

It is unsurprising that Salil Mehra cautions that '[b]lack-letter law's *blind spot* … may become a cloaking device behind which algorithmic price coordination can readily hide'.[65] This necessitates the expansion of 'agreement', as contained in Article 101 TFEU, to deny this exploit. Unsurprisingly, this has been met with increasing resistance from liberal economists. Professor Donald Turner argued that interdependence is an inescapable truth of oligopolistic – or, as it applies to this case, algorithmic – market structures. A 'rational [party] … simply takes one more factor into account – the reactions of his competitors to any price change that he makes'.[66] This is defensible on two grounds: firstly, it ensures commercial freedom, and secondly, enforcement would be infeasible. Generally, this approach aligns with Chicagoan economics, conceiving a free market which, as Read describes, has 'its own rationality'[67] so should enjoy *laissez-faire* non-interventionism from the state.

Consequent 'neoliberal' thought celebrates the rationality of economic agents to 'produce' and 'consume', and views freedom to contract as an extension of their rights to private property.[68] Indeed, Demsetz empirically demonstrated that firms' 'positive correlation between profit rates and concentration … should be expected from a workable incentive system that rewards superior performance'.[69] Accordingly, it is natural that as rational-choice efficiency increases economic performance, it will be taken. The *effect* is therefore collusive, but the

[65] Salil Mehra, 'Antitrust and the Robo-Seller: Competition in the Time of Algorithms' (2016)] 100(4) Minnesota Law Review 1323, 1351.
[66] Donald Turner, 'The Definition of Agreement under the Sherman Act: Conscious Parallelism and Refusals to Deal' (1962) 75(4) Harvard Law Review 655, 665.
[67] Jason Read, 'A Genealogy of Homo-Economicus: Neoliberalism and the Production of Subjectivity' (2009) 6 Foucault Studies 25, 27.
[68] ibid.
[69] Harold Demsetz, 'The Market Concentration Doctrine: An Examination of Evidence and a Discussion of Policy' (1st edn, American Enterprise Institute for Public Policy Research 1973) 20 in Mark Glick and Eduardo Ochoa, 'Classical and Neoclassical Elements in Industrial Organization' (1990) 16(3) Eastern Economic Journal 197, 205.

means are entirely inadvertent, if not unavoidable. Short of wilful communication, the state lacks the necessary justification to intervene. In doing so, Turner admits, it would be tantamount to requiring firms to ignore their competitors' prices,[70] with the line between collusive and rational decisions seemingly blurred. The irrationality of this approach is clearly undesirable: it is unfeasible and, by curtailing economic performance, would impact the welfare benefits achieved through innovation in the pursuit of profit. To do so would be, at best, unwarrantedly optimistic and, at worst, negligent. Consequently, a stronger economic framework is desirable to establish the bounds of rationality, for fear that unabated and/or inadvertent enterprise risks collusive equilibria.

Turner's stance suggests the Harvard Structure → Conduct → Performance (SCP) paradigm may offer a viable remedy to the oligopoly problem. In this, the conduct and consequent performance of firms cannot be faulted, it being an issue of market structure. The three are causally linked.[71] By introducing *ex ante* structural remedies to prevent oligopolies from forming, therefore, the problem may be avoided.[72] Whilst not disagreeable, its applicability to algorithmic collusion is imperfect. As the requirement that there are few market players to engender tacit collusion is not necessarily true of algorithmic markets, the problem is less structural than behavioural. The two may not be mutually exclusive, however. The SCP paradigm may be applied, if not to the market, then to algorithms themselves, suggesting that their conduct is an encoded, structural attribute which leads to tacitly collusive outcomes.

Harrington supports this conclusion, arguing that 'collusion by autonomous agents is the use of pricing rules that embed a reward-punishment scheme which supports supra-competitive prices'.[73] The

[70] Turner (n 66) 669.
[71] Joe Bain, *Barriers to New Competition* (1st edn, Harvard University Press 1956).
[72] Turner (n 66) 671.
[73] Joseph Harrington, 'Developing Competition Law for Collusion by Autonomous

concept of 'agreement', therefore, is supplanted by encoded behaviour to prompt effective price-fixing. He suggests that authorities audit the coding of algorithms to ascertain the programme which would punish another firm for deviating from the presumptive common policy of a highly transparent market (i.e. the oligopoly problem).[74] In theory, this would reduce transparency as algorithms would not be monitoring and reacting to competitors' strategies, making tacit cartels inherently unstable. Indeed, it may promote confidence in evidentiary standards: that certain encoded behaviours are *per se* illegal. Its viability, however, is doubtable; as *Trod* demonstrated, algorithms may fail to collude even where common policy had been explicitly agreed.[75] Consequently, whilst appreciative of such *ex ante* recourse, imposing algorithmic intent is difficult to justify.

Alternatively, Ezrachi and Stucke propose an imposed 'time lag' to limit the speed of algorithms' price changes.[76] This approach indirectly disincentivises reward–punishment schemes, bypassing the weaknesses of Harrington's proposal whilst also slowing the achievement of a stable supra-competitive equilibrium. This strategy was adopted by the Austrian Fuel Price Fixing Act 2009 (Spritpreisverordnung) where commercial fuel aptly illustrates conscious parallelism in practice.[77] Evanthia and Karsten conclude that the Act, which restricted fuel stations' price increases to once per 24 hours, was a success as consumers' search costs were reduced due to less price volatility.[78]

Artificial Agents' (2018) 14(3) Journal of Competition Law & Economics 331.

[74] ibid.

[75] *Trod Ltd* (n 29).

[76] Ariel Ezrachi and Maurice Stucke, *Virtual Competition: the Promise and Perils of the Algorithm-driven Economy* (1st edn, Harvard University Press 2016) 239–240.

[77] Attempts to litigate conscious parallelism in this sector have similarly failed: 'plus factors' such as high profits and prices, price uniformity, and parallel changes are deemed consistent with competition in this market structure, *White v RM Packer Co* 635 F3d 571 (1st Cir 2011).

[78] Evanthia Fasoula and Karsten Schweikert, 'Price Regulations and Price Adjustment Dynamics: Evidence from the Austrian Retail Fuel Market' (Hohenheim Discussion Papers in Business, Economics and Social Sciences, Working Paper 08, 2018).

There are two issues with this approach, however: it would directly limit pro-competitive dynamic pricing by indirectly limiting anti-competitive behaviour; and it would reduce consumer choice and information in deciding from whom to purchase.[79] Indeed, as algorithms actively monitor consumer demand, the welfare costs attached to price volatility are less relevant. Altogether, this proposal would simultaneously reduce pro-competitive effects and induce unwarranted, state-sponsored inefficiencies.

Rejecting *ex ante* remedies as infeasible, Judge Posner – an American jurist, economist, and critic of Turner – argued that interdependence does not so much explain how sellers establish supra-competitive prices as why. He describes tacit collusion as 'not an unconscious state' but analogous to a unilateral contract, 'treated by the law as a contract rather than as individual behaviour'.[80] Consequently, proper economic discovery may legitimise judicial enforcement. To a limited extent, this has already been reflected in *Suiker Unie*, wherein the ECJ admitted that

> …although it is correct to say that this requirement of independence does not deprive economic operators of the right to adapt themselves … [it precludes disclosing] the course of conduct which they themselves have decided to adopt or contemplate adopting.[81]

Notably, it indicates the expansion of agreement would include price leadership which, in practice, may include public price announcements. Thus, although *Shipping Containers* failed to meet the threshold for explicit collusion, its unilateralism may be relevant to tacit scenarios.

Public price announcements exist in a controversial grey area between

[79] OECD, 'Competition Assessment Toolkit: Volume 1' (OECD, 2017).
[80] Richard Posner, 'Oligopoly and the Antitrust Laws: A Suggested Approach' (1968) 21 Stanford Law Review 1562, 1576.
[81] *Suiker Unie* (n 37) [174].

anti-competitively revealing future prices to competitors and pro-competitively reducing consumer search costs. Capobianco argues that, whilst current jurisprudence is at a balance teetering between them, practices would fall more determinately where they include'an invitation to collude'.[82] This approach is simplistic, even accounting for Posner's argument: whilst Capobianco's criteria may be demonstrative of anti-competitive practices and price leadership, an invitation is unlikely, if at all necessary. Public price announcements may require nothing more than the announcing party's good reputation for competitors to adopt consciously parallel behaviour – the 'acceptance' of the unilateral 'offer' to collude. Dibadj is proactive in recognising the threat of conscious parallelism and the facilitatory role of public price announcements. In favour of the econometric methods developed by Posner, he suggests a 'menu of remedies', namely injunctions and structural remedies.[83] The latter has been discounted already, with reference to the SCP paradigm. Alternatively, injunctions could prove beneficial to establishing tolerable and predictable bounds to the rational conduct of firms in the free market. In the digital economy, however, this is unlikely to apply. Price signalling is conducive to achieving a common policy as it exposes intention; but as algorithms monitor the markets and react in real-time, the transparency those injunctions seek to resolve is effectively redundant. Injunctive remedies, therefore, make little headway in resolving the oligopoly problem of an algorithmic market.

4.3 Post-Chicago: 'Welfare first' principles

It is for these reasons that Posner admitted the infeasibility of state interventionism, which is particularly relevant to the difficulties attributable to the online market.[84] Kaplow, however, continues to

[82] Antonio Capobianco, 'Unilateral Disclosure of Information with Anticompetitive Effects' (OECD, 2012) [61]. (Emphasis in the original.)
[83] Reza Dibadj, 'Conscious Parallelism Revisited' (2010) 47(3) San Diego Law Review 589, 630.
[84] Richard Posner, 'Review of Competition Policy and Price Fixing' (2014) 79 Antitrust Law Journal 761, 763.

lambast judicial reliance upon communication, as exonerating cases 'on the ground that they involve mere interdependence are those that involve the greatest rather than the least social harm'.[85] Mehra notes that the 'robo-seller shifts the balance' towards this Post-Chicagoan approach, given the expansion of tacit collusion.[86] Whilst Posner sought to expand the definition of communication, therefore, Kaplow deems it dispensable, proposing a 'direct approach' which identifies a social problem, detects cartelists' activities, and applies sanctions.[87] This 'welfare first' approach risks casting the antitrust net too widely, at the expense of judicious enforcement against firms and the dynamic nature of the market.

On the matter of detection, Kaplow argues that market patterns (price elevations, maintenance, and drops) and market structure inherently imply the presence of tacit collusion.[88] Although these econometric suggestions are not dissimilar to Posner's or Dibadj's, his suggestion to 'combin[e] complementary types of evidence and [assign] different weights to each'[89] is a highly arbitrary and pendulous reversal of the Chicagoan approach. Consequently, whilst Kaplow's disaffection towards self-regulation as 'one shoe fits all' is well-founded, necessitating closer scrutiny of a complex market, his approach threatens to do more harm than good in casting the antitrust net too wide.

The reason for this is that Kaplow identifies the social issue as preliminary. His approach ensures that 'competition policy concerned with consumer [welfare] should optimally be more aggressive', to

[85] Louis Kaplow, 'On the Meaning of Horizontal Agreements in Competition Law' (2011) 99(3) California Law Review 683, 689.
[86] Mehra (n 65) 1343.
[87] Louis Kaplow, 'Direct Versus Communications-based Prohibitions on Price Fixing' (2011) 3(2) Journal of Legal Analysis 449, 455.
[88] ibid 468–470.
[89] Louis Kaplow, *Competition Policy and Price Fixing* (Princeton University Press 2013) 248.

capture even smaller price elevations.[90] This demonstrably risks commercial freedoms as his apparent objection towards allocative inefficiencies errs towards Hutt's so-called 'sovereignty of the consumer'. This idea holds that 'the sphere of freedom and power is that of the consumer, while the sphere of obedience and restriction is that of the producer', which will, therefore, achieve market stability through consumers' freedom of choice.[91] Two issues may be illustrated from this: consumer sovereignty establishes, firstly, a continued intolerance of firms' autonomy and, secondly, overzealous market control.

Persky attempts to dilute the consumer sovereignty model by better defining production as the means and consumption as the end.[92] Superficially, this does not appear wholly controversial; Pareto optimality is not dispensed with as, according to market forces, we may illustrate that it is supply that must meet demand – being the first to move. Although this may generally be the case, Gintis argues that social outcomes are the 'reflection of individual preferences, constrained by available resources and knowledge of technologies'.[93] The foresight of this approach, presumably, did not stretch to the concept of pricing algorithms, but adequately explains the relationship between 'consumer sovereignty' and a framework within which it exists, but no further than the bounds of supply-side efficiencies (or inefficiencies). Were we to treat Hutt's suggestion as true, it would be tantamount to assuming an inelasticity of supply: price being determined only by the movement of demand. Firms would be little more than vehicles for social output, without incentive to innovate or provide economic growth.

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[90] ibid 220.

[91] William Hutt, 'The Concept of Consumers' Sovereignty' (1940) 50(1) The Economic Journal 50, in Joseph Persky, 'Retrospectives: Consumer Sovereignty' (1993) 7(1) Journal of Economic Perspectives 183, 187.

[92] Persky (n 91) 188.

[93] Herbert Gintis, 'Behavior and the Concept of Sovereignty: Explanations of Social Decay' (1972) 62(1) The American Economic Review 267, 267.

This argument rests upon the assumption that regulators, as conduits of consumer welfare, understand how best to maximise it. Regulating overzealously would see firms' bondage to production; indicative of neo-Keynesian interventionism supporting the enforcement of a static, allocative equilibrium.[94] This sets a dangerous precedent for short-termism where algorithms' predictive effects would have dynamic prices reflecting long-term efficiencies.[95] Indeed, Gintis argues that 'technology … is constrained to those compatible with the reproduction of the social relations of capitalist production'.[96] Consequently, consumer sovereignty is not absolute: it is limited to means also in the interest of the producer. Where consumer welfare is protected too readily according to short-term inelasticity, firms will enjoy little incentive to develop supply-side efficiencies or technologies to create long-term price reductions. The causal relationship between supply and demand rejects the sovereignty of either. Instead, supply-side efficiencies present a framework to expand and accommodate consumer demand. Focusing so overtly upon short-term consumer protections would, therefore, jeopardise and restrict future efficiency and scope.

These proposals from various economic schools have raised no justifiable conclusions. At risk of the oligopoly problem being exacerbated by pricing algorithms, policy must be reformulated. Every argument, however, has revolved around ideas of consumer welfare – being either too strong or too weak, with little commonality to find a middle ground. To this end, this paper proposes removing consumer welfare from immediate consideration. A seemingly radical proposal, Behren differentiates consumer welfare from consumer choice, replacing long-term speculation and short-term apprehension with

[94] John Hicks, 'Mr Keynes and the "Classics", A Suggested Interpretation' (1937) 5(2) Econometrica 147, 157.
[95] Tony Curzon Price and Mike Walker, 'Incentives to Innovate v Short-term Price Effects in Antitrust Analysis' (2016) 7(7) Journal of European Competition Law & Practice 475, 475.
[96] Gintis (n 93) 267.

'economic freedom of market agents within the framework of a market structure which is not constricted by producers at the expense of the alternatives.' [97] Indeed, competition policy is framed by a static 'snapshot' of allocative efficiency, to which ends pricing algorithms are both panacea and anathema – where it should appreciate long-term dynamic efficiencies. By escaping this consumer welfare paradigm, the protection of competition for the sake of competition should be reasserted – an approach indigenous to European policy in the form of ordoliberalism.

4.4 Returning to ordoliberalism

Ordoliberalism 'advocates a state-regulated competitive process as a necessary instrument for the protection of individual economic freedom'.[98] This is a model of social-liberalism through which strong macroeconomic rules ensure and protect microeconomic free-market competition.[99] This philosophy informed the TFEU as an economic constitution which 'defines the rules of the game under which economic activities can be carried out'.[100] Indeed, the Commission has reflected this need 'to protect … the structure of the market and, in so doing, competition *as such*'.[101]

Ordoliberalism is not without detractors. Reflecting the Commission's 'more-economic approach', it is deemed overly formalistic,[102] with

[97] Peter Behrens, 'The "Consumer Choice" Paradigm in German Ordoliberalism and its Impact upon EU Competition Law' (Institute for European Integration, Discussion Paper, 2014) 33.
[98] Ignacio Herrera Anchustegui, 'Competition Law through an Ordoliberal Lens' (2015) 2(2) Oslo Law Review 139, 139.
[99] Werner Bonefeld, 'Freedom, Crisis and the Strong State: On German Ordoliberalism' (2012) 17(5) New Political Economy 1, 1.
[100] Anchustegui (n 98) 147.
[101] Case C-501/06 P *GlaxoSmithKline Services and Others v Commission and Others* [2009] ECR I-09291 [63]. (Emphasis added.)
[102] Pinar Akman, 'Searching for the Long-Lost Soul of Article 82 EC' (CCP Working Paper, 2007) 3 in Elias Deutscher and Stavros Makris, 'Exploring the Ordoliberal Paradigm: The Competition-Democracy Nexus' (2016) 11(2) The Competition Law Review 181, 182.

established rules preventing a case-by-case economic analysis.[103] This is, in part, true, but, in both respects, conducive to effectively countering algorithmic cartels. Anchustegui observes that ordoliberalism is not mutually exclusive with the Commission's economic analysis, but 'shapes and sets the rules of an institutional framework' rather than being the policy in itself.[104] Consequently, ordoliberalism does not lack efficiency considerations, but recognises firms' competitive output within that institutional framework rather than presuming that case-by-case micro-economic inefficiencies are reflective of the macro-level.[105] It therefore escapes the lack of short-term differentiation between algorithms' pro- and anti-competitive effects, as this paper will express how long-term economic insights may complement the formalistic application of Article 101(1).

A second criticism arises from an apparent scepticism towards accumulated market power. Indeed, Miksch conceptualised competition *as-if*, requiring 'that firms refrain from conduct that would be unavailable to them if they had no monopoly power'.[106] It may be argued that Article 102 TFEU, which prohibits 'abuse by one *or more* undertakings',[107] could be applied to firms' collective dominance. In *Piau v Commission*, the court explicitly outlined its potential use to remedy tacit collusion; but neither the case nor Commission Guidelines voice how.[108] Indeed, where barriers are low, 'collective' dominance could refer to potentially hundreds of firms, none of which boast

[103] Doris Hildebrand, 'The European School in EC Competition Law' (2002) 25(1) World Competition 3, 4.
[104] Anchustegui (n 98) 165.
[105] Behrens (n 97) 27.
[106] As observed by Flavio Felice and Massimiliano Vatiero, 'Ordo and European Competition Law' in Luca Fiorito, Scott Scheall, and Carlos Eduardo (eds), *Research in the History of Economic Thought and Methodology* vol 32 (Emerald Publishing Ltd 2014) 147, 156.
[107] TFEU art 102.
[108] European Commission, 'Guidance on the Commission's enforcement priorities in applying Article 82 of the EC Treaty to abusive exclusionary conduct by dominant undertakings' [2009] OJ C 45/02.

sizeable market shares but all of which enjoy the same transparency and reactionary mechanisms to maintain a tacitly supra-competitive status quo.

More broadly, however, second-wave ordoliberal thought has substituted competition as if for 'competition as a discovery procedure', as put forward by Hayek.[109] This approach reaffirms static efficiencies as inadequate, instead favouring longer term realisations of consumer welfare. This will likely involve a process of creative destruction:[110] provided barriers to entry are not infeasibly high, algorithms' development of dynamic prices will create market power, attracting innovative entrants who will erode incumbents' market shares. In the medium-to-long term, consumers would benefit from the rational behaviour of economic parties in the free market as capacity expands and prices are lowered.

This does not solve the problem, but outlines that market structures are undeserving of an anti-competitive presumption.[111] Consequently, Article 101 should be mobilised where broader economic discovery suggests firms may be making supra-competitive profits by algorithmic means. The expansion of Article 101(1), however, is not disconnected from earlier conclusions rejecting the short-termism of state intervention. Whilst price-fixing is *per se* illegal in US antitrust law, irrespective of contextual factors, EU policy offers a defence within the bifurcated architecture of the TFEU, under Article 101(3).[112] This makes Article 101(1) inapplicable where an agreement or concertation 'contributes to improving the production or distribution of goods or to promoting technical or economic progress, while allowing consumers a

[109] Friedrich Hayek, 'Competition as a Discovery Procedure (translated by Marcellus Snow)' (2002) 5(3) The Quarterly Journal of Austrian Economics 9, 9.
[110] Joseph Schumpeter, *Capitalism, Socialism and Democracy* (5th edn, Routledge 1994) 81–86.
[111] Kaplow (n 87).
[112] Commission, 'Guidelines on the application of Article 81(3) of the Treaty' [2004] OJ C 101/08.

fair share of the resulting benefit' without imposing restrictions on the firms which are not indispensable to these benefits and do not afford the 'possibility of eliminating competition in respect of a substantial part of the products in question'.[113] Colombo therefore supports the expansion of this defence in line with broader enforcement powers, as this paper has already recognised the potential for pricing algorithms to realise the criteria of the defence through long-term price reductions, lower search costs, and by accounting for capacity constraints.[114] This is objectively valuable to the DSM's facilitating digital services: offering the most pertinent legal landscape to publicly justifying the pro-competitive effects of algorithms whilst not, in the process, deterring their development and application. Price increases are not anti-competitive *per se*, but may indicate long-term dynamic effects benefitting consumer and commercial parties – maximising digital growth.

Regulation 1/2003 impedes this reform. Through its 'self-assessment' regime, firms bear the onus of ascertaining their own adherence to competition law.[115] Bailey observes the consequent deficiency of Article 101(3), resulting in its infrequent, and negative, application.[116] Scant guidance suggests that it establishes a presumption firmly against firms allegedly breaching Article 101(1),[117] but whilst risk management is to be expected, it cannot substitute the positive application. Indeed, firms may actively inform the economic constitution and efficiencies by justifying their long-term position and market behaviour. Accordingly, Article 101(3) may expand the state's market comprehension, to be mobilised after Article 101(1) is invoked –

[113] Treaty on the Functioning of the European Union, art 101(3).
[114] Niccolò Colombo, 'Virtual Competition: Human Liability vis-à-vis Artificial Intelligence's Anticompetitive Behaviours' (2018) 2(1) European Competition and Regulatory Law Review 11, 18–20.
[115] Council Regulation (EC) 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty [2002] OJ L1/1, s 8.
[116] David Bailey, 'Reinvigorating the Role of Article 101(3) under Regulation 1/2003' (2016) 81(1) Antitrust Law Journal 111, 130.
[117] Commission (n 112).

necessitating Commission-published guidance to this effect.

4.5 The burden of proof and presumptions of innocence

Article 2 of Regulation 1/2003 outlines the burden of proof for Article 101(1) as resting upon the authority alleging the infringement, and that the undertaking(s) must then bear the burden of proving the defence is adequately fulfilled.[118] In *MasterCard v Commission* the court held that there was not 'an excessive burden of proof on the applicants by requiring empirical proof to be adduced' *vis-à-vis* Article 101's bifurcated architecture between clause (1) and (3).[119] At first glance, this approach appears reasonable: undertakings may challenge authorities' claims of an anti-competitive impact with pro-competitive, to neutral net-effect.[120] This is superficial, however. Jones and Sufrin observe the court's wide deference towards authorities' use of lighter, qualitative factors to discharge their burden,[121] provided they are factually accurate and conclusions may be drawn,[122] where firms must objectively quantify their defence.[123] Although the limbs of Article 101 are structurally balanced, therefore, they are substantively imbalanced. As the burden of proof funnels to firms only at second instance, it is inherently restrictive and imposes a presumption of guilt, in contravention of the *in dubio pro reo* principle.

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[118] Council Regulation (n 115) art 2.
[119] Case T-111/08 *MasterCard and Others v European Commission* [2012] ECLI:EU:T 260 [40].
[120] ibid [85].
[121] Such as consumer responses and documentary evidence, *viz* Case T-342/07 *Ryanair Holdings plc v European Commission* [2010] II-03457 [163].
[122] Alison Jones and Brenda Sufrin, *EU Competition Law: Text, Cases, and Materials* (6th edn, OUP 2016) 251.
[123] Alfonso Lamadrid de Pablo, 'The Double Duality of Two-sided Markets' (Presentation at Pros and Cons Conference, Stockholm, 28 November 2014) <https://chillingcompetition.com/2014/11/28/the-double-duality-of-two-sided-markets/> accessed 28 April 2019, 12.

Although the Commission generally holds claims to a standard of proof on the balance of probabilities,[124] Article 101(1) requires 'evidence to support the firm conviction'.[125] Consequently, competition policy seemingly errs towards a criminal standard, which accentuates the need for due process and for an assumption of innocence to apply to commercial parties. This supports Kaliniti's proposal that the entire burden of proof rests upon competition authorities – leaving undertakings with only an evidential burden. Rationalised with ordoliberal proposals, the expanded definition of agreement would be tempered by an active and complimentary approach towards firms' economic evidence within the framework of legal formalism – promoting a more cautious approach which eschews a funnelling relationship between Articles 101(1) and 101(3) and consequent over-enforcement.[126] This ensures an effective balance towards firms' respective and long-term dynamic-pricing and, where this is doubted, scope for authorities to mobilise the economic constitution at risk of not discharging their burden.

5 Conclusion

Pricing algorithms do not necessitate vast swathes of reform in EU competition policy. Neither can they be left entirely unregulated for fear of consumer welfare being undermined. This paper has established that, in the case of explicit collusion, current policy has proven adequate at least to the extent that it is clearly captured by Article 101 TFEU – as demonstrated by the case of Trod Ltd. The broad definition of agreement may be transplanted with little confusion from the offline 'smoke-filled room' to online correspondence. It has demonstrated, even, that less direct communication such as 'cheap talk' enjoys

[124] This is not explicitly stated, though may be inferred from the 'neutral' net effect and there being no reason to suspect otherwise, *Napp Pharmaceuticals Holdings Ltd v Director General of Fair Trading* [2002] CAT 1 [112].

[125] Case T-67/00 *JFE Engineering v European Commission* [2004] II-02501 [57].

[126] Andriani Kalintiri, 'The Allocation of the Legal Burden of Proof in Article 101 TFEU Cases: A 'Clear' Rule with Not-So-Clear Implications' (2015) 34(1) Yearbook of European Law 232, 253.

stronger economic rationale for legal intervention as a concerted practice under current policy.

Nevertheless, Trod offers telling lessons. Although the technology failed to maintain the algorithmic cartel at times, such imperfections may be remedied in future. It was only due to parties' correspondence that the veil could be (partially) lifted on the ongoing collusion. As pricing algorithms facilitate increasing concertation in lieu of agreement, current policy may have difficulty in detecting and capturing cartels. This will require the European Commission to better define concerted practices as a classification in its own right, where it is presently dually classified with agreement at the expense of clarity. More significantly, however, the degree(s) of separation between human agents and the collusive effects of algorithms has demonstrated the inadequacy of the EU Fines Notice in disgorging the extent to which cartelists benefit. This risks a failure to deter algorithmic cartels and, in fact, incentivises cartels' higher supra-competitive equilibria. This paper therefore calls for a reformulation of the current approach. It proposes one which forensically audits cartelists' accounts to ascertain and disgorge supra-competitive profits, thereby ensuring certainty in the sanctions against them as an effective deterrent. Altogether, this suggests that algorithmic cartels are not so comfortably captured by current policy but sitting at its Rubicon – inviting policymakers' attention to tackle future instances of explicit collusion.

The most precipitous issue presented within this paper, however, is the ability of algorithms to promote tacit collusion as a rational business decision. Emulating the oligopoly problem, they risk expanding it from markets of just a few competitors to those of many. The literature reveals no remedial consensus, as proposals are torn between biases on market structure and efficiency and, more intolerably, consumer welfare at the expense of proper economic consideration. These proposals fail to account for the distinction between algorithms' pro- and anti-competitive effects, which are behavioural in nature. Consequently, this paper proposes removing these issues from the

equation. By dismissing 'welfare first' economics as undesirably short term, it promotes an ordoliberal approach to escape the impasse. This approach would maintain and protect healthy competition for the sake of competition: framing firms' conduct within an economic constitution at first instance, but protecting consumer welfare as a consequence at second instance.

An ordoliberal approach must be implemented predictably and judiciously. As the TFEU is a product of early ordoliberal sentiment in the EU, however, the groundwork already exists in current policy. Consequently, a proper economic constitution must afford competition authorities broader powers to capture perceived anti-competitive behaviour by expanding the breadth of Article 101(1). To differentiate the pro- and anti-competitive impacts of algorithms, however, Article 101(3) must be reconceptualised as a viable defence to Article 101(1) to justify long-term market behaviour and rational economic decisions with pro-competitive effects. As a result, whilst competition authorities must retain their ability to bring initial claims, they should bear the onus of the entire burden of proof to ensure that firms are not subject to presumptions against them for rational conduct within the free market. To this end, a cautious but complementary approach balancing authorities' shorter term concerns with firms' long-term efficiencies may be produced: curtailing over-enforcement, maintaining the presumption of innocence, and not rewarding wanton interventionism by the state.

Harmful comments on social media

Kathryn Chick

Abstract
Social media has become a breeding ground for malicious, abusive, and offensive communications. These comments when posted online can contribute to or cause, *inter alia*, depression, anxiety, and isolation. However, where communications have caused harm to others, the restrictive guidelines issued by the Crown Prosecution Service can make it difficult to engage the law and prosecute the communicator. The justifications for the high threshold set are largely associated with protecting the right to freedom of expression. This article critically analyses these guidelines, arguing that too much protection is afforded to freedom of expression at the cost of many harmful comments going unchallenged. It is argued that harmful speech posted online should not warrant the same protections as other forms of speech such as political and intellectual speech. Although not all online comments result in harm, and while there are non-legal means to deal with unpleasant comments, it should be easier for those genuinely harmed to take legal action if necessary.

1 Introduction

Social media is considered to be one of the greatest revolutions since television and is often praised for the benefits it has brought to society and to individual users.[1] Its popularity stems from the 'sense of membership, commitment and reciprocity'[2] that it offers, as well as its

[1] Gavin Sutter, 'Nothing New Under the Sun: Old Fears and New Media' (2000) 8 International Journal of Law and Information Technology 338.
[2] Tony Fitzpatrick, 'Critical Cyberpolicy: Network Technologies, Massless Citizens, Virtual Rights' (2000) 20(3) Critical Social Policy 375, 382.

global reach, which allows access to information and ideas that were previously unobtainable.[3] However, social media has been recognised as a 'double-edged sword'.[4] Despite the positive attributes of digital communications, there are drawbacks, including harms that can be caused to people in a way that offline communications cannot.

When harmful comments have been posted online, there are two Acts under which an offence may have been committed: the Malicious Communications Act 1988 (MCA) and the Communications Act 2003 (CA). Under section 1 MCA, it is an offence to send to another person an electronic communication conveying a message that is indecent, grossly offensive, threatening or contains information that is known or believed to be false. The sender's purpose, or one of their purposes, in sending it must have been to cause distress or anxiety to the recipient or to any person to whom they intended its content to be communicated.[5] Under section 127 CA, a person is guilty of an offence if he 'sends by means of a public electronic communications network a message or other matter that is grossly offensive or of an indecent, obscene or menacing character'. It is also an offence under this provision to send a message known to be false using a public, electronic communications network for the purpose of causing annoyance, inconvenience or needless anxiety to another person.[6]

However, before a person can be prosecuted under the MCA or CA, the Crown Prosecution Service (CPS) must decide whether to proceed with the case. In order to prevent inappropriate or unmeritorious prosecutions, the CPS established guidelines to regularise its treatment of these cases.[7] This article focuses on the CPS Guidelines on

[3] Peter Coe, 'The Social Media Paradox: An Intersection with Freedom of Expression and the Criminal Law' [2015] Information & Communications Technology Law 16.
[4] Maya Hertig Randall, 'Freedom of Expression in the Internet' (2016) 26 Swiss Review of International and European Law 235, 247.
[5] MCA 1988, s 1(b).
[6] CA 2003, s 127(2).
[7] Andrew Ashworth and Mike Redmayne, *The Criminal Process* (4th edn, OUP 2010) ch 7.

Prosecuting Cases Involving Communications Sent via Social Media (CPS Guidelines or the Guidelines).[8]

The CPS Guidelines impose a high threshold for prosecuting cases under section 1 MCA or section 127 CA, which has been justified because of the importance of safeguarding the right to freedom of expression. Freedom of expression is a human right protected under Article 10 of the European Convention of Human Rights, incorporated into domestic law via the Human Rights Act 1998. Article 10 provides that everyone has the freedom to hold opinions and receive and impart information and ideas without interference by public authority.[9] It is a qualified right which can be restricted where prescribed by law and where such restrictions are necessary in a democratic society for the protection of *inter alia* the reputation or rights of others.[10] As the CPS affords significant protection to freedom of expression, prosecution is rendered unlikely in many circumstances, resulting in the potential for some meritorious cases going unchallenged.

This article discusses whether the CPS Guidelines have struck the right balance between freedom of expression and protection from harmful communications on social media. Section 1 explains what the CPS Guidelines set out and what constitutes 'harmful comments' online. Section 2 critically analyses the CPS Guidelines, and raises issues with the current balance between freedom of expression and protection from harm. Section 3 demonstrates that the justifications for freedom of expression do not apply to harmful comments posted online and therefore should not be given such significant weight in the CPS Guidelines. Section 4 considers why freedom of expression on social media can be more harmful than face-to-face communication,

[8] Director of Public Prosecutions, 'Guidelines on Prosecuting Cases Involving Communications Sent Via Social Media' (2013) CPS <http://data.parliament.uk/DepositedPapers/Files/DEP2013-1025/social_media_guidelines.pdf> accessed 15 October 2018.
[9] Human Rights Act 1998, sch 1, art 10(1).
[10] ibid art 10(2).

explaining why protection of harm should be given more weight than freedom of expression in the CPS Guidelines.

2 The definition of harm and CPS guidelines

The CPS Guidelines for prosecuting harmful communications that have been posted on social media centre around a notion of *harmful* communications. This section explores the legal definition of harmful communications and their treatment by the Guidelines.

2.1 Harm

Leading academic Joel Feinberg defines harmful conduct as that which interferes with a person's interests.[11] Feinberg believes that a person's most important interests are their 'welfare interests,' which include *inter alia,* physical and psychological wellbeing, emotional stability and the ability to engage in normal social intercourse.[12] Some argue that online communication could not possibly lead to harm, and that the potential harm flowing from speech is less significant than the danger from action, [13] or that speech can only be harmful if it leads to action which causes harm, such as inciting violence. [14] As Feinberg recognised, various experiences can cause distress, offence or irritation without precluding any welfare interests. [15] Wounded pride, hurt feelings, anger, embarrassment, and shame are all feelings of the moment that will pass, and cannot be classed as harms.[16]

It is accepted that comments made to an individual online can cause temporary emotions, which need not be dealt with by law as they are not necessarily harmful. However, if one becomes so consumed with

[11] Joel Feinberg, *The Moral Limits of the Criminal Law Volume 1: Harm to Others* (OUP 1987) ch 1.
[12] ibid 37.
[13] Martin H. Redish, 'Self-Realisation, Democracy, and Freedom of Expression: A Reply to Professor Baker' (1981–82) 130 University of Pennsylvania Law Review 678.
[14] K.C. O'Rourke, *John Stewart Mill and Freedom of Expression: The Genesis of a Theory* (Routledge 2001).
[15] Feinberg (n 11).
[16] ibid.

feelings of offence or otherwise, to the extent that their welfare interests have been precluded, that ought to be considered harmful and the law should intervene.[17] Thus, for the purposes of this article, harmful comments are those posted online that have the effect of precluding a person's welfare interests.

2.2 CPS guidelines

To decide whether online comments should be prosecuted, the CPS follows its two-stage Full Code Test. First is the evidential stage, which requires there to be enough evidence to provide a realistic prospect of conviction.[18] If a case does not have sufficient evidence, the prosecution must not go ahead.[19] Second, the prosecution must be necessary in the public interest. For this stage, things to consider include the seriousness of the offence committed, the culpability of the suspect, the circumstances of and the harm caused to the victim, the suspect's age and maturity at the time of the offence, the impact on the community, and whether prosecution is a proportionate response.[20] If these stages are satisfied, then a prosecution can commence.

As regards communications sent via social media, the CPS has categorised four different types of communication that could be prosecuted:

1. communications that may constitute credible threats of violence or damage to property;
2. communications that specifically target an individual(s) which may constitute stalking or harassment;
3. communications that may be a breach of a court order; or
4. communications that do not fall into any of the categories

[17] ibid.
[18] CPS, 'About CPS' <https://www.cps.gov.uk/about-cps> accessed April 2019.
[19] ibid.
[20] CPS, 'The Code for Crown Prosecutors' <https://www.cps.gov.uk/publication/code-crown-prosecutors> accessed April 2019, para 4.8.

> above, which may be considered grossly offensive, indecent, obscene or false.[21]

As this article discusses harmful communication that could be prosecuted under the MCA or CA, it focuses on the fourth category.

The CPS Guidelines dictate that at the evidential stage, cases that fall under this fourth category are to be subjected to a 'high threshold' and that 'prosecution is unlikely to be in the public interest.'[22] This implies that the CPS has little concern for the harm that certain online comments can cause. This high threshold is justified on the basis that a lower threshold would give rise to a floodgate of trivial cases,[23] and would create the potential for a chilling effect on freedom of expression. Prosecutors are advised to 'exercise considerable caution before bringing charges' under section 1 MCA and section 127 CA.[24] Furthermore, the CPS states that 'the age and maturity of suspects should be given significant weight, particularly if they are under the age of 18'.[25] Therefore, the CPS affords significant protection to freedom of expression and it is unlikely that many cases under the fourth category will satisfy the Full Code Test.

However, this article argues that there is a marked difference between expressing views strongly and deliberately setting out to cause harm.[26] Too much weight has been given in favour of freedom of expression, leading to harmful comments going unchallenged.

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[21] Director of Public Prosecutions, 'Guidelines on Prosecuting Cases Involving Communications Sent Via Social Media' (2013) CPS <http://data.parliament.uk/DepositedPapers/Files/DEP2013-1025/social_media_guidelines.pdf> accessed October 2018.
[22] ibid para 13.
[23] ibid para 33.
[24] ibid para 34.
[25] ibid para 46.
[26] Graeme Broadbent, 'Malicious Communications Act 1988: Human Rights' (2007) 71 Journal of Criminal Law 288.

3 Justifying the current CPS guidelines

This section interrogates the justifications put forward by the CPS in support of their guidelines. It questions whether these justifications warrant the current restrictive policy adopted *vis-à-vis* prosecuting harmful communications.

3.1 The floodgate argument

The CPS Guidelines justify the high threshold for prosecuting alleged offences under section 1 MCA or section 127 CA on the basis that to do otherwise would lead to a flood of cases due to the millions of messages sent on social media every day.[27] The floodgate argument is the notion that certain cases should not be prosecuted because to do so would 'swamp the courts with [future] litigation.'[28] Undoubtedly, not all instances of unpleasant expression online have caused the readers harm, and they should not all be taken to court. [29]

However, it is not inevitable that a lower threshold for prosecution would lead to a floodgate of cases. There are avenues other than court which are used to resolving issues on social media, such as blocking or reporting. Blocking someone often prohibits that person from contacting you in any way or viewing your posts,[30] and reporting comments to the social networking site provides a channel for possible removal.[31] These are widely used tools, as 46% of girls aged 11–21 would report offensive behaviour online to the social media site.[32]

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[27] Director of Public Prosecutions (n 21) para 33.
[28] Ronald Dworkin, *Taking Rights Seriously* (Duckworth 1977) 100.
[29] HM Government, *Internet Safety Survey Green Paper* (2017).
[30] Facebook, 'Unfriending or Blocking Someone' <https://www.facebook.com/help/1000976436606344?helpref=hc_global_nav> accessed April 2019.
[31] Facebook, 'How to Report Something' <https://en-gb.facebook.com/help/263149623790594/> accessed April 2019.
[32] Girlguiding, 'Girls' Attitudes Survey' (2018) <https://www.girlguiding.org.uk/globalassets/docs-and-resources/research-and-campaigns/girls-attitudes-survey-2018.pdf> accessed April 2019, 4.

Therefore, it cannot be claimed with certainty that a lower threshold would lead to a flood of cases.

Nonetheless, to deny prosecution on this basis seems unfair. As noted by Gur, the floodgate argument ignores the conduct of the alleged and ignores the harm caused to the victim.[33] It also ignores the merits of a case.[34] Instances of harmful communication could go unchallenged as a result of this. The floodgate principle underpinning the CPS Guidelines fails to adequately consider the potential for harm to be suffered by online readers.

3.2 Chilling effect on speech

The CPS Guidelines stress that a lower threshold for prosecuting cases under section 1 MCA and section 127 CA could lead to a potential chilling effect on speech. Coe suggests that if speech online is not protected, it could impede the dissemination of information.[35] Similarly, Stein argues that users may stop expressing their opinions and beliefs online or may even stop using the sites altogether for fear of being prosecuted.[36]

However, these arguments are flawed. As social media has become a key instrument for communication today, it is unlikely that people would stop using it altogether.[37] Furthermore, social media exists to encourage people to become more open and connected with the world and to share ideas with others.[38] It would be a positive outcome if

[33] Noam Gur, 'Ronald Dworkin and the Curious Case of the Floodgates Argument' (2018) 31(2) Canadian Journal of Law & Jurisprudence 323.
[34] ibid.
[35] Coe (n 3).
[36] Bethany Stein, 'A Bland Interpretation: Why a Facebook Like should be Protected First Amendment Speech' (2014) 44 Seton Hall Law Review 1255.
[37] Ian J Lloyd, *Information Technology Law* (8th edn, OUP 2017).
[38] Kathleen Chaykowski, 'Mark Zuckerberg Gives Facebook A New Mission' (*Forbes*, 22 June 2017) <https://www.forbes.com/sites/kathleenchaykowski/2017/06/22/mark-zuckerberg-gives-facebook-a-new-mission/#c5891b91343b> accessed

harmful comments online were deterred.

Expression has certainly been restricted in other areas of law. For instance, the *ProLife Alliance*[39] case concerned the BBC refusing to show a broadcast on television because it contained graphic images of abortion. The House of Lords claimed that the reference to 'rights of others' under Article 10(2) is capable of including the sense of outrage felt by the public who 'in the privacy of their own homes had turned on the television … and been confronted by gratuitously offensive material.'[40] Thus, in other areas of law, speech or other forms of expression which are likely to have a negative impact on the recipient have been deterred by the threat of punishment. It therefore follows that comments posted on social media that have harmful effects on the reader should also be deterred. The CPS Guidelines ought to lower the threshold and have less concern for the chilling effect on speech and more consideration for victims of harmful online communications.

3.3 Public interest

The CPS Guidelines state that comments posted on social media are unlikely to be in the public interest. In fact, the Law Commission noted that a significant proportion of prosecutions under section 1 MCA and section 127 CA are linked to communications targeting high-profile figures.[41] Recently, there has been an increase in Members of Parliament (MPs) receiving harmful comments on social media. For example, in 2018 MP Jess Phillips received over 600 rape threats on Twitter.[42] Whilst these cases are rightly being prosecuted, the CPS is wrong to consider that mainly cases involving victims in the public eye

March 2019.

[39] *R (ProLife Alliance) v British Broadcasting Corporation* [2003] UKHL 23.

[40] ibid [91].

[41] Law Commission*, Abusive and Offensive Online Communications: A Scoping* Report (Law Com No 381, 2018) [5.74].

[42] Kevin Rawlinson, 'Labour MP Calls for End to Online Anonymity After 600 Rape Threats' *The Guardian* (London, 2018) <https://www.theguardian.com/society/2018/jun/11/labour-mp-jess-phillips-calls-for-end-to-online-anonymity-after-600-threats> accessed 5 March 2020.

are worthy of prosecution. With 88% of people in Great Britain online,[43] anyone has the potential to be harmed on social media,[44] not just public figures.

Significant harm can be caused to victims by online comments, and it should be a matter of public interest to protect these victims, no matter who they are.[45] Certain comments are capable of causing psychological, emotional, and social harm, which may increase feelings of depression, isolation, and anxiety.[46] In adults this can cause them to miss work;[47] likewise, children might stop attending school.[48] This could have long-lasting impacts on an individual as it could affect their livelihood or education.[49] The psychological impacts of harmful online comments can be so profound that people as young as 12 years old have committed suicide following such incidents.[50] This demonstrates just how serious an impact harmful online comments can have on a victim's mental wellbeing.[51]

It follows that the CPS is wrong to claim that prosecution is unlikely to

[43] Office for National Statistics, 'Adults' Media Use and Attitudes Report' [2018] <https://www.ofcom.org.uk/__data/assets/pdf_file/0011/113222/Adults-Media-Use-and-Attitudes-Report-2018.pdf > accessed April 2019, 109.
[44] HM Government (n 29).
[45] Krupa Patel, 'Cyberbullying: What's the Status in England?' (2012) 13 San Diego International Law Journal 589.
[46] Cybersmile, 'How Is Cyberbullying Different from Traditional Bullying?' (2014) <https://www.cybersmile.org/blog/how-is-cyberbullying-different-from-traditional-bullying> accessed February 2019.
[47] Robin Kowalski and others, 'Bullying and Cyberbullying in Adulthood and the Workplace' (2018) 158(1) Journal of Social Psychology 64.
[48] Patel (n 45).
[49] Sally Kift and others, 'Cyberbullying in Social Networking Sites and Blogs: Legal Issues for Young People and Schools' (2009) 20(2) Journal of Law, Information and Science 60.
[50] Cybersmile, '12-Year-Old Cyberbullying Victim Posted RIP on Social Media Before Taking Her Own Life' (*Cybersmile* 2019) <https://www.cybersmile.org/news/12-year-old-cyberbullying-victim-posted-rip-on-social-media-before-taking-her-own-life> accessed April 2019.
[51] Patel (n 45) 594.

be in the public interest as harms flowing from harmful comments can be catastrophic. It should be considered a matter of public interest to ensure that social media is not used to harm others and that, where harm has been caused, prosecution is available.

3.4 Age of the sender

The CPS Guidelines state that significant weight should be given to the age and maturity of the sender, particularly those under the age of eighteen. This is justified on the grounds that 'children may not appreciate the potential harm and seriousness of their communications'.[52] Thus, the CPS has tilted the scales further in favour of the rights of young persons to freedom of expression. However, it is contended that young people should be held responsible where their online comments have intentionally caused harm.

The age of criminal responsibility in England and Wales is 10,[53] and therefore when contemplating whether to prosecute a young person between the ages of 10 and 18, the CPS ought to recognise their capability to accept criminal responsibility for their actions. It is accepted that many people under 18 will send messages online that are not intended to harm the recipient and that merely cause them to feel temporary emotions of sadness, embarrassment or shame *inter alia.* As previously argued, this sort of speech should not be prosecuted. However, under 18s are capable of intending to cause harm to the recipient. For example, a high school student in America wanted to publicise his hatred towards his school teachers and created a website dedicated to them.[54] The website was titled 'Teacher Sux' with profane comments and pictures posted relating to the teachers, including a picture of one teacher's decapitated head with blood dripping down her neck.[55] Furthermore, the website invited visitors to donate money

[52] Director of Public Prosecutions (n 21) para 46.
[53] Crime and Disorder Act 1998, s 34.
[54] Renee Servance, 'Cyberbullying, Cyber-harassment, and the Conflict Between Schools and the First Amendment' [2003] Wisconsin Law Review 1213.
[55] ibid.

towards paying a hit man to kill one of the teachers.[56] This exhibits the potential harms associated with online communication by under 18s and explains why the CPS Guidelines ought to be less considerate to young people who intentionally and successfully harm others online.

Having considered how the CPS's justifications for a high threshold are disputable, this article will now discuss the rationale underpinning the current protections offered to the right to freedom of expression by the CPS.

4 Freedom of expression on social media

As the CPS Guidelines give significant weight to freedom of expression on social media, this section will critically analyse the Article 10 right justifications. It demonstrates why harmful comments posted online should not be protected by the right to freedom of expression and establishes why the CPS ought to reconsider the balance it has struck between freedom of expression and protection from harm. To do so, the justifications for freedom of expression, as laid out by Lord Steyn in *ex p Simms,*[57] are critically analysed in turn.

4.1 The right to freedom of expression

For years, freedom of expression has been regarded as a right which carries 'high importance'[58] as the cornerstone of a free society.[59] These beliefs have survived for centuries and, as a consequence, freedom of expression is now considered to be a fundamental human right as per Article 10 of the Human Rights Act 1998. Article 10 protects most forms of speech, including 'those that offend, shock or disturb the State or any section of the population.'[60] Nonetheless, not all forms of speech are afforded equal levels of protection.

[56] ibid.
[57] *R v Secretary of State for the Home Department, ex p Simms* [2000] 2 AC 115, 126.
[58] *Reynolds v Times Newspapers* [2001] 2 AC 127, [200].
[59] Stephen Gard, 'Book Review – Defending My Enemy: American Nazis, the Skokie Case, and the Risks of Freedom' (1981) 32 Hastings Law Journal 711.
[60] *Handyside v United Kingdom* [1976] EHRR 737, [49].

4.2 Hierarchy of speech

Over time, European and domestic courts have developed a hierarchy of speech,[61] distinguishing between political, educational, and artistic expression.[62] At the pinnacle of the hierarchy lies political speech.[63] As Scott LJ stated in *Lyon v Daily Telegraph*, 'it is in the public interest to have a free discussion of matters of public interest.'[64] An additional benefit for affording greater protection to political speech is that it 'is a basic safeguard against irresponsible political power'.[65] The increased value of political speech was recognised in *Campbell v MGN* whereby the dissemination of information concerning Naomi Campbell's drug addiction was found to be 'of a lower order than … political information'.[66] Lady Hale went on to state that below political speech sits educational speech due to its ability to help individuals play their 'full part in society and in our democratic life'.[67] Both political and educational speech would fall under media law, and freedom of expression expert Rowbottom's category of 'high-value' speech. Rowbottom has carried out extensive research on freedom of expression online in the past decade, providing this article with a modern typology to refer to.[68] High-value speech is distinguishable for being professionally produced, aimed at a wide audience and/or well researched in advance.[69]

Further down the hierarchy lies commercial and artistic expression, which is afforded much less protection.[70] And finally, at the bottom lies

[61] Mark Elliot and Robert Thomas, *Public Law* (3rd edn, OUP 2017) 843.
[62] *Campbell v MGN Limited* [2004] UKHL 22, [148].
[63] ibid [148].
[64] *Lyon v Daily Telegraph* [1943] KB 746, [752].
[65] J G Fleming, *The Law of Torts* (9th edn, Law Book Company 1998) 648.
[66] *Campbell* (n 62) [29].
[67] ibid [148].
[68] University of Oxford, 'Jacob Rowbottom' <https://www.law.ox.ac.uk/people/jacob-rowbottom> accessed January 2020.
[69] Jacob Rowbottom, 'To Rant, Vent and Converse: Protecting Low Level Digital Speech' (2012) 71(2) Cambridge Law Journal 355.
[70] Richard Clayton and Hugh Tomlinson, *The Law of Human Rights* (2nd edn, OUP

offensive, hurtful, and indecent speech, which is seldom protected.[71] It is suggested that these forms of speech be grouped under Rowbottom's 'low-level expression', which is defined as amateur, spontaneous, inexpensive to produce and often akin to everyday conversation.[72] As section 127 CA concerns speech that is grossly offensive, indecent, or menacing and section 1 MCA covers speech that is grossly offensive, indecent, threatening or false, the speech on which this article is centred constitutes low-level expression.

4.3 Justifications for freedom of expression

Having established the hierarchy of different forms of speech, the next part of this paper critically analyses the main justifications for freedom of expression. It is argued that these justifications are only applicable to high level speech and thus, low-level speech should be restricted where it causes harm to the recipient.

(A) Autonomy and self-development

Freedom of expression has been justified on the grounds that it helps the autonomy and self-development of individuals;[73] one argument being that hearing a range of ideas and opinions can help to educate and improve knowledge.[74] This aligns with Mill's view that freedom of expression exists primarily for the sake of the hearer.[75] For Mill, it is not the act of expressing one's thoughts that carries value, but the need for people to hear a variety of opinions, in order to achieve their own genuine thoughts and individualism.[76] Furthermore, Redish argues that without free speech, persons could not reach their full intellectual potential.[77]

2000) [15].
[71] Rowbottom (n 69).
[72] ibid.
[73] Eric Barendt, *Freedom of Speech* (2nd edn, OUP 2007) 16.
[74] ibid.
[75] John Stuart Mill, *On Liberty* (1st edn JW Parker & Son 1859).
[76] O'Rourke (n 14).
[77] Redish (n 13).

Though the ability to express oneself freely is important in order to educate the masses, it is likely that only high-level speech is going to provide valuable knowledge. As stated by Lady Hale, intellectual and educational speech is only important for giving individuals the 'potential to play a full part in society and in our democratic life'.[78] Thus, only speech that is political or otherwise in the public interest will lead to an individual's development of knowledge. It follows that harmful speech posted online, such as comments or posts that bully, harass, or cause distress to the reader, should not be justified on this basis.

In a similar vein, but in juxtaposition to Mill's belief that freedom of expression is for the sake of the hearer, Feldman argues that freedom of expression is for the sake of the speaker: it enables freedom of conscience, personal identity, and self-fulfilment.[79] Greenwalt submits that to suppress communication is the most serious impingement on our personalities compared to any other restraint on liberty.[80]

Some have argued that all communication, including poor taste jokes and offensive comments, can be justified as they allow the speaker to choose how to present themselves to society.[81] Although an opinion may be considered 'wrong' by the majority, it is important to protect expression that is unpopular. Society has a right to try to convince people that certain beliefs are flawed, but should not attempt to prevent their expression.[82] In fact, the law currently defends expression which the majority consider wrong or offensive, and this article agrees that speech which is merely unpopular but not harmful should not be prosecuted.

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[78] *Campbell* (n 62) [148].
[79] David Feldman, *Civil Liberties and Human Rights in England and Wales* (2nd edn, OUP 2002).
[80] Kent Greenwalt, *From the Bottom Up: Selected Essays* (OUP 2016) 377.
[81] Rowbottom (n 69).
[82] O'Rourke (n 14).

(B) Discovery of truth

The right to freedom of expression is often justified on the basis that it leads to the discovery of the truth.[83] In order for something to be 'true', it must be accurate and in accordance with fact or reality.[84] For Mill, the only way to discover the truth is to weigh all competing opinions against each other.[85] Gordon refers to this as the 'marketplace of ideas,' whereby all opinions and thoughts are exchanged, pushing out bad ideas and allowing good ones to thrive.[86] It is believed by some that it is only from the free competition of ideas that the truth can genuinely emerge.[87] This is not to say that opinions which are bad or false are to be suppressed, because to do so would be to assume infallibility.[88] Instead, the free marketplace of ideas should incorporate all opinions, which people can discuss with each other and determine for themselves whether an opinion is pernicious or false. [89]

One benefit of the marketplace of ideas is that it continues to make room for new opinions. There is no such thing as an 'objective truth,'[90] as what is considered to be factual or reality is changing constantly.[91] New discoveries are leading to realisations that what was once considered to be true is now, in fact, false.[92] For example, smoking was once considered to be healthy. This is supported by Emerson who contends

[83] C Edwin Baker, 'Scope of the First Amendment Freedom of Speech' [1978] 25 UCLA Law Review 964.
[84] Oxford Dictionary, 'Truth' <https://en.oxforddictionaries.com/definition/truth> accessed March 2019.
[85] Mill (n 75).
[86] Jill Good, 'John Stuart Mill and the Marketplace of Ideas' (1997) 23(2) Social Theory and Practice 235.
[87] Jacob Salwyn Schapiro, 'John Stuart Mill, Pioneer of Democratic Liberalism in England' [1943] Journal of the History of Ideas 127.
[88] Mill (n 75).
[89] Raymond Wacks, *Understanding Jurisprudence: An Introduction to Legal Theory* (5th edn, OUP 2017) 259.
[90] ibid.
[91] Samuel Arbesman, *The Half Life of Facts* (LLC Gildan Media 2012).
[92] ibid.

that there is no way of suppressing the false without also suppressing the true.[93]

The truth justification is not only popular amongst philosophers and academics, but also judges and lawmakers. For instance, section 2 of the Defamation Act 2013 provides a truth defence whereby expression that has significantly harmed one's reputation can be justified because it was true. To uncover to the world something of which it was previously ignorant is, for Mill, an extremely important service one human can provide for their fellow persons.[94] However, it is submitted that the justification of truth should only be applicable in situations where the speech involved is high level, in order to unveil something which is in the public interest.

Low-level speech – including offensive or harmful expression directed at an individual, especially one who is not a public figure – should not be defended on the basis of truth. For example, in 2010 Tyler Clementi committed suicide after his roommate filmed him having sex with a man and uploaded it online, stating he was gay.[95] The fact that the roommate's comments were based on his own observations and perception should not justify him expressing them. The harm caused by some low-level (offensive or hurtful) speech makes the value of their truth worthless. Thus, this justification should not be applicable to harmful speech directed at individuals and accordingly, the CPS should give less weight to freedom of expression in such cases.

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[93] Thomas Emerson, 'The Right of Privacy and Freedom of the Press' (1979) 14 Harvard Civil Rights Civil Liberties Law Review 329.
[94] Mill (n 75) 8.
[95] Ed Picklington, 'Tyler Clementi, Student Outed as Gay on Internet, Jumps to his Death' *The Guardian* (London, 2010) <https://www.theguardian.com/world/2010/sep/30/tyler-clementi-gay-student-suicide> accessed October 2018.

(C) Democracy

Freedom of expression is considered the 'cornerstone of the survival of democratic society'.[96] This is reflected in Article 10(2), which states freedom of expression can only be restricted if, *inter alia,* it is necessary in a democratic society.[97] For Gard, the only thing that separates a free society from others is the unrestricted flow of ideas, including those which are hateful and those which are hurtful.[98] Such liberty of expression can be justified as a means of maintaining stability in society.[99] There is more likely to be resentment and rebellion if people cannot present their opinions.[100] Emerson believes that suppressed groups would be forced underground, making them even more dangerous to society.[101] This is certainly true for high-level political speech, as democracy requires that individuals employ their thoughts and opinions in making political choices.[102]

More specifically, the argument of democracy is used to justify freedom of expression online. Social networking sites have become *the* medium for communication and it is therefore imperative that users' opinions are constitutionally protected.[103] With magazines, blogs, and newspapers now posting on social media, it has become an 'information superhighway',[104] creating a platform where the expression of political opinions and information are being engaged in by people who would otherwise be apathetic.[105] This is beneficial for a democratic society

[96] Alan Sears, 'Protecting Freedom of Expression Over the Internet: An International Approach' (2015) 5(1) Notre Dame Journal of International & Comparative Law 171, 185.
[97] Human Rights Act, sch 1.
[98] Gard (n 59).
[99] Thomas Emerson, 'Toward A General Theory of the First Amendment' (1963) 27 Yale Law Journal 877.
[100] Greenwalt (n 80).
[101] Emerson (n 100).
[102] Redish (n 13).
[103] Stein (n 36).
[104] Fitzpatrick (n 2) 388.
[105] Stein (n 36).

because a better informed citizenry may yield a better system of government and more deliberative political decision-making processes.[106] Even political figures have social media accounts which anyone can access and comment on. This is an extremely positive aspect of freedom of expression on social media, as it encourages uninhibited, vigorous, and wide-open expression on public issues.[107] Thus, the justification of democracy is applicable to high-level political speech.

However, the democracy argument should not justify harmful comments on social media, even if directed at a public figure. For example, in 2014 a journalist's feminist campaign resulted in harmful online comments directed at her.[108] One person tweeted 'you should have jumped in front of horses, go and die.'[109] The democracy argument should not apply here as the expression had little relation to politics, culture, or social values, and the person who tweeted that was rightly prosecuted for the harm suffered by the recipient.[110] Therefore, harmful speech should not be protected by the CPS on the basis of democracy.

Having explained why harmful comments online are unjustifiable, this article shall now demonstrate why protection from harm ought to be given more consideration by the CPS.

[106] Greenwalt (n 80).
[107] Gard (n 59).
[108] Andrew Murray, *Information Technology Law: The Law and Society* (3rd edn, OUP 2016) ch 7.
[109] ibid.
[110] ibid.

5 Protecting users from harm in social media

Some believe that as there is no imminent risk of physical harm, online communications cannot be as harmful as offline communications.[111] However, this section demonstrates how certain unique characteristics of social media give it the potential to amplify the impact of low-level speech on the recipient. Thus, speech that would cause temporary emotions face-to-face can cause significant harm if posted online. This section will conclude that the CPS should take more seriously the fact that social media is utilised by some to harm others and that the Guidelines ought to shift in favour of prosecuting those who do so.

5.1 Anonymity

One of the most fundamental, powerful characteristics of online communication is anonymity.[112] On the internet, people are able to assume different personas and use various pseudonyms in order to mask their true identities.[113] For some, anonymity is a very positive aspect of the online world. Strossen maintains that without the 'cloak of anonymity, many individuals [would] not exercise their right to freedom of expression.'[114] Anonymity encourages speakers to share their genuine ideas and opinions, which can be done more liberally if people know that they cannot be identified.[115] In a similar vein, Randall has argued that anonymity is 'a shield from the tyranny of the majority.'[116]

On the other hand, Patel observes that anonymity is the most 'fearful' characteristic of online communications.[117] Anonymity can also be

[111] Law Commission (n 41) [3.68].
[112] Patel (n 45).
[113] ibid.
[114] Nadine Strossen, 'Protecting Privacy and Free Speech in Cyberspace' (2001) 89 Georgetown Law Journal 2103, 2106.
[115] Charlene Christie and Emily Dill, 'Evaluating Peers in Cyberspace: The Impact of Anonymity' (2016) 55 Computers in Human Behaviour 292.
[116] Randall (n 4) 247.
[117] Patel (n 45) 594.

used as a sword with the intent to cause harm to others. For example, Ask.fm is an anonymous 'questions and answers' website; at least four teenagers who were subject to abusive comments on Ask.fm have committed suicide.[118] This suggests that anonymity can make online communications extremely harmful can contribute to the many factors which lead a person to commit suicide.

The psychological injury suffered by a victim who has received abusive comments online is potentially heightened where the perpetrator is anonymous.[119] The lack of identity limits the victim's ability to take steps to prevent further abuse.[120] For example, Weber and Pelfrey found that many teenagers who receive abusive online messages from peers confront them in person in order to reconcile.[121] However, where the speaker is anonymous, this is not an option.

Moreover, anonymity also empowers users to post messages in unrestrained ways,[122] and avoid being held accountable for harm caused.[123] Behind 'a mask of namelessness', speakers are willing to say more than they would say face-to-face.[124] This increased freedom that anonymity provides reduces an individual's inhibitions, separating their identity from their actions.[125] Therefore, anonymity increases the

[118] Joe Shute, 'Cyberbullying Suicides: What Will It Take to Have Ask.fm Shut Down?' *The Telegraph* (London, 2013) <https://www.telegraph.co.uk/news/health/children/10225846/Cyberbullying-suicides-What-will-it-take-to-have-Ask.fm-shut-down.html> accessed March 2019.
[119] Scott Hammock, 'The Internet Loophole: Why Threatening Speech On-Line Requires a Modification of the Court's Approach to True Threats and Incitement' (2002) 26 Columbia Journal of Law and Social Problems 65.
[120] Michael Moore and others, 'Anonymity and Roles Associated with Aggressive Posts in an Online Forum' (2012) 28(2) Computers in Human Behaviour 861.
[121] Nicole L Weber and William V Pelfrey, *Cyberbullying: Causes, Consequences and Coping Strategies* (LFB Scholarly Publishing 2014).
[122] Liam Bullingham, 'The Presentation of Self in the Online World: Goffman and the Study of Online Identities' (2012) 39(1) Journal of Information Science 101.
[123] Christie and Dill (n 116)
[124] Hammock (n 120).
[125] Randall (n 4).

likelihood of harmful comments being posted on social media. The CPS Guidelines should encourage the prosecution of those who use anonymity to harm others.

5.2 Physical detachment between speakers and their audience

Communicating online allows people to distance themselves from reality. People can show a side of themselves that they would not feel comfortable doing offline.[126] The physical detachment attributed to online communication is also a cause for concern, as it removes the possibility of physically avoiding harmful communications. Online communication can be sent at any time and received any place,[127] and so harmful comments posted online can penetrate the safety of the home, meaning there is no escape.[128]

The physical detachment between speakers and their audience can also be problematic because the sender cannot observe the true extent of the harm caused.[129] Physical cues such as crying are not visible to the online communicator,[130] potentially causing them to unknowingly inflict genuine harm.[131]

Furthermore, the fact that the recipient cannot hear the speaker's tone of voice means that misinterpretations are likely to occur.[132] For example, a comment calling someone a 'fat cow' could be taken seriously and in extreme cases, could even lead to an eating disorder, which may not have been the speaker's intention. It is noted that where

[126] Liam Bullingham, 'The Presentation of Self in the Online World: Goffman and the Study of Online Identities' (2012) 39(1) Journal of Information Science 101.
[127] Kift and others (n 49).
[128] Cybersmile, 'How Is Cyberbullying Different from Traditional Bullying?' (*Cybersmile*, 14 September 2014) <https://www.cybersmile.org/blog/how-is-cyberbullying-different-from-traditional-bullying> accessed February 2019.
[129] Emerson (n 100).
[130] Patel (n 45).
[131] ibid.
[132] Cybersmile (n 129).

comments are intended to be a joke, prosecution should not be permitted. However, where a comment is sent with the intention of causing harm, but not the level of harm actually caused, the CPS Guidelines should permit the sender's prosecution.

5.3 Audience

The increasing popularity of social networking sites means that comments posted online have the potential to be viewed by a significantly larger audience compared to face-to-face communication.[133] Online expression can come to the attention of people beyond the speaker's intended audience. For example, in 2012 Daniel Thomas posted a homophobic message about Olympic diver Tom Daley. It had only been intended to be seen by his Twitter followers, but instead reached millions, including Tom Daley himself.[134] This instance demonstrates how, online, speakers cannot control the audience of their comments. The CPS refused to prosecute this case on the basis that, *inter alia,* the post was intended to be viewed by family and friends only.[135] However, it is contended that speakers should not be able to avoid prosecution simply because their comment reached a wider audience than intended. It is common knowledge that social media increases the potential for comments to reach far and wide, [136] and this should not excuse the speaker for causing harm to another.

If an online comment is viewed by a large audience, it is likely to significantly increase the risk and level of harm suffered by the victim. [137] For instance, in 2014, a teenage boy committed suicide after a video of him masturbating in the school bathroom went viral. The video was seen by a wide audience, some of whom began to bully the victim. [138]

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[133] Murray (n 109).
[134] BBC News, 'Tom Daley Tweet: No Action Against Daniel Thomas' *BBC News* (London, 2012) <https://www.bbc.co.uk/news/uk-wales-19661950> accessed April 2019; Coe (n 3).
[135] Coe (n 3) 33.
[136] Murray (n 109).
[137] Randall (n 4).
[138] E J Dickson, 'California Teenager Kills Himself After Video of Him Masturbating

This also exhibits how enabling a large amount of people to view online posts can amplify the harm caused as it widens the 'pool of individuals' [139] who might be willing to communicate abusive and harmful messages. It follows that the potential for a large audience makes online communications more harmful than face-to-face communication. The CPS Guidelines ought to enable prosecution, even when the post in question is viewed by an unintended audience.

5.4 Instant and permanent

Once a message has been sent or posted online, it is instantly and permanently available for all to see:[140] 'the internet never forgets'.[141] This can be injurious for victims of harmful communication because something that was private can become permanently public. [142] Furthermore, Moore and others note that the permanency of online attacks enables a single incident to have repeated effects.[143] Therefore, the permanency of online comments make them more harmful than face-to-face comments. Accordingly, the CPS Guidelines should encourage the prosecution of senders of harmful communications.

As well as being permanent, the instantaneous nature of posting messages online can be harmful as it allows people to do so without a moment's reflection. [144] This means that users are 'no longer constrained by the sound of their own voice',[145] and make harmful comments they are unlikely to say to someone's face. The CPS Guidelines should protect those who have been harmed by an unfiltered comment.

Goes Viral on Snapchat and Vine' *Daily Dot* (2014) <https://www.dailydot.com/irl/matthew-burdette-suicide/> accessed April 2019.

[139] Robin Kowalski, Allison Toth & Megan Morgan, 'Bullying and Cyberbullying in Adulthood and the Workplace' (2018) 158(1) The Journal of Social Psychology 64, 65.

[140] Murray (n 109).

[141] Randall (n 4) 243.

[142] Coe (n 3).

[143] Moore and others (n 121).

[144] Patel (n 45).

[145] Hammock (n 120) 81.

5.5 Why should the law protect users from these harms?

Subject to the harm principle, criminal law should permit individuals to do as they wish unless their conduct harms others.[146] Therefore, if harmful comments are posted online contrary to section 1 MCA or section 127 CA, it should follow that the sender be prosecuted.

However, some argue that protection from certain harms should not be dealt with by law, but by individuals themselves. O'Rourke suggested that victims can simply choose to avoid what has been said.[147] For example, online users could 'log off and vanish,' avoiding any further harm.[148] However, this is a futile suggestion for two reasons. Firstly, in this digital age, online presence has become a vital form of social interaction.[149] Victims could end up feeling as though they are the ones being punished, especially children and young adults.[150] It is unrealistic to assume that people can just avoid using it. Secondly, as Stevens J stated in a US case regarding offensive language on the radio:

> to say that one may avoid further offence by turning off the radio when he hears indecent language is like saying that the remedy for an assault is to run away after the first blow.[151]

Therefore, regarding social media, simply logging off is unlikely to protect the victim because harm has already been caused.

It is also arguable that, as opposed to logging off, one could block the perpetrator on social media or report them to the social networking site. However, this is also not always effective. The blocked person may be

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[146] Hamish Stewart, 'The Limits of the Harm Principle' [2010] Criminal Law and Philosophy 17.
[147] O'Rourke (n 14).
[148] Fitzpatrick (n 2) 382.
[149] Christie and Dill (n 116).
[150] Kift and others (n 49).
[151] *Federal Communications Commission v Pacifica Foundation* (1978) 438 US 726 [748].

able to contact the victim via other social media platforms, or they could create a new account which has not been blocked and continue to send harmful messages.[152] It follows that harm caused on social media should not be dealt with entirely by the individuals themselves; rather, there should be scope for them to be dealt with by the law.

Some argue that prosecution is not a proportionate response to dealing with online communication.[153] However this article disagrees. Regarding the award of damages for libel cases, Barendt argued that damages act as a deterrent, causing people to 'be careful about the terms in which they speak [online]'.[154] It is submitted that, similarly, the threat of prosecution would also have deterrent effects on harmful online comments. Also, under section 1 MCA and section 127 CA, the sentences available do not exceed two years' or six months' imprisonment respectively. These punishments are relatively low,[155] and thus should not be deemed disproportionate to the harm suffered by victims of online abuse.

Despite Rowbottom's contention that low-level speech should under no circumstances be criminalised in light of the need to protect freedom of expression,[156] it is argued that the Article 10 right should not apply to harmful expression. Though the fundamentality of the right to freedom of expression is accepted, the CPS should take more seriously the harm that comments on social media can cause.

[152] Amelia Butterly, 'What People Can Still See, Even After You Block them Online' *BBC News* (London, 2015) <http://www.bbc.co.uk/newsbeat/article/34538297/what-people-can-still-see-even-after-you-block-them-online> accessed April 2019.
[153] Rowbottom (n 69) 356.
[154] Eric Barendt, *Freedom of Speech* (2nd edn, OUP 2007) 467.
[155] Patel (n 45).
[156] Rowbottom (n 69).

6 Conclusion

This paper has argued that the CPS Guidelines for prosecuting cases under section 1 MCA or section 127 CA does not strike the right balance between freedom of expression and protection from harm. Too much protection has been afforded to freedom of expression at the risk of many harmful communications going unchallenged.

It has been contended that the CPS justifications for the current prosecution thresholds are unconvincing. To complain that a lower threshold would lead to a floodgate of trivial cases is a weak argument; it ignores the fact that online expression has the potential to cause actual harm, and the need to consider the merit of individual cases. To maintain that a lower threshold would have a chilling effect on speech is also unconvincing. Other areas of law have taken a more stringent approach to speech that is perceived as harmful. With the majority of people now online, it ought to be considered a matter of public interest to prosecute. Furthermore, the age of criminal responsibility in England and Wales is 10 and so any differential approach to prosecuting defendants according to their age must be underpinned by a clearer rationale.

The justifications offered by the CPS for the high threshold give too much weight to freedom of expression, which this article argues is wrong. This article has acknowledged the fundamentality of freedom of expression as a human right. It benefits both individuals and society at large; it encourages self-development by improving knowledge and education and by allowing individuals to express their personalities. Furthermore, freedom of expression is both a necessary and desirable component of living in a democratic society. Nonetheless, these benefits derived from freedom of expression should not be associated with low-level comments posted online with the intention of harm to others. An online comment should not be protected if it has harmed another simply because it is true. Furthermore, low-level speech should not be protected by the democracy argument because that is more

closely related to high-level political speech that is in the public interest.

Instead of protecting low-level speech that causes harm, the CPS Guidelines should shift the balance in favour of protecting victims from harm online. The unique characteristics of social media – namely anonymity, the physical detachment of the online world, the size of the audience, and the instant and permanent nature of online posting – give it the power to amplify the harm caused to recipients. Legal remedies should be available to those harmed online – logging off is not a panacea.

Disabled foetuses and the search for equality

Rachel Adam-Smith

Abstract
This paper questions whether and how the Abortion Act 1967 discriminates against the disabled foetus. It argues that the lack of definition and guidance on the terms 'substantial risk' and 'serious handicap' affords doctors wide discretionary powers. The broad definition and lack of guidance on these terms enables the termination of foetuses with completely treatable and manageable conditions. This paper contends that the Abortion Act has failed to keep pace with advancements in modern medicine and human rights. As a result, the existing legislative measures provide foetuses with a potential disability a lower level of protection than they would otherwise have 'but for' their diagnosis. In reflecting on the value placed on disabled lives by law and society, this paper will argue that the time limit for the abortion of disabled foetuses should be brought into line with the time limit for non-disabled foetuses.

1 Introduction

Abortion raises important questions of reproductive autonomy, and progress made in this area must be safeguarded. However, medical advances are ever-improving thus our understanding of obstetrics and neonatal care have raised new questions for the social, moral, and medical permissibility of late-term abortions. This paper interrogates the provisions of the Abortion Act 1967 (the Abortion Act) in light of these advancements by questioning its applicability to foetuses with disabilities. It examines the ongoing tension between current legislation and the disability rights movement.

In its first section, this paper will outline historic and current abortion legislation, and will address issues of ambiguity and disagreement which stem from the lack of definition to the terms 'serious handicap' and 'substantial risk' within abortion legislation.[1]

The second section of this paper sets out how the right to life enshrined in Article 2 of the European Convention of Human Rights (ECHR) applies to foetuses. It raises the question as to whether a viable foetus, regardless of disability, should be afforded the same legal protections as a premature infant. It draws on the decision of the European Court of Human Rights (ECtHR) in *Vo v France*[2] which held that the foetus was entitled to 'some protection of human dignity'.[3]

Through a comparison with the test for disability discrimination protection set out in the Equality Act 2010, this paper then moves to examine the 'serious handicap' threshold within abortion legislation, and attempts to reconcile this test with advances in medical treatment that mean many more conditions are now treatable and manageable. The fourth section of this paper also draws on the Equality Act and applies notions of direct and indirect discrimination to current abortion law.

In its fifth section, this paper articulates the need to protect a foetus from pain and suffering, by comparison with premature infants. It will be argued that there is no intrinsic difference between a premature infant and a viable foetus of the same age and level of development.[4]

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[1] Abortion Act 1967, s 1(1)(d) Ground E; Sheelagh Mcguiness, 'Law, Reproduction, and Disability: Fatally "Handicapped"?' (2013) 21 Medical Law Review 213; Elizabeth Wicks, Michael Wyldes, and Mark Kilby, 'Late Termination of Pregnancy for Fetal Abnormality: Medical and Legal Perspectives' (2004) 12(3) Medical Law Review 285.
[2] *Vo v France* [2005] 40 EHRR 12; Rosamund Scott, 'Interpreting the Disability Ground of the Abortion Act' (2005) 64 Cambridge Law Journal 388.
[3] *Vo v France* (n 2).
[4] Jeff Mcmahan, 'Infanticide and Moral Consistency' (2013) 39(5) Journal of Medical Ethics 272.

Thus, it will be argued that there can be no difference in moral status between a viable foetus and a premature infant of the same age. This section will question the unlimited nature of section 1(1)(d) abortions in light of the need to protect a foetus from pain and suffering. Further, it will consider whether the process of late-term abortions affords a foetus dignity in line with the decision in *Vo v France*, in which the ECtHR made it clear that the foetus was entitled to 'some protection of human dignity'. It concludes by arguing that viable foetuses should be afforded the same protections as a premature infant.[5]

The penultimate section of this paper considers the value that society places on disabled lives. It examines the considerable social and economic costs of having an impairment, and the potential impact of these costs on decisions to abort by prospective parents. It argues that parents and their disabled children must be empowered to lead fulfilling lives within a society that respects and values disabled lives.[6]

In the final substantive section of this paper, the issue of genetic screening will be addressed. The consequences of advances in genetic knowledge and the huge proliferation of prenatal tests has increased concern that genetic screening signals powerful messages about disabled people's fundamental right 'to be'.[7] As most genetic testing and other screening is completed prior to the current twenty-four-week threshold enshrined within the Abortion Act, it questions the ongoing need for late-term abortions on the basis of the section 1(1)(d) criteria.

2 History of abortion legislation

Abortion is an offence under sections 58 and 59 of the Offences Against the Person Act 1861 and section 1(1) of the Infant Life (Preservation) Act 1929.[8] Section 1(1) of the Infant Life (Preservation) Act 1929

[5] Scott (n 2); *Vo v France* (n 2).
[6] Scott (n 2).
[7] Linda Ward, 'Whose right to Choose? The New "Genetics", Prenatal Testing and People with Learning Difficulties' (2002) 12(2) Critical Public Health 187.
[8] Jo Samanta and Ash Samanta, *Medical Law Concentrate: Law Revision and Study*

provides that it is an offence to destroy the life of a foetus that is 'capable of being born alive' and is punishable up to a maximum penalty of life imprisonment. The phrase 'capable of being born alive' was defined in *Rance v Mid-Downs Health Authority*[9] as 'breathing and living by reason of its breathing through its own lungs alone, without deriving any of its living or power of living by or through the connection to its mother'. It is noted that, under section 1(2) of the Infant Life (Preservation) Act, a foetus of twenty-eight weeks' gestation or older is presumed to be capable of being born alive.[10]

The Abortion Act legalised the medical process of abortion on certain grounds by registered practitioners.[11] The Abortion Act allows for the abortion up to forty weeks' gestation on a wide number of grounds.[12] In order to understand the form the Abortion Act took, it is important to realise that the legislation was not enacted in order to provide women with the right to terminate their unwanted pregnancies.[13] The principal factor behind public and parliamentary support for legalisation was concerns about high mortality rates resulting from illegal abortions, especially among the poor.[14] Coupled with this, there was inadequate contraception, as the pill only became widely available during the 1960s, meaning that unwanted pregnancies were common. Abortion was not legalised in order to enhance women's reproductive autonomy; instead, the main purpose was to enable doctors to act lawfully in assisting desperate women to end their pregnancies.[15]

Guide (3rd edn, OUP 2018) 77; Offences Against the Person Act 1861, ss 58, 59; Infant Life (Preservation) Act 1929.

[9] *Rance v Mid-Downs Health Authority* [1991] 1 All ER 1230, 1241.

[10] Jonathan Herring, 'Contraception, Abortion and Pregnancy' in *Medical Law and Ethics* (7th edn, OUP 2018) 324; Life Preservation Act, s 1(1)(2).

[11] NHS, 'Overview Abortion' (*NHS*, 17 August 2016) <https://www.nhs.uk/conditions/abortion/> accessed 20 December 2018; Abortion Act, s 1(1)(d) Ground E.

[12] NHS (n 11).

[13] Emily Jackson, *Medical Law: Text, Cases, and Materials* (4th edn, OUP 2016) 9.

[14] Ibid.

[15] ibid.

The statutory grounds for an abortion are found in section 1 of the Abortion Act, as amended by the Human Fertilisation and Embryology Act 1990, which states:

> (1) Subject to the provisions of this section, a person shall not be guilty of an offence under the law relating to abortion when a pregnancy is terminated by a registered medical practitioner if two registered medical practitioners are of the opinion formed in good faith
>
> (a) that the pregnancy has not exceeded its twenty fourth week and that the continuance of the pregnancy would involve risk, greater than if the pregnancy were terminated, of injury to the physical or mental health of the pregnant woman or any existing children of her family; or
>
> (b) that the termination is necessary to prevent grave permanent injury to the physical or mental health of the pregnant woman; or
>
> (c) that the continuance of the pregnancy would involve risk to the life of the pregnant woman, greater than if the pregnancy were terminated; or
>
> (d) that there is a substantial risk that if the child were born it would suffer from physical or mental abnormalities as to be seriously handicapped.[16]

It is worth noting here that the Abortion Act still uses the terminology 'handicapped', a word which is now generally avoided in communicating with or about disabled people, as set out in the Government's inclusive language guidance issued in December 2018.[17]

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[16] Abortion Act, ss 1(1)(a), (b), (c), and (d); Jonathan Herring, *Medical Law and Ethics* (7th edn, OUP 2018) 304.

[17] Gov.uk, 'Guidance Inclusive Language: Words to Use and Avoid when Writing about Disability' (*Gov.uk*, 18 December 2019) <https://www.gov.uk/government/publications/inclusive-communication/inclusive-

Having set out the statutory criteria, it is important to note that the Abortion Act does not allow a woman to decide to terminate an unwanted pregnancy. There is no right to abortion, even if the grounds in the Act are plainly satisfied. Instead the statute legitimises the doctors' decision to administer an abortion in circumstances which meet the section 1(1) criteria. [18] Therefore, the Abortion Act focuses on the opinion of the doctors. It is not necessary to show that one of the statutory grounds was actually made out; it is sufficient that the doctors were of the opinion that it was.[19] This means that the statute enshrines deference to medical opinion, and a prosecution could only be brought on the grounds that the doctors had not acted in good faith. [20] Consequently, the law empowers doctors, rather than women, to judge whether an abortion should be performed.

This paper centres on section 1(1)(d) of the Abortion Act.[21] Prior to the Abortion Act, statutory protection of foetuses was determined solely by the stage of gestation, with twenty-four weeks representing an arbitrary cut-off point.[22] The Abortion Act altered this by creating a situation whereby foetuses are differentiated on the basis of a potential disability or 'serious handicap'.[23] Section 1(1)(d) therefore, can be seen as an anomaly in the broader context of legislative measures to prevent late-term abortions, as it affords foetuses with a potential disability a lower level of protection than they would have but for their 'diagnosis.'[24]

language-words-to-use-and-avoid-when-writing-about-disability> accessed 20 November 2018.

[18] Emily Jackson, 'Abortion, Autonomy and Prenatal Diagnosis' (2000) 9(4) Social and Legal Studies 467.

[19] Herring (n 16) 303.

[20] ibid.

[21] Abortion Act, s 1(1)(d) Ground E; Mcguiness (n 1) 213–242.

[22] Mcguiness (n 1).

[23] ibid.

[24] ibid.

3 The foetus and the right to life

A foetus does not possess a legal personality, therefore, a foetus has no right to life in English Law.[25] The question as to whether the foetus, including the late-term foetus has a right to life under Article 2 of the ECHR was addressed by the ECtHR in *Vo v France*.[26] In this case, the ECtHR made it clear that the foetus was entitled to 'some protection of human dignity'.[27] However, the Court observed that 'the unborn child is not regarded as a "person" directly protected by Article 2 of the Convention. Thus, the foetal right to life is implicitly limited by the mother's rights and interests.'[28] As a result, the only point of agreement is that the embryo or foetus is human. The Court observed that since the foetus has the capacity to become a person, it requires 'protection in the name of human dignity, without making it a "person" with the "right to life" for the purposes of Article 2'. However, if prenatal life is given some legal protection by the criminal law, then it could be argued that Article 2 should apply to the foetus at the point when the foetus becomes viable.[29] Otherwise, the protections afforded to the foetus by the criminal law would appear to be redundant and insignificant.

4 Abortion and the disabled foetus

The analysis above has shown how the Abortion Act section 1(1)(d) provides for a ground of abortion where there is a 'substantial risk' that the child born would suffer a 'serious handicap',[30] known as the disability ground for abortion.[31] Yet, how 'serious handicap' should be defined has remained subject to ambiguity and disagreement. Some have suggested that the legislation is deliberately vague to avoid

[25] Rosamund Scott, 'The English Fetus and the Right to Life' (2004) 11(4) European Journal of Health 355.
[26] *Vo v France* (n 2).
[27] ibid [84].
[28] Scott (n 2), *Vo v France* (n 2).
[29] Scott (n 2).
[30] Abortion Act, s 1(1)(d) Ground E.
[31] ibid.

fettering the discretion of the two certifying doctors.[32] This is grounded in the fact that the Abortion Act is silent on the definition of serious handicap. As a result, this broad definition allows the termination of foetuses with medical conditions such as cleft lip and/or palate (cl/p), which are deemed as treatable, as the NHS guidance states: 'Most of these problems will improve after surgery and with treatments such as speech and language therapy.'[33]

Despite the fact that conditions such as cl/p can be treated, they still fall under the umbrella of 'serious handicap'. The issue as to what constitutes a level of disability which might amount to 'serious handicap' was considered in *Jepson v Chief Constable of West Mercia Police Constabulary*.[34] Jepson asked West Mercia Police to investigate the circumstances of an abortion carried out on a twenty-eight-week foetus with bilateral cl/p.[35] The police concluded that the abortion was in line with the legislation, whereas Jepson argued that late abortions could only be justified for more serious conditions. Leave was granted to apply for judicial review and the court concluded that since the doctors had formed their opinion in good faith (that the child would be seriously disabled), there was insufficient evidence for a conviction, and therefore the decision of the police was sound.[36]

The case of Jepson reinforces the difficulties that arise due to the lack of clear definition as to what constitutes 'serious handicap' in the 1967 Act.[37] As a consequence of this case, the Disability Rights Commission stated:

[32] Mcguiness (n 1), Wicks, Wyldes, and Kilby (n 1).
[33] NHS, 'Overview cleft lip and palate' (*NHS*, 29 July 2016) <https://www.nhs.uk/conditions/Cleft-lip-and-palate/> accessed 28 January 2019.
[34] *Jepson v Chief Constable of West Mercia Police Constabulary* [2003] EWHC 3318.
[35] ibid.
[36] ibid. Samanta and Samanta (n 8) 75.
[37] Mcguiness (n 1).

> Section 1(1)(d) is offensive to many people; it reinforces negative stereotypes of disability, to permit terminations at any point during a pregnancy on the grounds of disability, while time limits apply to other grounds set out in the Abortion Act, is incompatible with valuing disability and non-disability equally.[38]

Disability is the loss or limitation of opportunities to take part in the life of the community on an equal level with others.[39] By comparing the Equality Act with section 1(1)(d) of the Abortion Act, it can be seen that the lack of definition afforded to the terms 'substantial risk' and 'serious handicap' in section 1(1)(d) illustrates how the Abortion Act is at odds with the Equality Act 2010, which specifically defines disability as having a physical or mental impairment that has a 'substantial' and 'long term' negative effect on your ability to carry out normal daily activities.[40] The term 'substantial' in the Equality Act is defined as more than minor or trivial - for example, it takes much longer than it usually would to complete a daily task such as getting dressed.[41] Therefore, if 'substantial' was assessed in line with the Equality Act, then, the question that needs to be asked is whether the condition in question would have more than a minor or trivial impact on the daily activities of the child. A lack of definition in the Abortion Act as to the terms 'substantial risk' and 'serious handicap' illustrates there is a lack of coherence between the definition of disability under the Equality Act and the understandings of foetal disability contained in abortion legislation. As a result, the lack of definitional coherence affords the

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[38] Celia Hall, 'Disabled Group in Abortion Law Attack*', The Telegraph* (London, 22 August 2001) <https://www.telegraph.co.uk/news/uknews/1338130/Disabled-group-in-abortion-law-attack.html> accessed 16 February 2019.

[39] Tania Burchardt, 'Capabilities and Disability: The Capabilities Framework and the Social Model of Disability' (2014) 19(7) Disability & Society 735.

[40] Equality Act 2010, section 6(1)(b). Gov.uk, 'Your Rights under the Law, Definition of Disability under the Equality Act 2010' (*Gov.uk*, 13 December 2018) <https://www.gov.uk/definition-of-disability-under-equality-act-2010> accessed 10 November 2019.

[41] ibid.

medical profession wide discretionary powers.[42] However, this definitional failure potentially removes protection for foetuses that may well have enjoyed a good quality of life.

The lack of definition discussed above potentially enables society to select against some traits. This could exacerbate the discrimination and stigmatisation of those with similar traits; so much so that selection cannot comfortably coexist with society's professed goals of promoting inclusion and equality for people with disabilities.[43] Consequently, the impaired foetus is in a much weaker legal position than the unimpaired one, as highlighted by the case of Jepson.[44] Further, in looking to define the terms 'substantial risk' and 'serious handicap' we must reflect on the varying degrees of disability, advancements in medicine, and, most importantly, the equality agenda and the social need to respect and value disabled lives.

5 The disabled foetus and discrimination

Tom Shakespeare defines disability equality as the political principle that people should be treated equally, should be included rather than excluded from society, and should have the right to be heard, regardless of physical or intellectual endowment.[45] This implies not only a negative obligation not to discriminate, but also a duty to recognise differences between people and to take positive action to achieve real equality.[46] However, the United Nations (UN) Committee's recommendations illustrate that disability equality in the UK is not

[42] Chris Cowland, 'Selective Abortion: Selecting the Right Response' (2010) 2 King's Student Law Review 55.
[43] Adrienne Asch, 'Genes and Disability: Defining Health and the Goals of Medicine: Disability Equality and Prenatal Testing: Contradictory or Compatible?' (2003) 30 Florida State University Law Review 315.
[44] Scott (n 2); *Jepson* (n 34).
[45] Tom Shakespeare, 'Choices and Rights: Eugenics, genetics and disability equality' (1998) 13(5) Disability & Society 665.
[46] Daniel Moeckli and others, *International Human Rights Law* (3rd edn, OUP 2017) 148.

currently being realised.[47] The UN were concerned that some people think that disabled people's lives are less valuable than the lives of non-disabled people. According to the UK committee, the UK should 'change its abortion laws so that they do not allow selective abortion at any stage of pregnancy because the foetus has an impairment, while respecting women's rights to reproductive and sexual freedom'. [48] Furthermore, they recommended that an action plan should be produced to stop disabled people being perceived as not having a 'good and decent life', and to recognise that disabled people are equal to non-disabled people.[49]

Unlawful discrimination means treating someone less favourably than others on the basis of certain personal attributes that are protected by law. [50] The Equality Act states that you must not be discriminated against because you have a disability, someone thinks you have a disability (this is known as discrimination by perception), or you are connected to someone with a disability (this is known as discrimination by association).[51] Within the Equality Act, a disability is defined as a physical or a mental condition which has a substantial and long-term impact on your ability to do normal day-to-day activities (section 6

[47] European and Human Rights Commission (EHRC), 'How is the UK Performing on Disability Rights, the UN Recommendations for the UK' (EHRC 18 January 2018) <https://equalityhumanrights.com/en/publication-download/how-well-uk-performing-disability-rights> accessed 10 November 2018.
[48] Ibid 9.
[49] Ibid 14.
[50] Equality Act 2010 Guidance, 'Guidance on Matters to be Taken into Account in Determining Questions Relating to the Definition of Disability. Introduction' (Equality Act 2010 May 2011) <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/570382/Equality_Act_2010-disability_definition.pdf> accessed 20 April 2019; Equality Act.
[51] Equality Act, s 6; EHRC, 'Disability Discrimination' (*EHRC*, 11 April 2019) <https://equalityhumanrights.com/en/advice-and-guidance/disability-discrimination> accessed 20 April 2019.

(1)).[52]

Protection from discrimination for disabled people applies in a range of circumstances.[53] Only those disabled people who meet the definition of disability in accordance with section 6 of the Equality Act and the associated schedules and regulations made under that section will be entitled to the protection that the Act provides.[54] Whether a person satisfies the definition of a disabled person for the purposes of the Abortion Act will depend upon the full circumstances of the case. That is, whether the substantial adverse effect of the impairment on normal day-to-day activities is long term. Importantly, the effects of impairments may be more difficult to ascertain in babies and young children because they are too young to be assessed against activities that are normal and day-to-day for older children and adults.[55]

Direct discrimination is treating one person less favourably than you would treat another person because of a particular protected characteristic that the former has. The definition is set out in section 13 of the Equality Act. In order to establish direct discrimination, the complainant has to show that the treatment was less favourable than the treatment of someone else in similar circumstances who did not have that characteristic.[56] In other words, they have to show (comparatively) less favourable treatment, not just unfavourable treatment.

A classic example of direct discrimination is when members of a certain group are denied access to a public facility, such as a swimming pool, which is open to everyone else. But most cases of direct discrimination are not as straightforward as this.[57] More often, direct discrimination

[52] EHRC (n 51).
[53] EHRC, 'Being Disabled in Britain, A Journey Less Equal' (*EHRC*, 3 April 2017) <https://www.equalityhumanrights.com/sites/default/files/being-disabled-in-britain.pdf> accessed 24 April 2019.
[54] Equality Act, s 6.
[55] ibid.
[56] ibid.
[57] Moeckli and others (n 46).

occurs covertly: the 'discriminator' will not admit that the difference in treatment was based on a prohibited ground, making it difficult for the complainant to provide sufficient evidence.[58] However, it is clear from the discussions in this paper that whilst the Abortion Act does not allow the abortion of a non-disabled foetus post-twenty-four weeks, it makes an exception for the disabled foetus. Therefore, the discrimination that this paper contends is extant within the Act does not occur covertly, it is openly acknowledged that a foetus can be aborted at any stage in the pregnancy based upon disability.

Indirect discrimination is defined by Section 19 of the Equality Act as when:

> A person (A) discriminates against another (B) if A applies to B a provision, criterion or practice which is discriminatory in relation to a relevant protected characteristic of B's.[59]

Unlike direct discrimination, indirect disability discrimination can be lawful if objectively justified as a proportionate means of achieving a legitimate aim.[60] Some of the most insidious types of discrimination do not operate overtly, but instead come in the form of neutral measures that disproportionately affect those with protected characteristics.[61] Though this paper maintains the distinction made under section 1(1)(d) of the Abortion Act, it would also be captured by the indirect discrimination measures of the Equality Act if it was deemed a neutral measure, as under section 19(2)(b) it puts foetuses with a disability at a significant disadvantage as compared with their non-disabled counterparts.

Though a discussion of discrimination legislation is important to indicate the misalignment between equality policies and abortion

[58] ibid.
[59] Equality Act, s 19.
[60] EHRC (n 53).
[61] Ruth Costigan and Richard Stone, *Civil Liberties and Human Rights, Freedom from Discrimination* (Article 14) (11th edn, OUP 2017) 495.

legislation, it is important to note that sections 13 (direct discrimination) and 19 (indirect discrimination) are both limited in their applicability to 'persons'. As noted above, foetuses lack legal personality and thus would not be eligible for protection under the Act.

6 Pain and legal personality: why disabled foetuses require protection

Some foetuses will have a significant and life-limiting disability. If born they would exist without any realistic expectation of a reasonable lifespan and/or would suffer immeasurable pain, up to the point of their death. Consequently, aborting a disabled foetus with no expectation of a long-term life could be considered legitimate, as ultimately you are preventing future harm in the form of pain and suffering that could be experienced by the child. By way of example, conditions such as Tay-Sachs disease (a genetic life-limiting condition which destroys nerve cells in the brain and spinal cord) or anencephaly (a severe life-limiting developmental disorder involving the absence of major portions of the brain, skull, and scalp) would fall within this category.[62] However, where birth is compatible with a good or reasonable quality of life, as in the case of Down's syndrome, then, arguably, it will most likely be in the foetus's interests to be born.[63] This argument is supported by Kate Greasley, who states that:

> only with respect to extremely debilitating and rare diseases could the suffering involved in life be so acute that it is plausible to suggest that an individual would be better off having that life ended before birth.[64]

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[62] NHS, 'Tay-Sachs Disease' (*NHS*, 7 February 2018) <https://www.nhs.uk/conditions/tay-sachs-disease/> accessed 14 March 2019; NHS, 'Fetal Anomaly Screening Programme' (*NHS*, 2019*).* <https://www.gov.uk/guidance/fetal-anomaly-screening-programme-overview> accessed 14 March 2019; Shakespeare (n 45).

[63] Scott (n 2).

[64] Kate Greasley, *Arguments about Abortion: Personhood, Morality, and Law* (OUP 2017) 229.

Having addressed the pain and suffering that a future child may feel, further consideration must also be given to the pain a disabled foetus may feel during the late-term abortion process. As discussed above, if further research determines that a foetus does feel pain at the point of viability (twenty-four weeks), then it could be argued that the disabled foetus should, during the process of late-term abortions, be afforded the right to freedom from 'inhuman or degrading treatment' under Article 3 of the ECHR. Arguably, this could establish a further reason as to why the Abortion Act provide equality in terms of time limits for non-disabled foetuses, as proposed by Lord Shinkwin in his private members' bill.[65] Despite this, there is of course an issue as to whose rights should take priority – the mother's or the foetus's. This paper has established that the Abortion Act was not enacted in order to provide women with the right to terminate their unwanted pregnancies.[66] However, section 1(1)(d) seemingly prioritises the mother's rights over those of the foetus. The effect of raising a disabled child and the potential rationale underpinning the prioritisation of material rights, will be discussed later in this paper.

Conversely, Chris Cowland argues that the abortion of a foetus with disabilities seeks to allow only the birth of children with desirable characteristics and essentially murders those who lack such attributes or more accurately, who possess undesirable traits.[67] Further, Cowland asserts that a foetus can be murdered and that selective abortion is the same as infanticide.[68] McMahan also argues that there is no intrinsic difference between a premature infant and a viable foetus of the same age and level of development.[69] Thus, if moral status is a function of intrinsic properties only, there can be no difference in moral status

[65] HL Deb 21 October 2016, vol 774 col 2545.
[66] Jackson (n 13) 698.
[67] Cowland (n 42).
[68] ibid.
[69] Mcmahan (n 4) 273.

between a viable foetus and a premature infant of the same age.[70] Disabled and non-disabled foetuses must therefore be afforded the same levels of protection *vis-à-vis* infliction of pain.

The International Association for the Study of Pain defines pain as 'an unpleasant sensory and emotional experience associated with actual or potential tissue damage'.[71] To feel something is defined as having 'the emotions excited, to experience a sensation'.[72] These definitions imply that the brain must achieve a certain level of neural functioning, as well as having prior experience, before pain can be understood.[73] Currently, there is no direct way of assessing pain in foetuses.[74] The most rational approach is to make an informed guess based on the knowledge of the development and function of the nervous system at different gestational ages. Pain is a complex phenomenon, however, and even if the nature of the experience changes with development, this does not prove that immature humans cannot be distressed by pain.

Ferschl and others argue that invasive foetal procedures clearly elicit a stress response, but it is unclear if this response correlates with conscious perception of pain.[75] Furthermore, they state that by nineteen weeks' gestation, a foetus can reflexively withdraw from a noxious stimulus without involvement of the cerebral cortex. They state, even if pain fibres reach the cortex at twenty-four weeks' gestation, the signals may not translate into what we perceive as pain.[76] However, Lloyd-Thomas and Fitzgerald state that even at twenty-six weeks very low

[70] ibid.
[71] International Association for the Study of Pain (IASP), 'Pain' (IASP, 2018) > https://www.iasp-pain.org/Education/Content.aspx?ItemNumber=1698> accessed 12 February 2019.
[72] Stuart Derbyshire and others, 'Do Foetuses Feel Pain?' (1996) 313 British Medical Journal 795; IASP (n 72).
[73] Derbyshire (n 73).
[74] ibid.
[75] Marla Ferschl and others, 'Anesthesia for *in Utero* Repair of Myelomeningocele' (2013) 118(5) Anesthesiology 1211.
[76] ibid.

birthweight infants show a clear and measurable flexion withdrawal reflex to noxious stimulation, suggesting that nociceptive afferent (perception to pain) input to the spinal cord is present.[77] Whilst these studies were carried out after birth, it is reasonable to infer that such responses would also occur *in utero*.[78] As there have been considerable advances in prenatal diagnostic technologies, especially ultrasonography, an increasing number of foetal anomalies are being diagnosed early in gestation.[79]

The issue of pain perception is discussed further in the following paragraphs. Koul and others state that available scientific evidence show that possible foetal pain perception occurs well before late gestation, during the second trimester. [80] However, the British Pregnancy Advisory Service states that current research shows the senses of the foetus are not developed enough to feel pain before twenty-eight weeks' gestation.[81] Despite suggestions from the Royal College of Obstetricians and Gynaecologists (RCOG) that foetuses are certainly unable to experience pain until at least the end of the second trimester (twenty-six weeks), Koul and others state that adequate pain relief should be provided to a foetus from mid-gestation onwards during any surgical procedure. [82]

The issue of pain that a foetus may feel needs further attention, so that

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[77] Derbyshire (n 73).
[78] ibid. Katharine Andrews and Maria Fitzgerald 'The Cutaneous Withdrawal Reflex in Human Neonates: Sensitization, Receptive Fields, and the Effects of Contralateral Stimulation' (1994) 56 Science Direct 95.
[79] Archna Koul, Raminder Sehgal, and Jayashree Sood, 'Anaesthesia for Foetal Surgery' (2015) 5 Current Medicine Research and Practice 22.
[80] ibid.
[81] British Pregnancy Advisory Service, 'Abortion: Frequently Asked Questions' (*BPAS*, 2015) <https://www.bpas.org/abortion-care/considering-abortion/abortion-faqs/> accessed April 2019.
[82] Royal College of Obstetricians and Gynaecologists, 'Fetal Awareness Review of Research and Recommendations for Practice' (*RCOG*, March 2010) <https://www.rcog.org.uk/globalassets/documents/guidelines/rcogfetalawarenesswpr0610.pdf > accessed 19 April 2019, 19; Koul (n 80).

pain management for all foetuses is consistent. Particularly, as the RCOG states, 'the case for administering analgesia after twenty-four weeks when the neuroanatomical connections are in place, needs to be considered.'[83] Vivette Glover suggests that foetuses over seventeen weeks old may feel pain and states, 'given there is a possibility (that a foetus can feel pain) we should give the foetus the benefit of the doubt'.[84]

The evidence set out above indicates there is a difference in the administration of pain dependent on whether the foetus is to be aborted or operated on *in utero*. On that basis, it is questionable whether the late-term abortive foetus is afforded the same level of dignity in line with the decision in *Vo v France* (discussed above),[85] in which the ECHR made it clear that the foetus was entitled to 'some protection of human dignity'.[86] This is particularly important when reflecting on the process of abortion carried out in the third trimester. Whether the process of abortion subjects a foetus to inhuman or degrading treatment and what should amount to 'human dignity' needs further consideration but goes beyond the remit of this paper. However, it is clear from the findings set out above that further guidance is required as to what is meant by 'some protection of human dignity'. [87] Further, there is a need for further research to establish whether a foetus feels pain, particularly, as at twenty-six weeks, very low birthweight infants show a clear and - measurable flexion withdrawal reflex to noxious stimulation, suggesting that nociceptive perception to pain input to the spinal cord is present. [88] Consequently, it is reasonable to assume that such responses to pain would also occur in utero and as such, the issue as to whether a foetus feels pain needs addressing further.[89]

[83] ibid.
[84] BBC News, 'Abortion Causes Foetal Pain', *The BBC* (London, 29 August 2000) <http://news.bbc.co.uk/1/hi/health/900848.stm> accessed 19 April 2019.
[85] Scott (n 2).
[86] *Vo v France* (n 2).
[87] ibid.
[88] Derbyshire (n 73).
[89] ibid; Andrews and Fitzgerald (n 79).

7 Disabled children and social exclusion

One measure of social development is how society chooses to support and enhance the opportunities for all members of society, not just for those who are considered able-bodied.[90] It is reported by the Equality and Human Rights Commission that more disabled people than non-disabled are living in poverty or are materially deprived.[91] As a result, parents are often unable to buy specialist equipment, whether sensory, medical or educational.[92] Families with disabled children are often more socially isolated than other families, and a lack of money is one of the main causes.[93] Thus, parents are faced with many barriers including affordability and inaccessible facilities. Furthermore, Zaidi and Burchardt argue that the extra costs of a disability are substantial, with costs rising in line with the severity of the disability.[94] For families with children who have disabilities, the decision of one parent not to work may be more of a necessity than a choice.[95] It is evident that the monetary expenses associated with raising disabled children in terms of both out-of-pocket outlays and opportunity costs are significantly higher than those associated with raising non-disabled children.[96] Consequently, a disabled person's family will achieve a lower standard of living than a non-disabled person's family on the same level of income.[97]

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[90] Shirley Porterfield, 'Work Choices of Mothers in Families with Children with Disabilities' (2002) 64(4) Journal of Marriage and Family 972.
[91] EHRC (n 53).
[92] Contact a Family, 'Counting the Costs 2012. The Financial Reality for Families with Disabled Children Across the UK' (*Contact a Family*, 2012) <https://contact.org.uk/media/381221/counting_the_costs_2012_full_report.pdf> accessed 23 March 2019.
[93] ibid.
[94] Asghar Zaidi and Tania Burchardt, 'Comparing Incomes when Needs Differ: Equivalization for the Extra Costs of Disability in the UK' (2005) 51(1) Review of Income and Wealth 89.
[95] Porterfield (n 91).
[96] ibid.
[97] Zaidi and Burchardt (n 95).

The prevalence of poverty and social exclusion experienced by disabled families can have consequent impacts on the decision of prospective mothers considering termination.[98] On this reasoning, prospective parents would be making a decision based on the society that they live in, not necessarily the intrinsic effects of impairment.[99] Arguably, society should be morally obliged to do more to remove discrimination and social barriers, thus supporting all members of society equally.[100] It is accepted that a woman should have the reproductive autonomy to terminate a pregnancy whatever her reasons, but she must also feel empowered *not* to terminate the foetus, and confident that society will do what it can to enable her and her child to live fulfilling lives.[101] However, Meakin argues that the interests of all parties concerned – not only those of 'the person the child may become', but also those of the parents, the family, the 'next child', and the community – are often considered.[102] Thus, it is argued that the decision to terminate a pregnancy often rests upon a utilitarian calculation taking all of these parties' interests into account.

There is also a consequential concern that discrimination against disabled people can be aggravated by this practice. Kate Greasley argues that the routine termination of disabled foetuses diminishes the quality of life of disabled persons by depleting their numbers.[103] Furthermore, she argues that with fewer disabled people in the world, the motivation to adapt the environment so as to counter the disadvantage experienced by disabled persons who do exist may be weaker.[104] For example, when the number of wheelchair-users is high,

[98] Porterfield (n 91).
[99] Shakespeare (n 45).
[100] ibid.
[101] ibid.
[102] Derek Meakin, 'Should the Baby Live? The Problem of Handicapped Infants – Book Review' (1986) 1(2) Disability, Handicap & Society 211; Helga Kuhse and Peter Singer, *Should the Baby Live? The Problem of Handicapped Infants* (OUP 1985) 3.
[103] Greasley (n 65).
[104] Meakin (n 103).

there is a greater incentive for the state, and others, to invest in the infrastructure that allows wheelchair access, such as ramps or disabled bathrooms, but less incentive when there are fewer wheelchair-users requiring such facilities.

Social barriers and financial implications, often result in prospective parents making a decision based on the society that they live in, rather than the intrinsic effects of impairment.[105] As Shakespeare argues, the fewer disabled people there are, the less need there is to adapt, or understand how society could be more inclusive.[106] Moreover, it is argued that by screening and terminating those with disabilities one may in fact be selecting against impairments that could be successfully alleviated with greater public support.[107]

8 Proposals for reform: advancements in genetic screening and the value of disabled life

For the disabled community, prenatal diagnosis followed by abortion is a social, moral, and political issue, not simply a health or medical one, as traditionally perceived.[108] The very existence of a test for foetal abnormality can create pressures to use the technology in order to reach an early diagnosis. Therefore, it is naïve to say that technology is neutral, because the possibility of obtaining prenatal genetic information inevitably creates new problems and dilemmas which did not previously exist. The implication is that testing, and subsequent selection are desirable advances.[109] Ward argues that:

> the 'effectiveness' of prenatal diagnosis is determined by health economists, via cost-benefit analysis which set the resources invested in screening against the savings that result, that is the

[105] Shakespeare (n 45).
[106] ibid.
[107] Rosamund Scott, 'Prenatal Testing, Reproductive Autonomy, and Disability Interests' (2005) 14(1) Cambridge Quarterly of Healthcare Ethics 65.
[108] Ward (n 7).
[109] Shakespeare (n 45).

savings to the State of the costs of supporting a disabled child.[110]

Thus, it is argued, that the State's interest in prenatal testing is not about women making an informed choice but about making a particular choice, namely to abort foetuses with severe impairments.[111] Scott supports this argument, and states that 'the routine nature of screening, can be interpreted as an overzealous attempt to eliminate disability'.[112] As a result, it is argued that the approach of science fails to distinguish between impairment (biological) and disability (social).

On this point, Shakespeare goes on to argue that 'far from valuing disabled people, our society currently views disabled people as an unnecessary social cost'.[113] Further, he states that 'foetuses with genetic abnormalities are terminated because society places no value on disabled lives, and because the social and economic costs of having an impairment in a disabling society are considerable'.[114] However, he concludes, 'the decisions underlying selective termination may often be about the social implications of bringing up a disabled child, not a eugenic unwillingness to bring disabled people into the world'.[115] Thus, advances in genetic knowledge and the huge proliferation of prenatal tests adds to concerns that genetic testing raises fundamental question about disabled people's right 'to be'.[116]

By way of example, if we consider individuals with Down's syndrome, it is argued that most of these individuals lead healthy lives.[117] However, Down's syndrome is one of the two most common conditions

[110] Ward (n 7).
[111] ibid.
[112] Scott (n 108).
[113] ibid; Shakespeare (n 45).
[114] Shakespeare (n 45) 679.
[115] ibid 672.
[116] Ward (n 7).
[117] Rebecca Reingold and Lawrence Gostin, 'Banning Abortion in Cases of Down Syndrome, Important Lessons for Advances in Genetic Diagnosis' (2018) Journal of the American Medical Association 319(23), 2375.

for which prenatal testing is offered. Given that people with Down's syndrome rarely suffer physical pain or distress as a direct result of their primary impairment (though they may have other conditions in addition), it is questionable as to whether the impairment should be described as 'serious'.[118] Thus, Ward argues that prenatal testing for Down's syndrome is more about preventing the 'suffering' (social or psychological) of others (e.g. parents), than of the individual directly affected.[119] Moreover, Marteau and Drake found that where women gave birth to children with Down's syndrome, having declined the opportunity to have prenatal screening, they were consequently more likely to be blamed for their situation.[120] Thus, the routine gestational screening for Down's syndrome is indicative of social expectations that a positive diagnosis should at least provoke a serious consideration about termination.[121]

We turn now to the screening for Down's syndrome and other syndromes. According to the NHS website, screening for Down's syndrome and other syndromes is offered at eleven to fourteen weeks; further screening tests for abnormalities will be carried out around eighteen to twenty-one weeks.[122] Amniocentesis is usually carried out between fifteen and twenty weeks of pregnancy, but may be later if necessary (though there is a lack of guidance on the meaning of necessity here). An alternative to amniocentesis is a test called chorionic villus sampling, carried out between the eleventh and fourteenth week of pregnancy. [123] This detailed ultrasound scan, sometimes called the mid-pregnancy scan, is usually carried out

[118] Ward (n 7).
[119] ibid.
[120] Theresa Marteau and Harriet Drake, 'Attributions for Disability: the Influence of Genetic Screening' (1995) 40 Social Science and Medicine 1127; Shakespeare (n 45).
[121] Greasley (n 65) 229.
[122] NHS, 'Your Pregnancy and Baby Guide, Screening Tests in Pregnancy' (*NHS*, 8 February 2018) <https://www.nhs.uk/conditions/pregnancy-and-baby/screening-tests-abnormality-pregnant/> accessed 13 March 2019.
[123] NHS, 'Overview – Amniocentesis' (*NHS*, 21 April 2016) <https://www.nhs.uk/conditions/Amniocentesis/> accessed 13 March 2019.

between eighteen and twenty-one weeks and looks in detail at the baby's bones, heart, brain, spinal cord, face, kidneys, and abdomen.[124] None of the timeframes set out by the NHS are post-twenty-four weeks. This raises the question as to why abortion on the grounds of disability are possible up to the point of birth if genetic testing appears to be complete by twenty-four weeks.

The question of time limit for the abortion of disabled foetuses was central to the proposals that were put forward by Lord Shinkwin in his Abortion (Disability Equality) Bill. Lord Shinkwin proposed that the time limit for the abortion of foetuses where there is a 'substantial risk' of 'serious handicap' should be brought into line with the time limit for non-disabled foetuses.[125] He justified this by stating that section 1(1)(d) of the Act creates a 'search and destroy' approach to screening, and questioned how this can be consistent with principles of equality.[126] Further, he argued, 'there is an inconsistency within the law, whereby discrimination on the grounds of disability is prohibited in law after birth, yet is enshrined in law at the very point at which the discrimination begins, before birth'.[127] Thus, he stated, 'laws governing disability discrimination and abortion are moving in conflicting and contradictory directions'. [128] Lord Shinkwin suggested that any abortions by reason of disability need to be carried out within the first twenty-four weeks, except when there is a risk of serious permanent damage to the mother or her life is at risk, in which case they will remain legally permissible until birth, and governed by section 1(1)(a) of the Abortion Act.[129] As set out above, genetic screening according to the NHS guidance seems to be complete by twenty-four weeks.

[124] NHS, 'Your Pregnancy and Baby Guide, 20-week Anomaly Scan' (*NHS*, 6 March 2018) <https://www.nhs.uk/Conditions/pregnancy-and-baby/anomaly-scan-18-19-20-21-weeks-pregnant/> accessed 13 March 2019.
[125] Abortion Act, s 1(1)(d) Ground E; Abortion (Disability Equality) Bill [HL], 2016–17.
[126] HL (n 66).
[127] ibid.
[128] ibid.
[129] Abortion Act, s 1(1)(a)

Therefore, there appears to be no reason why abortion based on the grounds of disability should be allowed or is necessary over the twenty-four-week time limit.[130]

9 Conclusion

One of the main issues discussed in this paper is the lack of definition for the terms 'serious handicap' and 'substantial risk'.[131] This lack of guidance affords doctors wide discretionary powers, and potentially gives disproportionate weight to subjective medical notions of 'serious' and 'substantial'. Importantly, this broad definition allows the termination of foetuses with medical conditions such as cl/p, which are considered to be treatable.[132] This paper has determined that the lack of definition to the above-mentioned terms illustrates that the Abortion Act, section 1(1)(d) fails to reflect the changes in the law and medical advancements.[133] The terms 'substantial risk' and 'serious handicap' should be clearly defined, so as not to lead to the abortion of foetuses with conditions which in reality are not 'serious or substantial'.

The Equality Act fails to prohibit discrimination against the disabled foetus, despite protecting other characteristics such as race and sex, and despite the fact disability is a protected characteristic.[134] Therefore, this paper agrees with Lord Shinkwin's contention that the ability to abort a disabled foetus at any point in a pregnancy puts section 1(1)(d) at odds with more general developments in the equality agenda. [135] Furthermore, the lack of time limitations on section 1(1)(d) abortions seems at odds with with the fact that NHS genetic screening appears to be completed before twenty-four weeks' gestation. This paper concludes that, in line with the proposals put forward by Lord Shinkwin, the disabled foetus should be afforded the same legal

[130] NHS (n 125).
[131] Abortion Act, s 1(1)(d).
[132] NHS (n 33).
[133] Abortion Act, s 1(1)(d); Equality Act; Human Rights Act 1998.
[134] Equality Act.
[135] HL (n 66).

protections as the non-disabled foetus. This can be achieved by bringing the twenty-four-week time limit for disabled foetuses in line with non-disabled foetuses, except when there is a risk of serious permanent damage to the mother or her life is at risk, in which case they will remain legally permissible until birth.[136] This would mean that the ability to abort over twenty-four weeks would be allowed only when there is risk of serious permanent damage to the mother or her life is at risk.

[136] Abortion Act, s 1(1)(a).

Reflecting on the Impact of Strike Action on Problem-based Learning at York Law School

Lauryn Clarke

Abstract
This paper considers the problem-based learning approach that the LLB course at York Law School is based around. It will explore how, for first-year students, this new style of learning is challenging to begin with, but confers clear benefits to students, especially in preparing them for future legal and non-legal careers. Its consideration of the reflective learning approach embedded within the school curriculum highlights the importance of reflecting on individual and group performance, as well as helping students to develop valuable transferable skills. It also provides a timely reflection on the strike action at the end of both Term 1 and 2 of the 2019/20 academic year, and how the lack of guidance and staffing affected the functioning of this innovative system of teaching.

1 Introduction

One of the many attractions of York Law School (YLS) is the fact that it is centred around the problem-based learning (PBL) approach, unlike many law schools in the country. In this paper, I will be discussing my experience as an undergraduate first-year law student at YLS, and reflecting on what working in the PBL 'student law firms' is like. Finally, I am going to consider the impact of the strike action that took place throughout the 2019/20 academic year and how this affected the PBL structure and the group dynamics of my student law firm, as well as discussing how this allowed me to reflect on my experiences as a YLS student as a whole.

2 Problem-based Learning

The PBL process involves students being grouped into 'student law firms' of around fourteen people, where we work together to plan, carry out, and feedback our research on different legal problems. We remain in the same firm for all modules throughout the academic year and in our second year we are put into a new firm. Within the first few weeks of the course starting, we began to set ground rules and established our responsibilities within the firm. For instance, everyone had to adequately complete the research in order to contribute effectively in the feedback sessions. Setting a positive group dynamic helped to develop a good work ethic and a sense of professionalism that will no doubt help when it comes to working as a lawyer in a legal environment. When there is an aspect of the research that you are struggling to understand, it is reassuring to know that you are likely to get helpful guidance from other members of the student law firm. This creates a more cooperative atmosphere, instead of one of competition or rivalry, which may be found on courses that are more focused on independent learning, with a heavier proportion of independent work.

After experiencing my first term of the PBL cycle, one notable aspect is how structured the weeks are. Each PBL cycle spans one week and involves pickup, feedback, and interim sessions, as well as plenaries. We have two PBL sessions a week, and the cycle begins in the latter half of each session. We pick up and begin working through a new 'problem' that usually focuses on two subjects of law. We establish learning outcomes from the problem, which we use to direct our independent research. To do this, we read the problem as a group and clarify any unclear terms, then work together to establish the key parties and their interests, and the key facts within the problem, and then write a short summary. Finally, we use a mind-map to establish the points of law that we think are relevant and then use this to create our learning outcomes. This means that the sessions are very student-led and we can create the learning outcomes in our own words, which makes them easier to use when researching.

The PBL approach is used for the 'Foundations in Law' modules which carry through Year 1 and 2, covering the seven core subjects required for a qualifying law degree. We cover Foundations in Law I and II in Year 1, and III and IV in Year 2. Throughout the week we have Foundations in Law plenaries that relate to the content of the problems. These plenaries aim to encourage more contribution and discussion from students than traditional lectures and act as a springboard for further independent research.

The PBL cycle also involves interim sessions that take place during the middle of the week. These involve discussing in our PBL groups the research we have so far undertaken, and receive direction from a tutor on issues that have arisen during our research. We then use the first half of our next PBL session to feed back on our research. This feedback session involves the student law firm going through each learning outcome and consists of students contributing their research to the group. As each outcome is discussed, the tutor offers additional guidance or information, where required, to ensure that all necessary outcomes have been fully researched. The cycle then starts again in the second half of the session, where we pick up a new problem.

It is clear to see the difference between this structure and structures more commonly found in law degrees. I enjoy the way in which all the elements of the PBL process at YLS complement each other so nicely. For instance, what we learn in plenaries aids our research and understanding of PBL problems. This provides reassurance and guidance, as the plenaries often help you to check that you are on the right track and give you support by suggesting where you should focus your research. This is motivating and helps to build your confidence in tackling PBL problems. I also found this helpful particularly in the first few weeks when getting to grips with new subject matter and research techniques felt quite daunting.

However, there are also some disadvantages of the PBL process, such as the fact that it was quite hard to adjust to this style of learning and get into the rhythm of the PBL cycle. This is because it was something I had never experienced before. I found that in the first few weeks I underestimated the time it would take to complete the research for the PBL problems, and quickly learnt that if I didn't do enough work at the start of the week in preparation for the feedback sessions, I'd be very busy towards the end of the week. Despite this, I did find that I quickly adapted, and being in small groups in our student law firm helped with the wider challenges of settling into university, such as making friends. This was the result of the cooperative atmosphere created by the PBL style of learning, as we soon began to share different concerns and research tips, thus allowing for a smoother transition into the rhythm of the timetable.

3 Reflective learning

There is a heavy focus on reflective learning throughout the LLB course at YLS. In the Legal Skills module, which is aimed at developing practical vocational skills that are particularly useful in a legal profession, we are encouraged to keep a journal for the reflective portfolio coursework. This allows time to reflect on the sessions. For instance, reflecting on how you acted or reacted to certain events. I have found this aids both group and personal development. We looked at Belin's theory, which identifies nine 'clusters of behaviour'; these are 'team roles' with strengths and weaknesses, and a team needs each in order to be high performing.[1] My student law firm decided that I was a 'team worker' according to Belbin's theory.[2] I reflected on the fact that the weaknesses of this role are being indecisive and non-confrontational, which resulted in me attempting to be more assertive within my student law firm. There is also a psychological aspect to the Legal Skills module, which is clear through our learning of Tuckman

[1] Meredith Belbin, 'The Nine Belbin Team Roles' (*Belbin*) <https://www.belbin.com/about/belbin-team-roles/> accessed 15 February 2020.
[2] ibid.

and Belbin's theories, and our reflection of the events during the course of these sessions in relation to these theories. Tuckman's theory on group development consists of four stages that a group experiences when establishing their dynamic.[3] These stages consist of forming, norming, storming, and performing. The focus this module has on the psychology of a group and the individuals within a group provided a refreshing variation from focusing on substantive law. Also, there is value to learning about group dynamics and models, as it helps to prepare students for a future beyond a degree, where such knowledge will be invaluable.

It helped aid my group's development by reflecting on how we were interacting with each other, through our knowledge of group dynamics. This allowed us to assess how we were performing, and what we could do to improve. For example, the storming stage of Tuckman's theory involves disputes amongst the group. Although in my student law firm I do not think that we have experienced a full storming stage yet, it is reassuring to know that such difficulties are an important part of group development. This helps to motivate and gives a sense that each student has an active role in the group environment and the group's development, as opposed to being a passive part of any difficulties that may emerge. Another important part of the focus on reflection within the first and second years of the course is the Foundations in Law Portfolio and Reflections module. This consists of writing a portfolio that focuses on either one or two concepts that you have noticed are consistent throughout your study of the foundation subjects. The portfolio then requires students to show how the learning of these concepts has been advanced through the Foundations in Law work.

[3] Donald B Egolf, *Forming Storming Norming Performing: Successful Communications in Groups and Teams* (iUniverse 2001).

4 The strikes

During the last two weeks of Term 1, and the last four weeks of Term 2, industrial action took place. The University and College Union (UCU) announced that industrial action would be taken for eight days as a result of a dispute over pensions, and a second dispute over 'four fights' covering pay, equality (including the gender pay gap), workloads, and casualisation within Higher Education. Although this meant that most plenaries were cancelled, and we did not have a tutor in any of our student law firm sessions, many students supported the reasoning behind strike action and understood why it was important for the future of higher education.

It is important to reflect on the impact this has had on the day-to-day routine of the course, specifically on the PBL cycle. For example, I found that without the usual plenaries and interim sessions to provide reassurance and guidance, it was much harder to complete the PBL problems. As our interim PBL tutor was on strike, turnout declined as sessions were much less helpful without the tutor. The absence of the tutor also meant that we were not given the direction for research that we usually received and therefore, overall, it was a less productive and useful session. Although we were still attending the interim with the intention of sharing our research with the rest of the student law firm, it was harder to know whether our research was on the right track. It was clear to see that this lack of attendance was demotivating for firm members who did attend the sessions during the strike period. The strike period has made me appreciate the fact that the interim session provides a useful halfway point, because of the ability to collate research before the session, receive reassurance during sessions, or direction where needed.

Another impact the strikes had on my experience was that there was a lack of plenaries, especially those that related to the topics of the PBL problems. When I looked at the plenaries uploaded after strike week in compensation for those that had been cancelled, I realised that some of

the content would have been particularly useful at the time I needed it. I struggled with one of the learning outcomes of a problem in the last PBL cycle of the first term, but I then found in the plenaries uploaded later that the content I was struggling with was featured and therefore if the plenary had gone ahead it would have helped me considerably in the research process for that PBL problem. Therefore, this disruption has made me realise the benefits of the usual PBL cycles.

The strikes also had an impact on the group dynamics within my student law firm during the PBL feedback sessions, as we found these difficult to complete without a tutor present. It meant that we lacked reassurance or clarification usually provided by the tutor in relation to any queries we had about our research, and meant that many of us found it harder to keep focused on the task, resulting in us being much less efficient. This reflects the importance and value of the tutor in PBL sessions, whose role it is to facilitate the sessions. It also suggests that as a student law firm we all need to develop the necessary skills to stay focused and motivated, without the need for an authoritative figure to be present.

However, as we entered the period of strikes at the end of Term 2, experience from the previous strikes had allowed me to feel more prepared to adapt my timetable and process of learning. As I knew it would be harder and more time-consuming to complete my research for the PBL problems without input from tutors both in the PBL session and the interim, I began adapting the way I carried out my research. I did this by starting earlier in the week so that I had more time to work on the learning outcomes because this meant that, despite having less guidance across the period, I would be able to complete my independent research to a higher standard, as I was giving myself more time than usual.

5 Conclusion

To conclude, the PBL process has proven to be a valuable method of learning. This unique approach to studying law has equipped me with the necessary knowledge of the core subjects and also helped to develop my work ethic and professionalism. Furthermore, the well-structured pedagogical aspects of the course, such as the learning of group dynamics in the Legal Skills module, complement the learning of substantive law and will benefit our future beyond our undergraduate studies. It is clear to see that, as a result of the strike action, it was much harder to complete the PBL research to a good standard in the absence of the plenaries and interims that usually form part of the PBL cycle. I believe this shows how intricate and complex the PBL style of learning is, as reflected in the clear issues caused by removing even just one aspect of it during the industrial action.