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EDITORIAL: WIDENING PERSPECTIVES

Sam Guy

It gives me great pleasure to introduce this volume of the York Law Review. Now in its third edition since its launch in the 2019–20 academic year, the journal remains young but is, I hope, becoming increasingly established in its form and purpose. Indeed, we were very pleased, after a pandemic-enforced delay, to be able to properly mark the launch of the journal in-person in this academic year, as part of an event with the former President of the Supreme Court, Lady Hale, hosted at the University of York. There is much strong research-informed writing produced by law school students, which for the most part does not see the light of day once it has been examined. Each year, the majority of the articles published in the Review represent edited versions of student dissertations submitted as part of the undergraduate and postgraduate taught programmes. This year is no different, with one LLM dissertation and four undergraduate dissertations completed by members of the 2020–21 student cohort, as well as a shorter piece completed by a LLM student in the 2021–22 cohort. As in the previous volumes of the Review, the breadth of subject matter covered in these articles is a testament to the diverse research interests cultivated among the Law School's student body, in an engaged learning community of staff and students.

While the articles selected in this volume are diverse in subject matter, certain cross-cutting themes can be identified. For instance, our first two articles share an interest in protecting against the harms that can be caused to victims through online technology and its associated communities. The unique characteristics of communication in the online sphere may present difficulties when seeking to address the infliction of harm by applying particular statutes or legal doctrines — here, in criminal and tort law — which have not necessarily been

designed or developed with the digital sphere in mind. The extent to which existing mechanisms suffice to approach new challenges, or whether bespoke techniques are required for the online space, is a pressing and increasingly common question in our rapidly digitalising age, and these articles engage with the issues thoughtfully and with nuance. First, Eloise Hewson engages with the concerning patterns of abuse against women endemic to the esports — that is, competitive video gaming — community. Eloise demonstrates how tort law offers more realistic solutions to address this behaviour than non-tortious action, and argues that although individual esports players could thus be tortiously liable, many abusive players lack the financial means to pay damages in practice. Accordingly, it is argued that the esports teams themselves could be held vicariously liable to remedy the behaviour of their team members. Eloise highlights three areas where ambiguity in the doctrine of vicarious liability could be clarified in a manner facilitating esports teams to be held to account. Second, Danial Kamal Shahreen tackles the issue of online content, prevalent on social media, which encourages its — predominantly young — audience to self-harm. He establishes a case to protect children from online self-harm content notwithstanding concerns as to freedom of expression. Crucially, he argues that the theoretical basis upon which the protection of children is often founded is overly justified in terms of vulnerability, and advocates for a more rights-based approach to children's relationship with the online world. Finally, Danial addresses the Law Commission's proposal to create a new offence dealing with harmful online communications, which has been adopted in the Online Safety Bill, arguing that it offers some improvements in dealing with online self-harm content, but that deficiencies remain.

A number of our articles also demonstrate an interest in the role of law and legal norms in our innermost spheres of private life, in particular the treatment of children and family life. In addition to Danial's aforementioned piece analysing the protection of children from online self-harm content, we have James Garrity's article seeking to assess the prospects of a problem-solving court model for the Youth Justice

System for addressing persistent criminal activity by young offenders. Drawing from criminological theory, James applies an insightful and fascinating 'pathways' conceptual device, understanding young people as encountering institutions and their lived experiences to produce individual pathways, whereby they may go along pathways towards or away from crime at different points. Accordingly, James suggests that a problem-solving court model, designed to encourage young people along positive pathways towards desisting from crime, could be better placed than the current Youth Courts to enable youth to build lives beyond crime, and thus can represent a useful tool for the system of Youth Justice. Another article which analyses the law's relationship to children and family is Freya Cole Norton's discussion of 'legal sex' and 'gendered parenting'. Using the work of Michel Foucault, Freya argues that the concept of 'legal sex' — the birth registration process whereby new-born children are categorised as female or male — has become an unquestioned practice and, while appearing simply a banal formality, may help to construct a social message about sex and gender, and the distinction between the two, that is then accepted by society to be true. Freya proposes that the emphasis on 'legal sex' maintained in society is disseminated into the institution of the family through gendered parenting, whereby parents adopt and sustain expectations of sex and gender.

A further commonality across several articles is an emphasis on critically broadening the perspectives through which we understand the construction of legal rules and norms. As discussed, Freya's article takes a Foucauldian Legal Feminist view to suggest we attend to the role of legal registration in helping to structure social beliefs, which is imparted through gendered parenting in the family. Emily Forbes, in her article on the use of 'alternative care models', an alternative to immigration detention, calls for an intersectional approach to the design and assessment of these models, in order to expand the understanding of how they are experienced by women and girls seeking asylum, and ensure that their needs are met. Alternative care models are interim measures applied when asylum-seekers enter a

country, avoiding the asylum-seekers being detained. Taking a case study of the Makeni Transit Centre in Zambia, an alternative care model, Emily develops a series of wellbeing indicators for children, and demonstrates that these indicators are met to varying degrees in the Zambian example. She advocates for attention to be paid to intersectionality — of gender, age, and migration status — when designing the alternatives to detention and in international human rights law more broadly. The research underpinning this article was conducted in collaboration with the International Detention Coalition, and was used in a research brief for the Thai Government concerning alternatives to immigration detention in relation to children and families. This is a testament to the valuable research and impact that is conducted by staff and students in the Centre for Applied Human Rights, and we are very pleased to be able to publish this work in the Review.

Continuing the emphasis on broadening the gaze through which we view the production of law and legal norms, we see recognition of how the construction of the judicial role in its current form may affect and narrow the results that it produces. This takes place at a systemic level — James Garrity shows how the construction of the Youth Justice System, without the therapeutic considerations which a problem-solving court could provide, has accordingly been ill-suited to encouraging young people along prosocial pathways desisting from crime. It also takes place at the internal level, with Ed Clothier discussing the injunctions pursued against Insulate Britain protestors and demonstrating how an environmentally conscious judge may have identified sources of indeterminacy in legal doctrine and, using the same reasoning in the case, decided in favour of the protestors and nudged the law in their favour. Both arguments demonstrate that, by widening our gaze, whether to incorporate new types of courts with different core aims, or to consider how different values in judging might affect judicial approaches, different results can accordingly be delivered. Whether such change is desirable is, of course, a matter of

debate, but these articles suggest that it is possible to rethink commonly accepted but narrow paths.

Ed's article differs from our other offerings in that, rather than starting life as a dissertation, it was selected as a winning piece in the York Law Review's annual competition process. The competition is a feature of the Law Review which enables students to write interesting, shorter pieces specifically for the journal, providing a perspective on recent developments in an area of law of their choice. On that metric, Ed's article certainly meets the brief. The approach of the legal system towards the human right to protest, while rarely too far from public view, has been firmly in the news cycle in recent months. In January, a Bristol jury acquitted the so-called 'Colston Four' on criminal damage charges, following the toppling of the statue of 1600s slave-owner Edward Colston, as part of the Black Lives Matter protests in June 2020. In March, the High Court ruled in the *Leigh and others* judicial review that the Metropolitan Police's conduct in preventing a vigil being organised following the death of Sarah Everard in 2021 was in breach of the claimants' right to protest. Members of Extinction Rebellion are regularly arrested for their protest actions around climate change. Ed's article focuses on the injunctions pursued by National Highways against Insulate Britain protestors. Ed explores how indeterminacy in the law can be applied with considerable judicial discretion, even in supposedly 'easy cases', and that this can be used to direct the law in a particular ethical direction. This exploration of judicial values and discretion may be challenging to those who insist, perhaps unrealistically, upon a sharp divide between the realms of legal doctrine and political or value-led decisions, but the role of values in judicial decision-making is worth taking seriously.

In bringing together this selection of articles in their current form, a number of thanks are due. First, I personally owe many thanks to the rest of the Review's student editorial team. All but two of the team — myself and Megan Hurcombe — were new to the role this year, and so

we needed to hit the ground running building a new dynamic and discerning which methods would enable us to work best, while engaging quickly with the process of reviewing articles. The team has organised effectively through the now-familiar pandemic-era communication of regular Zoom meetings, supplemented by WhatsApp updates. They have proven adaptable, generous, and collegiate, and I am very grateful to have coordinated the team for the year.

I would also like to extend gratitude to our copyeditor, Carol Stephenson, for her willingness to support the journal and for her flexibility as we have organised the copyediting process — it has been very much appreciated. The professional support team within the Law School, in particular Jackie Richmond and Louise Stokes, have provided invaluable practical assistance on various tasks such as contacting authors, advertising positions within the team, and distributing copies of the journal. A last note of thanks must go to each member of the Review's Editorial Board. Thanks go to Martin Philip for continued support with matters relating to publication, indexing, and distribution. After an excellent two years as the journal's first Editor-in-Chief, Carl Makin has continued work on the Review behind-the-scenes as the 'Outgoing Editor-in-Chief', for which I am grateful. Finally, many thanks are due to the Review's joint Academic Liaisons, Professor Caroline Hunter and Dr Jed Meers, both have been very supportive, finding time to provide assistance with reviews, offering helpful advice, and giving personal encouragement which has been much appreciated. I very much hope that you enjoy reading the selection of articles in this volume.

Exploring Vicarious Liability to Remedy the #E-Too Movement

Eloise Hewson

Abstract

The esports, or competitive video gaming, industry is an exciting area of economic and cultural growth. Gaming can facilitate interpersonal connection, shared problem-solving, and creativity. Players may purchase a game, watch a streamer play it online, join an online gaming community, attend a tournament, compete professionally, or find employment in game development or a related field. The gaming industry generates enormous economic value and employs tens of thousands of people in the UK alone. However, the esports sector does not extend its benefits equally. Women are regularly verbally harassed in video games, countless women have been groped at esports events, women have been raped by professional players, underage fans have been groomed. Abuse is endemic to online gaming communities.

This article argues that it is necessary to hold esports teams vicariously liable for the harms caused by professional players in order to remedy abuse in online games. The first section proposes that serious instances of abuse committed by professional esports players have normalised misogyny in gaming communities and proposes that non-tortious solutions are inadequate. The second section considers civil legal options and argues that, whilst individual players could be held liable in tort, the lack of means of most abusers renders direct claims worthless. Finally, section three shows that esports teams could be held vicariously liable for abuse if three doctrinal ambiguities were clarified. It is concluded that these ambiguities should be resolved in order to compel esports teams to compensate victims and lessen abuse by improving social norms in online gaming communities.

‘this is the INTERNET folks… there are no laws here, at least not clearly defined ones’[1]

1 The Problem

1.1. Introduction

The sexualised abuse of women is endemic throughout the internet[2] and is especially acute in online gaming communities; over 60 per cent of female gamers are harassed,[3] and employees[4] and underage fans[5] repeatedly report being abused by professionals employed in the esports[6] industry. Esports misogyny rises tirelessly in a toxic cycle of

[1] Anonymous online comment quoted in Keats Citron, ‘Law’s Expressive Value in Combating Cyber Gender Harassment’ (2009) 108(3) Michigan Law Review 373, 401.

[2] See for example Emma Jane, “‘Back to the Kitchen, Cunt”: Speaking the Unspeakable About Online Misogyny’ (2014) 28(4) Journal of Media and Cultural Studies 558, 560–563; Keats Citron (n 1) 374, 380–384.

[3] Jenny McBean and Seb Martin, ‘Bryter Female Gamer Survey’ (Bryter 2020) 20 <https://pages.bryter-research.co.uk/hubfs/003-FGS-1603/Bryter%20-%20Female%20Gamers%20Survey%202020.pdf> accessed 25 May 2022 (survey of 1001 female and 1003 male participants who play video games at least monthly, commissioned by Women in Games charity.) See further Women in Games, ‘Bryter X Women in Games’ <https://www.womeningames.org/project/diversity-guide/> accessed 25 May 2022.

[4] Dom Sacco, ‘Method back on track after almost imploding in wake of abuse scandal’ (*EsportsNews*, 26 June 2020) <https://esports-news.co.uk/2020/06/26/method-players-partners-step-away-over-abuse-scandal/> accessed 25 May 2022; Method, ‘Statement on Co-CEO: An Update from Method’ <https://www.method.gg/statement-on-co-ceo> accessed 25 May 2022; Cecilia D’Anastasio, ‘Inside The Culture Of Sexism at Riot Games’ (*Kotaku*, 7 August 2018) <https://kotaku.com/inside-the-culture-of-sexism-at-riot-games-1828165483> accessed 25 May 2022.

[5] Cecilia D’Anastasio, ‘When Your Favorite Streamer Turns Out to Be a Creep (Or Worse)’ (*Kotaku*, 19 February 2019) <https://kotaku.com/when-your-favorite-streamer-turns-out-to-be-a-creep-or-1832734851> accessed 25 May 2022.

[6] For definitions of esports, see Omar Ruvalcaba and others, ‘Women’s Experiences in eSports: Gendered Differences in Peer and Spectator Feedback During Competitive Video Game Play’ (2018) 42(4) Journal of Sports and Social Issues 295, 296 (survey

public outcry and continuing abuse.[7] The 2012 *#1reasonwhy* movement, in which female game creators shared experiences of industry discrimination on Twitter, exposed widespread sexual harassment and led some to anticipate genuine positive change.[8] Less than two years later, a female developer was accused of trading sex for positive game reviews, sparking a culture war between progressive industry-members, who saw the rumours as an unsubstantiated smear campaign, and anti-feminist trolls. Women were given actionable death and rape threats.[9] In 2019, news outlets proclaimed that there was a newfound determination for equality[10] after the *#MeToo* movement prompted women to expose sector-wide abuse in the games

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of 61 female and 31 male esports viewers recruited from university psychology department and observation of 39 female and 48 male Twitch streamers); Michael Ward and Alexander Harmon, 'ESport Superstars' (2019) 20(8) Journal of Sports Economics 987, 987 (collection of community-compiled earnings data relating to 24,000 players); John Holden and Thomas Baker, 'The Econtractor? Defining the Esports Employment Relationship' (2019) 56(2) American Business Law Journal 391, 393; Lindsey Darvin, Ryan Vooris and Tara Mahoney, 'The Playing Experiences of Esports Participants: An Analysis of Treatment Discrimination and Hostility in Esport Environments' (2020) 2(1) Journal of Athlete Development 36, (survey of 471 participants, 77% of whom were male, recruited via Reddit).

[7] Jane (n 2) 566.

[8] Mary Hamilton, '#1reasonwhy: The Hashtag That Exposed Games Industry Sexism' *The Guardian* (London, 28 November 2012) <https://www.theguardian.com/technology/gamesblog/2012/nov/28/games-industry-sexism-on-twitter> accessed 25 May 2022.

[9] Caitlin Dewey, 'The Only Guide to Gamergate You Will Ever Need to Read' *Washington Post* (14 October 2014) <https://www.washingtonpost.com/news/the-intersect/wp/2014/10/14/the-only-guide-to-gamergate-you-will-ever-need-to-read/> accessed 25 May 2022; Nick Wingfield, 'Feminist Critics of Video Games Facing Threats in "GamerGate" Campaign' *New York Times* (New York, 15 October 2014) <https://www.nytimes.com/2014/10/16/technology/gamergate-women-video-game-threats-anita-sarkeesian.html> accessed 20 May 2021; Editorial, 'The Guardian View on Gamergate: When Hatred Escaped' *The Guardian* (London, 20 August 2019) <https://www.theguardian.com/commentisfree/2019/aug/20/the-guardian-view-on-gamergate-when-hatred-escaped> accessed 25 May 2022.

[10] Lucy Orr, '"This Industry Has a Problem with Abuse": Dealing with Gaming's #MeToo Moment' *The Guardian* (London, 17 September 2019) <https://www.theguardian.com/games/2019/sep/17/gaming-metoo-moment-harassment-women-in-games> accessed 25 May 2022.

industry by sharing their experiences online.[11] Only a short while later, over three days in June 2020, hundreds of women publicly alleged that they had been assaulted or harassed by esports professionals.[12] Many assumed that improvements were inevitable following June 2020,[13] but the events of the past decade show that proactive change is necessary to break cycles of abuse in esports.

This article argues that esports teams should be held vicariously liable for the torts of their players in order to lessen abuse in gaming communities. This first section proposes that the esports gender harassment problem is caused by the formation of toxic communities around abusive high-level players and shows that non-tortious solutions to this problem are inadequate. Section two shows that abusive players could be held liable in tort, but that claims are undermined by the lack of financial resources of individual abusers. Finally, section three argues that esports teams could be held vicariously liable for the torts of their players, but that three doctrinal ambiguities currently frustrate claims. It is concluded that the ambiguities in the doctrine should be resolved in order to compel teams to compensate victims and lessen abuse in wider gaming communities.

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[11] Laurie Penny, 'Gaming's #MeToo Moment and the Tyranny of Male Fragility' (*Wired*, 9 June 2019) <https://www.wired.com/story/videogames-industry-metoo-moment-male-fragility/> accessed 25 May 2022; Orr (n 10); John Holden, Thomas Baker and Marc Edelman, 'The #E-Too Movement: Fighting Back Against Sexual Harassment in Electronic Sports' (2019) 52 Ariz St L J 1, 12.

[12] Shannon Liao, 'Gaming Companies Are Responding to a Wave of Sexual Misconduct Allegations' *CNN Business* (New York, 25 June 2020) <https://edition.cnn.com/2020/06/25/tech/gaming-metoo-twitch/index.html> accessed 25 May 2022; Wes Fenlon, 'Women in the Games Industry Speak Out Over Sexual Assault and Harassment' (*PCGamer*, June 2020) <https://www.pcgamer.com/women-in-the-games-industry-speak-out-over-sexual-assault-and-harassment/> accessed 25 May 2022.

[13] Taylor Lorenz and Kellen Browning, 'Dozens of Women in Gaming Speak Out About Sexism and Harassment' *New York Times* (New York, 23 June 2020) <https://www.nytimes.com/2020/06/23/style/women-gaming-streaming-harassment-sexism-twitch.html> accessed 25 May 2022; Darvin, Vooris and Mahoney (n 6) 44.

1.2. Limitations

Two limitations as to scope should be noted. First, although online abuse often occurs across borders,[14] this article will focus on English law. This approach is appropriate because many recent allegations of abuse have involved English players, potentially engaging English law.[15] Internationality limitations will be discussed further as each solution is analysed.[16] Second, although this piece unavoidably disproportionately discusses male-on-female abuse,[17] *esports gender abuse* is taken to mean *abuse relating to gender*, rather than merely that affecting women. It should particularly be noted that male-on-male abuse is frequently downplayed[18] and often invokes gender norms in similarly harmful ways.[19]

The lack of high-quality research into online abuse provides an additional limitation. Jane proposes that online harassment is understudied because it is vulgar and falls outside of ordinary scholarly discourse.[20] Perhaps more pertinently, journalists and academics who write about online gender abuse are often subjected to harassment;[21] one researcher witnessed debates about her 'rapeability'

[14] See for example Steven Messner, 'WoW's Top Competitive Raid Guild Is Collapsing Amid Multiple Accusations of Sexual Assault and Abuse' (*PCGamer*, June 2020) <https://www.pcgamer.com/wows-top-competitive-raid-guild-is-collapsing-amid-multiple-accusations-of-sexual-assault-and-abuse/> accessed 25 May 2022.
[15] See for example Messner (n 14); Cale Michael, 'Evil Geniuses Cut Ties with Dota 2 Caster GranDGranT Amid Sexual Harassment Allegations' (*DotEsports*, 22 June 2020) <https://dotesports.com/dota-2/news/evil-geniuses-cuts-ties-with-dota-2-caster-grandgrant-amid-sexual-harassment-allegations> accessed 25 May 2022.
[16] See ss 2.3 and 3.3.
[17] Jane (n 2) 559.
[18] Martha Chamallas, 'Vicarious Liability in Torts: The Sex Exception' (2013) 48(1) Valparaiso U L Rev 133, 164.
[19] Jane (n 2) 565.
[20] ibid 558.
[21] ibid 561–563.

circulating online following the publication of her work.[22] As such, it appears that the proliferation of online abuse itself limits research engagement. Somewhat ironically, online abuse may also be under-researched because it is trivialised. Keats Citron argues that cyber harassment is considered juvenile 'locker-room talk' affecting only 'overly sensitive complainers'.[23] Online abuse is dismissed as a *social problem*[24] and infantilised as an issue to be solved by parents.[25] One *New York Times* journalist, after describing women being driven from their homes during *gamergate*, jovially concluded that progress was indicated by Lara Croft's 'more modestly proportioned' breasts.[26]

A final limitation is imposed by the lack of research analysing the esports industry.[27] What little research has been conducted is sometimes compromised by commercial interests[28] and poor participant selection. Whilst one empirical study of gamers present on Reddit[29] attracted overwhelmingly male responses,[30] recruitment within a university psychology department attracted majority female participants,[31] casting doubt on the extent to which small-scale studies can represent diverse online communities. To account for unavoidable

[22] ibid 562.
[23] Keats Citron (n 1) 375, 395–396.
[24] Liao (n 12); Paula Giliker, '"Tailoring" the Close Connection Test for Sexual Abuse Victims: Vicarious Liability in the Court of Appeal' (*University of Bristol Law School Blog*, 26 April 2021) <https://legalresearch.blogs.bris.ac.uk/2021/04/tailoring-the-close-connection-test-for-sexual-abuse-victims-vicarious-liability-in-the-court-of-appeal/> accessed 25 May 2022.
[25] Digital, Culture, Media and Sport Select Committee, *Government Response to the Digital, Culture, Media and Sport Select Committee Report on Immersive and Addictive Technologies* (CP 241, 8 June 2020) (Government response to DCMS) para 32.
[26] Wingfield (n 9).
[27] Holden and Baker (n 6) 394.
[28] ibid 398.
[29] Darvin L, Vooris R and Mahoney T, 'The Playing Experiences Of Esports Participants: An Analysis Of Treatment Discrimination And Hostility In Esport Environments' (2020) 2(1) Journal of Athlete Development 36.
[30] Darvin, Vooris and Mahoney (n 6) 42.
[31] Ruvalcaba and others (n 6) 301, 304.

source deficiencies, multiple references are used to verify statistics where possible and methods are described briefly in the first citation of empirical sources.

1.3. The importance of lessening abuse

Research on esports gender harassment is important because of the significant effect that abuse can have on victims' lives. Cyber harassment impacts the day-to-day activities of those affected and leads to social withdrawal.[32] Women affected by threats specifying an 'exact time of attack' have described feelings of terror consuming their lives.[33] Harassment may also trigger mental health conditions;[34] one woman assaulted by an esports player was recently admitted to a psychiatric ward.[35] Victims of cyber harassment also bear the financial losses of seeking treatment and obscuring their online and physical activities from abusers.[36]

As Keats Citron has argued, whilst victims bear the most significant effect of harassment, abuse also harms wider online communities.[37] The Government has acknowledged that video games have positive cultural, social, and educational effects[38] which are denied to women excluded from online spaces.[39] Almost half of one-thousand female gamers interviewed in 2020 stated that abuse ruined the online gaming experience.[40] Almost a third of women[41] also reported being forced to

[32] Keats Citron (n 1) 385.
[33]Dewey (n 9); Jane (n 2) 563; Wingfield (n 9) discussing a threatened mass shooting.
[34] Keats Citron (n 1) 390.
[35] D'Anastasio (n 5).
[36] Holden, Baker and Edelman (n 11) 21–22.
[37] Keats Citron (n 1) 375, 390.
[38] Government Response to DCMS (n 25) para 2. See also Department of Culture, Media and Sport, *Report on Immersive and Addictive Technologies* (HC 2017-19, 1846) (DCMS Report) para 1.
[39] DCMS Report (n 38) paras 175–176.
[40] McBean and Martin (n 3) 22.
[41] ibid 21.

attempt to 'pass' as men online by avoiding voice-communications, using gender-neutral pseudonyms, and mimicking male behaviour.[42] Women are also prevented from forming online relationships and fully engaging with games; a significantly lower percentage of women than men play against random opponents or friends met online,[43] and fewer women would class themselves as 'proper' or 'hardcore' gamers,[44] indicating that women are unable to share in the positive effects of online gaming.

Harassment in esports can also cause negative economic consequences. The esports industry generates roughly $700M per year,[45] attracting more viewers[46] and offering higher prize pools than most traditional major sports.[47] In the UK, the games sector generates £1.52B gross economic value[48] and employs 22,000 people.[49] However, harassment lowers commercial[50] and governmental[51] investment. Women are also unable to benefit equally from sector growth due to the exclusionary effects of abuse.[52] Equal amounts of men and women play games,[53] but only 12 per cent of game developers are female[54] and there are no female players in the vast majority of high-level esports teams.[55] Female employees are

[42] Keats Citron (n 1) 375, 387.
[43] McBean and Martin (n 3) 5.
[44] ibid 10.
[45] Ruvalcaba and others (n 6) 296; Ward and Harmon (n 6) 987.
[46] Ruvalcaba and others (n 6) 296; Ward and Harmon (n 6) 987; Darvin, Vooris and Mahoney (n 6) 40.
[47] Holden and Baker (n 6) 392; Holden, Baker and Edelman (n 11) 6–7; Darvin, Vooris and Mahoney (n 6) 40.
[48] DCMS Report (n 38) para 157.
[49] Government Response to DCMS (n 25) para 3.
[50] Holden, Baker, and Edelman (n 11) 7–8, 22. See also for example Sacco (n 4).
[51] DCMS Report (n 38) para 163; Government Response to DCMS (n 25) para 28.
[52] Keats Citron (n 1) 375, 386; Government Response to DCMS (n 25) para 36.
[53] DCMS Report (n 38) para 174; McBean and Martin (n 3) 5.
[54] DCMS Report (n 38) para 174.
[55] See for example Overwatch League, 'Players' (Overwatch League 2021) <https://overwatchleague.com/en-us/players> accessed 25 May 2022.

encouraged to refuse to work at studios with sexist cultures,[56] impeding equal career development and frustrating change.[57] Many women have also abandoned esports careers following harassment by powerful male colleagues.[58] Lessening abuse could promote both economic growth and equal access to profit.

1.4. Industry breakdown

Gaming communities form where players communicate via messages or voice-chat either in-game or via third party platforms. Discord, which allows users to communicate via text or voice in chatroom-style forums,[59] is used by over 250 million gamers.[60] Twitch allows players to live stream their gameplay and talk to viewers via a chat window.[61] Many professional players stream during their downtime,[62] and most esports tournaments are broadcast over Twitch.[63] High-level players

[56] Orr (n 10).
[57] Keats Citron (n 1) 394.
[58] Dewey (n 9); D'Anastasio (n 4); Holden, Baker and Edelman (n 11) 3–4; D'Anastasio (n 5); Michael (n 15).
[59] Discord <https://discord.com/> accessed 25 May 2022.
[60] Kaylee Fagan, 'Everything You Need to Know About Discord, the App That Over 250 Million Gamers Around the World Are Using to Talk to Each Other' (*Insider*, 12 October 2020) <https://www.businessinsider.com/how-to-use-discord-the-messaging-app-for-gamers-2018-5?r=US&IR=T> accessed 25 May 2022.
[61] Twitch <https://www.twitch.tv/> accessed 25 May 2022; Ruvalcaba and others (n 6) 296–297.
[62] Damian Alonzo, 'What It's Like Being an Overwatch League Pro' (*PCGamer*, February 2016) <https://www.pcgamer.com/uk/what-its-like-being-an-overwatch-league-pro/> accessed 25 May 2022; Hunter Bayliss, 'Not Just a Game: The Employment Status and Collective Bargaining Rights of Professional ESports Players' (2016) 22 Washington and Lee Journal of Civil Rights and Social Justice 359, 376–377.
[63] Bayliss (n 62) 384; Jacob Wolf, 'Overwatch League to Be Streamed on Twitch.tv in Two-Year, $90 Million Deal' (*ESPN*, 9 January 2018) <https://www.espn.co.uk/esports/story/_/id/22015103/overwatch-league-broadcast-twitchtv-two-year-90-million-deal> accessed 25 May 2022; Archimtiros, 'Mythic Castle Nathria Race to World First Livestreams and Raid Coverage' (*WoWHead*, 15 December 2020) <https://www.wowhead.com/news/mythic-castle-nathria-race-to-

can build large followings on Twitch, with some streams attracting hundreds of thousands of viewers.[64] Online gaming communities also coalesce around platforms such as YouTube, Reddit, and 4chan.[65] It is also notable that, in gaming communities as elsewhere, Twitter has developed a role in facilitating large-scale movements such as the June 2020 abuse allegations.[66]

Over a quarter of gamers watch competitive esports tournaments.[67] Professional players are often attached to teams, many of which begin as small grassroots groups.[68] Teams often expand, incorporate, and begin to manage income and streaming activity.[69] The largest esports teams operate across multiple games and attract significant external investment.[70] Some esports competitions are organised informally by the teams involved.[71] However, many tournaments are managed by a separate league corporation, which may be independent from, or affiliated with, the original developers of the game. For example

world-first-livestreams-and-raid-coverage-319847> accessed 25 May 2022; Max Miceli, 'LCS Posts Strongest Twitch Viewership of 2021 Spring Split in Week 3' (*DotEsports*, 22 February 2021) <https://dotesports.com/league-of-legends/news/lcs-posts-strongest-twitch-viewership-of-2021-spring-split-in-week-3> accessed 25 May 2022.

[64] Holden and Baker (n 6) 399–400. See also Mark Johnson and Jamie Woodcock, 'The Impacts of Livestreaming and Twitch.tv on the Video Game Industry' (2018) 41(5) Media, Culture and Society 670, 671 (collection of semi-structured interviews with over 100 professional and semi-professional streamers, demographic information not provided); McBean and Martin (n 3) 16.

[65] Holden, Baker and Edelman (n 11) 19–20.

[66] See for example allegations mentioned in Sacco (n 4); Michael (n 15).

[67] McBean and Martin (n 3) 17.

[68] See for example EchoGuild <https://twitter.com/EchoGuild?ref_src=twsrc%5Egoogle%7Ctwcamp%5Eserp%7Ctwgr%5Eauthor> accessed 25 May 2022; WoWProgress <https://www.wowprogress.com/> accessed 25 May 2022.

[69] See for example Method <https://www.method.gg/> accessed 25 May 2022.

[70] See for example Complexity <https://complexity.gg/> accessed 25 May 2022; Steven Rondina, 'Who Owns Every Team in the Overwatch League?' (*Win*, 24 February 2020) <https://win.gg/news/3890/who-owns-every-team-in-the-overwatch-league-question-mark> accessed 25 May 2022.

[71] Archimtiros (n 63).

Valve, the developers of Counter Strike: Global Operations, have no relationship with the teams playing their game or the league organising tournaments.[72] By contrast Activision Blizzard, the developers of Overwatch, wholly own the Overwatch League and manage teams closely.[73]

This article mainly analyses abuse in World of Warcraft, a massively multiplayer online game in which players complete quests and fight monsters in an open-world environment,[74] and Overwatch, a first-person shooter in which teams of six compete to finish map-based objectives.[75] These games have been selected because, despite being developed by the same studio,[76] they exemplify the differences between organised and grassroots esports management. Whilst Activision Blizzard manage the Overwatch League for commercial gain,[77] World of Warcraft's *Race to World First* competition has been developed by teams inside the community[78] and is largely unacknowledged by game developers.[79]

[72] Holden and Baker (n 6) 406–407.
[73] ibid 408, 428; Overwatch League, 'Rules of Competition and Code of Conduct' (Overwatch League, 2 February 2019) para 5.16(a)(ii) <https://overwatchleague.com/en-us/news/21568602/rules-of-competition-and-code-of-conduct> accessed 25 May 2022. For further examples, see Bayliss (n 62) 364–366; Holden and Baker (n 6) 404–405.
[74] World of Warcraft <https://worldofwarcraft.com/en-gb/start> accessed 25 May 2022; Steven Messner and Heather Newman, 'World of Warcraft Beginner's Guide: How to Get into WoW in Time for Shadowlands' (*PCGamer*, October 2020) <https://www.pcgamer.com/uk/how-to-get-into-world-of-warcraft/> accessed 25 May 2022.
[75] Overwatch <https://playoverwatch.com/en-us/about/> accessed 25 May 2022.
[76] Activision Blizzard <https://activisionblizzard.com/home> accessed 25 May 2022.
[77] Holden and Baker (n 6) 428. See also Johnson and Woodcock (n 64) 673.
[78] Archimtiros (n 63).
[79] Preach Gaming, 'Castle Nathria Roundtable - With Complexity Limit and Echo!' (10 January 2021) 54.10–55.00 <https://www.youtube.com/watch?v=IR2I4Cw-wH8&ab_channel=PreachGaming> accessed 25 May 2022.

1.5. Causes of esports gender abuse

Numerous studies have found that, whilst women and men experience similar levels of abuse in online games,[80] the type of abuse encountered varies in severity between the sexes.[81] Whilst men experience more in-game criticism and swearing, women face much higher levels of demeaning and discriminatory abuse.[82] Female players' mistakes are amplified,[83] they are frequently told that they are worse players than men in the same rank,[84] and they are entirely excluded from games twice as often as men.[85] Female gamers are also sexually harassed and sent unsolicited sexual pictures a disproportionate amount[86] in what has been described by one female streamer as a 'gross lust-fest'.[87] Women are ultimately threatened with sexual violence and rape far more often than men.[88]

Rather than being a novel phenomenon, online gender abuse is a modern incarnation of a 'much older discursive tradition' which holds women out as inferior beings existing only to pleasure men.[89] Low levels of gender diversity in gaming has nurtured a hegemonic culture hostile to non-traditional players;[90] as games have attracted an increasingly diverse audience, friction has been created in a subculture where misogyny traditionally ran unchecked.[91] Men are notably more

[80] McBean and Martin (n 3) 20; Ruvalcaba and others (n 6) 302, 306.
[81] See further Keats Citron (n 1) 374–375.
[82] McBean and Martin (n 3) 20; Darvin, Vooris and Mahoney (n 6) 42–43, 49.
[83] DCMS Report (n 38) para 46.
[84] Keats Citron (n 1) 380; Cecilia D'Anastasio, 'Twitch Confronts Its Role in Streaming's #MeToo Reckoning' (*Wired*, 26 June 2020) <https://www.wired.com/story/twitch-streaming-metoo-reckoning-sexual-misconduct-allegations/> accessed 25 May 2022.
[85] McBean and Martin (n 3) 20.
[86] ibid.
[87] D'Anastasio (n 84).
[88] Keats Citron (n 1) 380, 389; McBean and Martin (n 3) 20.
[89] Jane (n 2) 565–566.
[90] Holden, Baker and Edelman (n 11) 8–9; Darvin, Vooris and Mahoney (n 6) 38–39, 41.
[91] Wingfield (n 9); Dewey (n 9); Editorial, 'The Guardian View on Gamergate: When

abusive than women in online games,[92] and significantly less able to recognise discrimination and intervene where it happens to others.[93] Anonymous gaming spaces allow male players to engage with abusive discourse without fear of reprisal.[94]

Arguably the most significant cause of gender-based harassment in esports is the normalisation of abuse by high-level players. Sexual comments are directed at female streamers ten times as often as males,[95] at an average of at least one comment every two minutes.[96] However, there is no difference in the prevalence of sexualised comments posted to male and female streamers' chats overall,[97] suggesting that for each time a female streamer is abused in her own stream, another woman is abused in a male streamer's chat. Jane explains that misogyny escalates online because men compete to formulate the most offensive insults,[98] a phenomenon likely exacerbated by the perceived proximity between male esports players and their Twitch fans.[99] MethodJosh, a prominent esports player and streamer, allegedly developed a micro-community on Twitch and Discord in which girls were referred to as 'whores' and 'thots' and interrogated for their age, height, weight, and relationship status.[100] Some argue that MethodJosh encouraged sexism in his community to attract views from male gamers who were unsuccessful with

Hatred Escaped' (n 9); Holden, Baker and Edelman (n 11) 8–9; Kenzie Gordon quoted in Lorenz and Browning (n 13).

[92] McBean and Martin (n 3) 20; Darvin, Vooris and Mahoney (n 6) 42–43, 49.

[93] Darvin, Vooris and Mahoney (n 6) 42–43 and 49.

[94] Holden, Baker and Edelman (n 11) 8–9.

[95] Ruvalcaba and others (n 6) 305.

[96] ibid 307.

[97] ibid.

[98] Jane (n 2) 560–561.

[99] Noah Smith, '"It's Not as Awesome as People Imagine": Esports Players Say "Dream Job" is More Than Fun and Games' *Washington Post* (13 December 2018) <https://www.washingtonpost.com/sports/2018/12/13/its-not-awesome-people-imagine-esports-players-say-dream-job-is-more-than-fun-games/> accessed 25 May 2022.

[100] D'Anastasio (n 5).

women.[101] MethodJosh's most popular Twitch clips show him entertaining fans by explaining in detail how to take intimate pictures[102] and then calling young female fans live on stream to ask for sex.[103]

1.6. Examples of abuse

Example allegations will now be discussed in order to demonstrate the patterns of abuse that proposed solutions must address. It is acknowledged that many reports are unsubstantiated, and the accuracy of individual allegations is therefore not relied upon.[104] Gamertags will be used rather than full names in order to provide both privacy and readability. It is unavoidably difficult to provide a comprehensive account of abuse in esports, as women have reported feeling unable to make public allegations and many stories inevitably fail to attract media attention.[105] Of the over one-hundred allegations made in June 2020 alone, claims ranged from gender-based discrimination, to inappropriate sexualised behaviour, to physical assault.[106] Many women allege that players made repeated sexual advances online or in person or touched them without consent at esports functions.[107] Three particularly serious allegations are outlined below.

In 2018, Overwatch League player DreamKazper was suspended from competition following allegations of sexual misconduct with

[101] ibid.
[102] Kungozai Methodjosh Highlights and Compilations, 'MethodJosh Most Viewed Twitch Clips of All Time Compilation! Truly the Best of MethodJosh' (19 February 2019) (MethodJosh Clips) 04.35–05.48 <https://www.youtube.com/watch?v=opI523KMJj4&ab_channel=KungozaiMethodjoshHighlightsandCompilations> accessed 25 May 2022.
[103] ibid 07.28–08.27, 08.45–09.14 (content warning: sexual harassment.)
[104] Note however admissions in Lorenz and Browning (n 13); Fenlon (n 12).
[105] See for example Liao (n 12).
[106] ibid; Lorenz and Browning (n 13); Messner (n 14).
[107] See for example Michael (n 15).

minors.[108] DreamKazper, aged twenty-one, was accused of asking for nude pictures from fourteen- and fifteen-year-old fans.[109] It was further alleged that the player purchased plane tickets so that an underage fan could visit him and demanded nude photographs as 'payment' when she refused to stay.[110]

In 2019, Elvine, a popular World of Warcraft player, was caught by an FBI child abuse operation after asking an agent posing as a fourteen-year-old girl to meet up for sex.[111] Elvine was known to be sexually aggressive with online fans and multiple sources alleged that he made inappropriate advances at conventions.[112] One woman claimed that Elvine pressured her into his hotel room at a convention, made sexual advances for an hour, grabbing her when she attempted to leave, and only released her when a friend replied to an 'SOS message'.[113]

MethodJosh has been recorded on stream categorising his computer files into 'kinda creepy', 'ban from Twitch', and 'probably a prison sentence'.[114] Shortly before June 2020, the player told his fans to 'enjoy the ride' figuring out that 'this all isn't a joke and I'm serious and need help.'[115] In June 2020 MethodJosh, a member of World of

[108] Julia Alexander, 'Overwatch League Player Fired After Sexual Misconduct Allegations' (*Polygon,* 9 April 2018) <https://www.polygon.com/2018/4/8/17213638/overwatch-league-suspends-player-jonathan-dreamkazper-sanchez> accessed 25 May 2022; Robert Paul, 'Full Benefits, 6-Figure Salaries, 401Ks and Nutritionists - 2 Professionals Reveal What it's Really Like to Be Paid to Play Video Games for a Living' (*Insider,* 18 April 2018) <https://www.businessinsider.com/what-its-like-to-play-in-the-overwatch-league-2018-4?r=US&IR=T> accessed 25 May 2022.

[109] Cecilia D'Anastasio, 'How Two Underage Girls Say an *Overwatch* Pro Took Advantage of Them' (*Kotaku,* 11 April 2018) <https://kotaku.com/how-two-underaged-girls-say-an-overwatch-pro-took-advan-1825185594> accessed 25 May 2022. See also D'Anastasio (n 5).

[110] D'Anastasio (n 109). See also D'Anastasio (n 5).

[111] D'Anastasio (n 5).

[112] ibid.

[113] ibid.

[114] MethodJosh Clips (n 102) 09.14–10.00.

[115] ibid 10.00–10.30.

Warcraft's top competitive team,[116] was accused of soliciting illegal images, grooming, sexual harassment, and rape.[117] MethodJosh allegedly distributed sexual pictures of ex-girlfriends and fans.[118] Multiple fans aged fourteen and fifteen reported being told that they were 'the perfect age' before being groomed and asked for sex.[119] One female streamer alleged that MethodJosh raped her when she visited his house to stream with him.[120]

In summary, abuse typically includes: verbal sexual harassment; the sharing of intimate pictures; sexual assault or rape; and the grooming of underage fans. It is important to address this abuse both because of its effect on victims and in order to prevent the normalisation of harassment in wider online communities.

1.7. The inadequacy of non-tortious solutions

Tort law is proposed as the most fruitful source of redress for esports gender abuse in this article because of the impracticability of alternative solutions. Although abuse may sometimes constitute a criminal offence,[121] investigations into esports players have proved difficult to substantiate in practice[122] and this difficulty is compounded

[116] Messner (n 14).
[117] Sacco (n 4).
[118] ibid.
[119] ibid; Messner (n 14).
[120] Messner (n 14).
[121] See for example the Sexual Offences Act 2003 ss 1, 2, 3, 9, 10, 14, 15 and 15A, the Protection of Children Act 1978 ss 1 and 2(3), and the Coroners and Justice Act 2009 s 62.
[122] Messner (n 14) discussing the allegations against MethodJosh; D'Anastasio (n 84) discussing the allegations against Elvine. See further Office for National Statistics, 'Sexual offences in England and Wales Overview: Year Ending March 2020' (18 March 2021) <https://www.ons.gov.uk/peoplepopulationandcommunity/crimeandjustice/bulletins/sexualoffencesinenglandandwalesoverview/march2020> accessed 25 May 2022.

by court backlogs in the UK[123] and the systemic trivialisation of cyber harassment.[124]

Abuse could arguably be lessened should communications platforms employ more extensive monitoring. However, Twitch's own transparency report shows that only 2 per cent of reports of 'hateful conduct, sexual harassment, and harassment' were acted upon in 2020.[125] Even where companies attempt to tackle issues, abusers often avoid detection by using ephemeral platforms such as Snapchat[126] and 'fragmenting' their digital presence across multiple platforms.[127]

Internal sanctions, another potentially useful solution, are routinely under-applied by esports teams. Players frequently boycott companies seen to support victims[128] and intimidate women by leaking private information and issuing actionable death and rape threats in order to suppress initial complaints.[129] Whilst some retaliation is explicitly dangerous, much more is insidiously doubtful. The rape myth that many women raise complaints as revenge[130] is doggedly repeated,[131]

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[123] Haroon Siddique, 'Crown Court Backlog Has Reached "Crisis Levels", Report Warns' *The Guardian* (London, 30 March 2021) <https://www.theguardian.com/law/2021/mar/30/crown-court-backlog-has-reached-crisis-levels-report-warns> accessed 25 May 2022; Caelainn Barr and Alexandra Topping, 'Fewer Than One in 60 Rape Cases Lead to Charge in England and Wales' *The Guardian* (London, 23 May 2021) <https://www.theguardian.com/society/2021/may/23/fewer-than-one-in-60-cases-lead-to-charge-in-england-and-wales> accessed 25 May 2022.

[124] Keats Citron (n 1) 397, 402–403.

[125] Twitch, *Transparency Report 2020* (2 March 2021) Reports and Enforcements section <https://www.twitch.tv/p/en/legal/transparency-report/> accessed 25 May 2022.

[126] D'Anastasio (n 5).

[127] See discussion of Elvine in D'Anastasio (n 5).

[128] Holden, Baker and Edelman (n 11) 24–25. See also Kenzie Gordon quoted in Lorenz and Browning (n 13).

[129] Keats Citron (n 1) 385; Penny (n 11); Dewey (n 9); Jane (n 2) 562–563; Wingfield (n 9).

[130] Genevieve Waterhouse, Ali Reynolds and Vincent Egan, 'Myths and Legends: The Reality of Rape Offences Reported to a UK Police Force' (2016) 8 The European

creating a hostile environment in which victims are less able to speak out.

Pervasive sexism inside esports teams also undermines internal sanctions. As noted by the Court of Appeal in *Gravil*, there is also an 'obvious temptation' for sports teams to ignore abuse in order to retain capable players.[132] Victims are often humiliated and disbelieved during internal investigations in close communities, as leaders prefer the accounts of favoured members over those of complainants.[133] It is hardly surprising that Method failed to discipline MethodJosh adequately; Sasha Stevens, a Method co-CEO, has also been found to have manipulated power dynamics in order to make unwanted sexual advances towards female employees.[134] When Stevens' conduct was reported to the team the employees affected were threatened with legal action.[135] In light of these failings, the next section investigates civil claims as an additional method of redress.

2 The problem with direct tortious claims

2.1. Establishing liability

Abuse in esports is a serious and pervasive issue which cannot be remedied effectively by the criminal law, platform monitoring, or internal sanctions. This section shows that direct tortious claims against abusive teams and players are also insufficient methods of

Journal of Psychology Applied to Legal Context 1, 2.

[131] See for example Dom Sacco, 'Finding the Courage to Speak Out About Harassment in Esports: Opinion & List of UK-Focused Accusations' (*EsportsNews*, 3 July 2020) <https://esports-news.co.uk/2020/07/03/finding-courage-speak-out-about-harassment/> accessed 25 May 2022 discussing those who *distort the truth*.

[132] *Gravil v Carroll* [2008] EWCA Civ 689, [2008] 6 WLUK 425 [26] (Lord Clarke MR).

[133] *Trustees of the Barry Congregation of Jehovah's Witnesses v BXB* [2021] EWCA Civ 356, [2021] 4 WLR 42 [16]–[18] (Davies LJ).

[134] Method (n 4); Messner (n 14) discussing AnnieFuchsia and Swebliss' allegations.

[135] ibid.

redress. First, it is shown that direct tortious claims against esports teams are unlikely to succeed; whilst teams may negligently inflict harm by employing abusive players,[136] it will often prove prohibitively difficult to demonstrate breach of duty of care. It is then argued that claims against individual players could succeed, principally in trespass to the person and wilful infringement of personal safety, which remedy the direct and indirect infliction of harm respectively.[137] However, it is concluded that claims against individual players would be worthless due to the lack of financial means of many abusers.

Turning firstly to direct claims in negligence, esports employers have a duty to provide a safe working environment, potentially establishing team liability where a player abuses a fellow employee.[138] Teams may also have wider duties to fans, as companies who create risk by choosing to engage dangerous employees act negligently.[139] However, team liability in negligence is likely frustrated by the difficulty of proving that employers have acted below the standard of the reasonable esports team.[140] Defendants will not be held liable where their inadequate employment practices are common in the sector;[141] in *EXE*, it was considered acceptable for a school to hire a known child sex offender, as DBS checks were uncommon at the time of employment.[142] Most esports teams do not screen players thoroughly or investigate allegations of abuse closely, thus rendering lax

[136] *Wong v Parkside Health NHS Trust* [2001] EWCA Civ 1721, [2003] 3 All ER 932 [7] (Hale LJ).
[137] *Wong* (n 136) [7] (Hale LJ).
[138] *Wilsons & Clyde Coal Co Ltd v English* [1938] AC 57 (HL) 87–88 (Maugham LJ).
[139] *Haynes v Harwood* [1935] 1 KB 146 (CA) 153–153 (Greer LJ); *Home Office v Dorset Yacht Co Ltd* [1970] AC 1004 (HL) 1027 (Reid LJ), 1037–1038 (Morris LJ); *Mattis v Pollock (t/a Flamingos Nightclub)* [2003] EWCA Civ 887, [2003] 1 WLR 2158 [33] (Judge LJ).
[140] *Nettleship v Weston* [1971] 2 QB 691 (CA) 699 (Lord Denning MR).
[141] *Maga v Birmingham Roman Catholic Archdiocese Trustees* [2010] EWCA Civ 256, [2010] 1 WLR 1441 [65] (Lord Neuberger MR).
[142] *EXE v Governors of the Royal Naval School* [2020] EWHC 596 (QB), [2020] 3 WLUK 214 [1], [144], [147], [155] (Griffiths J).

employment practices sufficient.[143] Further, Martha Chamallas and Philip Morgan agree that it is difficult for complainants to gather sufficient information to demonstrate that employers failed to take necessary precautions.[144] Whilst a breach may be established where a team encourages[145] or fails to remedy[146] abuse which they have been made aware of, most claims in negligence against esports teams are likely to fail.

Should an esports team be found to have breached a duty of care, claims are reasonably likely to satisfy the remaining elements of negligence. Cause in fact may be established where a player's employment has exposed them to the complainant, as *but for* the negligent recruitment the abuse would not have taken place.[147] As the independent action of a third party employee, sexual abuse will only be foreseeable where it is very likely to occur.[148] However, liability for serious abuse may be imposed where the tortfeasor's actions are somewhat less foreseeable,[149] and Chamallas has argued that, since *#metoo*, workplace sexual abuse has become inherently more foreseeable.[150] Whilst the breach of duty requirement is the sole element likely to frustrate claims, it imposes a significant barrier to direct team liability.

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[143] See for example Maddy Myers, 'How Pro Gamers Live Now: Curfews, Personal Chefs, and All of it on Camera' (*Kotaku*, 21 June 2018) <https://kotaku.com/how-pro-gamers-live-now-curfews-personal-chefs-and-a-1827017564> accessed 25 May 2022; Messner (n 14).

[144] Phillip Morgan, 'Distorting Vicarious Liability' (2011) 74(6) MLR 932, 945; Chamallas (n 18) 153.

[145] *Mattis* (n 139) [33] (Judge LJ).

[146] *Maga* (n 141) [65]–[67], [74] (Lord Neuberger MR).

[147] See *Barnett v Chelsea and Kensington Hospital Management Committee* [1969] 1 QB 428 (CA).

[148] *Dorset Yacht* (n 139) 1030 (Reid LJ).

[149] *Attorney General of the British Virgin Islands v Hartwell* [2004] UKPC 12, [2004] 1 WLR 1273 [21], [25] (Nicholls LJ).

[150] Martha Chamallas, 'Will Tort Law Have its #MeToo Moment?' (2018) Ohio State Public Law Working Paper 456, 31.

Tortious claims brought against individual players are more likely to succeed. Claimants have frequently successfully claimed for sexual assault under trespass to the person.[151] Battery is direct[152] and non-consensual[153] touching[154] with intent to bring about physical contact.[155] Any touch beyond that which is generally accepted in everyday life can constitute a battery,[156] and as such much of the physical abuse allegedly committed by esports players could engage this tort. Unlawful physical contact may also constitute assault if apprehended immediately beforehand.[157] Rape may also constitute false imprisonment,[158] which is defined as unlawful restraint[159] with intent to deprive the complainant of their liberty.[160] False imprisonment was proved in *Lawson*, where the claimant had been 'constrained by the apprehension of violence' over three days,[161] but may not warrant additional damages where the only deprivation of liberty is the assault itself.[162]

Esports players may also be liable in the tort of wilful infringement of

[151] See for example *Lawson v Glaves-Smith (Dawes Executor)* [2006] EWHC 2865 (QB), [2006] 11 WLUK 300; *Haringey LBC v FZO* [2020] EWCA Civ 180, [2020] 2 WLUK 190; *B v Cager* [2021] EWHC 540 (QB), [2021] 3 WLUK 99; *Barry Congregation* (n 133). See also Nikki Godden, 'Claims in Tort for Rape: A Valuable Remedy or Damaging Strategy?' (2011) 22(2) King's Law Journal 157; Phillip Morgan, 'Vicarious Liability and the Beautiful Game - Liability for Professional and Amateur Footballers?' (2018) 38 LS 242, 244.
[152] *Wong* (n 136) [7] (Hale LJ).
[153] *Collins v Wilcock* [1984] 1 WLR 1172 (HC) 1777–1778 (Goff LJ); *Re F (Mental Patient: Sterilisation)* [1990] 2 AC 1 (HL) 72–73 (Goff LJ).
[154] *Collins* (n 153) 1777 (Goff LJ).
[155] *Letang v Cooper* [1965] 1 QB 232 (CA) 239 (Lord Denning MR); *Wilson v Pringle* [1987] QB 237 (CA) 249 (Croom-Johnson LJ).
[156] *Collins* (n 153) 1777–1778 (Goff LJ); *Re F* (n 153) 72–73 (Goff LJ).
[157] *Collins* (n 153) 1777 (Goff LJ).
[158] Godden (n 151) 161.
[159] *Collins* (n 153) 1777 (Goff LJ).
[160] *Iqbal v Prison Officers Association* [2009] EWCA Civ 1312, [2010] QB 732 [72] (Lord Neuberger MR).
[161] *Lawson* (n 151) [110] (Eady J).
[162] *Cager* (n 151) [36] (Johnson J).

the right to personal safety, described from here as the tort in *Rhodes*.[163] The tort in *Rhodes* is engaged by harmful non-direct conduct, such as verbal harassment, directed at the claimant with intent to cause severe distress and resulting in a recognised psychiatric illness.[164] In *C v WH*, it was obvious that grooming and sexual abuse would cause harm to the vulnerable claimant, engaging the tort in *Rhodes*[165] and suggesting that esports players who sexually manipulate young fans may also be held liable under this tort.

Abuse alleged in the esports sector may engage a number of additional torts. Civil proceedings could be brought for statutory harassment[166] where a player has abused another on at least two occasions in a way designed to cause distress.[167] As held in *AMP*, the sharing of sexual images without consent can establish liability for statutory harassment.[168] Sharing private images will also engage the tort of misuse of private information if the claimant's interest in confidentiality outweighs the defendant's interests in publication,[169] as is invariably the case where sexual images have been shared.[170] In summary, civil claims may be available following sexual assault, rape, grooming, verbal sexual harassment, and the sharing of intimate pictures, potentially remedying all common patterns of abuse seen in the esports sector.

[163] *OPO v Rhodes* [2015] UKSC 32, [2016] AC 219.
[164] ibid [88] (Lady Hale DP and Toulson LJ).
[165] *C v WH* [2015] EWHC 2687, [2015] 9 WLUK 449 [89] (Nelson J).
[166] Protection from Harassment Act 1997 ss 1 and 3.
[167] *Dowson v Chief Constable of Northumbria* [2010] EWHC 2612 (QB), [2010] 10 WLUK 459 [142] (Simon J).
[168] *AMP v Persons Unknown* [2011] EWHC 3454 (TCC), [2011] 12 WLUK 641 [44] (Ramsey J)
[169] *Campbell v Mirror Group Newspapers Ltd* [2004] UKHL 22, [2004] 2 AC 457 [134] [137] (Hope LJ).
[170] *AMP* (n 168) [17] [32] (Ramsey J). See further Copyright, Designs and Patents Act 1988 s 85.

2.2. Usefulness of direct tortious claims

Civil claims cannot entirely replace the sanctions previously discussed. Platform monitoring could stop harm before it occurs.[171] Industry sanctions are cost-effective methods of influencing online norms.[172] Criminal penalties can protect wider communities[173] and accurately reflect the severity of abuse.[174] Further, claims in tort may have a comparatively lower deterrent effect than other sanctions, especially where tortfeasors are unable to pay compensation personally.[175] It is therefore important to remedy failings in all solutions discussed in order to lessen abuse in esports. However, civil claims can provide useful additional remedies when used alongside other solutions.[176] As Godden has argued, using civil claims as an addition to, rather than replacement for, criminal complaints is unproblematic.[177] Paula Giliker noted in 2017 that many civil sexual abuse claims are preceded by criminal complaints in practice,[178] a trend which has continued in recent years.[179] Bringing both criminal and civil cases can also benefit claimants, as where convictions are

[171] See s 1.7.
[172] See s 1.7.
[173] Ellen Bublick, 'Tort Suits Filed by Rape and Sexual Assault Victims in Civil Courts: Lessons for Courts, Classrooms and Constituencies' (2006) 59(1) SMU L Rev 55, 75.
[174] Godden (n 151) 162.
[175] Chamallas (n 18) 154.
[176] See discussion in *Wong* (n 136) [16] (Hale LJ).
[177] Godden (n 151) 159, 178.
[178] Paula Giliker, 'A Revolution in Vicarious Liability: Lister, the Catholic Child Welfare Society Case and Beyond' in Worthington, Robertson and Virgo (eds), *Revolution and Evolution in Private Law* (Hart Publishing 2017) available at <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3016347> accessed 25 May 2022.
[179] *JXJ v Province of Great Britain of the Institute of Brothers of the Christian Schools* [2020] EWHC 1914 (QB), [2020] 7 WLUK 293 [4] (Chamberlain J); *EXE* (n 142) [24]–[25] (Griffiths J); *Haringey LBC* (n 151) [4] (McCombe LJ) citing *FZO v Adams* [2018] EWHC 3584, [2018] WLUK 750 [3] (Cutts J); *Barry Congregation* (n 133) [8] (Davies LJ); *Cager* (n 151) [23] (Johnson J).

secured they may be used as evidence in civil trials turning on identical facts.[180]

Tortious claims can benefit claimants in ways that other solutions cannot. Whilst compensation orders may be issued following criminal claims,[181] these are unsuitable in complex sexual abuse cases.[182] Compensation may also be provided by the Criminal Injuries Compensation Authority (CICA).[183] However, complainants may prefer tortious remedies, which demand compensation directly from abusers, over claiming through CICA, which draws from public funds.[184] Further, as awareness of the extent of the harm caused by sexual abuse has improved, civil financial awards have become significantly larger than CICA payouts.[185] Recent civil rape claimants have been awarded £62,000[186] and £240,337,[187] and claims following the sexual assault of minors have attracted damages of £87,748[188] and £1,112,390[189] in recognition of the complex psychiatric problems caused by abuse. A recent claim for grooming under the tort in *Rhodes* also attracted significant damages of £51,370.[190] It should be acknowledged that awards of high damages may perpetuate the myth that women fabricate claims for financial benefit,[191] but this consideration should not prevent victims from fully recovering their losses. Whilst awards made for the misuse of private information are

[180] Civil Evidence Act 1968 ss 11(1) and 11(2). See also *JXJ* (n 179) [35] (Chamberlain J).
[181] Power of Criminal Courts (Sentencing) Act 2000 s 130.
[182] Giliker (n 178) 5–6.
[183] Criminal Injuries Compensation Act 1995 s 1(1).
[184] Godden (n 151) 174. See further Giliker (n 178) 6.
[185] Godden (n 151) 171.
[186] *Barry Congregation* (n 133) [1] (Davies LJ).
[187] *Lawson* (n 241) [140] (Eady J).
[188] *Cager* (n 151) [43] (Johnson J).
[189] *Haringey LBC* (n 151) [2] (McCombe LJ).
[190] *C v WH* (n 165) [94] (Nelson J).
[191] Godden (n 151) 173.

typically lower,[192] valuable injunctions may be issued to prevent the wider dissemination of private photographs.[193]

Tortious claims may also allow claimants to achieve a sense of justice by confronting their abusers in court. It should be noted that claimants may face intrusive questioning in civil trials which could cause additional distress.[194] For example, the claimant in *Haringey LBC* was asked to discuss intimate details of his relationship with his current partner,[195] and the recent contraceptive medical history of the claimant in *C v WH* was presented in court.[196] However, some argue that aggrieved parties[197] can benefit from reversing power dynamics by exposing abuse in court.[198] The appeal of civil claims will inevitably vary between claimants, but tortious liability could seemingly usefully remedy the financial and emotional harm caused by abuse in the esports sector.

2.3. Feasibility of claims against individual players

As previously established, claims brought directly against esports teams in negligence are likely to fail, whereas claims brought against individual players are likely to succeed. It is argued in this section that, whilst tortious claims against individual players are broadly feasible, such actions will often be worthless due to the lack of financial means of most abusers.

Neither the international nature of esports abuse, nor claimant anonymity concerns, should render tortious claims against players

[192] See for example *Campbell* (n 169) [10] (Nicholls LJ).
[193] *AMP* (n 168) [11] (Ramsey J).
[194] Bublick (n 173) 76–77; Godden (n 151) 177–178; as noted in *JXJ* (n 179) [55] (Chamberlain J).
[195] *Haringey LBC* (n 151) [31] (McCombe LJ) citing *FZO* (n 179) [97] (Cutts J).
[196] *C v WH* (n 165) [40]–[41] (Nelson J).
[197] Morgan (n 151) 260.
[198] Godden (n 151) 179–180.

unfeasible. Despite the cross-border nature of online abuse, so long as a claimant is inside their home jurisdiction when receiving harmful communications they may elect to sue in the courts of their own country[199] and cases will be decided under domestic law.[200] These rules also apply wherever the claimant and defendant share a nationality, regardless of where abuse occurs.[201] As detailed earlier, claimants may be reluctant to make complaints due to fear of receiving further online abuse from retaliatory players.[202] Tortious claims remain feasible because courts have the power to grant anonymity orders to claimants whose own interests, for example in safety and privacy, outweigh the public interest in open justice,[203] and to victims of sexual offences.[204] Anonymity orders have been widely used in recent civil sexual abuse[205] and harassment[206] cases.

It is often more feasible to prove sexual abuse allegations under the civil, rather than criminal, law. The 'obvious advantage of the civil law' is that it is easier to prove a case on the balance of probabilities

[199] Regulation (EC) 1215/2012 of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (recast) [2012] OJ L351/1 (Brussels I (Recast)) arts 5(1) and 7(2); Case C-21/76 *Handelskwekerij G J Bier BV v Mines de Potasse d'Alsace SA* [1976] ECR I–01735 [15], [19]. Note that application in the UK post-Brexit remains unclear.

[200] Regulation (EC) 864/2007 of 11 July 2007 on the law applicable to non-contractual obligations [2007] OJ L199/40 (Rome II) art 4(1). See also art 1(2)(g) relating to privacy claims. See The Law Applicable to Contractual Obligations and Non-Contractual Obligations (Amendment etc) (EU Exit) Regulations 2019 for continuing effect post-Brexit.

[201] Brussels I (Recast) (n 289) art 4(1); Rome II (n 290) art 4(2).

[202] See s 1.7.

[203] Civil Procedure Rules 1998 in Coulson LJ, *The White Book 2021* (Sweet & Maxwell 2021) R 39.2(1) and R 39.2(4); *XXX v Camden LBC* [2020] EWCA Civ 1468, [2020] 4 WLR 165 [24] (Dingemans LJ).

[204] Sexual Offences (Amendment) Act 1992 ss 1(1) and 1(2); *Cager* (n 151) [2] (Johnson J).

[205] See for example *Maga* (n 141); *C v WH* (n 165); *EXE* (n 232); *Haringey LBC* (n 151); *Barry Congregation* (n 133); *Cager* (n 151).

[206] *AMP* (n 168) [2], [46] (Ramsey J).

than beyond reasonable doubt.[207] This benefit is, admittedly, somewhat undermined by the higher 'intermediate' standard of proof sometimes incorrectly employed where criminal conduct is alleged in civil courts.[208] The House of Lords have clarified that the seriousness of a claim does not raise the civil standard of proof unless the conduct alleged is inherently unlikely,[209] but the Lords' decision sits uneasily with recent cases such as *C v WH* in which a rape allegation was dismissed on the basis that it was 'very serious'[210] in spite of the finding that the defendant groomed and sexually assaulted the claimant over a number of years,[211] rendering rape entirely plausible. Regardless of whether an intermediate standard of proof is incorrectly employed in practice, civil claims remain somewhat easier to prove than criminal cases.

Civil cases also have the advantage of being distanced from the rape myths which undermine the criminal process. Whilst *rape* is 'loaded with gender-based assumptions', *trespass to the person* is not an inherently sexual claim, potentially weakening misogynistic connotations.[212] The judge in *EXE* expressly noted that lack of violence did not necessarily indicate consent,[213] dispelling the *real rape myth* which could have impeded criminal charges.[214] It should however be remembered that judges must refer to the tortious claim being brought, rather than merely referring to *rape*,[215] in order to avoid transposing rape myths into the civil law.[216]

[207] Godden (n 151) 167.
[208] ibid 169–170.
[209] *Re B (Children) (Sexual Abuse: Standard of Proof)* [2008] UKHL 35, [2009] 1 AC 11 [70], [72] (Hale LJ).
[210] *C v WH* (n 165) [74] (Nelson J).
[211] ibid [69]–[70] (Nelson J).
[212] Godden (n 151) 161–162.
[213] *EXE* (n 142) [118] (Griffiths J).
[214] Waterhouse, Reynolds and Egan (n 130) 3, 7–8.
[215] See for example *Barry Congregation* (n 133) [1]–[2] (Davies LJ).
[216] Godden (n 151) 161–163.

It is acknowledged that the elements of some tortious claims are harder to make out than corresponding criminal offences. First, whereas children cannot consent to sex in the criminal law,[217] consent is a defence to trespass to the person even where victims are under sixteen.[218] It is plainly arguable that a child's consent should not be recognised in the civil law;[219] in *EXE*, the underage claimant was blamed for 'taking the initiative'[220] in a judgment incompatible with both the criminal law and general common sense. The consent of a child who has been groomed thankfully remains invalid.[221] Second, whilst criminal harassment and grooming offences are not result-dependant,[222] the tort in *Rhodes* is only engaged where a claimant suffers a recognised psychiatric illness.[223] Sexual harassment is therefore not actionable in tort following mere emotional distress, potentially indicating that the civil law continues to underrepresent the severity of gendered harms.[224] Whilst these flaws will somewhat undermine the feasibility of tortious claims, civil remedies likely remain feasible for most victims of esports abuse.

Although tortious claims for abuse in the esports sector are broadly feasible, direct claims against players will often be worthless due to the precarious finances of most abusers. Numerous authors have demonstrated that sexual abusers are frequently unable to satisfy judgments.[225] Esports players are especially unlikely to have the financial means to pay compensation; whilst successful players can attain high salaries and prizes,[226] the vast majority of professionals

[217] Sexual Offences Act 2003 ss 5, 6, 7, 8, 9 and 10.
[218] *EXE* (n 232) [75], [124] (Griffiths J).
[219] ibid [76] (Griffiths J).
[220] ibid [90]–[95], [120], [122] (Griffiths J).
[221] *Haringey LBC* (n 151) [126]–[130] (McCombe LJ). See also *Cager* (n 151) [28] (Johnson J).
[222] Protection from Harassment Act 1997 s 1; Sexual Offences Act 2003 ss 14 and 15.
[223] *OPO* (n 163) [73] (Lady Hale DP and Toulson LJ).
[224] See further Keats Citron (n 1) 392–393.
[225] Godden (n 151) 174; Chamallas (n 18) 136.
[226] Jerome Heath, 'The Biggest Prize Money Winners in Esports History' (*DotEsports*, 11 March 2021) <https://dotesports.com/general/news/top-earning-

make very little money from online gaming.[227] The average esports player earns around $6,000 per year,[228] and low rewards are compounded by the high attrition rate in the sector.[229] Players' earnings typically peak as teenagers[230] and only a fifth of professional careers last over two years.[231] Lack of means may force complainants to bring cases against tortfeasors' employers through vicarious liability.[232] Such actions are not exclusive with direct tortious claims. The next section examines the availability of vicarious liability in the esports sector in order to establish whether claimants could access remedies from solvent defendants.

3 Vicarious liability

3.1. Introduction to vicarious liability

Vicarious liability allows a claimant to sue an employer for a tort committed by their employee, and is established under a two stage test.[233] First, it must be demonstrated that there is a relationship akin to employment between the defendant and the tortfeasor.[234] It is argued here that esports employment often satisfies this test, as players work for employers rather than acting as independent contractors. In practice, esports players may be employed by both teams, who manage rosters and funding, and leagues, who run

esports-players-21870> accessed 25 May 2022.
[227] See further Morgan (n 151) 243.
[228] Ward and Harmon (n 6) 1000–1001.
[229] ibid 1000.
[230] ibid 1006.
[231] ibid 1005.
[232] Godden (n 151) 175; Giliker (n 178) 7. See for example *C v WH* (n 165); *Barry Congregation* (n 133).
[233] *Barclays Bank Plc v Various Claimants* [2020] UKSC 13, [2020] AC 973 [1] (Lady Hale P).
[234] ibid [1], [27] (Lady Hale P).

tournaments,[235] in which case both employers could be held dually vicariously liable. [236]

Second, vicarious liability can only be established where there is sufficient connection between the employment relationship established and the tortfeasor's harmful behaviour.[237] The application of vicarious liability to abuse in traditional sports has been analysed previously.[238] However, Lord Hope has noted that the connection between employment in entertainment industries and the abuse of fans remains unclear.[239] It is argued here that three doctrinal ambiguities must be resolved in order to clarify the application of vicarious liability to the esports sector.

3.2. Establishing Liability Under Stage One

The first stage of the vicarious liability test is satisfied where a tortfeasor is in a relationship akin to employment with an esports team or league, rather than 'carrying on business on [their] own account.'[240] In order to establish whether a relationship akin to employment exists, courts must analyse the relationship between the tortfeasor and defendant on a case-by-case basis.[241] In this section, typical esports employment relationships will be examined and it will be argued that teams and leagues are likely to be held vicariously liable under the stage one test.

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[235] See s 1.4.

[236] *Viasystems (Tyneside) Ltd v Thermal Transfer (Northern) Ltd* [2005] EWCA Civ 1151, [2006] QB 510 [79] (Rix LJ). See also *Various Claimants v Institute of the Brothers of the Christian Schools* [2012] UKSC 56, [2013] 2 AC 1 [39]–[40], [45] (Lord Phillips P).

[237] *Barclays Bank* (n 233) [1] (Hale LJ); *WM Morrison Supermarkets Plc v Various Claimants* [2020] UKSC 12, [2020] AC 989 [25] (Lord Reed DP).

[238] Morgan (n 151).

[239] Lord Hope of Craighead, 'Tailoring the Law on Vicarious Liability' (2013) 129(Oct) LQR 514, 526. See also *Christian Schools* (n 236) [85] (Lord Phillips P).

[240] *Barclays Bank* (n 233) [27] (Lady Hale P).

[241] ibid.

Defendants who closely direct the activities of tortfeasors are typically in relationships akin to employment.[242] In *Gravil*, the Court of Appeal found a rugby club vicariously liable partly on the basis that players were required to make themselves available for matches and training.[243] As Holden and Baker argue, esports teams and leagues direct the activities of players far more closely than traditional sports employers.[244] Esports employers can exert overwhelming influence over players because of the power differentials present in the sector;[245] leagues typically own the intellectual property underpinning players' highly specialised careers,[246] and competitors are often recruited by teams as minors,[247] transported to unfamiliar countries,[248] and then monitored by managers who act as 'the mom, the dad, the agent… the landlord, [and] the life coach.'[249] During World of Warcraft's *Race to World First*, players are expected to play for up to fourteen hours per day, with sleep and breaks closely regulated.[250] Professional Overwatch players' schedules are managed by the League,[251] who retain the ability to change working rules and conditions at their discretion.[252]

[242] *Christian Schools* (n 236) [56] pt ii (Lord Phillips P); *Barclays Bank* (n 233) [28] (Lady Hale P). See also *Barclays Bank* (n 233) [20] (Lady Hale P) on the importance of control.
[243] *Gravil* (n 132) [7], [9] (Lord Clarke MR).
[244] Holden and Baker (n 6) 410–412.
[245] ibid 412.
[246] Bayliss (n 62) 377–378; Holden and Baker (n 6) 412.
[247] Paul (n 108). See also Overwatch League (n 73) para 3.1.
[248] Alonzo (n 62).
[249] Myers (n 143).
[250] Ben Barrett, '1,960 Man-Hours Per Week: The Truth About WoW Raiding at the Highest Level' (*PCGamesN*, 15 December 2017) <https://www.pcgamesn.com/world-of-warcraft/wow-raiding-nighthold-method-danish-terrace-death-jesters#:~:text=by%20Network%2DN-,1%2C960%20man%2Dhours%20per%20week%3A%20the%20truth%20about%20WoW%20raiding,Mythic%20difficulty%20%E2%80%93%20unlocks%20next%20week.> accessed 25 May 2022; Preach Gaming (n 79).
[251] Overwatch League (n 73) para 5.3; Holden and Baker (n 6) 429.
[252] Overwatch League (n 73) para 1.4; Holden and Baker (n 6) 430.

Overwatch teams typically live together in company housing and are held to strict training schedules with defined hours for training, eating, and socialising.[253] Some teams mandate curfews at bedtime.[254] As esports teams and leagues typically direct activities in minute detail, they are very likely to be considered akin to employers.

Three further factors suggest that esports players are likely to be considered akin to employees. First, tortfeasors who are bound by external rules have repeatedly satisfied the first stage of the test.[255] Teams and leagues near universally impose disciplinary authority over players;[256] Overwatch League players are held to a written code of conduct interpreted and amended entirely at the discretion of the League.[257] Second, those who do not work under a portfolio practice are also typically akin to employees.[258] Many teams and leagues restrict players' abilities to compete in other competitions, move between teams, and work elsewhere, actively stifling portfolio practices.[259] It is also often unfeasible for players expected to compete for extended hours to seek external work.[260] Although many players stream alongside their employment, some personal streams will generate very little income, and success largely depends on the celebrity conferred by players' professional esports employment.[261] Third, those paid retainers and engaged across multiple projects are

[253]Alonzo (n 62). See also discussion of League of Legends schedules in Myers (n 143).
[254] Myers (n 143).
[255] See for example *Christian Schools* (n 236) [56] pt iv (Lord Phillips P); *Gravil* (n 132) [7], [9] (Lord Clarke MR). cf *JXJ* (n 179) [138] (Chamberlain J).
[256] Bayliss (n 62) 375, 402; Holden and Baker (n 6) 405.
[257] Overwatch League (n 73) para 1.4.
[258] *Gravil* (n 132) [7], [9] (Lord Clarke MR). cf *Barclays Bank* (n 233) [28] (Lady Hale P); *SKX v Manchester City Council* [2021] EWHC 782 (QB), [2021] 4 WLR 56 [53] (Cavanagh J).
[259] Holden and Baker (n 6) 412, 429. cf discussion of the ESL Pro League in Holden and Baker (n 6) 407, 426
[260] See RogerBrown discussing this point in Preach Gaming (n 79) 51.50–54.00.
[261] ibid 51.50–54.00. See further Bayliss (n 62) 365, 376–377.

more likely to be akin to employees.[262] Top World of Warcraft guilds now provide payment in order to retain skilled players,[263] and Overwatch League competitors are paid minimum salaries of $50,000 per year.[264] Many players also sign contracts extending across multiple tournament seasons,[265] likely establishing vicarious liability under the stage one test.

In doubtful cases, courts examine the five 'policy reasons' underpinning vicarious liability in order to establish whether a relationship akin to employment exists.[266] Although it is argued here that many esports players undoubtedly satisfy the stage one test, the policy factors will briefly be considered for completeness. The three most important policy factors require that tortfeasors work 'on behalf of the employer' and as 'part of the business activity of the employer', thus 'creat[ing] the risk of the tort'.[267] The work completed by esports professionals is the business of their team and league,[268] and the risk of abusive behaviour increases as players are exposed to fans. Under the fourth policy factor, defendants controlling tortfeasors more closely may be akin to employers; as previously established, teams and leagues exercise a large degree of control over players.[269] Finally, the greater ability of teams and leagues, rather than individual abusers, to compensate victims may sometimes support the imposition of vicarious liability.[270] As such,

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[262] *Barclays Bank* (n 233) [28] (Lady Hale P); *SKX* (n 258) [53] (Cavanagh J).
[263] Preach Gaming (n 79) 45.00–52.00.
[264] Noah Higgins-Dunn, 'Six-Figure Salaries, Million-Dollar Prizes, Health Benefits and Housing Included - Inside the Overwatch League' *CNBC* (29 September 2019) <https://www.cnbc.com/2019/09/29/what-its-like-to-be-a-professional-gamer-in-the-overwatch-league.html> accessed 25 May 2022. See also Bayliss (n 62) 378.
[265] Higgins-Dunn (n 264); Bayliss (n 62) 378.
[266] *Barclays Bank* (n 233) [27] (Lady Hale P).
[267] *Christian Schools* (n 236) [35] (Lord Phillips P). *Barclays Bank* (n 233) [20] (Lady Hale P).
[268] Holden and Baker 2019 (n 6) 429.
[269] *Christian Schools* (n 236) [35] (Lord Phillips P). See also *Barclays Bank* (n 233) [20] (Lady Hale P).
[270] *Christian Schools* (n 236) [35] (Lord Phillips P); *Barclays Bank* (n 233) [20] (Lady

the policy factors further support the conclusion that the stage one test is met.

3.3. Establishing liability under Stage Two

It will now be argued that three ambiguities in stage two of the test for vicarious liability should be resolved in order to clarify that esports employers may be held liable for the torts of their players. The standard stage two test examines whether a tortfeasor's actions were committed 'in the ordinary course of [their] employment'.[271] Courts should firstly clarify whether sexual abuse committed in the course of engaging with fans is sufficiently connected to employment. An alternative stage two test examining 'proximity' and 'authority' can be used in sexual abuse cases.[272] The second and third necessary clarifications relate to whether employers confer authority when they confer celebrity, and whether the alternative test applies in the same way to the abuse of adults as to the abuse of children.

The standard stage two test is met where a tortfeasor's wrongful conduct was committed 'in the ordinary course of [their] employment';[273] courts must examine whether the wrong was sufficiently connected to the 'field of activities' usually entrusted to the employee.[274] The Supreme Court has stated that 'sexual abuse can never be a negligent way of performing [an employment] requirement',[275] as it is too dissimilar to authorised activities.[276] However, the court is yet to consider a case in which an abusive employee has been tasked with cultivating relationships with fans;

Hale P).
[271] *Morrison Supermarkets* (n 237) [25] (Lord Reed DP).
[272] *Christian Schools* (n 236) [83]–[84] (Lord Phillips P); *Morrison Supermarkets* (n 237) [23] (Lord Reed DP); *Barry Congregation* (n 133) [83]–[84] (Davies LJ).
[273] *Morrison Supermarkets* (n 237) [25] (Lord Reed DP).
[274] ibid.
[275] *Christian Schools* (n 236) [62] (Lord Phillips P).
[276] *Morrison Supermarkets* (n 237) [23] (Lord Reed DP).

Morgan has argued that sports teams could be held vicariously liable for sexual abuse where victims are met 'in the context of club activities' or where players are 'tasked with engaging with members of the public for the purposes of the club.'[277]

The torts of esports players who meet victims in the context of team activities should be considered to be sufficiently connected to their employment. In *Maga*, the Court of Appeal held a church liable for the torts of an abusive priest who had developed a relationship with his victim during 'church-organised' discos.[278] Where employees meet victims at work, a sufficient connection can be established even where abuse ultimately occurs away from the workplace or outside of usual employment hours.[279] Much of the physical abuse alleged in esports has taken place at conventions and tournaments attended by teams in professional capacities.[280] Allegations of groping at after-parties are commonplace.[281] Esports players also meet victims during online team events. Women joined MethodJosh's Discord server after finding him on team livestreams[282] and both of the underage fans allegedly groomed by DreamKazper followed him after watching promotional events.[283]

The standard test should also be met because esports players are frequently tasked with engaging with fans by their employers.[284] It

[277] Morgan (n 151) 248.
[278] *Maga* (n 141) [48] (Lord Neuberger MR).
[279] *Haringey LBC* (n 151) [150] (McCombe LJ). Although see also *EXE* (n 142) (Griffiths J) [127].
[280] Messner (n 14).
[281] See for example (Michael n 15); Dom Sacco, '"This Criminal Behaviour Needs to Get Out of Society" - UK FGC Host Logan Sama on Disturbing Reports from EVO After-Party' (*EsportsNews*, 11 August 2019) <https://esports-news.co.uk/2019/08/11/logan-sama-on-evo-after-party/> accessed 25 May 2022. See also D'Anastasio (n 5).
[282] D'Anastasio (n 5).
[283] D'Anastasio (n 109). See also Overwatch League (n 73) para 1.1 for a list of mandatory team events.
[284] See for example Smith (n 99); Archimtiros (n 63).

was considered relevant when establishing vicarious liability in *Maga* that the tortfeasor priest had been entrusted with a duty to attract people to church by developing relationships within his community.[285] Similarly, dicta in *GB* suggests that an employee responsible for a youth fan club would act within their employment when abusing supporters.[286] Esports teams 'boost individual [player] profiles'[287] in the expectation that employees will attract fans by being 'as accessible as possible' online.[288] Esports players are also often required to chat with fans during mandatory team streams such as *Race to World First* events, which run for upwards of sixteen hours per day.[289] As sexual abuse is connected to esports players' duties to meet and develop personal relationships with fans, future judgments should clarify that sexual abuse can be connected to employment under the standard test.

An alternative stage two test can be applied where sexual abuse is alleged in order to emphasise criteria 'particularly relevant to that form of wrongdoing.'[290] Courts can hold employers vicariously liable for sexual abuse where employment confers 'proximity' to and 'authority' over victims.[291] It is clearly arguable that esports players are afforded proximity to potential victims through exposure to fans. However, courts should clarify that employers grant players authority over victims where they confer celebrity status.

[285] *Maga* (n 141) [46]–[47] (Lord Neuberger MR).
[286] *GB v Stoke City Football Club Ltd* [2015] EWHC 2862, [2015] 10 WLUK 831 [148] (Butler J). Morgan (n 151) 249.
[287] Method, 'Road to World First' <https://www.method.gg/road-to-world-first> accessed 25 May 2022.
[288] Smith (n 99).
[289]Archimtiros (n 63). See also discussion of mandatory streaming in professional League of Legends in Smith (n 99).
[290] *Morrison Supermarkets* (n 237) [23] (Lord Reed DP). See also *Christian Schools* (n 236) [83] (Lord Phillips P).
[291] *Christian Schools* (n 236) [84] (Lord Phillips DP); *Morrison Supermarkets* (n 237) [23] (Lord Reed DP); *Barry Congregation* (n 133) [83]–[84] (Davies LJ).

Esports teams confer authority on their employees by creating 'athlete-celebrities'[292] who stream under team branding and use team-based pseudonyms such as 'MethodJosh'.[293] Courts have previously found conferral of authority where tortfeasors enjoy general moral responsibility, for example by virtue of employment in teaching or the priesthood.[294] Authority conferred by celebrity is, admittedly, entirely different. However, whilst arguing that vicarious liability should be restricted, Morgan has proposed that authority is context-specific, as some claimants will not respect traditional authority figures in practice.[295] Just as context can limit liability, it can also extend it; although celebrity sportspeople may not be afforded universal respect, it is proposed the test should be satisfied where tortfeasors hold authority over the actual claimant in question.

Celebrity esports players hold authority over fans and junior colleagues. In *Barry Congregation*, authority had led the sexually abused claimant to assume that the tortfeasor would act with 'pure motives'.[296] In a similar way, esports players occupy positions of trust within online communities due to the power differentials created by celebrity status.[297] Authority also manifested in *Barry Congregation* as a fear that there would be 'repercussions' if a complaint was made.[298] Many victims have expressed fear about speaking out against celebrity esports players with large followings and industry connections,[299] believing that their reports would be dismissed[300] and their careers undermined[301] by abusers wielding community authority.

[292] Darvin, Vooris and Mahoney (n 6) 40.
[293] See for example Sacco (n 4).
[294] *Maga* (n 141) 45 (Lord Neuberger MR).
[295] Morgan (n 144) 941.
[296] *Barry Congregation* (n 133) [85] (Davies LJ).
[297] See discussion of Dreamkazper in D'Anastasio (n 109); D'Anastasio (n 5) discussing followers feeling they can trust *the objects of their fandom*.
[298] *Barry Congregation* (n 133) [85] (Davies LJ).
[299] See discussion of Elvine in D'Anastasio (n 5).
[300] Messner (n 14).
[301] Liao (n 12); Messner (n 14); Allegations against Iamspoon in D'Anastasio (n 84).

As it is arguable that the conferral of celebrity status confers authority over potential victims, it should be clarified whether such a situation would satisfy the alternative test.

Finally, it should be clarified that the alternate test applies in the same way regardless of whether adults or children are abused. Courts often baldly state that the alternate test applies 'in cases concerned with the sexual abuse of children.'[302] In *Barry Congregation*, the Court of Appeal was split on the question of whether the alternate test could apply in the same way where an adult had been abused.[303] Davies LJ, giving the lead judgment, considered that the age of the claimant was unimportant as 'the rationale for the test' did not depend on the 'characteristics of the victim'.[304] By contrast, Males LJ, whilst acknowledging that each case is fact-specific, argued that adults could generally be expected to resist abuse by removing themselves from harmful situations.[305] Males LJ's approach has so far been accepted at face value by the academic community, potentially rendering adult victims less able to access tortious remedies.[306]

Davies LJ's application of the alternate test should be preferred for two reasons. First, risk-based approaches increasingly underpin vicarious liability,[307] and yet the risk of sexual abuse does not necessarily lessen with age. Unequal power dynamics, for example between employees and managers[308] or celebrities and fans,[309]

[302] *Morrison Supermarkets* (n 237) [23] (Lord Reed DP); *Christian Schools* (n 236) [3] (Lord Phillips P).
[303] *Barry Congregation* (n 133).
[304] ibid [84] (Davies LJ).
[305] ibid [96] (Males LJ).
[306] Giliker (n 24); Abigail Scott, 'Revisiting the Close Connection Test for Vicarious Liability: Adult Sexual Abuse Cases' (*Ropewalk Chambers*, 23 March 2021) <https://www.ropewalk.co.uk/knowledge-sharing/blog/personal-injury/1792/revisiting-the-close-connection-test-for-vicarious-liability-adult-sexual-abuse-cases> accessed 25 May 2022.
[307] Giliker (n 178) 17.
[308] See for example Method (n 4).
[309] See for example D'Anastasio (n 109).

increase the risk of sexual abuse even where victims are adults.[310] Chamallas argues that judges who have not experienced workplace sexual harassment struggle to appreciate that abuse can be engendered by employment dynamics,[311] an interesting claim when it is considered that the lead judgment in *Barry Congregation* was provided by a female judge, whilst the adult employee exception was suggested by a man.[312] Second, as vicarious liability attempts to ensure that harm is borne by the party who should 'fairly bear liability',[313] denying adult claimants a remedy effectively blames victims for abuse.[314] As Chamallas has noted, it is unfair to expect women to alter their own behaviour on the assumption that they will be harmed intentionally by men,[315] and as such it should be clarified that the alternative test applies in the same way regardless of the age of the victim.

Esports teams could be held vicariously liable for the torts of their players if it was clarified that sexual abuse is a wrongful way of engaging with fans, satisfying the standard test, or that employers who confer celebrity confer authority and that adults are not expected to resist abuse, satisfying the alternate test. These ambiguities should be resolved whenever an appropriate case is next considered, although it is acknowledged that these points could best be addressed if a test case was brought before the courts.

Finally, it is acknowledged that vicarious liability should not be expanded to remedy abuse in specific sectors at the expense of overall doctrinal coherence.[316] Vicarious liability scholars have repeatedly argued that public outrage over sexual abuse has extended the

[310] Chamallas (n 18) 166.
[311] ibid 159.
[312] *Barry Congregation* (n 133).
[313] *Christian Schools* (n 236) [83] (Lord Phillips P).
[314] See further Waterhouse, Reynolds and Egan (n 130) 2.
[315] Chamallas (n 18) 155.
[316] Lord Hope (n 239) 525.

doctrine,[317] undermining clarity,[318] facilitating opportunistic claims,[319] and placing a disproportionate burden on corporate defendants.[320] Giliker has recently described vicarious liability as an 'uncontrolled instrument of distributive justice' imposing liability on 'innocent' defendants.[321] The innocence of corporate defendants will be questioned in the following section, but for now it should be noted that the clarifications proposed here are not expansions, but rather the novel and proper application of existing rules. Further, these clarifications are limited to narrow fact patterns; clarification one will apply only where employees have been tasked with engaging with fans, and the development of the alternative sexual abuse test means that clarifications two and three are insulated from having any effect on commercial cases.[322]

3.4. Usefulness of vicarious claims

Vicarious liability could usefully remedy abuse in the esports sector by triggering wider industry change. It is commonly argued that vicarious liability is of limited use because it frustrates 'corrective justice'[323] by forcing losses upon 'innocent' employers.[324] This argument is undermined by the reality that employers are frequently personally responsible for abuse, even where specific negligent practices cannot be identified. Morgan has proposed that establishing

[317] Phillip Morgan, 'Vicarious Liability on the Move' (2013) 129 LQR 139, 139; Giliker (n 178) 3, 19–20.
[318] Lord Hope (n 239) 525.
[319] Paula Giliker, 'Vicarious Liability "On the Move": The English Supreme Court and Enterprise Liability: A Commentary on Various Claimants v Catholic Child Welfare Society [2012] United Supreme Court 56' (2013) 4(3) Journal of European Tort Law 306, 313.
[320] ibid 312.
[321] Giliker (n 178) 1, 3, 19–20.
[322] Donal Nolan, 'Reigning in Vicarious Liability (Case Comment)' 49(4) ILJ 609, 621. cf Giliker (n 24).
[323] Godden (n 151) 174; Giliker (n 178) 1.
[324] Morgan (n 144) 945; Giliker (n 178) 1.

company liability through negligence is often preferable to vicarious liability, as negligence claims identify specific blameworthy officials and practices.[325] Morgan's argument demonstrates Chamallas' claim that people prefer to blame individuals than to recognise systematic failings;[326] abuse is often rationalised as a 'pathological outsider infiltrating an otherwise healthy system' where it is actually symptomatic of wider institutional failure.[327] For example, it is unlikely that Method would be held liable in negligence for failing to investigate MethodJosh adequately, despite this failing indicating the presence of a wider misogynistic and elitist culture at the organisation.[328] Employers who allow abusive cultures to develop are partly responsible for abuse, and it is therefore appropriate that they bear losses through vicarious liability.

Vicarious liability claims would be useful in the esports sector because teams currently do not take their responsibility to reduce abuse seriously. Celebrity esports players are typically not required to comply with any background checks or sexual harassment training.[329] The twenty-three-year-old CEO of one Overwatch League team responded to sexual abuse allegations by having 'parental' discussions with players and mandating visits to art galleries so that employees could 'develop their public personas in healthy ways'.[330] Holden, Baker, and Edelman argue that industry change is possible; just as company liability has improved employment practices in traditional sports, abuse could be lessened in esports.[331] The imposition of liability may encourage teams to take proactive steps to reduce abuse by improving recruitment and training and promoting internal

[325] Morgan (n 144) 945.
[326] Chamallas (n 18) 167–169.
[327] ibid 170–171.
[328] See s 3.1; Messner (n 14); Sacco (n 4).
[329] D'Anastasio (n 5); D'Anastasio (n 84).
[330] Myers (n 143). See further Lyons discussing coach responses to abuse in Paul (n 108).
[331] Holden, Baker and Edelman (n 11) 39–40.

transparency.[332] Method's reformation demonstrates that teams make positive changes when held to account;[333] the team now conducts background checks, provides anti-harassment training, has formal disciplinary and reporting procedures, and employs an external HR consultant.[334] Crucially, where teams reduce harassment amongst elite players, social norms evolve, lessening abuse in wider online communities.[335]

It must briefly be acknowledged that it may not be useful or appropriate to impose vicarious liability on very small teams. Whilst some esports teams are large corporations which can instigate meaningful change,[336] others are small grassroots organisations.[337] Vicarious liability could likely be established even where teams are unincorporated,[338] players are amateur,[339] and no profits are generated.[340] Courts have justified imposing liability on unincorporated groups on the basis that previous defendants have had more extensive financial resources[341] and insurance[342] than individual tortfeasors. However, as Morgan has discussed, there is no limited liability in unincorporated sports teams, and as such any individual player could be forced to pay compensation.[343] Further, small teams are likely to face 'fluctuating membership' and lack authority over

[332] *Gravil* (n 132) [26] (Lord Clarke MR); Morgan (n 151) 247–248, 251, 260; Chamallas (n 18) 152.
[333] Sacco (n 4).
[334] Method (n 184); Method, 'Meet the New Method Guild' <https://www.method.gg/meet-the-new-method-guild> accessed 25 May 2022.
[335] Holden, Baker and Edelman (n 11) 39, 42.
[336] Rondina (n 70).
[337] See discussion of team size in Preach Gaming (n 79) 45.00–46.00, 51.20–51.40.
[338] *Christian Schools* (n 236) [20], [27] (Lord Phillips P); Morgan (n 151) 255.
[339] Morgan (n 151) 252–254; *Barclays Bank* (n 233) [29] (Lady Hale P). cf *Gravil* (n 132) [10], [41] (Lord Clarke MR).
[340] *Gravil* (n 132) [9] (Lord Clarke MR); *Christian Schools* (n 236) [57]–[58] (Lord Phillips P); Morgan (n 151) 254.
[341] *Christian Schools* (n 236) [31]–[32] (Lord Phillips P).
[342] *Gravil* (n 132) [28] (Lord Clarke MR).
[343] Morgan (n 151) 256.

players,[344] a problem especially acute in informal online groups. As such, whilst it is useful to hold most esports teams liable for the torts of their players in order to effect wider community change, small teams should arguably be shielded from liability.[345]

3.5. Feasibility of Vicarious Claims

Cost is the most significant barrier to the feasibility of civil claims against esports teams.[346] Legal aid is available to some complainants alleging sexual offences, harassment, and child sexual abuse;[347] costs may be covered in civil rape,[348] sexual assault,[349] and grooming cases,[350] where indecent pictures of children have been shared,[351] and where an injunction is sought following harassment.[352] However, adult claimants seeking compensation for verbal harassment or the sharing of intimate pictures are ineligible for legal aid, as are those who exceed maximum income limits[353] or those bringing claims with too low a chance of success.[354] As legal uncertainty could undermine the availability of funding, ambiguities in the vicarious liability should be resolved in order to render claims feasible.

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[344] ibid 256.
[345] ibid 261.
[346] Bublick (n 173) 77; Godden (n 151) 177; Holden, Baker and Edelman (n 11) 25.
[347] Legal Aid, Sentencing and Punishment of Offenders Act 2012 (LASPO 2012) s 9, Sch 1 Pt 1 ss 3(1), 37(1) and 39(1).
[348] ibid Sch1 Pt 1 s 39(1); Sexual Offences Act 2003 s 1.
[349] LASPO 2012 (n 347) Sch1 Pt 1 s 39(1); Sexual Offences Act 2003 ss 2, 3, 9, 10.
[350] LASPO 2012 (n 347) Sch1 Pt 1 s 39(1), Sch1 Pt 1 s 3(1); Sexual Offences Act 2003 ss 14, 15, 15A.
[351] LASPO 2012 (n 347) Sch1 Pt 1 s 3(1).
[352] ibid Sch1 Pt 1 s 37(1).
[353] ibid s 11; The Civil Legal Aid (Financial Resources and Payment for Services) Regulations 2013 ss 6, 7, and 8.
[354] Civil Legal Aid (Merits Criteria) Regulations 2013 ss 5 and 43; The Conditional Fee Agreements Order 2013 ss 3 and 5; Constitutional Affairs Committee, 'Constitutional Affairs - Third Report' (HC 2005-06); Stuart Sime, *A Practical Approach to Civil Procedure* (OUP 2020) ch 2 para 2.18.

Merely increasing awareness of the possibility of liability in the esports sector could effect change, even where funding constraints frustrate some claims. Clarifying the application of vicarious liability to esports teams would empower lawyers and charities[355] to warn employers of the risk of liability and make victims aware of their legal options.[356] Many employers currently consider esports to be an 'unregulated' industry,[357] but those aware of the financial consequences of abuse have made meaningful improvements.[358] As such, increasing awareness of vicarious liability in esports by clarifying the doctrine would be likely to prompt teams to reform their practices proactively before any litigation is brought.

4 Conclusion

This article has argued that vicarious liability could play a key role in remedying and lessening abuse in the esports sector. Courts should clarify at the next opportunity that sexual abuse is a wrongful way of developing relationships with fans, that employers who confer celebrity confer authority, and that sexual abuse is connected to employment in the same way regardless of the age of the victim. Should these clarifications be made, funding constraints would be lessened and industry awareness of liability would be increased, promoting improvements in esports employment practices and ultimately reducing abuse by changing social norms in online gaming communities.

[355] Women in Games <https://www.womeningames.org/> accessed 25 May 2022; British Esports, 'Women in Esports' <https://britishesports.org/women-in-esports-campaign/> accessed 25 May 2022.
[356] See further Keats Citron (n 1) 377, 413.
[357] Preach Gaming (n 79) 46.10–46.20.
[358] Method, 'Method Rebuild' (2 October 2020) <https://www.method.gg/rebuild> accessed 30 May 2021

‘Won’t Somebody Please Think of the Children!’ – Online content promoting/encouraging self-harm and the law: A socio-legal study

Danial Kamal Shahreen

Abstract

With a new communication offence having been proposed by the Law Commission and adopted in the draft Online Safety Bill, this article considers how the law should deal with online content promoting/encouraging self-harm to adequately protect victims, with a particular focus on children. To do so, I consider three pertinent issues: the adequacy of existing communication offences; the need to balance freedom of expression concerns against factors weighing in favour of restrictions; and the different conceptions of the child as influences to justify protection. From these analyses, overall, I argue that the Law Commission’s proposal is inadequate and insufficient as a means of protection and offer suggestions for improvement accordingly.

1 Introduction

The enhancement of technology, the ever-growing sophistication of networked environments, and the commonplace nature of online communication modalities,[1] have inarguably proliferated individuals' capacity to disseminate harmful online content and communications within the digital and online sphere.[2] Thus, the significant risks that such a development poses to the safety, privacy, and well-being of children[3] has been acknowledged,[4] raising the inevitable question of whether current regulatory provisions are suited to dealing with the nature of risks that children face online.

The impact of online harms 'causes untold damage in the real world'.[5] It is a contemporary issue requiring response, especially given the concerns within Parliament, that children are not adequately protected online.[6] Accordingly, the Law Commission's consultation paper 'Harmful Online Communications: The Criminal Offences'[7] proposes a new communication offence ('the Proposal'). This proposal requires evaluation in terms of how effectively it would protect children from online content promoting/encouraging self-harm as a particular type of

[1] S Lindgren (ed), *Hybrid Media Culture: Sensing Place in a World of Flows* (Routledge 2014) 1.
[2] B Chesney and D Citron, 'Deep Fakes: A Looming Challenge for Privacy, Democracy and National Security' (2019) 107 CLR 1753, 1764; S Theil, 'The Online Harms White Paper: Comparing the UK and German Approach to Regulation' (2019) 11(1) JML 41; Law Commission, *Abusive and Offensive Online Communications: A Scoping Report* (Law Com No 381, 2018) para 1.38.
[3] As defined in the Family Law Reform Act 1969 s 1(1); United Nations, 'The United Nations Convention on the Rights of the Child' (United Nations, 1989) <https://www.unicef.org.uk/what-we-do/un-convention-child-rights/> accessed 19 May 2022.
[4] UNICEF, 'The State of the World's Children 2017: Children in a Digital World' (UNICEF, 2017).
[5] HC Deb 13 February 2020, vol 671, col 973.
[6] HC Deb 7 October 2020, vol 681, col 151WH.
[7] Law Commission, *Harmful Online Communications: The Criminal Offences* (Law Com CP No 248, 2020) para 1.8.

online harm. However, this is a rather limited enquiry, given the Proposal is yet to become law, there is no suitable baseline by which to test it, and this type of online content is seemingly treated as a peripheral issue within the consultation paper. Instead, this article takes a more holistic approach to evaluating the issue of online content promoting/encouraging self-harm and is structured as follows.

First, I will argue that the criminal law has not appreciated the significance of, nor adequately responded to the nature, rise, and prevalence of pro-self-harm content online, with existing communications offences unsuitable as a means of protection. Second, I will argue that pro-self-harm content online should not be protected under freedom of expression because of the strengths of a harm-based argument and judicial approaches to various types of expressions. As such, this justifies restriction through the criminal law. Third, I will argue that a rights-based perspective on the protection of children should hold more influence than a vulnerability-based perspective to justify protection from pro-self-harm online, because it is less restrictive and paternalistic, and considers respect for children's dignity as rights holders and their ability to exercise agency in decision making. Finally, I will argue that overall, the Proposal is unfortunately not a sufficient means of protection for children from pro-self-harm content online, and therefore will offer suggestions as to improvements.

2 The Nature of Self-Harm Content Online, Its Rise and the Existing Communication Offences

This section will discuss what constitutes 'self-harm' and its manifestations, with a particular focus on pro-self-harm content online, before explaining the factors that have proliferated its rise and prevalence, and why it should be a concern. Evaluating the existing communication offences, I will argue that the criminal law has not

afforded due consideration to these issues and has proven inadequate as a means of protection.

2.1. What Is 'Self-Harm'?

'Self-harm' is by no means a novel concept,[8] and is a heavily contested term,[9] with various definitions offered in academia. Some consider it 'the deliberate, direct destruction or alteration of body tissue without conscious suicidal intent'.[10] Others differentiate between 'self-harm' and 'self-injury',[11] as separate terms that ought not to be conflated,[12] and consider self-harm as any act that is intentional, accidental, committed through ignorance or poor judgment that causes psychological or physical harm to oneself without suicidal intention.[13] By contrast, 'self-injury', or 'non-suicidal self-injury', is said to constitute a form of self-harm that leads to bodily injury.[14] It encompasses a wide range of behaviours/practices[15] which are not socially[16] or culturally sanctioned,[17] such as cutting, burning,

[8] M McAllister, 'Multiple Meanings of Self-Harm: A Critical Review' (2003) 13 International Journal of Mental Health Nursing 177, 178.
[9] D Boyd, J Ryan and A Leavitt, 'Pro-Self-Harm and the Visibility of Youth Generated Problematic Content' (2011) 7(1) A Journal of Law and Policy for the Information Society 1; NJ Shanahan, 'Self-Harm: Images and Text Posted on Social Media Platforms' (PhD thesis, University of Leeds 2017) 10.
[10] AR Favazza, 'The Coming of Age of Self-Mutilation' (1998) 186(5) The Journal of Nervous & Mental Disease 259.
[11] R Sebree and S Popkess-Vawter, 'Self-Injury Concept Formation: Nursing Development' (1991) 27 Perspectives in Psychiatric Care 27.
[12] McAllister (n 8).
[13] McAllister (n 8).
[14] McAllister (n 8).
[15] K Skegg, 'Self-Harm' (2005) 366(9495) Lancet 1471.
[16] ED Klonsky, SE Victor and BY Saffer, 'Nonsuicidal Self-Injury: What We Know, and What We Need to Know' (2014) 59(11) The Canadian Journal of Psychiatry 565; MK Nock and AR Favazza, 'Nonsuicidal Self-Injury: Definition and Classification' in MK Nock (ed), *Understanding Nonsuicidal Self-Injury: Origins, Assessment and Treatment* (American Psychological Association 2009).
[17] MK Nock, 'Why Do People Hurt Themselves? New Insights into the Nature and Functions of Self-Injury' (2009) 18(2) Curr Dir Psychol Sci 78.

branding, hitting, scratching, picking at skin, reopening wounds,[18] as well as disordered eating and substance abuse.[19] These examples are illuminating of the nature of the term, however the utility of the distinction has been questioned.[20] Kahan and Pattison seemingly suggest that the rather 'rudimentary' distinctions serve a negative purpose in obfuscating the term.[21] This is a plausible critique which lends itself to Shanahan's claim that definitional issues and challenges often have a wider consequence in affecting our understanding of this behaviour.[22] With that said, there is some justification for Sebree and Popkess-Vawter's definition/differentiation[23] to be adopted under the umbrella of 'self-harm', because it relates to the nature of such content typically found online. Therefore, I will proceed on that basis.

2.1.1. What is the nature of 'self-harm' content online?

In recent years, there has been a growing influx of self-harm material documented on the internet,[24] and self-harm content online can be grouped into three categories.[25] These include, firstly, factual and informative sites drawing from medical literature. These sites, often compiled by experts, are viewed as not engendering participation but

[18] PA Adler and P Adler, *The Tender Cut Inside the Hidden World of Self-Injury* (University of New York Press 2011) 1.
[19] N Shanahan, C Brennan and A House, 'Self-Harm and Social Media: Thematic Analysis of Images Posted on Three Social Media Sites' (2019) 9(2) BMJ Open 1, 3.
[20] AJ Edmondson, 'Listening with Your Eyes: Using Pictures and Words to Explore Self-Harm' (PhD thesis, University of Leeds 2013) 2.
[21] J Kahan and EM Pattison, 'Proposal for a Distinctive Diagnosis: The Deliberate Self-Harm Syndrome (DSH)' (1984) 14(1) Suicide and Life-Threatening Behaviour 17, 21.
[22] Shanahan (n 9) 11.
[23] Sebree and Popkess-Vawter (n 11).
[24] TG Baker and SP Lewis, 'Responses to Online Photographs of Non-Suicidal Self-Injury: A Thematic Analysis' (2013) 17 Archives of Suicide Research 223.
[25] Boyd, Ryan and Leavitt (n 9) 11.

rather passive consumption.[26] Second, self-help and support sites/communities, which were often in the form of personal blogs, message boards and semi-private groups.[27] These sites do engender participation as they often advocate for interpersonal connection, help-seeking and recovery towards sufferers expressing their first-person narratives, and lastly, pro-self-harm sites/communities (although the term 'pro-self-harm' is a contested category).[28] Similarly to self-help and support sites/communities, these also engender participation but do so through triggering content and the advocacy/encouragement of self-harm as a lifestyle. This article is mainly concerned with the last of these categories. Before exploring the nature of the regulatory landscape of self-harm content online, the reasons for its rise and prevalence will be considered.

2.1.2. What Has Facilitated the Representation/Communication of 'Self-Harm' Content Online?

The internet, in addition to being a pertinent source of information, is a space for conversation.[29] In enabling different modes of communication,[30] and greater anonymity,[31] it has arguably facilitated one's greater ability for self-expression. To this point, the internet is one of the factors accounting for the flourishing representation and

[26] Z Alderton, *The Aesthetics of Self Harm and the Visual Rhetoric of Online Self-Harm Communities* (Routledge 2018) 2; Adler and Adler (n 18) 110.
[27] Adler and Adler (n 18) 111–112.
[28] A Johannson, 'Hybrid Embodiment: Doing Respectable Bodies on Youtube' in S Lindgren (ed), *Hybrid Media Culture: Sensing Place in a World of Flows* (Routledge 2014) 25.
[29] Boyd, Ryan and Leavitt (n 9) 11.
[30] Adler and Adler (n 18) 111; SM Dunlop, E More and D Romer, 'Where Do Youth Learn About Suicides on the Internet, and What Influence Does This Have on Suicidal Ideation?' (2011) 52(10) Journal of Child Psychology 1073.
[31] JA Bargh, KYA Mckenna and GM Fitzsimons, 'Can You See the Real Me? Activation and Expression of the "True Self" on the Internet' (2002) 58(1) Journal of Social Issues 33, 35.

communication of self-harm online.[32] This is unsurprising given that, as Baker and Lewis point out, self-harm is highly stigmatised as an embodied practice,[33] and one which Westerlund and Wasserman recognise has long been held as strongly taboo.[34] This in turn is arguably reflective of the preference of the internet as a means of communicating self-harm,[35] with the internet serving as a fertile location for the rise of virtual communities,[36] and, it has been claimed, dramatically changing the way that self-harm is depicted and publicly accessed today.[37] This may indicate that the stigmatising of self-harm is a potential factor driving these forms of content onto online spaces.

Such notions are furthered in the modern age because of the shift of such content towards more dynamic spaces,[38] such as social networking sites. These dynamic spaces facilitate better user engagement in being able to articulate and exchange thoughts[39] through functionalities such as comments, reblogging and liking

[32] Y Seko and SP Lewis, 'The Self-Harmed, Visualized and Reblogged: Remaking of Self-Injury Narratives on Tumblr' (2018) 20(1) New Media & Society 180, 181.
[33] Baker and Lewis (n 24) 233–234; D Boyd and others, 'The Conundrum of Visibility Youth Safety and the Internet' (2009) 3(4) Journal of Children and Media 410, 412.
[34] M Westerlund and D Wasserman, 'The Role of Mass-Media in Suicide Prevention' in D Wasserman and C Wasserman (eds), *Oxford Textbook of Suicidology and Suicide Prevention: A Global Perspective* (OUP 2009).
[35] G Campaioli and others, 'The Dual Value of the Web: Risks and Benefits of the Use of the Internet in Disorders with A Self-Destructive Component in Adolescents and Young Adults' (2017) 39 Contemporary Family Theory 301, 306; SP Lewis and others, 'Nonsuicidal Self-Injury, Youth and the Internet: What Mental Health Professionals Need to Know' (2012) 6(3) Child and Adolescent Psychiatry and Mental Health 1.
[36] PA Adler and P Adler, 'The Cyber Worlds of Self-Injurers: Deviant Communities, Relationships and Selves' (2008) 31 Symbolic Interaction 33, 34.
[37] F Arendt, S Scherr and D Romer, 'Effects of Exposure to Self-Harm on Social Media: Evidence From a Two-Wave Panel Study Among Young Adults' (2019) 21(11–12) New Media & Society 2422, 2423; K Rodham and others, 'An Investigation of the Motivations Driving the Online Representations of Self-Injury: A Thematic Analysis' (2013) 17 Archives of Suicide Research 173.
[38] Alderton (n 26) 3.
[39] Alderton (n 26) 4.

appealing content.[40] Thus, it would seemingly account for the rise in the use of social networking sites for representing, exploring, and discussing self-harm online,[41] which is reflected in its popularity among youth.[42]

2.1.3. Why should pro-self-harm content online be a concern?

According to the Office for National Statistics, 100 per cent of households with children in the UK had internet access in 2020.[43] Internet access and use shape conditions for opportunities but also shape the conditions in which children are exposed to increased risks online,[44] including exposure to harmful online content.

The sheer volume of pro-self-harm content online, particularly on social networking sites, that is readily accessible[45] and potentially

[40] Seko and Lewis (n 32) 182–183.
[41] Shanahan (n 9) 19.
[42] M Anderson and J Jiang, 'Teens, Social Media & Technology 2018' (Pew Research Center, 2018).
[43] Office for National Statistics, 'Internet Access – Households and Individuals, Great Britain Statistical Bulletins: 2020' (ONS, 2020) <https://www.ons.gov.uk/peoplepopulationandcommunity/householdcharacteristics/homeinternetandsocialmediausage/bulletins/internetaccesshouseholdsandindividuals/2020> accessed 19 May 2022.
[44] D Smahel and others, 'EU Kids Online 2020: Survey Results from 19 Countries' (London School of Economics and Political Science, 2020) <https://www.lse.ac.uk/media-and-communications/assets/documents/research/eu-kids-online/reports/EU-Kids-Online-2020-10Feb2020.pdf> accessed 19 May 2022, 18; S Livingstone and E Hesper, 'Balancing Opportunities and Risks in Teenagers' Use of the Internet: The Role of Online Skills and Internet Self-Efficacy' (2010) 12(2) New Media & Society 309, 310; A Oksanen, 'Young People Who Access Harm-Advocating Online Content. A Four-Country Survey' (2016) 10(2) Journal of Psychosocial Research on Cyberspace <https://cyberpsychology.eu/article/view/6179/5909> accessed 19 May 2022.
[45] Campaioli and others (n 35) 303; The Berkman Center for Internet and Society at Harvard University, 'Enhancing Child Safety & Online Technologies: Final Report of the Internet Safety Technical Task Force to the Multi-State Working Group on Social

available to children,[46] arguably reflects the reality represented in the literature. For example, in 2020, Facebook acted on 6,410,000 pieces of content that encouraged suicide or self-injury, by removing the content or covering it with warnings. Similarly, Instagram acted on 6,303,600 pieces of content of the same nature.[47] This is by no means representative of the extent of all pro-self-harm content online available on the internet but highlights the issue of accessibility to pro-self-harm content online as a potential concern for children. Thus, the regulatory landscape must offer an adequate means of protection.

2.2. The regulatory landscape of pro-self-harm content online

This section assesses the regulation of pro-self-harm content online through the criminal law, as the law can serve as a regulatory means to restrict behaviour[48] and, more importantly, as a means of protection and redress for victims. The existing communication offences under section 1 of the Malicious Communications Act 1988 (MCA 1988) and section 127(1) of the Communications Act 2003 (CA 2003) are avenues for regulating harmful content online through criminal law. Considering that these are the provisions which the Proposal is seeking to replace, it is instructive to evaluate their adequacy as a means of protection, before making a comparison with the Proposal later in the article.

Networking of State Attorneys General of the United States' (The Berkman Center for Internet and Society at Harvard University, 2008) 7 <https://cyber.harvard.edu/sites/cyber.law.harvard.edu/files/ISTTF_Final_Report.pdf > accessed 19 May 2022; Oksanen (n 44).

[46] Campaioli and others (n 35).

[47] Facebook, 'Community Standards Enforcement Report' (Facebook, 2020) <https://transparency.facebook.com/community-standards-enforcement#suicide-and-self-injury> accessed 19 May 2022.

[48] J Black, 'Constructing and Contesting Legitimacy and Accountability in Polycentric Regulatory Regimes' (2008) 2 Regulation and Governance 137, 139.

Within the internet context, section 1 of the MCA 1988 provides that a person is guilty of an offence if one sends an electronic communication that is in whole or in part indecent or grossly offensive with the purpose of causing distress or anxiety to the recipient or other persons that he/she intended the content or its nature should be communicated.[49] The focus of the offence, as *Director of Public Prosecutions v Collins* demonstrates, lies in the *sending* of the indecent or grossly offensive electronic communication with the requisite *mens rea*.[50] Section 127(1) of the CA 2003 provides that a person is guilty of an offence if he/she sends a message over a public electronic communications network that is grossly offensive, of an indecent, obscene, or menacing character.[51] The focus of the offence similarly lies in the *sending* of a grossly offensive, indecent, obscene or menacing communication over a public electronic communications network, which following *Chambers v Director of Public Prosecutions* includes social media platforms such as Twitter that operate through the internet as a public electronic network.[52]

One issue with both offences stems from their focus on the sending of the communication. As Bakalis observes, these offences do not consider the impact of the communication to the victim — it is seemingly treated as inconsequential.[53] Whilst Bakalis writes about section 1 of the MCA 1988, her point is similarly applicable to section 127(1) of the CA 2003, which requires no intended recipient or recipients in general. This is problematic in that it is arguably reflective of children not being adequately protected from pro-self-harm content online. By not considering the effect of the behaviour on the victim, it undermines one of the strong bases for criminalisation,

[49] Malicious Communications Act 1988 s 1.
[50] *Director of Public Prosecutions v Collins* [2006] UKHL 40, [2006] 1 WLR 2223 [2227] [7] (Lord Bingham).
[51] Communications Act 2003 s 127(1).
[52] *Chambers v Director of Public Prosecutions* [2012] EWHC 2157, [2013] 1 WLR 1833 [1839] [21] (Lord Judge CJ).
[53] C Bakalis, 'Rethinking Cyberhate Laws' (2018) 27(1) Information and Communications Technology Law 86, 98.

namely the need for harm under the harm principle —[54] it undervalues the fact that it is by reason of the harm that the conduct has caused that it is criminalised. To this point, Von Hirsch contends that the state has a duty in resource protection. 'Resources' as per Von Hirsch and Simester, are things which people have a normative claim over, of which the maintenance of physical, psychological, and physiological health would arguably qualify.[55] The state has arguably failed to fulfil its duty[56] to maintain the physical, psychological, and physiological health of children (resources which children arguably have a normative claim over) by insufficiently protecting them from pro-self-harm content online in a way that would adequately consider the impact of such a communication.

Another more fundamental issue that accentuates this criticism is that the offences seemingly criminalise based on gross offensiveness and indecency, an aspect which Bakalis and the Law Commission have recognised and questioned.[57] In practice, guidance as to the meaning of these two terms is limited. The leading case of *Connolly* simply provides that they are to be given their ordinary English meaning,[58] and the CPS guidelines on social media communication prosecutions seem to appear a rather derivative source,[59] in that it simply repeats that gross offensiveness and indecency are ordinary English words.[60]

[54] H Stewart, 'The Limits of the Harm Principle' (2010) 4 Criminal Law and Philosophy 17, 18. The harms of pro-self-harm content online will be further explored in the third section of the article.
[55] A Simester and A von Hirsch, *Crimes, Harms and Wrongs: On the Principles of Criminalisation* (Hart Publishing 2011) 37.
[56] A von Hirsch, 'Harm and Wrongdoing in Criminalisation Theory' (2014) 8 Criminal Law and Philosophy 245, 250.
[57] Bakalis (n 53) 99; Law Commission, *Harmful Online Communications* (Law Com CP No 248, 2020) para 3.133.
[58] *Connolly v Director of Public Prosecutions* [2007] EWHC 237, [2008] 1 WLR 276 280 [10] (Dyson LJ).
[59] L Bliss, 'The Crown Prosecution Guidelines and Grossly Offensive Comments: An Analysis' (2017) 9(2) JML 173, 180.
[60] Crown Prosecution Service, 'Social Media – Guidelines on Prosecuting Cases Involving Communications Sent Via Social Media' (Crown Prosecution Service,

It is therefore difficult to conceive how the courts would approach pro-self-harm content online, given this lack of clarity. Whether various forms of pro-self-harm content online can be considered 'grossly offensive' or 'indecent' is an inherently subjective exercise,[61] based arguably on subjective value judgments. The Law Commission recognises this as an area of under-criminalisation,[62] and I would contend it is further reflective of the inadequacy and unsuitability of the existing law as a means of protection and redress from pro-self-harm content online.

This section has argued that the law has not afforded due consideration to these important issues, reflected in the inadequacy and unsuitability of the existing communication offences as a means of protection for children from pro-self-harm content online. The next section addresses the possible implications that greater regulation in this area could have on freedom of expression, and whether its harms play a pivotal role in tipping the balance.

3 Implications of Regulating Pro-Self-Harm Content Online on Freedom of Expression

The regulation of pro-self-harm content online through the criminal law raises pertinent questions, particularly whether such content should be protected under freedom of expression ('FOE'). This is important because FOE is considered as an integral pillar to society,[63] that serves the intrinsic value of facilitating the discovery of truth, enabling the proper functioning of a democratic society, and self-

2018) <https://www.cps.gov.uk/legal-guidance/social-media-guidelines-prosecuting-cases-involving-communications-sent-social-media> accessed 19 May 2022.

[61] G Reed and T White, 'Social Media Offences' (2014) 178 Criminal Law and Justice Weekly 539, 540.

[62] Law Commission, *Harmful Online Communications* (Law Com CP No 248, 2020).

[63] *Handyside v United Kingdom* [1976] 1 EHRR 737 (App no 5493/72) 754.

fulfilment/autonomy.[64] This section argues that pro-self-harm content online should not be protected based on FOE, because of the weight of countervailing factors supporting regulation.

3.1. Can Pro-Self-Harm Content Online Constitute 'Expression', and If So on What Basis Should Protection Be Justified?

Does pro-self-harm content online constitute 'expression'? An implied interpretation of 'expression', proposed by Pitaksantayothin, derived from Article 10(1) ECHR,[65] Article 19 UDHR,[66] and Article 19(2) ICCPR,[67] denotes the communication of ideas, opinions, and messages irrespective of the medium used.[68] Content online that encourages or advocates self-harm as a lifestyle may conceivably be regarded as an 'expression', as it satisfies the supposed need for a communicative ability.[69] Thereafter in the rest of this section, pro-self-harm content online will be referred to as pro-self-harm expressions online ('PSHEO').

Taking it further, it may also be viewed[70] as a form of expression that is 'performative' in the sense that to say something is to do

[64] F Schauer, *Free Speech: A Philosophical Enquiry* (Cambridge University Press 1982). Judicial weight given to freedom of expression can be seen reflected in Lord Steyn's dicta in *R v Secretary of State for the Home Department, ex parte Simms* [2000] 2 AC 115 125–26 and in Knowles J's dicta in *R(Miller) v College of Policing* [2020] EWHC 225 [2]–[3].
[65] European Conventions on Human Rights.
[66] Universal Declaration of Human Rights.
[67] International Covenant on Civil and Political Rights.
[68] J Pitaksantayothin, 'Regulating Sexually Explicit Content on the Internet: Towards Reformation of the Thai Regulatory Approach' (PhD thesis, University of Leeds 2013) 15.
[69] Schauer (n 64) 94–95; ibid 14.
[70] Similar to Langton's argument in the context of hate speech: R Langton, 'The Authority of Hate Speech' in J Gardner, L Green and B Leiter (eds), *Oxford Studies in the Philosophy of Law*, vol 3 (OUP 2018) 123.

something;[71] a 'speech act', as coined by MacKinnon.[72] As Waldron argues, speech acts may be harmful in themselves, or may have harmful consequences.[73] To this point, the Law Commission suggests that if the inherent nature of an expression is harmful or has the potential to cause harm, then the interference with freedom of expression will be easier to justify.[74] In considering whether PSHEO should be protected under the FOE, it is prudent to analyse these aspects and to consider two of the approaches towards the regulation of FOE.[75] The first approach is a balancing approach — this emphasises the importance of FOE but recognises its importance can ultimately be outweighed by considerations relating to the harm it causes. The second is a more content-based restriction approach, where the character of an expression may deprive it of the protection deriving from the FOE.[76]

A content-based approach may be appealing to those like Raz, who may adopt a moralistic view towards expression (as a proper form of exercising personal autonomy),[77] and to governments who are worried about an expression's communicative impact on the public.[78] However, one can appreciate the benefits of the balancing approach as propounded by Waldron — namely its inherent candour in involving a trade-off and in specifying the nature and importance of the values of each side of the balance —[79] in allowing a fairer appraisal of the issue case-by-case. Moreover, the balancing approach in part mirrors Mill's

[71] JL Austin, *How to Do Things with Words*, vol 1 (OUP 1976) 6, 12.
[72] C MacKinnon, *Only Words* (Harvard University Press 1993) 17.
[73] Whilst Langton makes this point in the context of hate speech, it is similarly applicable to pro-self-harm expressions online: J Waldron, *The Harm in Hate Speech* (Harvard University Press 2012) 38.
[74] Law Commission, *Harmful Online Communications* (Law Com CP No 248, 2020) para 2.14.
[75] Waldron (n 73) 145–46.
[76] ibid.
[77] J Raz, *The Morality of Freedom* (OUP 1988) 379–80.
[78] GR Stone, 'Content Neutral Restrictions' (1987) 54 University of Chicago Law School Chicago Unbound 46, 47, 57.
[79] Waldron (n 73) 147.

view on the principles that justify coercive interference with conduct (and therefore expression),[80] one of which is the requisite 'harm principle'. This denotes that coercive powers are rightfully exercised and thus justifiable only when their purpose is to prevent harm to others.[81] Given these considerations, I will proceed using the balancing approach, outlining respective considerations to be accounted for when balancing FOE with the necessity to regulate PSHEO.

3.1.1. The Prima Facie Case for Protecting PSHEO Expression

As a starting point, there is a prima facie case for protecting PSHEO as 'expression'. Of significant weight in this regard is the importance of respecting autonomy. Baker submits that respecting autonomy entails allowing each person to present themselves to others and, in turn, influence them as to their values, knowledge, or emotions.[82] Expressions, particularly speech, are integral in embodying people's power and capacity to present themselves —[83] expression performs a self-disclosing function.[84] Consequently, Baker posits that in any case where the law denies a person to use their expression to embody their views or values, the law does not treat them as having formal autonomy. Formal autonomy is a notion that encompasses, among other things, a person having the right over their minds (and thus

[80] LW Sumner, 'Criminalizing Expression: Hate Speech and Obscenity' in J Deigh and D Dolinko (eds), *The Oxford Handbook of Philosophy of Criminal Law* (OUP 2011) 20–21.
[81] JS Mill, *On Liberty* (E Alexander (ed), Broadview Press 1999) 52.
[82] C Edwin Baker, 'Harm, Liberty, and Free Speech' (1997) 70(4) S Cal L Rev 979, 992.
[83] C Edwin Baker, 'Autonomy and Informational Privacy or Gossip: The Central Meaning of the First Amendment' (2004) 21(2) Soc Phil & Pol'y 215, 218–19.
[84] Waldron (n 73) 164.

being able to decide what to say), if it does not interfere with the rights of others.[85]

PSHEO are reflective of the values of those who subscribe to advocating and encouraging self-harm as a lifestyle. To not afford it protection would be, according to Baker's autonomy argument, to not provide respect for their formal autonomy. To this point, Baker also argues that the legitimacy of the state is dependent on their respect for people's autonomy.[86] This argument is compelling, especially given that FOE is seen as serving the value of autonomy. Regardless, the protection of PSHEO under FOE must be considered in light of the harm it can cause.

3.1.2. Countervailing Factors Negating Protection Based on the Harms of PSHEO

Building further on the earlier argument that PSHEO should be of concern, internet use and accessibility to PSHEO perpetuate the normalisation of self-harming behaviours.[87] Through the process of social modelling, observed behaviours online are imitated[88] through the exchange of practices, techniques, and methods of concealment,[89] commonly known as the 'social contagion' effect.[90] This may entice individuals to take on more injurious methods of self-harm.[91] A factor

[85] Edwin Baker (n 83) 223, 225; C Edwin Baker, 'Autonomy and Hate Speech' in I Hare and J Weinstein (eds), *Extreme Speech and Democracy* (OUP 2009) 142.
[86] Edwin Baker, 'Autonomy and Hate Speech' (n 85) 142.
[87] N Jacobs, R Evans and J Scourfield, 'The Influence of Online Images on Self-Harm: A Qualitative Study of Young People Aged 16–24' (2017) 60 Journal of Adolescence 140, 1411–2; Boyd, Ryan and Leavitt (n 9) 14–15.
[88] A Khasawneh and others, 'Examining the Self-harm and Suicide Contagion Effects of the Blue Whale Challenge on Youtube and Twitter: Qualitative Study' (2020) 7(6) JMIR Mental Health 1, 2.
[89] Jacobs, Evans and Scourfield (n 87) 141.
[90] S Jarvi and others, 'The Impact of Social Contagion on Non-Suicidal Self-Injury: A Review of the Literature' (2013) 17 (1) Archives of Suicide Research 1, 2.
[91] Jacobs, Evans and Scourfield (n 87) 142–43.

that amplifies this social contagion effect arguably lies in the functionalities of common social networking sites such as the hashtag, which acts as a descriptor for individual content.[92] As Moreno's study indicates, self-harm related terms on social networking sites such as Instagram were often found to overlap with existing unrelated terms,[93] which could therefore facilitate accidental exposure.[94]

Feinberg says that a harmful act bears the tendency to cause harmed conditions in people,[95] with the notion of 'harm' encompassing, in part, the setting back, thwarting or defeating of a person's interest.[96] For example, consider an individual who posts PSHEO on social media to an audience which may be considered more vulnerable, such as children (an aspect which will be discussed and scrutinised in the following section). The audience then acts on the actions advocated by the PSHEO post on social media, resulting in physical injury. Following Feinberg, the act of the individual in posting PSHEO can be considered a 'harmful act' because it has the tendency to cause 'harmed conditions' — the injury to the audience's physical state. Harmed conditions in this example are not limited to physical injury but also arguably encompass impacts on the audience's psychology and physiology. To this point, as Feinberg defines a person's interest in '*X*' as being one's stake in '*X*'s well-being' (that is inseparable from the person's own well-being), it could be argued that PSHEO causes harm in the sense that it sets back one's welfare interest in maintaining one's physical health,[97] psychological health, and physiological health. However, if taken on its own, it is doubtful

[92] JA Fulcher, '#selfharn on Instagram: Understanding Online Communities Surrounding Non-Suicidal Self-Injury Through Conversations and Common Properties Among Authors' (2020) 6 Digital Health 1.
[93] MA Moreno and others, 'Secret Society 123: Understanding the Language of Self-Harm on Instagram' (2016) 58 Journal of Adolescent Health 78, 81.
[94] ibid.
[95] J Feinberg, *The Moral Limits to the Criminal Law Volume One Harm to Others* (OUP 1984) 31.
[96] ibid 33–34.
[97] ibid 37.

whether this would outweigh the importance of FOE as put forward in the autonomy-based argument. This is because adopting only harm-based considerations in this way lacks the nuances needed to appreciate the nature and issue of PSHEO holistically. Therefore, if one were to ground the argument based on harm further in philosophical considerations, particularly through a Millian perspective, then it could perhaps be afforded more weight.

Mill contends that if an opinion or idea is expressed in certain circumstances which cause that expression to represent a 'positive instigation to some mischievous act' — 'mischievous' seemingly in the sense of causing harm to others —[98] then restrictions on such expressions are justifiable.[99] Marshall contends that Mill distinguishes between 'discussions' and 'instigations', the latter denoting a 'speech act' that is closely connected with the act, so as to be considered a part of it.[100] According to Blasi, such a speech act encompasses the character of the speech, the intentions of the speaker and the propensity of the speech to induce listeners to act.[101]

This reading of Mill is relevant when considering why PSHEO should not be protected under FOE, upon applying Waldron's balancing approach. Taking first the distinction between 'discussions' and 'instigations', real-life examples prove instructive here. Illuminating examples, akin to those given in the Proposal,[102] include 'if you ate today shame on you dumb fuck',[103] accompanied by pictures of skinny and seemingly anorexic women. Others include 'literally how hard is it to understand that you're not supposed to eat? LIKE HOW HARD

[98] Mill (n 81) 101.
[99] V Blasi, 'Shouting Fire in a Theatre and Vilifying Corn Dealers' (2011) 39(3) Cap U L Rev 535, 542.
[100] G Marshall, *Constitutional Theory* (OUP 1980) 157.
[101] Blasi (n 99) 539.
[102] Law Commission, *Harmful Online Communications* (Law Com CP No 248, 2020) para 6.190.
[103] The user's account has been recently suspended by Twitter therefore I am unable to cite accordingly.

IS IT TO UNDERSTAND ARE YOU DUMB OR SOMETHING YOU FAT COW STOP EATING YOU UGLY HAG'.[104] I was able to easily locate these tweets through the use of pro-self-harm search terms such as 'promia' and 'proana'. These pro-anorexic expressions are indicative of a Millian 'instigation' rather than a 'discussion'. Those sending the tweets instigate to their followers, and others who may have discovered the tweets using such search terms as the above, to not eat and to stop eating. This is particularly evident in the way that the rhetorical questions, coupled with the demeaning adjectives used as linguistic devices, set out to induce and advocate listeners to (re-)engage in self-harming behaviour. Therefore, on a Blasi-Millian/Marshall-Millian interpretation, restrictions on such instigative expressions would be justifiable.

Lowe, however, suggests that demarcating the line between 'discussions' and 'instigations', especially within the digital realm, is a difficult task as the distinctions can be blurred.[105] He attributes this to the availability of mass communications, the ease with which ideas can be expressed, and the instantaneous nature of social networking sites.[106] Whilst Lowe's comments may be pertinent in challenging the use of the 'instigation/discussion' distinction above, I argue that, where PSHEO features characteristics like those in the examples provided, demarcating the line between 'discussions' and 'instigations' would not prove a difficult task, given the rather unambiguous meaning that it typically expresses. Regardless of these critiques, I nevertheless argue that it does not dilute the extent of harms caused by PSHEO. While I agree with Rowbottom's sentiment that some thought should be given to the 'low-level' nature of PSHEO in necessitating appropriate restrictions — 'low-level' in the sense they are expressed by a sole person or small group with little

[104] The user's account has been recently suspended by Twitter therefore I am unable to cite accordingly.
[105] JGG Lowe, 'Freedom of Artistic Expression Under Article 10 of the European Convention on Human Rights' (PhD thesis, University of Edinburgh 2016) 30.
[106] ibid.

preparation, little prior thought about the risks, and lacking in external oversight to smaller audiences —[107] it is debatable whether this is sufficient to warrant FOE protection. This is especially so when considering the countervailing factors negating protection based on the harms of PSHEO as discussed above.

3.1.3. Countervailing factors negating protection based on judicial approaches

It is also pertinent to consider the approaches that the courts have taken with regards to the FOE and protection from harm. A useful starting point is to consider the supposed implicit hierarchy of protection placed upon different types of expression and the 'value' of the different types of expression,[108] and to determine where PSHEO would fit within the hierarchy. There is value in an academic typology and hierarchy of different forms of expression in serving as a useful guide to assess the relative position of expressions, including PSHEO, and thereby inform assessments of the extent to which regulation of types of expression is appropriate or acceptable. This is despite the lack of an explicit *court-endorsed* typology and hierarchy,[109] with Article 10 ECHR instead employing the simple and non-differentiating term of 'information and ideas'.

A common hierarchy of the different type of expressions typically sees political expressions ranking the highest,[110] followed by artistic

[107] J Rowbottom, 'To Rant, Vent and Converse: Protecting Low Level Digital Speech' (2012) 71(2) CLJ 355, 371–76.
[108] ibid 368; D Harris and others, *Law of the European Convention on Human Rights* (3rd edn, OUP 2014) 629–30, 633, 636.
[109] R Clayton and H Tomlinson (eds), *The Law of Human Rights*, vol 1 (2nd edn, OUP 2009) 1459–60.
[110] *R (ProLife Alliance) v British Broadcasting Corporation* [2002] EWCA Civ 297, [2003] UKHL 23, [2004] 1 AC 185 224 [6] (Lord Nicholls); *TV Vest AS and Rogaland Pensjonistparti v Norway* [2009] 48 EHRR 51 [59]; *Campbell v Mirror Group Newspapers Ltd* [2004] UKHL 22, [2004] 2 AC 457 499, 500 [148] (Baroness Hale).

expressions,[111] commercial expressions,[112] gossip,[113] pornography,[114] and hate speech.[115] On its surface, PSHEO does not seem to obviously fit within any of the 'higher' value expressions that are afforded varying degrees of protection. With that said, however, there is potential scope for PSHEO to be regarded as a relatively high value expression, given that the hierarchy and typology highlighted is by no means determinative. As Voorhoof highlights, jurisprudence concerning Article 10 ECHR has a general tendency to be inclusive of broader types of expressions and thus broader levels of protection.[116] Furthermore, in *Handyside v the United Kingdom*,[117] the court emphasised that expressions protected under Article 10(1) are not limited to information or ideas that are inoffensive but also includes those that 'offend, shock or disturb', which certainly engages PSHEO.[118] This does challenge my argument that PSHEO should not be protected, because of the possibility that it could be included in the protection afforded by FOE within a broader scope of expression than the typology outlined. However, this does not necessarily defeat the overall argument that PSHEO should not be protected, because of the court's approach towards balancing FOE and protection from harm, as will be explored below.

Regarding the courts' approach towards balancing FOE and protection from harm, PSHEO have yet to be considered. Therefore, it would not be prudent to analyse the European Court of Human Rights'

[111] *Müller and others v Switzerland* [1991] 19 EHRR 212 225 [27]; *Otto-Preminger Institute v Austria* [1995] 19 EHRR 34 44 [50]; Harris and others (n 108) 633.
[112] *Markt Intern and Beermann v Germany* [1990] 12 EHRR 161; Harris and others (n 108) 636.
[113] *Campbell v Mirror Group Newspapers Ltd* (n 110) [149] (Baroness Hale).
[114] *Belfast City Council v Miss Behavin' Ltd* [2007] UKHL 19, [2007] 1 WLR 1420 1430 [28] (Lord Rodger).
[115] *Norwood v United Kingdom* [2005] 40 EHRR SE 111.
[116] D Voorhoof, 'Freedom of Expression under the European Human Rights System – From Sunday Times (No 1) v. U.K. (1979) to Hatchette Filipacchi Associes (Ici Paris) v. France (2009)' (2009) 2 Int Am & Eur Hum Rts J 3, 3–4.
[117] *Handyside* (n 63) 754.
[118] ibid 754.

assessment criteria with regards to compliance with Article 10.[119] Rather, a more useful indicium to explore how the courts would deal with such an issue would be to assess how the courts treat FOE and the legitimate aims that in part exempt protection.

The most pertinent aims in this context would arguably be, as the Law Commission suggests, the protection of health and the protection of the rights of others.[120] Regarding the latter, cases such as *Editorial Board of Pravoye Delo and Shtekel v Ukraine*[121] and *Delfi AS v Estonia*[122] indicate that the courts recognise the increased risk of harm posed by content on the internet to the exercise of the rights and freedom of others, comparative to the risk of harm posed by content on other mediums such as print media in the press. As this is an aspect which the court recognises, it could be said that, if the courts were to consider the preceding analysis as to the harms that such expressions pose, and the support derived from philosophical perspectives such as Blasi's and Marshall's reading of Mill,[123] the position that PSHEO should not be protected on the basis of freedom of expression through a harm-based argument would be strengthened.

The courts' approach to assessing whether any interference with expression is justified further supports this argument. This is because the court takes into account the nature and content of the expression, and the impact of the speech.[124] Concerning the nature and content of

[119] *Official Judgment Transcript of Karácsony and others v Hungary* [2016] 64 EHRR 10 (App no 42461/13) [13]–[16], [46]–[59].
[120] Law Commission, *Harmful Online Communications* (Law Com CP No 248, 2020) para 2.51.
[121] *Official Judgment Transcript of Editorial Board of Pravoye Delo and Shtekel v Ukraine* App no 33014/05 (ECtHR, 5 May 2011) [17], [63].
[122] *Official Judgment Transcript of Delfi AS v Estonia* App no 64569/09 (ECtHR, 16 June 2015) [57], [157].
[123] Blasi (n 99); Marshall (n 100).
[124] European Court of Human Rights, 'Guide on Article 10 of the European Convention on Human Rights: Freedom of expression' (European Court of Human Rights, 2020) <https://www.echr.coe.int/Documents/Guide_Art_10_ENG.pdf> accessed 19 May 2022, 97–8.

expression, the main criteria of whether interference with such expression is justified is dependent on whether the expression contributes to a debate of general interest.[125] Only where the expression does contribute to a debate of general interest will this have the effect of reducing the margin of appreciation.[126] Having regard to the nature of PSHEO, it is possible that it does not contribute to a debate of general interest, given the public health and internet safety concerns, especially in the context of children. When addressing the impact of the speech, the courts consider the vulnerability of the intended readership and those who have access to the expression. In *Handyside*, the Court assessed the justification for the interference of the publication of the *Little Red Schoolbook*, a book that was controversial because of the nature of its content (including sections on sex, masturbation, orgasm, intercourse and petting as well as pornography among others) against which action was brought under the Obscene Publications Act 1959 (as amended by the Obscene Publications Act 1964). In doing so, the Court placed particular importance to its intended readership, namely children and adolescents.[127] The Court reasoned that due to the direct style of the publication and certain sections advocating intercourse and petting as well as the benefits of pornography, children could interpret it 'as an encouragement to indulge in precocious activities harmful for them'.[128] Applying this to the present context, it is arguably indicative of how the courts might approach the issue of PSHEO. As the real-life examples above showcase, PSHEO can exhibit similar qualities to the publication in *Handyside*, as instigative speech acts with the capacity to encourage harm.

Therefore, taken cumulatively, the harm-based arguments against pro-self-harm expressions online being afforded protection on the basis of freedom of expression, and the courts' treatment of expression in

[125] ibid 97.
[126] ibid 96.
[127] *Handyside* (n 63) [52].
[128] *Handyside* (n 63) [52].

similar contexts, the hierarchal standing of different expressions, and the legitimate aims that exempt protection in part, outweigh the initially attractive appeal of the autonomy-based argument in favour of protection.

4 Conceptions of 'the Child' and the Legitimacy of Regulation?

The following section considers the basis on which children need protection from harm, and which conception of the child ought to be given precedence in justifying protection. I will argue that a rights-based conception of children ought to be a weightier influence in justifying protection compared with a vulnerability-based conception. While aspects to the vulnerability approach should be given due consideration as an influence to justify protection, its paternalistic conception is problematic compared to a rights-based conception, which ought to be afforded greater weight.

4.1. Conception of the Child as 'Vulnerable'

The concept of a 'child' varies temporally and is dependent on cultural and social perspectives. However, as Lansdown highlights, there is a consistency among these perspectives, in that children are viewed as 'vulnerable'.[129] It is a key feature in the Western conception,[130] rooted in the sixteenth–seventeenth-century protectionist model.[131] Today,

[129] G Lansdown, 'Children's Rights' in B Mayall (ed), *Children's Childhoods: Observed and Experienced* (The Falmer Press 1994) 33–4.
[130] PH Christensen, 'Childhood and the Cultural Construction of Vulnerable Bodies' in A Prout (ed), *The Body, Childhood and Society* (Macmillan 2000).
[131] F Kelly, 'Conceptualising the Child Through an "Ethic of Care": Lessons for Family Law' (2005) 1(4) Int JLC 375, 376.

this conception is most often found in policy frameworks.[132] For instance, the preamble of the United Nations Convention on the Rights of the Child (UNCRC) employs the notions that children are 'entitled to care and assistance'[133] and requiring 'special safeguards'.[134] This arguably reflects an emphasis on the vulnerability conception of the child and is indicative, to an extent, of the influence that this conception has had on the adoption of the UNCRC.[135] Such an emphasis is also reflected in case law. For example, Latey J in *re X (a Minor) (Wardship: Jurisdiction)* stated that children are particularly vulnerable and require 'especial protection' as 'they have not formed the defences inside themselves which older people have'.[136] The importance of the concept of vulnerability is therefore apparent, and perhaps accounts in part for its use as a justificatory tool for the range of extensive child protection laws, as well as criminal offences.[137] While appreciating and acknowledging that this is paramount, such claims ought to be explored beyond their face-value considerations. First, it is necessary to consider what is meant by the concept of 'vulnerability'.

4.1.1. Defining 'vulnerability'

Vulnerability as a concept is 'notoriously vague',[138] and the existing literature does little to elucidate the nature of vulnerability.[139] Yet the way that the concept tends to be presented rarely reflects this — often

[132] B Fawcett, 'Vulnerability. Questioning the Certainties in Social Work and Health' (2009) 52(4) International Social Work 473.
[133] United Nations, 'The United Nations Convention on the Rights of the Child' (n 3).
[134] ibid.
[135] J Tobin, 'Understanding Children's Rights: A Vision Beyond Vulnerability' (2015) 84(2) Nord J Int'l L 155.
[136] *Re X (a Minor) (Wardship: Jurisdiction)* [1975] Fam 47 [52] (Latey J).
[137] L Hoyano and C Keenan, *Child Abuse: Law and Policy Across Boundaries* (OUP 2010).
[138] J Herring, 'Vulnerability, Children and the Law' in M Freeman (ed), *Law and Childhood Studies: Current Legal Issues*, vol 14 (OUP 2012) 244.
[139] LA Weithorn, 'A Constitutional Jurisprudence of Children's Vulnerability' (2017) 69 Hastings LJ 179, 189.

vulnerability is presented as a concept with a fixed and universally applicable meaning.[140]

Schroder and Gefenas propose that vulnerability is the state in which one faces a significant probability of incurring identifiable harm while substantially lacking the ability and means to protect oneself.[141] The two facets of this definition (likelihood of harm materialising, and the capacity to protect oneself from harm) provide a sensible normative framework for determining whether third-party intervention is necessary for protection, especially within the digital realm. It reflects, in part, the theoretical development within nursing, of an 'etic' (externally evaluated) perspective to vulnerability;[142] where an individual's vulnerability is assessed in terms of the risk facing that individual, and any such intervention is justified on the basis that it constitutes a means of managing those risks by an objective standard.[143] The framework proposed by Schroeder and Gefenas does, though, have certain shortcomings. It lacks the requisite elements constituting the legal framework of the criminal law, namely the need for an *actus reus* and most importantly, *mens rea*. However, this should not detract from its potential use as a normative framework in supplementing the criminal law to facilitate adequate protection. This view can be supported when considering the forms of vulnerability typically considered by the courts, as distinguished by Weithorn.[144] These include (1) harm-based vulnerability — greater susceptibility to physical/psychological harm as a result of exposure to certain

[140] Fawcett (n 132).
[141] D Schroeder and E Gefenas, 'Vulnerability: Too Vague and Too Broad?' (2009) 18(2) Cambridge Quarterly of Healthcare Ethics 113, 117.
[142] J Spiers, 'New Perspectives on Vulnerability Using Emic and Etic Approaches' (2000) 31(3) Journal of Advanced Nursing 715, 716.
[143] MC Dunn, ICH Clare and AJ Holland, 'To Empower or to Protect – Constructing the Vulnerable Adult in English Law and Public Policy' (2008) 28(2) LS 234, 245; Spiers (n 142) 717.
[144] Appreciably Weithorn makes this point in an American context, however, following the sentiments like those of Justice Latey in *re X (a Minor) (Wardship Jurisdiction*), it could similarly apply to a UK context: Weithorn (n 139) 179.

stimuli;[145] (2) influence-based vulnerability — greater susceptibility to external influences, pressures or coercion;[146] and (3) capacity-based vulnerability — children having an immature decision-making capacity which hinders their capability to protect themselves from potential harms/dangers.[147]

It is not difficult to see how these categories could apply to children in the digital realm, especially given the added dimension of internet use and accessibility to pro-self-harm content online and the nature of such content. Another facet that arguably adds to these categories of vulnerability relates to the different roles that children adopt on the internet (which bears weight in the concerns of children's participation online).[148] Hasebrinks and others set out that these include the role as (1) a recipient of content and communication; (2) a participant — engaging in personal/peer communication and other materials; and (3) an actor in offering content or engaging in personal contact.[149] This enhances the argument in favour of vulnerability as a weighty influence because it contextualises children's multifaceted roles in the digital realm, which is pertinent when considering how regulation ought to protect children from PSHEO in practice.

Therefore, to an extent, it can be seen how definitional frameworks of vulnerability, the distinct types of childhood vulnerabilities, their applicability to children within the digital realm, and the different roles children adopt, may bear some significance in favour of the

[145] Weithorn (n 139) 203.
[146] Weithorn (n 139) 206.
[147] Weithorn (n 139) 209.
[148] JE Wilson and K McAloney, 'Upholding the Convention on the Rights of the Child: A Quandary in Cyberspace' (2010) 16(2) Child Care in Practice 167, 168.
[149] U Hasebrink, S Livingstone and L Haddon, 'Comparing Children's Online Opportunities and Risks Across Europe: Cross-National Comparisons for EU Kids Online' (EU Kids Online, 2008) 8 <http://eprints.lse.ac.uk/21656/1/D3.2_Report-Cross_national_comparisons.pdf> accessed 19 May 2022.

argument that vulnerability is a weightier influence to justify and necessitate protection.[150]

4.1.2. Problematising the conception of the child as vulnerable

Yet the perception of the child as vulnerable has certain consequences. This conception seemingly renders the child as an object rather than a subject, being subjected to an array of regulatory devices,[151] including the law, that through the development of social policies, shape the spheres of childhood.[152] Childhood has thus been regarded by some as 'the most intensively governed sector of personal life'.[153] The application of such regulatory devices to children can be rather paternalistic, albeit benevolently, in that they seek to protect children not from themselves but from harms caused by others — this is a 'presumptively non-blameable' kind of paternalism.[154] To an extent, the Proposal reflects this kind of paternalism by focusing on the harms that have been or are likely to be caused by a defendant's actions in sending or posting a communication online. With regards to whether this consideration ought to weigh against vulnerability, one must consider whether such paternalism can be justified and if so, what countervailing factors are in play.

Godwin proposes that for paternalism to be morally justifiable, the benefits accrued by children as 'subjects' — or indeed as 'objects' —

[150] G Lansdown, 'The Realisation of Children's Participation Rights' in B Percy-Smith and N Thomas (eds), *A Handbook of Children and Young People's Participation: Perspectives from Theory and Practice* (Routledge 2010) 16.
[151] NS Rose, *Governing the Soul: The Shaping of the Private Self* (Free Association 1999) 121.
[152] A James, P Curtis and J Birch, 'Care and Control in the Construction of Children's Citizenship' in A Invernizzi and J Williams (eds), *Children and Citizenship* (SAGE Publications 2007).
[153] Kelly (n 131) 377.
[154] Feinberg (n 95) 5.

must outweigh any detriment to their interests.[155] The main benefit of legally protecting children from PSHEO based on their perceived vulnerability is that it safeguards their physical, physiological, and psychological welfare. While normatively appealing, it is contestable whether this outweighs the potential detriments to children's interests. Most significantly, regulation denies children's agency by asserting that they do not possess comparable decision-making capacities and executive capacities to protect themselves from such harms that PSHEO poses and causes.[156]

These considerations are arguably weighty, as decision-making, and the executive capacities of children are influential factors that impact the balancing act,[157] and as Boyd observes, children often use the internet in ways that reflect their agency.[158] Therefore, omitting to include these capacities in a balancing assessment would fail to reflect a true assessment of the issue. It is nonetheless prudent to adopt a degree of caution in querying the extent to which children's digital literacy — while it might reflect their agency — can be relied upon for judicious navigation of the internet and to ensure they effectively protect themselves from the harm that PSHEO poses.[159] This is an issue beyond the purview of this article.

Thus far, this section has considered the consequences of, and issues with, perceiving children as vulnerable, and whether the resulting paternalism is justified. I argued that the potential detriments, including the paternalistic objectification of children, weigh against it, although it is by no means determinative of the normative debate. In

[155] S Goodwin, 'Children's Capacities and Paternalism' (2020) 24 The Journal of Ethics 307, 311.
[156] ibid 312.
[157] ibid 312.
[158] D Boyd, *It's Complicated the Social Lives of Networked Teens* (Yale University Press 2014).
[159] S Livingstone, 'Regulating the Internet in the Interests of Children: Emerging European and International Approaches' in R Mansell and M Raboy, *The Handbook on Global Media and Communications Policy* (OUP 2011) 506.

turn, this casts doubt as to whether it should be the preferred basis upon which children need protection from harm. Thus, it calls into question whether other conceptions should be considered as weightier influences.

4.2. A Rights-Based Conception of the Child

In recent years, there has been a gradual shift towards a conception of the child informed by a rights-based perspective.[160] This model emphasises that, instead of seeing children solely as vulnerable and lacking capacity, children have distinct independent rights,[161] which support their participation as active agents in influencing their lives.[162] As Nyamutata highlights, this model is reflective of one of the features of the emergent paradigm of childhood:[163] the important need for children to be seen as actively involved in how their own social lives are constructed, instead of being passive subjects of structural determinations.[164] This conception is similarly embedded within policy frameworks. The UNCRC represents the primary reference point for considering children's rights in the digital age —[165] Article 12 provides, inter alia, that state parties shall assure to the child who is capable of forming his or her own views the right to express those views freely in all matters affecting the child.[166] This is a clear

[160] C Barton and G Douglas, *Law and Parenthood* (Butterworths 1995).
[161] Kelly (n 131) 378.
[162] C Nyamutata, 'Childhood in the Digital Age: A Socio-Cultural and Legal Analysis of the UK's Proposed Virtual Legal Duty of Care' (2019) 27(4) IJLIT 311, 322; Lansdown (n 150) 16.
[163] Nyamutata (n 162).
[164] A James and A Prout (eds), *Constructing and Reconstructing Childhood: Contemporary Issues in the Sociological Study of Childhood* (Routledge 2015) 4.
[165] M Bulger and others, 'Where Policy and Practice Collide: Comparing United States, South Africa and European Union Approaches to Protecting Children Online' (2017) 19(5) New Media and Society 750, 751–52.
[166] United Nations, 'The United Nations Convention on the Rights of the Child' (n 3).

formulation of this rights-based philosophy,[167] which is pertinent to children's rights in the digital sphere for reasons explored below.

Among proponents of a rights-based conception of the child, there is a lack of a consensus as to its conceptual foundation.[168] This may bring into question whether it is prudent to consider this conception of the child, with academics in the children's rights literature hesitant to recommend regulating children's legal situations through a rights-based conception because of this lack of consensus.[169] I argue that the rights-based conception does warrant exploration as a counter to the conception of the child as vulnerable. This aligns with Quennnerstedt's call for a critical approach towards 'the consensus issue' — that is, the prevalent idea that there is a true norm, valid in all circumstances, that frames research concerning children's rights in a particular direction, thereby excluding or discouraging other avenues.[170] Using the rights-based approach as a counter to this tendency of consensus could, in turn, somewhat ameliorate the supposed propensity for rights-based conceptions to be viewed as a mere rhetorical device, as it has at times in the realm of human rights.[171] This is because of its capacity to serve an important expressive purpose and to draw out varying values compared to a vulnerability-based conception. Therefore, a useful starting point is to explore the strength of the case for a rights-based conception of the child.

[167] M Freeman, 'Towards a Sociology of Children's Rights' in M Freeman (ed), *Law and Childhood Studies* (n 138) 31.
[168] Tobin (n 135) 396.
[169] MR Arce, 'Maturing Children's Rights Theory from Children, With Children, Of Children' (2015) 23 International Journal of Children's Rights 283, 286.
[170] A Quennerstedt, 'Children's Rights Research Moving into the Future – Challenges on the Way Forward' (2013) 21 International Journal of Children's Rights 233, 237.
[171] D Kennedy, 'International Human Rights Movement: Part of the Problem?' (2002) 15 Harv Hum Rts J 101.

As Ferguson notes, the rights-based conception of the child can be argued to serve an expressive purpose.[172] This is because it recognises that children and their dignity as rights-holders are entitled to respect, and that children have agency as decision-makers.[173] This argument reflects an intrinsic belief in the value of the expressive purpose of a rights-based conception, derived from individuals' interest in integrity.[174] This subsequently could explain in part the rhetorical power which the discourse of rights is said to hold.[175] This is not to say that the conception of the child as vulnerable, in contrast, does not carry an expressive purpose. It arguably does so in signalling that aspects of children's vulnerabilities form a justifiable reason for the inclusion of vulnerability in the debate — although, as discussed above, this is not unproblematic. The conception of the child as vulnerable has been heavily relied upon in the development of law, policy, and practice,[176] arguably obscuring the utility of differing perspectives, which a rights-based conception of the child can offer. According to Bainham, a rights-based perspective has greater capacity to draw out and consider varying values than compared with a conception based on vulnerability.[177] In the context of children in the digital realm, akin to the argument made by Choudhry and Herring,[178] I would argue that this indicates the rights-based approach may justify protection more convincingly, as it is a comparatively less

[172] L Ferguson, 'Not Merely Rights for Children but Children's Rights: The Theory Gap and the Assumption of the Importance of Children's Rights' (2013) 21(2) International Journal of Children's Rights 177, 183.
[173] M Freeman, 'Why It Remains Important to Take Children's Rights Seriously' (2007) 15(1) International Journal of Children's Rights 5, 7–8.
[174] CR Sunstein, 'On the Expressive Function of the Law' (1996) 144(5) U Pa L Rev 2021, 2026.
[175] Kelly (n 131) 382; M Freeman, *The Rights and Wrongs of Children* (Frances Pinter 1983) 32.
[176] Lansdown (n 129) 35.
[177] A Bainham, 'Can we Protect Children and Protect Their Rights' (2002) Fam Law 279, 288.
[178] S Choudhry and H Fenwick, 'Taking the Rights of Parents and Children Seriously: Confronting the Welfare Principle under the Human Rights Act' (2005) 25(3) OJLS 453, 454.

constraining conception than a view of children founded on paternalistic grounds.

To this point, however, Ferguson has argued that the value of the expressive purpose in conceiving the child as a rights holder is contingent on evidence of improved outcomes for children in practice.[179] Paré in response emphasises that the relative effectiveness of a rights-based perspective does not detract from its supposed utility as one of the many tools used to improve children's lives.[180] While one can appreciate Paré's holistic perspective, a need for evidence of the effectiveness of the rights-based perspective's expressive purpose holds weight, to the extent that it demands more than just a rhetorical impact. Moreover, a measure of improved outcome provides a framework to judge the supposed utility of a rights-based perspective. In the context of children in the digital realm, providing such evidence of improved outcomes is not forthcoming as there are yet to be studies in this area. This deficiency however should not take away from the seeming influence of the expressive purpose of a rights-based perspective in the courts, albeit in a non-criminal law context. In the Commonwealth case of *Niu and Maple*, which concerned a child-residence dispute, Cleary J gave weight to the child's view of her ability to manage different parenting arrangements using technology and social media.[181] Simpson comments that this judgment sends the message that the use of technology permits children to claim agency, and he posits that digital communicative behaviour may play a part in shifting the boundaries of how judgments concerning children and children's decision making are made.[182] This aspect ought to count in favour of a rights-based perspective as a weightier influence, however, it does not hold the same normative force as empirical evidence of improved outcomes, which has not yet been forthcoming. It remains

[179] L Ferguson (n 172) 177, 186.
[180] M Paré, 'Children's Rights Are Human Rights and Why Canadian Implementation Lags Behind' (2017) 4(1) Canadian Journal of Children's Rights 24, 31.
[181] *Niu and Maple* [2014] FamCA 421 138–39 (Cleary J).
[182] B Simpson, *Young People, Social Media and the Law* (Routledge 2018) 54.

instructive in allowing us to consider how the Law Commission should approach the issue, but it remains wise to adopt a degree of caution for the same reasons given in the context of the conception of the child as vulnerable.

There is definite merit in Nyamutata's sentiment that striking a balance between the different conceptions of the child would be one way to resolve the issue of which conception should be a weightier influence in justifying protection from pro-self-harm content/expressions online. This is by no means simple, but is especially prudent given the issues with both conceptions, and the consequences that an imbalance between the two would pose,[183] as this section demonstrates. That is, whilst an overreaching and paternalistic approach of the vulnerability-based conception accounts for children's vulnerability — an especially pertinent aspect given the landscape and nature of PSHEO — it serves to undermine their autonomy and agency regarding their decision-making capacities. By contrast, sole focus on a rights-based conception, while respecting children's autonomy and agency, might result in children exposing themselves to harm and abuse.[184] Yet taken as a whole, there remains a strong case for the rights-based conception of the child to be considered as a weightier influence given its advantages relative to the conception of children as vulnerable.

5 Analysis of the Law Commission's Proposal

The preceding sections have examined the various issues pertaining to PSHEO. Yet to address such issues in a practical sense, they must be considered through an analysis of the Law Commission's Proposal. Therefore, this final section analyses whether the Proposal deals with the issues previously discussed in relation to the existing

[183] J Savirimuthu, *Online Child Safety Law, Technology and Governance* (Palgrave 2012) 3.
[184] ibid 4.

communication offences and could thus be regarded as a better and more sufficient means of protection for victims of PSHEO. It assesses whether the different conceptions of the child are considered in the Proposal as influences in justifying protection. While the Proposal appears to have addressed the inadequacies of the existing communication offences in some regard, I argue that it still falls short of being a sufficient means of protection for children. This is because of a lack of consideration towards the wider type of harms pertaining to PSHEO, the impact of harms on victims and the influence that different conceptions of the child could have on the overall assessment. Suggestions for improvement to the Proposal are therefore offered to ensure these concerns are addressed when considering legislative reform. It is important to note that the Law Commission has since published their final report, 'Modernising Communication Offences'.[185] The updated Proposal, among other recommendations, will be brought into law by the UK Government through the Online Safety Bill.[186] Thus, the following analysis will highlight areas where the updated Proposal differs from its original form.

The Proposal provides that: 'a defendant is guilty of an offence if he/she sends or posts a communication without reasonable excuse that was likely to cause harm to a likely audience and he/she intended to harm or was aware of a risk of harming a likely audience'.[187]

The focus of the offence on the propensity of communications to cause harm appears a positive step in ameliorating the deficiencies of section 1 of the MCA 1988 and section 127(1) of the CA 2003, in that it does not require the communication to be of a particular character

[185] Law Commission, *Modernising Communications Offences A Final Report* (Law Com No 399, 2021).
[186] Chris Philp, 'Update on the Law Commission's Review of Modernising Communications Offences' (UK Parliament, 2022) <https://questions-statements.parliament.uk/written-statements/detail/2022-02-04/hcws590> accessed 19 May 2022.
[187] Law Commission, *Harmful Online Communications* (Law Com CP No 248, 2020) para 5.49.

(neither grossly offensive, indecent or menacing). This is a better reflection of the state fulfilling its duty in resource-protection.[188] Yet the lack of consideration towards the impact of the communication on victims remains an aspect that leaves much to be desired, for the same reasons argued in relation to the existing offences. The updated Proposal in this regard has largely remained the same, except for the removal of the requirement that the defendant is 'aware of a risk of harming'. As such, the comments and criticisms similarly apply.

The Proposal also leaves much to be desired if one considers the harms, particularly physiological harms, that PSHEO causes to susceptible children. As highlighted in the article's second section, these include incidences of self-harm and suicide facilitated through the 'social contagion' effect and enhanced by social media platforms and functionalities. Cases like that of Molly Russell indicate that these harms are a considerable reality. Russell was a teenager who was known to have consumed PSHEO and who committed suicide in 2017, with her death linked to PSHEO and the social media algorithms on Instagram which perpetuate it.[189] To this point, however, the type of harms covered by the Proposal limits the extent to which such harms can be taken into consideration. While the Law Commission recognises that incidences of self-harm and suicide form part of physiological harms that can arise from harmful communications, the Proposal only covers emotional or psychological harms.[190] The Law Commission in their final report has sought to justify the narrow scope of harms covered (in the updated Proposal now only covering 'psychological harm amounting to serious emotional distress') on the basis that such harms represent the common denominator of harmful communications online and the concerns surrounding the increasing of scope of harms in this area of

[188] See von Hirsch (n 56).
[189] BBC, 'Instagram "helped kill my daughter"' (BBC, 2019) <https://www.bbc.co.uk/news/av/uk-46966009> accessed 19 May 2022.
[190] Law Commission, *Harmful Online Communications* (Law Com CP No 248, 2020) para 5.49.

criminal law and its impact on the foreseeability of harms as a consequence of a defendant's action.[191] The Law Commission's reasoning is appreciable to the extent that the updated Proposal looks to cover a wide range of harmful communications online and not only PSHEO.

With that said, as Barker and Jurasz put it, this aspect of the Proposal (and arguably of the updated Proposal as well), in adopting such a narrow approach to the type of harms, ignores the online-offline transference of harms.[192] I would argue that such criticism holds great weight in relation to the particular nature of PSHEO. As discussed in the third section, PSHEO represent 'instigations' that seek to induce/advocate behaviours to susceptible children, which arguably facilitates and amplifies such online-offline transference. While the updated Proposal falters in this regard, the Law Commission's proposal of a new offence that specifically targets the encouragement or assisting of self-harm amounting to serious harm, requiring proof that the defendant intended a specific result, is seemingly more reflective of the reality of especially extreme PSHEOs.[193] An in-depth analysis of this is beyond the scope of this article, however further scrutiny into this particular proposal ought to be considered. This consideration as to the narrow focus of the proposed offence is not to say that emotional or psychological harms are any less deserving of consideration than physiological harms. Rather, the current category of harms under the Proposal should be broadened to include physiological harms posed and caused by PSHEO, to improve the Proposal as a means of protection.

In relation to whether the Proposal considers the vulnerability and rights-based conceptions of the child as influences in justifying

[191] Law Commission, *Modernising Communications Offences Report* (Law Com No 399, 2021) 26.
[192] K Barker and O Jurasz, 'Reform of the Communication Offences – Consultation Response to the Law Commission' (2020) Open University 1, 4.
[193] Law Commission, *Modernising Communications Offences Report* (Law Com No 399, 2021) 216.

protection, section 5 appears the most pertinent part of the Proposal to this issue. It provides that the courts take into account the context of the communication sent or posted, which includes the characteristics of a likely audience when assessing whether the communication was likely to cause harm.[194] These characteristics include age,[195] which is certainly relevant to children.

The Law Commission, in the initial report, put forward that this is an encouraging facet of the Proposal as it acknowledges the importance of contextual factors in elucidating the harmful nature of a communication.[196] In their final report, the Law Commission echoed similar sentiments and took into consideration consultee responses to the effect that recognising and addressing context is crucial for ensuring the offence can effectively address the harms that victims experience. I agree with this stance. However, regarding children and PSHEO, I suggest that a more nuanced approach ought to be adopted. As argued in the fourth section, the rights-based conception of the child should be given more weight as an influence in justifying protection, although the conception of the child as vulnerable should not be overlooked in its entirety. This is an aspect that the Law Commission should consider and enunciate as part of their explanations for this section in relation to children and PSHEO. This is because first, it will signify that due appreciation and recognition is given to children as rights-holders, having the capacity to exercise agency in protecting themselves from PSHEO. Second, it also indicates that children's vulnerabilities as a likely 'characteristic of a likely audience' are also being considered because of the different types of vulnerabilities of children, children's internet use/accessibility, the different roles that children adopt online, and the strong influence that PSHEO has as a Marshall-Millian 'instigation'. I

[194] Law Commission, *Harmful Online Communications* (Law Com CP No 248, 2020) para 5.49.
[195] Law Commission, *Harmful Online Communications* (Law Com CP No 248, 2020) para 5.126.
[196] Law Commission, *Harmful Online Communications* (Law Com CP No 248, 2020) para 5.120.

appreciate that other contextual factors might also impact the assessment of whether PSHEO is likely to cause harm. Nonetheless, I would argue that accounting for both conceptions in the assessment under section 5 of the Proposal, with more weight given to the rights-based conception, would serve as a useful framework to address any overly paternalistic predispositions when it comes to children. If not, it is likely to realise and affirm the concerns of some consultees, including the Law Society, that there is potential for inconsistency in the courts' decision making.[197]

To summarise, the Proposal, in its initial and updated form, does address some issues with the existing communication offences. In this sense, it appears as a justifiable positive step towards protecting children from PSHEO. However, upon closer analysis I argue that its failure to adopt a more nuanced and expansive outlook on issues such as the type of harms, the impact of harms on victims, and the influence of different conceptions of the child indicate that, while it is a better means of protection, it is nonetheless insufficient.

6 Conclusion

The main aim of this article was to holistically address how the law should deal with PSHEO to effectively ensure appropriate protection for children. First, it analysed the inadequacies of the current existing communication offences as a means of protection from PSHEO, suggesting that further consideration to PSHEO needs to be given and that the Proposal ought to ameliorate such deficiencies. Drawing from this, it then argued that PSHEO should not be protected under freedom of expression. The article then demonstrated that the rights-based conception of the child should act as a weightier influence in

[197] The Law Society, *Law Society Response to the Law Commission Consultation Paper on Communications Offences* (The Law Society, 2020) <https://www.lawsociety.org.uk/campaigns/consultation-responses/law-commission-consultation-on-communications-offences-law-society-response> accessed 19 May 2022.

justifying protection from PSHEO, as it provides a more nuanced outlook to the wider issue beyond paternalistic grounds. The final section then encapsulated the previous discussions in assessing the Proposal as the current vehicle for reform, concluding that the Proposal is not currently a sufficient means of protection for children from PSHEO. The article suggested improvements to rectify these deficiencies. Therefore, the article has explored what the law should do to address the issue of PSHEO and how this should be achieved. Ultimately, the suggestions offered ought to only act as one piece to a much larger and incomplete puzzle of PSHEO and the protection of children, as it is an issue that necessitates a wider range of private actors working together in a pluralistic endeavour.

To What Extent Would a Problem-Solving Family Court Help Young Offenders Construct More Durable Pathways Out of Crime?

James Garrity

Abstract

This article considers the problem-solving family court put forward by Sir James Munby, then-President of the Family Court, in his 2017 Parmoor Lecture to the Howard League for Penal Reform. It utilises constructivist pathways — a heuristic device rooted in developmental criminology — as a normative framework with which to discern effective and counterproductive problem-solving practice. Identifying a target population for this problem-solving court and explaining why a therapeutic mode better encourages prosocial pathway construction, as compared to the existing Youth Court, it closely examines the Family Drugs and Alcohol Court (FDAC) model. The article details how problem-solving family courts already help parents to successfully navigate pathways to desistance, and applies learning from this jurisdiction and overseas to Sir James' prototype court and the inherent limitations of problem-solving practice.

1 Introduction

Problem-solving courts are used to address the causes of problematic behaviour, with each adapted to the specific needs of its target population. They share five core elements: tailored treatment programmes; recognising lifestyle factors; coordinating multiagency working; agreeing sentencing conditions with offenders; and judicial monitoring of rehabilitation.[1] Best practice is closely aligned with therapeutic jurisprudence, which holds that the legal process itself is a means of rehabilitating participants.[2] Similarly, its core principles map tightly onto key tenets of procedural justice.

For the purposes of this paper, a young offender is someone between the ages of ten and seventeen years old, who is formally charged with an offence.

Constructivist pathways are embedded in life-course developmental criminology and seek to create explanatory narratives around social processes and influences that motivate individual action.[3] Individuals negotiate social institutions, structural influences, and personal experiences to construct unique pathways, which may go into and out of crime.[4] Pathways towards crime are designated 'antisocial', while mainstream or desisting trajectories are 'prosocial'.[5]

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[1] Jennifer Ward, 'Problem-Solving Criminal Justice: Developments in England and Wales' (2018) 14(3) Utrecht L Rev 7.

[2] David Wexler, 'Therapeutic Jurisprudence: An Overview' (2000) 17 TM Cooley L Rev 125, 129.

[3] Alan France and Ross Homel, 'Societal Access Routes and Developmental Pathways: Putting Social Structure and Young People's Voice Into the Analysis of Pathways Into and Out of Crime' in Alan France and Ross Homel (eds), *Pathways and Crime Prevention: Theory, Policy and Practice* (Willan Publishing 2007) (*Pathways and Crime Prevention*) 9–11.

[4] Jeanette Lawrence, 'Taking the Developmental Pathways Approach to Understanding and Preventing Antisocial Behaviour' in *Pathways and Crime Prevention* (n 3) 27.

[5] Bears no relation to the statutory definition of 'antisocial behaviour' under the Anti-social Behaviour Act 2003.

This work is novel and interdisciplinary in nature, bringing a developmental criminology perspective to the problem-solving literature. Therapeutic jurisprudence is inherently multidisciplinary, and thus naturally suits the incorporation of another perspective, particularly one that can examine individual desistance.[6] The pathways approach moves the conversation beyond myopic and ill-suited measures of outcomes. Research examining sociological understanding of why someone ceases offending, is missing from the problem-solving approach in England and Wales, and in the US.[7] This paper's utilisation of constructivist pathways, which epitomise the long-term perspective essential to child first practice, goes some way to address that shortfall. While much ink has been spilt discussing the theory of problem-solving practice, there has been little on how to interpret its outcomes.[8] I hope that this paper will add a qualitative element to a body of research which is otherwise quantitative, that is inappropriate to analysis of desistance over the life-course.

At the core of the pathways' conceptualisation is the notion of failed transitions.[9] Children offend because the primary institutions of their early lives, home or school, did not equip them with the necessary skills to grow into productive, socially included adults. They stopped believing that they belonged and found in offending an alternative path. That cascade of failures, presided over by parents, teachers, and social workers, culminates in a young person in the docket, at the mercy of the criminal justice system. That is a collective failure, but the consequences of that failure are placed on the individual child. Society has a responsibility to rectify that series of oversights, not to condemn these hostages to circumstance. Problem-solving courts can

[6] Wexler (n 2) 128.
[7] Ward (n 1) 8.
[8] Kimberly Kaiser and Kristy Holtfreter, 'An Integrated Theory of Specialised Court Programs: Using Procedural Justice and Therapeutic Jurisprudence to Promote Offender Compliance and Rehabilitation' (2016) 43(1) Criminal Justice and Behaviour 45, 47.
[9] Lawrence (n 4) 37.

right communal wrongs. They could give young people the means of opening the doors that seemed closed to them, such that they can lead normal, fulfilling lives.

The most effective point to intervene in a developing criminal pathway is in the early to mid-teenage years.[10] Subsequently, effective youth justice interventions produce short- and long-term savings: the former in terms of fewer disposals, reducing demand on police, and custodial estate, resources. As pathways to persistent offending in adulthood are usually rooted in adolescent offending, the adult criminal justice system could see an appreciable drop in the frequency and seriousness of offending over time. A system that reintegrates offenders back into the community would lessen the burden on social services, while judge-led interventions could serve as a model for interagency coordination that prevents parallel working and resultant waste of strained resources.

The Carlile, Taylor and Lammy Reviews all demonstrate political will for problem-solving reform in the Youth Justice System (YJS).[11] Beyond Westminster, the Northamptonshire Youth Offending Service (NYOS) and FDAC illustrate the extent to which local authorities and practitioners can implement ambitious change on a local level. Thus, these findings are actionable even without legislation.

The discussion concerning the application of problem-solving principles has been generated by the 'paradox of success' — the idea that those who remain in the YJS have more complex needs. American evidence suggests that problem-solving approaches are most effective for high-risk offenders, thus this paper offers a model

[10] Lesley McAra and Susan McVie, 'Youth Crime and Justice: Key Messages from the Edinburgh Study of Youth Transitions and Crime' (2010) 10(2) Criminology & Crim Just 179, 190.

[11] Gillian Hunter and others, *Time to Get it Right: Enhancing Problem-Solving Practice in the Youth Court* (ICPR 2020) 2 <https://justiceinnovation.org/sites/default/files/media/documents/2020-06/time_to_get_it_right_final.pdf> accessed 27 May 2022.

for dealing with the most pressing issue in modern youth justice practice.[12] The Government has made enthusiastic noises around problem-solving practice in the Youth Court, though little has been done since.[13] Beyond the moral and utilitarian imperatives — remedying antisocial pathways in childhood could preclude a lifetime of offending — this paper seeks to revive the political momentum behind this mode of therapeutic jurisprudence. Problem-solving practice could serve adult offenders — in drug and domestic violence courts it already has — but Youth Justice is the movement's most effective vanguard. Its success could improve the argument and practice for wider application.

Furthermore, procedural justice holds that public perceptions of fairness are more important than those of effectiveness in establishing the legitimacy of a justice system and thus maximising compliance, giving further impetus to examinations of rehabilitative and therapeutic court models.[14] Not only are compassionate approaches — as opposed to punitive, deterrence-focused modes of justice — more morally legitimate as an exercise of state power over the individual, but they induce greater compliance with the law and its institutions. If we conceive of offending as behaviour rooted in alternative, antisocial pathways; deterrence should not be a primary objective of a YJS. The decision to offend is not an isolated choice in the moment, but the consequence of a lifetime of decisions, experiences, and socialisation. Antisocial pathways are inculcated by a failure to make the required

[12] ibid 12.[13] ibid 24.[14] Mike Hough and others, *Attitudes to Sentencing and Trust in Justice: Exploring Trends from the Crime Survey for UK* (LSE 2013) 13 <http://eprints.lse.ac.uk/50440/1/Jackson_Attitudes_sentencing_trust_2013.pdf> accessed 27 May 2022.

[13] ibid 24.[14] Mike Hough and others, *Attitudes to Sentencing and Trust in Justice: Exploring Trends from the Crime Survey for UK* (LSE 2013) 13 <http://eprints.lse.ac.uk/50440/1/Jackson_Attitudes_sentencing_trust_2013.pdf> accessed 27 May 2022.

[14] Mike Hough and others, *Attitudes to Sentencing and Trust in Justice: Exploring Trends from the Crime Survey for UK* (LSE 2013) 13 <http://eprints.lse.ac.uk/50440/1/Jackson_Attitudes_sentencing_trust_2013.pdf> accessed 27 May 2022.

transitions between developmental life periods, and one cannot simply revert to a prosocial access route for which they do not have the prerequisite competencies.[15] The YJS should seek to facilitate the personal and common turning points that allow for long-term desistance, offering the young offender a chance to construct a pathway out of crime.

There is a concerning ignorance of criminological theory in criminal justice practice.[16] As the discipline is concerned with explaining and understanding offender behaviour, this seems a critical deficit. If the object of criminal justice systems is the reduction of aggregate harm and the appreciation of a collective social product, we must seek to engage theory to understand how and why legal processes effect the outcomes that they do. To do so, this paper will utilise developmental criminology to understand the effect of legal processes across the life course. If policy makers are concerned with efficacy and not ideology, this is where they should start — looking through the lens of what we know to work and why.

That lack of professional literacy must go some way to explain the narrow focus on recidivism, which is inexplicably retained in the academic literature. The success of welfarist systems can only be judged over the long term.[17] Most studies on specialised courts still focus on recidivism, though this has begun to change.[18] Critically, measures of reoffending claim objectivity where there is none.[19] Policy makers can set the terms of reference to serve their own ends; narrow the definitions to assert success or widen their scope to justify reform.[20] Recidivism is not a measure of rehabilitation or

[15] Lawrence (n 4) 47.
[16] Stephen Case and Kathy Hampson, 'Youth Justice Pathways to Change: Drivers, Challenges and Opportunities' (2019) 19(1) YJ 25, 34.
[17] McAra and McVie (n 10) 200.
[18] Kaiser and Holtfreter (n 8) 58.
[19] Tim Bateman and Alexandra Wigzell, 'Exploring Recent Trends in Youth Justice Reconvictions: A Challenge to the Complexity Thesis' (2020) 20(3) YJ 252, 256.
[20] ibid 253.

reintegration.[21] Instead, it is an absence of detected antisocial behaviour. It neither indicates that the person in question has ceased offending — as most criminality is undetected — nor that they have established or maintained a prosocial trajectory by going into education or work, starting a family, or desisting from substance misuse.[22] It is not an appropriate measure of success for a rehabilitative system of justice, as it says nothing meaningful about the outcomes of its processes. The constructivist pathways normative framework, outlined below, offers a better understanding of how justice systems should be modified to effectively rehabilitate and reintegrate their subjects.

Constructivist pathway theory is rooted in developmental criminology, conceiving life as constituted of distinct developmental stages.[23] Each stage has associated developmental tasks — the behaviours and competencies that one must acquire to successfully 'transition' to the next stage. Developmental stages are governed by a primary social institution (school, work) which communicate these tasks.[24] The pathway is a heuristic device for charting and interpreting the choices made by individuals in relation to these institutions, developmental transitions, and their unique trajectory through life.[25]

People cannot be understood either as entirely independent of, or subject to, social forces. Pathways are constructed within societal access routes. These broad routes are perceived differently by different people, depending on their local cultural context.[26] This context can determine which pathways are considered acceptable, and 'not for me'.[27] Those brought up in deprived communities, exposed to

[21] McAra and McVie (n 10) 184.
[22] Bateman and Wigzell (n 20) 253.
[23] France and Homel (eds), *Pathways and Crime Prevention* (n 3) 3.
[24] Lawrence (n 4) 33.
[25] ibid 28.
[26] France and Homel, 'Societal Access Routes and Developmental Pathways' (n 3) 13, 20.
[27] Jacqueline Goodnow, 'Adding Social Context to Developmental Analyses of Crime

high levels of crime will negotiate and construct their pathways in relation to that crime.[28] Crime is a natural feature of life, and thus not taboo. Criminal behaviour is an option.[29]

Antisocial pathways are an alternative to conventional access routes. They become attractive when people fail to progress through typical, prosocial transitions.[30] Falling back on redundant behaviours ill-suited to a new institutional context, young people find themselves in a 'person-by-institution bad fit'.[31] Antisocial pathways exist as the only structure for those in this position. Often, offending and substance-misuse manifest through boredom, an alternative form of leisure for persistent truants and those excluded from school.[32] As young people find initial success in these easily mastered activities, they fall into antisocial pathways. Subsequently, life period tasks form the backdrop of movements into and out of crime.[33]

Several factors can facilitate antisocial pathway construction.[34] Chief among these are tightly bonded social networks based on an immediate locale of family and street.[35] In contrast to peers whose networks are built around primary social institutions like school and college, children with tight social networks often report an apathetic and fatalistic outlook on their futures.[36] Where networks contain other young offenders, they can draw children into and maintain criminality.[37] As tighter networks do not yield the opportunities of a

Prevention' in *Pathways and Crime Prevention* (n 3) 56.
[28] France and Homel, 'Societal Access Routes and Developmental Pathways' (n 3) 20.
[29] Goodnow (n 28) 57.
[30] Lawrence (n 4) 38.
[31] Lawrence (n 4) 36.
[32] Colin Webster and others, *Poor Transitions: Social Exclusion and Young Adults* (Policy Press 2004) 29.
[33] Lawrence (n 4) 37.
[34] Hazel Kemshall and others, 'Young People, Pathways and Crime: Beyond Risk Factors' in *Pathways and Crime Prevention* (n 3) 89.
[35] ibid 97.
[36] ibid 98.
[37] Webster and others (n 30) 30.

diverse social network, people have fewer opportunities to move away from a social group facilitating escalating offending behaviour; and often they do not want to.[38] Young offenders are caught in a state of 'risk stagnation', where they refuse to believe that they can change their situation.[39] Instead, they commit to an antisocial pathway, supported by a social scaffolding helping them develop criminal proficiencies and entrench patterns of antisocial behaviour.[40]

However, pathways are not deterministic. Changes in direction are to be expected and are conceptualised as turning points.[41] These can be typical life period transitions, such as moving away from home or committing to a relationship, or intensely personal, like bereavement; they occur when someone 'comes to a consciousness-raising decision that triggers a change in orientation and direction'.[42] The effect of critical moments is entirely unpredictable, dependent on the person in question and their position in their life-course.[43]

Interventions, therefore, must seek to facilitate these turning points. The purpose of any rehabilitative justice system, particularly problem-solving justice — rooted in the therapeutic jurisprudential doctrine that crime is the consequence of underlying problems that should be remedied by courts — is long-term desistance from crime.[44] Pathways literature outlines how we can make future offending less likely. If we conceive of antisocial behaviour as a consequence and magnifier of failed prosocial transitions, then we must address their root causes: tightly bonded, locality-centred association, school exclusion,

[38] ibid 30.
[39] Kemshall and others (n 35) 98.
[40] Goodnow (n 28) 59.
[41] Lawrence (n 4) 40.
[42] Lawrence (n 4) 41.
[43] Robert MacDonald, 'Social Exclusion, Youth Transitions and Criminal Careers: Five Critical Reflections on 'Risk'' in *Pathways and Crime Prevention* (n 3) 121.
[44] Bruce Winick, 'Therapeutic Jurisprudence and Problem-Solving Courts' (2003) 30 Fordham Urb LJ 1055.

personal trauma, and early childhood abuse.[45]

Systems need to tackle why the offender failed to transition and promote prosocial pathway construction going forward. The former may involve counselling or training, or directing institutional-personal change, like moving schools or prohibiting contact with certain peers; in order to allow a child to break away from locality-based networks.[46] Once the scaffolding supporting an antisocial pathway has been removed, the disposed needs the tools to construct a prosocial one. In the same way that social bonds can maintain engagement in illegal activity, they can motivate engagement in the tasks of school and work by seeding and reinforcing values.[47] Sustaining social systems like work and close personal relationships alter negative pathways and maintain positive ones.[48] A simpler way of asking whether an intervention induces an offender to construct prosocial pathways, is to ask if it will help them build what we recognise as a 'life' — with its trappings of work and partnership. Problem-solving interventions need to facilitate skill acquisition, prosocial network development and institutional engagement necessary for navigation of a conventional, prosocial pathway.

Consequently, I will assess the durability of pathways out of crime facilitated by existing and proposed justice systems by the extent that they –

(1) Move offenders away from antisocial pathways; and
(2) Facilitate turning points and provide offenders with opportunities to construct prosocial pathways.

[45] Lawrence (n 4) 46.
[46] Per Breanna Boppre, Emily Salisbury and Jaclyn Parker, 'Pathways to Crime' in Henry Pontell (ed), *Oxford Research Encyclopaedias: Criminology and Criminal Justice* (OUP 2018) 8. Self-efficacy refers to the personal confidence or ability to achieve specific goals.
[47] Goodnow (n 28) 59.
[48] Alan Hayes, 'Why Early in Life is Not Enough: Timing and Sustainability in Prevention and Early Intervention' in *Pathways and Crime Prevention* (n 3) 214.

Recognising that pathways are distinctly individual constructions, built on experience and sociocultural influences, systems that are less prescriptive and allow for bespoke interventions will be considered more likely to achieve these two objectives.

It is by this rubric that I argue that a problem-solving court — situated within the expanded jurisdiction of the Family Court — *will* help young offenders construct more durable pathways out of crime. This paper will explore why the Youth Court consistently fails to alter emergent pathways; and examine the extent to which nascent problem-solving bodies like Youth Referral Order review panels are improving YJS outcomes. It will move on to analyse public child proceedings, with a particular focus on the Family Drug and Alcohol Courts — a problem-solving court already operating within the Family Court. In examining how it aids pathways to desistance, analogous to pathways out of crime, this paper will demonstrate that tailored FDAC interventions cultivate higher levels and sustainability of desistance. It will further draw out how to better implement problem-solving justice in the Family Court context. Finally, analysis of pathways produced by the existing YJS, problem-solving and child-focused practice, will be synthesised to critically evaluate whether Sir James' proposals would manifest lasting pathways out of crime.[49] Additional comment is made on practical issues of implementation. While problem-solving justice is no panacea, there is compelling reason to look at its application beyond young offenders.

[49] Sir James Munby was President of the Family Division of the High Court from 2013 to 2018.

2 Does the Youth Court Fail to Facilitate Pathways Out of Crime for the Most Serious Offenders?

> 'Children's participation in the Youth Court remains an aspiration rather than a reality.'[50]

The modern Youth Court is a creature of compromise. Formerly the Juvenile Court, it was created by the Children Act 1908 with joint civil and criminal jurisdiction; the former was spun off into the Family Court by the 1989 Act.[51] It acquired its contemporary moniker and mission — preventing offending while having regard to the welfare of the young person — through the Criminal Justice Act 1991.[52] Its caseload has fallen by three quarters over the last decade.[53] Simultaneously, the 'paradox of success' has meant that those who remain are the most serious offenders, ones to whom a diminished Youth Court struggles to deliver basic services in a timely manner.[54] While the notion that this 'hard core' reoffend at higher rates is unsubstantiated, they are demonstrably subject to severe hardship.[55] They are disproportionately in care, poor and victims of childhood abuse, with high incidences of mental health and learning difficulties.[56] That is sadly inevitable; antisocial pathways follow from structural and relational adversity early in life.[57] A narrative promulgated by the Carlile and Taylor inquiries, that the Youth Court is structurally incapable of helping those children navigate pathways out of offending, continues to gain steam.[58] The extent to which it is a

[50] Tim Bateman in Hunter and others (n 11) iii.
[51] Stephen Case, *Youth Justice: A Critical Introduction* (Routledge 2018) 30, 156.
[52] ibid 157; Bowen and Whitehead (n 12) 25.
[53] Hunter and others (n 11) 2.
[54] ibid 31, 33.
[55] Bateman and Wigzell (n 20) 263.
[56] Hunter and others (n 11) 6.
[57] McAra and McVie (n 10) 189.
[58] Charlie Taylor, 'Review of the Youth Justice System in England and Wales'

political construction is immaterial: 64 per cent of children subject to Youth Rehabilitation Orders (YROs) and 69 per cent of those sentenced to custody reoffend within the year.[59] These metrics, though flawed, are indicative of a failing system.

The 'complexity thesis' refers to the consensus among youth justice professionals that children in their charge are in more acute need than previous cohorts, and has been employed to explain away the decline in positive contact outcomes.[60] Practitioners report higher rates of mental health and cognitive problems, and more difficult backgrounds, characterised by family breakdown and intergenerational offending.[61] This narrative has been accepted with little interrogation.[62] Although these accounts *are* representative of the complex pathologies of repeat offenders, the problems are not new. Such accounts reflect the concentrated need that has always been present in children that offend. A cultural shift regarding the discussion of mental health and socio structural inequalities, has meant that children and professionals are more willing to discuss these issues openly.

Children who persistently offend have always been victims of multifaceted disadvantage.[63] It is only now that we are ready to recognise this fact. Young offenders have always been ill-served by a Youth Court insufficiently adapted to their needs; that emphasises punishment over rehabilitation. However, we must draw a distinction between the success of the diversionary whole and the outcomes of Youth Court contact. The latter have worsened as the number of children processed has fallen from its 2007–08 peak. This further supports the notion that Youth Court disposals are counterproductive for persistent serious offenders.

Ministry of Justice (Cm 9298, 2016) 8.
[59] Case and Hampson (n 17) 29; Taylor (n 59) 3.
[60] Bateman and Wigzell (n 20) 255.
[61] Hunter and others (n 11) 12.
[62] Bateman and Wigzell (n 20) 255.
[63] McAra and McVie (n 10) 185.

Taylor and others describe an environment that alienates young people, preventing the voluntary and informed engagement needed for legal processes to have prosocial outcomes.[64] Youth Courts operate as modified adult criminal courts. Observers report children find it difficult to communicate and to understand their sentences, which is compounded by a culture of allocating junior advocates who do not have the experience to explain it to them.[65] Alienation only diminishes self-efficacy and further pushes offenders along antisocial trajectories, compromising their perception of the court's legitimacy and thus willingness to comply with orders, as well as colouring their view of other social institutions. Youth Courts entrench antisocial pathways by imposing stigmatic and legal barriers to prosocial engagement. Custodial sentences isolate children from family and concentrate the influence of antisocial peers.

Taylor highlighted the plight of a girl subject to an electronic-tag curfew. She missed her curfew by seventeen minutes, but the court was only capable of determining her guilt or innocence.[66] He argued that it was indicative of a court lacking the flexibility to meet the needs of young offenders. Both the Carlile and Taylor reviews thus recommended the implementation of problem-solving, judicial monitoring approaches — the latter in the shape of Scottish Children's Hearings — to better coordinate interventions and support.[67] Taylor's Children Panels were explicitly problem-solving bodies, which left findings of guilt to the Youth Court, assuming responsibility for developing plans of rehabilitation in lieu of sentencing.[68] Although Taylor's recommendations have seen little uptake, the enthusiasm for problem-solving has remained among practitioners.[69] The most prominent of these locally-led efforts are the YRO Review Panels,

[64] Winick (n 45) 1072.
[65] Taylor (n 59) 27.
[66] ibid 28.
[67] Hunter and others (n 11) 8; Taylor (n 59) 30.
[68] Taylor (n 59) 32.
[69] Case and Hampson (n 14) 29.

which seek to implement the essence of problem-solving practice in post-sentencing monitoring.

Problem-solving courts have antecedents in tribal systems of justice and welfarist juvenile courts, pioneered in America at the turn of the twentieth century.[70] Their modern incarnation arose in Florida in 1989, where traditional sentences were doing little to restrain an overwhelming caseload of non-violent drug offences.[71] All subsequent courts have materialised in that context — when adversarial courts fail to resolve problems that animate recurrent offending amongst certain groups.[72] They have expanded into disparate specialisms like domestic violence, indigenous communities, and mental health.[73] Through its interactions with the latter, problem-solving courts have taken on the substance of therapeutic jurisprudence, which emphasises legal processes' capacity to act as rehabilitative or 'therapeutic' agents. It sees law and practitioners as social actors, and considers how processes can be modified to aid recovery.[74] Subsequently, problem-solving approaches are inherently malleable. They adapt the model to serve the needs of the target group, utilising specialised settings and staff.[75] Therapeutic jurisprudence seeks to incorporate developments from psychology, criminology, and social work literature to enhance the therapeutic potential of the law.[76] The judge is central to the problem-solving court. There they are is not a neutral arbiter but the leader of a team.[77] This is particularly valuable in treating children, who benefit immensely from having a constant authority figure that communicates care, throughout the ups and downs of rehabilitation.[78]

[70] Natasha Bakht, 'Problem Solving Courts as Agents of Change' (2005) 50 Crim LQ 224, 225; Winick (n 45) 1056.
[71] Winick (n 45) 1056.
[72] Bakht (n 71) 227.
[73] ibid 247.
[74] Wexler (n 2) 127.
[75] Bowen and Whitehead (n 12) 6.[76] Kaiser and Holtfreter (n 8) 48.
[76] Kaiser and Holtfreter (n 8) 48.
[77] Bakht (n 71) 252.
[78] Joanna Adler and others, 'What Works in Managing Young People Who Offend? A

Continuity is essential, and part of the five components of therapeutic jurisprudence, outlined by Winick and Wexler:

- ‘Ongoing judicial intervention;
- Responsiveness to behaviour;
- Integration of treatment services with judicial case processing;
- Multidisciplinary involvement; and
- Collaboration with communication-based and government organisations.’[79]

While specialised courts emerged separately from therapeutic jurisprudence, modern best practice incorporates its principles.[80] In spite of problem-solving’s theoretical agnosticism, Kaiser and Holtfreter argue that its positive effects can be understood through a model integrating the core of Wexler’s jurisprudence and the essence of procedural justice.[81] Judicial monitoring, the salient element in court-centred rehabilitation, creates a relationship of trust that improves engagement and enhances compliance with the wider justice system. Participants feel that they have been ‘heard out’ and that impression of fairness translates to feeling that the system and its decisions are legitimate.[82] Problem-solving justice is effective in part because welfarist courts are perceived to be fair. Research indicates offender compliance is contingent more on perceptions of fairness than efficacy; prima facie, the effective justice system is the one people comply with.[83] Feelings of group belonging are not nuanced.[84] How a young person feels about authority correlates with their willingness to engage in the life-stage institutions and activities that embed prosocial pathway progression. Alternatively, if a young person feels the state is indifferent and arbitrary, they are likely to

Summary of the International Evidence’ (Ministry of Justice, 2016).
[79] Kaiser and Holtfreter (n 8) 56.
[80] ibid 45.
[81] ibid 47, 56.
[82] Bowen and Whitehead (n 12) 5.
[83] ibid.
[84] Kaiser and Holtfreter (n 8) 50.

experience 'risk stagnation' that will push them towards antisocial associations and behaviours.[85] Problem-solving courts can thus be understood through the transposition of these two theories: they work when they reflect the essence of therapeutic jurisprudence and procedural justice. These principles embody effective practice because they encourage prosocial engagement and identification.

Pathways can determine whether practices are therapeutic, in a process seeking to facilitate desistance from crime. Judges should take pains to ensure that participants do not feel coerced, treating them with dignity and respect. They should persuade, allowing participants the psychological benefits of the perception of choice.[86] Motivational interviewing techniques empathetically highlight discrepancies between an individual's behaviour and their underlying goals, creating motivation for change.[87] For treatments to be effective, people must recognise that they have a problem. Judges can assist with, not solve those problems.[88] This is particularly important when we consider that 'risk stagnation' is manifested by a sense of powerlessness and a lack of choice. For participants to move forward, they must develop a sense of agency through the problem-solving process. Mandating treatment is antithetical to that goal and thus facilitating a pathway to desistance. More recent evidence concerning the outcomes of mandatory drug treatments and community supervision orders indicates that this is as much an issue of framing. Giving participants the option of returning to court, however undesirable, is enough to create the important illusion of choice.[89]

Youth Referral Order Review Panels have been successful insofar as they implement problem-solving practice, but limitations borne of the law and its status as a local initiative have restrained it from realising

[85] Kemshall and others (n 35) 127.
[86] Winick (n 45) 1077.
[87] ibid 1081.
[88] ibid 1067.
[89] ibid 1074.

its full potential. The NYOS first introduced panels in response to Lord Carlile's call for age-appropriate modifications to criminal justice processes.[90] The freedom allotted to Youth Offending Teams in designing local service delivery, allowed for the pilot scheme to take place without Westminster involvement. The panels were designed to address a perceived lack of engagement with YROs.[91] Such orders task local services with overseeing retributive and reparative undertakings in the community, while resolving a young person's criminogenic needs and supporting participation in education or work.[92] The NYOS utilised a problem-solving approach, bringing magistrates onto premises to engage with young people directly; to acknowledge the small steps taken against adversity towards a law-abiding life.[93] In informal settings, magistrates use motivational interviewing to draw out problems in the home, education, employment or with their mental or physical health — including substance abuse problems — coordinating solutions with attending care workers and parents, to aid the successful completion of orders.[94] Magistrates receive training in these techniques and in accommodating mental health or learning difficulties.[95] Participants, whose disadvantaged backgrounds contributed to their difficulties with compliance, attributed positive outcomes to the panels, like school reengagement or successful apprenticeships.[96] Magistrates felt the environment allowed young people to communicate the reality of their lives and how much help they needed to get back on track.[97] They congratulated defendants on work done but held them to account when promises remained unfulfilled.[98] Unfortunately, magistrates can

[90] Ward (n 1) 13.
[91] Jenni Ward and Kathryn Warkel, 'Northampton Youth Offending Service Review Panel Evaluation' (Middlesex University, 2015) 4.
[92] ibid.
[93] ibid 5, 6.
[94] Ward and Warkel (n 92) 10; Lawrence (n 4) 46.
[95] Ward and Warkel (n 92) 8.
[96] ibid 14.
[97] ibid 15.
[98] Hunter and others (n 11) 29.

only take part in a personal capacity, because the provision in the Criminal Justice and Immigration Act 2008 to have courts carry out periodic reviews has not been commenced.[99]

Though taken from a small evaluative base, YRO panels have had documented success in encouraging prosocial engagement that builds pathways out of crime.[100] Interviewed participants expressed a simple desire for social inclusion: 'I want a job; I want to get a place to live' said one, attributing past offending to having too much time on his hands.[101] Antisocial routes become attractive when conventional access routes are perceived to be beyond reach.[102] The time children would have spent in school, if not for truancy or exclusion, is monopolised by antisocial peers who engage in and enable delinquency as a form of leisure. Filling that time with education or training separates young people from prolonged and concentrated pressure to offend. They develop indispensable skills, acting to motivate and sustain prosocial pathways. Another participant secured a catering apprenticeship through the YOS. The work made him happier, giving him purpose and routine that he needed to break his patterns of acquisitive offending.[103] Magistrates conveyed that continued success would allow them to seek an early end to his order. These incentives are powerful as they give the young person agency in the rehabilitative process, which helps remedy a lack of self-efficacy common to antisocial pathways. In encouraging children to recommit to education and training, the YRO panels reintegrate young people and bestow personal agency sorely lacking in more retributive community sentencing.[104]

Problems remain where panels are constrained by limited legal authority, notably in coordinating local authority agencies. Artificial

[99] ibid 28.
[100] ibid 30.
[101] Ward and Warkel (n 92) 12.
[102] Lawrence (n 4) 38.
[103] Ward and Warkel (n 92) 13.
[104] ibid 15.

delineations in provision and a culture of 'passing the buck' have created parallel systems in and outside YOSs.[105] This failure of cohesion obviously wastes scarce resources but increases the risk that young people will fall between the gaps, isolating them when they need support. Hunter had to recommend that social service case workers be compelled to attend the hearings of children in their charge.[106] Clearly there is a vacuum of interagency coordination and accountability, that problem-solving judges could fill, but volunteer magistrates cannot exercise their powers outside of court. Even in court, where judges can order children's services to carry out investigations, they rarely do so.[107] If a problem-solving court is to be successful, it must allot more substantial powers to judges in their guise as a nexus of joined up working and train them to use those powers routinely.

3 Do Problem-Solving Family Courts Generate Sustainable Pathways Out of Trouble?

> 'The essence of FDAC is that a specially trained judge, backed by a multidisciplinary specialist team working with other professionals, uses regular court reviews without lawyers present as the problem-solving forum for engaging parents in tackling problems that put their children at risk of harm.'[108]

The Family Drug and Alcohol Court (FDAC) is an alternative to ordinary care proceedings involving substance misuse.[109] Introduced in response to the 2003 report *Hidden Harm*, highlighting widespread

[105] Hunter and others (n 11) 27; Taylor (n 59) 14.
[106] Hunter and others (n 11) 28.
[107] Children Act 1989 s 38(6).
[108] Jo Tunnard, Mary Ryan and Judith Harwin, *Problem Solving in Court: Current Practice in FDACs in England - Final Report* (Lancaster University 2016) 3.
[109] Judith Harwin and others, *After FDAC: Outcomes Five Years Later - Final Report* (Lancaster University 2016) 1.

parental substance misuse, the 2008 pilot was funded by three inner-London Boroughs; where it featured in 62 per cent of care proceedings.[110] A working group led by Judge Nicholas Crichton adapted the American Family Drug Treatment Court, which used judge-led non-adversarial hearings to determine and monitor treatment for drug dependent parents.[111] Emphasising the role of the judge and judicial continuity, the FDAC uses an 'integrated' model in which a single judge has jurisdiction over care proceedings and treatment intervention.[112] At the successful conclusion of the pilot in 2012, the model was rolled out with the support of then-President of the Family Court, Sir James Munby. The wider rollout takes place within a new legal framework — the 2014 Children and Families Act — which introduced a statutory requirement of twenty-six weeks for normal completion of proceedings.[113]

Consequently, the FDAC model is built around the eighteen-week 'trial for change'. This intervention is formulated by the multidisciplinary team after an initial assessment consisting of observation and interviews.[114] It is then presented to parents at the Intervention Planning Meeting, and an agreed plan is presented to the court. The Plan forms the basis of the intervention, coordinated by a FDAC key worker who liaises with treatment providers and conducts weekly meetings and drug testing. Their reports are fed into the fortnightly Non-Lawyer Review Hearings, in which specially trained judges employ motivational interviewing techniques to identify

[110] Stephen Whitehead, 'Building Better Courts: Lessons from London's Family Drug and Alcohol Court' (*New Economics Foundation*, 2014).
[111] ibid.
[112] Judith Harwin and others, 'Child and Parent Outcomes in the London Family Drug and Alcohol Court Five Years On: Building on International Evidence' (2018) 32 Int J Law Policy Family 140, 148.
[113] ibid 151.
[114] Jo-Ann Maycock, Sheena Webb and Tom Borro, 'Combining Expert Assessment and Intervention During FDAC Proceedings and Trauma Informed Approaches' [2017] Fam Law 1119.

problems and solutions, as well as praise progress.[115] Judges strongly adhere to problem-solving principles, clearly communicating decisions and consequences to parents, while cultivating a relationship of trust.[116] The FDAC model offers the clearest measure for the effectiveness of problem-solving in the Family Court, and given the extensive reference made to its success by Sir James, we can infer that his proposals involve the implementation of much of its techniques and structure.[117]

However, parental desistance is not the overriding goal of the FDAC process. The system is designed to identify parents that are capable of immediate change, but most are not.[118] The welfare of the child, the court's paramount principle, demands that a permanent placement be arranged promptly. This results in a truncated process, extended at most to twenty-six weeks.[119] Though a higher proportion of mothers (35 per cent) are reunited with their children compared to those in ordinary proceedings (21 per cent), less than half cease misuse by the end of proceedings.[120] The creation of pathways to desistance is simply not the objective of proceedings, and this is reflected in studies of its efficacy. There is no data as to whether most mothers, whose children were taken into care, benefited from the FDAC process.[121] Those that were reunited with their children benefited from the 'FDAC effect' as 58 per cent were estimated to have sustained cessation over the five-year follow-up.[122] This suggests that while the proceedings' ultimate focus detracts from the accessibility of its facilitated pathways, the ones it produces are sustainable.

[115] ibid 29.
[116] ibid 25.
[117] Sir James Munby, 'Children Across the Justice Systems' (Parmoor Lecture, Howard League for Penal Reform, 2017) 6.
[118] MacDonald (n 44) 117.
[119] Maycock, Webb and Borro (n 120).
[120] Harwin and others, *After FDAC* (n 110) 20.
[121] ibid 8.
[122] ibid 24.

Drug-dependent pathways are a mode of antisocial pathway and are similarly rooted in social exclusion. Although adolescent drug use is not causally related to crime, it is largely transitory and exists only as a marker of problems which themselves may induce disengagement from prosocial pathways; drug dependency is, like crime, effectively an alternative pathway.[123] Notwithstanding that dependency can drive criminal behaviour (unlike casual use), it too is engendered and progressed through association with tightly-bonded networks, it both drives and is driven by social exclusion, and prevents the development of skills, networks and proficiencies necessary to return to a prosocial pathway.[124] The utility of the pathways metaphor is that it strips out the specialist language of the criminal justice system to allow for cross-disciplinary discussions; particularly where multi-agency working is required, as in the problem-solving context.[125] How problem-solving courts deal with dependency could be directly analogous to its capacity to rehabilitate offenders — to facilitate desistance from criminal pathways. Indeed, substance abuse desistance will often be part of that process.

Nevertheless, there are key differences between the operative contexts of the FDAC and YJS. A limitation of the FDAC comparison to a criminal justice context is that the majority of those engaged by FDACs are women, while most young and adult offenders are male.[126] Women could respond better to problem-solving interventions, a result of endocrinological or socialised differences. Their pathways to crime are distinct, with familial and personal relationships having a larger bearing on offending.[127] Those differences might shape the contours of turning points away from crime. Furthermore, FDAC parents are at different developmental stages. Over three quarters of

[123] Kemshall and others (n 35) 103.
[124] MacDonald (n 44) 116.
[125] Kaye Haw, 'Risk Factors and Pathways Into and Out of Crime: Misleading, Misinterpreted or Mythic? From Generative Metaphor to Professional Myth' in *Pathways and Crime Prevention* (n 3) 72.
[126] Hunter and others (n 11) 11.
[127] ibid 6, 16.

mothers were between the ages of twenty and forty, having made early adulthood transitions that are thought to encourage natural desistance, like moving out of the family home.[128] This indicates that FDACs address less transitory and more entrenched patterns of antisocial behaviour.[129] In contrast, the threat of child removal is considered an important element of sustaining engagement with treatment, and children are often a powerful motivator for constructing pathways out of trouble, outside of care proceedings.[130] None of these go so far as to defeat the purpose of comparison, but will be considered when assessing Sir James' reforms .

Sustainable pathways to desistance, like those out of crime, have two elements: altering antisocial pathways and assisting prosocial pathway progression. FDACs, while largely succeeding in the former, need to do more to promote the social reintegration of recovering parents.

A key element of immediate and longer-term positive change is the perception of possible self. The FDAC process manifests turning points by helping parents internalise the possibility of change. Two elements facilitate this perception: in applying principles of procedural fairness (clear and open communication) in court, parents believe they are given a 'fair shake' and are encouraged to take responsibility for their rehabilitation.[131] Secondly, the counselling and additional therapies available through the 'trial for change' give parents the tools to address traumas that underlie the antisocial behavioural patterns that have held them back.[132] Believing that they can change, participants move beyond a state of 'risk stagnation' in which they refuse to abandon antisocial networks out of a sense of belonging and

[128] Harwin and others, *After FDAC* (n 110) 13; Webster and others (n 33) 2.
[129] Harwin and others, *After FDAC* (n 110) 15.
[130] Whitehead (n 111).
[131] Kaiser and Holtfreter (n 8) 48.
[132] Paul Mazerdle and others, 'Repeat Sexual Victimisation Among an Offender Sample: Implications for Pathways and Prevention' in *Pathways and Crime Prevention* (n 3) 161, 164.

hopelessness.[133] This drives the willing engagement necessary for programme success — judges cannot order recovery; they can only assist and encourage it.[134]

FDACs do not go far enough to reintegrate participants at the end of the trial for change. Saliently, there are no resources for bringing mothers into employment, a key sustaining system for prosocial pathways.[135] However, socio structural factors — a dearth of affordable childcare and flexible working — make it difficult for single mothers to work. Moreover, the type of work available must be of sufficient quality. Low-waged and temporary employment is ineffectual, and Government welfare-to-work programmes have consistently failed to yield the required standard.[136] Though YRO review panels have seen individual examples of success, a problem-solving YJS would still encounter the same problems. Additionally, the process does not address the familial estrangement suffered by addicts and thus utilise the family as another key sustaining system. The estrangement wrought of substance dependency often aggravates abuse, concentrating the influence of antisocial networks, entrenching patterns of problematic behaviour. Participants are denied the opportunity to form new peer networks that could motivate further recovery, away from substance-abusing friends and partners.[137]

But these shortcomings must be understood in line with the limited objectives and resources of FDAC. The process is not ultimately designed to rehabilitate — that is only an objective insofar as it is in the best interests of the child subject to care proceedings. The truncated treatment schedule recognises the repercussions of uncertainty for the child, striking a balance between continued parental involvement and promptly securing a lasting arrangement. A

[133] Kemshall and others (n 35) 98.
[134] Winick (n 45) 1067.
[135] Hayes (n 49) 218.
[136] Webster and others (n 33) 35.
[137] Boppre, Salisbury and Parker (n 47) 16.

rehabilitative justice system would not sit at such cross-purposes. Plainly, those that are not reunited with their children do not receive additional support, but 'successful' mothers would benefit from longer-term assistance. The first two years after reunification are the riskiest in terms of direct relapse or other indicators of dysfunction.[138] Failed recoveries compromise the overriding objective of FDAC and the broader family court — the welfare of the relevant child.[139]

4 Could a Problem-Solving Court Create Obstacles to Pathways Out of Crime?

> 'The Family Court should be rebalanced as a problem-solving court, engaging therapeutic and other support systems that so many children and parents need.'[140]

It would be generous to suggest that Sir James made an actionable proposal for the amalgamation of the Youth Court into a revamped family court. Rather, almost thinking aloud, he intimated that a family court, reoriented towards problem-solving and therapeutic practice, would be a better vehicle for grappling with complex and interrelated needs of adolescent offenders and their families.[141] The Family Court already hosts a successful problem-solving court. Besides, Carlile, Taylor and their disciples in the NYOS assert that problem-solving justice holds real promise for young offenders. This section therefore seeks to evaluate the likely efficacy of a problem-solving family criminal court, bringing together analyses of extant problem-solving practice, while drawing on criminological literature to illuminate potential pitfalls. This examination will produce a fleshed-out model for problem-solving youth justice, maximising its potential for

[138] Harwin and others, *After FDAC* (n 110) 24.
[139] Children Act 1989 s 1(1).
[140] Munby (n 118) 8.
[141] ibid.

promoting pathways out of crime while compensating for its shortcomings.

If we understand antisocial behaviour as a consequence of failed prosocial transitions, then problem-solving family courts' interventions need to address the causes of offending behaviour — tightly-bonded, locality-centred association, school exclusion — and facilitate prosocial pathway construction going forward. The former may involve counselling or training, to acquire missing social skills, or directing situational-personal change like moving schools or prohibiting contact with certain peers; to allow a child to break away from social networks fortifying a pathway into crime. It follows that once an antisocial scaffolding is removed, the disposed needs the tools to construct a prosocial one. Interventions need to be capable of facilitating prosocial network development and institutional engagement necessary for successful navigation of a conventional, lawful pathway. The latter could take the form of placement in further education colleges and apprenticeships. While we have seen that apprenticeships are successfully organised through existing YOS schemes, the state of education in the custodial estate is more precarious.[142] Charlie Taylor found that education services 'play a peripheral role in efforts to rehabilitate children' due to their presumption that children who offend are incapable of succeeding in education.[143] Taylor, a former headteacher, deemed education in custody inadequate, with children receiving half of the targeted thirty hours of schooling a week.[144] Likewise, young people that want to enter the workforce are subject to the opportunities in their local area — a particular problem for provision in deprived areas, where offending is concentrated.[145] In the Teesside Study, interviewees' participation in training and employability schemes had little positive impact, resulting in the same poorly paid, insecure work they

[142] Ward and Warkel (n 92) 13.
[143] Taylor (n 59) 11.
[144] ibid 40.
[145] Webster and others (n 33) 42.

otherwise had access to.[146] A critical limitation emerges from this analysis: without wider socioeconomic change, there is little guarantee that employment assistance schema will do much good. There is only so much that individual interventions can do to mitigate broader socio structural factors that drive social exclusion and antisocial pathway construction. Much of transition disengagement is rooted in believing that prosocial pathway success is not within reach. In much of Britain today, that is true. Criminality is often an economically rational choice in deprived communities. Successful efforts to reduce ingrained criminality must change this.

Additionally, the court will require legislation to specifically direct public authorities, unless agencies willingly subject themselves to the jurisdiction of the court, per the constitutional principle outlined in *A v Liverpool City Council*.[147] FDACs circumvent the rule through voluntary arrangements, but these will be harder to achieve at a national scale. It is thus likely that the court will require primary legislation.[148] The desirability of statutory powers over judicial initiative is only substantiated by the testimony of FDAC judges, who reported under-resourcing specialist teams and courts, and anxiety generated by fragile funding arrangements.[149] Considering that a problem-solving family court would operate at an order of magnitude greater than the then-nascent FDACs, questions arise as to whether — without statutory support — the Family Court will have the personnel to carry out fortnightly reviews of young offenders' progression. International experience shows that specialised courts are vulnerable to austerity and changes in policy agendas, as they can easily be dismantled; an Act of Parliament would go some distance to attenuate that peril and allocate the resources necessary for its full realisation.[150] Clearly, the fate of problem-solving youth practice is fundamentally a

[146] ibid 35.
[147] Munby (n 118) 4.
[148] ibid 9.
[149] Tunnard, Ryan and Harwin (n 109) 30.
[150] Bakht (n 71) 249.

question of political will. As much as problem-solving courts efficiently use existing funds and generate savings, a fundamental expansion of the family court's jurisdiction could be a step too far for an organisation strained by austerity.[151] Should the executive return to the cause, allocating the necessary money and powers, problem-solving judges will provide children opportunities to construct turning points out of crime. Yet, as individual pathways are inherently unpredictable, interventions through problem-solving justice must be appropriate to the individual and their circumstances. What effects prosocial behaviour in one, might not in another.[152] What is certain, is that a government that is serious about tackling crime must take steps to ameliorate intergenerational disadvantage, that both gives rise to offending and frustrates efforts to build pathways out of crime.

The risk of net-widening and up-tariffing inherent to novel rehabilitative tools renders an independent referral mechanism a necessity.[153] In American Mental Health Courts defendants who agree to participate have their charges — having been screened and referred by jail psychiatrists at bail hearings — dismissed entirely or prosecuted in abeyance. Suspended sentences are dismissed or heavily reduced upon completion of treatment.[154] Similarly, FDAC operates as a parallel system, available to those subject to ordinary care proceedings. It has no influence over the decision of a local authority to refer the matter. Its position as an alternative maintains the crucial element of choice, while still incentivising treatment. However, this is not simply a matter of compliance. System contact has almost universally negative consequences for children's pathways to desistance. The success in driving down the number of first-time entrants into the YJS, is grounded in a diversionary approach that understands the criminogenic effect of formal disposal. Pathways to desistance are, more than anything, about identity. They require a

[151] Whitehead (n 111).
[152] MacDonald (n 44) 123.
[153] Bowen and Whitehead (n 12) 29.[154] Bakht (n 71) 248.
[154] Bakht (n 71) 248.

young person to accept that they can change. Antisocial labels, like offender or drug abuser — that diminish self-efficacy and create social exclusion — are imposed from without.[155] They are subsequently internalised and reinforced by the person in question.

This is why court contact is so problematic. As much as interventions have the potential to prompt positive turning points, they can spawn ones that negatively impact the trajectory of a young life. An offender label shifts what behaviour is acceptable and 'not for me' in the wrong direction.[156] Judges are social authority figures, in whom defendants vest wider feelings about whether they should trust or feel included by society.[157] Young people, whose transitory offending behaviour was tangential to their perception of self, take this rejection to heart. Their participation in school — a key obstacle to antisocial pathway progression — is disrupted.[158] In its place they are exposed to the criminogenic influence of other offenders, in the custodial estate or community supervision; in addition to the reality that certain access routes are closed to them due to the legal consequences and stigma associated with criminal conviction.[159] Where a young person would have grown out of offending behaviour, an interaction with the court begets relational trauma and a critical moment inducing commitment to an antisocial pathway. This is what academics mean by labelling. It has real consequences: the Edinburgh Longitudinal Study, which used annualised surveys of 4300 participants to examine the self-reported offending careers of disadvantaged children, found that 96 per cent of those who became chronic offenders in adulthood had experienced police contact by the age of fifteen. This was compared to less than half for those who engaged in the same antisocial behaviour as adolescent, but desisted from offending.[160] Consequently, its authors

[155] France and Homel, 'Societal Access Routes and Developmental Pathways' (n 3) 16.
[156] Goodnow (n 28) 56.
[157] Kaiser and Holtfreter (n 8) 50.
[158] McAra and McVie (n 10) 200.
[159] Bowen and Whitehead (n 12) 30.[160] McAra and McVie (n 10) 194.
[160] McAra and McVie (n 10) 194.

found that doing nothing is often better in reducing serious offending.[161] Pertinently for a model focused on intervention, most of the hard-won success achieved in Youth Justice since 2007 has been through prioritising diversion away from system contact.

The piloted Scottish Youth Court is one-such cautionary tale. Attempting to implement youth-focused problem-solving, it 'encouraged prosecution in cases that might previously have attracted an alternative resolution'. The pilots were terminated on the grounds of their excessive cost and the criminogenic effect of up-tariffing young offenders.[162] This risk almost certainly fed into Charlie Taylor's specific formulation of his problem-solving Children's Panels.[163] Leaving the decision to prosecute to existing systems that prioritise diversion retains a check against inappropriate interventions, administered by well-intentioned but overzealous youth justice practitioners.[164] A court that foregrounded whether intervention was therapeutic for the young person at issue, would be less likely to 'overdose' and propagate offending pathways through unneeded system contact. However, this attitude would need to pervade beyond the court to decision-makers who determine if a child should be referred to trial. Alternatively, employing a problem-solving court solely as a sentencing body would keep intact existing structures that prioritise diverting children away from court.

The problem-solving court is fundamentally a rehabilitative body. Utilising therapeutic jurisprudence, it eschews the traditional adversarial form in pursuit of an environment that improves compliance with treatment, through building supportive relationships of trust.[165] That capacity to build empathy is a key strength of the problem-solving approach, realising the law's potential to act as an

[161] ibid 200.
[162] Bowen and Whitehead (n 12) 29.[163] Taylor (n 59) 32.
[163] Taylor (n 59) 32.
[164] Bowen and Whitehead (n 12) 30.[165] Kaiser and Holtfreter (n 8) 46.
[165] Kaiser and Holtfreter (n 8) 46.

instrument of healing.[166] However, it puts aside much of what make traditional courts objective arbiters of fact. Ward and Warkel highlighted the risk that YRO review magistrates would lack the necessary impartiality, should that young person return to court. Given the desirability of judicial continuity in the problem-solving process, this is something that a family court should attempt to accommodate. If the relationship between sentencing and supervision is a closed-loop, then there is no reason why further offending — which is to be expected along non-linear paths to desistance — cannot inform the structure of a treatment plan, which will include agreed penalties for backward steps. The problem arises where problem-solving courts are tasked both with finding guilt and administering treatment. Taylor's designation of his panels as a sentencing-only body was a concession to that complication. Indeed, the FDAC model regards the reversion to ordinary care proceedings as an important motivator for mothers to comply with the treatment plan.[167] The issue of whether a problem-solving YJS should strive for continuity between trial and sentencing is not one that this author seeks to resolve.

Instead, this paper adds a caveat to Sir James' proposal of a problem-solving family court. The author agrees that the inherent limitations of the problem-solving model render it ill-suited to assuming the full jurisdiction of the Youth Court. The FDAC and American Mental Health Courts illustrate the utility of a parallel carrot and stick method. Retaining the existing structure of the YJS at large alleviates the risk of a problem-solving court inadvertently undoing decades of progress. Subsequently, this paper recommends that a problem-solving court should only take over the sentencing function of the Youth Court, which would still offer punitive disposals, with the view that this would improve uptake and engagement with rehabilitation programmes.[168]

[166] Winick (n 45) 1090.

[167] Harwin and others, *Child and Parent Outcomes* (n 113) 150.

[168] Therapeutic jurisprudence holds that those who feel that they have been treated fairly are less likely to reoffend; successful reintegration starts at disposal.

5 Conclusion

This paper has made the case for a problem-solving, family criminal court, targeted at young people embedded in antisocial pathways. Though the clamour for reform is to some extent a political construction, it is the author's view that a therapeutic court would facilitate more turning points out of crime for chronic offenders, whose complex underlying needs are ill-served by traditional disposal. Assuming a sentencing function parallel to the Youth Court, a problem-solving family court could operate in line with best practice, without undermining the broad success of the diversionary youth justice model. While it is no silver bullet, a well-designed court could support young people in building lives free of crime.

Additional research in this area should further explore the problem-solving approach and pathways evaluative framework. If practitioners wish to take this configuration forward, the author recommends a pilot scheme across multiple sites around the country, to evaluate how it works in geographically and socioeconomically diverse communities. A longitudinal study, such as that conducted by Professor Judith Harwin for FDACs, should be carried out contemporaneously to evaluate long-term outcomes and identify possibilities for improvement in practice. This could be conceived and funded at the local level, but there would be clear advantages to Westminster involvement. A pathways frame would aid the study of desistance in the youth and adult custodial population. Constructivist pathways could provide valuable insights into how to best use offenders' time in custody, in aid of reintegration. Turning points can take place across the life-course, not just in adolescence.

Improvements to traditional justice disposals are beyond the scope of this article, but the author would point to the spread of problem-solving principles in general practice (see Ryder) as a path forward.

Breaking the Binary: Assessing the Impact of 'Legal Sex' on 'Gendered Parenting'

Freya Cole Norton

Abstract

'Legal sex', the formal registration and categorisation of sex, initiates a sex/gender binary discourse in the UK that limits substantive sex equality and gender diversity. This article, employing a Foucauldian legal feminist method, takes an alternative theoretical approach, and investigates the systems of power that produce and sustain the sex/gender reality which society accepts as truth. It explores the extent to which 'legal sex' contributes to the social construction of the sex/gender binary discourse. It examines the intersection between 'legal sex' and 'gendered parenting' to determine the effect of this system of power. It discusses decertification to evaluate a method of dismantling the system of power. This article posits that 'legal sex' initiates a 'truth regime' by creating a discourse that is accepted by society as the truth. This discourse informs and constrains the interactional practices of parents, resulting in 'gendered parenting', which entrenches and perpetuates the discourse. Decertification of 'legal sex', despite limitations, provides a potential means of dismantling the system of power by undermining the discourse and weakening the 'mechanisms of control'. Ultimately, it replaces the discourse for one that promotes the intra-variation of sex and gender, and in doing so advances sex equality and gender diversity.

1 Introduction

> '…I believe that one of the meanings of human existence – the source of human freedom – is never to accept anything as definitive, untouchable, obvious, or immobile. No aspect of reality should be allowed to become a definitive and inhuman law for us.'[1]

The procedure of formally registering a new-born's sex, thus assigning a 'legal sex', creates a harmful sex/gender binary that is prevalent throughout western society and contributes to sex inequality and gender diversity oppression. This article considers the effect of 'legal sex' on the sex/gender discourse in society, the influence on (and of) 'gendered parenting', and the possibility of decertification.

This section will introduce the negative effects of 'legal sex' and 'gendered parenting' and the Foucauldian Legal Feminist method. Section two, employing Foucault and Lorber's theories, explores the effect of 'legal sex' on the social construction of the sex/gender 'truth regime' and binary discourse. Section three investigates the influence of the 'truth regime' on the interactional practice of 'gendered parenting'. The intersection between the 'truth regime' and West and Zimmerman's concept of 'doing gender' is utilised to realise the relationship between the legal institution and parental interaction. The fourth section promotes decertification of 'legal sex' as a tool to dismantle the current 'truth regime' and 're-do gender'. This article will posit that 'legal sex' produces a 'truth regime' that sustains and entrenches a binary sex/gender discourse through mechanisms of constraint. The 'truth regime' informs and constrains the interactional practices of parents, coercing them into imposing the discourse onto

[1] Michel Foucault, 'Discussion of "Truth and Subjectivity"' (Lecture at the UC Berkeley 1980) in Graham Burchell (tr), *About the Beginning of the Hermeneutics of the Self* (University of Chicago Press 2015) 93, 93.

their children via 'gendered parenting'. Decertification would, it is argued, begin to dismantle the system of power by undermining the discourse and weakening the 'mechanisms of control', making space for a new discourse promoting sex and gender intra-variation.

1.1. The Negative Effects of 'Legal Sex' and 'Gendered Parenting'

At first glance, 'legal sex' and 'gendered parenting' practices appear benign, but this article will argue they set in motion a discourse that negatively impacts sex equality and gender diversity.[2] Although equality has been formally achieved in statute, and there has been some increased understanding of gender diversity in society, certain practices continue to create a social structure that negatively impacts development, the 'gender gap' in achievement, occupational segregation, the gender pay gap, and violence against women and girls.[3] Research into the 'gender gap' in achievement has found that '…constructions of gender difference…produce different behaviours which impact on achievement.'[4] Occupational segregation, linked to the skills and achievement gap, is consciously felt by 51 per cent of people affected by stereotypes.[5] Research has found that only 5 per cent of children believed a plumber was a role 'for girls'.[6] Girls, and subsequently women, are encouraged into female-dominated occupations which typically pay less than male-dominated roles.[7] This

[2] Josh L Boe and Rebecca J Woods, 'Parents' Influence on Infants' Gender-Typed Toy Preferences' (2018) 79(5) Sex Roles 358, 377.

[3] Leah Culhane and Andrew Bazeley, 'Gender Stereotypes in Early Childhood: A Literature Review' (*Fawcett Society*, 2019) <https://www.fawcettsociety.org.uk/gender-stereotypes-in-early-childhood-a-literature-review> accessed 27 May 2022.

[4] Department of Children, School and Families, *The Gender Agenda: Gender Issues in School – What Works to Improve Achievement for Boys and Girls* (DCFS 2009) 2 <http://dera.ioe.ac.uk/id/eprint/9094> accessed 27 May 2022.

[5] Culhane and Bazeley (n 3).

[6] ibid 29.

[7] Judith E Owen Blakemore, Sheri A Berenbaum and Lynn S Liben, *Gender*

contributes to the 15.5 per cent gender pay gap.[8] Children who are unable to express their gender diversity because of peer judgement may experience negative effects on their physical and psychological well-being due to repressed feelings and often subsequent mental health issues.[9] Boys with rigid beliefs, adhering to the discourse, are more likely to carry out violence against women and girls.[10] Childhood development is affected by stereotypical toy choices, resulting in differential skills being developed by girls and boys. 'Feminine toys' promote less technical skills, limiting optimal development and increasing sex differences.[11] Such social practices and the sex/gender discourse in the United Kingdom operate as a limiting factor to substantive equality and inhibit the flexibility needed for gender diversity to flourish.

1.2. Foucauldian Legal Feminist Method

This article, reinvigorating the 'stalled revolution' of substantive equality and gender diversity for the majority,[12] takes a Foucauldian Legal Feminist approach to the gaps in sex, gender, and law literature. Foucauldian and feminist scholars are allied in their common interest of analysing the operation of power, and its means of social control.[13]

Development (Taylor & Francis Group 2008) 10.

[8] Office for National Statistics, 'Gender Pay Gap in the UK: 2020' (ONS 2020) <https://www.ons.gov.uk/employmentandlabourmarket/peopleinwork/earningsandworkinghours/bulletins/genderpaygapintheuk/2020> accessed 27 May 2022.

[9] Culhane and Bazeley (n 3).

[10] H. Luz McNaughton Reyes and others, 'Gender Role Attitudes and Male Adolescent Dating Violence Perpetration: Normative Beliefs as Moderators' (2016) 45(2) Journal of Youth and Adolescence; Women and Equalities Committee, *Sexual Harassment and Sexual Violence in Schools, Third Report of Session 2016–17* (September 2016) 156 < https://publications.parliament.uk/pa/cm201617/cmselect/cmwomeq/91/91.pdf> accessed 27 May 2022.

[11] ibid.

[12] Karin A Martin, 'William Wants a Doll. Can He Have One? Feminists, Child Care Advisors, and Gender-Neutral Child Rearing' (2005) 19 Gender & Society 456, 458.

[13] Vanessa E Munro, 'Legal Feminism and Foucault – a Critique of the Expulsion of

The third 'wave' of Foucauldian Feminist theory is employed, focusing on '…Foucault's assertion that prevailing categories of sex identity are the result of the transition to a modern regime of power and a proliferation of subjectifying discourses...'.[14] Foucault's 'truth regime' is employed as an analytical framework and fused constructively with a feminist approach, with law and parenting as sites of struggle,[15] to conceptualise the forms of power that operate in legal and social institutions, in order to characterise contemporary sex/gender binary culture.[16]

2 'Legal Sex' and the 'Truth Regime'

'Legal sex' marks the primary site where harmful sex/gender norms are created and become consolidated into institutional and societal conceptions.[17] This section will consider the contribution of 'legal sex' to the sex/gender norms and its operation as the '…scaffolding in the conduct of modern [legal] life…'.[18]

2.1. 'Legal Sex'

'Legal sex', the process of registering and categorising the sex of a new-born as female or male, rooted in the Victorian era, fails to keep up with contemporary concepts of sex and gender.[19] Since 1836, when

Law' (2001) 28(4) Journal of Law and Society 546, 549.

[14] Monique Deveaux, 'Feminism and Empowerment: A Critical Reading of Foucault' (1994) 20(2) Feminist Studies 223, 223.

[15] Lois McNay, *Foucault and Feminism: Power, Gender and the Self* (Polity Press 1992) 3.

[16] Annie Bunting, 'Feminism, Foucault, and Law as Power/Knowledge' (1992) 30 Alta L Rev 829.

[17] Tey Meadow, '"A Rose is a Rose": On Producing Legal Gender Classifications' (2010) 24(6) Gender & Society 814.

[18] ibid 820.

[19] Julie McCandless, 'Reforming Birth Registration Law in England and Wales?' (2017) 4 Reproductive Biomedicine & Society Online 52, 52.

the birth registration system was centralised and the registration of births was made compulsory,[20] 'legal sex' has become an unquestioned and essential legal practice. The sex, exclusively female or male, is determined at birth by a medical professional, who applies socially agreed-upon biological criteria,[21] namely external genitalia.[22] Following registration of the birth, the new-born's sex is documented on the birth certificate and with the General Register Office.[23] 'Legal sex', referred to as the 'breeder document',[24] becomes the basis of all subsequent documentation and interactions that require authentication of sex. 'Legal sex' thus '…marks a point when identity becomes not just a psychological, personal or social phenomenon, but one that has standing in the eyes of the law.'[25] It determines the individuals' legal legitimacy and their interactions with legal institutions. For instance, it regulates access to maternity rights, equality laws, and dictates retirement age. 'Legal sex' also operates as a universally accepted organising principle, determining physical positioning.[26] For instance, it determines the single-sex spaces an individual can access.[27] The state has failed to abandon registration and categorisation on the basis of sex, despite renouncing categorisation based on race, ethnicity, or class. This is arguably an egregious error, promoting the damaging belief that sex divisions are an essential, normal, and natural

[20] Birth and Deaths Registration Act 1836.
[21] Candace West and Don H Zimmerman, 'Doing Gender' (1987) 1 Gender & Society 125, 127.
[22] Amy S Wharton, *The Sociology of Gender: An Introduction to Theory and Research* (John Wiley & Sons 2009) 19.
[23] 'General Register Office' *Gov.uk* <https://www.gov.uk/general-register-office> accessed 27 May 2022.
[24] Paisley Currah and Lisa Jean Moore, '"We Won't Know Who You Are": Contesting Sex Designation in New York City Birth Certificates' (2009) 24(3) Hypatia 113, 126.
[25] J Michael Ryan, 'Born Again?: (Non-) Motivations to Alter Sex/Gender Identity Markers on Birth Certificates' (2020) 29(3) Journal of Gender Studies 269, 271.
[26] Isabel Marcus, 'Reflections on the Significance of the Sex/Gender System: Divorce Law Reform in New York' (1987) 42 University of Miami Law Review 55, 58.
[27] Judith Lorber, *Paradoxes of Gender* (Yale University Press 1994).

framework for modern life.[28]

2.2. The Social Construction and 'Truth Regime'

'Legal sex' is considered by most as a mere formality, but it continues to dominate lives long after the initial registration.[29] It initiates a sex/gender 'truth regime', a form of knowledge and truth, that contributes to the socially constructed cultural pattern, practice, and perception of sex and gender.[30] The 'truth regime' is the '… "general politics" of truth . . . that is, the types of discourse [a society] accepts and makes function as true.'[31] 'Legal sex' initiates a discourse because the practice itself creates messages about sex/gender that are accepted by society. This discourse is chiselled into society through '…a system of ordered procedures for the production, regulation, distribution, circulation and functioning of statements…'.[32] 'Legal sex' has shaped reality by composing a truth that invests in the belief that sex is purely biology and, sex and gender are naturally and normatively dimorphic.[33] The discourse, based on biological essentialism, produces a reality for society by filtering the thoughts and conversations through this set of background suppositions, without individuals being fully aware of the process occurring.[34] The truth is sustained through circular systems of power that produce then continuously sustain the discourse.[35] Thus truth is then dispersed

[28] Judith Lorber, 'Using Gender to Undo Gender: A Feminist Degendering Movement' (2000) 1(1) Feminist Theory 79, 80.
[29] Marcus (n 26) 57.
[30] ibid.
[31] Michel Foucault, 'Truth and Power' in Paul Rabinow (ed), *Essential Works of Foucault 1954–1984* (The New Press 2000) 131.
[32] Michel Foucault, 'The Political Function of the Intellectual' (1977) 17(13) Radical Philosophy 126, 133.
[33] David Allen Rubin, '"An Unnamed Blank That Craved a Name": A Genealogy of Intersex as Gender' (2012) 37(4) Signs 883, 889.
[34] Sharon Cowan, '"Gender Is No Substitute for Sex" A Comparative Human Rights Analysis of the Legal Regulation of Sexual Identity' (2005) 13 Feminist Legal Studies 67.
[35] Michel Foucault, *Power/Knowledge: Selected Interviews and Other Writings,*

throughout society. At the interactional level, individuals wield some limited power over the truth, creating heterogeneous relations to power.[36]

It is argued, therefore, that the 'truth regime' contributes to the social construction of sex and gender.[37] Legal knowledge is the source of authority and legitimacy for maintenance of the sex/gender binary and provides individuals with appropriate means, ends and justifications for constructing themselves and environments in line with the binary.[38] Society's beliefs are not inherent or natural, but the result of the discourse being 'done to society'.[39] Sex/gender truth does not emerge from biological characteristics but from the legal and social processes.[40] 'Legal sex' launches the process that constructs sexed and gendered individuals, beginning with the legal assignment to a sex category.[41] The truth gives rise to and is built into major institutions, including family and economy.[42] Therefore, sex/gender can be said to be socially constructed through the process of 'legal sex' initiating a 'truth regime'. Only by raising awareness and questioning the mechanism behind the dominant discourse is society able to deconstruct the socially created narrative. To fully express this 'truth regime', we follow Foucault's theory and examine each element.[43]

1972–1977 (Harvester Press 1980) 133.

[36] Lorna Weir, 'The Concept of Truth Regime' (2008) 33(2) Canadian Journal of Sociology 367, 385.

[37] Judith Lorber, 'Shifting Paradigms and Challenging Categories' (2006) 53(4) Social Problems 448.

[38] Kirsi Eräranta and Johanna Moisander, 'Psychological Regimes of Truth and Father Identity: Challenges for Work/Life Integration' (2011) 32 Organization Studies 509, 510.

[39] Davina Cooper, 'Beyond the Current Gender Wars' (2019) 25(4) IPPR Progressive Review 393.

[40] Judith Lorber, 'Seeing Is Believing: Biology as Ideology' (1993) 7 Gender & Society 568.

[41] Wharton (n 22) 21.

[42] Wharton (n 22) 13.

[43] Daniele Lorenzini, 'What is a "Regime of Truth"?' (2015) 1(1) Le Foucaldien 1, 2.

2.2.1. '…(1) the types of discourse [society] harbors and causes to function as true…'[44]

'Legal sex' produces the dominant sex/gender discourse, controlled by the 'truth regime', that has power over the social world. The discourse is a conglomeration of narratives, concepts, and norms which govern society's insight into the socially constructed reality. It produces and reinforces power. It is not merely a description but articulates norms which affect relationships, authority, and power relations.[45] Consequently, the discourse governs, controls, and regulates the perception of truth, and hence behaviour and thought. Put simply, the '...discourse simultaneously constitutes a truth about subjects, and constitutes subjects in terms of this truth regime.'[46] The intricacies of the discourse are detailed below.

The most widely accepted narrative is that assigned sex is essentially and entirely biological. The process of assigning a new-born as being exclusively female or male, based on biological criteria, underpins this narrative. It has been deeply ingrained and reinforced by scientists.[47] The development of scientific research on the differences between females and males has bolstered the biological approach to verifying and classifying sex. The coercive powers of the 'truth regime' support the perception that individuals have a 'natural reality',[48] and that we have a biological 'essence' that lives beyond the confines of social life.[49] Therefore, society accepts that '…one's sex category presumes

[44] ibid.
[45] Charles Taylor, 'Foucault on Freedom and Truth' (1984) 12(2) Political Theory 152.
[46] Wendy Brown, 'Power After Foucault' in John S Dryzek, Bonnie Honig and Anne Phillips (eds), *The Oxford Handbook of Political Theory* (Oxford University Press 2008) 71.
[47] Lorber, 'Using Gender to Undo Gender' (n 28) 83.
[48] Suzanne J Kessler and Wendy McKenna, 'Toward a Theory of Gender' in Susan Stryker and Stephen Whittle (eds), *The Transgender Studies Reader* (Taylor & Francis Group 2006) 122.
[49] Diane Richardson, 'Conceptualising Gender' in Victoria Robinson and Diane Richardson (eds), *Introducing Gender & Women's Studies* (4th edn, Macmillan

one's sex…'. This is difficult to escape given its unanimous acceptance, thus sustaining the 'truth regime'.[50]

Next is the narrative that '…only two biological sexes exist and…all people fit neatly into either the category male or female.'[51] This conceptualises sex as binary and takes the polarised view that there is 'one sex in everybody'.[52] It asserts that each individual must be assigned, categorised, and organised into one of the two mutually exclusive 'legal sexes'.[53] It does not acknowledge or recognise intersex or non-binary persons.[54] While transgender individuals can swap their sex category through the Gender Recognition Act 2004, this does not interrupt but rather maintains and perpetuates the binary categories. The cis-centric narrative, that gender is directly linked to sex, advances the belief that gender corresponds to, and is the cultural and social interpretation of, biological sex.[55] Sex acts as the framework on which gender is built. This presumes that biologically sexed females will identify as women and inevitably develop feminine characteristics.[56] The female body, born with the biological ability to carry a child, will link directly to women having maternal nurturing instincts.[57] Transgender individuals do not confront this narrative; instead, as they change their legal and external biological sex criteria

International Higher Education 2015) 8, 11.
[50] West and Zimmerman, 'Doing Gender' (n 21) 127.
[51] Julie A Greenberg, 'Defining Male and Female: Intersexuality and the Collision between Law and Biology' (1999) 41 Ariz L Rev 265, 275.
[52] Richardson (n 49) 8.
[53] Betsy Lucal, 'What It Means to Be Gendered Me: Life on the Boundaries of a Dichotomous Gender System' (1999) 13(6) Gender & Society 781, 783.
[54] Cowan (n 34) 87.
[55] Louise Richardson-Self, '"There Are Only Two Genders – Male and Female…" An Analysis of Online Responses to Tasmania Removing "Gender" from Birth Certificates' (2020) 1(1) International Journal of Gender, Sexuality and Law 296, 297.
[56] Thekla Morgenroth and Michelle K Ryan, 'The Effects of Gender Trouble: An Integrative Theoretical Framework of the Perpetuation and Disruption of the Gender/Sex Binary' (2021) 16(6) Perspectives on Psychological Science 1113.
[57] Lorber, 'Using Gender to Undo Gender' (n 28) 84.

to match their gender, they reaffirm the link.[58] The belief that 'legal sex' reflects the individual's genuine gender further supports the binary 'truth regime'.[59]

The most harmful and persistent narrative is that there is a hierarchy between the sexes. This belief is partly based on the belief that the categories are distinguished by opposite traits. This ensures the differences are reiterated and reaffirmed in subcultural situations where there is contact between the sexes.[60] The social order has seen some improvement — for example, being female no longer deprives the right to vote,[61] own property,[62] and benefits from statutory equal pay.[63] Nevertheless, the female category continues to be devalued.[64] The discourse and 'truth regime' support this division through subordination. For instance, the narrative that gender is directly linked to sex sees biological females being encouraged to display nurturing traits. Then, women are regarded as better suited to remain at home with children, resulting in women having a lower earning capacity and becoming dependent on their partner. Sex markers act as a privileging mechanism for men while being a source of patriarchal dominance and control over women.[65]

[58] Gender Recognition Act 2004

[59] Richard Kohler, Alecs Recher and Julia Ehrt, 'Legal Recognition in Europe: Toolkit' (2013) Transgender Equality Network 1, 8.

[60] Laurel Westbrook and Kristen Schilt, 'Doing Gender, Determining Gender: Transgender People, Gender Panics, and the Maintenance of the Sex/Gender/Sexuality System' (2014) 28(1) Gender & Society 32, 37.

[61] Representation of the People Act 1918.

[62] The Law of Property Act 1922.

[63] Equal Pay Act 1970.

[64] Lorber, *Paradoxes of Gender* (n 27) 61.

[65] Marcus (n 26) 61.

2.2.2. '…(2) the mechanisms and instances which enable one to distinguish true from false statements…'[66]

These 'mechanisms of control' enforce the discourse. The state wields 'disciplinary power', a series of techniques by which the individuals and their actions are controlled through methods of coercion.[67] 'Legal sex' creates a bureaucratic 'disciplinary power' which operates as '…a machine for creating and sustaining a power-relation independent of the person who exercises it…'.[68] At this stage the power moves top to bottom.[69] The 'mechanism and instances' are made up of three elements: surveillance, normalisation and examination.

Legal sex categories can be regarded as a 'metric for bureaucratic surveillance'.[70] Surveillance is a 'calculated gaze' whereby the state puts the sex/gender behaviour of individuals under a 'microscope of conduct' through constant observation. It is '…a mechanism that coerces by means of observation…the means of coercion make those on whom they are applied clearly visible.'[71] 'Legal sex' operates as a 'mechanism of control' because it arranges individuals, by requiring registration on the General Register, to ensure continuous visibility and enable the state to persistently observe the sex of individuals.[72] Surveillance can occur on a more localised level when, for example, an individual is required to prove eligibility for access to single-sex spaces such as sports teams or refuges, and to prove entitlement to state services, for instance sex-specific hospital wards or pensions.[73]

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[66] Lorenzini (n 43) 2.
[67] Michel Foucault, *Discipline and Punish: The Birth of Prison* (Alan Sheridan tr, Pantheon Books 1977).
[68] ibid 201.
[69] Johanna Oksala, *How to Read Foucault* (Granta Books 2012).
[70] Meadow (n 17) 831.
[71] Foucault, *Discipline and Punish* (n 67) 170.
[72] 'Research Your Family History Using the General Register Office' *Gov.uk* <https://www.gov.uk/research-family-history> accessed 28 May 2022.
[73] Davina Cooper, Emily Grabham and Flora Renz, 'Introduction to the Special Issue

Legal and social agents, who have legitimacy bestowed by the legal institution, are empowered to observe the individual by requiring proof of 'legal sex', usually a birth certificate. The individual is observed to ensure their adherence to the discourse, based on their 'legal sex', is being carried out successfully.

'Legal sex' has been normalised, it is argued, through repeated enactment, as an essential, inevitable, and unquestioned practice of the legal and social order.[74] Normalisation — the construction of an idealised norm of conduct — is the process by which discourses, and associated behaviours come to be seen as 'normal'. Observation is at the root of normalisation because judgements of individuals are based on their observed adherence to norms. The individual is then judged, put into a hierarchical system, and marked as normal or abnormal.[75] 'Legal sex' has become 'normal' and essential to society's functioning through constant enactment. Individuals are divided into two mutually exclusive categories and constituted in terms of the discourse, resulting in individuals repeatedly behaving according to predetermined appropriate norms.[76] These behaviours, including registering and categorising 'legal sex', are repeated over and over, to become habitual and 'normal'. The perceived normality is further ingrained by the consistent importance of 'legal sex' in the legal field, for access to rights, privileges, obligations, and resources.[77] Normalisation is abetted by sex being utilised as the primary organisational principle arranging education, sport, marriage, and parenthood.[78] Over time, it is argued, the repetition of 'legal sex' and

on the Future of Legal Gender: Exploring the Feminist Politics of Decertification' (2020) 10(2) feminists@law 5 <https://journals.kent.ac.uk/index.php/feministsatlaw/article/view/937> accessed 28 May 2020.

[74] Dianna Taylor, 'Normativity and Normalization' (2009) Foucault Studies 45, 47.

[75] Foucault, *Discipline and Punish* (n 67).

[76] Taylor (n 74).

[77] David Cruz, 'Disestablishing Sex and Gender' (2004) 2 Dukeminier Awards: Best Sexual Orientation Law Review 253, 263.

[78] Wharton (n 22) 10.

associated behaviours have become embedded in society, to the extent that individuals cannot see past this 'normal' practice. Normalisation has thus become a prominent instrument of power.[79]

Examination of 'legal sex' and associated behaviours involves the scrutinisation and grading of individuals.[80] Examination combines the 'mechanisms of control' to place individuals under a 'normalising gaze', a form of observation that facilitates the qualification, classification and subsequent punishment or rewarding of behaviour.[81] The purpose is to determine whether an intervention, sanction or reward is appropriate. The normalisation of 'legal sex' means that an individual's sex category can be relevant in a plethora of situations, and the individual's performance, based on the discourse relevant to their sex, can be subjected to evaluation.[82] Examination has three actions. First the individual is made visible, a sign of subordination to the examining body, through the General Register Office and birth certificates. Second, it brings individuals to the 'field of documentation' and allows the individual's performance to be tracked and compared to the norm. The registration of sex enters individuals to the 'field of documentation' where their adherence to the discourse can be compared to their sex category. Third, the process makes each individual a 'case'; an individual case is then classified as to be rewarded, corrected, punished, or excluded for the behaviour.[83] As I will examine in the next section, the individual can face punishment if they fail to meet the discourse, for example if their gender does not match their registered sex. These 'mechanisms of control' arguably show that '[t]he individual is…a reality fabricated by this specific technology of power that I have called "discipline".'[84]

[79] Foucault, *Discipline and Punish* (n 67).
[80] Oksala (n 69).
[81] ibid 184.
[82] West and Zimmerman, 'Doing Gender' (n 21) 139.
[83] Foucault, *Discipline and Punish* (n 67) 191.
[84] ibid 194.

2.2.3. '…(3) the way in which each is sanctioned…'[85]

If, upon examination, an individual falls outside of the normalised discourse, the state has been said to undertake the 'art of punishing'.[86] The purpose of the sex/gender 'truth regime' is to regulate the thoughts and behaviour of individuals and to punish those who transgress.[87] This punishment is corrective, serving to enforce the 'truth regime' by ordering individuals to meet the models of thought and behaviour. Individuals are sanctioned by two means: legal invalidity and social unintelligibility. Legal invalidity occurs when an individual identifies outside the discourse. For example, an intersex individual is unable to be legally recognised as intersex and instead has to legally assert themselves as female or male,[88] forcing them to place themselves as a 'site of truth to be mastered'.[89] If the individual refuses to be mastered, a 'de-subjugation of the subject' takes place.[90] This makes access and involvement in the legal system difficult — for instance, basic transactions like proving identity for a passport become traumatic events.[91] Social unintelligibility can be said to occur when individuals face interactional repercussions, like misattribution.[92] Individuals are scrutinised in daily situations, including when presenting identity papers.[93] In these situations, they face being called

[85] Lorenzini (n 43) 2.
[86] Foucault, *Discipline and Punish* (n 67).
[87] Dean Spade, 'Mutilating Gender' in Susan Stryker and Stephen Whittle (eds), *The Transgender Studies Reader* (Taylor & Francis 2006) 315, 459.
[88] Nikoletta Pikramenou, *Intersex Rights: Living Between Sexes* (Springer Nature 2019) 61.
[89] Riki Anne Wilchins, 'What Does It Cost to Tell the Truth' in Susan Stryker and Stephen Whittle (eds), *The Transgender Studies Reader* (Taylor & Francis 2006) 547, 549.
[90] Michel Foucault, 'What Is Critique?' in Sylvere Lotringer and Lysa Hochroth (eds), *The Politics of Truth* (Lysa Hochroth tr, Semiotext 1997) 32.
[91] Kohler, Recher and Ehrt (n 59) 8.
[92] Lucal (n 53) 785.
[93] Lena Holzer, 'Sexually Dimorphic Bodies: A Production of Birth Certificates' (2019) 45(1) A Fem LJ 91.

to account and sanctioned through social dislocation, harassment and exclusion.[94] Individuals are thus unlikely to resist the 'truth regime', because rebels can be publicly penalised.[95]

2.2.4. '…(4) the techniques and procedures which are valorised for obtaining the truth…' and (5) '…the status of those who are charged with saying what counts as true…'[96]

The technique first valorised for obtaining the truth is the application of the predetermined set of biological traits. Scientists, who have classified certain traits as the sex criteria, and delivering physicians, who apply these criteria, are designated the status of determining the 'true' sex of the new-born.[97] They are held in high esteem, being in a position of knowledge and power. Later in life, the documentation holding the sex marker is valorised for holding the truth. Legal agents are charged with obtaining the truth about an individual in necessary situations. For example, entering a women-only refuge would require an agent to check the documentation to establish female sex. In cases of confusion over the true sex of an individual, the courts become valorised for obtaining the truth. In *W v W*, to determine the validity of a marriage, the court decided whether an intersex individual was female or male, based on their own biological criteria.[98] Notably the individual is not valorised for obtaining their own truth, these decisions are made on their behalf by powerful authorities.

'Legal sex' contributes to the formulation and enforcement of the

[94] Lucal (n 53) 785.
[95] Lorber, *Paradoxes of Gender* (n 27) 10.
[96] Lorenzini (n 43) 2.
[97] Heath Fogg Davis, *Beyond Trans: Does Gender Matter?* (University of New York Press 2018) 127.
[98] *W v W* [2001] Fam. 111, [2001] 2 WLR 674.

harmful sex/gender discourse of the 'truth regime' in the legal and social sphere. It has been argued that '…the coupling of a series of practices with a truth regime forms an operative knowledge-power system (dispositif) which effectively inscribes in the real something that does not exist…'[99] This regime does not operate in a vacuum but is arguably dispersed throughout society. Accordingly, 'legal sex' is now contextualised with reference to parenting.

3 The 'Truth Regime' and 'Gendered Parenting'

When '…treated as a "real force" that operates in the web of social connection, the law can embed an idea of gender that crosses the "limits of this representation or reproduction"'.[100] This section explores the scarcely researched intersection between the 'truth regime' and the notion of 'doing gender', with 'legal sex' argued to form a facet of the 'doing gender' approach to parenting.[101]

3.1. 'Gendered Parenting'

'Gendered parenting' can be described as messages presented to children from parents about how they should behave to comply with the sex/gender discourse, and has been argued to have a powerful influence over thought and behaviour into adulthood.[102] Parents, from

[99] Michel Foucault, 'The Birth of Biopolitics: Lectures at the College de France 1978–1976' (Lecture at the College de France, 1979) in Darrow Schecter (ed), *The Critique of Instrumental Reason from Weber to Habermas* (Continuum International Pub Group 2010) 173.

[100] Valeria Venditti, 'Gender Kaleidoscope: Diffracting Legal Approaches to Reform Gender Binary' (2020) 1 International Journal of Gender, Sexuality and Law 56, 72.

[101] James W Messerschmidt, '"Doing Gender": The Impact and Future of a Salient Sociological Concept' (2008) 23 Gender & Society 85, 86.

[102] Judi Mesman and Marleen G Groeneveld, 'Gendered Parenting in Early Childhood: Subtle but Unmistakeable if You Know Where to Look' (2018) 12 Child Development Perspectives 22, 22.

the announcement of 'it's "a girl"' or 'it's "a boy"', form expectations based on the discourse and begin to raise their children in differentiated ways.[103] The first experiences of a child are with their parents, making this role fundamental to development.[104] As the first source of information, they convey messages about appropriate sex/gender behaviours, attitudes and expectations.[105] By two years old, the child is conscious of the social relevance and stereotypes of their own and other sexes and genders.[106] Although there are advantages to 'gendered parenting', particularly that it prepares children for the reality of their current social environment and how to function to be accepted, the disadvantages are argued to outweigh these benefits.[107] The negatives, as discussed in the introduction, are vast. Personal identities and choices are constrained,[108] and opportunities in education, family, and careers are limited.[109] Parental interaction is, then, key to the child's sex/gender development.[110]

Parents, as the most fundamental authority over their children, hold the power to rebel against the discourse. Despite this potential, displayed with the rise of second-wave feminism and gender-neutral parenting,[111] a 'stalled revolution' has occurred.[112] The times are changing, with explicit parenting practices of boys and girls resulting

[103] Marcus (n 26) 59.
[104] Mesman and Groeneveld (n 102) 22.
[105] Culhane and Bazeley (n 3).
[106] Owen Blakemore, Berenbaum and Liben, *Gender Development* (n 7).
[107] Mesman and Groeneveld (n 102) 25.
[108] Susan M McHale, Ann C Crouter and Shawn D Whiteman, 'The Family Contexts of Gender Development in Childhood and Adolescence' (2003) 12(1) Social Development 125, 134.
[109] Alina Morawska, 'The Effects of Gendered Parenting on Child Development Outcomes: A Systematic Review' (2020) 23 Clinical Child and Family Psychology Review 553.
[110] Culhane and Bazeley (n 3).
[111] Elizabeth P Rahilly, 'The Gender Binary Meets the Gender-Variant Child: Parents' Negotiations with Childhood Gender Variance' (2015) 29(3) Gender & Society 338, 340.
[112] Martin (n 12) 458.

in more similar experiences and opportunities,[113] yet this change is arguably not occurring quickly enough.[114] Implicit and unconscious practices remain prevalent,[115] practices so embedded in interactional processes that they are invisible to parents and children.[116] Even those who take on a gender-neutral approach, and resist the harmful discourse, can fall into the 'gender trap'.[117] This trap causes even the most progressive parents to practice 'gendered parenting', often unconsciously, feeling '…accountable to a modicum of gender normativity in public...',[118] and to the pull of peers.[119] Any parent fighting against the discourse must wage active and constant battle to protect their children from sex/gender binary expectations.[120]

3.2. The 'Truth Regime', 'Doing Gender' and Parenting

The 'truth regime', intersecting with the 'doing gender' approach, sets in motion 'gendered parenting' by informing and constraining parents' perceptions of sex and gender. 'Gendered parenting' is thus an effect of the 'truth regime'. The discourse acts as the material base upon which 'gendered parenting' is formed.[121] It is not a mere ideology but constitutes individuals in terms of the truth.[122] It operates as a scaffolding that the social and interactional elements of the 'truth regime' are built upon.[123] The social construction of the sex/gender

[113] Owen Blakemore, Berenbaum and Liben, *Gender Development* (n 7) 1.
[114] Andrée Pomerleau and others, 'Pink or Blue: Environmental Gender Stereotypes in the First Two Years of Life' (1990) 22 Sex Roles 359, 366.
[115] Mesman and Groeneveld (n 102) 23.
[116] Owen Blakemore, Berenbaum and Liben, *Gender Development* (n 7) 5.
[117] Emily W Kane, *The Gender Trap: Parents and the Pitfalls of Raising Boys and Girls* (University of New York Press 2012) 149.
[118] Rahilly (n 111) 341.
[119] Lorber, *Paradoxes of Gender* (n 27) 32.
[120] ibid 57.
[121] ibid 56.
[122] Taylor (n 45).
[123] Candace West and Don H Zimmerman, 'Accounting for Doing Gender' (2009)

discourse, operating as a capillary, disseminates the truth into society and onto parents, who accept it as reality. The discourse, wielded as an instrument of power, is argued to govern insight into the sex/gender reality and oblige the parent to conform. The discourse initiates and encourages the repetition of the truth about the binary nature of sex and gender, which may be absorbed into parenting practices,[124] imposing a 'law of truth' onto them which they must then recognise in their children.[125] It then '…determines the obligations of individuals with regard to procedures of manifestation of truth…'.[126] Parents are then constructed, organised, and positioned by the 'truth regime' to meet the discourse, with the effect arguably that their thoughts and behaviours towards their children are in adherence to the discourse. This, therefore, links the legal and social institutional and parenting interactional levels, which legitimises social arrangements based on 'legal sex' and reproduces these arrangements within 'gendered parenting' interactions.[127]

Parents, having adopted the discourse into parenting practices, can be argued to contribute to the sustainment, entrenchment, and extension of the 'truth regime' by producing rituals of truth. The 'truth regime', intersecting with 'doing gender', informs the interactional practices of parents. 'Doing gender', the social doing, involves '…interactional portrayals of what we would like to convey about sexual natures, using conventionalised gestures.'[128] The interactional context sets the stage for depictions of the discourse. The discourse conveys information and provides guidelines on how to raise the child.[129] The

23(1) Gender & Society 112, 115.

[124] Gundula Ludwig, and Stefanie Wohl, 'Governmentality and Gender: Current Transformations of Gender Regimes Revisited from a Foucauldian Perspective' (ECPR Conference on Gender and Politics, 2009).

[125] Michel Foucault, 'The Subject and Power' (1982) 8(4) Critical Inquiry 777, 781.

[126] Michel Foucault, *On the Government of Living: Lectures at the College de France 1979–1980* (Graham Burchell tr, Palgrave Macmillan 2014) 93.

[127] West and Zimmerman, 'Doing Gender' (n 21) 126.

[128] ibid 130.

[129] Wharton (n 22) 123.

requirement for parents to adopt the discourse generates these interactional practices and rituals of truth by the actualisation of truth through parenting practices.[130] Parents are not merely passive conduits nor free agents, but a combination.[131] They hold the power to induce and extend the 'truth regime' but have to operate within the confines of the discourse. Therefore, parents are agents of socialisation. This power is utilised to construct and enact parenting methods, materialising as the performance of 'gendered parenting'. The constant performance of the discourse through 'naturalised scripts' becomes the primary source of an infant's knowledge.[132] The child learns, through these interactions, the appropriate expectations, characteristics, and behaviours associated with being born 'a girl' or 'a boy'.[133] Parents, thus, 'do gender' by reproducing the 'truth regime' through interactions with their children.[134] This can contribute to the circular system of power and represents a recrudesce effect between the legal institution, the social institution, and the social construction of sex and gender.[135] 'Gendered parenting', a 'truth effect' of the discourse,[136] is argued to '…simultaneously sustain, reproduce, and render legitimate the institutional arrangements that are based on sex category.'[137]

3.3. 'Gendered Parenting' Practices

'Doing gender', pursuant to the 'truth regime', is evident through parenting practices. These early parenting practices set in motion

[130] Michel Foucault, *Wrong-Doing, Truth-Telling: The Function of Avowal in Justice* (University of Chicago Press 2014).
[131] Kane (n 117) 149.
[132] Wharton (n 22) 90.
[133] Richardson (n 49) 3.
[134] Kane (n 117) 149.
[135] Lorber, 'Using Gender to Undo Gender' (n 28) 83.
[136] Marianne W Jörgensen and Louise J Phillips, *Discourse Analysis as Theory and Method* (Sage Publications 2008) 14.
[137] West and Zimmerman, 'Doing Gender' (n 21) 146.

'lifelong messages' about sex and gender.[138] Two examples of mechanisms of gender socialisation by which parents impose the dominant discourse upon their children are discussed below.[139] Within these parenting practices each element of the discourse of the truth regime, detailed in the previous section, is evident.

Parents, by creating a gendered world for their children, undertake sex/gender differentiated parenting through channelling.[140] As the gatekeepers to the world, they have the power to shape their children to meet typical traits and behaviours. Creating differential environments has a direct impact on the child's perception and development of sex/gender specific skills. Channelling takes many forms, including the naming, dressing, and room décor for the new-born. Names are highly gendered,[141] and the conspicuous use of blues and pinks in clothing makes it impossible not to identify the sex, both practices making the child's sex instantly visible to society.[142] Age-old colour schemes are also evident in children's bedrooms.[143] By the age of three or four, parents can begin channelling their children through gender specific activities, for instance boys may play football and girls may participate in ballet.[144] The most researched area of channelling/shaping has been the influence of parent-purchased toys. Toys are an integral element of child development sending explicit and implicit ques for the child's sex/gender evolution. Girls can be restricted to domestic items, dolls, and dress up.[145] Boys are often

[138] Boe and Woods (n 2) 369.
[139] Owen Blakemore, Berenbaum and Liben, *Gender Development* (n 7) 272.
[140] ibid 272.
[141] Denis K Burnham and Mary B Harris, 'Effects of Real Gender and Labelled Gender on Adults' Perceptions of Infants' (1992) 153(2) Journal of Genetic Psychology 165, 173.
[142] Madeline Shakin, Debra Shakin and Sarah Hall Sternglanz, 'Infant Clothing: Sex Labelling for Strangers' (1985) 12(9–10) Sex Roles 955.
[143] Culhane and Bazeley (n 3).
[144] Burnham and Harris (n 141) 165.
[145] Judith E Owen Blakemore and Renee E Centers, 'Characteristics of Boys' and Girls' Toys' (2005) 53(9–10) Sex Roles 619, 620.

encouraged to play with vehicles, guns, and construction sets.[146] The creation of a gendered world encourages a child's development to align with the discourse. Channelling or shaping is a practice that sustains the discourse because '…rigid gender-typing reinforces a binary in which boys and girls are different, and it creates a power structure…' where girls can be perceived as inferior to boys.[147]

Differential treatment, that is, the distinct interactions parents have with children of different sexes,[148] is visible in a variety of situations, including initial expectations, interactions involving play, socialisation of emotion, and discipline. The initial expectation parents have of their infants can differ based on their sex, despite the absence of any characteristics at this stage.[149] Male new-borns are perceived as larger and stronger while female infants are seen as gentle and soft.[150] As the child grows, there is evidence of differential interaction during play.[151] Girls can be rewarded for playing with 'feminine' toys, and boys may face a punitive reaction to cross-gender play.[152] The socialisation of emotion, even in infancy, differs.[153] Girls are encouraged to show and discuss emotion, while boys can be discouraged from doing the same.[154] Discipline is also often a site of difference,[155] as parents may be more harsh and more likely to use physical punishment on boys

[146] Judith E Owen Blakemore, 'Children's Beliefs About Violating Gender Norms: Boys Shouldn't Look Like Girls, and Girls Shouldn't Act Like Boys' (2003) 48 Sex Roles 411, 418.
[147] Boe and Woods (n 2) 369.
[148] Owen Blakemore, Berenbaum and Liben, *Gender Development* (n 7) 272.
[149] ibid 239.
[150] Katherine Hildebrandt Karraker, Dena Ann Vogel and Margaret Ann Lake, 'Parents' Gender-Sterotyped Perceptions of Newborns: The Eye of the Beholder Revisited' (1995) 33(9) Sex Roles 687, 693.
[151] Boe and Woods (n 2) 361.
[152] Judith H Langlois and Chris Downs, 'Mothers, Fathers, and Peers as Socialization Agents of Sex-Types Play Behaviors in Young Children' (1980) Child Development 1237, 1243.
[153] Leslie R Brody and Judith H Hall, 'Gender and Emotion in Context' (2008) 3 Handbook of Emotions 395, 405.
[154] ibid.
[155] Owen Blakemore, Berenbaum and Liben, *Gender Development* (n 7) 283.

than girls. This differential treatment of interactions reinforces the discourse and can, '…whether consciously or unconsciously guided, reinforce a strict gender binary, placing certain characteristics at extreme ends of a perceived continuum of feminine to masculine.'[156]

3.3.1. '…the mechanisms and instances which enable one to distinguish true from false statements…'[157]

The 'mechanism and instances', the means by which the 'truth regime', intersecting with 'doing gender', is enforced, operate a 'disciplinary power' through decentralised and informal methods of coercion operated by peers. The 'disciplinary power' is decentralised and disseminated from the formal institution of 'legal sex' to all individuals. Therefore, any member of society can operate the 'mechanisms of control'.[158] The legal institution is not needed to directly control behaviour,[159] because the mechanisms are operated in an interactional context. These informal methods of control can operate laterally among parents and apply a 'constant pressure to conform'.[160] If parents fail to meet the discourse, then 'mechanisms of control', operated by their peers, can hold them to account.

Surveillance is undertaken by peers on 'gendered parenting' practices and interactions.[161] The 'truth regime' and 'doing gender' intersection actuates lateral peer surveillance because accountability to fellow parents is a fundamental feature of interactional and social practice.[162]

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[156] Boe and Woods (n 2) 360.
[157] Lorenzini (n 43) 2.
[158] Foucault, *Discipline and Punish* (n 67) 202.
[159] Angela C Henderson, Sandra M Harmon and Jeffrey Houser, 'A New State of Surveillance? An Application of Michel Foucault to Modern Motherhood' (2010) 7(3/4) Surveillance & Society 231, 236.
[160] Oksala (n 69).
[161] Foucault, *Power/Knowledge* (n 35) 104.
[162] West and Zimmerman, 'Doing Gender' (n 21) 137.

This represents a 'carceral continuum' that is disseminated but remains as powerful.[163] Parents are surveyed '…through interpersonal communication and observation, ranging anywhere from conversations…to a covert, silent monitoring…'.[164] This type of observation may become automatic and commonplace for parents and peers alike, and can be undertaken by any individual a parent comes into contact with. The parent is judged by the observations made, according to how well their behaviour meets the 'truth regime', which pressurises parents to adhere to the norms.

The knowledge of consistent surveillance means that parents may 'internalise the gaze'. Parents begin to act as though they are being watched constantly, heightening self-awareness, and causing them to regulate their own behaviour.[165] Essentially, individuals who have been subject to the formal rules of 'legal sex' and the regulation of peer observation begin to internalise those rules. Individuals then partake in self-surveillance which is '…the attention one pays to one's behaviour when facing the actuality or virtuality of an immediate or mediated observation…'.[166] Therefore, the relationship between the 'truth regime' and accountability results in the internalisation and re-enactment of the dominant sex/gender discourse. The normalisation of 'gendered parenting' acts as a further means of social control over parents.[167] 'Gendered parenting' has become normalised through consistent enactment and is ingrained into society; it is not only viewed as a set of prevailing norms but is seen as the natural order of things. Normalisation has made parenting practices homogeneous, making explicit the differences between normal parents who 'do gender' in accordance with the 'truth regime' and those who fail to, and are considered abnormal.[168] This disciplinary mechanism works

[163] Henderson, Harmon and Houser (n 159) 235.
[164] ibid 231.
[165] ibid 235.
[166] Paulo Vaz and Fernanda Bruno, 'Types of Self-Surveillance: From Abnormality to Individuals "At Risk"' (2003) 1(3) Surveillance & Society 272, 273.
[167] Taylor (n 74) 46.
[168] David Murakami Wood, 'Beyond the Panopticon? Foucault and Surveillance

by creating situations of 'petty humiliation'.[169] This can instil a fearful paranoid behaviour where parents cannot stop comparing their practices and behaviour to the perceived norm. In doing so, parents may continue the self-control pattern, internalise the work of supervision, and '…begin to interrogate [them] "selves" to see if they are acceptably 'normal'.'[170]

Examination marks the point at which individuals' adherence to the 'truth regime' is judged based on their parenting.[171] Examination involves the judgement of a parent's performance, and categorisation of it as either normal or requiring punishment, thereby linking surveillance to normalisation to form a situation where parents are simultaneously observed and evaluated.[172] When an individual becomes a parent, they enter the 'field of documentation' and become visible. The intersection between the 'truth regime' and 'doing gender' forms social interactions, meaning that parents are examined and accountable to their peers.[173] Peers may judge the parents based on the extent to which their parenting practice adheres to the discourse and, because sex is omnirelevant, examination can take place anywhere at any time.[174] The examination of behaviour determines whether the parent is rewarded or suffers being stigmatised, condemned, or criticised. This leads to social isolation and a sense of disconnection from society.[175] The result of this mechanism of coercion is that parental practices may be '…designed with an eye to

Studies' in Jeremy W Crampton and Stuart Elden (eds), *Space, Knowledge and Power: Foucault and Geography* (Routledge 2016) 247.

[169] Oksala (n 69).

[170] Anne Schwan and Stephen Shapiro, *How to Read Foucault's Discipline and Punish* (Pluto Press 2011) 120.

[171] Oksala (n 69).

[172] West and Zimmerman, 'Doing Gender' (n 21) 139.

[173] BJ Risman, 'Gender as a Social Structure: Theory Wrestling with Activism' (2004) 18 Gender & Society 429, 430

[174] West and Zimmerman, 'Doing Gender' (n 21) 136.

[175] Lorber, *Paradoxes of Gender* (n 27) 30.

their accountability, that is, how they might look and how they might be characterized.'[176]

3.3.2. '…the way in which each is sanctioned…'[177]

If, after a parent's parenting is examined, they do not fully realise the 'truth regime' or discourse, then the parent and child can be held accountable.[178] The 'art of punishing' arranges the behaviours that parents display into hierarchies to differentiate individuals who should be punished from those requiring rewards.[179] The discourse is '…enforced through informal sanctions of gender-inappropriate behaviour by peers and by formal punishment…'.[180] The formal sanctions are the reporting or referring the parent to more formal institutions. For instance, a parent failing to conform — evidenced through their child displaying 'abnormal' behaviour — can, in extreme circumstances, be reported to social services by peers. More commonly, informal sanctions include the interactional consequences of social dislocation for both parents and children. This is where they become removed from mainstream society and shunned by their peers.[181]

The 'truth regime', intersecting with the 'doing gender' approach, instigates and informs parental practices and coerces the practice of 'gendered parenting'. Simultaneously 'gendered parenting' sustains, entrenches, and actualises the discourse as a socially accepted interactional practice. Therefore, as we contemplate reform, we must consider the need for change at both the institutional and social level of 'legal sex' and the interactional level of the discourse.

[176] West and Zimmerman, 'Doing Gender' (n 21) 136.
[177] Lorenzini (n 43) 2.
[178] Wharton (n 22) 63.
[179] Foucault, *Discipline and Punish* (n 67).
[180] Lorber, *Paradoxes of Gender* (n 27) 32.
[181] Lorber, *Paradoxes of Gender* (n 27) 32.

4 Decertification of 'Legal Sex'

The harmful nature of the sex/gender discourse drives demand to decertify 'legal sex' to facilitate the dismantling of the current 'truth regime', creating space for a more favourable discourse. Effectively, '[i]t is time to disestablish sex and gender.'[182]

Having identified the mechanisms through which the sex/gender binary is produced and ingrained in society, an alternative approach can be offered to disrupt the current system and contribute to the 'feminist de-gendering movement' by 'envisioning a feminist utopia'.[183] To dismantle the current discourse, the underlying framework that generates and sustains the 'truth regime' must be broken down.[184] In turn, the practice of 'gendered parenting' could be attenuated, with a goal of creating a just society where 'legal sex' has much reduced legal and societal meaning. Dismantling the dichotomous discourse could help to remove sex stereotypes and create more space for gender diversity to flourish.[185] Although reform would not automatically reverse the harmful effects of the sex/gender binary, it is hoped that decertification would be the first step to breaking the binary.[186] In turn, the social interactions, particularly 'gendered parenting', would be 'redone'. The potential effect of this is that a more favourable discourse would be initiated, and the state would be unable to force individuals into the formal and legal sex/gender edifice.

[182] Cruz (n 77) 255.
[183] Risman (n 173) 446.
[184] Lila Braunschweig, 'Abolishing Gender Registration: A Feminist Defence' (2020) 1 International Journal of Gender, Sexuality and Law 76, 86.
[185] Lena Holzer, 'Smashing the Binary? A New Era of Legal Gender Registration in the Yogyakarta Principles Plus 10' (2020) 1 International Journal of Gender, Sexuality and Law 98, 123.
[186] Braunschweig (n 184) 92.

From a practical standpoint, reform would remove the legal requirement to register a new-born's sex on their birth certificates but birth, and sex, information would continue to be stored on the General Register. This aligns with the approach of the Committee on Women and Equality, who argued that '[t]he Government should be moving towards 'non-gendering' official records as a general principle and only recording gender where it is a relevant piece of information.'[187] Termed decertification,[188] this involves the legal institution and state stepping back from publicly assigning, registering, and categorising sex at birth.[189] Decertification removes the legal status of sex and the formally assigned aspect of personhood, verified by the state.[190] This active de-gendering requires interrupting the repeated presence of 'legal sex' on documentation, most importantly the birth certificate, and removing the presence of sex and gender from legal institutional regulations, which are usually unnecessary.[191] Maintaining the legal requirement for information to be registered with the General Register office is important in the event that an individual needs legal proof of their sex.[192] This would put sex/gender on par with other informal aspects of personhood, including race.[193] It would also mitigate objections to reform that feel the removal of 'legal sex' altogether is

[187] Women and Equalities Committee, *Transgender Equality* (HL First Report of Session 2015–16, HC 390) <https://publications.parliament.uk/pa/cm201516/cmselect/cmwomeq/390/390.pdf>> accessed 28 May 2022.

[188] Davina Cooper, 'Diversifying, Abolishing, Equalising Gender…Can the Law Do All Three?' (The Future of Legal Gender, 22 August 2018) <https://futureoflegalgender.kcl.ac.uk/2018/08/22/diversifying-abolishing-equalising-gender-can-the-law-do-all-three/#> accessed 28 May 2022.

[189] Davina Cooper and Robyn Emerton, 'Pulling the Thread of Decertification: What Challenges Are Raised by The Proposal to Reform Legal Gender Status' (2020) 10(2) feminists@law 1, 2 <https://journals.kent.ac.uk/index.php/feministsatlaw/article/view/938> 28 May 2022.

[190] Cooper, Grabham and Renz, 'Introduction to the Special Issue on the Future of Legal Gender' (n 73) 5.

[191] Braunschweig (n 184) 91.

[192] Holzer (n 185) 105.

[193] Cooper and Emerton, 'Pulling the Thread of Decertification' (n 189) 2.

too extreme. Essentially, the disestablishment, instead of complete abolition, would be an appropriate way forward.[194]

Support, and models, for decertification can be found in international jurisdictions. In 2019, Tasmania, a pioneer, introduced an opt-in system,[195] whereby birth certificates do not show the sex marker upon a new-born's birth certificate unless the parent or individual (once over 16) request it.[196] The sex continues to be recorded on the birth register.[197] Tasmania has, it may appear, accepted that the sex/gender binary is a socio-legal product rather than a natural state requiring codification. The recent nature of, and sparse literature on, this reform limits a more in-depth analysis. The German Federal Constitutional Court, in 2018, recognising the discriminatory nature of binary registration, held that parliament must either offer a third gender option or remove sex from documentation. Although Germany, unsurprisingly, chose the former option, this ruling signifies the court's readiness to accept the de-gendering of birth certificates.[198] At the international level, the Third International Intersex Forum declared that '…sex or gender should not be a category on birth certificates…'.[199] Recently, Principle 13 of the Yogyakarta Principles demanded that '[States should] end the registration of the sex and gender of the person in identity documents such as birth certificates...'.[200] These examples represent the demand and readiness

[194] Cruz (n 77) 341.
[195] Justice and Related Legislation (Marriage and Gender Amendments) Act 2019.
[196] CL Quinan and others, 'Framing Gender Identity Registration Amidst National and International Developments: Introduction to "Bodies, Identities, and Gender Regimes: Human Rights and Legal Aspects of Gender Identity Registration"' (2020) 1 International Journal of Gender, Sexuality and Law 1, 19.
[197] Justice and Related Legislation (Marriage and Gender Amendments) Act 2019 s 22.
[198] Braunschweig (n 184) 77.
[199] ILGA and ILGA Europe, *Third International Intersex Forum* (2013) <https://www.ilga-europe.org/resources/news/latest-news/3rd-international-intersex-forum-concluded> accessed 28 May 2022.
[200] Stefano Osella, '"De-Gendering" The Civil Status? A Public Law Problem' (2020) 18(2) IJCL 471, 472.

for decertification, and, Tasmania in particular, provides a model for reducing state control over 'legal sex'.[201]

4.1. Dismantling the 'Truth Regime' and 'Redoing Gender'

Decertification would begin the process of deconstructing the 'truth regime' by undermining the current discourse and weakening the 'mechanisms and instances' of control. The aim here is to produce a new 'politics of truth' whereby the current discourse no longer holds favour, and the mechanisms are not sufficient for constraining individuals. The battle for the truth is not the search for an 'absolute truth'. Instead, it is the battle over '…the rules according to which the true and false are separated and specific effects of power are attached to the true…', thereby detaching the power of truth from the operation of 'legal sex' registration.[202] Decertification would interrupt the circular system of power that gives rise to the current truth by disrupting the socially accepted reality.[203] This dismantling would not abolish the entrenched norms immediately given the long-lasting nature of such regimes. For example, fragments of the once powerful Christian Church 'truth regime' are still evident in the Sunday traditions of today.[204] Dismantling the 'truth regime' would leave behind remnants but this would not prevent the new discourse's development.

The new 'truth regime', when intersecting with the 'doing gender' approach, would alter the information bestowed on parenting. It would free individuals whose competence as parents is hostage to the 'doing' of gender, modifying 'gendered parenting' practices to produce

[201] Holzer (n 185) 104.
[202] Michel Foucault and Paul Rabinow, *The Foucault Reader: An Introduction to Foucault's Thought* (Penguin 1991) 75.
[203] Foucault, *Power/Knowledge* (n 35) 133.
[204] Norman Jackson and Pippa Carter, *Rethinking Organisational Behaviour: A Poststructuralist Framework* (Pearson Education Limited 2007) 109.

different interactional parenting methods.[205] In this sense, '[g]ender is not undone so much as redone.'[206] The 'redoing' of gender would reposition parents in relation to the new truth and disrupt the regulatory process of parenting.[207] Parents would take on the new discourse and set into motion the actualisation and normalisation of the new truth through revised interactional practices. Simultaneously, the replacement parenting practices would change the interactional norms and parents would cease to sustain or entrench the current 'truth regime'. Operating as agents of socialisation, they may then impose the new discourse onto their children. This would modify, as opposed to break, the 'doing gender' approach to the system.[208] The desired effect of this is the 'de-gendering of interaction', meaning that the form of interaction would not be dependent on the sex category of the individuals.[209] There would be no more state-endorsed cries of 'it's a girl' or 'boy'.[210] Ultimately, '…decertification symbolises the possibility of living and raising children beyond gender, while providing a practical and discursive support for those who refuse to accede to gender's terms.'[211]

4.2. Undermining the Discourse

The discourse marks a point at which the 'truth regime' can be undermined in order to constitute a new 'politics of truth'.[212] The discourse can act as '…a hindrance, a stumbling point of resistance and a starting point for an opposing strategy.'[213] The discourse thus

[205] West and Zimmerman, 'Doing Gender' (n 21) 126.
[206] West and Zimmerman, 'Accounting for Doing Gender' (n 123) 118.
[207] Judith Butler, *Undoing Gender* (Psychology Press 2004) 43.
[208] Ryan (n 25).
[209] Wharton (n 22) 228.
[210] Cooper and Emerton, 'Pulling the Thread of Decertification' (n 189) 24.
[211] ibid 8.
[212] Michel Foucault, *The History of Sexuality: An Introduction* vol I (Robert Hurley tr, Pantheon 1978) 114.
[213] Michel Foucault, *The Will to Knowledge: The History of Sexuality* vol I (Penguin Books 1998) 100.

becomes the ideal site of resistance,[214] where the sex/gender 'truth regime' is fragile and possible to frustrate.[215] Decertification would create a new truth, or opposing strategy, that would undermine the current discourse. The new discourse would be altered to reflect the fact that sex and gender, although treated so by the legal, social, and scientific institutions, are not binary.[216] This would weaken the naturalisation of sex and gender-based differences.[217] It would also undermine the assumption that there is one dominant and one subordinate sex.[218] It would create space for sex and gender diversity to expand, challenging the belief there are only two categories.[219] The new discourse could also stop sex and gender from being seen as a legal status and characteristic. The female and male marker would be separate to gender development, separating the female from femininity.[220] In essence, the decertification of 'legal sex' would have a liberating effect because the essentialist truth of sex and gender would no longer have a legal basis.[221] By undermining the discourse, it may no longer have the ability to produce or transmit power and, therefore, would be mitigated in controlling society's perception of reality. It could become ineffectual at constraining behaviours, thoughts, or interactions.

[214] Jonathan Gaventa, 'Power After Lukes: An Overview of Theories of Power Since Lukes and Their Application to Development' (Participation Group, Institution of Development Studies, 2003) 1, 4 <http://www.powercube.net/wp-content/uploads/2009/11/power_after_lukes.pdf> 28 May 2022.
[215] Foucault, *The Will to Knowledge* (n 213) 100.
[216] Lorber, 'Using Gender to Undo Gender' (n 28) 82.
[217] Cooper and Emerton, 'Pulling the Thread of Decertification' (n 189) 8.
[218] Holzer (n 185) 101.
[219] ibid 112.
[220] Davina Cooper, 'Bringing the Utopian Into Our Gender Politics' (*Social Politics and Stuff*, 2015) <https://davinascooper.wordpress.com/2015/01/25/bringing-the-utopian-into-our-gender-politics/> accessed 28 May 2022.
[221] Andrea Büchler and Michelle Cottier, 'Legal Gender Studies' (2012) Dike.

4.3. Weakening the 'Mechanisms of Control'

The 'mechanisms and instances' component would also be weakened by decertification because the 'mechanisms of control' would no longer be adequate to wield 'disciplinary power' successfully. 'Disciplinary power' operated over parents, specifically decentralised lateral mechanisms operated by peers, are weakened by the norms being altered and, therefore, the pressure to conform being reduced. The 'truth regime' is hence further dismantled by the inability of the system to sustain coercive power over society.

Resistance to surveillance, or 'revolts against the gaze',[222] would undermine the state's ability to observe an individual's sex category. The state may find it more difficult to put individuals under a 'microscope of conduct' because decertification of 'legal sex' would arrange individuals in a manner that obstructs constant observation. This new arrangement, namely the removal of sex from official documents, diminishes the relevance of sex for identification purposes and hence surveillance could be reduced.[223] Sex would be stored with the General Register Office, which would allow the state to monitor the population at a general level. However, this would not facilitate surveillance by agents of legal or social control in the day-to-day lives of individuals. Informal observation by peers would also be undermined because the sex category would be less visible. The subversion of the discourse further weakens the power of surveillance because the truth against which the individual is judged has altered. The 'internalised gaze' would also be modified to meet the new discourse. Surveillance, or the 'calculated gaze', is not altogether removed from society, but the standard to which behaviour is compared is revised. Without constant surveillance based on 'legal sex', and with a more liberal standard against which to judge

[222] Felix Driver, 'Power, Space, and the Body: A Critical Assessment of Foucault's Discipline and Punish' (1985) 3(4) Environment and Planning D: Society and Space 425, 441.
[223] Holzer (n 185) 104.

behaviour, the 'truth regime' would not be able to control the truth or individuals freed from the pressure to adhere to the discourse.

Normalisation would be weakened by the reform of 'legal sex' because the act of registering and categorising sex would no longer be a habitual practice and the normalised discourse would be destabilised. The current 'truth regime' would be replaced with a new normal. Decertification would prevent the entrenchment of the current discourse into society's functioning, because 'legal sex' would no longer be essential or integral to legal or social life. The process of dividing individuals into two mutually exclusive groups, which initiates the discourse, would be made visible enough to be questioned. 'Gendered parenting' practices would be unsettled as the norms that have informed parents are changed and parents alter their practices to adhere to the new discourse. The new 'normal' standard of behaviour, informed by the new discourse, would become ingrained in society through constant enactment and performance. It would then be used to evaluate an individual's behaviour. Certification, obliging the repetition of sex and gender across various situations, which has arguably helped to create both the legal institutional and social interactional norms, would be weakened to the extent that the 'truth regime' could wield impotent power. [224] In essence, '[e]liminating legal gender categories thus seems promising for the purpose of breaking with normative ascriptions about legitimate genders and [sex]…'.[225]

Examination would be undermined. The visibility of sex categories would be concealed, and individuals would not enter the 'field of documentation'. Therefore, examination, as a method of control, would be unable to coerce individuals into compliant behaviour. The discourse is currently '…the ground against which peers evaluate one

[224] Davina Cooper and Flora Renz, 'If the State Decertified Gender, What Might Happen to Its Meaning and Value?' (2016) 43 Journal of Law and Society 483, 487.
[225] Holzer (n 185) 123.

another's conduct.'[226] The removal of 'legal sex' could make the individual's sex category invisible and consequently the examining body could not track the individual's performance. The sex category's importance, although required in limited situations, would be reduced. By making 'legal sex' imperceptible, the individual cannot become a 'case' where they are trained or corrected.[227] Therefore, parents no longer need to face sanctions, for instance social dislocation, or be trained to conform to 'gendered parenting' practices. Instead, they have more freedom. Decertification can thus reduce the policing of the discourse and supports sex/gender liberation.[228]

4.4. The New Discourse

It is envisioned that the new discourse would involve the promotion of sex and gender as varying along a spectrum. It would involve the emancipation from state control such that society, especially parents, would be liberated from the constraints of the current discourse. The current 'truth regime' produces a binary discourse and does not acknowledge the intra-variability of sex or gender.[229]

The new discourse would recognise the complexity of individuals and conceptualise sex as '…plural, and as a spectrum, a field or intersecting spectra or continua.'[230] The possible combinations of genitalia, hormones, brain structures, bodies and mannerisms produce boundless varieties of sex in human beings.[231] It challenges the belief that birth means destiny and supports the notion that a sex/gender binary does not reflect reality.[232] Rather, male and female are two ends

[226] West and Zimmerman, 'Accounting for Doing Gender' (n 123) 118.
[227] Foucault, *Discipline and Punish* (n 67).
[228] Holzer (n 185) 107.
[229] Cowan (n 34).
[230] Surya Monro, *Gender Politics: Citizenship, Activism and Sexual Diversity* (Pluto Press 2005) 36.
[231] Lorber, *Paradoxes of Gender* (n 27) 22.
[232] Greenberg (n 51) 275.

of the spectrum within which there is tremendous intra-group variation.[233] There is a great disparity between the biology of individuals, and '…on close inspection, absolute dimorphism disintegrates even at the level of basic biology. Chromosomes, hormones, the internal sex structures, the gonads, and the external genitalia all vary more than most people realize…'.[234] The individual's sex is a mosaic — for example, androgens and oestrogen are not distinct sex hormones but instead vary in each individual.[235] Therefore, legal assignment of individuals based on genitalia is a major simplification. This signifies the need to change the legally and socially promoted, but scientifically erroneous, perspective of sex as a binary.[236]

There is a heterogeneity of gender identities that represent a diversity of expression beyond the simplified binary gender paradigm.[237] Individuals are not born, but taught to be, gendered. Gender, described as a kaleidoscope, is a '…relational, fluctuating, everchanging space that we inhabit, instead of essential and unchanging feature...'.[238] Gender is a spectrum with masculinity and femininity at opposing ends. These identities are not necessarily static, but can evolve, shift, and develop.[239] For example, the concept of 'woman' denies the multiplicity, complexity, and variation within this 'category'.[240] Gender diversity is already recognised in a number of limited identities, including transgender, agender, and non-binary. However, under the new discourse the freedom of expression would be further encouraged, and diversity would be celebrated instead of tolerated.

[233] Cruz (n 77) 259.
[234] Ann Fausto-Sterling, 'The Five Sexes, Revisited' (2000) 40(4) Sciences 18, 20.
[235] Janet Shibley Hyde and others, 'The Future of Sex and Gender in Psychology: Five Challenges to the Gender Binary' (2019) 74(2) American Psychologist 171, 174.
[236] Elizabeth M Saewyc, 'Respecting Variations in Embodiment As Well As Gender: Beyond the Presumed "Binary" of Sex' (2017) Nursing Inquiry 1.
[237] Cooper and Renz (n 224) 486.
[238] Venditti (n 100) 59.
[239] Cooper and Renz (n 224) 503.
[240] Lorber, *Paradoxes of Gender* (n 27) 5.

Parenting practices would teach diversity instead of binary. This allows individuals the freedom to shape their own identities or live without a gender label.[241] This article agrees that '…a utopia in which even gender polarisation has been so completely dismantled that…the distinction between male and female no longer organizes either the culture [or] the psyche' is desirable.[242]

4.5. Practical Implications

The practical implications of decertification are evident when proof of sex is needed for the state to determine rights and obligations or manage the population. However, the challenges of informalising sex are easily reworked and overcome when sex is treated as is any other informal element of personhood, such as race or sexuality.[243] 'Legal sex', displayed on the birth certificate, is used as a mechanism for managing and organising the population.[244] The presence of the category can determine state-enforced obligations, distribution of resources,[245] and dictates entry into single-sex spaces.[246] These include welfare benefits, maternity pay, pension age, and access to refuges. Critics are concerned that decertification would make division based on sex difficult and be detrimental to women's safety in single-sex spaces.[247] However, the importance of 'legal sex' in these situations has diminished following reforms, for example the equalisation of pension age for women and men born after the 1960s, resulting in the 'legal sex' criteria no longer being essential for access to certain resources and spaces.[248] Even in situations where sex is still relevant,

[241] Cooper and Emerton, 'Pulling the Thread of Decertification' (n 189) 13.
[242] Sandra Lipsitz Bem, 'Defending *The Lenses of Gender*' (1994) 5(1) Psychological Inquiry 97, 101.
[243] ibid.
[244] Ryan (n 25) 271.
[245] Currah and Moore (n 24) 116.
[246] Laura Greenfell and Anne Hewitt, 'Gender Regulation: Restrictive, Facilitative or Transformative Laws' (2012) 34 Syd LR 761.
[247] Cooper and Emerton, 'Pulling the Thread of Decertification' (n 189) 9.
[248] Women and Equalities Committee, *Transgender Equality* (n 187).

the General Register Office provides access to proof. 'Legal sex' is also a critical site for antidiscrimination law and affirmative action.[249] The Equality Act 2010 protects people on the grounds of sex discrimination, and section 159 legalises forms of affirmative action for those who have a 'protected characteristic'. There are concerns that women could struggle to make claims under the Equality Act 2010 if sex was not marked on their birth certificates. However, decertification does not remove access to equality on the grounds of sex.[250] Sex would be treated like other 'protected characteristics' that are not recognised as a legal identity or subject to a precise legal definition, including disability and race.[251] It also does not pose a risk to affirmative action because it is rarely dependent on 'legal sex' but instead '…works independently of a personal status registration and thus legal gender.'[252] Decertification would mean that sex, a piece of personal information, does not make a functional difference to legal processes.[253]

5 Conclusion

The purpose of this article was to determine the effect 'legal sex' has had upon the creation of the sex/gender binary, and thus the influence it had over 'gendered parenting'. And, whether decertification of 'legal sex' would break the binary system parents impose on their children. It has been argued that the archaic practice of registering and categorising 'legal sex' initiates a sex/gender 'truth regime' that, operating as a form of power, contributes to the social construction of sex and gender. 'Legal sex' fabricates a discourse that governs and regulates society's insight into the 'truth' and is accepted as reality. 'Mechanisms of control' enforce the discourse and compel individuals

[249] Cooper and Emerton, 'Pulling the Thread of Decertification' (n 189) 11.
[250]ibid 9.
[251] Susanne Lilian Gossl and Berit Volzmann, 'Legal Gender Beyond the Binary' (2019) 33(3) IJLPF 403, 420.
[252] ibid.
[253] Women and Equalities Committee, *Transgender Equality* (n 187).

to conform. The practice of 'gendered parenting' is the inevitable result of the 'truth regime', intersecting with 'doing gender' to inform and compel the interactions of parents. The discourse, operating as an instrument of power, disseminates the truth and obligations to conform throughout society, especially to parents. Parents may actualise the discourse through conventionalised rituals of truth, which sustain and entrench the 'truth regime' further. The 'mechanisms of control' operate at a decentralised lateral level to exert 'disciplinary power' over parents, who fear social dislocation. As demonstrated in Tasmania, the decertification of 'legal sex' demonstrates the potential to dismantle the operation of the 'truth regime's' power, by undermining the discourse and weakening the 'mechanisms of control'. A new narrative, acknowledging the intra-variation of sex and gender, would be initiated by removing 'legal sex' and thus the messages it promotes. The 'mechanisms of control' could be weakened, by removing sex as a visible characteristic and scaling down the standard of accountability. This would dismantle the current 'truth regime', and hence 'redo gender', to ultimately break the binary system that parents impose on their children, arguably advancing sex equality and promoting gender diversity within society. Although decertification may feel like a far-off utopia for its advocates, this article seeks to place the consideration of decertification firmly into the debate by highlighting the operation of 'legal sex' and 'gendered parenting', and arguing that their effects are harmful

An Intersectional Approach to Alternative Care Models: A case study of asylum-seeking children at the Makeni Transit Centre in Zambia

Emily Forbes

Abstract

As the use of immigration detention has increased, so too has the development of alternative care models. Alternative care models are interim measures implemented when an asylum-seeker initially enters a country to avoid their detention until a durable solution is found. This paper seeks to determine the impact of alternative care models on the well-being of unaccompanied asylum-seeking children and asylum-seeking children with their families, specifically those accommodated at the Makeni Transit Centre in Lusaka, Zambia. Due to the diverse identities of children accommodated in alternative care models, an intersectional approach is applied to make visible the realities of children with minority identities. The findings of this research highlight that although there are gaps in the services provided at the Makeni Transit Centre, many of the well-being needs of accommodated children are being fulfilled. However, due to the limitations of the research, the indicators used can only offer an objective understanding of the well-being of children in alternative care models. More broadly the findings of this research highlight the need for an intersectional approach to alternative care models to ensure the needs of women and girls are satisfied. The findings further show that disaggregated data is required to understand the extent to which those with minority identities enjoy their rights, and thus uncover discriminatory practices within alternative care models.

1 Introduction

A study conducted in Australia comparing the well-being of community-based asylum seekers with those in detention found that the children in detention had significantly worse social-emotional well-being than the community-based children.[1] This highlights the critical importance of children's well-being being the primary consideration in the development of alternative care models. This paper therefore seeks to determine how alternative care models can ensure the well-being of asylum-seeking children. To achieve this, the issue of immigration detention will be outlined, including the relevant international legal framework which will be considered through an intersectional lens. Drawing on this discussion, a series of child well-being outcomes will be developed to assess the well-being of children accommodated in alternative care models. These outcomes will then be applied to the situation of children in the Makeni Transit Centre. It is hoped that this research will not only inspire future evaluations of the well-being of children in alternative care models, but also the adoption of intersectionality in such evaluations.

This research has been conducted in collaboration with the International Detention Coalition (IDC), who are a global network working to reduce the use of immigration detention and encourage the use of rights-based alternatives.[2] The research was used by IDC to develop a research brief for the Government of Thailand on promising practices in alternatives to immigration detention (ATD) for children and families, aiming to further the Thai Government's understanding of other states' implementation of these models. It provides recommendations to ensure the needs of women and girls, men and boys living in ATDs are met and to support the Thai Government and

[1] Karen Zwi and otherd, 'The Impact of Detention on the Social-emotional Well-being of Children Seeking Asylum: A comparison with community-based children' (2018) 27 European Child and Adolescent Psychiatry 411.

[2] 'About Us' (International Detention Coalition) <https://idcoalition.org/about/> accessed 23 May 2022.

other stakeholders in strengthening and expanding ATD in Thailand. This research supports the project by developing a framework capable of assessing the well-being of asylum-seeking children in alternative care models.

Immigration detention is a law, a policy, and a practice.[3] Therefore, a mixed-method approach has been adopted for this research. A doctrinal methodology was used to examine the normative sources of law regulating child immigration detention and to identify their limitations. Focus was given to the rights set out in the Convention on the Rights of the Child (CRC),[4] drawing on the rights prescribed by the Convention Relating to the Status of Refugees (Refugee Convention).[5] Building on this doctrinal analysis, a series of rights-based, gender-sensitive indicators has been developed to enable the well-being of children in alternative care models to be measured. Sensitivity to intersectionality is essential to ensuring the well-being of asylum-seeking children, especially girls, in alternative care models. To demonstrate this, the intersections of migration status, age and gender have been considered, in addition to an analysis of the Convention on the Elimination of Violence Against Women (CEDAW),[6] to provide an understanding of how best to support and promote the well-being of children accommodated in these models.

Furthermore, this paper will argue for the application of intersectionality beyond the context of alternative care models, highlighting the need for an intersectional lens to be applied to international human rights law and international refugee law to

[3] Amy Nethery and Stephanie Silverman, 'Understanding Immigration Detention and its Human Impact' in *Immigration Detention: The Migration of a Policy and its Human Impact* (Routledge 2015) 1.

[4] Convention on the Rights of the Child (adopted 20 November 1989, entered into force 2 September 1990) 1577 UNTS 3 (CRC).

[5] Convention Relating to the Status of Refugees (adopted 28 July 1951, entered into force 22 April 1954) 189 UNTS 137 (The Refugee Convention).

[6] Convention on the Elimination of Discrimination Against Women (adopted 18 December 1979, entered into force 3 September 1981) 1249 UNTS 13 (CEDAW).

adequately protect those falling under more than one international treaty. This paper will first provide support for this hypothesis by presenting the findings of desk-based research reviewing existing literature demonstrating the need for an intersectional approach to international human rights law (IHRL), and discussing the development of indicators to measure the enjoyment of human rights. It will further illustrate how adopting an intersectional lens to an indicator methodology can uncover discrimination in the enjoyment of rights.

The empirical element of the research considers the context within which immigration detention is practised, attempting to gain an authentic insight into the operation of the practice. These indicators are applied and considered alongside an analysis of alternative care models implemented in Zambia. Zambia has been chosen for specific analysis due to the existing myriad of good practices, policies and models relating to asylum seekers implemented within the country. This case study was further chosen in an attempt to challenge Eurocentrism within the discussion surrounding good practices in migration policies.

2 The Immigration Detention Context

2.1. Child Immigration Detention

Immigration detention is an increasing phenomenon. It is estimated that 272 million people migrated in 2019 compared to 192 million at the start of the century,[7] an increase correlating with the accelerating development of immigration detention policies and systems globally.[8] Immigration detention has been defined as 'the deprivation of liberty

[7] Marie McAuliffe and Binod Khadria (eds), *World Migration Report 2020* (International Organisation for Migration 2020) 22.
[8] Nethery and Silverman (n 3) 1.

of non-citizens for reasons related to their immigration status'.[9] It is seen as an exercise of state sovereignty, as well as a means to control migrating populations and protect against perceived national security threats.[10] For these reasons states are investing ever growing sums of money into detention facilities, including a recent trend of investing in facilities in transit countries.[11]

Children made up 14 per cent of the total migrating population in 2019,[12] many of whom will have been placed in immigration detention. Child immigration detention is a more complex phenomenon than that of adults. The Committee on the Rights of Migrant Workers has defined it as: 'any setting in which children are deprived of their liberty for any reason relating to their immigration status or that of their parents, regardless of the name or justification provided by the state for depriving children of their liberty or the name of the facility or location where the child is deprived of liberty.'[13] It is well established that child immigration detention is a violation of children's rights and severely detrimental to their well-being.[14] It

[9] Global Detention Project, 'Children in Immigration Detention: Challenges of Measurement and Definition' (Global Detention Project, 1 June 2015) <www.globaldetentionproject.org/wp-content/uploads/2016/06/GDP_child_detention_discussion_paper_2015_FINAL.pdf> accessed 23 May 2022.

[10] Robyn Sampson and Grant Mitchell, 'Global Trends in Immigration Detention and Alternatives to Detention: Practical, Political and Symbolic Rationales' (2013) 1(3) Journal of Migration and Human Security 97.

[11] ibid.

[12] McAuliffe and Khadria (n 7) 232.

[13] Committee on the Protection of the Rights of All Migrant Workers and Members of their Families, *Joint General Comment No 4 (2017) of the Committee on the Protection of the Rights of All Migrant Workers and Members of their Families and No. 23 of the Committee of the Rights of the Child on State obligations regarding the human rights of children in the context of international migration in countries of origin, transit, destination and return* (OHCHR, 16 November 2017) <https://documents-dds-ny.un.org/doc/UNDOC/GEN/G17/343/65/PDF/G1734365.pdf?OpenElement> accessed 23 May 2022.

[14] Nethery and Silverman (n 3) 8–9.

has been found to consistently exacerbate existing health conditions of detainees,[15] with sleeping and eating problems, suicidal ideations and self-harm being alarmingly prevalent among child detainees.[16] Despite this, the detention of children for immigration purposes is used regrettably frequently.[17] Seventy-seven states are known to detain children, with 330,000 children being detained every year in immigration detention facilities globally.[18] These statistics alone demonstrate the sheer magnitude of the problem.

2.2. Alternatives to Detention

The use of child immigration detention has accelerated since the early 20th century,[19] simultaneous to pushbacks from civil society against the practice and to States recognising the need to pursue alternatives.[20] Despite the growing push for ATD, many States are reluctant to surrender their right to detain anyone, including children, for immigration purposes.[21] Alternative care arrangements have emerged

[15] Martha von Werthern and others, 'The Impact of Immigration Detention on Mental Health: A Systematic Review' (2018) 18(1) BMC Psychiatry 382.
[16] ibid 13.
[17] International Detention Coalition, 'Strategic Plan: 1st July 2020 to 30th June 2022' (3 July 2020) <https://idcoalition.org/wp-content/uploads/2020/07/IDC-Strategic-Plan-2020-2022-ENGLISH.pdf> accessed 23 May 2022.
[18] UN Special Rapporteur on the Human Rights of Migrants, 'Ending Immigration Detention for Children and Providing Adequate Care and Reception for Them' (20 July 2020) para 12 <https://documents-dds-ny.un.org/doc/UNDOC/GEN/N20/188/27/PDF/N2018827.pdf?OpenElement> accessed 23 May 2022.
[19] Amy Nethery and Stephanie Silverman, 'Understanding Immigration Detention and its Human Impact' in *Immigration Detention: The Migration of a Policy and its Human Impact* (Routledge 2015) 6.
[20] Robyn Sampson and Grant Mitchell, 'Global Trends in Immigration Detention and Alternatives to Detention: Practical, Political and Symbolic Rationales' (2013) 1(3) Journal of Migration and Human Security 97.
[21] Flynn M, 'The Debate over 'Alternatives' to Immigration-related Detention of Children' in *Migrations, State Obligations and Rights in a Globalized Context* (Global Studies Institute 2019)

from this crossroad between the opposition to child immigration detention and States refusing to concede their sovereignty.

IDC defines ATD as "any legislation, policy or practice, formal or informal, that ensures people are not detained for reasons relating to their immigration status."[22] IDC have carried out extensive research into ATD, finding that they are more affordable, humane, and effective than detention.[23] Their research has found that existing best practices ensure the right to liberty by establishing a presumption against detention; mandating ATD in the first instance; only permitting detention when ATD cannot be implemented; and prohibiting the detention of vulnerable individuals.[24] They have further identified that the most successful ATD incorporate case management into their approach, as implementing case management at all stages often leads to a case resolution which is tailored to the individual's needs.[25] Case management focuses on understanding and responding to the specific needs of the individual and is usually achieved by employing a caseworker to assist them and their family.[26] The caseworker can make referrals, which often has a positive impact on well-being as a result of facilitating access to support services.[27] As part of their advocacy, IDC have developed a series of tools

[22] Robyn Sampson, Vivienne Chew, Grant Mitchel and Lucy Bowring, *There are Alternatives: A Handbook for Preventing Unnecessary Immigration Detention (revised edition)* (IDC 2015) 2.0.
[23] ibid, III.
[24] ibid, 4.0.
[25] Robyn Sampson, Vivienne Chew, Grant Mitchell and Lucy Bowring, *There are Alternatives: A Handbook for Preventing Unnecessary Immigration Detention (revised edition)* (IDC, 2015) VI.
[26] Steering Committee for Human Rights, 'Human Rights and Migration: Legal and Practical Aspects of Effective Alternatives to Detention in the Context of Migration' (Council of Europe, 2018) para 205 < https://edoc.coe.int/en/migration/7961-legal-and-practical-aspects-of-effective-alternatives-to-detention-in-the-context-of-migration.html> accessed 8 March 2022.
[27] Robyn Sampson, Vivienne Chew, Grant Mitchell and Lucy Bowring, *There are Alternatives: A Handbook for Preventing Unnecessary Immigration Detention (revised edition)* (IDC, 2015) 7.1.2.

underpinned by human rights-based standards.[28] Their latest tool, the 'Revised Community Assessment and Placement Model' has been designed to help governments and stakeholders analyse and develop ATD.[29] They have gone on to develop the 'Child Sensitive Community and Assessment Placement Model', which seeks to ensure asylum-seeking children are not detained.[30]

The Steering Committee for Human Rights at the Council of Europe has identified that ATD come on a spectrum of restrictiveness.[31] Regardless of where the ATD lies along the spectrum, each measure has its strengths and weaknesses.[32] For example, *registration with authorities* is identified as the least restrictive model, fully respecting the individual's liberty. However, this model may limit access to other human rights.[33] Flynn has argued against the use of ATD on the basis that they are fundamentally part of the detention system and as such perpetuate it,[34] and jeopardise the right to freedom of movement and other fundamental rights.[35] He further argues that ATD are inapplicable in cases involving children. ATD may only be used when there are legitimate grounds for detention, the absence of which will render the alternative arbitrary.[36] There are no legal grounds upon which to detain children and therefore immigration detention is always

[28] ibid, 5.0.
[29] ibid, 3.0.
[30] ibid, 4.4.
[31] Steering Committee for Human Rights, 'Human Rights and Migration: Legal and Practical Aspects of Effective Alternatives to Detention in the Context of Migration' (Council of Europe, 2018) para 205 < https://edoc.coe.int/en/migration/7961-legal-and-practical-aspects-of-effective-alternatives-to-detention-in-the-context-of-migration.html> accessed 8 March 2022.
[32] ibid.
[33] ibid, 207.
[34] ibid.
[35] Michael Flynn, 'The Debate over 'Alternatives' to Immigration-related Detention of Children' in *Migrations, State Obligations and Rights in a Globalized Context* (Global Studies Institute 2019) 115-117.
[36] ibid.

a violation of children's rights.[37] Flynn therefore contends that ATD are not the solution to the problem of child immigration detention.[38]

Flynn's argument highlights an ongoing debate surrounding the terminology used in relation to alternatives. On the one hand, the advocacy being carried out in relation to countries who practice child immigration detention is promoting *alternatives to detention.* On the other hand, in other contexts and considering Flynn's critique, the term *alternative care models* may be more appropriate. Regardless, alternatives are a recent phenomenon and while there is expanding literature on this subject matter, additional research is required to evaluate the impact of practices being adopted to combat the phenomenon of immigration detention on the well-being of children. Furthermore, the existing literature fails to provide a gendered analysis, a gap this research seeks to address.

2.3. An Intersectional Approach to International Human Rights Law and International Refugee Law

The emergence of the concept of intersectionality in the late 1980s, and Crenshaw's coining of the term, exposed the monolithic nature of law.[39] It challenges the rigid and homogenising approach the law takes

[37] Committee on the Protection of the Rights of All Migrant Workers and Members of their Families, *Joint General Comment No. 4 (2017) of the Committee on the Protection of the Rights of All Migrant Workers and Members of their Families and No. 23 of the Committee of the Rights of the Child on State obligations regarding the human rights of children in the context of international migration in countries of origin, transit, destination and return,* 16 November 2017, CMW/C/GC/4-CRC/C/GC/23, para 5.

[38] Michael Flynn, 'The Debate over 'Alternatives' to Immigration-related Detention of Children' in *Migrations, State Obligations and Rights in a Globalized Context* (Global Studies Institute 2019) 115-117.

[39] Sumi Cho, Kimberlé Crenshaw and Leslie McCall, 'Towards a Field of Intersectional Studies: Theory, Application and Praxis' (2013) 38(4) University of Chicago Press 785.

to female experiences,[40] by allowing multiple facets of identities to be considered simultaneously.[41] It further serves as a framework to dissect and address the interactions between power structures and their consequential social inequalities and oppressions.[42]

At an international level, the immigration detention of children is governed by IHRL and international refugee law (IRL). Today, IHRL seeks to ensure atrocities are not repeated, whereas IRL continues to seek to remedy displacement when an individual's rights have been violated.[43] The two legal regimes operate in parallel,[44] yet often complement one another. This section will adopt an intersectional lens to demonstrate the ability of both regimes to work together to protect asylum-seeking children. It will further demonstrate the necessity of an intersectional lens to ensure all asylum-seeking children are protected.

IHRL is not immune to law's monolithic and homogenising nature. In this context, the consequences materialise as a protection void for persons protected by more than one IHRL treaty.[45] Davis argues for an intersectional approach to IHRL to address this void, contending that IHRL requires reform to adequately remedy the violations and inequalities of those with intersecting minority identities.[46] The same issues arise in IRL with the labels of 'victims'[47] and 'baggage'

[40] Kimberlé Crenshaw 'Mapping the Margins: Intersectionality, Identity Politics, and Violence Against Women of Color' (1991) 43(6) Stan L Rev 1241 at 1244 –45.
[41] Aisha Nicole Davis, 'Intersectionality and International Law: Recognising Complex Identities on the Global Stage' (2015) 28 Har Hum Rts J 205 at 208.
[42] Kimberlé Crenshaw, 'Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine' (1989) 1989(1) U Chi Legal F 139.
[43] Alice Edwards, 'International Refugee Law' in Daniel Moeckli, Sangeeta Shah and Sandesh Sivakumaran, *International Human Rights Law* (OUP 2019) 543.
[44] ibid 539. See also Deborah Anker, 'Refugee Law, Gender, and the Human Rights Paradigm' [2002] 15 Har Hum Rts J 139.
[45] Davis (n 41) 206.
[46] ibid 216.
[47] Heaven Crawley, 'Gender, "Refugee Women" and the Politics of Protection' in Claudia Mora and Nicola Piper (eds), *The Palgrave Handbook on Gender and*

traditionally being attached to migrating women,[48] exposing its homogenising nature. Within a migration context, research on women was largely absent in the literature until the 1980s.[49] Since then the female experience of migration has gained further focus within academia, with findings demonstrating how women have different migration experiences to men.[50] It is often more difficult for women to receive international protection and they suffer more violence as well as discrimination throughout their migration journeys.[51] These issues fundamentally arise from The Refugee Convention's omission of the rights violations most typically suffered by women, namely, violations of social, economic and cultural rights.[52] This is addressed in the following section.

2.4. International Law and the Immigration Detention of Children

IHRL seeks to prevent arbitrary detention,[53] stipulating that immigration detention is only permissible when it is necessary, proportionate, and in pursuance of a legitimate aim.[54] Additionally, the Global Compact on Migration requires that immigration detention must be used as a last resort and only after less coercive measures have been considered.[55] In spite of this, states often arbitrarily detain migrants, including children, ignoring these safeguards.[56]

Migration (Palgrave Macmillan 2021) 363.

[48] Monica Boyd, 'Women, Gender, and Migration Trends in a Global World' in Claudia Mora and Nicola Piper (eds), *The Palgrave Handbook on Gender and Migration* (Palgrave Macmillan 2021) 20.

[49] ibid 21.

[50] ibid.

[51] Crawley (n 47) 360.

[52] ibid.

[53] International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976, 999 UNTS 171) (ICCPR) art 9(1).

[54] ibid.

[55] UN, Global Compact for Safe, Orderly and Regular Migration (19 December 2018) objective 13 <https://refugeesmigrants.un.org/migration-compact> accessed 23 May

The CRC falls under the IHRL regime, positioning children as rights holders for the first time.[57] A key principle of the CRC is non-discrimination, meaning that the rights set out in the CRC are afforded to all children, irrespective of nationality or status.[58] It requires states to ensure all children's right to liberty,[59] healthcare,[60] education,[61] and other essentials,[62] as well as their right to family life are being met.[63] Perhaps most importantly, it requires states to ensure the best interests of the child are the primary consideration in all cases involving that child.[64]

The CRC is seemingly gender neutral, utilising both male and female pronouns.[65] It also encompasses both economic, social, and cultural rights as well as civil and political rights,[66] therefore addressing issues most relevant to females, unlike the Refugee Convention. However, the CRC omits girl-specific issues, failing to consider harmful practices specific to young females.[67] For example, it addresses the issue of child military service,[68] but fails to mention practices

2022.

[56] Grant Mitchell, 'Global Advocacy: Civil Society Engagement of Government on Alternatives to Immigration Detention' in Michael Flynn (ed), *Challenging Immigration Detention* (Edward Elgar 2017) 121.

[57] Nura Taefi, 'The Synthesis of Age and Gender: Intersectionality. International Human Rights Law and the Marginalisation of the Girl-Child' (2009) 17(3) International Journal of Children's Rights 345, 356.

[58] Convention on the Rights of the Child (CRC) art 2.

[59] ibid art 37.

[60] ibid art 24.

[61] ibid arts 28–29.

[62] ibid art 27.

[63] ibid art 16.

[64] ibid art 3(1).

[65] Cynthia Price Cohen, 'The United Nations Convention on the Rights of the Child: A Feminist Landmark' (1997) 29(3) William and Mary Journal of Women and the Law 29, 45.

[66] ibid.

[67] ibid.

[68] CRC art 38.

affecting girls such as child marriage and female genital mutilation.[69] Likewise, girls are omitted from the protection of the adult-centric CEDAW,[70] which was introduced as an attempt to remedy the male-dominance of IHRL.[71] However, in doing so, the rights it provides are predominantly framed as being women's rights, largely ignoring the needs of girls.[72]

IRL stems from the right to seek asylum enshrined in the Universal Declaration of Human Rights (UDHR).[73] The Refugee Convention being the primary source of IRL regulates the refugee status determination process and provides asylum-seekers with the right to enter a country to seek international protection; however, it is otherwise largely silent on asylum-seekers.[74] Despite the so-called gender-neutral approach adopted by the Refugee Convention, the literature has identified that the Refugee Convention is often interpreted through androcentric[75] and adult-centred lenses,[76] calling for an intersectional approach to address the needs of women, children and specifically girls into the dialogue. The Refugee Convention offers international protection to anyone who

> '...owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such

[69] Taefi (n 57) 345, 356.
[70] ibid 355.
[71] Davis (n 41) 205, 216.
[72] Taefi (n 57) 345, 355.
[73] Universal Declaration of Human Rights (adopted 10 December 1948, UNGA Res 217 A(III)) (UDHR) art 14.
[74] Larry Lock, 'The Refugee Convention: Who Are Refugees and Asylum Seekers' (*Free Movement*, 5 June 2020) <www.freemovement.org.uk/refugee-convention/> accessed 23 May 2022.
[75] ibid.
[76] Jason Pobjoy, *The Child in International Refugee Law* (CUP 2017) 3 citing Mary Crock, *Seeking Asylum Alone: A Study of Australian Law, Policy and Practice Regarding Unaccompanied and Separated Children* (Federation Press 2006) 244.

> fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it.'[77]

Under this definition, women frequently find it harder to be granted international protection as the male migrant is often considered the norm and female experiences frequently go unrecognised as requiring protection under the Refugee Convention.[78] This was acknowledged by the United Nations Refugee Agency (UNHCR) in their 'Guidelines on International Protection'.[79] IRL prioritises activity in the public sphere, which is traditionally seen as masculine, over the feminine activities of the private sphere.[80] This is demonstrated by the fact that political persecution is often considered more worthy of international protection than gender-based violence.[81] However, it is widely accepted within the women's rights movement that this paradigm is a result of the way IRL is interpreted and that IRL need not be reformed.[82]

Furthermore, in theory, the Refugee Convention is 'age-neutral',[83] however, in reality children are often omitted from the scope of the Refugee Convention, leaving their claims vulnerable to becoming

[77] The Refugee Convention (n 5) art 1.
[78] Crawley (n 47) 360.
[79] UNHCR, *Guidelines on International Protection: Gender- Related Persecution within the context of Article 1A(2) of the 1951 Convention and/or its 1967 Protocol relating to the status of refugees* (7 May 2002) <https://www.refworld.org/cgi-bin/texis/vtx/rwmain?page=search&docid=3d36f1c64&skip=0&query=HCR/GIP/02/01> accessed 24 May 2022 .
[80] Crawley (n 47) 360.
[81] ibid.
[82] Deborah Anker (n 44) 139. See also Crawley (n 47) 360. See also, Hilary Charlesworth and Christine Chinkin, *The Boundaries of International Law* (Manchester University Press, 2000).
[83] Pobjoy, *The Child in International Refugee Law* (n 76) 17.

invisible or decided incorrectly.[84] This is especially true for accompanied asylum-seeking children as their fate often echoes that of their parents or guardian despite being entitled to their own refugee status determination.[85] When administrative procedures fail to consider the needs and vulnerabilities of children, this can amount to a violation of the best interests of the child. Therefore, as Pobjoy argues, the best interests of the child principle imposes an obligation on states not only to protect asylum-seeking children, but to consider their claims individually and provide children with international protection, even if they remain outside the protection afforded by the Refugee Convention.[86] It is commonly said that asylum-seeking children should be treated as children first and foremost. While this statement is accurate, it risks failing to address the needs that arise from the other aspects of the child's identity. For this reason, the CRC and the Refugee Convention must work in tandem to provide protection to asylum-seeking children. The CRC supplements the protection provided by the Refugee Convention,[87] to ensure each child receives the full spectrum of rights they are entitled to as a child *and* as an asylum-seeker. Therefore, the CRC is crucial to ensure the rights of asylum-seeking children are met. It is particularly important during the refugee status determination process, providing children with the right to have their views heard during proceedings.[88]

CEDAW is also crucial for the protection of the asylum-seeking girls who are especially vulnerable to marginalisation. Their rights are suspended somewhere between CEDAW, CRC and the Refugee Convention. As Taefi suggests, an intersectional approach will remedy the exclusion of the girl-child from the rights discourse.[89] This

[84] ibid.
[85] ibid 49.
[86] Jason Pobjoy, 'The Best Interests of the Child Principle as an Independent Source of International Protection' (2015) 64(2) International and Comparative Law Quarterly 327, 332.
[87] Pobjoy, *The Child in International Refugee Law* (n 76) 239.
[88] CRC arts 9(2) and 12(1).
[89] Taefi (n 57) 345, 346.

analysis of the male-dominant CRC and adult-dominated CEDAW, and the Refugee Convention, which is guilty of both issues, highlights the protection voids that materialise in the absence of intersectionality in IHRL and IRL. This demonstrates the need for an intersectional approach to ensure the full enjoyment of rights.

3 Developing Indicators for Assessing Well-being

3.1. An Intersectional Approach to Indicators

Indicators are tools used to gain insight into social phenomena.[90] Human rights indicators specifically have been defined as 'a piece of information used in measuring the extent to which a legal right is being fulfilled or enjoyed in a given situation.'[91] They can play an important role in the protection and promotion of human rights,[92] and as Gilleri promotes, they can tackle discrimination and measure substantive gender equality.[93]

Human rights indicators are frequently adopted by the human rights movement to measure progression in the realisation of fundamental rights,[94] however their use is contested by some academics who claim they are insufficient to produce meaningful data or capture the

[90] Siobhan Alice McInerney-Lankford, *Human Rights Indicators in Development* (World Bank 2010) 14.

[91]Maria Green, 'What We Talk About When We Talk About Indicators: Current Approaches to Human Rights Measurement' (2001) 23(4) Hum Rts Q 1062, 1065.

[92] Emilie Filmer-Wilson, 'An Introduction to the Use of Human Rights Indicators for Development Programming' (2006) 24(1) NQHR 155–156.

[93] Giovanna Gilleri, '"How Are You Actually Doing Ladies" Indicators of Gender Equality Through the Lens of the UN Co mmittee on the Elimination of Discrimination against Women' (2020) 24(8) IJHR 1218.

[94] Gauthier de Beco, 'Human Rights Indicators: From Theoretical Debate to Practical Application' (2013) 5(2) Journal of Human Rights Practice 380.

necessary information.[95] Rosga and Satterthwaite contend that whilst the ability of human rights indicators to simplify complex data is useful, their limitations are frequently overlooked.[96] Due to the natural constraints of indicators, their role is reduced to that of a proxy.[97] Unable to provide a complete understanding of the realisation of a human right in a state, indicators instead measure manageable pieces of data that can be built up to provide a fuller picture.[98] Similarly, Gilleri argues that indicators can often produce oversimplified data which requires the views of those with first-hand experience of the issues to 're-contextualise' and 're-humanise' to ensure their voices are not silenced.[99] With regards to gender-sensitive indicators, she argues that they are insufficient to measure intersectional discrimination due to their simplifying nature, but the data produced by indicators can be supplemented by primary sources to provide a better understanding.[100]

In conjunction with indicators, disaggregated data can be used to provide a better understanding of the enjoyment of rights and to uncover discrimination.[101] However, an issue with adopting this methodology is the potential lack of data in the public domain.[102] In many cases, acquiring disaggregated data will be particularly challenging,[103] especially where it is the government's responsibility to

[95] Katrien Beeckman, 'Measuring the Implementation of the Right to Education: Education *Versus* Human Right Indicators' (2004) 12 International Journal of Children's Rights 71, 72.
[96] Ann Janette and Margaret Satterthwaite, 'The Trust in Indicators: Measuring Human Rights' (2009) 27(2) Berkeley J Int'l Law 253, 255–256.
[97] Sital Kalantry, Jocelyn E. Getgen and Steven Arrigg Koh, 'Enhancing Enforcement of Economic, Social, and Cultural Rights Using Indicators: A Focus on the Right to Education in the ICESCR' (2010) 32(2) Hum Rts Q 253, 288.
[98] ibid 289.
[99] Gilleri (n 93) 1218, 1237.
[100] ibid 1232.
[101] Gauthier de Beco, 'Human Rights Indicators for Assessing State Compliance with International Human Rights' (2008) 77 Nord J Int'l L 23, 30.
[102] Kalantry, Getgen and Koh (n 97) 253, 290.
[103] ibid.

produce the data, as it may expose a failure on their behalf to uphold their human rights obligations or discriminatory practices.[104] This presents a challenge when adopting an intersectional approach to indicators, as this requires disaggregating already disaggregated data,[105] allowing for a better understanding of the differing enjoyment of rights within communities. The International Organisation for Migration (IOM) specifically advocates for an intersectional approach to migration data, utilising sex-and-gender-disaggregated data to understand the diverse realities within migrant communities.[106] Both sex-and-gender-disaggregated migration data can support the provision of rights and help develop a gender response to migration governance.[107] An absence of gender-disaggregated data allows inequalities and intersectional discrimination in migration to remain invisible.[108]

The Global Compact for Safe, Orderly and Regular Migration[109] was introduced alongside The Global Compact on Refugees[110] in 2018 to promote international cooperation on the situation of refugees and migrants.[111] The global compacts are significant because they introduce an intersectional approach to migration, adopting 'gender-responsive' and 'child-sensitive' as guiding principles. The latter is especially significant as it explicitly 'ensures the human rights of women, men, girls and boys are respected at all stages of

[104] ibid.
[105] de Beco (n 101) 23, 30.
[106] Jenna Hennebry, Hari KC and Kira Williams, 'Gender and Migration Data: A Guide for Evidence-Based, Gender Responsive Migration Governance' (International Organization for Migration, 2021) 8.
[107] ibid.
[108] ibid.
[109] UN, Global Compact for Safe, Orderly and Regular Migration (19 December 2018).
[110] UN, Global Compact on Refugees (17 December 2018) <https://documents-dds-ny.un.org/doc/UNDOC/GEN/N18/446/08/PDF/N1844608.pdf?OpenElement> accessed 23 May 2022.
[111] Vitit Muntarbhorn, 'The Global Compacts and the Dilemma of Children in Immigration Detention' (2018) 30(4) IJRL 668.

migration.'[112] To achieve these goals, disaggregated data is required to understand the diverse experiences at each stage of the migration process.[113] Prior to the global compacts, the Beijing Platform of Action attempted to introduce an intersectional lens to migration,[114] calling for governments to intensify efforts to ensure equal enjoyment of human rights for all women and girls. This was also the first international attempt to recognise the rights of girls; however, it fails to acknowledge the effects of adult domination and gender-bias.

3.2. Developing Indicators

A human rights-based approach is required to ensure human rights are encompassed by the indicators.[115] For this reason, indicators traditionally used by the development community cannot be recycled by the human rights community. For example, where the development community may use traditional indicators such as literacy rates to assess the right to education, human rights indicators require information on laws and policies related to education and discriminatory practices.[116] A human rights-based approach commences by understanding the context in which human rights exists.[117] The content of the right to be measured is clarified by examining the relevant treaties and general comments to identify the important attributes of the right.[118] A clearly defined conceptual framework is then required to develop the indicators.[119] Responding to

[112] UN, Global Compact on Refugees (17 December 2018) objective 15.
[113] Hennebry, KC and Williams (n 106) 3.
[114] Nira Yuval-Davis, 'Intersectionality, Citizenship and Contemporary Politics of Belonging' (2007) 10(4) Critical Review of International Social and Political Philosophy 561, 565.
[115] de Beco (n 101) 23, 26.
[116] Filmer-Wilson (n 92) 155, 159.
[117] de Beco (n 101) 23, 26.
[118] Janette and Satterthwaite (n 96) 253, 273, 295.
[119] Beeckman (n 95) 71, 74.

calls from United Nations Treaty Bodies,[120] The Office of the High Commissioner for Human Rights (OHCHR) has created a framework for human rights indicators.[121] Within this framework there are three types of indicators; structural, process, and outcome.[122] Structural indicators assess a state's intention to abide by IHRL, considering the ratification of legal instruments and their subsequent adoption into domestic law.[123] Process indicators link structural and outcome indicators by assessing a state's efforts to implement human rights and outcome indicators aim to capture the results of a state's efforts.[124]

A series of indicators — *the child well-being outcomes* — have been developed using a human rights-based approach and drawing on OHCHR's framework to evaluate the impact alternative care arrangements have on children's well-being. The child well-being outcomes adopt a holistic, rights-based, and actor-orientated approach to well-being, based on the 'doing well-feeling good' framework which encompasses both objective and subjective facets of well-being.[125] 'Doing well' refers to the material dimension of well-being and 'feeling good' refers to one's personal perception of their well-being.[126] This research project has endeavoured to encompass both facets within its child well-being outcomes. An indicator methodology has been adopted to assess the extent to which the well-being of children in alternative care arrangements is being met. This framework allows the enjoyment of their human rights fundamental to

[120] McInerney-Lankford (n 90) 18.
[121]OHCHR, 'Report on Indicators for Monitoring Compliance with International Human Rights Instruments' (HRI/MC/2006/7, Human Rights International, 11 May 2006); OHCHR, 'Report on Indicators for Promoting and Monitoring the Implementation of Human Rights' (HRI/MC/2008/3, Human Rights International, 6 June 2008).
[122] McInerney-Lankford (n 90) 14.
[123] de Beco (n 94) 380, 381.
[124] ibid 382.
[125] Sarah White, 'Analysing Wellbeing: A Framework for Development Practice' (2010) 20(2) Development and Practice 158, 160.
[126] ibid.

their well-being to be measured. The child well-being outcomes have been developed based on selected rights enshrined in the CRC that if fulfilled are conducive to the positive well-being of children. These selected rights are indivisible, interdependent, and interrelated on one another,[127] and therefore are all required to ensure a child's well-being. The attributes of these rights were identified to allow the indicators to capture the essence of the rights and, crucially, measure the extent to which these rights are enjoyed by children in alternative care arrangements. They are based upon five rights set out in the CRC, with the best interests of the child being adopted as the overarching principle.[128] However, as an intersectional approach is required to ensure the rights of children with intersecting identities are fulfilled, they also draw upon the rights enshrined in the Refugee Convention and CEDAW.

3.3. The Best Interests of the Child

The best interests principle requires the best interests of the child to be the primary consideration in all cases or decisions involving that child.[129] In the absence of a precise legal definition, the Committee on the Rights of the Child has indicated the principle was designed to ensure each child's full enjoyment of their CRC rights and their holistic development.[130] UNHCR has further guided, each child's best interests will vary and be dependent upon their individual circumstances and experiences.[131]

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[127] Vienna Declaration and Programme of Action (adopted 23 May 1969, entered into force 27 January 1980) 1155 UNTS 331 art 5.
[128] CRC art 3(1).
[129] ibid.
[130] Committee on the Rights of the Child, *General Comment No 14 (2013) on the Right of the Child to Have His or Her Best Interests Taken as a Primary Consideration* (OHCHR, 29 May 2013) art 3 paras 1 and 4 <https://www2.ohchr.org/english/bodies/crc/docs/gc/crc_c_gc_14_eng.pdf> accessed 23 May 2022.
[131] UNHCR, *2021 UNHCR Best Interests Procedure Guidelines: Assessing and Determining the Best Interests of the Child* (May 2021) para 2.1.2 <www.refworld.org/docid/5c18d7254.html> accessed 23 May 2022.

With regards to the immigration detention of children, the Committee on the Rights of the Child has said that the 'detention of children on the sole basis based on their migration status or that of their parents is a violation of children's rights, is never in their best interests and is not justifiable.'[132] This was reaffirmed in a joint comment made by the Committee on the Rights of the Child and the Committee on the Rights of Migrant Workers in 2017 which prohibited the detention of children for immigration purposes.[133] This joint comment represents a shift away from the previous position that children may be detained for immigration purposes as an option of *ultima ratio*.[134]

The best interests principle regulates the reception of asylum-seeking children by host states as well as prohibiting their immigration detention.[135] Consequently, the best interests of the child must be the primary consideration in all decisions made relating to a child from the moment of entry to the state. As it is well established that immigration detention is never in a child's best interests, alternative care arrangements must be made available by states to ensure the best interests of asylum-seeking children are met. Additionally, Pobjoy

[132] Committee on the Rights of the Child, *Report of the 2012 Day of General Discussions on the Rights of the Child in the Context of International Migration* (28 September 2012) para 32 </www.refworld.org/docid/51efb6fa4.html> accessed 23 May 2022.

[133] Committee on the Protection of the Rights of All Migrant Workers and Members of their Families, *Joint General Comment No 4 (2017)* (n 13) para 5. See also, Working Group on Arbitrary Detention, *Report of the Working Group on Arbitrary Detention* (2 July 2018) annex para 40 <https://documents-dds-ny.un.org/doc/UNDOC/GEN/G18/196/69/PDF/G1819669.pdf?OpenElement> accessed 24 May 2022; United Nations Special Rapporteur on torture and other cruel, inhumane or degrading treatment or punishment, *Report of the Special Rapporteur on Torture and Other Cruel, Inhumane or Degrading Treatment or Punishment* (23 November 2018) para 22 <ttps://documents-dds-ny.un.org/doc/UNDOC/GEN/G18/347/27/PDF/G1834727.pdf?OpenElement> accessed 24 May 2022.

[134] Ciara M Smyth, 'Towards a Complete Prohibition on the Immigration Detention of Children' (2019) 19(1) HRL Rev 1–36.

[135] CRC art 2(1).

argues the best interests principle creates a state obligation to protect asylum-seeking children, acting as an independent source of international legal protection.[136] This compensates for the 'adult-focused lens'[137] traditionally adopted by IRL, as discussed earlier.[138]

UNHCR has developed a case management framework, the Best Interests Procedure, to help decipher what is in the best interests of any given asylum-seeking or refugee child.[139] The Procedure seeks to ensure all actions and decisions made addressing protection risks and needs of a child are made in accordance with the best interest of the child principle. As alternative care models are developed to address the protection needs and care of asylum-seeking children, the Procedure should feature in these models to ensure their best interests are being met. There are two key steps to a Best Interests Procedure: a best interests assessment and a best interests determination. The Assessment is an informal process systematically carried out, assessing the child's needs throughout the Best Interests Procedure,[140] only ceasing when the child is no longer at risk, or a durable solution has been established.[141] The Determination is a more formal process, with strict procedural safeguards designed to facilitate the implementation of protective measures and assistance for the child and/or their parents or caregivers.[142] It is used when making life-altering decisions for the child, with the aim of ultimately leading to a formal, durable solution for the child that is in their best interests.[143]

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[136] Pobjoy, *The Child in International Refugee Law* (n 76) 1.
[137] ibid citing, Mary Crock (n 76) 244.
[138] Pobjoy, *The Child in International Refugee Law* (n 76) 186.
[139] UNHCR, *2021 UNHCR Best Interests Procedure Guidelines: Assessing and Determining the Best Interests of the Child* (May 2021) para 2.1.2 <www.refworld.org/docid/5c18d7254.html> accessed 24 May 2022.
[140] ibid para 2.4.2.
[141] ibid para 3.2.3.
[142] UNHCR, *2021 UNHCR Best Interests Procedure Guidelines: Assessing and Determining the Best Interests of the Child* (May 2021) para 2.1.2 <www.refworld.org/docid/5c18d7254.html> accessed 24 May 2022.
[143] ibid.

4 The Child Well-Being Outcomes

4.1. Liberty

The right to liberty is enshrined in IHRL[144] and afforded to all, irrespective of migration status.[145] It is specifically afforded to children by Article 37(b) CRC. The right to liberty, in conjunction with the right to seek asylum,[146] the right to non-penalisation for irregular entry or stay,[147] and the right to freedom of movement,[148] establishes a presumption against immigration detention in international law. Thus, liberty should automatically be enjoyed by asylum-seekers when they enter states seeking international protection.[149] Unfortunately, this is often not the case.

The right to liberty imposes restrictions on a state's ability to detain persons, including prohibiting arbitrary detention.[150] A way around this is for host states to make alternative care models that respond to the vulnerability of the child available. States should consider the age and personal situation of the child when providing alternative care and protection for an asylum-seeking child as what is required will depend on their specific needs.[151] For example, supported independent living (SIL) may be an appropriate model for older children, but younger children may require enhanced protection.

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144 UDHR art 3; ICCPR art 9; International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (adopted 18 December 1990, entered into force 1 July 2003) 2220 UNTS 3 (ICRMW) art 3.
145 Sampson and others (n 22) para 4.0.
146 UDHR art 14.
147 The Refugee Convention (n 5) art 31.
148 UDHR art 13.
149 UNHCR, *Guidelines on the Applicable Criteria and Standards Relating to the Detention of Asylum-Seekers and Alternatives to Detention* (2012) para 14 <https://www.refworld.org/docid/503489533b8.html> accessed 24 May 2022.
150 Sampson and others (n 22) para 4.0.
151 *Mubilanzila Mayeka and Kaniki Mitunga v Belgium* App no 13178/03 (ECtHR, 12 October 2006) [55].

4.1.1. Liberty Indicators

- The immigration detention of children is prohibited in national law.
- Alternative care models are provided for in national law.
- Alternative care models are considered prior to detaining a child for immigration related purposes.
- An appropriate age assessment is carried out only when required to determine the child's age upon their entry to the country.
- The child can freely exercise their right to liberty to an extent that is reasonable for a child of that age.

4.2. Physical and Mental Well-Being

The right to health is realised by several international treaties,[152] encompassing both physical and mental well-being. The connection between these two facets of health means that the concept of parity of esteem is fundamental to the realisation of the right to health.[153] This requires physical and mental health to be treated equally. Beyond this, the CRC entitles children to the highest attainable standard of health,[154] and specifically requires those responsible for the care and

[152]International Convention on the Elimination of All Forms of Racial Discrimination (adopted 21 December 1965, entered into force 4 January 1969) 660 UNTS 195 (CERD) art 5(d)(iv); CEDAW art 12; International Covenant on Economic, Social and Cultural Rights (adopted 16 December 1966, entered into force 3 January 1976) 993 UNTS 3 (ICESCR) art 12; ICRMW art 43(e); The Refugee Convention (n 5) art 23; CRC art 24.

[153] OHCHR, *Mental Health and Human Rights* (31 January 2017) para 21 <https://documents-dds-ny.un.org/doc/UNDOC/GEN/G17/021/32/PDF/G1702132.pdf?OpenElement> accessed 24 May 2022, citing Royal College of Psychiatrists, 'Whole-Person Care: From Rhetoric to Reality'.

[154] CRC art 24(1).

protection of children to ensure health authority standards are met with respect to children.[155]

It is undeniable that immigration detention is detrimental to the physical and mental well-being of detainees and that children are especially vulnerable to its effects.[156] This can materialise as emotional problems, hyperactivity, and conduct disorders.[157] The children in detention's well-being was similar to that of children referred to mental health services, whilst the community-based children were in line with the Australian norm.[158] In another study, higher levels of anxiety, depression, and PTSD were found in detained refugees compared to non-detained refugees.[159] This highlights the need to keep children out of immigration detention and the benefit of alternatives, especially those which are community-based.

Another feature of alternative care models that can benefit a child's well-being is participation. Participation is not only a human right but has also been shown to be a determinant of psychological well-being.[160] Enjoyment of the right to mental health requires everyone to be involved with decisions relating to their own well-being.[161] Host states should therefore facilitate the participation of asylum-seekers in decisions made regarding their care and support.[162] Drawing on CEDAW, the healthcare needs of women and men must be treated

[155] CRC art 3(3).
[156] Nethery and Silverman (n 3) 8–9; von Werthern and others (n 156) 382.
[157] ibid 417.
[158] ibid 419.
[159] von Werthern and others (n 156) 2.
[160] Margarita Alegría and others, 'Social Determinants of Mental Health: Where We Are and Where We Need to Go' (2018) 20(11) Current Psychiatry Reports 1, 2.
[161] United Nations Special Rapporteur on the right to physical and mental health, *Interim Report of the Special Rapporteur on the Right of Everyone to the Enjoyment of the Highest Attainable Standard of Physical and Mental Health* (27 July 2018) para 43 <https://documents-dds-ny.un.org/doc/UNDOC/GEN/N18/464/55/PDF/N1846455.pdf?OpenElement>.
[162] ibid 44.

equally.[163] It requires state parties to take measures to eradicate sex discrimination in the provision of healthcare. This includes the provision of gender-specific healthcare such as pregnancy services, reproductive rights, and family planning education. Therefore, alternative care arrangements must provide nuanced healthcare. As well as providing healthcare to children they must protect and promote both their physical and mental health. Ensuring gender equality at every stage as well as providing gender specific services. Further, they must facilitate children's participation in cases relating to them.

4.2.1. Physical and mental well-being Indicators

- The state's constitution protects children's right to health.
- The child is screened upon arrival by a suitably qualified health professional with the permission of a parent, carer or guardian.
- The initial health screening is attuned and sensitive to the possibility that the child or members of their family may have been victims of torture or trauma.
- Children receive free healthcare when required.
- Children have their healthcare needs assessed regularly.
- Children who are victims of torture or who have experienced trauma receive psychosocial support.
- Children can participate in decisions made regarding their care and support.
- Women and girls have equal access to health care that is tailored to their needs.
- Pregnancy and postnatal services provided.

[163] CEDAW art 12.

- Education on reproductive rights and family planning is provided.

4.3. Educational Well-Being

The CRC recognises the right of every child to education.[164] This requires states to provide free primary education to all children,[165] and make further education available and accessible to everyone.[166] CEDAW echoes this, enshrining women's right to non-discrimination in education,[167] including access to the same schools and curriculum,[168] and equal opportunities for further education and men.[169] The Refugee Convention requires states to afford that same education to refugees as nationals;[170] however, it is silent on asylum-seekers and other children on the move. There is also a requirement that education develops the child's respect for their own cultural identity.[171]

The right to education is especially important for migrant children who are especially vulnerable to recruitment by armed groups, sexual exploitation, and other violations of their rights. If fulfilled, the right to education can act as a protection mechanism against these risks. Katarina Tomasevski, the former UNSR on the right to education has previously set out a conceptual framework for the right to primary education upon which indicators can be based.[172] This is known as the

[164] CRC arts 28–29.
[165] ibid art 28(1)(a).
[166] ibid 28(1)(b)–(c)
[167] CEDAW art 10.
[168] ibid art 10(b).
[169] ibid art 10(e).
[170] The Refugee Convention (n 5) art 22.
[171] CRC art 29(1)(c).
[172] Katarine Tomaševski, 'Human Rights Obligations: Making Education Available, Accessible, Acceptable and Adaptable' (2001) <www.right-to-education.org/sites/right-to-education.org/files/resource-

'4 A's framework: availability, accessibility, acceptability and adaptability'[173] which was later adopted by the Committee on Economic, Social and Cultural Rights.[174] Drawing on Tomasevski's framework, educational well-being indicators should reflect a state's fulfilment of their obligations to make education available, accessible, acceptable, and adaptable.

4.3.1. Educational well-being indicators

- National legislation provides for the education of migrant children.
- Children do not have to pay school fees.
- Schooling materials provided free of charge.
- There are enough schools accessible from where children in the alternative care model are residing.
- There is an adequate number of teachers.
- Teachers are appropriately qualified and screened for suitability.
- Children have their educational needs assessed regularly.
- School-age children have access to education appropriate to their age, needs and abilities, including primary and, where possible, secondary education and, if necessary, special education.
- There are incentives for girls to attend school.

attachments/Tomasevski_Primer%203.pdf> accessed 24 May 2022.

[173] ibid.

[174] Committee on Economic, Social and Cultural Rights, *CESCR General Comment No.13: The Right to Education (Art.13)* (8 December 1999) <https://documents-dds-ny.un.org/doc/UNDOC/GEN/G99/462/16/PDF/G9946216.pdf?OpenElement> accessed 24 May 2022.

- Adequate water, sanitation and hygiene (WASH) facilities are present at schools.
- The enrolment rate for non-national children is the same as national children.
- The child is provided with a transcript and certificate when they complete the course.
- Asylum seeking boys and girls have equal access to secondary education.
- Cultural orientation is facilitated by the education provided.
- Children are taught the language of their country of origin and the local language in the country of asylum and destination.
- Reporting restrictions are not excessive or unduly onerous so as to interfere with educational commitments.

4.4. Material Well-Being

All human rights are indivisible, interdependent, and interrelated.[175] This means the realisation of one right is often dependent on that of another.[176] For example, the enjoyment of the right to education is dependent on the realisation of other human rights, such as the right to food and health.[177] Likewise, many of the non-material rights conducive to a child's well-being are dependent on their material well-being. For this reason, it is essential that alternative care models fulfil children's right to an adequate standard of living by providing essential items as this is fundamental to multiple aspects of their well-being. Looking to Article 27 CRC which entitles children to an

[175] Vienna Declaration and Programme of Action (adopted 23 May 1969, entered into force 27 January 1980) 1155 UNTS 331 art 5.
[176] Theo van Boven, 'Categories of Rights' in *International Human Rights Law* (2019 OUP) 140.
[177] Beeckman (n 95) 71, 76.

adequate standard of living, states are required to facilitate the provision of nutrition, clothing, and housing whether via support programmes or material assistance, the absence of which will impede the child's right to health and right to education.

4.4.1. Material well-being indicators

- The child has adequate access to food.
- The child has adequate access to clothing.
- The child is provided with shelter.
- Other essential items are provided, such as hygiene kits.
- The child, or their parent or guardian, receives financial assistance**.**

4.5. Family Life

The right to family life is provided for in several international treaties.[178] The preamble of the CRC calls for the protection of families by virtue of their status as a fundamental group within society and recognises that growing up in a family environment is conducive to a child's development and well-being. The Refugee Convention also recognises family unity as the essence of society. The Committee on the Rights of the Child reaffirms this by guiding that 'family' must be interpreted in a broad sense to include extended and adopted family.[179] Familial relationships are highly influential over our mental health.[180] Thus, the CRC provides children with the right to

[178] UDHR arts 12 and 16(3); ICCPR arts 17 and 23(1); ICESCR art 10(1); CRC arts 9 and 16; ICRMW arts 14 and 44(1).
[179] Committee on the Rights of the Child, *General Comment No 14 (2013)* (n 130) para 60 <https://www2.ohchr.org/english/bodies/crc/docs/gc/crc_c_gc_14_eng.pdf> accessed 24 May 2022.
[180] Alegría and others (n 160) 1, 2.

unhampered familial relations,[181] to not be separated from their parents against their will unless it is in their best interests,[182] and to family reunification.[183] The right to family reunification requires states to assist unaccompanied children to trace their parents.[184] In cases where this is unsuccessful, the child is entitled to the same protection as any other child deprived of their family environment in that country.[185] This means alternative care must be provided in line with national laws.[186]

4.5.1. Family life indicators

- The decision to detain a child's parents considers the best interests of the child and their right to family life.
- The child's extended or adopted/foster family is included in family rights.
- Less coercive and intrusive alternatives to detaining children and their families are always explored with child detention as a last resort.
- When placing the child in foster care or guardianship, criminal checks, parental tests, training, and home visits are carried out to ensure the child's best interests will be met.
- The state assists with family reunification.
- Steps are taken to prevent situations which may violate a child's right to family life, such as recruitment by armed gangs, or child marriage.

[181] CRC art 8.
[182] ibid art 9.
[183] ibid art 22.
[184] ibid.
[185] ibid.
[186] ibid art 20.

5 A Zambian Case Study of Alternative Care Models

5.1. The Zambian Context

In a world with ever-growing hostility towards asylum-seekers, Zambia is fast becoming increasingly known for its hospitality as both a transit and destination country.[187] As of 31 January 2022, there were 105,190 persons of concern in Zambia, 4,447 of whom were asylum-seekers; most were from the Democratic Republic of Congo (DRC).[188]

Immigration detention is practised in Zambia. This is partially a result of the Government's reservation to Article 26 of the Refugee Convention which leads to asylum-seekers being detained at points of entry where there are no reception centres.[189] However, some positive steps have been taken to move away from this practice. The Immigration and Detention Act 2010 imposed a 30-day limit on immigration detention, or 90-days prior to deportation.[190] The 2010 Act also provides for ATD in the form of asylum-seekers' permits and report orders,[191] and the Refugee Act 2017 provides a framework for authorities to implement ATD.[192] Beyond this, Zambia is continuously

[187] Nicholas Maple, 'What's Behind Zambia's Growing Welcome to Refugees' (*Refugees Deeply*, 12 June 2018) <https://deeply.thenewhumanitarian.org/refugees/community/2018/06/12/whats-behind-zambias-growing-welcome-to-refugees> accessed 24 May 2022.

[188] UNHCR, *Zambia Country Overview* (31 January 2022) <https://data2.unhcr.org/en/country/zmb> accessed 24 May 2022.

[189] UNHCR, *Progress Report 2018 Beyond Detention: A Global Strategy to Support Governments to End the Detention of Asylum Seekers and Refugees 2014–2019* (February 2019) 75 <www.refworld.org/docid/5c9354074.html> accessed 24 May 2022.

[190] Immigration and Detention Act 2010 No 18 of 2010 s 18.

[191] UNHCR, *Beyond Detention 2014–2019: A Global Strategy to Support Governments to End the Detention of Asylum-Seekers and Refugees — Final Progress Report* (August 2020) 18 <www.refworld.org/docid/5f452dce4.html> accessed 24 May 2022.

[192]UNHCR, *Global Strategy Beyond Detention 2014–2019: A Global Strategy to*

working to amend its laws to better protect and end the detention of asylum-seeking children.[193] An example of this is their policy to consider all unaccompanied children found at the border with an unidentifiable nationality as Zambian nationals.[194] According to UNHCR, they have also stopped detaining children and single mothers with children for immigration purposes, made possible with help from UN agencies and other partner organisations supporting the establishment of shelters for migrants, refugees, and asylum seekers.[195] It has also been helped by the promotion of ATD within the country. Five types of ATD have been found to be used in Zambia; reporting conditions, residence at reception centres, release of bail, asylum seekers' permits, and report orders.[196] There was an increase in the use of report orders as an ATD during the COVID-19 pandemic, when Zambia released all foreign nationals detained for immigration purposes.[197]

There has been a decrease in the number of children detained for immigration purposes since 2013, when 49 children were detained for immigration purposes; in 2015, there were 18 children detained in immigration detention.[198] In 2017,[199] 2018 and 2019, there were no

Support Governments to End the Detention of Asylum-Seekers and Refugees- National Action Plan Zambia (November 2015) <www.unhcr.org/566aa6429.pdf> accessed 24 May 2022.

[193] UN Migration Network Working Group on Alternatives to Immigration Detention, *Covid-19 & Immigration Detention: What Can Governments and Other Stakeholders Do* (February 2021) Annex, 5 <https://migrationnetwork.un.org/sites/default/files/docs/annex_to_policy_brief_on_atd_and_covid-19.pdf> accessed 24 May 2022.

[194] Zambia's Constitution of 1991 with Amendments through 2016 art 35(2).

[195] UNHCR, *Beyond Detention 2014–2019 Final Progress Report* (n 191) 10.

[196] UNHCR, *Progress Report 2018 Beyond Detention* (n 189) 75.

[197]UN Migration Network Working Group on Alternatives to Immigration Detention, *Covid-19 & Immigration Detention* (n 193).

[198] UNHCR, *Progress Report mid-2016. Beyond Detention: A Global Strategy to Support Governments to End the Detention of Asylum Seekers and Refugees 2014–2019* (August 2016) 84 <www.refworld.org/docid/57b850dba.html> accessed 24 May 2022.

[199] UNHCR, *Progress Report 2018 Beyond Detention* (n 189) 74.

reports of unaccompanied children being detained for immigration purposes.[200] Between 2014 and 2017 the number of places available for UASC in alternative care arrangements increased from 2[201] to 13.[202] The number of ATD places available for families with children increased from 2[203] to 13 during the same period[204] and then decreased again to 12 by 2019.[205]

5.2. Seeking Asylum in Zambia

Upon entering Zambia, asylum seekers have seven days to submit an application for international protection.[206] Following submission they will be granted an asylum seekers' permit which is valid for 30-days whilst their refugee status determination is being processed.[207] Asylum-seekers who are issued with a report order or asylum-seekers' permit are able to live in the community; however, this comes with the obstacle that they cannot access basic rights through UNHCR unless they are a vulnerable person.[208] Alternatively they may be accommodated by a transit or reception centre.[209] The Northern province has five semi-permanent reception centres for asylum-seekers.[210] A sixth, in Chikumbi, Lusaka province, was opened in response to recommendations from the Migration Dialogue for Southern Africa to promote ATD.[211] The reception centres currently

[200] UNHCR, *Beyond Detention 2014–2019 Final Progress Report* (n 191) 105.
[201] UNHCR, *Progress Report mid-2016* (n 198) 84.
[202] UNHCR, *Progress Report 2018 Beyond Detention* (n 189) 74.
[203] UNHCR, *Progress Report mid-2016* (n 198) 84.
[204] UNHCR, *Progress Report 2018 Beyond Detention* (n 189) 74.
[205] UNHCR, *Beyond Detention 2014–2019 Final Progress Report* (n 191) 105.
[206] Refugee Act 2017 No 1 of 2017 13 April 2017 s 11(1).
[207] Zambia Department of Immigration, 'Immigration Permit Types: Asylum Seeker's Permit' <www.zambiaimmigration.gov.zm/permit-types/#1558184670991-7a5f6a67-8bf7> accessed 24 May 2022.
[208] UNHCR, *Progress Report 2018 Beyond Detention* (n 189) 75.
[209] UNHCR, *Beyond Detention 2014–2019 Final Progress Report* (n 191) 103.
[210] ibid 104.
[211] UNHCR, *Progress Report 2018 Beyond Detention* (n 189) 73.

serve as an ATD for asylum seekers arriving from DRC. They are first hosted here, before moving onward to a transit centre and then a refugee settlement.[212]

Zambia has three transit centres; one at Maheba refugee settlement, one at Mayukwayukwa refugee settlement, and Makeni in Lusaka.[213] There are a further six shelters for UASC, asylum-seekers, refugees, and victims of trafficking. These provide food, accommodation, and counselling,[214] as well as case management services.[215] In Zambia, it is common for asylum-seekers to be transferred to refugee settlements whilst their refugee status determination is pending.[216] Here they will receive healthcare, education, and food. There are three refugee settlements in Zambia; Meheba, Mayukwayukwa, and Mantapala, with 326, 14, and 130 asylum-seekers respectively.[217]

The Ministry of Health, working with partners, is responsible for healthcare provisions in the refugee settlements.[218] The primary healthcare in Mantapala has been improving steadily since its inception with a health centre opening in June 2019 and serious cases being referred to a local hospital.[219] The Ministry of Health, the Commissioner for Refugee, and UNHCR closely monitor the health situation in the settlements.[220] When poor mental health became more

[212] ibid 72.
[213] UNHCR, *Beyond Detention 2014–2019 Final Progress Report* (n 191) 104.
[214] ibid.
[215] UNHCR, *Progress Report 2018 Beyond Detention* (n 189) 75.
[216] IDC, 'Successful ATD in Zambia' (IDC, 20 April 2018) <https://idcoalition.org/news/successful-alternative-in-zambia/> accessed 24 May 2022.
[217] UNHCR, *Settlement Profile – Meheba* (28 February 2021) <https://reliefweb.int/sites/reliefweb.int/files/resources/Settlements%20Profiles%20Zambia-CO%20-%20Feb2021.pdf> accessed 24 May 2022.
[218] UNHCR, *Public Health Briefing Note: Mantapala Settlement* (June 2019) <https://reliefweb.int/sites/reliefweb.int/files/resources/70149.pdf> accessed 24 May 2022.
[219] ibid
[220] ibid.

prominent in the camp, a comprehensive mental health and psychosocial support assessment was established.[221] Childline Zambia provides free counselling to children in need of psychosocial support in Mantapala. Their services include going door-to-door and having a help desk based in the camp, as well as providing case management referrals, implementing youth outreach initiatives, distributing hygiene kits, and creating child-friendly spaces where children can come to play games and engage in activities.[222]

The Ministry of General Education actively ensures the education provided by the primary and secondary school in Mantapala satisfies the national policy.[223] Both schools welcome children from the local community, facilitating local integration.[224] Forty-six per cent of those enrolled at the schools are girls,[225] and six per cent are from the local community.[226] Increased enrolment rates at the primary school have led to overcrowding in both schools, which has resulted in some children not attending school.[227] Plan International responded to this by building two new school blocks in Mantapala, upon completion this will bring the pupil: classroom ratio to 52:1.[228] There is a 72 per cent enrolment rate for children of primary school age, but this drops to 20 per cent at secondary school level. The UNHCR and the World

[221] ibid.

[222] Childline Zambia, 'Our Programmes' <https://clzambia.org/our-programmes/> accessed 24 May 2022.

[223] UNHCR, *Educational Briefing Note: Mantapala Settlement* (June 2019) <https://reliefweb.int/sites/reliefweb.int/files/resources/70148.pdf> accessed 24 May 2022; UNHCR and WFP, *Zambia: Joint WFP/UNHCR Needs Assessment Mantapala Settlement* (May 2021) 20 <https://wfp-unhcr-hub.org/wp-content/uploads/2021/05/Zambia-Mantpala-JNA-2021_final.pdf> accessed 24 May 2022.

[224] ibid.

[225] UNHCR, *Educational Briefing Note* (n 223).

[226] UNHCR and WFP (n 223) 20.

[227] UNHCR, *Educational Briefing Note* (n 223).

[228] UNHCR, *Fact Sheet: Zambia* (31 March 2020) <https://reliefweb.int/sites/reliefweb.int/files/resources/76566.pdf> accessed 24 May 2022.

Food Programme (WFP) have contributed this to a lack of WASH facilities and teacher accommodation.[229]

Since 2020, WFP has provided monthly cash grants to 90 per cent of residents in Mantapala allowing them to buy food of their choice.[230] Prior to this, families received monthly food baskets.[231] The new system promotes self-reliance and gives families autonomy over their nutrition. UNHCR, working with CARE International, has been attempting to raise support for women's issues within the local community. They have hosted meetings with local and influential men to facilitate community awareness of sexual and gender-based violence (SGBV) and support services.[232] CARE International has held further training sessions to help address the root causes of SGBV, which have targeted women, girls and boys.[233]

5.3. Existing Good Practices

In their report *There Are Alternatives: Africa,*[234] IDC identified several good practices implemented in Zambia. These include child-specific screening systems including child-friendly interview spaces in border areas and accompanying training of government officials; case management systems run by civil society organisations and case resolution for unaccompanied children through assisted voluntary return and reintegration to their country of nationality and a variety of alternative care arrangements ranging from shelters and open reception centres to foster care and guardianship arrangements.[235]

[229] UNHCR and WFP (n 223) 20.
[230] Sophie Smeulders, 'Zambia: Cash grants power hopes for refugees from DR Congo' (*UN World Food Programme*, 18 June 2021) <www.wfp.org/stories/refugee-day-zambia-dr-congo-hunger-development-un-world-food-programme> accessed 24 May 2022.
[231] ibid.
[232] UNHCR, *Fact Sheet: Zambia* (n 228).
[233] ibid.
[234] Tiffany Shakespeare and Junita Calder, *There Are Alternatives; Africa* (IDC 2018).
[235] ibid.

When placing children with local families, the Government tries to find families with ties to their country of nationality.[236] Beyond this, Zambia has been a pioneer in promoting the best interests of the child principle with the introduction of their 'Guidelines for Best Interest Determination of Vulnerable Migrant Children in Zambia' (Best Interest Guidelines).[237] The launch of these Guidelines aimed to incorporate a Best Interests Assessment and Best Interests Determination into their reception system for asylum-seeking children.[238] These built on the 'Guidelines: Protection Assistance for Vulnerable Migrants in Zambia', which provide guidance to first-line officers on screening and identifying vulnerable migrants with the use of a 'migrant profiling form' during the initial interview.[239] This works in tandem with the National Screening and Referral Mechanism, which is acknowledged as successfully preventing many vulnerable migrants from immigration detention.[240]

The National Referral Mechanism successfully addresses many of the well-being needs of asylum-seeking children. It was developed to identify vulnerable migrants and ensure they are referred to the appropriate authorities and services. Asylum seekers and UASC are considered vulnerable migrants under the mechanism.[241] The process begins with Stage 1, an interview to assess the migrant's protection needs.[242] At Stage 2 they will be referred to the relevant authority or

[236] ibid.
[237] Government of Zambia, *Guidelines for Best Interests Determination for Vulnerable Child Migrants in Zambia* (IOM, July 2018) <https://publications.iom.int/system/files/pdf/bid_guidelines_zambia.pdf?language=es> accessed 24 May 2022.
[238] ibid 1.2.
[239] UNHCR, *Options Paper 2: Options for Governments on Open Reception and Alternatives to Detention* (first published 2015, revised version 2020) (2020) 2 <www.refworld.org/docid/5523e9024.html> accessed 24 May 2022.
[240] UN Migration Network Working Group on Alternatives to Immigration Detention, *Covid-19 & Immigration Detention* (n 193).
[241] Government of Zambia (n 237) para 2.5.
[242] ibid.

services for further assessment and refugee status determination.[243] The National Referral Mechanism will also identify and meet the immediate needs of the vulnerable migrants, including the provision of alternative care.[244] A social worker will carry out regular assessments of the alternative care arrangement to ensure the child's rights and protection.[245] The immediate needs of the child will continue to be met until a durable solution is found.[246]

5.4. The Alternative Care Model: Makeni Transit Centre

Makeni Transit Centre (Makeni) is situated in the Zambian capital, Lusaka. The Commissioner for Refugees has been responsible for the management of Makeni since January 2019,[247] although the centre remains heavily supported by UNHCR. It hosts UASC and children with families awaiting the outcome of their refugee status determination.[248] Under Zambian law, inhabitants can access services from UNHCR's implementing partners pending a decision.[249] Within Makeni this includes physical and mental health care, reproductive services, counselling, legal advice, case support and case

[243] ibid.
[244] ibid.
[245] ibid.
[246] ibid.
[247] UNHCR, *Briefing Note: Urban Refugee Programme, Lusaka, Ndola* (5 October 2019) <https://reliefweb.int/sites/reliefweb.int/files/resources/72116.pdf> accessed 24 May 2022.
[248] ibid.
[249] Elizabeth Donger and others, *Refugee Youth in Lusaka: A Comprehensive evaluation of Health and Wellbeing* (Harvard FXB Center for Health and Human Rights, 2017) 21 <https://cdn1.sph.harvard.edu/wp-content/uploads/sites/2464/2018/05/UNHCR-ZAMBIA-Report1.pdf> accessed 24 May 2022.

management.[250] It also accommodates vulnerable groups via a safe house for SGBV survivors and has child-friendly areas.[251]

Healthcare has been provided to inhabitants at Makeni since it opened, however, in September 2016 the healthcare clinic began welcoming Zambian nationals as well.[252] The benefits of this are two-fold, providing healthcare to a wider group and promoting integration. Action Africa Help Zambia (AAHZ) has been an implementing partner of UNHCR since 2001 and assists the Ministry of Health to provide and manage medical care within Makeni.[253] The Ministry provides new arrivals at reception and transit centres with basic health services.[254] UNHCR also collaborates with its implementing partners to provide further services, such as psychosocial counselling, which it provides alongside CARE International and the Commissioner for Refugees.[255] CARE International also has a referral system in place whereby victims of SGBV are referred to counselling, health services, and access to justice.[256] UNHCR provides child protection and case management services with the support of WorldVision.[257] They also provide food and core relief items to the transit centres.[258] The Commissioner for Refugees provides additional food provisions to

[250] UNHCR, *Briefing Note: Urban Refugee Programme, Lusaka, Ndola* (n 247).
[251] ibid.
[252] AAHZ, 'Lusaka Clinic Launches Service for Host Community' (*AAHZ*, 6 May 2016) <www.actionafricahelp.org/lusaka-clinic-launches-services-for-host-community/> accessed 24 May 2022.
[253] AAHZ, 'Zambia' <www.actionafricahelp.org/zambia/> accessed 24 May 2022.
[254] UNHCR, *Public Health Briefing Note: Mantapala Settlement* (n 218).
[255]UNHCR, *Urban Refugee Programme in Zambia: Briefing Notes 2020* (September 2020) <https://reliefweb.int/sites/reliefweb.int/files/resources/Urban%20Refugee%20Programme%20in%20Zambia%20-%20Briefing%20Note%20SLS-Kel%2BALT%20final.pdf> accessed 24 May 2022.
[256] ibid.
[257] ibid.
[258] UNHCR, *Briefing Note: Urban Refugee Programme, Lusaka, Ndola* (n 247).

Makeni.[259] Inhabitants have also benefited from recent water, sanitation and hygiene initiatives in the surrounding area.[260]

An assessment of the educational support provided to children at Makeni safe house was carried out in March 2020. It found that these children were included in an initiative to provide educational support to vulnerable children in Lusaka.[261] There are several additional initiatives designed to facilitate education in Makeni. For example, CARITAS Czech Republic supports livelihood and literacy programs in Makeni,[262] and the Pestalozzi programme provides cash and learning materials to 395 vulnerable children and scholarships to children from marginalised communities.[263] This year, 200 students will also have access to tertiary education following the signing of a memorandum of understanding between Cavendish University, Zambia and UNHCR covering 50 per cent of the tuition fees.[264]

The Zambian Government recognises a child's family environment as the best environment for them to thrive.[265] The 2017 Act commits the Government to assisting UASC trace their families.[266] In cases where the parents cannot be found they will be afforded the same protection as any other child permanently or temporarily deprived of liberty.

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[259] UNHCR, *Urban Refugee Programme in Zambia: Briefing Notes 2020* (n 255).
[260]AAHZ, 'Children at Makeni Transit Centre Receive a Treat' *(AAHZ*, 17 December 2021) <www.actionafricahelp.org/children-at-makeni-transit-centre-receive-a-treat/> accessed 24 May 2022.
[261] UNHCR, *Fact Sheet: Zambia* (n 228).
[262] UNHCR, *Briefing Note: Urban Refugee Programme, Lusaka, Ndola* (n 247).
[263] ibid.
[264] UNHCR, *Operational Update: Zambia October 2021* (2021) <https://reliefweb.int/sites/reliefweb.int/files/resources/UNHCR%20Zambia_Operational%20Update_October%202021_3x.pdf> accessed 24 May 2022.
[265]Ministry of Community Development, Mother and Child Health, 'Minimum Standards of Care for Child Care Facilities: Regulations and Procedures' (*Better Care Network*, 1 July 2014) <https://bettercarenetwork.org/library/the-continuum-of-care/residential-care/minimum-standards-of-care-for-child-care-facilities-regulations-and-procedures> accessed 24 May 2022.
[266] The Refugee Act 2017 No 1 of 2017 13 April 2017 s 23.

5.5. Evaluation of the Well-Being of Children in Makeni Transit Centre

Zambia's Best Interest Guidelines demonstrate a commitment from the Government to uphold the best interests of the child. This is reinforced by the Minimum Standards of Care for Child Care Facilities, which incorporates the best interests principle into the foundations of facilities providing care to children in Zambia, including transit centres like Makeni.

These efforts are further reinforced by their steps to end the immigration detention of children. Although a prohibition of the practice remains absent from their domestic law, ATD are being used to keep children out of immigration detention which is in their best interests. In many cases ATD are considered before detaining asylum seekers, especially children as UNHCR have reported no UASC being detained since 2017, although statistics could not be found for 2020-21. UNHCR has also noted that single mothers with children are not detained for immigration purposes, suggesting they are trying to maintain family unity and are thus taking steps to ensure children's right to family life. This is supported by the fact that children can reside in reception centres, transit centres and refugee settlements with their families.

Some ATD report orders and asylum seekers' permits are provided for in law and allow the recipient to exercise their right to liberty, but these fall short of ensuring their basic human rights. It is unclear from the available data whether children and families accommodated at Makeni are able to freely move in and out of the centres. What is clear is that those residing in refugee settlements will have their freedom of movement restricted. At present, the only way to exercise free movement outside the refugee settlements is by obtaining an Urban

Residency Card,[267] which is only available to those with refugee status and is notoriously difficult to secure.[268]

Children have no explicit right to health in Zambia; however, basic physical and mental health services are provided at Makeni, successfully promoting the physical and mental well-being of children. Physical well-being is ensured by AAHZ, who provide medical care to Makeni, whereas the Commissioner for Refugees and CARE International ensure mental well-being by providing psychosocial counselling. Makeni takes this a step further by welcoming the local community at the health centre, as children's well-being will benefit from developing ties with their local community. The Best Interest Guidelines require meaningful child participation during the Best Interests Assessment.[269] It is unclear whether this requirement is fulfilled, but it creates the potential to make a further positive impact on the child's well-being.

The needs of women have clearly been considered when deciding which services to provide at Makeni, as reproductive services are provided and there is a safe house and referral system for survivors of SGBV. Further, 170 vulnerable women were selected to be beneficiaries of *The Women and Girls at Risk* programme in the three refugee settlements in Lusaka.[270] The aim of this programme is to support the participants' economic participation.[271] This is evidence of an intersectional approach. However, as Gilleri and De Beco highlight, the quality of these services cannot be measured by the indicators alone. Primary research would be required to fully understand the extent to which these services address the needs of women and girls and thus positively impact their well-being. The

[267] UNHCR, *Operational Update: Zambia July 2021*, 30 August 2021 <https://data2.unhcr.org/en/documents/details/88390> accessed 24 May 2022.
[268] Donger and others (n 249)
[269] Government of Zambia (n237) para 3.1
[270] UNHCR, *Operational Update: Zambia October 2021* (n 264)
[271] ibid.

specific needs of children have also been considered, as shown through the child-friendly areas and child protection services.

Once again, the position of the girl-child is vague. This could either be a result of inadequate data or a lack of consideration to her needs. A coordinated, tailored approach from the implementing partners at Makeni would benefit her by responding to the specific needs of young refugee girls. A coordinated approach would allow WorldVision, the partner providing child protection, to work with CARE International to respond to the intersectional needs of the girl-child. The available data regarding the education provided at Makeni is limited and insufficient to apply many of the child well-being outcomes. Whilst some level of education is provided by partners such as CARITAS Czech Republic, the available data suggests there is a lot of room for improvement. Drawing on the fact that access to services appears to be better across all the child well-being outcomes at refugee settlements, and gaps remain in the access to education at these settlements, it can be implied that the education provided at Makeni is inadequate and not fulfilling children's educational well-being. The material well-being of children is catered for by UNHCR who provide food and other core items to Makeni. Once again, the data does not allow for a thorough qualitative analysis of the situation.

Overall, the services provided at Makeni support the well-being of UASC and children with families. The Government of Zambia is taking significant steps to improve the liberty afforded to children and ensure they are not placed in immigration detention. The health service addresses both the physical and mental healthcare needs of residents, adopting an intersectional response by providing gender-and-child-specific services. The education services provided could be improved upon significantly, with the data suggesting the poor quality is a result of a lack of funding in this area. The data did not go beyond identifying the fact that material supplies were provided at Makeni, suggesting the provision of these could be improved upon.

Judicial Morality and the Limits of the Law

Ed Clothier

Abstract

After four years of escalation through the courts of England and Wales, on 25 June 2021 the Supreme Court upheld individuals' rights to block public highways as a means of protest. Five months later, nine people were handed down custodial sentences following a peaceful protest, which involved blocking a public highway. The determination of these cases demonstrate the extent of the law's indeterminacy and offers a paradigmatic example of how the law can represent a statement of individual judicial morality. Employing a slim-lined version of Duncan Kennedy's Judicial Phenomenology, and with reference to these cases, this paper will demonstrate how an 'environmentally activist' judge could have refused a significant number of injunction applications and decided the law, and the fate of the protestors, very differently. This article proposes that, contrary to Hart's claims that indeterminacy is solely a matter of the 'open texture' of language, there are many sources of indeterminacy which can make even seemingly 'easy cases' ambiguous.

1 Introduction

To say that the law is greatly indeterminate is to say that it is to a great degree unknowable, or, to go a step further, to say it is arbitrary. This paper does not seek to examine the nature of what the law is but rather to show, in a number of seemingly easy cases, that the law, as a social phenomenon that predominantly takes place in courts, is largely an expression of a particular court's morality, and in most instances that is the morality of a judge.

To explore this view, the paper will rely heavily on three legal scholars: Hart, Guastini, and Kennedy. First, these scholars provide a comprehensive cross section of views of indeterminacy, with Hart and Kennedy at distinct points on the spectrum, while Guastini offers a more distanced, technical and nuanced view. Second, these scholars all discuss judging in action, providing the reader with a practical understanding applicable to real world cases, allowing the reader to test their claims against real judicial reasoning.

Consequently, the paper proceeds as follows: first a summary of the National Highways and Transport for London (TFL) injunctions and how they were decided.[1] Second, Hart's claim for limited indeterminacy, resulting from the 'open texture' of language, will be investigated. Third, Kennedy and Guastini's further sources of indeterminacy will be examined. Next, the paper will take Kennedy's lead in not being 'at all convinced when people start out claiming they can tell us about judging without some grounding in a specific imagined situation',[2] and will apply Kennedy's phenomenology to the National Highways and TFL Injunctions. Finally, the pervasiveness of morality in the law will be demonstrated more generally.

[1] *National Highways Ltd v Persons Unknown* [2021] EWHC 3081 (QB).

[2] Duncan Kennedy, 'Freedom and Constraint in Adjudication: A Critical Phenomenology' (1986) 36 J Legal Educ 518.

2 Summary of National Highways and Transport for London Injunctions

Between 15 September 2021 and 11 November 2021, a loose collective known as 'Insulate Britain' held multiple protests.[3] The protests involved the blocking of public highways by laying in the road. Initially, the protests focused on the M25 but later included major roads in London's Parliament Square, and other major roads in Southeast England. The collective's overarching aim was to bring about a change in Government policy, specifically, the improved insulation of all homes in Britain.[4] Both Public Highways and TFL brought multiple injunctions against the protestors.[5] Ultimately, the injunctions were granted but the collective continued their activities, resulting in nine protesters being handed down custodial sentences for contempt of court.[6]

TFL was not a party to the National Highways hearing but, to assist in demonstrating the central point of this paper, it will be assumed that they were joint claimants. Their inclusion as joint claimants is not problematic, as the injunctions granted in favour of TFL[7] are materially considered in the judgment,[8] and are particularly relevant to the application of Kennedy's phenomenology.

The presiding judge's ruling revolved around Articles 10 and 11 of the

[3] *National Highways* (n 1) [6]
[4] *National Highways* (n 1) [8].
[5] ibid [14], [16].
[6] *National Highways Ltd v Heyatawin* [2021] EWHC 3078.
[7] Andrew Fraser-Urqhuart and Charles Forrest, 'High Court Grants Urgent Interim Injunction to Transport for London Against Insulate Britain Protesters' (*Francis Taylor Building*, 8 October 2021) <https://www.ftbchambers.co.uk/news/high-court-grants-urgent-interim-injunction-transport-london-against-insulate-britain> accessed 24 May 2022.
[8] *National Highways* (n 1) [16].

European Convention on Human Rights.[9] Lavender J relied heavily on the recent ruling in *PPS v Ziegler,* which ruled in favour of protestors' rights.[10] Following *Ziegler*, Lavender J conceded that, although *Ziegler* was a criminal case, he agreed with counsel for the defendants that it was applicable as to whether the protestors' actions constituted a tort of trespass or nuisance.[11] In effect, this meant that he would apply the same formula from *Ziegler* to the case at hand. *Ziegler* sets out eight factors relevant to the assessment of proportionality of an interference with the Article 10 and 11 rights, specifically in cases where protestors are 'blocking traffic on the road'.[12] Lavender J favoured the protestors on five of the eight factors.

Of those factors to which Lavender J was opposed, factor (7) states a requirement for 'the absence of any complaint about the defendants' conduct' in cases where protesters block public highways.[13] To which Lavender J offered a weak, textually based, response. Factor (4) deals with whether the protests were carefully targeted and (6) with the duration of the protests.[14] Factors (4) and (6) were pivotal in his decision. However, with only minor amendments to the judge's ethical standpoint, it will be shown how this case could have been determined very differently.

3 Hart and Indeterminacy

Law's indeterminacy for all but the most provocative of legal scholars is widely accepted.[15] Guastini contends that the spectrum of indeterminacy flows between 'the noble dream', a state where the law

[9] Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights, as amended) arts 10 and 11
[10] *DPP v Ziegler* [2021] UKSC 23, [2021] 4 ALL ER 985 [151].
[11] *National Highways* (n 1) [29].
[12] ibid [38].
[13] *National Highways* (n 1) [38].
[14] *National Highways* (n 1) [39].
[15] For example, see Ronald Dworkin, *Law's Empire* (Harvard University Press 1986).

is fully determined, and 'the nightmare', where the law is wholly indeterminate.[16] Hart is seen as the standard bearer of 'the vigil' middle ground, allowing a level of indeterminacy in hard cases while conceding that these are rare.[17]

For Hart, the single source of indeterminacy in the law is the necessity of the use of 'open language', equally attributing this to legislation and precedent.[18] Hart contends that the open texture of language to communicate rules is inevitable as it reflects the open texture of our world. The inability to forecast all future cases means that rules must be formulated generally: allowing for future interpretation to determine the correct application to the case at hand. Specifically, a part of the field of law is 'left open for the exercise of discretion by courts and other officials in rendering initially vague standards determinate'.[19] For Hart, most cases are plain cases, where 'individuals can see for themselves, in case after case' the plain meaning of the rule.[20] Judicial or official interpretation is only required in 'hard cases' to clarify or 'narrow' the language to fit a particular case, for example, in constitutional matters or parliament's ability to bind or destroy itself.[21] In these hard cases Hart is happy to concede that 'all that succeeds is success', that 'open texture' is the sole source of indeterminacy.[22] Yet Hart claims that indeterminacy does not exist, from any source, in so-called easy cases, a claim that does not withstand scrutiny.

Now let us take the weak response to factor (7) offered by Lavender J in the National Highways cases as an example, the factor relating to

[16] Riccardo Guastini, 'Rule-Scepticism Restated' in Leslie Green and Brian Leiter (eds), *Oxford Studies in Philosophy of Law* vol 1 (Oxford Scholarship Online 2011) 138, 150–151.
[17] HLA Hart, *The Concept of Law* (2nd edn, Oxford University Press 2012) 136.
[18] ibid 126.
[19] ibid 136.
[20] ibid 136.
[21] For example see HWR Wade, 'The Basis of Legal Sovereignty' (1955) 13 CLJ 172.
[22] Hart (n 17) 153.

'complaints about protestors conduct'.[23] Lavender J contends that it was 'abundantly clear from press reports that many members of the public object to the Insulate Britain protests'.[24] Inexplicably, he then references no specific press reports and instead relies on hearsay. He states only that 'at least one press report *suggested* that an ambulance was held up'.[25] Clearly, Lavender J takes a very broad reading of factor (7), particularly the words 'complaint' and 'conduct'.

Here, language is a source of great indeterminacy on which Lavender J, regardless of his ethical views, would have to rely heavily on his own interpretation. In *Ziegler*, factor (7) addresses not whether people disagreed with defendants protesting, a ridiculous hurdle for any political protest to have to surmount, but whether there were formal complaints. While there may have been complaints, most likely to the police, whether they related to the protestors' 'conduct' would be another matter. In any event, the claimant presented no complaints as evidence. Given the exceptionally open language of factor (7) and the lack of explicit evidence, Lavender J could, and probably should, have more comfortably concluded, as did the Divisional Court in *Ziegler*, that this could be of 'little if any relevance to the assessment of proportionality'.[26] Further, it would seem that in giving their judgment in *Ziegler*, Hamblen LJ and Stephens LJ directly anticipated such issues, instructing future interpreters that 'the factors must be open textured without being given any pre-ordained weight'.[27] Their explicit use of the Hartian term 'open textured' is striking and it is hard to think that the Lord Justices were not cognisant of future potential indeterminacy when delivering their judgment.

[23] *National Highways* (n 1) [38].
[24] *National Highways* (n 1) [39].
[25] Emphasis added, *National Highways* (n 1) [39].
[26] *Ziegler* (n 10) 85.
[27] ibid 71.

4 Beyond Open Texture

Guastini goes beyond Hart and identifies three sources of indeterminacy, outside of the '"objective" flaws of constitutional and statutory language',[28] namely: i) the plurality of interpretive methods; ii) juristic theories; and iii) the ethical and political preferences of interpreters.[29] Guastini feels that iii) 'is so manifest that there is no need to elaborate the point'.[30] That said, it is worth looking at the other two sources of indeterminacy and seeing how they differ from iii).

The 'plurality of interpretative methods' and 'juristic theories' are conceptually similar; they are distinguished from iii) by being 'cognitive' as opposed to 'acts of will'. Item i) refers to the different interpretive techniques that might be applied to any single sentence or piece of language, rather than the language itself ie the different, and importantly widely accepted, methods of interpreting set legal texts. By example, Guastini identifies three different interpretative methods adopted by Italian jurists to statutes.[31]

Item ii) is again cognitive and refers to pre-suppositions held by the jurist before they approach the legal text eg the primacy of EU Law over state law or *Marbury v Maddison* in the US.[32] These two sources of indeterminacy were roughly anticipated quite early on by the legal realist Llewellyn, who points to the 'current tradition of the court' and the 'sense of the situation as the court sees that sense'.[33] One can comfortably interchange the words court/jurist/judge where appropriate.

[28] Guastini (n 16) 148.
[29] ibid 148.
[30] ibid.
[31] ibid 149.
[32] ibid.
[33] Karl N Llewllyn, 'Remarks on the Theory of Appellate Decision and the Rule or Canons about How Statutes Are to Be Construed' (1950) 3 Vand L Rev 395, 396.

Indeterminacy from the above sources can be one of accident, for example the jurists' preferred method of interpretation in many instances is likely to be the result of legal training. However, both sources could as easily be subsumed into iii) with an activist judge selecting the method which best suits their 'ethical' ends.

Kennedy takes a more novel approach to exploring indeterminacy, in that he plays out the judicial reasoning of a judge where the judge has an agenda as to 'how-I-want-to-come-out' which, on the face of it, is opposed, or in conflict with, how 'the law' initially seems to present itself.[34] When Kennedy talks of a judge's 'how-I-want-to-come-out', he is referring to a judge's initial feelings and sentiments on first hearing a case. – that is, the alignment of their moral and lived sensibilities with their intuitive desire for a given resolution to a case. He takes an imagined case of a bus operator seeking an injunction against strike action by unionised bus drivers laying down in the street opposite the bus depot. His judge's initial response to the case is to: a) feel 'there is no way they will be able to get away with this';[35] and b) disagree with rules which allow employers to continue operating 'the means of production' while a dispute is on-going. This view is derived from a specific worldview held by the judge who would like to see a transformation of 'American economic life.'[36]

Two points arise. First, Kennedy's exposition captures in its entirety Guastini's three sources of indeterminacy, as he presents us with a judge who is attempting to adapt Guastini's first two sources to the judge's ethical preferences. That is to say, he demonstrates technical indeterminacy in the process and theories of interpretation, yet they are subject to a magnetic pull from the judge's pre-ordained 'how-I-want-to-come-out'. Second, Kennedy's judge has regard to what he dramatically terms 'the devil's compact', namely the perceived

[34] Kennedy (n 2) 518.
[35] ibid 519.
[36] ibid 520.

contract between the judge and public.[37] Kennedy's judge is consciously limited by the 'the whole force field' of the particular area of the law and is not out to win-at-all-costs – they are a conformist judge who nevertheless holds quite staunch ethical views.[38]

Kennedy is not propounding 'the nightmare' view of the law, he sees his judge as greatly restricted. Nonetheless, he is clear that he sees legal reasoning as 'a kind of work with a purpose, and here the purpose is to make the case come out the way my sense of justice tells me it ought to'.[39] He may not be successful in his task, but that does not by default make that area of the law determinate, as it may simply be 'the failure of particular judges to find a way to budge it'.[40]

In Kennedy's role-play, once all legal reasoning has been exhausted, Kennedy assumes his judge has failed to generate a decisive argument that completely accords with their 'how-I-want-to-come-out', and is left with a plausible, if unstable, argument against the injunction. It then becomes a matter of risk taking on the judge's behalf, with the options ranging from deciding against the injunction on the basis of the judge's incomplete argument, to the patently devious act of deciding against the injunction on the basis 'of fact finding I know to be false'.[41]

Kennedy demonstrates that through accepted legal reasoning, a sensible judge can come to an end point where, having done the work, they are faced with a risk curve containing multiple options on how to decide the case. And it will be that judge's individual risk appetite combined with their ethical preferences that are decisive.

[37] ibid 555.
[38] ibid 536.
[39] ibid 526.
[40] ibid 548.
[41] ibid 558–559.

5 Application to National Highways and TFL Cases

Now let us assume that Lavender J held prior moderate ethical views in favour of protestors' rights and could be considered an environmentalist. As such, it is assumed that his 'how-I-want-to-come-out' position is that he is going to work to do what he can to help Insulate Britain protestors.[42]

It has already been shown how the interpretation of factor (7) could easily be manipulated by recourse to its 'open texture'. However, the two factors pivotal in Lavender J's decision are factors (4) and (6), the factors relating to targeted protesting and duration.[43] Here, there is a simple solution that marries up our ethical judge's 'how-I-want-to-come-out' and a reading of the law, which does not rely on a different interpretation of language. Under a like-for-like reading of factors (4) and (6), that is, without recourse to a different interpretation of language, what is at issue is that the protests: i) were against government policies yet do not specifically target government; and ii) are potentially unlimited in duration. The contra-argument, as per *Ziegler*, is that if they were specifically targeted and had a set duration, then they would be permissible. Our activist judge could achieve their aims and come out in favour of the protesters by upholding the injunctions that relate to the M25 and other major roads while setting aside the injunctions that relate to Parliament Square. In so doing, he could write an opinion assisting the protestors by instructing them to limit the protest duration. While no existing precedent strictly defines a 'reasonable duration', only that such a duration exists, it would be enough to guide the protestors on this

[42] Indeed, this imagined judge became a reality on the 12 April, when District Judge Stephen Leake was inspired by protestors 'to do what I can to reduce my own impact on the planet', see 'Insulate Britain: Judge "Inspired" by Activists After M25 Protest' (BBC, 12 April 2022) <https://www.bbc.com/news/uk-england-kent-61085689> accessed 24 May 2022.

[43] *National Highways* (n 1) [39].

point, perhaps, referencing the ninety minutes deemed acceptable in *Ziegler*. In fact, the judge could go further and point to historic protests, which never ended up in court, that blocked public highways in opposition to government policy for extended periods in and around Westminster, such as the Black Cab protests.[44]

Although not a complete victory for our ethical judge, what the above brief exercise has shown is how multiple sources of indeterminacy can be used to budge the law in favour of a given ethical position. What is important is that on points (4) and (6) the judge has had to do no more than apply the same reasoning to give a completely different and much more favourable outcome to the protestors without relying on ambiguity in language.

6 Easy Cases

The above case is not a 'hard case' as Hart would have it, and this paper contends that the same indeterminacy applies to a great deal of easy cases. People are often surprised when there is no 'law' or 'when the law turns out to be plain unjust'.[45] To take Hart's 'crudest example', the killing of another person, how many people truly know what constitutes murder?[46] If one walked up to someone in the street and described the circumstances around Sally Challen's case, a case where a wife with full premeditation brutally beat her husband to death with a hammer while he ate his dinner,[47] how many could say whether she was a murderer or not? How many would know anything of coercive control, diminished responsibility and provocation (now

[44] For example, see Ella Willis, 'Tottenham Court Road Black Cab Protest: Cabbies Block Road over Planned Ban on Cars, Lorries and Taxis' *Evening Standard* (London, 21 January 2019) <https://www.standard.co.uk/news/london/black-cabs-block-tottenham-court-road-in-protest-over-planned-ban-on-cars-lorries-and-taxis-a4044961.html> accessed 24 May 2022.
[45] Kennedy (n 2) 556.
[46] Hart (n 17) 133.
[47] *R v Challen* [2019] EWCA Crim 916, [2019] Crim LR 980.

'loss of control')?[48] Simply to say that most cases of killing are 'plain', is naïve. Cases of killing are 'plain' only so far as the facts that surround them, as weighed by a jury, at the time, make them plain *ex-poste*. This is not to say we live in a state of anarchy, but it is to suggest that we live in a state where people abide by rules out of a sense of morality, not out of a sense of the law. The law itself is unknowable, for it requires us to know the mind of a judge or jury.

'The law' seemed clear with regard to criminal damage, but we do not know the mind of the jury that acquitted the Colston Four, a case where four people tore down a public monument in broad daylight in front of hundreds of eyewitnesses, the national media, and thousands on social media.[49] Therefore, one's best efforts are only forecasts of what the law might be and, for the most part, this is often conflated with what the law 'ought' to be. The three cases presented cannot be considered 'hard cases', they do not deal with complex cases around the constitution or the Rule of Recognition, and they would in fact be considered plain cases by the layman and the lawyer alike. Yet such cases demonstrate the capacity for differing interpretations of the law, allowed by open texture.

7 Conclusion

This paper started by examining the injunctions and cases surrounding the recent Insulate Britain protests; from there it has proceeded to lay out how the judge in the National Highways appeal hearing came to his decision to uphold the injunctions. Using this case as a springboard, Hart, Guastini and Kennedy's theories of indeterminacy have been introduced. While Hart was right to identify 'open texture' as a source of indeterminacy, he was too hasty in considering it the sole source. Open texture was easily identified as a source of

[48] Tony Storey, 'Coercive Control: An Offence but Not a Defence' (2019) 83 JCL 513.

[49] 'Edward Colston Statue: Four Cleared of Criminal Damage' (BBC, 5 January 2022) <https://www.bbc.co.uk/news/uk-england-bristol-59727161> accessed 24 May 2022.

indeterminacy in the National Highways appeal, so much so that judges in previous hearings had forecasted and allowed for it.

The real substance of this paper has been to go beyond open texture, looking at the causes of indeterminacy that might arise out of technical or ethical differences in judges' approaches to 'the law'. Most importantly, it has examined the role moral agency has in determining the law, specifically the morality of judges. By applying Kennedy's phenomenology, a different outcome was determined in the National Highways appeal, one that did not rely solely on open texture. This goes a small way to demonstrating that there are very few, if any, easy cases. The law itself is far more indeterminate than Hart would have us believe and, in many cases, it is no more than a series of moral ordinances by men in wigs.