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Editorial

Catching our breath at the end of the year

Rachel Dunn, Northumbria University

It is that time of the academic year when marking is done, graduations have been celebrated and we are all preparing to go on leave, holidays, or, for our students, new adventures. It has been a very busy year, with many challenges, but also a very rewarding year. This issue demonstrates the hard work students and staff put into every day within a university. I am very proud of the work in this issue and I hope you all enjoy it. It is a diverse body of work, from articles to reflections, and demonstrates the creativity of our students.

The first article in this issue is by a PGR from Keele University, Felicity Adams. Felicity's article, 'From Homophony to Polyphony: Law and Music a Consonant Duet for Future Legal Thinking and Practice?', explores how the law should embed the value of community. In order to do this, Felicity explores work by Ramshaw, supporting his thesis that a reciprocal relationship between law and music should be established to support the operation of community, as according to Derridean. It is a very interesting article and brought music and law together in a way I couldn't have imagined.

Jessica Hurwood produced an article on the Hart-Devlin debate and its application to legalising assisted dying. In "Application of the Hart-Devlin debate to the ideas and arguments raised in 'Legalising assisted dying would be a failure of collective human memory and imagination'", Jessica explores whether Hart's liberal approach has in fact prevailed, or if society prefers Devlin's more conservative approach. I would like to take this opportunity to congratulate Jessica on graduating with the highest undergraduate performance in law this year, winning the Oxford University Press Prize, the Watson Burton Prize and the Northumbria Law School Prize. This article shows the standard of her work and is a testament to her time at Northumbria University.

The last article in this issue is by a second year law student, Jacob Tron. Jacob, in his article, "The law relating to Proscription of terrorist organisations as set out in the Terrorism Act 2000", explores how the law relating to proscription of terrorist organisations protects the public, but also encroaches on civil liberties and human rights. It is a comprehensive article on terrorism law and discusses some interesting proposals for reform of the law.

This issue introduces our first reflection piece. John Salt, a recent graduate from Northumbria University, explores empathy in the legal profession, based on his experience in our award winning Student Law Office. John discusses how we should not strategise our emotion when working with our clients, but rather put ourselves in the shoes of our clients, to provide them with a humanistic consumer experience. In the age of technology and the development of AI legal services, a reflection on the importance of the human aspect of lawyering is welcomed.

This year saw the introduction of the Policy Clinic into the Student Law Office and Northumbria University. The purpose of the Policy Clinic is to conduct research, mainly empirical, for organisations, with the aim of influencing policy and law reform. We had some amazing projects run this year with some extremely dedicated students. In this issue is just one of many reports produced this year. Some of my own students carried out research for the UK Centre for Animal Law (ALAW), exploring reasons why elderly people with companion animals are unable to access residential care homes or supported accommodation, and whether these legal and/or regulatory factors can be overcome. Paula Sparks, Chairperson of ALAW, came from London to meet with the students working on this project and said the final report *"is a high quality piece of research and a testament to the hard work of students undertaking this project".* ALAW is paying for these students to attend their conference, Animal Law, Ethics and Policy 2019, to present their findings and discuss their experience of working on the project. I would like to congratulate Amy Millross, Golara Bozorg and Marija Bilerte on their hard work on this project, and all of the other students who carried out work in the Policy Clinic this year. Watch this space, more reports will come in future issues!

Lastly, we have two excellent undergraduate dissertations in this issue. Lucy Dougall, supervised by Professor Tony Ward, produced a dissertation entitled, "Intoxication in Criminal Law – An Analysis of the Practical Implications of the Ivey v Genting Casinos case on the Majewski Rule". This dissertation explores how intoxication works within the criminal law and how the application varies for the category of the crime. Specifically, Lucy analyses the recent Supreme Court decision in *Ivey v Genting Casinos* and how the doctrine of intoxication applies to property offences. Well done to Lucy and Professor Ward for producing such a high quality dissertation.

Last, but not least, Mert Evirgen, under the supervision of Professor Chris Newman, produced a dissertation entitled "An Alternative Approach to Solving the Dilemma of Litigation and Liability Disputes in Outer Space". This is an brilliant dissertation, and a must read for any who wants an introduction to space law and the issues around litigation of such a hostile environment, which can raise international tensions. Mert argues that the implementation of ADR in space disputes is urgent and can avoid international relationships breaking down. This dissertation highlights the diverse range of topics offered at Northumbria Law School, boldly going where no one has gone before.

I hope you all enjoy reading this issue as much as I have. It has been a hard year, but seeing all of this outstanding work produced brought together always make academia worth it. Well done to all of our students published in this issue and I call on more students, from all universities, to send in their work. It is a pleasure to be able to see what you are all interested in and new ideas being formed and discussed.

Have a lovely summer everyone, breathe, take a break, and we'll do it all again in September!

From Homophony to Polyphony:

Law and Music a Consonant Duet for Future Legal Thinking and Practice?

Felicity Adams, Keele University

Law and Music – A Transformative Hybrid: embracing the diverse and different

Cotterell describes the law as a 'ticketing' system whereby the law's authority enables its governance of individual admissions into the legal framework.[1] Cotterell's use of symbolism highlights the law as being instrumental in the construction of its own concepts and the control of its parameters to the 'inside' and 'outside' of the legal world.[2] The demonstration of law in this way affirms its active role in the construction of concepts such as 'community', which is rooted in the notion of identity.[3]

So-called 'sophisticated formalists' emphasise their preference for the concept of 'community' to operate as a singular unit in order for the integrity, legitimacy and fundamentally strength of the law to be upheld.[4] Thus, in order to construct 'community' as a singular, unified whole the law must privilege and fuse similar identities together and eschew and alienate identities differentiating from that fusion.[5]

[1] Rodger Cotterell, 'Law and Community: A New Relationship?' [1998] Oxford Journals 369
[2] Ibid
[3] John D Caputo, *Deconstruction in a Nutshell: A Conversation with Jacques Derrida* (Fordham University Press, 1997) P 113
[4] See Richard Dworkin in JW Harris, 'Unger's critique of Formalism in Legal Reasoning: Hero, Hercules and Humdrum [1989] The Modern Law Review 53
Brian Leiter, 'Legal Formalism and Legal Realism: What Is the Issue?' [2010] Legal Theory
Generally, Legal Formalism is the belief that judges mechanically and rigidly apply legal rules to all legal issues without consideration of any extraneous factors.
[5] Colin Farrelly, *Introduction to Contemporary Political Theory* (SAGE publications, 2004) P 195

Whilst some scholars derive strength from the operation of community in the singular, Jacques Derrida expresses the inherent danger of a 'community', which is devoid of difference, and is conditional upon absolute unity, singularity, and closure.[6] However, the law continues to promote the 'dangerous' conception of community as detailed by Derrida through its maintenance of strict binaries and adherence to the formalist quest for law to be maintained in narrow terms.[7] Indeed, scholars identify that the law's narrow manner of operation regularly results in the homogenisation of identities, which are then privileged and presented as the dominant form of 'community'.[8]

It is precisely this process of homogenisation, reduction and totalisation of identities undertaken in the promotion of a singular and unified 'community' that drives Jacques Derrida's overarching dislike for the notion of 'community'.[9] The problematic nature of adopting a singular standard of 'community' is cemented by scholars who unveil this quest for universality and unity as being a 'mask' to maintain the power of dominant groups.[10] Indeed, Caputo demonstrates that the law's quest for absolute unity results in its blindness towards diverse identities existing outside of the law's idealist parameters of community. This means that community in the Derridean sense may never be actualised in reality.[11]

[6] Caputo (n 3) P 107
[7] Oliver Wendell Holmes, *The Common Law* (Courier Corporation, 2013) P 1
Daniel Matthews, 'From jurisdiction to juriswriting: deconstruction at the limits of the law' (PhD thesis, Birbeck, University of London, 2015) P 20
Richard Pildes 'Forms of Formalism' [1999] The University of Chicago Law Review 618
[8] George Pavlich, 'The Force of Community' in Heather Strang and John Braithwaite (eds) *Restorative Justice and Civil Society* (CUP, 2001) P 63
[9] Caputo (n 3) P 14, 107
[10] Amy Guttman, 'Introduction' in Charles Taylor and (eds) Multiculturalism (Princeton University Press, 1994) P 18
[11] Caputo (n 3) P 131

Legal realists emphasise the need to illuminate and interrogate 'axioms' such as community.[12] The interrogation of these concepts is made more important by Cotterell who expresses the increasing demand for the law to reflect community in the diverse and fluid sense.[13] To this end, Ramshaw has advocated for a radical re-conceptualisation of existing legal thinking to mirror the music as a 'foundation of community.'[14] Although some are sceptical about the convergence between law and music, the power of music 'as a means…to harmonise physical and spiritual forces' should be emphasised.[15] This is an important factor to consider when recognising the need for the law to recognise and embrace a more diverse range of identities.[16]

This paper examines the extent to which the law should mirror music as a discipline that embraces the value of community in the diverse sense in order to accommodate difference. The paper advocates that the law should shift from privileging community in the unified, singular sense in order to champion community in the collective sense, so that the law may genuinely support the inclusion of a diverse range of identities.

To this end, the paper emphasises the importance for the law to embed the value of 'community' in the Derridean sense into its approach to embrace the innate differences

[12] Cotterell (n 3) 390
Jerome Frank, 'Mr. Justice Holmes and Non-Euclidean Legal inking' [1942] Cornell Law Review 571
[13] Cotterell (n 1) 390
[14] Desmond Manderson, 'Towards Law and Music: Sara Ramshaw, Justice as Improvisation: The Law of the Extempore (Oxford: Routledge, 2013)' [2014] Law Critique 312
[15] Sherylle Mills, 'Indigenous Music and the Law: An Analysis of National and International Legislation' [1996] Yearbook for Traditional Music 57
Bernhard Grossfeld and Jack A. Hiller, 'Music and Law' [2008] The International Lawyer 1147-1148
Desmond Manderson and David Caudill, 'Modes of Law: Music and Legal Theory – An Interdisciplinary Workshop Introduction' [1998] Cardozo Law Review 5
[16] Cotterell (n 1) 390

between identities. The paper argues that at present the operation of 'community' in the Derridean sense is prevented by its discordant relationship with the formalist legal approach. This approach privileges the closure of the law above accommodating the values of diversity and possibility, which are central to the Derridean conception of 'community'.[17] Subsequently, the paper supports Ramshaw's thesis that a reciprocal relationship between the law and music should be established in order to facilitate a shift from dominant legal thinking and praxis in order to promote 'community' in the Derridean sense.[18] This paper concludes by supporting music as a powerful instrument to emancipate the law from its formalist tendencies, and ultimately to enable the value of 'community' in the Derridean sense to be harmoniously embedded into future legal thinking.[19]

"I've always had trouble vibrating in unison": law, community, identity and polyphony[20]

Derrida expressed the notion of community as being one centred upon identity; emphasising the importance of understanding the promise of community because it is incomplete, flexible, and constantly in flux.[21] However, scholars continue to emphasise

[17] Doreen McBarnet and Christopher Whelan, 'The Elusive Spirit of the Law: Formalism and the Struggle for Legal Control' [1991] The Modern Law Review 2
Caputo (n 3)
[18] Sara Ramshaw and Paul Stapleton, 'Just Improvisation' [2017] Critical Studies in Improvisation 1
[19] Sara Ramshaw, Justice as Improvisation: The Law of the Extempore (Routledge, 2013) P 39
Manderson and Caudill (n 15) 1328
[20]Jacques Derrida in John Caputo, *The Prayers and Tears of Jacques Derrida: Religion Without Religion* (Indiana University Press, 1997) P 361
John Caputo, 'A Community Without Truth: Derrida and the Impossible Community' [1996] Research in Phenomenology 26
[21] Caputo (n 20) 26
Derrida (n 20) P 113
Mark Dooley and Liam Kavanagh, *The Philosophy of Derrida* (Routledge, 2014) P 17

the need for community to exist in in unified, singular and closed terms.[22] The desire to promote community in the singular sense is driven by its perceived display of togetherness and strength, attributes which are expressed as being fundamental by some scholars.[23]

Although the existence of community as a singular entity may denote strength to some, interestingly Derrida mourns the loss of togetherness undertaken in the creation of community as a singular unit. This is because the endeavour to unify is fruitless: it results in the reduction and homogenisation of identities.[24] Instead of seeking a union in the diverse sense through the coming together of a range of forces, the quest to achieve community as a unit results in the closure of mainstream society against those who are perceived to be the 'Other'.[25] Thus, the attempt to fuse and exclude identities in the drive for a unified community rather than embracing community as a boundless patchwork of identities exposes the myth of a singular unified and totalised community. Arguably, instead this process exposes the inherent fragmentation of community and ultimately the quest for a community in the singular sense as a superficial and futile venture.[26]

A more accommodating conception of community may be achieved by deconstructing these traditional conceptions of community. Deconstruction is essential

[22] JW Harris, 'Unger's critique of Formalism in Legal Reasoning: Hero, Hercules and Humdrum [1989] The Modern Law Review 53
[23] Ibid
[24] Derrida (n 20) P 113
[25] Jacques Derrida in John Caputo, *The Prayers and Tears of Jacques Derrida: Religion Without Religion* (Indiana University Press, 1997) P 231
[26] Sidonie Smith and Julia Watson (eds), *Autobiography, Theory: A Reader* (University of Wisconsin Press, 1998) P 172

to release community from the shackles of the conventional formalist approach.[27] Although the word 'deconstruct' may imply obliteration, the purpose of this method is not to 'destruct or to demolish' rather it involves the 'recognition of another community… beyond the identitarian fusion'.[28] Ultimately, this will enable the boundaries of community to be opened up to authentically incorporate a plethora of identities.[29] Derrida articulates that the nature of law as a constructed mechanism enables its deconstruction and subsequent improvement. Thus, this opportunity to ameliorate the law's approach towards community highlights the importance of deconstructing the law.[30]

Scholars identify music as an innovative model to facilitate the deconstruction of the law's current rigid approach towards community so as to accept more diverse and fluid conceptions of identity.[31] Fundamentally, through its incorporation of seemingly discordant and different concepts, music appears to provide an opportunity to 'disarm the bombs of identity' which operate as an armour to protect community from the invasion of the other.[32]

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[27] Philosopher, Jacques Derrida coined the critique of 'Deconstruction' to liberate concepts, language, traditions and beliefs from repression by strict conventions by the need for uniformity and to emphasis the fluidity of all concepts beyond the boundaries.
Derrida (n 25) P 31
John Sallis (eds) *Deconstruction and Philosophy: The Texts of Jacques Derrida* (University of Chicago Press, 1987) P 12
C Norris, *Deconstruction, Theory and Practice* (Routledge, 2003) P 126
Derrida (n 25) P 31
[28] Caputo (n 20) 25, 26 & 34
[29] Caputo (n 20) 25, 26 & 34
[30]Derrida (n 25) P 125
Michael A Peters and Gert Biesta, *Derrida, Deconstruction and the Politics of Pedagogy* (Peter Lang, 2009) P 32
[31]Simon Rose, 'When Law Listens' [2018] Critical Studies in Improvisation 2
[32]Sara Ramshaw, *Justice as Improvisation: The Law of the Extempore* (Routledge, 2013)
P 1
Niall Lucy, *Beyond Semiotics: Text, Culture and Technology* (A&C Black, 2001) P 6
Jacques Derrida, *Deconstruction in a Nutshell: A Conversation with Jacques Derrida* (Fordham University Press, 1997) P 16

In the text *Songs Without Music,* Manderson examines the formalist aesthetic of law and utilises music as a model to demonstrate the potential for the law to advance beyond this narrow approach.[33] Manderson utilises the concept of polyphony as a tool to demonstrate the potential for the law to support what may initially appear to be dissonant identities to collaborate with one another.[34] Manderson articulates that 'many voices come together at the same time as they remain apart'. This indicates the potential for inherently different voices and identities to assemble to produce harmony.[35] These voices are celebrated for their differences rather than being coerced into jettisoning their idiosyncrasies in order to display unity in the uniformed sense.[36]

Although polyphony in the canonical, Bachian sense may appear to reify the existing formalist aesthetic because of its unified structure, conversely Manderson locates polyphony as a concept rooted within plural, polylithic surroundings.[37] The polyphony remains plural because each musical contribution remains valued for its unique contribution to the holistic polyphonic structure. Fundamentally, each of the components forming the overall polyphony retains its individuality.[38] Of course, each musician must conform to a degree in order to form the polyphony; meaning that musicians may relinquish some of their preferred musical techniques. However, this does not mean that distinct musicality is jettisoned in its entirety. Rather, the creation of the polyphony demands reciprocity in that a diverse range of musical elements are welcomed and modulated in order to form the collective polyphony.

[33] Desmond Manderson, *Songs without music* (University of California Press, 2000) P 1 - 297
[34] Polyphony is a form of texture within music consisting of multiple different independent melodies. Peter Pesic, *Polyphonic Minds: Music of the Hemispheres* (MIT Press, 2017) P 3
Manderson (n 33) P 186
[35] Manderson (n 33) P 186
[36] Ibid
[37] Desmond Manderson, *Songs without music* (University of California Press, 2000) P 186
[38] Ibid P 186

Importantly in this reflection on polyphony, Manderson also conveys the sense of tolerance employed within the creation of music, as he recognises that different identities do not need to be homogenised and erased for 'harmony' to be achieved.[39] Ultimately, in recognising the individuality of the different voices that collaborate to produce polyphony, Manderson creates space for seemingly discordant identities to work as a community in the Derridean sense. In other words, Manderson's analysis highlights music as a discipline and praxis embodying community in the Derridean sense; operating not as singular and totalised entity, but as a playing mid-way between unity and multiplicity through its embrace of difference.[40]

Ultimately, in showing the successful creation of musical harmony through the incorporation of diverse elements, Manderson highlights that the law may also embrace and honour difference without sacrificing its structural integrity, reputation, and the production of meaning. Thus, this shows that community in the Derridean sense is a viable feasible endeavour.

'Judging the Singular' to Support a Community of Differences: law, improvisation, jazz and community[41]

A more conscious appreciation of the techniques already employed within music and current legal thinking may facilitate an opportunity for the law to move beyond its closed

[39] Ibid P 186
[40] Caputo (n 3) P 104
[41] Kathryn McNeilly and Paul Stapleton, 'Judging the Singular: Towards a Contingent Practice of Improvisation of Law' [2018] Critical Studies in Improvisation 1

operation of community to embrace difference, and thus community in the Derridean sense. This section will examine some of the existing parallels between jazz music and law and how embracing improvisation may support the law in delivering more equitable decisions.

The creation and performance of jazz music is commonly dismissed as an activity involving little skill, structure and restraint. [42] The performance of jazz music is frequently misrepresented as a pursuit prescribing absolute spontaneity from musicians. [43] However, Ramshaw corrects these assumptions, instead depicting the innate skill and preparation required in the production of Jazz music.[44] She illustrates that the communal nature of jazz music invites improvising jazz musicians to come together to 'jam' or to generate meaning through impromptu music. [45] Importantly, Ramshaw highlights that jazz musicians are proficient players who understand spontaneity and how to respond to different coinciding musical elements to generate the overall jazz piece.[46] Fundamentally, jazz music foregrounds reciprocity in that jazz musicians must present their independent contributions to frame the overall production, whilst also harnessing and accenting their playing to authentically *do jazz*. In some ways *doing jazz* may be compared with the concept of polyphony, as a multiplicity of players contribute a variety of independent sounds concurrently to produce a rich body of sound. However, it must be noted that jazz

[42] Sara Ramshaw, 'Deconstructin(g) Jazz Improvisation: Derrida and the Law of the Singular Event' [2006] Critical Studies in Improvisation
[43] Ibid
[44] Shelia Simon, 'Jazz and Family Law: Structures, Freedoms and Changes' [2009] Indiana Law Review 568, 569
[45] Sara Ramshaw, 'Jamming the Law: Improvisational Theatre and the 'Spontaneity' of Judgment [2010] Law's Theoretical Presence 146
[46] Ibid

players are permitted a greater degree of *rubato* than musicians participating within more canonical polyphonic arrangements.[47]

Whilst the foundation of Jazz music is predominantly based upon the creation of music through an engagement with improvisational techniques to create meaning, Ramshaw demonstrates that, 'improvisation is only made possible through a thorough knowledge of the tradition in which it is taking place, and much practice or dedication is required to learn the skills of the art of improvisation.' [48] Lewis reinforces that improvisation is conditional upon a deep understanding of musical theory, 'background, history, and culture of one's music.'[49] In her investigation of Jazz music, Ramshaw contests the misrepresentation of jazz music as primitive and simplistic activity, as although 'improvisation presents the musician with the possibility of creating a new piece of music', 'you can't improvise on nothin', you gotta to improvise on somethin'.[50] Ultimately then, improvisation is achieved through a combined dependence upon tradition and an embrace of the contemporary.

Although even the attempt to connect jazz music and the law may evoke frustration in legal formalists who seek to maintain the law as a 'rigorously structured doctrinal science', by recognising the parallels between improvisational jazz and

[47] Although Manderson argues that polyphony provides an opportunity for musicians to display individual musicality, Gould and Keaton contend that because the foundation of jazz is built on instinct, jazz musicians are more likely to exhibit a greater degree of spontaneity. Carol Gould and Kenneth Keaton, 'The Essential Role of Improvisation in Musical Performance' Journal of Aesthetics and Art Criticism 143

[48]Ramshaw (n 40) Deconstructin(g) Jazz Improvisation: Derrida and the Law of the Singular Event' 2
Sara Ramshaw, *Justice as Improvisation: The Law of the Extempore* (Routledge, 2013) P 71
Sara Ramshaw and Paul Stapleton, 'Just Improvisation' [2018] Critical Studies in Improvisation 1

[49] George Lewis, 'Improvised Music after 1950: Afrological and Eurological Perspectives' [2004] BMR Journal 114

[50] Rose (n 31) 3
Barry Kernfeld, *What to Listen for in Jazz* (Yale University Press, 1997) P 119

improvisation within judicial-decision making we are not transposing the key of law, but simply turning to face the seemingly strange. Similarly to the improvisational collaboration between jazz musicians within a jam to create meaning, judges also utilise improvisational techniques to collaborate with the people who are subjects of the judicial decision.[51] Whilst the collaboration between the judge and individual(s) may appear more structured due to the formal image of law, Ramshaw depicts the central role played by impromptu improvisation within judicial decision-making.[52]

Importantly, recognising and embracing the existing parallels between jazz and music through their combined use of improvisation may facilitate an opportunity for the law to reconfigure its understanding of 'community' in the Derridean sense.[53] This is because these approaches are identified as being committed to 'working with difference' through their combined use of improvisation and established techniques, as they recognise the limits to adopting a rule-based approach.[54] Indeed, Judge Smyth emphasises the potential for improvisation to support the production of bespoke judicial decisions that effectively respond to the distinct issues faced by people.[55] Thus, embracing improvisation may support the law in operationalising 'community' in the Derridean sense.[56] This is because the law will be encouraged to respond to a wide array of complex and diverse issues affecting people's lives. Arguably, then the law ought to embrace its performance of improvisation, as according greater appreciation to individual cases and

[51] Ibid
[52] Ramshaw and Stapleton (n 43)
[53] Hanoch Dagan, 'The Realist Conception of Law' [2007] The University of Toronto Law Journal
[54] Rose (n 31) 2
[55] Rose (n 31) 2
[56] Ibid

difference may also support the law in achieving a more substantive approach towards equality.

Therefore, in recognising and embracing the principle of improvisation as 'social practice' the law may 'foster new, better ways of being with one another both as individuals and as members of diverse communities… in sometimes divided societies.'[57] Not only this, but consciously recognising the existing role played by improvisation within judicial decision-making may also initiate a 'critical practice of improvisation within law that aims to foreground the singular and offers tools to advance the aims of justice in a challenging…system.' [58] Thus, this may enable the enactment of 'community' in the Derridean sense, as the technique of improvisation is shown to appreciate and respond to the different and distinct concerns of individuals ensuring that these concerns may not be fused or homogenised by the universal application of a rule-based approach to law.

From 'Outsiders' and 'Insiders' to a 'Community of Singularities': musical performance and incarcerated women - a qualitative study

The power of music as a model to support the law in advancing beyond its formalist aesthetic and closed conception of community is cemented when considering the law and criminalised women. Although some scholars support the continuation of law in formalist

[57] Ramshaw and Stapleton (n 43)
[58] McNeilly et al (n 39) 7

terms because of its seemingly simplistic and pure aesthetic through its isolation of 'distraction[s] and debris', arguably this approach simply encourages the operation of community in the closed, exclusionary and defensive sense.[59] Thus, this approach excludes a multiplicity of identities and forces some of the most vulnerable members of society to the margins.

The operation of law in strict, formalist terms is utilised as a shield to defend society from identities that threaten to disrupt the 'beauty' of the law's outwardly coherent form.[60] In prioritising the appearance of unity and coherence rather than collaborating with a broad range of identities, the law sacrifices the operation of community as a 'community of singularities'.[61] In privileging the formalist approach, the law employs a violent defence against the inclusion of identities sitting outside the accepted parameters of community.[62] This is particularly evident when considering the continued incarceration of women by the law.

Criminalised women are perceived as outsiders in relation to their position "within" wider society.[63] Currently, the law plays an instrumental role in the portrayal of criminalised women in this way through the judiciary's construction of these women as the 'Other'.[64] The law's construction of criminalised women as outsiders is achieved through its depiction and labelling of certain conduct as criminal, and its subsequent

[59] Adam Gearey and John Gardner, *Law and Aesthetics* (Hart, 2001) P 4
[60] Ibid
[61] Caputo (n 20)
[62] Pierre Legrand, *Derrida and Law* (Routledge, 2017) P 442
[63] Brenda L Russell, *Perceptions of Female Offenders: How Stereotypes and Social Norms Affect Criminal Justice Responses* (Springer Science & Business Media, 2012) P 2
Caputo (n 20) 25 & 26
[64]Charlotte Caltrow, Coercion and Co-offenders: A Gendered Pathway Into Crime (Policy Press, 2016) P 7 and 9

punishment of those who are judged to be breaking the criminal law.[65] In sentencing women to serve terms of imprisonment rather than addressing their conduct from within the visible realms of society by more inclusionary community based methods, the judiciary communicate their exclusion and erasure of incarcerated women from wider society.[66] Indeed, rather than utilising more community-based solutions that support the person in improving their lives from within society, statistics demonstrate the increased reliance upon prison by the judiciary to punish criminalised women.[67]

The law's current approach towards criminalised women precludes the operation of community in the Derridean sense, as the law incarcerates to exclude and shield seemingly 'deviant' identities from entering its view.[68] Ultimately, in relying upon prison as a means of punishment, the law erases and excludes the identities of criminalised women from wider society. Thus, this prevents women from interacting with identities outside of the prison setting and the operation of community in the Derridean sense.

O' Grady's qualitative study centring upon musical performance and criminalised women illuminates the concept of musical performance as a powerful concept for the law to mirror in order to advance beyond its current exclusionary and defensive approach to community. The study demonstrates musical performance as an avenue to support criminalised women in moving beyond the 'outsider' label ascribed to them by the law so

[65] Howard H Becker, *Outsiders* (Simon Schuster, 1963) P 9
[66] Julian V Roberts, *The Virtual Prison: Community Custody and the Evolution of Imprisonment (Cambridge University Press, 2004) P* 8
[67] Women in Prison, 'Key facts' (*in Prison*) < http://www.inprison.org.uk/research/key-facts.php > last accessed 20th May 2018
[68] Caputo (n 20)
Julian V Roberts, *The Virtual Prison: Community Custody and the Evolution of Imprisonment (Cambridge University Press, 2004)* P 60

that they may interact as part of a community in the Derridean sense.[69] The study focuses on the opportunity for imprisoned women to participate within musical performance to generate important values and the potential for music to provide a 'bridge from the inside to the outside',[70] as in the case of 'Sarah' and six fellow prisoners who worked together within a maximum-security prison in Australia over ten weeks to create a large-scale public musical performance.[71]

O'Grady's study of the musical performance by the women reaffirms music as a meaningful and transformative mode of praxis. This is because Elefent posits that in order 'for a performance to have a meaning there needs essentially to be relationship between performer, spectator, and the space in which it all meets.'[72]Thus, the musical production by the women within the study may be viewed as powerful because their performance involved the shared interaction between themselves as incarcerated women who exchanged their innermost feelings through their song-writing and musical performance with a public audience.[73] The shared interaction between the women and the 'outsider' audience demonstrates 'a sense of reciprocity between performer [and] audience' meaning that community in the Derridean sense is truly realised. [74] This is because the musical performance permits the shared interaction between 'insiders' and 'outsiders' which would ordinarily be prevented by the law's separation of incarcerated women and the general public. Ultimately, the communal interaction between the audience and the

[69] Lucy O'Grady, 'Women performing music in prison: an exploration of the resources that come into play' [2013] 123 - 147
[70] Ibid 131
[71] Ibid 123 - 124
CREST stands for (courage, readiness, exchange, support and trust) 124 and 125
[72] Brynjulf Stige, *Where Music Helps: Community Music Therapy in Action and Reflection* (Routledge, 2017) Ch 6
[73] O'Grady (n 64) 133 - 134
[74] O'Grady (n 64) 127

performers within the performance enabled the criminalised women to liberate themselves momentarily from their status as law-breakers ascribed to them by the judiciary to connect with those identities that are traditionally accepted as being part of wider society. In so doing, the women also developed important values, thus cementing the importance of supporting a collective community that appreciates difference.

Conclusion

Overall, this paper argues that in continuing its formalist, reductionist, exclusionary and narrow approach towards community, the law is complicit in maintaining the dangerous and reductionist conception of community as outlined by Derrida. The law should turn and face the seemingly strange by mirroring music, so that the law may pave the way for an acceptance of difference and a greater sense of justice.[75] The various examples detailing the successful incorporation of difference within the context of music show the array of potential alternative avenues available for the law to explore without jettisoning its authoritative reputation. To conclude, the power of music as a communal meaning-making activity is affirmed as a vital tool to support the law in explicitly recognising and departing from its closed manner of operation to achieve the perfect cadence of 'community' in the open, diverse, and ultimately Derridean sense. Ultimately as a hybrid, law and music represent a consonant duet for future legal thinking and practice.

[75] McNeilly (n 39) 7

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Application of the Hart-Devlin debate to the ideas and arguments raised in 'Legalising assisted dying would be a failure of collective human memory and imagination'

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The Hart-Devlin debate centres upon the strongly contested issue of whether or not the law should enforce morality. The debate between these two figures was sparked by the Wolfenden Report of 1957, which concluded that due to the importance of individual freedom, 'there must remain a realm of private morality which is, in brief and crude terms, not the law's business'.[1] The progression of our society into a more liberal entity has led to the argument that Hart, widely regarded as the twentieth century's greatest British legal philosopher,[2] has ultimately superseded Devlin in this debate. Therefore, this essay shall re-examine each side of the debate in light of the changing legal landscape, specifically with reference to the public opinion on legalising euthanasia. The examination will seek to determine whether Hart's liberal approach has in fact prevailed, or whether society is more inclined to accept the more conservative approach advocated by Devlin.

The article which is examined in this essay puts forward the arguments for and against legalising euthanasia, with the author evidently being opposed to such a measure. In order to apply Devlin and Hart's theories to this issue, a prudent starting point would be to consider their respective views on morality. Devlin believed that a recognised morality was fundamental for society's existence.[3] This emphasis on morality links Devlin to the naturalist tradition which dictates that laws must have certain requirements, deemed the 'inner morality of law', in order to command fidelity to them.[4] Devlin suggested that even immoralities which prima facie cause no harm, do in fact cause harm in the sense that the moral offender may weaken the moral bonds that act as society's cement. Furthermore, he argued that this effect would be exacerbated if the law did not intervene in such behaviour,

[1] Wolfenden Committee, *Report of the Committee on Homosexual Offences and Prostitution* (Cmnd 247,1957) para 61.
[2] Gregory Bassham, 'Legislating Morality: Scoring the Hart-Devlin Debate after Fifty Years' (2012) 25(2) Ratio Juris 117,121.
[3] Patrick Devlin, *The Enforcement of Morals* (OUP 1965) 11.
[4] Lon Fuller, 'Positivism and Fidelity to Law: A Reply to Hart' (1958) 71 HLR 630, 645.

because citizens may perceive this to be the law condoning vice. A useful analogy is to consider society's moral code like a house of cards, so removing one or two of these vital cards would result in the whole structure collapsing.[5] Devlin proposed this as a justification for the enforcement of morality through the law, 'society may use the law to preserve morality in the same way as it uses it to safeguard anything else that is essential to its existence'.[6] Likewise, Hart acknowledged that some 'universal values' must exist if society is to survive, e.g. there must be laws restricting violence, theft and deception.[7]

However aside from these universal values, referred to as the 'minimum content of natural law',[8] Hart did not believe that society must have a consensus on every aspect of morality. Indeed, Hart recognised that pluralistic, multi-cultural societies may contain a variety of moral views.[9] In addition, Hart suggests that even if society does have a shared morality, the existence of such society is not dependent on protecting these moral values. Although Devlin states 'history shows that the loosening of moral bonds is often the first stage of disintegration'[10] he offers no further elaboration on this point. Therefore, Hart critiques Devlin for proffering no empirical evidence to support his assumption that 'a change in [society's] morality is tantamount to the destruction of a society'.[11] In fact, Hart suggests that there is more evidence to the contrary. He argues that morality is not a single seamless web and therefore we can reject part of it, yet adhere just as strongly to the rest.[12] For example, within the European countries which have decriminalised homosexual conduct, there has been no evidence of any major social or moral disintegration, which Devlin prophesised, despite strong public disapproval of such conduct.[13] Therefore, the crux of the disagreement turns on whether or not one believes in social contamination from laxness in one kind of standard, to laxness in others.[14]

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[5] Bassham (n 2) 119.
[6] Devlin (n 3) 11.
[7] Michael Freeman, *Lloyd's Introduction to Jurisprudence* (9th edn, Sweet & Maxwell 2014) 346.
[8] James William Harris, *Legal Philosophies* (2nd edn, Butterworths 1997) 140.
[9] Raymond Wacks, *Understanding Jurisprudence: An Introduction to Legal Theory* (3rd edn, OUP 2012) 36.
[10] Devlin (n 3) 13.
[11] HLA Hart, *Law Liberty and Morality* (Stanford University Press 1963) 51.
[12] Ibid.
[13] Ibid 52. However note, some would argue that the lack of homogeneity in the UK is evidence of such social or moral disintegration.
[14] Harris (n 8) 141.

Devlin's views on morality resound within the article, as the author warns of the 'slippery slope' which may result from legalising euthanasia. She refers to The Netherlands as an illustration of this point, where the legalisation of euthanasia has led to this measure becoming available to children.[15] This in turn could address Hart's criticism regarding the lack of evidence in support of Devlin's assumption. On the contrary, it may be argued that this only shows the effect which legalising euthanasia has in terms of the broadening of euthanasia itself, it does not suggest that allowing euthanasia will erode other areas of established morality within society. Therefore, it does not address Hart's criticisms of the aspect of Devlin's theory which Hart termed 'the disintegration thesis'.[16] Using the example outlined above, if decriminalising homosexual conduct has not led to the collapse of society, as Devlin feared, what basis is there for arguing that legalising euthanasia would produce this effect?

In any event, the disagreement is relieved to a certain extent by Devlin's response to Hart, 'I do not assert that any deviation from a society's shared morality threatens its existence…I assert that [it is] capable…of threatening the existence of society so that neither can be put beyond the law.'[17] This qualifies Devlin's argument, limiting it to the contention that we cannot outright ban the law from enforcing public morality because the challenge to established morality may be so profound as to threaten the very existence of society.[18] This re-formulation of Devlin's argument can be viewed as an acceptance by Devlin that morality can change over time and hence not every deviation from morality is a challenge to society. Therefore, the real area for dispute turns upon when exactly the law should intervene; how profound does the challenge to morality have to be?

[15] Margaret Somerville, 'Legalising assisted dying would be a failure of collective human memory and imagination' *The Guardian* (London, 20 September 2017) <https://www.theguardian.com/commentisfree/2017/sep/20/legalising-assisted-dying-would-be-a-failure-of-collective-human-memory-and-imagination> accessed 27 March 2018.
[16] Hamish Stewart, 'Legality and Morality in H.L.A Hart's Theory of Criminal Law' (1999) 52 SMU Law Review 201,215. 'Disintegration thesis' cited in HLA Hart, *Law Liberty and Morality* (Stanford University Press 1963) 50.
[17] Devlin (n 3) 13.
[18] Ronald Dworkin, *Taking Rights Seriously* (New impression with a reply to critics, Duckworth 2004) 244.

In order to formulate an answer to this question, it is fundamental to consider the views expressed by Mill, which predated both Hart and Devlin's theories. At the core of Mill's theory is the harm principle he devised. This proposed that 'the only purpose for which power can be rightfully exercised over any member of a civilised community, against his will, is to prevent harm to others. His own good, either physical or moral, is not a sufficient warrant'.[19] Mill came to be viewed as the apostle of the 'permissive society' [20] and his views can be seen to influence the Wolfenden report, which declared that living off the earnings of prostitutes was to remain an offence, since this involves exploitation, which the harm principle warrants punishing.[21] In terms of this exploitation, Mill's harm principle can thus be used to justify the argument against legalising euthanasia. This is because the article forebodes that 'early inheritance syndrome', (whereby a person uses a power of attorney to access an elderly person's financial assets for their own benefit), would morph into an 'early death syndrome' if euthanasia were to be legalised.[22] Devlin and Hart's views on the harm principle shall be discussed in turn, in order to determine their opinions on when the law should intervene and whether legalising euthanasia would come within the scope for intervention.

Devlin fundamentally rejected the harm principle, he did not believe that an act must cause harm to some individual or group of persons before the law intervenes. His basic premise was that the criminal law is not just for the protection of individuals, but also for the protection of society.[23] As a result, he thinks that the law should intervene when conduct arouses widespread 'intolerance indignation and disgust'.[24] He argued that this should be judged by reference to the ordinary man, i.e. the 'man in the jury box'. On the one hand, this can be perceived as an adequate assessment because the jury does not give a snap judgement, its verdict should be based on argument, deliberation and guidance received from an experienced judge.[25] Since Devlin apparently conceded to the view that society's morality can change over time, it is arguable that the legalisation of euthanasia would be permitted under

[19] John Stuart Mill, *On Liberty* (Gertrude Himmelfarb ed, Penguin 1974) 68-69.
[20] Stephen Mavroghenis, 'Mill's Concept of Harm Redefined' (1994) UCL Jurisprudence Review 155, 157.
[21] Harris (n 8) 132.
[22] Euthanasia article (n 15).
[23] Peter Cane, 'Taking Law Seriously: Starting Points of the Hart/Devlin Debate' (2006) 10 The Journal of Ethics 21, 22.
[24] Devlin (n 3) 17.
[25] Freeman (n 7) 344.

this assessment. This is because, if society is becoming more accepting of euthanasia, legalising it would be unlikely to invoke the 'intolerance, indignation and disgust' required for the law to intervene and prevent such action. This is particularly the case with passive euthanasia, involving the withdrawal of life-preserving treatment, as opposed to active euthanasia which requires positive steps to terminate life.[26]

On the other hand, flaws can be exposed in the measure of society's morality proposed by Devlin. For example, Dworkin exclaims 'what is shocking and wrong is not [Devlin's] idea that the community's morality counts, but his idea of what counts as the community's morality'.[27] Dworkin argues that we must distinguish opinions which are supported by moral reasons, from opinions which are based on prejudice, aversion or rationalisations (implausible propositions of fact). He argues that a legislator may take account of the former but must ignore the latter.[28] Devlin himself stated that the ordinary man, or man in the jury box, whose opinion we must enforce 'is not expected to reason about anything and his judgement may be largely a matter of feeling'.[29] This is the complete antithesis to the above assertion that the man in the jury box would base his assessment on argument, deliberation and guidance. For Devlin, the reasons for moral condemnation are irrelevant, provided such condemnation exists, the act ought to be forbidden by law.[30] Thus, there is a concern that allowing the ordinary man to be the ultimate arbitrator on issues of morality, without any qualification, has a frightening evocation to the Nazi regime.[31] The article reinforces this point, by observing that the justification for the euthanasia program for people with 'lives not worth living' in the Holocaust, is 'eerily similar to present justifications for euthanasia.'[32] Therefore, whilst Devlin's 'man in the jury box' may be a valid starting point by which to determine issues of morality, in order to guarantee that these decisions are reached systematically and not arbitrarily, it seems that such decisions must be subject to rational, critical appraisal.

[26] Euthanasia article (n 15).
[27] Ronald Dworkin, 'Lord Devlin and the Enforcement of Morals' (1966) 75 Yale LJ 986, 1001.
[28] Harris (n 8) 139.
[29] Devlin (n 3) 15.
[30] Robert George, 'Social Cohesion and the Legal Enforcement of Morals: A Reconsideration of the Hart-Devlin Debate' (1990) 35 American Journal of Jurisprudence 14, 19.
[31] Graham Hughes, 'Morals and the Criminal Law' (1962) 71 Yale LJ 662, 675-6.
[32] Euthanasia article (n 15).

Nonetheless, this concern is alleviated to some extent by certain principles which, according to Devlin, must be borne in mind when deciding whether legal intervention is necessary. These principles are: that there must be toleration of 'the maximum individual freedom that is consistent with the integrity of society'; the legislators must keep in mind that the limits of tolerance shift; privacy should be respected as far as possible and the law is concerned with a minimum, not a maximum, standard of behaviour.[33] Thus, these principles go some way to ensuring that the boundaries of an individual's liberty are not unreasonably restricted. They ensure that public disapproval is only a necessary condition for legal enforcement, not a sufficient one, since such disapproval must also be aligned with these principles.[34] Additionally, the notion of the 'man in the jury box' deciding issues of morality is not entirely novel because the courts have recognised an offence of conspiring to corrupt public morals since 1962,[35] which gives an important role to the moral opinion of juries. Similarly, the courts have held that the concept of 'dishonesty' employed by the Theft Act 1968 is not a term defined by the law, but is rather a concept which the jury must determine by reference to their own moral standards.[36]

In regard to Hart, he extends Mill's harm principle to also encompass paternalism. This allows the law to intervene to prevent people from doing themselves physical harm and Hart favours this paternalist approach to that of legal moralism, the view that general agreement among members of society that conduct is immoral justifies legal prohibition.[37] In respect of the necessary 'harm', Hart seeks to incorporate offence caused by some public act within the reach of the law.[38] He makes a significant distinction between offence caused by some public display and offence caused by knowledge that certain things are done behind closed doors. He claims that the law cannot intervene in the latter instance because to do so 'would be tantamount to punishing them simply because others object to what they do; and the only liberty which could coexist with this…is liberty to do those things to which no-one seriously

[33] Devlin (n 3) 16-19.
[34] Bassham (n 2) 124.
[35] Shaw v DPP [1962] AC 220; Knuller (Publishing, Printing and Promotions) Ltd v DPP [1973] AC 435.
[36] R v Feely [1973] QB 530; R v Ghosh [1982] QB 1053.
[37] Harris (n 8) 135.
[38] Stephen Mavroghenis, 'Mill's Concept of Harm Redefined' (1994) UCL Jurisprudence Review 155, 160.

objects'.[39] This distinction between offence-through knowledge and offence-through witnessing was endorsed by the Williams Report of 1979.[40] Nevertheless, for others the harm principle goes too far. For example, Feinberg cites the crimes of consensual sodomy and incest which, in the USA, have attracted sentences ranging from twenty years' imprisonment to capital punishment. Since these are victimless crimes, he states that the penalty is presumably based on the assumed offensiveness of the behaviour, yet Feinberg maintains that causing offence is less serious than harming someone and therefore the sanctions should be less onerous.[41] Consequently, from this perspective it would be necessary to have a distinction between how the law intervenes for acts which cause direct harm to someone, and acts which indirectly harm someone through causing offence.

The distinction between the public and private sphere, advocated by Mill and Hart, has been questioned in terms of its viability. Stephen argued that the distinction was fallacious and nebulous and could not be maintained.[42] Similarly, Nattrass claimed that if we follow Hart's reasoning, we reach the ludicrous conclusion '…that it is morally preferable…for a man to beat his wife at home rather than in the street'.[43] However, this assertion is flawed in that it concerns the infliction of harm on another individual, which therefore comes within the harm principle regardless of whether it was committed in public or private. Despite this, there is still a valid critique of the public and private sphere distinction, in the form of John Donne's 'no man is an island' proposition. This claims that any activity has an impact on someone else e.g. if one injures themselves through taking drugs, they cause harm to society in the form of the cost on the medical services.[44] Therefore, private acts will always have repercussions on society, to one extent or another and this denies the plausibility of the argument that there can be distinct categories of activities committed in the public sphere, and those committed in private.

[39] Hart (n 11) 47.
[40] Williams Committee, *Report of the Committee on Obsenity and Film Censorship* (Cmnd 7772, 1979).
[41] Joel Feinberg, *Harm to Others: The Moral Limits of the Criminal Law* (OUP 1984) and *Offense to Others: The Moral Limits of the Criminal Law* (OUP 1985).
[42] James F Stephen, *Liberty, Equality, Fraternity,* (Reprinted edition, Cambridge University Press, 1967).
[43] Mark Nattrass, 'Devlin, Hart and the Proper Limits of Legal Coercision' (1993) 5 Utilitas 91, 101.
[44] Harris (n 8) 135-136.

Paternalists like Hart have traditionally opposed euthanasia, presumably on the grounds that nothing could be more harmful to you than dying.[45] Hart's concern with allowing euthanasia is not that society may view this as immoral, but rather that people may harm themselves if they make the wrong decision, e.g. consent may be given without adequate reflection or in circumstances where their judgement was clouded.[46] However, this argument may be countered by the idea of subjective paternalism. This permits the law to intervene in preventing euthanasia, if there is a reasonable belief that the person denied this right will ultimately be pleased that such action was not taken. This would therefore prevent euthanasia's scope from extending to those without terminal, debilitating illnesses, who may, for example, have recently experienced teenage heartbreak and believe that life can hold nothing for them.[47] Nevertheless, this idea has been criticised 'not one genuine justification for providing autonomy for some and not for others has or can be made…If assisted suicide was really a right, it should surely be accorded to all.'[48] Similarly, it has been submitted that allowing doctors to determine the validity of euthanasia requests in this way, results in the individual's supposed autonomy being made redundant.[49] Thus, if the argument against subjective paternalism were to be espoused, it would be extremely difficult to argue that Hart would be in favour of legalising euthanasia in this unfettered form.

Alternatively, Hart's argument that no-one is bound to admit that the law may punish forms of immorality which involve no suffering, may be seen to provide a justification for the legalisation of euthanasia.[50] This is because if we interpret this to be stating that the criminal law should be used to prevent suffering, legalising euthanasia is undoubtedly justified.[51] Therefore, the contradictory views which Hart puts forward in relation to euthanasia means that concluding on what side of the debate he would ultimately fall, is inevitably plagued with ambiguities. Despite this, it would seem that on balance, Hart would be more inclined to accept legalisation. This is because the potential harm of allowing euthanasia to those who

[45] Christine Pierce, 'Hart on Paternalism' (1975) 35 OUP 205, 206.
[46] Hart (n 11) 32-33.
[47] Ronald Dworkin, 'Euthanasia, Morality, and Law' (1998) 31 Loyola of Los Angeles Law Review 1147, 1151-1152.
[48] Jonathon Herring, 'Publication Review: Assisted Suicide, The Liberal Humanist Case Against Liberalization' (2014) International Journal of Law in Context, 273 citing page 57 of the book.
[49] Hallvard Lillehammer, 'Voluntary Euthanasia and the Logical Slippery Slope Argument' (2002) 61 Cambridge Law Journal 545, 546.
[50] Hart (n 11) 34.
[51] Pierce (n 45) 206.

desire it, is outweighed by the enduring pain and suffering which individuals would be subjected to if legalisation was not permitted. Additionally, the caveat to Mill's harm principle enables the law to intervene to prevent children causing harm to themselves.[52] Arguably, this addresses some of the concerns of those opposed to legalising euthanasia, as it would prevent the events cited in The Netherlands, namely the availability of euthanasia to children, from being lawful in our society. This, coupled with subjective paternalism, would limit the ambit of euthanasia, thus addressing Hart's concerns that people may request euthanasia momentarily, or without due reflection, when they do not truly want it.

Another aspect of this debate which causes disagreement amongst Hart and Devlin relates to the means of enforcement. Devlin believes that coercion should be used to enforce morality, yet Hart claims that there is 'little evidence to support the idea that morality is best taught by fear of legal punishment'.[53] Thus, Hart argues that if the threat of coercion does not compel people to behave morally, its justification can only be based upon the retributive theory of punishment.[54] However, this theory of punishment is only valid where the crime has harmed others and thus, in the case of immoral victimless acts committed in private, it cannot be logically argued that punishment is still called for.[55] This reflects the arguments cited by Feinberg, in relation to the crimes of consensual sodomy and incest. Additionally, Hart contends that enforcing morality by way of legal sanctions has the undesirable effect of curtailing the development of society's moral code.[56] Hart considers that if established morality is too stringently enforced, the opportunities to challenge an incorrect view of the majority would be removed and this could have detrimental effects, e.g. imagine if the monumental harms inflicted on Jews and other minorities by the Nazi regime were never challenged.[57] For Hart, enforcing morality through coercion is wrong in the sense that the price in terms of human misery and loss of freedom is too high.[58] This is clearly demonstrated in the case of euthanasia, because if this is not legalised, those individuals will be forced to

[52] Mill (n 19) 68-69.
[53] Hart (n 11) 58.
[54] JG Riddall, *Jurisprudence* (2nd edn, OUP 1999) 310.
[55] Hart (n 11) 60.
[56] Ibid pg 69-71.
[57] Thomas Peterson, 'New Legal Moralism: Some Strengths and Challenges' (2010) 4 Criminal Law and Philosophy 215, 218.
[58] Hart (n 11) 83.

experience the enduring misery of their physical condition and would arguably feel robbed of their ability to determine their own life.

Consequently, Hart believes that the more appropriate means of ensuring that members of society adhere to its moral code, is through discussion, advice and argument.[59] Hart's reluctance to enforce morality by legal coercion demonstrates his ties to the positivist approach. Positivism states that the individual must choose whether to disobey immoral laws and suffer the consequences and therefore under this approach, it is more likely that legal intervention on issues of morality will be restricted.[60] However, an alternative understanding is that the typical law-abiding citizen chooses to obey the law not to avoid its legal sanctions, but because they consider it the right thing to do. In this case, legal intervention for issues of morality may be regarded as necessary, to ensure the preferred course of action in relation to a particular matter is taken, rather than being viewed as a violation of individuals' autonomy.[61] However, even if this was the case, it is still unlikely that such a justification could be used against legalising euthanasia. This is because the majority opinion, particularly after consideration of concepts such as 'subjective paternalism', would be unlikely to believe that the law's intervention in order to prevent such a measure, would be the preferred course of action.

In conclusion, upon examination it is evident that the question as to whether Hart or Devlin's views would prevail in relation to legalising euthanasia is not as clear cut as it may initially appear. Although it is unlikely that such a measure would now invoke the 'widespread intolerance, indignation and disgust' required to prevent such action according to Devlin, issues still arise on the application of Hart's theory. This is because, if we take Hart to accept the legalisation of euthanasia, on the basis that preventing it would ultimately cause more harm to the individual, questions arise in relation to ascertaining an acceptable ambit of euthanasia. In other words, what conditions must be fulfilled in order for a person to be legally entitled to it. A sensible approach may be to determine society's moral views on this question and this resonates back to Devlin's 'intolerance, indignation and disgust'

[59] JG Riddall, *Jurisprudence* (2nd edn, OUP 1999) 311.
[60] H.L.A Hart, 'Positivism and the Separation of Law and Morals' (1958) 71 HLR 593, 620.
[61] Peter Cane, 'Taking Law Seriously: Starting Points of the Hart/Devlin Debat'e (2006) 10 The Journal of Ethics 21, 45.

assessment. Thus, it has been argued that liberals such as Hart, who support limited paternalism, abandon the ground of legal intervention resting on individual complaint and once this occurs, the extension to legal moralism seems perfectly plausible.[62] This in turn suggests that Devlin's theory has not been entirely disregarded, but rather it provides a useful tool in remedying the uncertainties which result from attempts to align Hart's theory to the arguments for legalising euthanasia. Thus, whilst Hart's liberal approach does seem to have prevailed in relation to legalising euthanasia, Devlin's theory may provide useful assistance in determining its scope.

[62] Gerald Dworkin, 'Devlin Was Right: Law and the Enforcement of Morality' (1999) 40 William and Mary Law Review 927, 942.

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The law relating to Proscription of terrorist organisations as set out in the Terrorism Act 2000

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"*One man's terrorist is another man's freedom fighter"*- How well does the current law relating to proscription of terrorist organisations protect the public and does this law encroach on an individual's Human Rights?

The ability to proscribe an organisation resides with the Home Secretary under s.3 of the Terrorism Act 2000. This power allows the Home Secretary to proscribe and deproscribe any group who he believes is "concerned with terrorism".[1] Fenwick claims that this is the Government's contribution "towards making the UK a hostile environment for terrorists."[2] This over-arching power gives greater responsibility to the police in cases of suspected terrorist activity, allowing for the already wide definition of a terrorist from section one of the Act to be applied to those who may, in some way be associated with the group. Proscription was originally added during the 1960s during the unrest in Northern Ireland[3], but aspects of what would now be classed as proscription offences originate from the 1930s and the Public Order Act 1936[4]. In the recent year's, attacks are still being carried out by terrorist groups, killing hundreds and inciting fear throughout the world. Proscription is as vital today as it was in the 1960s, shown in the attacks carried out in America, New Zealand and the UK itself. Terrorist acts, such as the Charlestown shootings in South Carolina, USA, in 2015, the Manchester arena bombing in 2017 and the attacks in Churchtown, New Zealand in 2019, indicate that groups of all different forms carry out acts of terrorism which must be recognised in our own legal system to maximise protection for British citizens.

[1] Terrorism Act s.3(5)
[2] Helen Fenwick, *Civil Liberties and Human rights* (4th edn, Routledge-Cavendish 2007) 1381
[3] Howard Davis, *Human Rights and Civil Liberties* (1st edn, Willan Publishing 2003) 336 - 337
[4] ibid

A question which remains is whether proscription is wholly effective in the war against terrorism. Whilst proscription may be somewhat beneficial in combatting the unrest caused by recent terrorist activity, the extent to which it governs and protects citizens is yet to be determined. This article will critically analyse and evaluate the Terrorism Act 2000, in particular s.3 and the powers of proscription, in terms of restrictions to human rights and civil liberties, as well as assess the classification of a terrorist and the issues regarding its wide-reaching definition.

Defining terrorism

In order to be able to fully comprehend the powers of proscription, one must first be able to understand what a terrorist is and how it is defined in the legislation. Prior to the Terrorism Act 2000, the Prevention of Terrorism (Temporary Provisions) Act 1989[5] defined terrorism as "the use of violence for political ends and includes any use of violence for the purpose of putting the public or any section of the public in fear."[6] This early definition focuses on the use of violence and whilst modern society acknowledge that terrorism can now take many forms, the most prolific and anticipated type of terrorism is violence. S.1 of the Terrorism Act 2000[7] redefined terrorism, giving it a broader definition of:

> "Terrorism means the use or threat of action where – (B) The use or threat is designed to influence the government or to intimidate the public or a section of people and (C) the use or threat us made for the purpose of advancing a political, religious or ideological cause"[8].

[5] Prevention of Terrorism (Temporary Provisions) Act 1989
[6] The prevention of terrorism (Temporary provisions) Act 1989
[7] Terrorism Act 2000
[8] Terrorism Act 2000 s.1(1)

The term "action" is defined in sub-section two as "(A) involving serious violence against a person;(B) serious damage to property; (C) endangering a person's life;(D) creates a serious risk to the health and safety of the public or; (E) is designed seriously to interfere with or seriously disrupt an electronic system."[9] Further amendments have since been made as a result of the Terrorism Act 2006 s.34, which now includes "international governmental organisation"[10] and provides a definition that is no longer confined to the United Kingdom.

Several issues could potentially arise with the definition of a terrorist; one of which is principally concerned with the nature of the definition itself and its lack of restrictions in terms of who cannot be a terrorist. The possibility of being characterised as a terrorist is not exempt from acts of armed conflict concerning foreign government. David Anderson states that "no express exemption for acts carried out overseas that constitute lawful hostilities under international humanitarian law[11]". It could therefore be argued that the definition of "terrorism" is somewhat similar to that of a strict liability offence as it is indiscriminate of all forms of conflict that have the potential to be seen as a terrorist act. For example, posting videos of groups exercising "self-defence by people resisting invasion of their country"[12] in R v Gul[13], or in R v Z[14], which concerned a group in Ireland named the Real IRA arguing that as they are not a proscribed group there is no ground for them to be labelled terrorists.

To further my point, the case of R v Gul[15], regarding the appellants argument concerning the parameters of the domestic laws powers into activities concerning terrorism, acknowledged the

[9] Terrorism Act 2000 s.1(2)
[10] Terrorism Act 2006 s.34
[11] David Anderson qc, 'The Terrorism Act in 2012' [2013] Independent reviewer of Terrorism legislation <https://terrorismlegislationreviewer.independent.gov.uk/wp-content/uploads/2013/07/Report-on-the-Terrorism-Acts-in-2012-FINAL_WEB1.pdf> accessed 20 April 2018
[12] Regina v Gul (Mohammed) [2014] AC 1260
[13] ibid
[14] R v Z [2005] 3 All ER 95
[15] Regina v Gul (Mohammed) [2014] AC 1260

sheer breadth of s.1[16]. It was stated that even if a State sanctioned military activity was carried out to influence another government, it could fall under the definition of terrorism. Although they do accept that this concept is only accepted by considering the meaning of terrorism, it reinforces the view that with a definition so vast certain activities such as acting in self-defence against an oppressive regime or even publicly supporting said rebellion could be classed as acts of terrorism. This point is further supported by Fenwick, who argues that "use of violence by civilians against an invader… thus label all resistance movements terrorist groups; they potentially cover almost all liberation movements, whether or not fighting against an undemocratic regime which does not respect human rights."[17]

The process of proscription and deproscription

Tim Legrand gave a direct explanation of the weight of the power given to the Home Secretary by s.3 stating that "proscription regimes require political executives to successfully narrate the existence of an identifiable and coherent organisation committed to a discernible, and illegitimate, political motive"[18]. Aside from s.3 of the Terrorism Act 2000 giving power to the Home Secretary to add a terrorist organisation to Schedule 2 of the Act, it also gives guidelines as to what warrants being put on the register. S.3(5)[19] outlines four criteria which indicate a group is "concerned in terrorism"; they consist of "(a)Commits or participates in acts of terrorism, (b) prepares for terrorism, (c) promotes or encourages terrorism, or (d) is otherwise concerned in terrorism"[20] . The Terrorism Act 2006 went on to further expand the definition on part (c) to include the "unlawful glorification" of terrorism. There are 88 proscribed groups[21] which fulfil the

[16] Ibid, [26] – [41]
[17] Helen Fenwick, Civil Liberties and Human rights (4th edn, Routledge-Cavendish 2007) 1380
[18] Tim Legrand and Lee Jarvis, 'Proscription Powers and Their Use in the UK' [2014] 9(4) British Politics <https://nsc.crawford.anu.edu.au/sites/default/files/publication/nsc_crawford_anu_edu_au/2017-05/legrand_jarvis_2014_enemies-of-the-state-article.pdf> accessed 20 April 2018
[19] Terrorism Act 2000 S.3(5)
[20] ibid
[21] Home office , 'List of Proscribed organisations' (Servicegovukhttps://assetspublishingservicegovuk/government/uploads/system/uploads/attachment_data/file/6

criteria of being a proscribed organisation, 14 relating to Irish Terrorism while the 74 others are international terrorist organisations. The power of proscription is given to the Home Secretary, however, there is no need for there to be a reasonable belief and it remains a subjective process at his discretion with little involvement from the executive. The phrase "concern in terrorism"[22] opens the definition up to a level of uncertainty, as who could fall under s.1's definition of a terrorist. This point is argued by both Davis and Fenwick, who claimed that because of the phrase "the definition of terrorism is extended because a range of people become terrorist subjects"[23]. This, in turn has the potential to open the definition to scrutiny as well as have the potential to violate Article 11[24] (freedom of association) of the European Convention of Human Rights. In the case of *O'Driscoll vs Secretary of State for the Home Department*,[25] the defendant was arrested and detained on suspicion of committing an offence under s.16 of the Terrorism Act 2000. The courts found that "Section 16 was not about freedom of expression but about knowingly providing money or other property to support a proscribed organisation. So long as the organisation was properly proscribed, s.16 could not be regarded as disproportionate" therefore it was found not to infringe Article 11 in that no body of government should over extend what is necessary to achieve their intended objective.

If an organisation believes it has been wrongly proscribed by the Home Secretary, they can appeal to be deproscribed from the list of terrorist parties. The Terrorism Act 2000 provides a mechanism to repeal an organisation, again, at the Home Secretary's discretion; stating "the Secretary of State may by order (b) Remove an organisation from that schedule"[26]. If the Home Secretary refuses the application, a final resort can be taken of a further appeal to the Proscribed

70599/20171222_Proscriptionpdf, 22 december 2017) <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/670599/20171222_Proscription.pdf> accessed 20 April 2018

[22] Terrorism Act 2000

[23] Helen Fenwick, Civil Liberties and Human rights (4th edn, Routledge-Cavendish 2007) 1381

[24] European Convection of Human Rights Article 11

[25] R (on the application of O'Driscoll) v Secretary of State for the Home Department [2002] EWHC 2477 (Admin), [2002] All ER (D) 327 (Nov)

[26] Terrorism Act 2000 S.3(3)

Organisations Appeal Commission (POAC); the process of which is found in s.5 of the Act[27]. However, when scrutinising the process of deproscription it can be held that some issues arise; namely, the level of power given to the Home Secretary. This is seen in the case of *the Peoples Mujahedin Of Iran (PMOI)[28],* who, after being refused twice by the Home Secretary, due to previous military activity which had since ceased[29], appealed to the POAC who allowed their application, claiming that the Home Secretary had misinterpreted the law when considering the first part of the two-pronged test[30]. This case also created a guide for a greater understanding of what it means to be "concerned with terrorism" and reiterated the test which should be applied when considering the deproscription of terrorist groups. Prior to its proscription in 2001, the PMOI had carried out acts of violence in opposition the Government of the Shah of Iran. The reasons for the group's proscription was well founded and it was agreed that at that time the group had carried out acts which were "concerned with terrorism".[31] At the time of their appeal application to the POAC, the group had henceforth ended all military action in an attempt to legitimise their campaign in pursuit of a peaceful democratic movement. The Home Secretary argued that the potential for the group to revert to its previous campaign of terrorist activity satisfied the definition of s.3(5) justifying her reasoning as to why she previously denied their appeal in both applications. The reasoning for her rejection was contended to be unfounded by the POAC and interfered with fundamental human rights. Through scrutiny of the Home Secretary's decision and both open and closed hearings, the groups was found to not be "concerned with terrorism"[32] and therefore there was no longer a justifiable reason as to keep the group proscribed.[33] The amount of successful deproscription appeals indicate both the strict test and the disproportionate level of power given to the Home Secretary. There have only been two successful cases from the Act being brought into force, both of which have been appealed by the POAC. From the outset of the appeal process, both cases were denied by the Home

[27] Terrorism Act 2000 S.5
[28] Secretary of State for the Home Department v Lord Alton of Liverpool and others [2008] EWCA Civ 443
[29] Nathan Rasiah, Reviewing Proscription under the Terrorism Act 2000, 13 Jud. Rev. 187 (2008)
[30]Secretary of State for the Home Department v Lord Alton of Liverpool and others [2008] EWCA Civ 443.
[31] Terrorism Act s.3(5)
[32] ibid
[33] Secretary of State for the Home Department v Lord Alton of Liverpool and others [2008] EWCA Civ 443

Secretary on grounds that were later quashed, demonstrating a failure in adequately apply the test to deproscribe terrorist groups. It is understandable that in terms of terrorist activity those groups must be held to account for the acts they have committed. However, if the group is no longer affiliated with and does not carry out acts that are defined in the Act, it is the task of the Home Secretary to deproscribe that group as per S.5 of the act.[34]

Proscription related offences

If s.3 of the Terrorism Act 2000 is a legal definition as to what constitutes proscription, then sections 11 to 13[35] of the same Act are offences based on the affiliations of organisations in Schedule 2. S.11 of the Terrorism Act makes it an offence to profess any association with an organisation. S11(1) states that "A person commits an offence if he belongs or professes to belong to a proscribed organisation"[36]. However, s11(2) does allow for a defence against the involvement in a proscribed group. To prove one's innocence, one must prove that at the time of joining the organisation the group was not listed in Schedule 2, and that they have not taken part in any activities relating to the group while it was proscribed[37]. A prominent issue with this defence relates to the presumption of innocence, a right found in Article 6 of the European Convention of Human Rights. The case of Sheldrake v DPP focused on the type of defence that was needed to fulfil the exception of s.11(2); it being evidential as well as being a negative[38] meaning the defendant would have to prove that they took no part in the activity of the organisation. This, however would suggest that the defendant was guilty during the trial and needed to prove his innocence. A statement by Lord Bingham from Sheldrake[39] argued the appropriateness of the section and what it imposes on defendants, saying "any blameworthy or

[34] Terrorism Act 2000 S.5
[35] Terrorism Act 2000 s.11-13
[36] Terrorism Act 2000 s. 11
[37] Terrorism Act 2000 s.11(2)
[38] Ruth Costigan and Richard Stone, *Civil Liberties and Human Rights* (11th edn, Oxford University Press 2017) 57
[39] Sheldrake v Director of Public Prosecutions; Attorney General's Reference (No 4 of 2002) [2004] UKHL 43

properly criminal conduct may fall within s11(1). There would be a clear breach of the presumption of innocence and a real risk of unfair conviction"[40].

Further offences relating to proscription are contained in sections 12 and 13 of the Terrorism Act 2000[41]; both involve showing support for any proscribed organisation. S.12(1) finds it an offence if "a person (A) invites support for a proscribed organisation; and (B) the support is not, or is not restricted to, the provision of money or other property"[42]. It is also an offence if a person:

> "arranges, manages, or assists in arranging or managing a meeting which he knows is – (A) to support a proscribed organisation; (B) to further the activities of a proscribed organisation; or (C) to be addressed by a person who belongs or professes to belong to a proscribed organisation"[43].

Similar to that of the s.11, the defence to this crime bares an evidential burden not a legal one[44]. The final offence that is connected to proscription concerning uniform, which holds a similarity to section one of the public order act 1936 concerning political uniforms in public spaces[45]. S.13(1) of the Terrorism Act characterises the offence as:

> "a person … if he: (A) wears and item of clothing; or (B) wears, carries or displays an article; in such a way or in such circumstances as to arouse reasonable suspicion that he is a member or supporter of a proscribed organisation"[46].

[40]Sheldrake v Director of Public Prosecutions; Attorney General's Reference (No 4 of 2002) [2004] UKHL 43 s.51
[41] Terrorism Act 2000
[42] Terrorism act 2000 s.12
[43] ibid
[44] Alun Jones, Rupert Bowers and Hugo Lodge, *Blackstones Guide to the Terrorism Act 2006* (Oxford University Press New York)
[45] Public Order Act 1936 section 1
[46] Ruth Costigan and Richard Stone, Civil Liberties and Human Rights (11th edn, Oxford University Press 2017) 57

When looking at these offences from a human rights standpoint, it could be argued that they infringe both Articles 10 and 11, freedom of speech and freedom of association respectively. Whilst these sections could amount to proscription related offences, one could argue that they are just normal activities in day to day society which as a result of legislation, may now be perceived as hostile and raise suspicion of support of terrorist action. As previously stated, legislation surrounding terrorist activity is indiscriminate in its power. Groups who fight for peace in foreign countries and far less extreme groups who use shock to convey their point could be considered as committing terrorist activity under the definitions of sections one and three[47]. It is therefore contended that by extension anyone who could be seen as supporting these groups in some way may be seen as committing acts linked to terrorism and proscription. A substantial quote from Lord Hoffman however, explains as to why some restrictions can be sanctioned for the good of society stating, "Individual freedom should only be restricted when there is a real and pressing need to do so"[48] and when that restriction is disproportionate with the outcome, the democratic system becomes unbalanced and the foundations of democracy crumble without freedom to express one's political beliefs[49].

Possible reform

From its original aims to curtail the powers of the Irish Republican Army and other splinter groups, the law on proscription has been amended several times to widen the definition but it poses the question as to whether this power supports law enforcers in protecting the UK against terrorism. Proscription has arguably been seen as a positive method to "discourage supporters of terrorist organisations"[50]. However, other sources such as Clive Walker believe "it's detrimental effects in terms of constraining the free expression of views about Northern Ireland

[47] ibid
[48] Ruth Costigan and Richard Stone, Civil Liberties and Human Rights (11th edn, Oxford University Press 2017) 454
[49] Helen Fenwick, Civil Liberties and Human rights (4th edn, Routledge-Cavendish 2007)
[50] ibid

outweigh its benefits"[51]. There are several potential reforms that could amend the current law on proscription. One recommendation put forward by David Anderson in his annual report focuses on setting a time limit before organisations may be considered for deproscription. He states "proscription orders should lapse after a period of time and be renewed only if there is sufficient evidence to do so"[52]. Another point put forward by Anderson relates to when the Secretary of State denies deproscription. Suggesting that reasons should be given in full to gain a greater understanding as to why groups have been denied and how this will affect their appeal[53]. Although the appeal reasoning differs in R v Z[54], the case still remains relevant to the recommendation. The reason for this appeal relates to the name of their proscribed group, although not actually a listed group under Schedule 2, the defendants were charged as belonging to a proscribed organisation, the 'Real IRA'. This is because as an umbrella term, the IRA related to all splinter groups surrounding what was one of the original reasons proscription was introduced. In doing this, the courts forsake groups that may not have used violent acts, branding all those groups who work under a name similar to that of the IRA as terrorist groups. These, however, could conflict with the current process of appeals. When looking at the current process under the Secretary of State, the two-point test that he follows makes little space for evidence as seen in the appeal process of PMOI[55]. The evidence of the organisation indicated their lack of criminal activity, yet they remained listed due to the Secretary of States' misinterpretation of the phrase "concerned in terrorism".

To conclude, Fenwick encapsulates the original intentions of the Terrorism Act 2000 at the start of the 21st century with the claim, "the TA has four key hallmarks, it is far more extensive, covering a much wider range of groups; it is permanent; its main provisions apply equally throughout the UK and it retains almost all the draconian special powers and offences adopted

[51] David Anderson Q.Q. "Independent review on Terrorism Laws; Searchlight or Veil" Cmnd 8803 [1983]
[52] David Anderson qc, 'The Terrorism Act in 2015' [2016] Independent reviewer of Terrorism legislation https://terrorismlegislationreviewer.independent.gov.uk/wp-content/uploads/2016/12/TERRORISM-ACTS-REPORT-1-Dec-2016-1.pdf accessed 20 april 2018
[53] ibid
[54] R v Z - [2005] 3 All ER 95
[55] Secretary of State for the Home Department v Lord Alton of Liverpool and others [2008] EWCA Civ 443.

under the previous temporary counter-terrorism scheme, whilst adding new incitement offences"[56]. With terrorism becoming much more of a prominent threat in society, legislation must remain ever changing to combat the problem. The process of proscription is one that must remain up to date with current world-wide state of affairs in order to maintain its protection on the citizens of the UK. However, the legislature and law enforcement must be able to strike a balance between exercising their power to penalise those concerned with terrorism while using their "wide, even intrusive, powers"[57] to a degree that is accepted and proportional to the harm which could be incurred. The public must have access to the protection of Human Rights and the freedom to express their religious and political views without fear of being branded a terrorist.

[56] Helen Fenwick, Civil Liberties and Human rights (4th edn, Routledge-Cavendish 2007)
[57] Regina v Gul (Mohammed) [2014] AC 1260

Empathy in the legal profession and its role in shaping my career

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The incorporation of empathy skills in a legal setting has gained a considerable amount of traction in recent years and is deemed to be a core legal competency required as part of legal training.[2]

This reflection aims to critique the use of empathy in a legal context and reflect on how my experience of working in the Student Law Office (SLO) has helped to deepen my understanding of both the role of empathy and requirement of using empathy as a tool to use in legal practice.

What is empathy in a legal setting?

The traditional standpoint was that emotions and the affective domain should be denied a place in the practice of law owing to the notion that legal practitioners should maintain an objective and impartial standpoint when dealing with clients.[3] Some commentators have even gone so far as to liken emotion to a bodily function and therefore are considered unpredictable and often illogical in nature,[4] thereby inappropriate in a legal setting.

Empathy, as discussed by Westaby and Jones, is a notoriously tricky concept to define. Not only is it a relatively new term in the English language, dating back only a century, during

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[2] Legal Education and Training Review independent research team, 'The Future of Legal Services Education and Training Services in England and Wales', [2013], table 4.3.

[3] Binder, D.A. Bergman, P., Price, S.C. & Tremblay, P.R, Lawyers *as Counsellors. A Client-centred Approach, (*3rd ed. St. Paul, Thomas/West 2012).

[4] Grossi, R, Understanding law and emotion [2015] Emotion Review, 7(1), pp. 55-60.

which time there has been no stable definition[5], but empathy is not in itself an emotion but involves an emotional reaction.[6]

One of the most frequently cited definitions of empathy in a legal setting is that of legal academic Lynne Henderson. In the article *Legality and Empathy*, Ms Henderson describes empathy as falling into three separate categories:

1. Feeling the emotion of another;
2. Understanding the experience or situation of another, both affectively and cognitively, often achieved by imagining oneself in the position of the other; and
3. Action brought about by experiencing the distress of another (hence the confusion of empathy with sympathy and compassion).[7]

I believe that empathy in the legal setting is as Henderson describes in her second category, effectively placing yourself in the shoes of the client.[8] In my opinion, it is no longer tenable to exclude emotion in the legal profession, and in order to provide clients with a humanistic consumer experience, a degree of empathy is required. Furthermore, there is an increasing weight of scientific evidence and philosophical argument demonstrating that emotion and cognition are intertwined, and to separate the two would result in impaired reasoning and decision making.[9]

Critique of general academic consensus

The public perception of lawyers is that they fall into one of two camps, they are either cold and calculating or justice warriors with a burning desire to right worldly wrongs.[10] In 1983,

[5] Merriam Webster Dictionary, <https://www.merriam-webster.com/dictionary/empathy accessed 10th May.
[6] Westaby C and Jones E, 'Empathy: An essential element of legal practice or 'never the twain shall meet?' [2017] International Journal of the Legal Profession, p 108.
[7] Henderson L, 'Legality and Empathy' [1987] Michigan Law Review p.1579.
[8] Henderson L, 'Legality and Empathy' [1987] Michigan Law Review p.1579.
[9] Nussbaum M., *Upheavals of Thought: The Intelligence of Emotions* (1ST ed. Cambridge, Cambridge University Press 2001).
[10] Edwards H.T, 'A Lawyer's Duty to Serve the Public Good' [1990] 65TH New York University Law Review, p.1148.

Barkai and Fine stated that 'most people are probably less eager to see a lawyer than to see a doctor'.[11] There is a plethora of academic material describing the honing of empathy as an essential skill for the legal professional; the emphasis is continuously placed on mechanising empathy for professional gain,[12] utilising empathy as a communication strategy as opposed to establishing an enhanced rapport.[13] There is however an ever increasing enclave of academics who believe that feeling a genuine sense of empathy can lead to the building of a genuine and authentic relationship with the client and the enabling of the legal professional to better understand and meet client needs.[14]

From a personal standpoint, the gravitas awarded to 'mastering the skill' of empathy[15] does not sit comfortably with me. The strategising of emotion strikes me as a calculating and somewhat manipulative method of behaviour and only reaffirms the public perception of the untrustworthy lawyer so often perpetuated in popular culture. For example, a recent Princeton University study found that a surveyed public felt lawyers to be equally as trustworthy as prostitutes.[16]

Despite my opinion, ultimately, the goal of the lawyer is to achieve the best possible outcome for their client. If the method by which they achieve this goal is disingenuous, does it matter? By no means would Atticus Finch condone such behaviour, but ultimately there is one overriding objective in these corporate times, lawyers have to have one eye on the accounting ledger as well as their copy of To Kill a Mockingbird. What I am attempting to say is that if one process works for one lawyer, and the client is happy, is there an issue? By no means am I

[11] Barkai J.L & Fine V.O, 'Empathy Training for lawyers and law students [1983] Southwestern University Law Review, 13(3) p.510.
[12] Margulies P, 'Reframing empathy in clinical legal education' [1999] Clinical Law Review, 5 (2), pp. 605-637.
[13] Gerarda Brown J, 'New directions in negotiation and ADR: deeply contacting the inner world of another: practicing empathy in value-based negotiation role plays' [2012] Washington University of Law and Policy, 39, pp.189-230.
[14] Rosenberg, J.D, 'Teaching empathy in law school' [2002] University of San Francisco Law Review, 36, pp. 621-657.
[15] Genty, P.M., 'Clients do not take sabbaticals: the indispensable in-house clinic and the teaching of empathy' [2000] Clinical Law Review, 7(1), pp. 273-286.
[16] Fiske S.T. & Dupree C, 'Gaining trust as well as respect in communicating to motivated audiences about science topics' [2014] Proceedings of the National Academy of Sciences of the United States of America, September 16, 2014 111 (Supplement 4).

propagating a Machiavellian, 'the ends justify the means' approach, but if one lawyer feigns empathy in order to make their client more comfortable in order to provide them with the best possible service, then I struggle to see the problem.

Empathy as a tool

Initially, I thought that regarding empathy as a tool was a mechanistic approach, a "pretend empathy"[17] was not a school of thought to which I wished to adhere. By way of experience, I realised that it is essential for a legal practitioner to have a level of impartiality in the work they do and as a result, it might prove quite difficult to invest emotionally in every client. Sometimes in the SLO, and no doubt in practice too, a considerable amount of time can be spent preparing information to advise a client who then does not attend This can leave students feeling angry at the lack of empathy reciprocated towards themselves and to some extent, this could compromise our professionalism, so it is crucial to maintain a professional distance at all times.

Every individual operates uniquely; some will naturally have a more developed sense of empathy and self-awareness through their life experiences. Over time people will develop their own style of working, and for some, it may be completely devoid of all empathy, and of course, such things are situation dependent. Gregory Forman, a family law attorney, discussed how he took being accused of "anti-empathy" as an "unintended compliment".[18] For Mr Forman, empathy was not something that assisted in achieving the best results for his clients but instead acted as a hindrance.

From personal experience, when interviewing a client, I found that my intention to demonstrate empathy, through verbal acknowledgement and body language resulted in me losing track of the purpose behind the interview. It would appear that there is a skill that I

[17] Morton A,' Empathy for the Devil' [2001] in: A. Coplan & P Goldie (Eds) *Empathy. Philosophical and Psychological Perspectives* (Oxford, Oxford University Press) pp. 318 – 330.
[18] Gregory Forman, 'Is empathy really useful for a family attorney?' (5th January 2017) < https://www.gregoryforman.com/blog/2017/01/is-empathy-really-useful-for-a-family-law-attorney/> accessed 10th May 2019.

need to hone and that the ability to ensure that I can perform the basics of interviewing seamlessly in order to display empathy. Therein lies the difference, while many people may feel empathy by placing themselves in the shoes of another, maybe not everyone can display their understanding of another's situation.

A few weeks later, I conducted a second interview in which I made the conscious decision to focus on the main objective, which was to extract information. My previous experience of trying to run before I could walk was pushed to the back of my mind, and just through focusing on gathering information, I was able to perform the interview to the best of my current ability. It is not to say that in the future, when more experienced, I would not revert to attempting to convey my empathy but only if the main objectives are taken care of. I should add that I did not sit in the interview like a robot while asking probing questions relating to an extremely sensitive situation, human nature kicked in, and sensitivity was exhibited.

My encounters with empathy during my time in the SLO

Whilst working in the SLO, my time has been divided between a call for a public inquiry and small claims cases. One case gave me cause to examine a private contractual dispute whilst the other had me assisting a firm of lawyers looking at the physical and sexual abuse of almost 1800 young men in a Youth Detention Centre. There was a clear difference in the emotions experienced when reading through the two different cases and from a personal perspective, I found the motivation to work on the detention centre case significantly easier to find than on the contractual case, important as it was to the person involved. I made sure that I conducted both cases to the best of my ability but these experiences did cause me to reflect on where my career aspirations might lead me.

Entering into my final year in the SLO, I started with the opinion that I did not want to work in a field that requires a significant emotional investment without a reciprocal salary. Working on the Detention Centre case forced me to change my opinion. What I initially thought of as an unwillingness to work within areas of law that I would most likely find uncomfortable was instead a lack of understanding of how I would respond to the emotions that would result

from interacting with such instances. I feared that the emotions I experienced could affect my mental wellbeing. If I was unable to manage my emotions when dealing with one case, would I be able to sustain a career of such emotions? Ultimately, when I was confronted with the facts of the case, rather than shy away from the uncomfortable truth, I took in the situation and used it to motivate me to produce work to the best of my ability.

The reason I found it easier to motivate myself was due to the natural empathy that I felt for the victims in the Detention Centre case. The sincerity of empathy allowed me to find an extra gear in order to help the clients and to make a difference in their lives. When looking at the contractual case, I found it difficult to envision my future sitting at a desk dealing with, what I consider to be, straightforward legal issues. The experience taught me that in order to embark on a legal career, I would need to pursue work which offers me fulfilment.

All this being said, I am not sure if I would be able to invest the level of emotion brought about by cases involving human rights abuse continuously. It was a unique scenario where so much time was dedicated to one case, and with each interaction, the onion shed another layer allowing for a deeper connection with the survivors. It took over my life, and I am not sure that I would be able to sustain such investment in the future. I realise that I sound like Goldilocks wanting just the right amount of interest to tantalise me to work to the best of my ability. What I am driving towards is my desire for is the requisite balance of work, work that is both engaging due to its fulfilling nature yet not so overwhelming that I cannot exercise sufficient restraint in order to remain logical and focused. I must not be alone in this sentiment based on the positive response to the incorporation of Corporate Social Responsibility.[19]

Conclusion

My initial approach to the role of empathy in a legal setting was that it is an essential skill and requisite in becoming a good quality legal practitioner. What I did not initially subscribe to,

[19] American Bar Association, 'Report on the future of legal services in the United States' [2016].

was the opinion held by many commentators that it was a skill that should be honed, an automatic tool utilised to coax information from unwilling clients.

My viewpoint has changed through personal experience. What many commentators were discussing was the ability to convey to the client a sense of compassion through empathy, an ability to demonstrate that you had placed yourselves in the shoes of the individual and experienced the same emotions as them, in a removed sense. There is a fundamental difference between experiencing empathy and demonstrating empathy. It would be almost inconceivable that, per Henderson's definition of empathy,[20] a lawyer would not place themselves to some degree in the shoes of a client. Empathy is a fundamental skill of comprehension; in some respects, a normal human behaviour.

The skill that I feel can be improved, is conveying to the client that you can understand their situation. Every individual possesses emotional intelligence, which changes through life experiences and is perhaps not something that can be worked on.[21] The ability to exhibit your understanding of another person in a professional setting is a skill that can be worked on. It is not the calculating tool I initially feared it to be, but instead, it is a skill that can and should be worked on, much in the same way that interviewing a client is.

In conclusion, my time in the SLO has enabled me to explore my understanding of empathy and how it plays an essential role in a legal context and will also help to shape my legal career.

[20] Henderson L, 'Legality and Empathy' [1987] Michigan Law Review p.1579.
[21] Rosenberg, J.D., 'Teaching empathy in law school' [2002] University of San Francisco Law Review, 36, pp. 621-657.

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THE ISSUES OF HOUSING THE ELDERLY WITH THEIR COMPANION ANIMALS IN CARE HOMES

Student Law Office, Policy Clinic, Northumbria University, School of Law

Research report for UK Centre for Animal Law (ALAW) undertaken by Marija Bilerte, Golara Bozorg and Amy Millross. Supervised by Dr Rachel Dunn.

May 2019

Northumbria University NEWCASTLE

A-LAW UK Centre for Animal Law

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Introduction

Our team was appointed by Ms Paula Sparks, from the UK Centre for Animal Law (ALAW), to carry out research into the difficulties for the elderly population and their companion animals to remain living together in supported accommodation/care homes. As stated on their website[1], A-law is a charity which brings together lawyers and others interested in animal protection law, to share experience and to harness that expertise for the benefit of animals, by securing more comprehensive and effective laws and better enforcement of existing animal protection laws. In the UK, they are a unique organisation, focusing on promoting knowledge and understanding - both amongst lawyers, universities, animal protection groups and the wider public - about animal protection laws in the UK and elsewhere around the world.

We have conducted this report to find out about the prevalence of difficulties faced by the elderly population in Newcastle upon Tyne to find suitable accommodation with their companion animal. We looked into the reasons why the elderly people with companion animals are unable to access certain accommodations with their companion animals and whether this is due to legal and/or regulatory factors or perception of the same or other reasons.

We began our research by exploring the reasons why companion animals should be able to accompany their humans into care homes, whether there are benefits in doing so and what impacts, if any, they may have on the humans in general and on the elderly population in particular. This was done through a review of the literature. In order to have a better understanding of the situation, we decided to conduct interviews with the managers of a number of care homes in the North East of England, to find out more about the issue in hand, and the reasons they give for either allowing all kinds of pets, allowing certain kinds of pets, or not allowing pets at all.

We wished to find out whether there are any steps that could be taken to reduce the obstacles faced by the elderly owners of companion animals who are entering the care system and want to have their pets with them in their new accommodation. Further, we explored what steps are necessary to overcome those legal/regulatory obstacles, e.g. legislation, amendments and/or what steps would need to be taken to overcome perceived legal or regulatory obstacles (e.g. education or guidelines).

Definitions

Companion Animal

Coined by the animal welfare and veterinarian sector, it refers to the co-dependent relationship of humans and other animals and is variously defined as “mutuality of the human-animal relationship”. [2] It refers to “any domesticated, domestic-bred or wild-caught animals, permanently living in a community and kept by people for company, amusement,

[1] A-Law – UK Centre For Animal Law (Alaw.org.uk, 2019) <https://www.alaw.org.uk> accessed 1st April 2019

[2] Froma Walsh, 'Human-Animal Bonds I: The Relational Significance of Companion Animals' (2009) 48 Family Process

work (e.g. support for blind or deaf people, police or military dogs) or psychological support including dogs, cats, horses, rabbits, ferrets, guinea pigs, reptiles, birds and ornamental fish".[3]

Elderly Population

In the North East of England, 18.5% of the population (2,618,700) were aged 65 or older in 2014.[4] The World Health Organisation has established that 'Most developed world countries have accepted the chronological age of 65 years as a definition of 'elderly' or older person'.[5] In England and Wales, there were 421,100 elderly care home residents over the age of 65 in 2017.[6]

Care Home

According to the NHS website "a Care Home is a place where personal care and accommodation are provided together"[7]; it is a residential setting where a number of older people live, usually in single rooms, and have access to on-site care services. A home registered simply as a care home will provide personal care - help with washing, dressing and giving medication. Some care homes are registered to meet a specific care need, for example dementia or terminal illness.[8]

In this report we refer to care homes and supported accommodation interchangeably and do not distinguish between them.

Background

For many people, pets are like family members. Companion animals can play a significant role in the life of all members of the family, especially in older family members' lives. With the improvement of medicine, we are facing an ageing population, many of whom, inevitably, have to move to care homes, nursing homes and such kind. Since many care homes through their policies restrict the allowance of pets (even those that often do, have strict restrictions), the elderly is faced with the dilemma of either leaving the loved family pets behind, or choose the animal over support and care in their old age.[9]

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[3] CALLISTO, 'Final Report' (CORDIS 2014) <https://cordis.europa.eu/docs/results/289/289316/final1-callisto-project-final-report.pdf> accessed 5th November 2018

[4] Jonathan McMullan, 'Population Estimates For UK, England And Wales, Scotland And Northern Ireland: Office For National Statistics' (*Ons.gov.uk*, 2019) <https://www.ons.gov.uk/peoplepopulationandcommunity/populationandmigration/populationestimates/bulletins/annualmidyearpopulationestimates/mid2017/previous/v1> accessed 1st April 2019

[5] World Health Organisation, 'Proposed Working Definition Of An Older Person In Africa For The MDS Project' (*World Health Organization*, 2018) <http://www.who.int/healthinfo/survey/ageingdefnolder/en/> accessed 12th November 2018

[6] Laing and Buisson, *Care of Older People UK Market Report* (2017) <https://www.laingbuisson.com/wp-content/uploads/2016/06/Care_OlderPeople_27ed_Bro_WEB.pdf> accessed 30th April 2019

[7] 'Supporting Information: Care Home' (*Datadictionary.nhs.uk*, 2019) <https://www.datadictionary.nhs.uk/data_dictionary/nhs_business_definitions/c/care_home_de.asp?shownav=> accessed 30th April 2019.

[8] 'Residential Care Home (Definition Of)' (*Housingcare.org*, 2019) <http://www.housingcare.org/jargon-residential-care-homes.aspx> accessed 30th April 2019

[9] Deborah Rook, 'For The Love Of Darcie: Recognising The Human–Companion Animal Relationship In Housing Law And Policy' (2018) 39 Liverpool Law Review 29

Unfortunately, when older people are left with no other option than moving into residential care, pets more often than not (especially cats and dogs) are not allowed to accompany them.[10] We know that pets can be extremely important to people and their wellbeing, yet the lack of pet-friendly care homes prevent the elderly from keeping a pet once they move into care homes. This is something discussed in depth in the background research conducted. This would lead them to have a difficult time to find a new suitable home.

Aims

The aims of the research, set by ALAW, were to identify:

- The prevalence of difficulties faced by the elderly population within Newcastle upon Tyne to find accommodation (whether sheltered or in care homes) with their companion animal;
- the reasons why elderly people with companion animals are unable to access accommodation with their companion animals and whether this is due to legal and/or regulatory factors or a perception of the same or other reasons.
- Any steps that could be taken to reduce the obstacles faced by elderly owners of companion animals who are entering the care system or need for sheltered accommodation.

Our focus was on care homes in Newcastle upon Tyne. We contacted a number of managers and asked them to participate in voluntary interviews, to help us understand what their care home pet policies are and the reasons that they have decided to adopt those policies. This way, we could directly collect some useful data which would enable us to examine the barriers faced by the pet loving elderly. We decided that semi-structured interviews would be best to achieve our objectives, as it would allow us structure, yet be flexible to peruse interesting ideas and opinions when needed.

This report displays the findings from this research project and recommends ways in which to improve the law on pets in care homes.

We would like to thank UK Centre for Animal Law and Debbie Rook for working with us on this research.

[10] Smith, R., Johnson, J., & Rolph, S. 'People, pets and care homes: a story of ambivalence' (2011) 12(4) Quality in Ageing and Older Adults 217

Background to the Study

The Law

Initial research found that there is a deficit of any law to deny companion animals in care homes and/or sheltered accommodation. Thus, it is at the discretion of a landlord, or those in charge of a property, to decide whether or not to include a 'no pet' covenant or clause in their contract. This can affect the relationship we have with companion animals and effects those from all areas of the country, regardless of gender, age or ethnicity.[11] In care homes, however, the issue and lack of legislation is particularly prevalent, as the elderly are faced with the choice of either giving up their pet or moving into accommodation which has the care they need.

The Animal Welfare Act 2006 is the principal legislation for animal welfare in England and Wales. Under the Animal Welfare Act 2006, powers exist for secondary legislation and codes of practice to be made to promote the welfare of animals.[12]

The particular requirements of ensuring an animal's welfare is set out in S.9 of the Act[13]:

> *S.9 - Duty of person responsible for animal to ensure welfare:*
>
> *(1) A person commits an offence if he does not take such steps as are reasonable in all the circumstances to ensure that the needs of an animal for which he is responsible are met to the extent required by good practice.*
>
> *(2) For the purposes of this Act, an animal's needs shall be taken to include—*
> *(a) its need for a suitable environment,*
> *(b) its need for a suitable diet,*
> *(c) its need to be able to exhibit normal behaviour patterns,*
> *(d) any need it has to be housed with, or apart from, other animals, and*
> *(e) its need to be protected from pain, suffering, injury and disease.*
>
> *(3) The circumstances to which it is relevant to have regard when applying subsection (1) include, in particular—*
> *(a)any lawful purpose for which the animal is kept, and*
> *(b) any lawful activity undertaken in relation to the animal.*
>
> *(4) Nothing in this section applies to the destruction of an animal in an appropriate and humane manner.*

The above duties are ones which a pet owner needs to meet to provide adequate welfare to their companion animal. There is no discrimination or age restriction to suggest that elderly

[11] Deborah Rook, 'For The Love Of Darcie: Recognising The Human–Companion Animal Relationship In Housing Law And Policy' (2018) 39 Liverpool Law Review 29, 37
[12] Animal Welfare Act 2006, s.14
[13] Animal Welfare Act 2006, s.9

people will not satisfy these requirements in the same way those under the age of 65 would. It is likely that in care homes this would also be the duty of the care home staff under S.3 of the Act, as they will be potentially responsible for the animal on a temporary basis, depending on what level of care they provide to the animal.[14] Many might question whether or not this would be their duty, but it is likely that they will fall under section this if there was a dispute.

Previous research conducted found that despite over 40% of care homes stating they accept companion animals, the reality is that in practice it is far less than that.[15] We found that some care homes stated that they allowed pets but in reality they didn't. These discrepancies are proof as to why our research is so important, to ensure that elderly residents know their position when choosing care with a companion animal and whether or not pets are allowed in the homes they are choosing to live in.

Benefits of the elderly owning pets

The main focus of previous research into this issue is more about the benefits of companion animals on the elderly, as opposed to the practicalities and accessibility of the elderly living with their companion animal. There is a particular deficit in knowledge and research on this area of accessibility of care homes catering for pets and the hope is that our research will aim to fill some of these deficits.

A research report by CLH Healthcare in 2017 looked at the benefits of pet-friendly healthcare.[16] The report stated that for a lot of older people (65 and above), their choice of pet would be a cat as they are less physically demanding as a dog, but are just as affectionate and sociable. They highlight that the big downside to pet ownership is the idea of having to give up pets when entering supported accommodation or care. In the report, Lori Palley says: "Pets hold a special place in many people's hearts and lives, and there is compelling evidence from clinical and laboratory studies that interacting with pets can be beneficial to the physical, social and emotional wellbeing of humans."[17]

The report also suggests that pets can soothe and relieve anxiety in people with dementia. The Alzheimer's Society has discussed the positive impact that pets can have on dementia sufferers.[18] It is suggested that any pet will benefit someone who suffers with dementia and will help to improve their quality of life. Pets bring a sense of unconditional love, friendship, and fun and, for people with dementia, it can help prevent feelings of anxiety or depression by reducing irritability, agitation, and loneliness.[19]

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[14] Animal Welfare Act, s.3(1)

[15] BlueCross, *Care Home Pet Policies*, <https://www.bluecross.org.uk/care-homes-pet-policies> accessed 30th April 2019

[16] CLH Healthcare, *The Benefits of Pet-Friendly Care Homes*, (7th August 2017) <https://www.clhgroup.co.uk/news-article/2017/08/07/the-benefits-of-pet-friendly-care-homes/254> accessed 30th April 2019

[17] Ibid, paragraph 7.

[18] Ibid, paragraph 9

[19] Ibid. Please also see, Ian H. Stanley and others, 'Pet Ownership May Attenuate Loneliness Among Older Adult Primary Care Patients Who Live Alone' (2014) 18 Aging & Mental Health

Jane Fossey, clinical psychologist and vice-chair of Society for Companion Animal Studies (SCAS), states "A number of small-scale studies suggest that introducing animals into care homes can have positive effects for people with dementia. For example, spending time with visiting animals has shown to reduce blood pressure and anxiety, and improve social interaction and sleeping patterns. It can also reduce the late-afternoon restlessness that can affect people with dementia."[20]

The obvious benefit of pets in care homes is also explained: the reduction in loneliness. The CLH Healthcare report discusses how seniors in care homes are likely to begin to feel cut off from the outside world, especially when mobility is an issue. A study by Stanley *et al* has shown that having a pet can help to prevent loneliness in seniors, cheer them up and even improve their quality of life.[21] The study shows that pet owners were 36% less likely than non-pet owners to report loneliness. An interaction was found between pet ownership and living status, in which living alone and not owning a pet was associated with the greatest odds of reporting feelings of loneliness.[22]

Another obvious benefit of pets in care homes is the support they can provide to their owners. For elderly residents suffering from certain health conditions, such as hearing loss or vision loss, pets are an obvious and solid support system. Usually, assistance pets are dogs, but in some instances other animals can be used.[23] Support dog uses now vary past just vision and hearing: dogs can now be trained to deal with other health conditions such as dog's ability to detect when a diabetics blood sugar is too low or too high, or their ability to sense panic attacks and calm anxiety.[24]

Here are just some benefits of having pet-friendly care homes as a whole, but our research sought to delve more deeply to the limitations and restrictions than the benefits. However, having the knowledge of the benefits that pets can bring to resident's helped shape the questions for the interviews.

An earlier study by the Joseph Rowntree Foundation in 2008, looked at 234 care homes and sheltered housing units in six UK cities replicated a study by the Joseph Rowntree Foundation in 1993 which highlighted the importance of pets to older people. Research psychologist June McNicholas, who conducted both studies, is disappointed that attitudes have changed little

[20] Ibid, paragraph 11

[21] Ian H. Stanley and others, 'Pet Ownership May Attenuate Loneliness Among Older Adult Primary Care Patients Who Live Alone' (2013) 18 Aging & Mental Health

[22] Ian H. Stanley and others, 'Pet Ownership May Attenuate Loneliness Among Older Adult Primary Care Patients Who Live Alone' (2013) 18 Aging & Mental Health

[23] CLH Healthcare, *The Benefits of Pet-Friendly Care Homes*, (7th August 2017), paragraph 14 <https://www.clhgroup.co.uk/news-article/2017/08/07/the-benefits-of-pet-friendly-care-homes/254> accessed 30th April 2019

[24] Ibid, paragraph 15. Please also see Cindy Wilson, 'The Pet as An Anxiolytic Intervention' (1991) 179 The Journal of Nervous and Mental Disease; Mary M. DeSchriver and Carol Cutler Riddick, 'Effects of Watching Aquariums on Elders' Stress' (1990) 4 Anthrozoös; WP Anderson, CM Reid and GL Jennings, 'Pet Ownership and Risk Factors for Cardiovascular Disease in People' (1992) 69 Australian Veterinary Journal; Karen Allen, Barbara E. Shykoff and Joseph L. Izzo, 'Pet Ownership, But Not ACE Inhibitor Therapy, Blunts Home Blood Pressure Responses to Mental Stress' (2001) 38 Hypertension; Karen Allen, Jim Blascovich and Wendy B. Mendes, 'Cardiovascular Reactivity and The Presence of Pets, Friends, and Spouses: The Truth About Cats and Dogs' (2002) 64 Psychosomatic Medicine.

in 15 years, despite growing evidence of the health and social benefits that pets bring. "We need to explode the myths that it is difficult, dangerous or time-consuming to have pets in care," she says. "A lot of fears from managers and staff are unfounded."[25]

There is not much case law in this area, but one was found. *Mrs P (by her litigation friend, the Official Solicitor) v Rochdale Borough Council, NHS North, Central and South Manchester Clinical Commissioning Groups*,[26] concerned a financial Deputy's failure to consider bringing Mrs P's dog, Bobbie, with her into a care home after she suffered two strokes. Mrs P was devoted to her dog and it was the 'only living being with whom she shared any love.'[27] As the Deputy had not arranged for further contact with Bobby, amongst other wrongdoings, they were removed from being Mrs P's Depuyty. The judge stated:

> *"It may seem to those not well rehearsed in the needs of a person who owns a pet, in this case a person who no longer has capacity to make decisions about various matters, what the importance of a pet is in their life. The deputy only has to read any single reference in reports, assessments or statements of Mrs P of how important Bobby is to her. Her Social Worker says in her witness statement to the court that:-*
>
> *"I would recommend that of single most importance in her life is her dog and having some form of contact with her dog in the future if possible."*[28]

Whilst this case is not specifically regarding pets in care homes, it is a positive step that the court recognised the importance of the relationship between Mrs P and Bobby and the lack of this contact being unacceptable. It is hoped that cases in the future will also take positive steps for the elderly and their companion animals.

Strains on other organisations

A newspaper article by Holly Brockwell[29] provides several other good points about why the elderly should be able to keep pets. One, the elderly are very unlikely to have big, messy and out of control pets and therefore aren't likely going to damage the property. Secondly, the number of animals that go in to shelters is high. An overall figure by the RSPCA alone found that they rescued and collected 102,900 animals during 2018.[30] Another source said that in 2010, 246,397 cats and dogs entered the care of the participating organisations[31]. Of these numbers, 48,770 dogs were surrendered by owner and 45,899 cats were surrendered by owner (accounting for 94,669 of the animals in the study).[32] It is hard to find a further break

[25] Blazina, C., Boyraz, G. and Shen-Miller, D., *The Psychology of the Human-Animal Bond* (Springer 2011)
[26] [2016] EWCOP B1
[27] Ibid, paragraph 14
[28] Ibid, paragraph 29
[29] Holly Brockwell, 'I Back Labour's Plan For Renters With Pets – Let's Stop Filling Shelters And Torturing Tenants' (*inews.co.uk*, 2018) <https://inews.co.uk/opinion/i-back-labours-plan-renters-pets-lets-stop-filling-shelters-torturing-tenants/> accessed 28th April 2019
[30] RSPCA, *Facts and Figures* < https://media.rspca.org.uk/media/facts> accessed 30th April 2019
[31] Jenny Stavisky, Marnie L Brennan, Martin Downes, Rachel Dean, 'Demographics and Economic burden of un-wanted cats and dogs in the UK: results of a 2010 census' (2012) 8(3) BMC Veterinary Research
[32] Ibid, 7, table 2

down of the number of those that were surrendered by elderly owners entering care, and these figures are not meant to represent this, but merely show the high numbers of animals entering shelters. Brockwell states that, "Landlords are the reason our animal shelters are overflowing. They don't mean to be, and they probably don't even realise, but they are."[33] This is not addressed in this research report, but is a focus for further research.

With this, the study found high numbers of "euthanasia" of animals was found. The study also suggested that other studies, such as Clark et al[34], showed there was a significant increase even between 2009 and 2010 of ethuanised animal numbers. Anchor Trust published research in 1998, which highlighted that almost 40,000 pets are needlessly destroyed every year.[35] This could be used to support an argument for promoting ownership of pets in care homes, as a method to help reduce the number of animals being euthanised.

Other Jurisdictions

Other jurisdictions have legislated on this issue and can be used as guidance and inspiration in England and Wales. The other jurisdiction focus on tenancy agreements and leases generally, rather than just focusing on care homes, but may be comparable and relevant in this area. In the Care Home Handbook[36], Dr. Graham Mulley from Leeds University states that, some countries, such as France, Switzerland, the USA and Norway, have laws which oblige care home providers to accept companion animals belonging to elderly residents. In others it is left to the individual homes. Some accept no pets and others accept specific animals. Some refuse permanent pets, but will allow pets to be brought in by visitors.

USA

In the USA, Rebecca J Huss published a detailed article entitled 'No Pets Allowed: Housing Issues and Companion Animals'[37], on the benefits of animals and the difficulties in remaining with them when living in rented accommodation. The article discusses, in depth, the benefits animals can have for their owners. Stating that pet owners report that they believe their pets relieve stress and are good for their health and the health of other human family members.[38] She states that this belief is supported by 'increasing' numbers of research studies that have looked at the impact companion animals have on human health, and lists a number of studies.[39] Generally, the research shows that contact with animals has a calming effect on people for example by reducing their blood pressure and cholesterol.

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[33] Holly Brockwell, 'I Back Labour's Plan For Renters With Pets – Let's Stop Filling Shelters And Torturing Tenants' (*inews.co.uk*, 2018) <https://inews.co.uk/opinion/i-back-labours-plan-renters-pets-lets-stop-filling-shelters-torturing-tenants/> accessed 28th April 2019

[34] Clark CC, Gruffydd-Jones T, Murray JK. 'Number of cats and dogs in UK Welfare Organisations' (2012) 170(19) The Veterinary Record

[35] Anchor Trust, *Losing a Friend to Find a Home: The dilemma of older people forced to decide between keeping their pets and finding a place to live* (1998)

[36] Graham Mulley, Clive Bowman, Michal Boyd, Sarah Stowe, *The Care Home Handbook* (Wiley-Blackwell 2014) 38-39

[37] Rebecca J Huss, 'No Pets Allowed: Housing Issues and Companion Animals' (2005) 11 Animal L. 69

[38] Rebecca J Huss, 'No Pets Allowed: Housing Issues and Companion Animals' (2005) 11 Animal L. 69

[39] See generally, Cindy C. Wilson & Dennis C. *Turner Companion Animals in Human Health* (Sage Publications 1998) discussing a variety of studies done on the impact of companion animals on human health; Delta Society,

Huss points out that animals, under U.S. law are treated as personal property,[40] as they are in the UK[41] and other countries. In America, it is tradition that people have a legal right to own and control property and generally the common law will support the idea of "absolute" possession of property – although there are restrictions to the use of personal property. If we had longer to conduct our research, it would have been interesting to look in to the situation of, a person going in to a care home and not allowed to take their pet and whether you could argue they are being deprived of their personal property.[42] This has the potential to be its own research in the future, as a way of promoting awareness for elderly pet owners' rights.

In America, landlords may restrict or prohibit the harbouring of an animal in a rental unit. Further, local laws may restrict the number of animals to be held on the property or impose other requirements relating to the ownership of the animal even if a person owns the real property where the animal is located.[43] A restriction similar to some of the problems faced in the UK when it comes to renting properties.

Huss highlights the issues with the Elderly and Handicapped Housing.[44] As part of the Housing and Urban-Rural Recovery Act 1983, Congress passed a rule entitled 'Pet Ownership in Assisted Rental Housing for the Elderly or Handicapped' (POEH). This rule provides that owners and managers of federally assisted rental housing for the elderly or handicapped cannot prohibit or prevent a tenant from owning common household pets. The rule does allow for some exceptions and the owner or manager of any federally assisted housing for the elderly or handicapped can remove any pet which is causing a nuisance or is a threat to the health and safety of other occupants or persons in the housing. [45] This is a law that the UK does not have, but could definitely benefit from having or, at least, consider something similar to ensure that elderly residents have the right to keep their companion animals with them, even if there are some restrictions or limitations.

Since this rule was introduced, The Department of Housing and Urban Development (HUD) have established an extensive set of regulations to implement POEH.[46] The regulations provide that tenants are to be given notice of the rights they have under the law and are to be given access to any pet rules developed in accordance with the regulations. The pet rules themselves are divided in to discretionary and mandatory rules.[47]

Health Benefits of Animals Bibliography, (listing articles that report on studies finding companion animals affect human health in a positive way); Delta Society, Healthy Reasons to Have a Pet, (listing the results of studies that found various ways that companion animals improved the health of humans). Aaron H. Katcher, *How Companion Animals Make Us Feel: Perceptions of animals in American Culture* (Smithsonian Institution Press 1989)

[40] Gary L. Francione, *Animals, Property, and the Law* (Temple U. Press 1995); Orland A. Soave, 'Animals, the Law and Veterinary Medicine (4th edn, Rowman & Littlefield 2000)

[41] Deborah Rook, 'For The Love Of Darcie: Recognising The Human–Companion Animal Relationship In Housing Law And Policy' (2018) 39 Liverpool Law Review 29

[42] This is a human rights issue, specifically focusing on Aeticle 1, Protocol 1 of the European Convention on Human Rights. As it is a human rights issue, it will only apply to a public authority care home, not a private care home.

[43] See infra pt. IV (discussing local laws).

[44] Rebecca J Huss, 'No Pets Allowed: Housing Issues and Companion Animals' (2005) 11 Animal L. 69, 90-93

[45] 12 U.S.C. s.1701r-l(b), (c).

[46] 24 C.F.R. s.5.300 et seq. (2003).

[47] Ibid, at ss. 5.318, 5.350.

The mandatory rules include that pet owners must have their pets inoculated in accordance with state and local laws[48], sanitary standards must be set governing the disposal of pet waste, including specific limitations on the number of times a week that a pet owner is required to change the litter in a litter box[49], pets are required to be restrained and under the control of a responsible individual while on the common areas[50], and the pet owners must register their pets and update their registration at least annually.[51] The discretionary pet rules provide some flexibility to reflect the needs of each housing project (supported accommodation). These rules allow reasonable limitations on the number of pets in each unit and specifically state that "project owners may limit the number of four-legged, warm-blooded pets to one pet in each dwelling unit."[52] Reasonable restrictions on the size, weight, and type of animals in the project may be mandated under the discretionary pet rules.[53] Pet deposits are allowed; however, they are limited to the equivalent of one month's rent or to an amount set by HUD periodically, depending on the type of housing.[54] There are also discretionary rules which set out the standards of pet care, for example, that pet owners may be required to control noise and odour caused by a pet[55]

If a tenant violates a pet rule, a procedure set out in the regulations sets out a minimum notice and meeting requirements before steps can be taken to remove a pet or terminate a pet owner's tenancy.[56]

The ideas presented in Rebecca J Huss' work provided some interesting points of thought and a host of potential reforms that could be made to the Law here in the UK. For example, the idea of regulations will provide protections for the owners and managers of the care homes and supported accommodation would be a positive change for the UK, as it will give them legal restrictions they can apply to the conditions of rent.

Canada

Under Sect. 14 of the Residential Tenancies Act 2006, 'no-pet' clauses are prohibited, but landlords are allowed to refuse to rent to someone with a pet, not including service animals. However, a 'no pet' clause in a lease is void, so signing a lease that has one doesn't give your landlord the right to evict you if you move an animal in, even if you previously agreed not to have a pet.[57] The landlord can, however, apply to evict the tenant if the animal, for example, is causing the landlord or another tenant to suffer a serious allergic reaction, or they are interfering with the reasonable enjoyment of the property.[58]

[48] Ibid, at s.5.350(a). Discretionary standards allow pet rules to require pet owners to license their pets in accordance with State and local law. Id. at s. 5.318(f).
[49] Ibid, at s. 5.350(b).
[50] 24 C.F.R. at s. 5.350(c).
[51] Ibid, s. 5.350(d).
[52] Ibid, s. 5.318(b)(1)(ii).
[53] Ibid, s. 5.318(b)(1)(ii).
[54] Ibid, s. 5.318(c). At least one housing authority outside of the state of California has banned ferrets.
[55] Ibid, s. 5.318(e) (2).
[56] 24 C.F.R. s. 5.356.
[57] Tribunals Ontario: Social Justice Division, *Landlord and Tenant Board: Frequently Asked Questions*, <http://www.sjto.gov.on.ca/ltb/faqs/#faq8> accessed 30th April 2019
[58] Residential Tenancies Act 2006, s.76 (Canada)

Debbie Rook has argued that this can, "encourage dishonesty on the part of the tenant, or at least a failure to disclose the truth, as it is better for a tenant not to admit to having a companion animal until they have signed the lease."[59] Whilst this is a good comparable jurisdiction for introducing 'no pet' clauses, there are issues with it which need to be considered.

France

France was the first country to prohibit 'no pet' clauses in leases, the 1970 legislation[60] declaring these clauses in residential tenancies are void. There is a requirement that the animal does not cause damage to property or disturbance to other occupants.

Reasons against allowing pets in care homes

Age

Coren highlights that some people in Canada feel that the elderly shouldn't be allowed to adopt kittens or puppies, stating, "the board is divided on the issue of whether seniors should or should not be allowed to buy kittens, puppies, cats or dogs from them. One side says that the elderly should not be allowed to adopt pets from the shelter in view of the fact that if the human dies before them these pets will be orphaned. The other side suggests that this is age discrimination."[61]

This is a very interesting view on elderly pet ownership and one that doesn't come up a lot in research. It is easy to agree the fact that elderly people could die when looking after an animal is just as likely as any other person. To make comments like this hold any weight, there would have to be some assessment of the elderly individual's health and condition, and sadly, the likelihood any condition or illness causing a soon-death. Coren agrees with this stating, "The argument that if the animal's owner dies sooner than their companion, the pet will be orphaned does not appear to me to have much merit. The same argument could be to suggest that single men or women in their 20s and 30s should not be allowed to have pets unless they have family living same city with them who would be willing to take over the pet should they die or become incapacitated".[62] This is also, he argues, the same argument for those adults in the midst of their career and caring for a family, as they may find it difficult to care for a pet and, "the truth of the matter is that because of the bond that seniors tend to form with their pets, they will usually go out of their way to make sure that their pet is well looked after and there is someone who is willing to take care of the animal should they die before their animal companion".[63]

[59] Deborah Rook, 'For The Love Of Darcie: Recognising The Human–Companion Animal Relationship In Housing Law And Policy' (2018) 39 Liverpool Law Review 29, 39

[60] Article 10 and the Law of 9 July 1970

[61] Stanley Coren PhD, DSc, FRSC, Animal Shelters say "No puppies or kittens for the elderly" (January 2011) <https://www.psychologytoday.com/us/blog/canine-corner/201101/animal-shelters-say-no-puppies-or-kittens-the-elderly> accessed 30th April 2019

[62] Ibid

[63] Ibid

This is another interesting point. The fact of the matter is, most elderly people need the companionship of their pets and often this companionship will provide them with a sense of purpose and routine - as mentioned previously. Given that an elderly resident has the capacity to care and look after the animal, it is fairly easy to argue that they will be able to provide a more constant care for the animals that a working man, woman or family would be able to. But again, this is all down to individual capacity and this would be something that would be necessary to monitor as a way of checking for any decline in health. He stated: "it seems to me that to deny seniors the companionship of a pet is simply an act of cruelty"[64].

Based on a healthy elderly individual this is a statement that many would agree with. But it is all about the assessment of capacity and their ability to care for an animal, because if they cannot care for the animal, who will? This is something explored in our research.

Health and Safety

Another reason for not allowing pets is health and safety concerns. Animals could lead to lower levels of hygiene (especially hand hygiene), which could lead to issues regarding risk of common colds and illness. Another issue is the risk of infection or other injuries resulting from animals, for example, if there is a less friendly dog in a communal area that accidentally attacks someone. According to a publication by Ohio State University[65], a recent study revealed gaps in protocols surrounding animals in long-term facilities, which contributed to higher risk of health and safety related issues.

The publication is more about having animals in the care home generally, as visitors or with residents as companion animals, but either way it makes interesting suggestions. The publication sets out ways to ***maximise benefits and reduce risk*** in facilities by taking simple steps:

- 1) choose the best animal;
- 2) ensure safe interactions between people and animals;
- 3) require evidence of proper animal care; and
- 4) create animal safety and cleanliness protocols for your facility.[66]

These recommendations are very subjective and generic in nature. They would also be very hard to enforce, especially point 2, as if anything was to happen that might carry some risk, and it would be too late to stop it. It is, however, just meant to provide a framework of the considerations a care home would need to make, and more detail would be needed to make an actual protocol for the facility.

They also recommend choosing good-natured animals to avoid bites and scratches – facilities should avoid animals that have a higher chance of making residents sick such as reptiles, amphibians, rodents and exotic species.[67] For example, animals such as turtles, frogs and

[64] Ibid

[65] Ohio State University, *Animals in Ohio Long-term Care Facilities: Keep Residents Safe While Enjoying Pets* (2016) <https://kb.osu.edu/bitstream/handle/1811/79017/Animals_LTCF_Brochure.pdf?sequence=9&isAllowed=y> accessed 30th April 2019

[66] Ibid, 3

[67] Ibid, 2

other reptiles/amphibians commonly carry Salmonella (a bacteria), which can cause severe illness in some people, especially anyone who suffers with a weakened or otherwise compromised immune system (a condition that is common among the elderly population). Also rodents, farm animals and exotic animals can also frequently transmit diseases.

They suggest that the age of the animal could have an impact on health of residents. They state, "Keep residents safe by using only mature animals", suggesting that choosing animals over the age of 1 years will lower the amount of biting and scratching incidents as well as lowering risk of the animal carrying any disease.[68] Ohio State have also issued guidance on ensuring safe interactions between residents and animals, and have published a draft protocol form for individuals to use to draft their own version.[69]

Despite this being a U.S. study, its advice could help the UK tackle the potential problems and concerns of allowing all care homes to accommodate resident's companion animals. The document makes some good recommendations on how to reduce the health and safety risks, especially the risk of disease and injury to both the elderly and the animals themselves, that are a cause for concern for many.

The Centre to Study Human-Animal Relationships and Environments also have similar recommendations, putting forward that care homes should provide plans of letting pets into care homes and, "To provide rational precautions for health and safety of people without unduly limiting the benefit of animals (as judged by the responsible administrator with consultation from a veterinarian, a physician and others)."[70] Further, residents, staff, and appropriate consultants should be in consultation in developing plans for allowing pets into care homes, consider the needs of some staff and residents not to be near the animals and consider the choice of the animal, including its purpose. Lastly, they advise that veterinarians should be advisors in selecting animals in a care home and "in developing a plan for promoting and monitoring the health and behaviour of resident animals as a continuing health maintenance program."[71]

It is a fairly good attempt at a full-coverage list of recommendations for both visiting pets and residential pets. These recommendations are generally what you could expect (e.g. specifying the types of animals to be expected to be accepted in to the facility) as well as relevant points on the care of animals (vets providing leadership for monitoring health and behaviour etc) but there are also some gaps in the recommendations. More detail could be given on what sort of 'plan' could be in place and how this should be done. There should be more clarity regarding restrictions on where the animals are allowed and the minimum requirements of room size to house different animals, to ensure there is enough room for the animal to live comfortably. Moreover, there may be some difficulties for care homes to work with these

[68] Ibid, 3

[69] Ohio State University, *Model Animal Protocols for Long-Term Care Facilities*, <https://kb.osu.edu/bitstream/handle/1811/79017/Model_Animal_Protocols_for_LTCF.pdf?sequence=10&isAllowed=y> accessed on 26th April 2019.

[70] CENSHARE, *Research Abstracts on the Human-Animal Bond and Long Term Care* <http://www.censhare.umn.edu/public-service-projects/companion-animals-in-care-environments/research-abstracts-on-the-human-animal-bond-and-long-term-care/> accessed on 20th March 2019

[71] Ibid, 6

recommendations, particularly financially affording a vet to advise them and monitor behaviour of the selected animals.

Current moves toward pets in care homes

A news article by the Telegraph, reported that "Elderly people should be allowed to keep their pets when they move into a care home, preventing the needless destruction of thousands of animals every year."[72] This has been put forward by Nigel Waterson, and "his Care Homes and Sheltered Accommodation (Domestic Pets) Bill would ensure many elderly people would be able to keep their beloved animals when they have to leave their own properties."[73] This Bill's aim was to create a legal presumption that pets could accompany the elderly into care homes and sheltered accommodation, unless an exception can be justified, such as the safety of the other residents.

This Bill, though reaching its second reading in March 2010, ultimately failed, due to a general election. There was support for the Bill across parties and if a similar Bill is introduced in the future it may stand a chance. There have been moves towards dealing with 'no pet' clauses, however, discussed below.

Scottish Labour Party proposals

The Scottish Labour Party, in April 2018, launched their 'paws clause' campaign, which would guarantee that owners can keep their pets if they move in to supported accommodation or care homes and also extends to those seeking temporary accommodation for the homeless.[74]

This movement by Scottish Labour shows that we as a nation really do care about our furry friends and want to protect them and their owners' rights. The inclusion of care home in this campaign is positive, as many proposals for change are focused on rental accommodation only, and it is refreshing to see political parties acknowledge the need for change for the elderly too.

The Scottish Labour Party are in consultation with landlords, tenants, care homes and temporary accommodation providers, to assess this possibility. [75] Despite agreeing that the default should be for pet owners to stay with their pets, it is important to see how plans like this will frustrate landlords and cause them to lose rights and control over the property as landlords.

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[72]Elderly people 'should be allowed to keep pets in care homes' *The Telegraph* (5th March 2010) <https://www.telegraph.co.uk/news/uknews/7377220/Elderly-people-should-be-allowed-to-keep-pets-in-care-homes.html> accessed 30th April 2019

[73] *Ibid*

[74] The Red Robin, *'Paws Clause': Labour Announce Plan to Allow Elderly and Vulnerable To Keep Pets* (2018) [online] <https://www.theredrobin.scot/_paws_clause_labour_announce_plan_to_allow_elderly_and_vulnerable_to_keep_pets> accessed 26th April 2019

[75] Ibid, paragraph 6

West Berkshire Local Government Policy

West Berkshire local government have application forms that can be filled out in order to potentially take pets with you in to care homes.[76] It does state, however:

> "4.4. There is no guarantee that the care home can continue to care for a service user's pet in the event that the pet outlives their owner. The arrangements for managing this circumstance must be discussed and agreed with the service user / family / representatives as part of the admissions process."[77]

They also issued 'Guidelines for the care of a pet in a care home'[78], however, the guidelines have not been updated or extended since 2014, which is now 5 years ago. Some might say that it may be outdated with the needs of society today, or maybe it has worked effectively so has not needed to be altered in the time, but there does not seem to have been any further work on this.

BlueCross

The BlueCross have a section on their website how the public can contact their local MP to help ensure all care homes have a pet policy. The website doesn't go in to detail about what this is and how effective it is but there is a template letter for people to use to send to their local MP. There is also a link for people to use to find their local MP too.[79]

[76] West Berkshire Council, *Procedures for bringing pets into care homes* (May 2014) <http://www.westberks.gov.uk/CHttpHandler.ashx?id=4637> accessed 30th April 2019

[77] Ibid, paragraph 4.4

[78] Ibid

[79] BlueCross, 'Care Home Pet Policies: Ask your MP to help ensure all care homes have a pet policy' <https://www.bluecross.org.uk/care-homes-pet-policies> accessed 26th April 2019

Research Methodology

Ethics

Ethics was granted by Northumbria University's Ethics Committee. We did have some issues surrounding ethics, which is discussed in more detail in the limitation section below. All participants were sent a consent form, which contained information about the study and how the data was managed,[80] prior to the interview taking place. This allowed the participants time to ask the research team any questions they may have had about the study prior to it taking place.

Sample

To recruit participants, a recruitment email/letter was sent around care homes in Newcastle upon Tyne and North East area.[81] A list was created of 23 care homes in the area with their names, address, phone, email and their pet policy. All 23 potential participants were contacted either through email or letter. Because there were no responses from the first correspondence after a month, follow-up calls were made. After the follow-up calls were made, 5 potential participants agreed to take part in the research, which was then narrowed down to 4 participants, as one fell out of contact. However, after one of the interviews, we got an interest from a care home manager outside of our initial recruitment area. Ultimately, 5 participants were recruited to participate in the research.

Interviews were scheduled using phone calls and follow up by email. Both telephone and face-to-face interviews were used for this sample. There were 3 face-to-face interviews and 2 telephone interviews, and the participant had the option to choose the most convenient one for them. For the face-to-face interviews, we travelled to the care home for their convenience and, similarly, if they opted for a telephone interview, we called them. For the face-to-face interviews a consent form was signed, whilst for the telephone interview the consent was gained orally, recorded using a Dictaphone so later it can be transcribed for evidence of consent.

Interviews

We have used a qualitative research method to obtain empirical data for this research project. This focuses on describing the meaning and central themes of the research and was useful to enable us to get to the experiences of the care homes managers, which ensured the depth and the breadth of the research.

To obtain this type of data, we conducted semi-structured interviews, which provided us with some good and practical data. It allowed us to plan specific questions, whilst also allowing room for any clarifications and explorations of interesting topics and comments. This keeps the interview under control, but are easily adapted when needed, whilst keeping the interviews similar.

[80] Please see Appendix 1 for the consent forms.
[81] Please see Appendix 2 for the recruitment emails.

Questions

Our interview questions[82] were divided into four parts, focusing on:

1) Whether pets were allowed in the care home.

2) The second part of questions were asked if the participant answered 'yes' to the first question. These questions established the background of why they allow pets in their care home, the benefits they have experienced, and how they manage this.

3) The third set of questions were asked if the participant answered 'no' to the first question. This set of questions explored why pets are not allowed in their care home, the company policy around this, and whether they allow animals in to visit.

4) The fourth set of questions looks at the legal aspects. The questions that are included are whether they know about any laws surrounding pets in supported accommodation and their thoughts around potential legislation banning 'not pet' clauses.

To make the interview process easier to follow, a flow chart was created showing the links between the questions.[83]

Analysis

To analyse the data collected from the interviews, thematic analysis was used, as we felt it the most appropriate for this research project. It emphasises pinpointing, examining, and recording patterns themes within data.[84] A theme captures the important data in relation to the research question and represents some patterned meaning.[85] Thematic Analysis consists of 6 phases:

[82] Please see Appendix 3 for the interview plan.
[83] Please see Appendix 4 for the flow chart.
[84] Virginia Braun and Victoria Clarke, 'Using Thematic Analysis In Psychology' (2006) 3 Qualitative Research in Psychology.
[85] Ibid, 82

Phase	Description of the process
1. Familiarising yourself with your data:	Transcribing data (if necessary), reading and re-reading the data, noting down initial ideas.
2. Generating initial codes:	Coding interesting features of the data in a systematic fashion across the entire data set, collating data relevant to each code.
3. Searching for themes:	Collating codes into potential themes, gathering all data relevant to each potential theme.
4. Reviewing themes:	Checking in the themes work in relation to the coded extracts (Level 1) and the entire data set (Level 2), generating a thematic 'map' of the analysis.
5. Defining and naming themes:	Ongoing analysis to refine the specifics of each theme, and the overall story the analysis tells; generating clear definitions and names for each theme.
6. Producing the report:	The final opportunity for analysis. Selection of vivid, compelling extract examples, final analysis of selected extracts, relating back of the analysis to the research question and literature, producing a scholarly report of the analysis.

Diagram 1 – The Stages of Thematic Analysis [86]

The first phase involved us familiarising ourselves with the data. All of the researchers transcribed interviews and checked them back against the recording to ensure accuracy. Transcribing is a good way to familiarise with the data as it requires you to not only listen to the interview again, but also engage with it and comprehend everything said.[87] All of the researchers transcribed an interview, which was checked back against the recording.

Phase 2 involves generating initial codes, which are an identifying feature of the data and appear interesting to the researchers.[88] We each took a copy of each of the five transcripts and began coding them. We approached the coding in different ways. Rachel used the computer system NVivo, whereas the rest of our group opted to simply use pen and paper. We did this separately to increase reliability of our coding and to ensure that we were each finding each of the codes, rather than deciding together what they were.

The purpose of coding is to use numerous code words to display what each statement in the interview is saying and to begin to see themes emerging. In terms of creating themes, we sat together and wrote down all the codes on a whiteboard and then had a lengthy discussion of recurring codes and how the codes could fit together in to themes. This was reviewed by the research team and transferred to diagrams, working through phases 3 - 5.

[86] Ibid, 87
[87] Catherine Kohler Riessman, *Qualitative research methods: Vol. 30 Narrative Analysis* (Sage Publications 1993)
[88] Virginia Braun and Victoria Clarke, 'Using Thematic Analysis In Psychology' (2006) 3 Qualitative Research in Psychology, 88

We came up with 6 themes:

1. Responsibility (Care of animals and Care of Residents)
2. Benefits
3. Costs
4. Choice
5. Policy
6. Law.

We incorporated all the codes in to one or more of these themes and we will use these themes to guide our discussion below.

Limitations

There were some limitations that we had experienced during this project. One of them was that the interviews with care home residents could not be conducted as originally planned. This was due to the potential lack of capacity to consent, which raised some ethical issues, and this meant that we were unable to conduct interviews with elderly residents. For example, some of the potential participants might have had to require the consent from a family member or the NHS. It was not feasible in the timeline that we have been given to acquire the consent from all the parties and we made the decision not to conduct the interviews with the elderly residents. However, we believe that this decision will not impact the aims and objectives of the research project, as the main objectives were to gain insight from the care home managers rather than those of residents. Further, the managers are in the best position to explore why pets are, or are not, allowed in their care homes and the issues surrounding this. The outcomes of the research project were not affected due to this ethical issue.

Another limitation experienced in this research was a lack of contact and delay in getting in contact with participants. Some care home managers needed persuasion to take part in the research and reassured of the confidentiality. Further, for some care home managers, it was difficult to take time out of their duties to speak with us. There were instances where they were not available for some time or where interviews had to be rearranged due to unforeseen circumstances. Even though this delayed the interview stage to some extent, it did not have a substantial impact on the project.

The small sample size can be seen as a problem by some.[89] Ideally, we would have liked a sample size of 20-25 participants. The number that would have been better would have been between 20-25 care home managers. However, for a pilot study, 5 participants have given us a good idea of what is happening in this area and what changes could be recommended. We appreciate that the findings cannot be generalised, and that other areas of England may find different results, but we are not making claims of application to other care homes and we

[89] For example, please see Bryan Marshall, Peter Cardon, Amit Poddar and Renee Fontenot, 'Does Sample Size Matter in Qualitative Research?: A Review of the Qualitative Interviews in IS Research' (2013) Journal of Computer Information Systems 11

acknowledge that further research is needed.[90] This has not affected the research as through interviewing 5 different care homes allowed us to gain insight into all perspectives of pet ownership when moving into a care home/supported accommodation.

[90] This kind of research was appropriate for the Student Law Office at Northumbria University. If others would like to take this design and conduct the study in other areas of England, this is welcomed, to create a larger study.

Results and Discussion

As was found through the research, the definition of "pet-friendly" has been widely interpreted.[91] All of the managers involved in the study claimed to have a pet-friendly care home. However, the levels differed quite remarkably. All of the participants believed that the presence of animals was quite beneficial to some residents and that this should be facilitated to ensure residents' choices and preferences were respected.

All of the managers said that they do allow animals into the care home in some way. However, the definition of allowing pets differed. Three out five allowed pets to live in the home, only after assessing the situation in the house, the needs of the elderly owner and the type of animal, but had no pets in residence at the time of the interviews. The greater the risks are, the less likely it would be to allow pets in. Two out of five, only allowed visiting animals.

A number of concerns were repeatedly mentioned both about the live-in pets and also about the visitor pets:

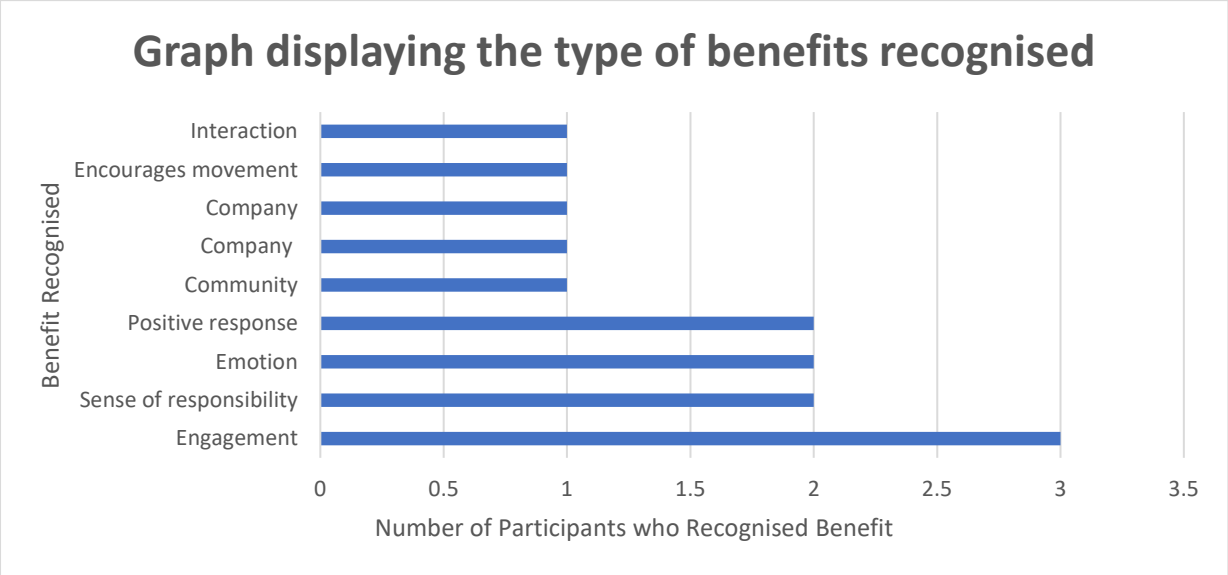
- Is it practical/feasible to allow pets in?
- What kind of animal it is and level of care it needs?
- Is the owner capable of looking after them and, if not, who would look after them?
- Who would clean, walk and feed the animal?
- Who would take them out to do their business?
- Would the home have the right size and facilities to fulfil the pet's needs?
- How many animals can the home accept overall?
- What if the other residents do not like pets?

Other factors to take into consideration included:

- The wellbeing of other residents
- Some of the residents do not like to be around animals, sometimes due to medical reasons, e.g. asthma
- The issues with hygiene and infection control (i.e. cats litter)
- Safety issues (i.e. residents might trip over an animal)
- Noise levels

[91] The Cinnamon Trust, 'Pet Friendly Care Home and Retirement Housing Register' <https://cinnamon.org.uk/pet-friendly-care-homes/> accessed 8th January 2019.

Benefits



Graph 1 – Displaying the kind of benefit of pets in care homes recognised by the participants

All the participants have recognised some benefits of having pets around the elderly residents. The types of benefit recognised are mental health, physical health, positive response, emotion, interaction, encourage movement, company, community, engagement, and sense of responsibility, as shown in Graph 1. The horizontal axis shows the number of participants that have recognised the specific benefit. The most common response was elderly engagement with the pets. Three out of five participants felt that the residents were more engaged when an animal is around, both physically and mentally. The background research also confirms this recognising older adult owning a pet were more likely to engage in physical activity than non-dog or non-pet owners and previous research highlights that dog owners engaged in greater overall physical activity.[92] This demonstrates that pets do have an impact on the elderly resident through the physical and mental changes can be seen when an animal is around the residents.

The next most common benefit recognised by managers is the mental health benefits on the elderly, which includes the sense of responsibility, positive response and emotion. One participant has stated:

> *"Most of our dementia residents are on top floor, they get a lot of satisfaction from the ponies coming up there. They are really gentle and you just see the look on their faces and respond to them. You know some of our ladies, really show a lot of interest in things but when they come in, you can see their faces and eyes light up. Like when they see a baby. It is quite nice."*

Another one has said:

[92] Roland J. Thorpe and others, 'Physical Activity And Pet Ownership In Year 3 Of The Health ABC Study' (2006) 14 Journal of Aging and Physical Activity

"Most people would have had pets most of their life, so trying to keep everything that they've always had, it's a big importance, it's sense of self and responsibility. Just to taking the dog out for a walk, it benefits, not only the mental state, but also the physical state. It does get people up and mobile, having a dog, moving about."

It is clear that pets bring positive mental benefits to the residents. Most of the participants have noted that there is some element of enjoyment perceived by the resident whether it is an expression of positive emotion or having a cheerful reaction to animals. This is affirmed by several research reports, that by having an animal around it can bring a sense of unconditional love, friendship, and fun and, for people with dementia, it can help prevent feelings of anxiety or depression by reducing irritable, agitation, and loneliness.[93] This has also been acknowledged in the Court of Protection in the case of *Mrs P (by her litigation friend, the Official Solicitor) v Rochdale Borough Council, NHS North, Central and South Manchester Clinical Commissioning Groups,*[94] highlighting the importance of the elderly having their pets with them and that without her dog her quality of life is affected. One participant stated:

"I remember one, a dog that came with the resident, the dog was very elderly as well as the resident, and that's why because they both been together so long that it just would have had a complete negative impact to separate the two…"

Thus, some care homes do appreciate the need for an elderly person to remain living with their companion animals and that separating them is worse for that resident. This is another instance of it being decided on a case-by-case basis.

The less commonly recognised benefits are social benefits, such as community, company, and interaction. This could be due to a lack of information available about the social benefits that pets provide, as it can be seen that most research surround the mental and physical benefits rather than social benefits that the pets offer. The previous researches focus on the elderly person quality of life and combatting loneliness,[95] which was discussed by a participant when asked if they had done any research around the benefits of pets for the elderly:

"As you know it's quite widely appreciated that pets do offer such positive benefits. Erm… especially with the regard to elderly people and combatting loneliness. It is just general information that we have picked up."

These benefits that are recognised have impacted on the manager's decision to have visiting pets, which can be either relative bringing them in or having a pet therapy. All the care home managers that have been interviewed have said that they allow a family member to bring their pet to the care home. One of the participants has stated that when a pet is brought in,

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[93] For example, please see CLH Healthcare, *The Benefits of Pet-Friendly Care Homes*, (7th August 2017) <https://www.clhgroup.co.uk/news-article/2017/08/07/the-benefits-of-pet-friendly-care-homes/254> accessed 30th April 2019

[94] [2016] EWCOP B1

[95] Ian H. Stanley and others, 'Pet Ownership May Attenuate Loneliness Among Older Adult Primary Care Patients Who Live Alone' (2014) 18 Aging & Mental Health

they don't let them have contact with any other resident and they go straight to the resident's room due to the health and safety of other residents and staff. Other care homes have a more communal feeling when a pet comes to visit, the manager allows the pet to be in a communal area so the residents that wish to see the animal have a chance to, which benefits all of the willing residents. In this case, the manager also weighs in the fact of those who do not like animals and allocated the space available based on that, so all the residents can feel comfortable in the care home. The visiting pets allow the residents to enjoy the benefits of the pets without assuming too much responsibility for them. One participant had pointed out:

> *"we have pets regularly, with different relatives who come in…… majority who live in here have got one form of dementia or another and all these mental health issues. Many of the people are not mobile and are not able to take the dogs out for a walk."*

The pet therapies are either from a charity or private pet hires. One of the most popular in Newcastle upon Tyne was the pony hire. Three out of five participants have stated that they hire a pony to walk around the care home and visit residents in their rooms. This service is used quite frequently as one of the participants had stated that it is getting "*more and more difficult"* to book it and that they have gone from getting them every couple of years to now booking the visit once every couple of months. There are other pet therapies used, such as the charity Pets as Therapy (PAT), private hires including ponies and reptiles, as well as people bringing in dogs. These are all very popular ways for the elderly to enjoy animal companionship. This has been confirmed by various charities including Blue Cross and the Cinnamon Trust.[96]

Costs

When discussing the cost of having a pet in the care home, it had included the cost of food, damage to the property, vet, staff costs, and potentially extra pay. All care home managers have stated that the cost of the food is the resident's responsibility which would also include other necessary supplies to look after the pet. This is understandable because the resident would need to pay for these supplies if they did not live in a care home.

Veterinary care

Another cost that would have to be considered by the elderly resident is the cost of the vet. No care home that participated in the research has on-site vet, which is understandable as those homes which allowed pets did not have many to justify getting a vet on the premises. However, the care homes are willing to assist the elderly in getting the pet to and from the vet if this is needed, for example, a family member can't take them. Others wanted the continuation of a specific veterinary practice to, "*try and maintain that normality for them."*

[96] 'The Cinnamon Trust - The National Charity For The Elderly, The Terminally Ill And Their Pets <http://www.cinnamon.org.uk/home.php> accessed 9 December 2018.;
'Pets As Therapy: Animals Helping Humans' <https://petsastherapy.org/> accessed 26th November 2018;
BlueCross, 'Care Home Pet Policies: Ask your MP to help ensure all care homes have a pet policy' <https://www.bluecross.org.uk/care-homes-pet-policies> accessed 26th April 2019

Staff costs

Some care home managers have stated that they are there to assist whenever possible rather than completely take care of the animals. This ties in with the staff costs of those who allow pets, as they do not charge extra for helping to care for it. One of the participants pointed out that their view of a pet living in a care home is an "*extension of the resident"* and animal care is part of the needs of the elderly. However, those participants that have enforced no pet policies have an opposite view on the staffing of caring for the animals. When asked if they would consider ever allowing pets one stated that the cost of any extra care/help needed would not be covered by the care home and *"the staff are here to look after the person, not their animals."* This included any help with the care of the pet and the resident would have to pay staff for the time spent on the animal. It is understandable that this would be a situation in big care homes where there are lots of elderly residents that all need constant care. Taking time to care for an animal could seriously impact on the general duties of the staff which would make the extra pay reasonable. One participant stated, *"We can't accommodate every couple of hours having one of the staff taking a dog for a walk, but I can accommodate 15 minutes every couple of days for a cage to be cleaned out."* Further, one mentioned it would be the same costs as the care for the person:

> *"So for example if we had to go for prearranged appointment to hospital or health centre for an appointment, if they are accompanied by member of staff, then the charge is £14 per hour for that. They would be talking away the job that they are supposed to do. You are looking at £14 as minimum per hour for this. It is a lot of money."*

This may justify their position on having enforced a no pet policy, as the cost of owning a pet in a care home can be substantial.

Damage

The damage that can be caused by pets, and the cost of that damage, is another deterrent, causing some care homes to impose a no pet policy. Those homes that do not allow pets have recognised that animals can cause a lot of damage, including urinating inside, chewing and noise levels. However, some care home managers interviewed saw the damage as being not a big problem and stated *"There might be damage, but it's something that we can always rectify as and when we need to."* They have stated that carpets can be easily replaced as even the elderly could have accidents on them: *"we do replace carpets quite regularly, they would be damaged by the residents themselves".* A participant had stated that if there was any damage to the fire door *"it would be at the expense of the person who's in the room"*.

Responsibility

Responsibility was one of the main concerns of the participants in the study. All of the participants mentioned that, responsibility is something that they must look into properly before letting a pet in. The main question that came up repeatedly was *"who would be responsible for looking after the animals?* This was covered above in relation to costs and staffing.

As stated above, one of the participants said they classify the pet "*as part of the resident's needs*" and an animal is an extension of the resident and "*in order to promote the wellbeing of the resident, you need to take care of the animal*." The staff at a home that does allow pets will help look after a pet if the resident deteriorates in health. However, as the amount of time staff can spend to look after an animal is not unlimited, again the care for the residents always take priority.

Visiting Animals

As stated above, all of the homes allowed pets to visit, regardless of whether they allowed to live on the premises. In fact, one participant mentioned that animals coming to visit *"is the best next thing"*. They all agreed that relatives looking after the animal and bringing it to visit a couple of times a week would be ideal, as that would reduce the staff work and would also significantly minimise the risk of accidents and the threat to health and safety. The people who have had a history of having pets usually welcome the idea of pets being around. These animals included, dogs, ponies, reptiles, etc. The elderly who have lost their pets also – one case was mentioned – can see animals visiting which would cheer them up.

Residents Care

Residents' care always took priority over animals. One of the managers said, in their home, residents are encouraged to be independent, but the staff would help the residents in any way possible to look after the animals, such as cleaning them, exercising animals, feeding them, etc. However, it was said that they can only accept a small number of pets in that case, as more would impact on the staff time.

If the other residents had a safety issue, or allergy issue with the animal, or they just simply did not like animals, the home would be reluctant to accept any pets. There was a couple of mentions of some residents having had to give their pets to family, because the animals were a risk or a nuisance to other residents. Allowing pets in seems like it is on a case-by-case basis, and is decided upon residents needs within the home at the given time.

Dependency and Deterioration

The three managers that allow pets to live in the home, spoke about the benefits of having pets for the elderly. One talked about how in their home they encourage the residents to be active and independent and having pets to look after would give them that sense of purpose. However, the majority said that if the elderly loses her/his ability to care for the animal and becomes unable to care for their pet, then they would refuse to accept the animal.

Almost all of the managers of the homes allowing pets said that, if the resident feels well enough to look after their pet, they are more than happy to support the resident to care for the animal, as the animal is a part of the owner's life and taking the benefits into account, the home would gladly accommodate the animals as well.

There was mixed views as to what would happen if the health of the elderly person were to decline. One participant stated they would try to accommodate for this:

> *"We would try and keep the pet as long as it was possible. Sometimes families will come in and they will do care for the pet, take it out. If that was unable, we would try and accommodate as much as we can, 'cause sometimes people decline only short term and they will get back on their feet. But if it somebody that's been around for a long time with the person, and they have a lot of love for that animal and we will try and keep here, as long as possible."*

This was a very accommodating and pet friendly care home, so it is not surprising that they would like to keep the pet with its owner for as long as possible. They even said that, "*some of the staff would take the dog on, and bring it in on certain days when they were on shift, so that the person still got to see the dogs."* There were other care homes who agreed that they would help to look after a pet when the elderly person's health declined and that staff had taken the pet on themselves.

If the deterioration of health in the resident is permanent, however, then they encourage the relatives to take on the pet, and bring them to visit. This was often a decision made as the elderly person was coming into the care home. For example, one participant stated that there:

> *"was a lady who had a springer spaniel, some sort of spaniel, and we didn't let the dog come…so her daughter had the dog and she would bring it in regularly, so it was kind of the next best thing so. But to be honest, she wouldn't have been able to look after it herself. So it would have been something the staff would have had keep on top of…"*

It really did depend on the size of the care home and how many members of staff they had to how accommodating they could be in this situation.

<u>Hygiene, Health and Safety</u>

Most care homes told us that they had residents with some form of dementia and that some of them are at the high dependency. Some residents lack capacity, they lack insight and awareness and are usually totally dependent on staff. Some have a weak eyesight and some suffer from breathing issues, such as asthma.

In assessing which animals can come and live in the home, and which residents can have their pets with them, they weigh up the positives and also the risks threatening the health and safety of the resident owner, or other residents. If the animal is a cat, the cat tray might cause hygiene concerns and perhaps other health issues. The cat fur might cause breathing problems for asthmatic residents.

It was also suggested that, if a resident has an eyesight problem, it is quite likely that an animal could cause the resident to trip over and fall. Another concern that was talked about was the presence of wheelchairs, walking frames, buzzers going off all the time, and the animals' reaction to those. For example,

> *"we recently have been asked to assess a resident who had their own dog but because of the residents that we have on that floor at the moment use walking frames. We had to outweigh the risk for the residents on that floor which is sad because to see that joy that pets bring when they visit and things like that."*

If the animals are not used to being around other people and the presence of such equipment would have a negative effect on them, then the animals must leave, as the risks are greater than the benefits in that instant.

Some residents do not like animals of certain type and some do not like to be around animals at all. There were quite a few instances where participants spoke about other residents being scared of animals, for example:

> *They have been quite recently. If it would have been on that floor a month ago, that would have been a possibility but again residents have changed on that floor, and their individual needs that I'm lead by and at the moment the lady on that floor is really scared of animals. It is their fear. Also, I have a lot of people who have high risks such as walkers and rollators.*

Others have talked about not wanting to "*isolate anyone in their own home*" by allowing an animal to live in the care home which they are scared of. Some stated this is why visiting animals were better, because they could make sure that resident was in a different room when the animal was on the premises. One participant will move a visiting dog to a different room, if a resident who does not like dogs wants to be in that room. It seems that all care homes will cater for the resident and take their needs into account when animals are in the home. However, one of the managers said that they accept pets, because their presence makes the home feel *"more homely".*

<u>Accidents and Incidents</u>

There were minimal incidents, we were told of, involving animals in the care homes. One incident mentioned by one of the participant involved a dog jumping on a resident and they suffered from a skin tear on their knee. That dog was not allowed on the premises again. Another participant talked about a cat scratching walls and bringing dead birds into the home, which apparently the staff weren't very happy about. However, there were no other incidents

mentioned by any participants of animals causing accidents. Some said that they hoped the "*benefits outweigh the potential for risk"* and this is why they allowed animals to visit.

Policy

Another theme discovered in our research was policy and this was a significant factor when making the decision to either allow pets in the home or not. As stated above, two of the care homes did not allow pets and they stated this was due to their policy. Many of the care homes visited had their own written pet policies with their own guidance on if and under what circumstances pets may live in the home with their owners.

Generally, these pet policies came from an aspect of the wider company policy for all their homes, some of which we managed to obtain copies of from two participants. The first one came from a care home that did not allow pets. The policy states that they do, if it is assessed that the animal is suitable, such as breed and size, how capable the elderly is to look after the pet and that the room is suitable for the animal. Even though this policy is in place, the manager did not allow any pets, mainly out of concern of who will look after the animal. The second pet policy came from a care home who does allow pets to live in the home. This pet policy provided pets are allowed, considering the kind of animal, the ability of the resident to care for the pet, where the pet can be kept and whether it will cause a nuisance or risk to other residents. It states that care staff will not help look after the pet, but in practice this was happening and the staff seemed to be very involved. It also provided guidance as to the responsibilities of the staff in terms of hygiene and infection control. This contrasts the first policy, which states the responsibilities of the residents and requirements of having a pet, but has nothing for the management. Both policies also state that they will help the elderly person re-home their pet, by putting them in contact with relevant organisations.

Therefore, it is clear that there is much influence coming from the managers of care homes, as to whether pets are allowed, rather than the actual company who owns the care home. There may be policies in place, but they are not strictly followed.

Having said this, we had evidence from one care home that hinted at some managerial influence. They were asked if their pet policy was manager dependent, to which they responded by saying *"There is that element and the decision would be definitely influenced by the manager*". This highlights that there is evidence of having some choice across our limited sample and that managers can be influential as to whether a home is pet friendly or not. This is consistent with the situation discussed in Rook's article, of Darcie being removed from a care home and his owner seeking alternative accommodation, due to a change of manager and their resistance of companion animals in care homes.[97]

Another manager had a particular interest in providing democracy for their residents. The home had a strong portfolio of situations they put to a vote for all residents in order to find out their views on different proposed idea to allow the people to have their say. One example

[97] Deborah Rook, 'For The Love Of Darcie: Recognising The Human–Companion Animal Relationship In Housing Law And Policy' (2018) 39 Liverpool Law Review 29

was given of a resident suggesting that they should raise a flag if a resident died, this wasn't agreed to by a majority and therefore didn't happen. They stated that if they were to allow pets, they would do the same thing if the issue of in-house pets were suggested by the management or residents alike, and:

> *"Erm, I think…you know, hopefully, I mean we have residents meeting here and hopefully we run the house to suit the needs of the residents, like a democracy".*

This is an idea that could work across many care homes, to make the decision about what the residents' want as much as what the animals and pet owners want.

Home Layout

Another concern raised on numerous occasions was the issue of whether or not the home layout was practical for animals or whether it "*particularly lends itself very well*" to them living there. One home stated that they allow pets on a certain floor so that they are away from those who do not like animals. This is a good idea and a good compromise to allow a home to have animals without infringing on others in the home that are not so open to having animals around. The size of the rooms and the laying of the communal areas played a significant role in allowing pets in the homes. One of the managers said that they accept pets because "*the homes/flats/rooms belong to people, and the damages caused are usually rectifiable",* so that way other residents can engage with the animal if they choose to. Further, having rooms across different floors could help with managing animals in the care home, with one participant saying, *"it's just a one storey building, one floor…so it would be hard to keep something like a dog or a cat away."* Another care home has rejected animals living with a resident, as there was someone else on the floor who was scared of dogs. Another participant talked about the rooms within the home being quite small and that was mentioned as reason for not letting pets in, as the animals cannot be completely kept away from other residents.

Risk Assessments and Procedures

We also tried to find out more about any policies or limitations for visiting animals. All of the care homes stated they do have visiting animals, whether this is by resident's families bringing their pets (or the resident's old pets) or by local charities and organisations that specialise in providing animal experiences for the elderly.

The first thing we found was that most of the care homes did not have a particular procedure or any guidance on visiting pets. This meant that essentially, any pets or animals could visit with very little limitations. There were no risk assessment guidelines to follow and when asked, none of them seemed too concerned by this, but most did do some kind of risk assessment. This was something that is strange considering how strict some of the homes were about pets living in the home they seemed quite relaxed about having animals in.

Having said this, it could be down to the fact that the managers acknowledged the fact that they don't have the responsibility of the animals when they are visiting, the responsibility would lay with the families or charities bringing the animals in, and this could be why they don't feel like it is necessary to have a clear procedure for the animals. However, one did say that they "*have a risk assessment in place because we have got a lady who is really scared of*

animals", showing acknowledgement for the preferences of the residents. The care home had a two-storey structure and the lady was "*ruled out of that floor at the moment".*

Opening the Floodgates

One participant had an interesting perspective on having a set pet policy. They were concerned that if they had a pet policy stating pets were allowed that this would "*open the floodgates*" and the homes would have as many animal residents as they would human residents. Some of the care homes we spoke to have up to 47 rooms in their care homes, so if they allowed every resident to have a pet, this could potentially be a lot of animals on the premises at one time.

This is something that might be able to be controlled for by allowing for pet policies to be tailored to the home. Whether this is related to the type of animals that are allowed or the number of animals allowed in the home at any one time. Providing this variety will make it easier for residents choosing a care home, as they will now cater for all preferences and also for the care homes to manage the animals that come in to the home.

Law

There was also the issue of the law relating to this matter, or noticeably a lack of legal knowledge on the legality of animals in care homes. From the literature used in our background research, it is clear that there actually isn't a lot of substantive law out there on the area and, therefore, we were not surprised by this lack of knowledge displayed by the managers. This is a large part of the problem, if there is no real guidance on the legal matters as well as the legal consequences, how are the managers meant to know what to do and the legality of their actions?

External Factors

We also asked participants about external factors such as their tenancy agreements and any issues regarding their landlord or leases. All the care homes stated they were not aware of any restriction on their leases or deeds which limits the amount of animals they can have on the property. Again, it seems to be the individual homes and their owners making the decision on pets in the homes not wider external factors.

Banning 'No Pet' Clauses

With regards to the potential option favoured by Scottish Labour, of making the use of no pet clauses illegal, all of the managers stated this would be unfair and they believed that the individual care homes, or the care home companies should have the right to decide their own pet policies based on the practicalities and personal preferences. One stated, "*it should be up to the individual place…what suits the house and the people that are living in it*", which sums up the views of the managers well. Another stated, "*I cannot speak for that personally, it would have to be a decision made by the company. There would be a meeting with senior management team and there would be a policy formed to say how the company would respond to that".* Another participant emphasised that a blanket ban is not suitable for care homes, stating:

> *"People from outside making that decision that pets are allowed in, they don't know the building, they don't know the client that is in there, so they cannot make that decision on a whole basis. It's gotta be at that time and what's best for the building at that time. I don't think anyone should have a no-pet policy, I think they should have to make that decision at the time and whether it's around the clients that they've got in the home."*

All the homes, however, did agree that there should be more transparency with their pet policies and allow for more knowledge and choice to be available for prospective residents to allow them to make a better-informed decision.

Choice

One issue that was frequently mentioned, as discussed above, was the negative impact that animals living in the care home could have on particular residents who were at risk of being distressed by their presence. Concern about residents' choice was more apparent in relation to animals living-in rather than visiting animals, as it has more of an impact on the residents. These concerns often related to space and the challenge of restricting the movements of animals within the home.

Choice of Interaction with Animals

None of the homes had a communal animal that lived within the house. One of the managers spoke about thinking of getting a dog for the house, but he mentioned such plan was not feasible, as the animal could not stay at the home overnight for more than three nights a week and transportation was not really practical. Another mentioned a care home they worked at previously which had a communal animal:

> *"years ago I did work in a place, we are talking years ago like 25 years ago, but I was quite shocked when I went there and there was a dog, there was a daschuand and it was enormous, bless it. Everyone just kept…it got all the tip bits, all the leftovers so it was really chunk. And when I got there, there was a bit of an issue with the garden and who was going to clean up the muck and stuff like that and that was a whole thing."*

It seems that even when a care home has a communal animal, this brings its own difficulties. Further, the managers did not seem to have any knowledge of s.9 of the Animal Welfare Act 2006, so possibly would not realise that there is this duty to ensure welfare of the animal.

Other spoke about preferring visiting pets, or pets that could live outside, so that the residents could have some contact and responsibility, without the risks attached with the animal being inside. For example, a participant stated:

> *"Like chickens…or something like that. I think that would be a bit of an interesting, so that residents, those who are able, could…could be proactive in keeping an eye on them and make sure they are looked after. Or if they weren't in to that, Just as a point of interest… that there is something there*

erm. But me personally, I would be more inclined…to…something outside than something inside."

Again, it is about giving the residents the choice of how much they engage and interact with animals and being able to distance themselves from that if they want to. This was addressed especially in the Ohio University research where, they suggested ways to maximise benefits and reduce risk in facilities by taking simple steps such as, choosing the best animal, as they suggested older and more mature animals can reduce some of the risks such as scratches or bites. The next recommended step is to ensure safe interactions between people and animals, require evidence of proper animal care, and create animal safety and cleanliness protocols for the facility.[98]

Choice of Pet Friendly Care Homes

All the participants talked about how important it is for the elderly to have the option of moving into a home that would accommodate their needs, such as providing for their pets, but they also mentioned that considering the number of residents, the care home and its manager in particular, should take all those needs of all the residents into account and decide whether an animal is going to be accepted by all the residents in the home.

Most participants stated that they would support a choice of a care home with animals and ones without, one stating:

"I agree that there should be all those choices out there. And that if every care home did something a little bit different and when people were looking they would think, yeah that's the one for me…because it does that thing I like…so….if they have pets and somebody is really in to that then it's great for them and if someone doesn't, then they can look for somewhere that doesn't do that…so it should be a choice."

This same participant highlighted the reason for this is because they think more people have dogs now than they used to, so this is going to become a bigger issue in the future. Ultimately, it was about being able to choose a home environment which is suitable for the elderly person, whether or not they want to be around animals, and that *"they should have that right a well to go to a home that environment is available."*

Some said if a resident chooses to give up their animals and move into the home – on which two cases were mentioned – if it was practical, they ask relatives to take the animal in. If this is not possible, they would help the resident to rehome the animal or would ask relevant charities to help them look after and rehome the animal. The managers sometimes weren't sure where the animal had been rehomed to, even though the resident had asked about the dog. It seems, from our data, that care homes will actively help residents, existing or potential, to rehome their animals, particularly in a way that they can still see them. There are some, however, who have such a blanket 'no pet' policy, that the choice is to give up the pet, however that happens, or to find alternative living arrangement.

[98] Ohio State University, *Model Animal Protocols for Long-Term Care Facilities*, <https://kb.osu.edu/bitstream/handle/1811/79017/Model_Animal_Protocols_for_LTCF.pdf?sequence=10&isAllowed=y> accessed on 26th April 2019

Recommendations for Reform

Managers do recognise some of the benefits that the elderly can receive from a pet. However, this knowledge is very limited and only scratches the surface of the true potential that pets can offer and we think that there could be more education provided for care homes around the need for elderly residents to be housed with their companion animals. Therefore, as a recommendation, it is suggested that there should be more information available for the care homes that teaches the managers of the potential benefits for the elderly with having a pet around. This approach was already implemented by the SCAS 'Pets for Life Campaign'.[99] Only one participant seemed to have done research around the benefits of pets and, whilst the other participants appreciated this benefit, they did not all seem fully aware of the importance. As stated in the Rowntree Foundation report, the lack of knowledge about the benefits is one of the reasons for having a 'no pet' policy.[100] It will be useful for care homes to know of this benefit in more detail and be provided with guidance and support of how to accommodate these needs. Further, it may be useful to provide them with detailed guidance on the Animal Welfare Act 2006, specifically s.9, and what duties are placed upon them should they accept an animal into the home.

It was difficult for us to say with confidence which care home operated best, in terms of their pet policies. All care home managers appreciated the importance of animals for some elderly people and did try to cater for this. The position, however is much more difficult than simply allowing pets to enter a care home. The ability to do this depend on staffing, the elderly persons and their needs, the needs of other residents and the layout of the home. Due to this, we do not think it would be appropriate to enforce care homes to allow in all pets, but there does need to be more regulation in place. The decision of whether to allow pets was dependant on the manager, regardless of the care home pet policy, so it could be a luck of the draw situation, as to whether a companion animal can accompany their own into the care home. There did not seem to be any further regulatory or statutory duties on these care homes and, even if they state in their pet policy that they allowed pets, if the manager did not want this it was not allowed. Even if the care home did have a pet policy which allowed resident to bring their pets in, this did not happen if the care home manager was against it. There needs to be more consistency between approaches of care homes and it seems that the only way to provide this is through some kind of statutory procedures and guidance for best practice. Further, there needs to be more information for the residents as to whether or not pets are allowed and, if so, what kinds of animals are allowed. We found that even where care homes did allow pets, there were no residents with pets at the time of the interview. Perhaps if there was better signposting to care homes which allow pets, more elderly people will be able to continue living with their companion animals.

We think that the Care Homes and Sheltered Accommodation (Domestic Pets) Bill was suitable and that it should be reintroduced. When studying s1(2) of the Bill, and when a care home manager can refuse permission for a resident to keep a domestic pet, it is

[99]Society for Companion Animal 'Pets For Life Campaign' (2013) <http://www.scas.org.uk/human-animal-bond/pets-and-older-people/pets-for-life-campaign/> accessed 29th March 2019

[100] Society for Companion Animal Studies, 'Pets And Older People In Residential Care' (2008) <http://176.32.230.19/scas.org.uk/wp-content/uploads/2013/03/3.Pets_and_older_people_report.pdf> accessed 3rd December 2018.

recommended that this include where the layout of the care home is not suitable for certain animals, such as dogs, due to a lack of outside space and small individual rooms. This will be consistent with what the participants were highlighting, particularly that it should be the choice of a home as to whether they allow companion animals into it. Further, we like the idea one of the participants presented, that their care home runs on a democracy and the residents should also be able to have a say in which animals are brought into their home. It may be difficult in practice, but we recommend that local authorities and care homes work together, to perhaps provide homes which are pet friendly, allowing animals to live in with their owners, or give the elderly the choice of moving into a care home which does not have pets. The participants seemed to prefer this option, as it caters for the elderly, but does not put unreasonable obligations on some care homes where it is not suitable for an animal to live.

Conclusion

The research team are confident that the research aims of this project were met. For ease of the reader, the research aims were to identify:

- The prevalence of difficulties faced by the elderly population within Newcastle upon Tyne to find accommodation (whether sheltered or in care homes) with their companion animal;
- The reasons why elderly people with companion animals are unable to access accommodation with their companion animals and whether this is due to legal and/or regulatory factors or a perception of the same or other reasons.
- Any steps that could be taken to reduce the obstacles faced by elderly owners of companion animals who are entering the care system or need for sheltered accommodation.

We discovered the difficulties care home managers face with housing the elderly population with their pets in Newcastle upon Tyne and have explored these in some detail with the participants. The findings are, in some ways, consistent with previous studies, but, in other ways, original for the subject area.

We understand that there were some limitations to this study, particularly the small sample size. We are not claiming, however, that this study provide results that can be generalised or that it provides a complete overview of the issues in this area. What we would like to encourage is others to do similar studies in this area, to compare the results with ours, and provide a larger study across England.

Overall, we have found that the reasons for care homes allowing, or not allowing, pets is not black and white. There are various reasons, such as the layout of the home or staffing issues, which can prevent or make care homes reluctant to take companion animals into the home with their owner. We are reluctant to say that legislation should be introduced which will result in all care homes having this requirement, but encourage this to be explored further, ensuring that guidance is in place to support care home managers.

Appendices

Appendix 1

Information for Participants

Amy Millross, Ellen Martin, Golora Bozorg and Marija Bilerte are full-time students in the Policy Clinic, Student Law Office at Northumbria University. We are undertaking this research for the UK Centre for Animal Law (ALAW). The aim is to explore the Human-Animal relationship between the elderly and their companion animals and we are exploring the difficulties the elderly face to find supported accommodation / care homes that with their companion animals, as well as finding out if there are any reasons why they are unable to stay with their companion animals institutionally. This document sets out the background to the study as a whole and provides detailed information about the part of the study in which you are invited to participate. If there are any questions that are not answered here, please contact us or our supervisor for further information at:

Student Law Office, Northumbria School of Law, 0191 227 3909 SLO1113@nortumbria.ac.uk	Dr Rachel Dunn (Supervisor) Northumbria School of Law, 0191 227 3311 rachel2.dunn@northumbria.ac.uk

The issues of housing the elderly with their companion animals

The purpose of this study is to find out two things. Firstly we want to gain an understanding of the views of residents of care homes / supported accommodation on companion animals and collect any experiences or stories to do with their companion animals being accepted or denied into the accommodation. Secondly, we want to find out the similarities and differences of the care homes or supported accommodation with regards to pet policies and how they are enforced and regulated. This research will contribute to the debate about whether or not the law regarding pet ownership in supported care is in need of reform. We will provide this data through a selection of methods:

- A review of literature on the matter of Human-Animal relationships and the benefits of pets for their owners.
- A comparative review of different law and regulations on pet ownership in similar situations across different jurisdictions.
- Interviews with the Managers and/or care-workers of the facilities to find out more about individual pet policies and reasons for allowing or not allowing pets (using audio recording)

What being involved in the research will mean?

Your participation in this study is voluntary. After signing this form you can withdraw from the study at any time and you will not be asked any questions as to why you no longer wish to take part. If you do withdraw from the study, you may request to re-join at any time; it is at our discretion if you are able to participate again.

Participation in this study means you provide us with permission to use the data we collect in the group interviews or interviews in the research project and any subsequent publications, by Northumbria University Law School and/or ALAW. Your responses will be combined with that of other participants during the analysis of the responses. Information about individuals or any personal data will not be used in any published reports.

Risks and Benefits of being in the study

There is no risk in participating in this study, however we are going to be discussing a topic that could potentially cause some upset to some participants. If at any point you feel upset by discussing the matters, you have the right to stop the discussion.

Your participation and opinions may prompt new perspectives and ideas which may be beneficial in the future. If you do not receive a direct benefit from your participation in this study, others may ultimately benefit from the knowledge obtained.

Confidentiality

The records of this study will be kept confidential to the extent of the General Data Protection Regulation (GDPR) and the Data Protection Act 2018. In any reports on the study, we will not include any personal information that will make it possible to identify any individual or group (for example, participants will be given a letter – Participant A – to not be identifiable). If an individual can be identified by the nature of their role, specific consent to waive confidentiality will be agreed and all written material will be subject to their scrutiny before publication. The audio data collected will not be included within the published research, only the information gained from them. This may include words you have said.

Electronic copies of data, including the audio, will be stored within a secured file, which can only be accessed by the members of the research team, on a password-protected computer in the Student Law Office. The file is stored on a secure drive that cannot be accessed outside of the office. Extracts may be shared and viewed by the research team and the organisation instructing the research, and publications will be generated based on the data. All documentation will be made anonymous prior to this to maintain participant confidentiality. A copy of the data will also be stored on the Supervisor's password-protected computer, in a locked office.

The audio recordings on the Dictaphone will be deleted within two weeks of the initial recording. The saved audio recordings will be deleted from the Student Law Office university computers after the research project has finished. However, electronic copies will be retained by the Supervisor for up to 1 year any electronic and hard copies will be held for a period of up to 6 years in the Student Law Office. Within this time you may request to see any data collected in this particular study. However, as stated above, all names of individuals will not be used and supported accommodation/care home facilities will be given a letter instead of their usual name.

Consent to Participate in the Element of the Study

You will be participating in an interview. You will be participating in face-to-face interviews (telephone interviews where face-to-face is not practical or feasible). We will use a Dictaphone to capture your voice to enable us to make transcripts of your comments. Interviews are expected to last around 30-60 minutes.

- ☐ I have read and understand the study that I will be participating in;
- ☐ I have been given an opportunity to ask questions about the study;

- ☐ I understand that taking part in the study will include being audio recorded;
- ☐ I have been given adequate time to consider my decision to participate;
- ☐ I understand that any of my personal details, such as my name, will not be revealed to anyone outside of the research team;
- ☐ I understand that my words may be quoted in publications, reports and other research outputs but my name will not be used;
- ☐ I understand I can withdraw from the study at any time and I will not be asked any questions about why I no longer wish to take part.
- ☐ I agree to participate in the study;

I agree to the University of Northumbria University at Newcastle recording and processing this information about me. I understand that this information will be used only for the purpose(s) set out in this information sheet supplied to me, and my consent is conditional upon the university complying with its duties obligations under the Data Protection Act 2018.

Name of Participant: Date:

Name of Researcher: Date:

Appendix 2

Dear (Managers name),

We hope this email finds you well.

We are Marija Bilerte, Amy Millross, Golara Bozorg and Ellen Martin, students from Northumbria University's Student Law Office, working alongside UK Centre for Animal Law (ALAW) on a research project entitled 'The difficulty for the elderly population and companion animals to remain living together in supported accommodation/care homes'. We are supervised by Dr Rachel Dunn on this project.

The purpose of the research is to:

- recognise the difficulty that elderly people face finding accommodation with their companion animal;
- reasons why the elderly may be unable to access accommodation with their companion animal;
- identifying organisations which allow this and their practices and procedures;
- and identifying any steps that could be taken to reduce obstacles faced by the elderly who are entering the care system.

There are many benefits of elderly persons living with their companion animals. So far, however, we have discovered there is often a problem of the elderly having to rehome their companion animals, as some supported accommodations do not allow pets as part of their policies.

We are inviting care home managers and residents to participate in interviews to discuss their views on housing the elderly with their companion animals in supported accommodation/care homes and any reasons why you would believe there is a problem with housing the elderly with pets. The information collected will be used to help us explain what the problems you may be facing and what guidance and/or legislation could be put in place to help the elderly be housed with their companion animals. The interview could take place at your supported accommodation/care home or over the phone. We would like to know if you would be able to express your views on this subject.

If you have any questions about the project then please contact us. You can contact us via email at la.studentlawoffice@northumbria.ac.uk or our supervisor at rachel2.dunn@northumbria.ac.uk and we will be happy to discuss any questions you may have.

Yours Faithfully,

Marija Bilerte, Amy Millross and Golara Bozorg

Student Advisors

Northumbria Student Law Office

Appendix 3

1. Do you allow pets in your accommodation?

IF YES:

1. Does the setting have a policy or guidance about keeping pets in the accommodation?
   - If yes, what is it? What's the procedure?
   - Where does the guidance come from? Was it made internally or are you using an external source?
   - What sort of issues are covered in the guidance? (ASK FOR MATERIALS)
   - Are you aware of (or do you refer to) guidance or information published by any of the companion animal charities, such as RSPCA, PDSA etc…

2. Have you found there to be benefits to residents in the setting of having pets?
   - If yes, what benefits?
   - Do you think they are important for the care home residents?

3. Have you experienced any problems with having pets in the setting, in terms of noise, mess, damage to property and/ or health?
   - If yes, what are the problems and how do you overcome them in the setting?
   - Where are they allowed in the setting?
   - Who is responsible for feeding, exercising and cleaning up after pets?

4. What happens to a pet if the owner dies?

5. Do you charge an increased rent for those with pets?

6. Do you have on-site / accessible vets?
   - Who bears the cost of this?

IF NO:

1. Do you have any reasons for not allowing pets?
   - What internal information or guidance do you rely upon?
   - Are there any external factors that you are aware of prohibiting pets in the setting?

2. Would you ever consider allowing pets?
   - If yes, what would make you consider this?
   - If no, what is the biggest factor for not considering it?

LEGAL:

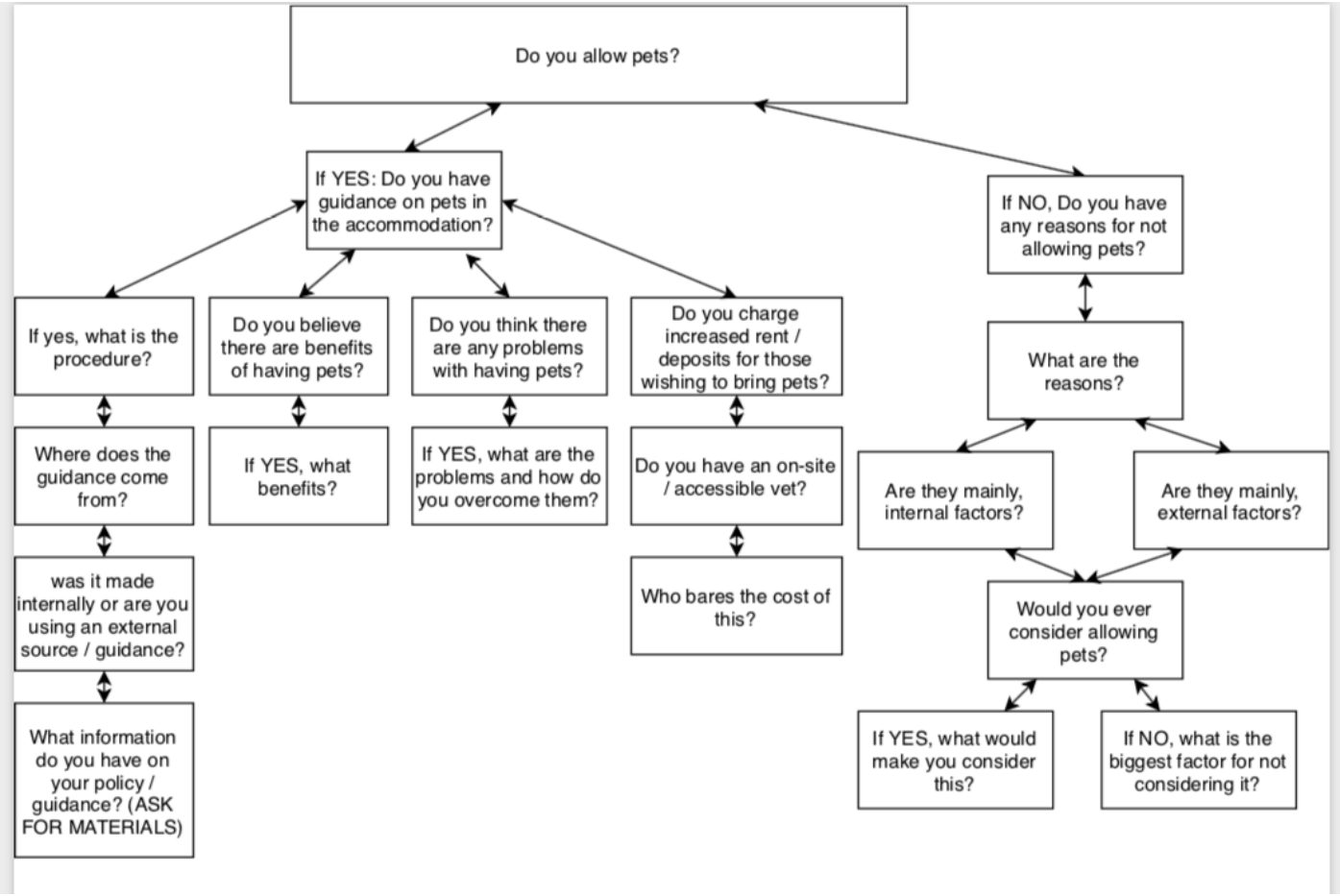
1. What knowledge do you have on the law surrounding pets in supported accommodation?

2. Would you like there to be more guidance in the law on this matter?
   - Do you think there should be legislation on this area of law?

- How would you feel if ‘no pet’ clauses were made illegal?

3. If legislation was passed, what would you want the law to cover?
   - And what would you not like to be included in it?

Appendix 4


Do you allow pets?
If YES: Do you have guidance on pets in the accommodation?
If NO, Do you have any reasons for not allowing pets?
If yes, what is the procedure?
Do you believe there are benefits of having pets?
Do you think there are any problems with having pets?
Do you charge increased rent / deposits for those wishing to bring pets?
What are the reasons?
Where does the guidance come from?
If YES, what benefits?
If YES, what are the problems and how do you overcome them?
Do you have an on-site / accessible vet?
Are they mainly, internal factors?
Are they mainly, external factors?
was it made internally or are you using an external source / guidance?
Who bares the cost of this?
Would you ever consider allowing pets?
What information do you have on your policy / guidance? (ASK FOR MATERIALS)
If YES, what would make you consider this?
If NO, what is the biggest factor for not considering it?

Northumbria University
NEWCASTLE

"Intoxication in Criminal Law – An Analysis of the Practical Implications of the Ivey v Genting Casinos case on the Majewski Rule"

Lucy Dougall

Introduction

The aim of this article is to consider the way intoxication works within criminal law, and how the application can differ depending on the category of the crime. In particular, it considers how the doctrine of intoxication applies to property offences, and how that application may be affected by the Supreme Court decision in *Ivey v Genting Casinos.* Due to the proportion of crimes committed containing an element of intoxication,[1] it is important that the law in this area works effectively and consistently, in order for all members of the public to understand their legal position. Specifically, the law should be fair on defendants but also should be interpreted in a way that protects public safety. There have been numerous debates[2] amongst academics about the intoxication doctrine, and whether it works in the way that protects the people it should.

Within England and Wales, many offenders commit crimes while under the influence of alcohol, making the law surrounding intoxication something of considerable importance. According to the March 2015 Crime Survey for England and Wales[3]; victims of violent incidents believed that the offenders were under the influence of alcohol in 47% of cases[4]. Despite the vast amount of alcohol related violent incidents, there seems to have been a decreasing number over the last ten years. Violent incidents in general have also decreased suggesting the proportion has remained similar. Between April 2005 and March 2015, the figures fluxuated, but the proportion remained between 45% and 55%.[5] In the 2013/14 Survey[6], in 54% of alcohol-related violent incidents the offender was aged

[1] Law Commission, *Intoxication and Criminal Liability* (Law Com No 314, 2009) para 1.1
[2] Eric Colvin, 'Codification and Reform of the Intoxication Defence' (1983) 26(1) Crim LQ 43
[3] John Flatley, 'Violent Crime and Sexual Offences - Alcohol-Related Violence' (*Office for National Statistics*, 12th February 2015) <https://www.ons.gov.uk/peoplepopulationandcommunity/crimeandjustice/compendium/focusonviolentcrimeandsexualoffences/2015-02-12/chapter5violentcrimeandsexualoffencesalcoholrelatedviolence> accessed 3rd September 2018
[4] ibid
[5] ibid
[6] ibid

between 16 and 24 years old. In 42% of incidents, the offender was between 25 and 39 years old.[7] This not only shows how commonplace offences involving intoxication are, but it presents the matter that it is an issue for the younger generation. This provides further evidence as to the importance of an appropriate body of law surrounding offences involving intoxication.

These statistics demonstrate the relevance of intoxication in relation to the Law. It further extends to the cost of crimes committed under the influence. In the UK, alcohol-related crime costs between £8 billion and £13 billion[8]. This highlights the importance of the law relating to intoxication in order to be fair and just for defendants as well as for the victims.

In most cases, law involving intoxication centres around the assumption that the intoxication is self-induced or voluntary[9]. Intoxication is often labelled as a defence[10], however, that description tends to divide academics[11]. Technically, there is no 'intoxication defence' that an individual can rely on, within either common law or statute. Rather, that the presence of intoxication can make it harder for someone to be prosecuted[12], and to this extent it resembles a defence.

The underlying principles of criminal law dictate that there has to be an actus reus and a mens rea, and that both elements must be proved by the prosecution beyond reasonable doubt in order for someone to be found guilty[13]. In order for a person (D) to be liable for any criminal offence, D must firstly commit the external element of that offence, called the actus reus[14]. This can include an act or potentially the failure to act[15]. In the case of a battery[16], this could possibly include

[7] Ibid
[8] 'Alcohol statistics' (*Alcohol Concern,* 4th August 2016) <https://www.alcoholconcern.org.uk/alcohol-statistics> accessed 3rd September 2018
[9] Law Commission, *Intoxication and Criminal Liability* (Law Com No 314, 2009) para 1.15
[10] A.P. Simester, 'Intoxication Is Never A Defence' (2009) Crim. L.R. 3, 3-14
[11] ibid
[12] Law Commission, *Intoxication and Criminal Liability* (Law Com No 314, 2009) para 1.15
[13] Martin Friedland, 'Beyond a Reasonable Doubt: Does it Apply to Finding the Law as Well as the Facts' (2015) 62(4) Crim LQ 428
[14] Law Commission, *Intoxication and Criminal Liability* (Law Com No 314, 2009) paras 1.19-1.14
[15] R v *Pittwood* [1902] TLR 37
[16] R v *Ireland* [1997] 3 WLR 534 (Steyn LJ)

D punching another (V). The external element of this crime would be the physical act of punching. In the case of a murder[17], if D were to fatally stab V, the external element of this crime would be the physical act of stabbing V. In the case of a theft[18], the external element would be the physical act of taking an item, for example taking a purse off a table. This element of the offence must be present in order to prosecute and convict D[19].

The second part of a criminal offence involves an element of fault[20]. Although this is not present in all criminal offences, it is the most relevant part of an offence in relation to intoxication. This element refers to the mental element of an offence, often referred to as the mens rea[21]. This varies dependent on the offence involved. In the case of the battery[22] used above, the mens rea element would be either the intention for D to apply unlawful force through punching V or being reckless as to the application of such force. In the case of the murder[23], the mens rea would be the intention to kill or cause grievous bodily harm to V through the stabbing[24]. In the case of the example of theft[25] given above, the mens rea would be dishonestly taking the purse from the table, with the intention of permanently depriving the owner of that purse. This would mean never to return the purse to the owner.

The prosecution is required to prove both the external element (actus reus) and the fault element (mens rea)[26]. Generally, the physical element of criminal offences remains relatively simple to determine. However, understanding whether the mens rea element has occurred within a particular criminal act can cause a lot of difficulty to prove in court. In particular, it has more bearing than the actus reus does on how an offence is dealt with when it comes to the

[17] Sir Edward Coke (Institutes of the Laws of England, 1797), R v Moloney [1985] AC 905
[18] Theft Act 1968, s.1(1)
[19] Law Commission, *Intoxication and Criminal Liability* (Law Com No 314, 2009) paras 1.9-1.11
[20] Ibid, para 1.12
[21] R v *Moloney* [1985] AC 905
[22] R v *Ireland* [1997] 3 WLR 534 (Steyn LJ)
[23] Sir Edward Coke (Institutes of the Laws of England, 1797), R v Moloney [1985] AC 905
[24] R v *Moloney* [1985] AC 905
[25] Theft Act 1968, s.1(1)
[26] Martin Friedland, 'Beyond a Reasonable Doubt: Does it Apply to Finding the Law as Well as the Facts' (2015) 62(4) Crim LQ 428

intoxication doctrine. If this cannot be done due to the presence of intoxication, there is a possibility that D will be acquitted. This is however only with a certain class of offences, where the mens rea is that of 'specific intent' rather than 'basic intent'[27].

The terms 'basic' and 'specific intent' have been interpreted by both academics and by judges to mean different things. There is no universal or codified definition for either term[28]. The distinction between them arose in the case of *Majewski*[29]. The defendant in this case was charged with four counts of ABH and three counts of assaulting a police constable. He claimed that due to his voluntary intoxication, he did not have the appropriate mens rea in order to be convicted. It was found in this case that the crime was of basic intent, therefore he was unable to use his intoxication to prevent a conviction[30].

In this case, although all judges were unanimous on the resulting verdict, all but one out of the seven had varying judgements containing differing definitions of the terms 'basic' and 'specific intent'[31]. As the entire intoxication doctrine is interpreted based on the distinction between 'basic' and 'specific intent'- it seems that more clarity is needed when it comes to the definitions to ensure that the law can be interpreted in a fair and consistent way[32].

'Basic intent' has been interpreted as meaning an offence that not does not have a 'specific fault requirement of intention'.[33] This includes the offence of battery, as the mens rea element can include recklessness as to the application of force[34]. If D was intoxicated, and he was throwing around his arms with clenched fists and accidentally punched V in the face, this could still potentially be a battery. In cases involving a 'basic intent' offence, the prosecution can establish the mens rea, even

[27] *DPP v Majewski* [1977] AC 443
[28] Law Commission, *Intoxication and Criminal Liability* (Law Com No 314, 2009) para 2.3
[29] *DPP v Majewski* [1977] AC 443
[30] Ibid
[31] *DPP v Majewski* [1977] AC 443
[32] Law Commission, *Intoxication and Criminal Liability* (Law Com No 314, 2009) para 1.74
[33] Ibid, paras 2.4-2.7
[34] R v Ireland [1997] 3 WLR 534 (Steyn LJ)

if that required element was not actually present. Even if D did not have any foresight as to risk of injury at the time, the jury (or tribunal of fact) will be asked to decide whether D would have had the necessary mens rea if they had been sober [35]. The presence of intoxication in these circumstances does not automatically prove the existence of mens rea, it allows the prosecution to ask the jury to consider whether they would have had it if they had not been intoxicated[36].

The judgements in *Majewski*[37] suggest that there are two types of 'specific intent' offences. The first labelled by Lord Elwyn Jones as a crime with 'ulterior intent'[38]. This is where the mens rea of the crime goes beyond the actus reus[39]. An example of this type of offence would be theft[40].The actus reus requires D to 'appropriate property belonging to another' for them to be found guilty of this offence[41]. The mere actus reus on its own does not actually constitute a crime. To pick up a pen of another person is technically 'appropriating property belonging to another'[42]. However, it would not be considered to be a theft due to the absence of the mens rea components. Simply appropriating an item in itself will not constitute a theft, the 'dishonesty' in relation to that appropriation and the 'intention to permanently deprive', will. Therefore, the criminal nature of this offence is nestled within the mens rea. It determines the criminal character of the entire crime[43]. Compared to the definition of a 'basic intent' offence, the mens rea of theft does go beyond the actus reus, meaning it will be classed as a 'specific intent' crime.

Lord Simon identified the other type of offence as 'purposive intent' [44]. This denotes simply an intention rather than recklessness[45]. For example, with murder, the mens rea is either an intention to kill or the intention to cause serious harm[46].

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[35] *R. v Aitken, R. v Bennett, R. v Barson* [1992] 1 W.L.R. 1006
[36] *DPP v Majewski* [1977] AC 443
[37] *DPP v Majewski* [1977] AC 443
[38] Law Commission, *Intoxication and Criminal Liability* (Law Com No 314, 2009) para 2.8
[39] *DPP v Majewski* [1977] A.C. 443
[40] Theft Act 1968, s 1(1)
[41] Ibid, ss.3, 4 and 5
[42] Theft Act 1968, ss.3, 4 and 5
[43] A.P. Simester, 'Intoxication Is Never A Defence' (2009) Crim. L.R. 3, 3-14
[44] *DPP v Majewski* [1977] A.C. 443, 480
[45] Ibid, (Simon LJ)
[46] *R. v Cunningham* [1982] A.C. 566, Homicide Act 1957, s1(1)

For this offence, recklessness would not suffice so it is an offence with purposive intent[47].

This distinction between basic and specific intent takes into account moral sensitivity by excluding specific intent offences from the doctrine. For offences with a more serious mens rea, an intoxicated wrongdoer is not held to the same standard as the most serious offender for that crime[48]. Rather than intoxication acting as a defence, it really just prohibits the prosecution from being able to prove the presence of mens rea in cases where there is 'specific intent'.

The structure of this article reflects an important contrast between offences of violence and offences against property. With violent offences, generally there is some form of overlap of the actus reus between two separate offences within the same class. With both section 18[49] and section 20[50] for Grievous Bodily Harm ('GBH'), the actus reus is the same, the only differentiating factor is the mens rea[51]. This is the same distinction between murder[52] and manslaughter[53]. The result is the death of the victim, but the mens rea for each crime differs. One crime is specific, the other is basic. This allows for the prosecution to prosecute a defendant for section 20[54] and manslaughter when they are generally unable to prosecute for section 18 offences or murder. This is since both section 20[55] and manslaughter are of 'basic intent', whereas section 18 and murder are of 'specific' intent. Section I will discuss how intoxication works in relation to these offences. It will also highlight a brief overview of the rationale behind the way intoxication works for both 'specific' and 'basic intent' crimes.

As there are numerous property offences that fit within the definition of 'ulterior intent' and therefore 'specific intent', there is a potential for defendants to evade

[47] *DPP v Majewski* [1977] A.C. 443, 480
[48] A.P. Simester, 'Intoxication Is Never A Defence' (2009) Crim. L.R. 3, 3-14
[49] Offences Against the Person Act 1861, s.18
[50] ibid, s.20
[51] ibid, ss.18 and 20
[52] Sir Edward Coke (Institutes of the Laws of England, 1797)
[53] *R v Fenton* (1830) 1 Lew CC 179
[54] Offences Against the Person Act 1861, s.20
[55] Ibid

liability when intoxicated. There are no offences that have an overlapping actus reus with theft, robbery and burglary and therefore have no corresponding offences that the defendant can be charged with. The issue with this is that the prosecution may be unable to prosecute a defendant for any type of property offence if the presence of intoxication prevents them from being able to establish the fault element of that offence. This inconsistency will be discussed further in Section II. This Section will also analyse the change made to the dishonesty test for theft. This change essentially transformed the original objective *and* subjective test into an objective test. This Section will explore the potential implications of the judgement in *Ivey v Genting Casino*[56] on the doctrine of intoxication and whether this change will affect the way offenders can be prosecuted in property cases involving intoxication.

Section III will go on to discuss potential ideas for reform in order to alleviate any problems discussed in the previous sections. Ideas will include all relevant reforms proposed by The Law Commission[57] as well as the potential relationship between proposed reforms and the changes arising from the *Ivey* decision. All ideas will then be analysed and compared to our current model, to understand whether reforms and codification would result in the desired effect on the justice system and society as a whole.

Although it can be argued that issues with intoxication tend not to cause many difficulties in practice, the doctrine should work in a way that allows for culpability to be taken into account. Individuals should be able to follow the law with the expectation that they will be judged accordingly. Issues with intoxication seem to be getting progressively worse, particularly due to the growing culture surrounding drugs. It is important to understand the way intoxication can and should be interpreted to validate the position for future offenders[58]. This article aims to create a compromise between the importance of accurate culpability and public safety, with reference to the significance of codification.

[56] *Ivey v Genting Casinos UK Ltd (t/a Crockfords Club)* [2018] A.C. 391
[57] Law Commission, *Intoxication and Criminal Liability* (Law Com No 314, 2009)
[58] Law Commission, *Intoxication and Criminal Liability* (Law Com No 314, 2009), para 3.8

I. Offences Against the Person

Violent Offences – Basic Intent

To properly understand the relationship between 'basic' and 'specific' offences and the doctrine of intoxication, it is important to dissect the definitions of each offence. Assault and battery are examples of basic intent offences, as they both require an element of recklessness as the mens rea. They can be committed with intent; however, it is important to note that recklessness *could* suffice. The definitions for both assault and battery are set out in case law, neither have a statutory definition. The definition for assault is where D 'intentionally or recklessly causes V to apprehend immediate unlawful personal violence'[59]. The mens rea for this crime can either be intentional, or it can be that D was reckless as to whether any apprehension was caused to V.

The definition of battery is the 'unlawful application of force by the defendant upon the victim'[60]. The mens rea of this offence includes any 'intentional or reckless touching', it doesn't even need to be "hostile, rude or aggressive"[61]. As both battery and assault include an element of recklessness, both will therefore be offences of basic intent. Both offences will still be basic intent offences even though it is possible to have an intention other than recklessness[62]. The elements of recklessness are always subjective[63], meaning that it depends on D's genuine belief. It requires that D 'foresees and appreciates some risk'[64].

The offence of Actual Bodily Harm[65] ('ABH') is also a basic intent offence. The definition in statute is 'an assault occasioning ABH'[66]. Although, it has been

[59] *Fagan v MPC* [1969] 1 Q.B. 439
[60] *R v Ireland* [1997] 3 WLR 534 (Steyn LJ)
[61] *Faulkner v Talbot* [1981] 3 All ER 468 (Lane LJ)
[62] Law Commission, *Intoxication and Criminal Liability* (Law Com No 314, 2009) para 1.43
[63] *R v Caldwell* [1981] 1 All ER 961
[64] *R v Parmenter* [1991] 94 Cr App R 193
[65] Offences Against the Person Act 1861, s.47
[66] ibid

determined to include a battery occasioning ABH[67] through case law. The mens rea is therefore the same as it is for assault and battery, depending on which offence resulted in the injury. No additional mens rea is required, only that D either 'intended or was reckless as to the injury inflicted' [68], with some appreciation of the risk involved.[69] As recklessness can suffice for the mens rea, this results in ABH being an offence of basic intent.

This is also how mens rea is exercised in the offence under section 20[70] for GBH. There are two offences of GBH, which can be used to highlight how the intoxication doctrine works in practice when it comes to violent offences. The first one, under section 20[71] is the lesser of the two offences as it is classed as a basic intent offence. The definition of this offence is that D has to 'unlawfully and maliciously wound or inflict any GBH on another person'[72]. The mens rea required for this offence is that D has either the intention to cause wounding or GBH, or that they are reckless as to the causing of some harm[73]. The rules of subjective recklessness will apply here too so D only has to foresee the risk of some harm rather than serious harm[74].

The only difference separating ABH and section 20[75] GBH from the offences of assault and battery, is the criminal consequence rather than the conduct itself. For ABH and GBH[76], the maximum penalty is 5 years imprisonment[77], whereas for assault and battery, the maximum penalty is 6 months[78]. This is evidence that the level of punishment changes depending on the severity of the consequence, rather than the conduct itself.

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[67] *R v Miller* [1954] 2 All ER 529
[68] *R v Roberts* [1971] EWCA Crim 4
[69] *R v Spratt* [1990] 1 WLR 1073
[70] Offences Against the Person Act 1861, s.20
[71] ibid
[72] Offences Against the Person Act 1861, s.20
[73] *R v Savage* [1991] 94 Cr App R 193
[74] *R v Parmenter* [1991] 94 Cr App R 193
[75] Offences Against the Person Act 1861, s.20
[76] Ibid
[77] *'Offences Against the Person, Incorporating the Charging Standard' (CPS, 12 November 2018) < https://www.cps.gov.uk/legal-guidance/offences-against-person-incorporating-charging-standard> accessed 10 January 2019*
[78] *Criminal Justice Act 1988, s.39*

Unlawful act manslaughter works in a similar way to ABH and GBH in that the result of the offence categorises how D will be prosecuted, even though the mens rea remains the same. The definition of unlawful act manslaughter requires D to 'commit an unlawful act which results in the death of another'[79]. For this type of manslaughter, it must be established that there was an unlawful act, and that all elements of that act are proven[80]. Other types of manslaughter will not be discussed throughout this project. The unlawful act must also have been dangerous, which means that there must be the 'risk of some harm, albeit not serious harm'[81]. It does not need to relate to the 'ensuing death'[82]. This means that the unlawful act can be any of the basic intent crimes explained above, therefore the mens rea will still be subjective recklessness. The maximum sentence is however life imprisonment[83] due to the extreme nature of the consequence of such an offence. However, this is not how the sentencing works in practice when the offence is in relation to intoxicated offenders.

All of the offences described above are basic intent offences, as they involve an element of recklessness. In the case of *Majewski*, it was held that although the presence of intoxication will not act as a substitution for the mens rea, the tribunal of fact are directed to consider whether D would have foreseen the relevant risk if he had been sober[84]. The *Majewski*[85] rule therefore has the effect that the relevance of the intoxication is severely diminished. This said, there has been confusion amongst academics[86] about the effect that intoxication has on the prosecution of basic intent crimes. Some interpret the decision in *Majewski*[87] as meaning that the presence of intoxication essentially proves that the fault element is present[88]. That the intoxication alone will provide evidence of some form of

[79] *R v Cato [1976] 1 WLR 110*
[80] *R v Lamb [1967] 2 QB 981*
[81] *R v Church [1965] 2 WLR 1220 (Edmund-Davies LJ)*
[82] *DPP v Newbury [1977] AC 500*
[83] *'Homicide: Murder and Manslaughter' (CPS, 18 March 2019) <* https://www.cps.gov.uk/legal-guidance/homicide-murder-and-manslaughter*> accessed 15 April 2019*
[84] Law Commission, *Intoxication and Criminal Liability* (Law Com No 314, 2009) paras 1.16-1.20
[85] *DPP v Majewski* [1977] A.C. 443
[86] Law Commission, *Intoxication and Criminal Liability* (Law Com No 314, 2009) para 1.17
[87] *DPP v Majewski* [1977] A.C. 443
[88] Law Commission, *Intoxication and Criminal Liability* (Law Com No 314, 2009) para 1.17

recklessness. This has proved not to be the case[89]. The significant effect that the *Majewski*[90] rule has had simply prevents D from using their intoxication to prove that the mens rea element was not there. However, this is only when the intoxication is voluntary and for basic intent crimes[91].

There are arguments against this method, as some believe that it undermines the basic principles of criminal law. There is the requirement of establishing the mens rea and actus reus [92] throughout criminal law, however the way the intoxication doctrine works makes it so the mens rea does not have to be established in cases involving basic intent offences. This is described as the simple definitional logic rule, as these academics believe that the law should be followed as it is. They believe that if the fault element cannot be proved, there should be no conviction, even with basic intent offences[93]. This will be discussed further once 'specific intent' crimes have been explained.

Violent Offences – Specific Intent

This simple definitional logic approach is however taken when it comes to prosecuting specific intent crimes, even when there is an element of intoxication present[94]. If an offence cannot be established with the mens rea of recklessness, the crime will then be of specific intent. The core examples of specific intent offences are murder and section 18 GBH. When D commits one of these offences whilst intoxicated, it is possible for that intoxication to prevent the mens rea from being established[95].

[89] *R v Richardson* [1999] 1 Cr. App. R. 392
[90] *DPP v Majewski* [1977] A.C. 443
[91] Ibid, 498, Law Commission, *Intoxication and Criminal Liability* (Law Com No 314, 2009) paras 2.35-2.38
[92] A.P. Simester, 'Intoxication Is Never A Defence' (2009) Crim. L.R. 3, 3-14
[93] Law Commission, *Intoxication and Criminal Liability* (Law Com No 314, 2009) paras 1.21, 1.39, 1.49-1.52, 1.58-1.62, 2.29-2.33
[94] Ibid, paras 1.21, 1.39, 1.49-1.52, 1.58-1.62, 2.29-2.33
[95] Law Commission, *Intoxication and Criminal Liability* (Law Com No 314, 2009) para 1.58

With section 18 GBH, the actus reus is exactly the same as a section 20 offence. The only difference lies within the mens rea. It is more serious as an offence, which is reflected in the sentence as it carries a maximum prison sentence of life[96]. The mens rea for this must be an intention to cause GBH or wounding, recklessness as to that result will not suffice[97].

The relationship between murder and unlawful act manslaughter is very similar. Although not set out in statute, the definition of murder is the 'unlawful killing of a human being… with malice aforethought'[98]. The mens rea of this has been interpreted to mean the 'intention to kill or cause GBH'[99]. The result of this offence is the death of another person, similarly to unlawful act manslaughter as discussed above. If both elements of murder are established, D will receive a mandatory life sentence[100]. Unless any of the three partial defences to murder apply, the court cannot pass a lower sentence even in mitigating circumstances[101].

The presence of intoxication can prevent the mens rea from being established by the prosecution as both murder and section 18[102] GBH are specific intent offences[103]. It is left to the jury to decide whether they believe that D had the required state of mind at the relevant time for that offence[104]. This means that if D commits a specific intent crime when intoxicated, this does not guarantee them any form of a 'defence'. Intoxication can simply be used to prevent the prosecution from establishing the mens rea of the offence. This would then result in either an acquittal or a different conviction[105] such as one of the basic intent crimes within

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[96] 'Offences Against the Person, Incorporating the Charging Standard' (*CPS*, 12 November 2018) <https://www.cps.gov.uk/legal-guidance/offences-against-person-incorporating-charging-standard> accessed 19 January 2019
[97] Offences Against the Person Act 1861, s.18
[98] Sir Edward Coke (Institutes of the Laws of England, 1797)
[99] *R v Cunningham* [1982] AC 566, Offences Against the Person Act 1861, s.18
[100] 'Homicide: Murder and Manslaughter' *(CPS, 18 March 2019)* < *https://www.cps.gov.uk/legal-guidance/homicide-murder-and-manslaughter> accessed 15 April 2019*
[101] 'Sentencing – Mandatory Life Sentences in Murder Cases' (*CPS*) <https://www.cps.gov.uk/legal-guidance/sentencing-mandatory-life-sentences-murder-cases> accessed 12 January 2019
[102] Offences Against the Person Act 1861, s.18
[103] *DPP v Majewski* [1977] A.C. 443, 480
[104] Law Commission, *Intoxication and Criminal Liability* (Law Com No 314, 2009) para 2.30
[105] *DPP v Majewski* [1977] A.C. 443, 499

the same bracket. The jury are instructed to "have regard to all the evidence… and on that basis to ask themselves whether they feel sure that at the material time the defendant had the requisite intent"[106] i.e. the jury must weigh up all evidence presented in order to make a decision to the defendant's intent. The presence of intoxication in relation to specific intent crimes provides difficulty for the prosecution to prove all elements of the offence beyond reasonable doubt[107].

Ultimately, the presence of intoxication can prevent someone from being charged with murder if it thwarts the prosecutions attempt to prove there was an intention to kill or cause GBH. If this occurs, the prosecution can then prove the elements from unlawful act manslaughter instead. The difference in culpability between a sober murder and an intoxicated murder will then be represented by the offence charged and the sentence passed. Similarly, both section 18[108] and section 20[109] have the same actus reus with differing mens rea, allowing section 20[110] to be used when section 18[111] cannot be due to intoxication. This was pointed out by Professor Ashworth:

"Murder and wounding with intent are crimes of specific intent, and there is no great loss of social defence in allowing intoxication to negative the intent required for those crimes when the amplitude of the basic intent offences of manslaughter and unlawful wounding lies beneath them – ensuring D's conviction and liability to sentence"[112].

By allowing offenders to still receive some form of conviction, it allows the intoxication doctrine to work well in practice.

[106] *Sheehan* [1975] 1 WLR 739
[107] *Woolmington v DPP* [1935] UKHL 1
[108] Offences Against the Person Act 1861, s.18
[109] Ibid, s.20
[110] Offences Against the Person Act 1861, s.20
[111] Ibid, s.18
[112] Ashworth, Principles of Criminal Law (5th ed, 2006) p 212

This is further reflected by Law Commission's decision in their 1993 report[113] to abandon their earlier recommendation[114] to abolish the *Majewski* rule on the grounds that they had no preferred alternative and believed the rule worked well in practice. The *Majewski* rule does seem to offer fair prosecution for offenders in relation to voluntary and violent offences. The practicalities of using a corresponding offence to still attain some form of conviction should be extrapolated and used in relation to other offences, particularly in relation to property offences.

The Subjectivism v Absolutism Debate

Sometimes, criminal courts interpret the law by using strict subjectivism[115]. 'Strict subjectivism' denotes a simple interpretation of the law. Practically speaking, the court will examine the case at hand and apply the law in consideration of the circumstances of the case. If the courts interpret law this way in all cases with involvement of intoxication, it is likely to encourage grave public policy concerns. If the law were to work in this way for specific *and* basic intent offences, it would set a dangerous precedent. This being, the more intoxicated a person becomes, the less culpable they are. It would turn intoxication into a defence, as the prosecution would struggle to prove mens rea even for all classes of offences, including basic intent[116]. It would potentially encourage voluntary intoxication as a tactic for evading liability.

The arguments for and against this approach discuss the balance between public policy and adhering to the underlying principles of criminal law. Some believe that it is more important to stay with strict definitional logic[117]. If the law requires the proof of the actus reus and mens rea beyond reasonable doubt in basic intent

[113] Law Commission, *Intoxication and Criminal Liability* (Law Com No 127, 1993) paras 4.47, 5.1, 5.24, 7.4
[114] Ibid
[115] Law Commission, *Intoxication and Criminal Liability* (Law Com No 314, 2009) paras 1.59-1.62
[116] ibid, paras 1.53-1.59
[117] Ibid, para 2.31

offences, then the presence of intoxication should not change this. Professor Sir John Smith[118] suggested that the House of Lords should:

'Recognise that if a particular mens rea is an ingredient of an offence, no one can be convicted of that offence if he did not have the mens rea in question, whether he was drunk at the time or not'[119] .

This is a fair argument as it uses the underlying principle of all criminal offences. If someone commits an offence without the relevant mens rea for a basic intent crime, they should not be held to the same level of culpability as someone that did have the relevant mens rea. For example:

Example 1A - If D punched V with the intention of punching them, and that punch results in V having a black eye, D would be charged and most likely be convicted of ABH. Using the definition stated earlier, the offence of battery would be satisfied due to the unlawful application of force and the intention to apply that force. The offence of ABH would also be satisfied due to the result of the unlawful force.

Example 1B – If D was dancing in a busy club whilst severely intoxicated with clenched fists and decided to swing his arms around, then accidentally punched V resulting in a black eye, D would be charged and most likely convicted of ABH. Although there was no intention to commit battery, the mens rea of the offence can also be satisfied through recklessness. No additional mens rea is required for ABH. Even though D was intoxicated, it is likely that when sober he would foresee some level of risk to injury resulting from his conduct.

Both examples show a large gap between the potential culpability of offenders of the same crime. Although mitigating and aggravating factors would be taken into account when sentencing, the same label would be given to both offenders. There is understandably an argument as to why this is classed as unfair.

[118] Ibid, para 2.33
[119] *Criminal Law Review* [1975] 574

There is however also an argument that becoming intoxicated in the first place is enough to warrant some form of accountability. Professor Glanville Williams[120] explained 'it would be inimical to the safety of all of us if the judges announced that anyone could gain exemption from the criminal law by getting drunk'[121]. This demonstrates that by allowing the presence of intoxication to act as a full defence, public safety would be ignored.

Lord Simon[122] argued that allowing all offenders to evade liability on the basis that they lacked the requisite fault on account of their intoxication, would 'leave the citizens legally unprotected from unprovoked violence'[123]. It would allow an attacker to deprive themselves of "the ability to know what he was doing by getting himself drunk". Then, they would be held to be innocent of that crime[124].

Criminal courts could take an absolutist view instead., Which would prevent D from being able to use intoxication to escape liability for any crime. This approach would only focus on D's conduct and the result of that conduct rather than the mens rea element affected by intoxication. This would mean that even in specific intent cases, the prosecution could still prove that D had the required mens rea by ignoring the intoxication. There are positives to this approach, particularly the benefits it could have in relation to public safety as stopping offenders from being able to rely on intoxication would act as a deterrent for many.

However, following this approach would totally undermine one of the main principles of criminal law: that both the actus reus and the mens rea must be established. Other than with strict liability offences, it must be proved that D had the required mens rea of the crime, as well as the required actus reus. By using an absolutist approach, prosecutors would be able to use the presence of intoxication to imply a mens rea that was not actually present, for both basic intent *and* specific

[120] Law Commission, *Intoxication and Criminal Liability* (Law Com No 314, 2009) para 1.54
[121] G. Williams, *Textbook of Criminal Law* (2nd ed, 1983) p 466
[122] *DPP v Majewski* [1977] A.C. 443, 476 (Simon LJ)
[123] Ibid
[124] Ibid, (Russell LJ)

intent crimes[125] . Using this approach for all offences wouldn't just undermine criminal law; it would also allow for a monumental difference in the moral culpability between the offence committed and the offence that D would then be charged with. For example:

Example 2A – If D intentionally plans then stabs his wife 18 times resulting in her death, he would be charged and most likely convicted of murder.

Example 2B – If D stabs a stranger at a party resulting in his death because he believed he was stabbing a pillow due to voluntary intoxication - it is likely that he would not be charged and convicted of murder. If courts were to take an absolutist approach to specific intent crimes, then it is likely that D would be charged with murder. This is since only the result of the crime would be taken into account rather than the actual mens rea as well as other circumstances.

There would be a huge mismatch in moral culpability if the absolutist approach were to be used in specific intent offences, namely the more serious of offences[126]. Clearly, the moral culpability in these two examples is very different from each other. Due to the fact in cases of murder, a mandatory life sentence is given in all cases where partial defences are not used, both offenders in examples **2A** and **2B** would be given the same sentence. Taking the absolutist approach in relation to specific intent offences would encourage huge disproportionate sentencing and labelling for intoxicated offenders compared to sober offenders.

Even though this approach would encourage the importance of public safety, it would also encourage unfair charges brought against offenders. There would be a huge gap between the moral culpability of committing a murder and the moral culpability of becoming intoxicated. However, just because this approach would be unfair to impose on specific intent crimes, there are advantages to using it for basic intent crimes.

[125] Law Commission, *Intoxication and Criminal Liability* (Law Com No 314, 2009) paras 1.56-1.61
[126] Law Commission, *Intoxication and Criminal Liability* (Law Com No 314, 2009) paras 1.56-1.59

The moral culpability of committing a basic intent crime could be similar to the moral culpability of becoming intoxicated. Lord Simon[127] held:

'*A mind rendered self-inducedly insensible through drink or drugs, to the nature of a prohibited act or to its probable consequence is as wrongful a mind as one which consciously contemplates the prohibited act and foresaw it's probable consequence'*[128]. This suggests that the recklessness of becoming intoxicated is also similar to the recklessness required by offences like assault, battery and criminal damage. By knowing that there are links between intoxication and violent and reckless behaviours, it should prevent people from allowing themselves to voluntarily enter that state[129].

Even when it comes to prosecuting basic intent crimes, the foreseeability when sober is also taken into account. The approach is not entirely absolutist in nature. It was shown in *Richardson*[130] that foreseeability will be considered. It will, however, be decided on a case-by-case basis. Lord Elwyn-Jones[131] proposed the following:

'When recklessness establishes an element of the offence, if the actor, due to self-induced intoxication, is unaware of a risk of which he would have been aware had he been sober, such awareness is immaterial'[132].

This shows that although strict definitional logic is not used and should not be used for basic intent crimes, there is still an element of flexibility when courts decide on the fate of offenders. There is still the option to consider circumstances of the offender in order to assess the mentality when sober in order to allow just and fair sentences that mirror the culpability shown when committing the offence[133].

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[127] *DPP v Majewski* [1977] A.C. 443, 480 (Simon LJ)
[128] Ibid
[129] A.P. Simester, 'Intoxication Is Never A Defence' (2009) Crim. L.R. 3, 3-14
[130] *R v Richardson* [1999] 1 Cr. App. R. 392
[131] *DPP v Majewski* [1977] A.C. 443, 475 (Elwyn-Jones LJ)
[132] Ibid
[133] *R v Richardson* [1999] 1 Cr. App. R. 392

Lord Edmund-Davies[134] suggested that the current law on intoxication represents the following:

'A compromise between the imposition of inebriates in complete disregard of their condition, and the total exculpation required by the defendants actual state of mind at the time he committed the crime in issue'[135].

This suggests that the current law works in a way that allows for a balancing act between strict subjectivism and an absolutist approach[136]. Interpreting specific intent crimes by using strict subjectivism allows for intoxication to be considered if no mens rea is present. This allows for intoxicated offenders to have their liability reduced due to the fact their moral culpability was not the same as a sober offender for the same crime. An absolutist view is used for basic intent crimes due to the moral culpability of becoming intoxicated being similar to the moral culpability of committing the crime. This compromise explains the theory behind the distinction between basic and specific intent. It further explains the justification for the intoxication doctrine being used for basic intent crimes and not for specific intent crimes. Clearly this compromise works well for violent offences as the prosecution can still attain some form of conviction.

The courts have referenced three competing interests when deciding cases regarding intoxication:

1. The need to label defendants correctly;
2. The need to respect the requirements of fault; and
3. The need to protect the public from drunken violence.

The Court of Appeal decided to strike the balance of the three in favour of protecting the public[137]. The law must also ensure that the interests of the accused are protected when it comes to sentencing. The judge and magistrates will 'always carefully take into account all the circumstances… before deciding which of the

[134] *DPP v Majewski* [1977] A.C. 443, 495 (Elwyn-Jones LJ)
[135] Ibid, 496
[136] Law Commission, *Intoxication and Criminal Liability* (Law Com No 314, 2009) para 1.58
[137] *R v Hatton* [2006] 1 Cr App R 16, *R v O'Grady* [1987] QB 995, *R v O'Connor* [1991] Crim LR 135

many courses open should be adopted'[138]. This is evidence that not only public safety is considered, but fairness and rehabilitation of offenders is considered too.

[138] *DPP v Majewski* [1977] A.C. 443, 484 (Salmon LJ)

II. Property Offences

As analysed in Section I, violent offences against other people are assessed on a case-by-case basis in order to understand the affect any intoxication had on D. The basic intent divide works in a way that allows offenders committing specific intent crimes to still be prosecuted with another offence that holds a lower level of culpability. Although there will always be arguments against this method, the practical benefits of corresponding elements of certain offences seem to work without any major moral objections.

This section will discuss the effect intoxication has when an offender has committed an offence in relation to property instead of another person. In particular whether the recent case of *Ivey v Genting Casinos*[139] has an effect on the relationship between intoxication and property offences. Although this case was that of a civil matter, it has undoubtedly set a precedent in relation to the mens rea element of theft[140]. It is interesting to analyse the new interpretation of dishonesty, and whether that interpretation will make theft and other property offences easier to prosecute. The new standard of dishonesty may result in a stricter position on intoxicated offenders.

One of the issues that many academics have with the way intoxication works is due to problems that arise in relation to offences regarding property[141]. This is generally due to the fact theft requires 'ulterior intent' to be established[142]. This Section aims to use hypothetical examples in order to create a more appropriate relationship between that of property offences and the intoxication doctrine. By analysing property offences thoroughly, there are potentially various ways that allow the relationship with intoxication to mirror the offences in Section I.

[139] *Ivey v Genting Casinos (UK) Ltd (trading as Crockfords Club)* [2018] A.C. 391
[140] *Ivey v Genting Casinos (UK) Ltd (trading as Crockfords Club)* [2018] A.C. 411
[141] Eric Colvin, 'Codification and Reform of the Intoxication Defence' (1983) 26(1) Crim LQ 43, 53
[142] *DPP v Majewski* [1977] A.C. 443, 460

Before the defendant (D) can be found guilty of theft[143], the prosecution must prove both the external elements and the fault elements of the offence. If D 'dishonestly appropriates property belonging to another with the intention to permanently deprive the other of it'[144], they will be guilty of theft. As introduced above, theft is a specific intent crime as it is an offence requiring ulterior intent[145].

This also relates to the offences of robbery and burglary. Firstly, robbery is an aggravated form of theft. The maximum sentence is life imprisonment[146], unlike theft with a maximum sentence of 7 years[147]. To be found guilty of robbery, all the elements of theft must be established[148] . However, there is an additional element of 'force or the threat of force on a person'[149] to occur immediately before or at the time of stealing[150]. The mens rea of robbery requires the dishonesty element, the intention to permanently deprive element and the intention to threaten force or use force[151].

It is further possible to be charged with two different types of burglary as well as a form of aggravated burglary. The first is when D enters a building, as a trespasser, with the intent to either steel anything in the building, commit GBH on anyone within that building or to commit any unlawful damage[152]. The mens rea of this offence is concerned with the intention upon entry into the building. There must be an intention to commit one of these three acts, and that must be done as a trespasser[153].

The second type of burglary occurs when D enters a building as a trespasser and steals, attempts to steal, inflicts GBH or attempts to inflict GBH[154]. Although the

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143 Theft Act 1968, s.1
144 ibid
145 *DPP v Majewski* [1977] A.C. 443, 460
146 'Theft Act Offences' (*CPS)* < https://www.cps.gov.uk/legal-guidance/theft-act-offences> accessed 15 April 2019
147 ibid
148 *R v Robinson* [1977] Crim LR 173
149 Theft Act 1968, s.8
150 *R v Lockley* [1995] Crim LR 656
151 *R v Dawson* [1985] 81 Cr App R 150
152 Theft Act 1968, s.9(1)(a)
153 *R v Collins* [1973] 3 WLR 243
154 Theft Act 1968, s.9(1)(b)

mens rea of the trespassing element can be one of recklessness, there must also be the required mens rea for one of the other offences[155]. For both types of burglary, the maximum sentence is 14 years for an offence in a dwelling and 10 years for other buildings[156].

To be convicted of aggravated burglary, D must have with him a firearm, imitation firearm, any weapon of offence, or any explosive[157] whilst entering a building (relevant to s.9(1)(a))[158], or at the time the offence is committed (relevant to s.9(1)(b))[159]. There is no need to establish that D intended using the weapon[160], only the mens rea of one type of burglary as well as the intention to carry one of the items mentioned above[161]. For aggravated burglary, the maximum sentence is also life imprisonment[162].

On the face of it, these property offences seem similar in structure to offences set out in Section I. With theft and burglary in particular with a lower sentence than robbery and aggravated burglary, they appear to be offences with lower culpability and sentences. This said, there is a significant difference between the offences set out here, and the offences set out in Section I that must be considered as it has a strong impact on the effectiveness of the intoxication doctrine. Due to all the offences above being that of ulterior intent, this indicates they will also be specific intent offences. If any of the offences are committed whilst intoxicated, the jury or magistrate will be directed to acquit if that intoxication makes it so the fault element cannot be established.

The use of intoxication in relation to offences in Section I can be effective in practice due to the existence of multiple offences with the same actus reus. As

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[155] *R v Collins* [1973] 3 WLR 243
[156] 'Theft Act Offences' (*CPS)* < https://www.cps.gov.uk/legal-guidance/theft-act-offences> accessed 15 April 2019
[157] Theft Act 1968, s.10
[158] Ibid, s.9(1)(a)
[159] Ibid, s.9(1)(b)
[160] *R v Stones* [1989] 1 WLR 156
[161] *R v O'Leary* (1986) 82 Cr App R 341
[162] 'Theft Act Offences' (*CPS)* < https://www.cps.gov.uk/legal-guidance/theft-act-offences> accessed 15 April 2019

there are no offences that exist that have the same actus reus as theft and burglary, offenders will potentially be acquitted. Rather than acting as the deterrent that it should, the basic and specific intent distinction in relation to property offences may encourage intoxication amongst offenders.

Clearly, this engages some public policy concerns. It creates the sense that the priority is creating a fair judgement for the offenders, rather than the promotion of safety for others. If the proposed theory behind the offences in Section I is that the fault needed for all basic intent offences is equivalent to the fault of becoming intoxicated, this could also be argued for theft and burglary. The custodial sentence of which is less than the sentence for manslaughter.

It can be argued that by recklessly becoming intoxicated, there is a heightened risk of recklessness as well as other morally corrupt behaviour. This could lead to theft from another person or from another person's property. The culpability of becoming intoxicated and then committing theft or burglary should not warrant an acquittal. This would place an intoxicated thief in a better position than a sober thief, which only encourages wrongdoing rather than acting as a deterrent as it should.

Dishonesty

Theft has always been considered to be a specific intent offence due to the ulterior intent that has to be established. It is interesting to analyse the reasoning for this using the new test for dishonesty.

The original test for dishonesty was a two-part test [163], where jurors and magistrates were asked to consider two questions. The first question was whether the conduct complained of was dishonest by the objective standards of reasonable and honest people. If the conduct complained of was dishonest in comparison to this standard, the second question considered would be whether the defendant

[163] *R v Ghosh* [1982] EWCA Crim 2

would have realised that a reasonable and honest person would regard his conduct as dishonest[164]. This test allowed an element of subjectivity. The answers to both of which had to be yes for the dishonesty element to be established. This test had been criticised for its ambiguity[165].

Jurors and magistrates are asked to take into account what D actually believed at the time of the offence, compared to the standards of a reasonable person. This has now been replaced by the decision in *Ivey v Genting Casinos*[166]. In *Ivey v Genting Casinos*[167], the Supreme Court held that the second question in the *Ghosh*[168] test 'did not correctly represent the law and that directions based upon it ought no longer to be given by judges to juries'[169]. The main issue that the Supreme Court had with this second element of the test was that 'the less a defendant's standards conform to society's expectations, the less likely they are to be held criminally responsible for their behaviour'. This element, therefore, would simply allow D to evade liability using the defence that their own standard of dishonesty was less than that of an honest and reasonable person[170]. The Supreme Court, in this case, decided to set that standard for others to follow, rather than allowing potential defendants to set their own[171].

The judges in *Ivey v Genting Casinos*[172] argued that the Ghosh test had the effect that 'the more warped the defendant's standards of honesty are, the less likely it is that he will be convicted of dishonest behaviour'[173]. In fact, the second limb of the Ghosh test practically eradicated the need for the first[174]. It was argued that

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[164] Ibid, Q.B. 1053, 1064

[165] Kenneth Campbell, 'The Test of Dishonesty in R. v. Ghosh' (1984) 43(2) Cambridge LJ 349, 351

[166] *Ivey v Genting Casinos (UK) Ltd (trading as Crockfords Club)* [2018] A.C. 391

[167] ibid

[168] *R v Ghosh* [1982] Q.B. 1053

[169] *Ivey v Genting Casinos (UK) Ltd (trading as Crockfords Club)* [2018] A.C. 391, 417

[170] Kenneth Campbell, 'The Test of Dishonesty in R. v. Ghosh' (1984) 43(2) Cambridge LJ 349, 357

[171] *Ivey v Genting Casinos (UK) Ltd (trading as Crockfords Club)* [2018] A.C. 391, 411

[172] Ibid

[173] Ibid, 409

[174] Muhammad Hasif, 'Ivey v Casinos: Reform to the Dishonest Principle' (2018) 2018 Sing Comp L Rev 108, 109

'to adopt a subjective test is to abandon all standards but that of the accused himself, and to bring about a state of affairs in which Robin Hood would be no robber'[175]. Originally, proving dishonesty when there was also the component of intoxication was extremely difficult due to this subjective consideration. The presence of which helped to define theft and other property offences as offences of ulterior intent.

Example 3A – D decides to take a purse from a table in a bar whilst intoxicated and decides to take it home with him; he does not return the purse.

Clearly, any reasonable and honest person would determine the conduct in **Example 3A** to be dishonest. The second limb of the test, however, would allow D to say that he believed his conduct was not dishonest compared to that objective standard. As the judges explain in the *Ivey*[176] case, this second limb makes it so D can excuse his behaviour with 'his own warped standards'[177], potentially arguing he believed the purse was discarded by the owner even if this was not his true belief.

Using the new test, the second element would not need to be proved at all. Therefore, making it possible to establish dishonesty in cases of theft when intoxication is present. In the case of **Example 3A,** D would not be able to use the excuse that his own standard of dishonesty was different from that of a reasonable and objective person. Using the new test, if all other elements of theft were established, D would potentially be convicted. The new standard of dishonesty would only take into account the objective standard, which in this case would likely determine the conduct of D to be dishonest.

This new test would potentially allow the relationship between theft and the intoxication doctrine to be like the offences described in Section I. It may prevent offenders from using their own subjective standard skewed by their intoxicated

[175] *Ivey v Genting Casinos (UK) Ltd (trading as Crockfords Club)* [2018] A.C. 391, 410
[176] *Ivey v Genting Casinos (UK) Ltd (trading as Crockfords Club)* [2018] A.C. 391
[177] Ibid, 416

mind as a reason for fault not to be established. Although if D returned the purse the next day, theft might be impossible to establish due to the other mens rea element. This would still be consistent with the reflection of culpability.

Intention to Permanently Deprive

The issue then becomes the requirement for D to intend on permanently depriving the owner of their property. Even though the change to the dishonesty test could ensure more convictions for intoxicated thefts, it may be difficult for the prosecution to establish the element of the intention to permanently deprive.

If the dishonesty element can be established, it must be accompanied by the intention to permanently deprive the owner of the property. Confusingly, this does not necessarily require the intention of permanently depriving the owner of their property. This element will be established if there is the intention to treat the property as their own to dispose of regardless of the rights of the owner. Even borrowing or lending property may still allow this element to be established if the circumstances make it equivalent to an outright taking or disposal[178]. This shows that the term 'intention to permanently deprive' is not an exhaustive definition; it can be interpreted quite broadly.

A mere borrowing is not enough to establish this element. However, if when the property is returned to the owner, it has 'changed state'[179] in such a way that 'all its goodness or virtue has gone'[180] then this can be enough.[181]

Example 4A – D becomes intoxicated, then on the way home decides to take a traffic cone from the street. The next day, he sees the traffic cone in his living room and leaves it there.

[178] *R v Coffey* [1987] Crim LR 498, CA
[179] *R v Lloyd, R v Bhuee, R v Ali* [1985] QB 829, 830
[180] Ibid
[181] Ibid

This is a useful scenario to consider. In particular, as stealing traffic cones and other traffic signs when intoxicated is a very prevalent thing with student culture. Understanding the position that a lot of student offenders could be in is important since the new objective dishonesty rules. It is likely that an honest, reasonable and objective person would consider the conduct in this example to be dishonest. With the new standard, it would not matter whether D believed his conduct to be dishonest compared to those standards. Using the *Ghosh* test, it is likely that D would have been able to evade liability by using his own subjective and intoxicated reasoning. This example highlights how important the *Ivey* decision could become in relation to intoxicated offenders.

If the first four elements of theft are established in a case similar to **Example 4A**, it would also have to be proven that there was an intention to permanently deprive. As D in this example decided not to return the traffic cone the next day, it is possible that D could be convicted of theft[182]. It could be argued that due to his intoxicated mind, D did not have the intention to permanently deprive at the time the appropriation of the traffic cone occurred. However, it is possible for the intention to occur after the actual appropriation. By keeping the traffic cone at his own home, D has shown that he is treating the property as if it were his own regardless of the owners' rights[183].

If D had returned the traffic cone the next day; he would most likely not be convicted of theft. It is very unlikely that the second element of the mens rea could or would be proven if the property were to be returned. It is very unlikely that this would amount to an intention to permanently deprive.

As the law aims to act as a deterrent, the risk of being prosecuted for theft may encourage offenders to return any property that they may have appropriated due to an intoxicated mistake. This continues to accurately reflect the correct standard of culpability.

[182] Theft Act 1968, s.1(1)
[183] Theft Act 1968, s.6(1)

This analysis shows that intoxicated offenders may still be prosecuted for theft even though it is considered to be a specific intent crime. With violent specific intent offences, the jury is asked to consider whether the requisite mens rea can be established based on the offender's conduct. This should in turn work the same way for property offences. This is another argument as to why intoxication is not considered to be a defence. The presence of intoxication will not automatically prevent someone from being convicted of a crime; it just acts as an obstacle to proving the requisite fault element in some cases. With theft, it is understandable as to why in the past, intoxication would prevent the mens rea from being established. With the new objective dishonesty test - dishonesty is far more likely to be established in cases involving intoxication. The only mens rea element that then has to be established is the intention to permanently deprive. This should now allow the relationship between theft and the intoxication doctrine to act as even more of a deterrent for offenders. If an offender appropriates property dishonestly according to a reasonable person's standards, they could be prosecuted if they do not return said property. This encourages better behaviour when that offender becomes sober. However, this is still only a proposed theory, convictions may have to rise in order to deter potential offenders.

Burglary

It is possible for burglary to work in a similar way to theft. Even if it cannot be classed as a basic intent offence, the mens rea can be broken down in a way that allows the fault element to be still established, even in cases where intoxication is present.

When analysing burglary under s.9(1)(a)[184], the first element that has to be established is that the offender must be a trespasser. They must either know they are a trespasser or be reckless as to whether they are trespassing[185]. They can even have permission to enter the building but become a trespasser because they

[184] Theft Act 1968, 9(1)(a)
[185] *R v Collins* [1973] 2 WLR 243

do something they were not invited to do[186]. If you 'invite someone into your house to use your staircase you do not invite him to slide down the banisters'[187]. This highlights that 'trespassing' can be established using recklessness, making it easier for the prosecution to prove. As described in Section I, the level of culpability of becoming intoxicated could equate to the level of culpability required for trespassing.

The next element that must be established is the intention to either: steal an item; inflict GBH; or commit unlawful damage. Both GBH and criminal damage *can* be offences of basic intent; the intention of these offences can be that of recklessness. This means that the last two elements of burglary individually require basic intent only, if the intoxicated intention is to commit either GBH or criminal damage, even for an ulterior intent crime. This would also make it easier for the prosecution to establish.

Example 5A – D stumbles into a house that he believes is his friends due to his intoxication. It is actually the house next door. He enters with the intention to commit criminal damage, as he has decided to throw paint on a wall.

In this example, the element that D has to be a trespasser can be established, as this can be done through recklessness. There must also be an intention to commit criminal damage which can be satisfied in this case. Even though burglary is a specific intent crime due to the ulterior intent, it can be broken down and established when intoxication is present due to the various elements that are relatively simple for the prosecution to prove. Although theft is a specific intent crime, using the new dishonesty rules, there is the potential for theft to be established as part of the burglary element whilst intoxicated too.

This works in a similar way to burglary under s.9(1)(b)[188]: The trespasser element can also be satisfied through recklessness[189]. The second element is that D either

[186] *R v Jones & Smith* [1976] 1 WLR 672
[187] ibid
[188] Theft Act 1968, s.9(1)(b)
[189] *R v Jones & Smith* [1976] 1 WLR 672

intends to commit GBH or theft or actually commits GBH or theft. As with the first offence of burglary, it may be possible for the elements of each offence to be established even when intoxicated.

Although this analysis does not result in both theft and burglary being offences with basic intent due to the presence of ulterior intent - it is possible for offenders to secure a conviction despite committing the offences whilst intoxicated. Intoxicated offenders could be charged with theft in cases of theft or robbery, and burglary in cases of burglary and aggravated burglary. This allows the relationship that these offences have with the intoxication doctrine to mimic the relationship intoxication has with the offences in Section I. Thus, the offences of theft and burglary to act as the corresponding crimes for the more serious property offences.

III. The Law Commission Report Revisited

This Section aims to analyse the proposed reforms suggested by the Law Commission and to understand whether these proposed reforms would alleviate the problems discussed in Section II if they were ever to be enacted. Particularly focussing on whether any changes would now be necessary taking into account the change to the dishonesty test.

Law Commission Proposals

In the Law Commissions most recent report, they take accept that the current law set out in common law should be codified and set out in legislation.[190] They take a similar approach to the approach set out in Section I, in that the law should make a compromise between subjectivism and an absolutist approach. They agree with Stephen Gough's view that 'subjectivism is an unattractive and unnatural standpoint'[191]. They rebut the idea of simple definitional logic for the reason that it allows too much of a defence and also the idea of absolutist interpretation due to the mismatch in culpability[192].

Their main aim throughout the most recent report is to codify the law and allow the *Majewski* rule to stand in a manner that is easier to understand and easier to interpret and apply[193]. The Law Commission believes that the *Majewski* rule should be codified through statute. They proposed that this statute list should include the types of subjective fault that should always have to be proved by the prosecution when the offence has been committed whilst intoxicated. This includes the states of mind which have been held to be 'specific intent' at common law; the states of mind which would no doubt be regarded as 'specific intent' and the states of mind which should be treated as 'specific intent' as a matter of principle. This is on the ground that the external element committed with the

[190] Law Commission, *Intoxication and Criminal Liability* (Law Com No 314, 2009) para 3.11
[191] S Gough, "Intoxication and Criminal Liability: The Law Commission's Proposed Reforms" (1996) 112 Law Quarterly Review 335, 337
[192] Law Commission, *Intoxication and Criminal Liability* (Law Com No 314, 2009) paras 1.48-1.62
[193] Ibid, para 3.18

required state of mind compared to the external element without the required state of mind would be fundamentally different[194].

The Law Commission also stated in their report that statute should exclude the element of subjective recklessness. This would mean that the subjective recklessness element in any offence would not have to be proven by the prosecution in cases where any lack of awareness was caused by voluntary intoxication[195]. This would be relevant for offences labelled as basic intent offences in Section I. The Law Commission detailed that there should be a definitive test that would be applied in cases where subjective recklessness exists and explained that there should also be a body of rules that would allow the court to decide whether D was voluntarily intoxicated at the time of the offence or not[196].

This approach simply codifies the rules that exist currently with definitive definitions and tests when needed, then allows common law to develop in relation to unusual scenarios. This would allow the courts to naturally and progressively evolve the law based around the codified basics[197].

The report formed by the Law Commission sets out a new draft for their 'Criminal Liability (Intoxication) Bill in Appendix A[198], then explains throughout the report the reasons for each provision. One of the first things tackled is the notion of basic and specific intent, and how the Bill does not actually refer to that distinction. They do however retain the approach that this distinction stems from, in that some subjective fault elements must always be proved, and that some subjective fault elements, subjective recklessness, in particular, do not always have to be proved[199]. Instead of using the term 'specific intent', they used the label of an offence with an 'integral fault element'[200].

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[194] Ibid, para 3.22
[195] Ibid, para 3.23
[196] Ibid, para 3.24
[197] Law Commission, *Intoxication and Criminal Liability* (Law Com No 314, 2009) para 3.31
[198] Ibid, Appendix A
[199] Ibid, para 3.33
[200] Ibid, para, 3.34

In relation to an offence where the fault element is not an integral fault element (equivalent to specific intent) - the Law Commission propose that when D is intoxicated at the material time, they should be treated as 'having been aware at the material time of anything which D would have been aware of but for the intoxication'[201]. This would apply to any relevant offence regardless of the degree of the intoxication, or whether the intoxication was brought on by alcohol or drugs[202]. This is the first recommendation stated in the report.

The second recommendation relates to offences that have an integral fault element only, currently labelled as the specific intent offences. The recommendation states that if the definition of the offence charged would make it so the *Majewski* rule would not apply currently, then the prosecution should have to prove that D acted with that relevant state of mind[203].

The third recommendation actually states the fault elements that should be included within the definition of an 'integral fault element'. This is one of the most criticised components that exists with intoxication currently. Although the second recommendation would make it so the actual state of mind rather than the offence itself would determine which rule would apply. This would stand to be an improvement on the current law. It would make it so each offence would be broken down into different fault elements, rather than being categorised based on the offence. Some elements of mens rea may be interpreted using the rule in recommendation one, and some using recommendation two, even though they both remain within the same crime[204].

The Law Commission decided to put forward the idea that various fault elements should be excluded from the *Majewski* rule and should therefore always have to be proved by the prosecution. They include the intention to a consequence rather than intention as to conduct; the knowledge as to something (although not

[201] Ibid, para 3.35
[202] Ibid, para 3.36
[203] Ibid, para 3.42
[204] Law Commission, *Intoxication and Criminal Liability* (Law Com No 314, 2009) para 3.44

knowledge as to risk); and the belief as to something, fraud and dishonesty. It should be noted however that dishonesty was included within this recommendation before the test changed in *Ivey v Genting Casinos*[205]. It is unknown as to the opinion the Law Commission would have on including this within this recommendation now.

By analysing the position that the Law Commission suggests, it seems that the offences described in Section I would remain relatively unchanged. The position regarding the offences stated in Section II, however, should be analysed again, due to the issues stated with ulterior intent.

If the Law Commission would regard the dishonesty rule as being subject to the *Majewski* rule, then recommendation one would apply. It would, therefore, be easier in statute for the prosecution to prove dishonesty. This would follow the proposed method as discussed in Section II, where dishonesty could be established easily in relation to intoxicated offenders. This would make it so the prosecution would not have to prove dishonesty; it would simply be considered by the jury. However, this is an assumption, as the Law Commission did not include any rules on the changing of such longstanding criminal law principals. This may be something that would potentially evolve through case law rather than being set out in statute.

This intention to permanently deprive would come within one of the intents regarded in recommendation two as an 'integral fault element'. Although this would not make it so the prosecution could not prove this element beyond reasonable doubt, it would just make it so the jury would be directed to consider all circumstances, including the fact D, was voluntarily intoxicated and whether or not that affected the required element of fault. This is very similar to the hypothetical interpretation set out in Section II, where it is still possible for an offender to be convicted if the mens rea can still be established with the intoxication taken into account.

[205] *Ivey v Genting Casinos (UK) Ltd (trading as Crockfords Club)* [2018] A.C. 391

The way that the recommendations work in relation to separating intents through individual elements of mens rea rather than basic and specific intent offences also works in a similar way to the hypothetical interpretation set out in Section II, specifically in relation to burglary. As the trespassing component of burglary includes an element of recklessness, when applying recommendation one, D would be considered as having been aware at the material time of anything that D would have been aware of had it not been for the intoxication[206]. It would be much easier for this component to be established. This would then be dealt with as a separate element of the crime, rather than the entire offence being labelled as specific intent. The next fault element would then be dealt with separately as well.

Criminal damage included within the definition of one type of burglary[207] can be committed either intentionally[208] or recklessly[209]. By using the recommendations proposed by the Law Commission, the fault element would be subject to the *Majewski* rule.

If a burglary included a criminal damage element, it is possible that the burglary would be easier to prosecute if the offender was intoxicated by using the proposed reforms. The *Majewski* rule would be applicable to both the trespassing element and the criminal damage element, which would not require the prosecution to have to prove any elements if they were present in a burglary. Rather than the entire offence being labelled as specific intent as the law does now due to the ulterior intent, the recommendations would allow for the offence to be broken up into the relevant fault elements. This would allow the court to analyse culpability on a more effective basis.

If a burglary included GBH, using the recommendations of the Law Commission, it is more likely that an offender would be convicted of burglary under s.9(1)(b)[210].

[206] Law Commission, *Intoxication and Criminal Liability* (Law Com No 314, 2009) para 3.35
[207] Theft Act 1968, s.9(1)(a)
[208] *R v Smith* [1974] QB 354
[209] *R v Stephenson* [1979] QB 695
[210] Theft Act 1968, s.9(1)(b)

As the offence would not be considered as a specific intent crime, it would be broken down into separate mens rea elements. This would work in a similar way to the burglary mentioned above, as the GBH[211] component of the burglary would also be subject to the *Majewski* rule. It is likely that the intoxication, in this case, would not be considered by the jury; the fault elements would be considered as if the intoxication was not present at all.

For the offence of burglary[212] where theft has to be either intended, or it has actually occurred, this would work in a slightly different way to the examples set out above. Taking each element of mens rea in turn, as this also requires either the intention to steal or any actual theft, there are actually more elements than with the previous examples. The trespassing element would be easy to establish using the recommendations due to the presence of potential recklessness.

As discussed in Section II, the mens rea of theft includes dishonesty and an intention to permanently deprive. Unlike with the examples set out above, these elements would not be subject to the *Majewski* rule according to recommendation 2 by the Law Commission. Specifically, with the intention to permanently deprive, the prosecution would have to prove this element, and the jury would be able to take into account the intoxication. If for example, D disposed of property that same night or sold it to another person, this would normally suffice in regard to this element. If D returned the property the next day when sober, it would be very difficult to prove this element.

These recommendations are definitely a step in the right direction, as codifying the law would allow the intoxication doctrine to be interpreted in a more definitive way with less room for inconsistency. There are still however further amendments that should be made in order to create more accessibility to convictions in relation to property offences. With these recommendations, they create a mismatch between the culpability and the chance of acquittal, particularly in relation to the branches of burglary. If the burglary relates to GBH or criminal

[211] Offences Against the Person Act 1861, s.20, Theft Act 1968, s. 9(1)(b)
[212] Theft Act 1968, s.9(1)(a) and s.9(1)(b)

damage, the *Majewski* rule will apply. Whereas, when theft is present, the *Majewski* rule will not apply. The mismatch in convictions would be too high compared to the culpability needed for each branch of the offence.

The Law Commission does also state that when determining the nature of the fault element when it is an integral fault element, whether there is an alternative offence of recklessness or not should be taken into consideration[213]. This implies that through the evolution of case law, this can be taken into consideration, particularly when looking at the offences held in Section II. By allowing courts to take this into consideration, it may then allow the law to evolve in a way that secures convictions for theft when the offender is voluntarily intoxicated. There is still an argument that the rules on this should be codified.

If the Law Commission recommendations were to be codified, it would allow the relationship between the intoxication doctrine and the offences within Section I to work as they do now. It would make sure they were implemented in a fair and consistent way with scope for evolution in unusual cases. The relationship between the doctrine and the offences in Section II would potentially be more appropriate. If each property offence were to be broken down into separate integral fault elements, it is likely that the dishonesty element would not be subject to the *Majewski* rule. The intention to permanently deprive element would not be subject to the *Majewski* rule, however this element would be far easier to prove when an offender later becomes sober. More codification surrounding the fault elements of theft would definitely be needed, particularly now the dishonesty test has changed. Generally, the recommendations relating to Section I and Seection II, in particular, can be interpreted in a way that sways more towards an absolutist approach. Potentially making it so offenders can still be charged with property offences, even if committed whilst intoxicated. The relationship between the Law Commissions Proposals and the Ivey case should be evaluated further in order to analyse the effects of Ivey on the Intoxication Doctrine.

[213] Law Commission, *Intoxication and Criminal Liability* (Law Com No 314, 2009) para 3.51

Conclusion

Throughout this project, it has become clear that although the *Majewski*[214] rule has benefits both in theory and in practice with certain offences, there are also a lot of problems and concerns. Particularly coming from the lack of codification as well as the problems through interpretation amongst property offences and offences that occur through an involuntary intoxication. Considering even the judges within the *Majewski*[215] case had differing opinions on basic and specific intent, clearly, some form of clarification and codification would be beneficial.

With offences against the person, the *Majewski*[216] rule works well in practice due to the nature of the corresponding offences. As all offences that have a specific intent also have a basic intent offence with the same actus reus, the prosecution can still secure a conviction, even in cases with intoxication present.

There are various arguments that suggest the way the intoxication works is unsatisfactory. Some suggest that by allowing the effect of the intoxication doctrine on basic intent crimes, it undermines a very important rule of law - that all elements of a criminal offence must be proved by the prosecution beyond all reasonable doubt. The theory behind the way this works in practice is that it will fail to provide a full defence in order for intoxicated offenders to evade liability. It seems to be an absolutist approach to interpreting the law. Yet, this has proved not to be the case through common law[217]. Offenders are still able to evade liability if they would not have been culpable when sober.

There are also various arguments about intoxication being taken into account for specific intent crimes. If the courts were to take an absolutist approach to interpret specific intent crimes, intoxication would not be taken into account at

[214] *DPP v Majewski* [1977] A.C. 443
[215] Ibid
[216] Ibid
[217] *R v Richardson* [1999] 1 Cr. App. R. 392

all. Although this would have obvious public safety benefits, it would create a monumental difference between the culpability of committing a serious offence with a sober intention, compared to when intoxicated. The *Majewski*[218] rule currently does not apply to specific intent crimes. However, rather than allowing a defence for intoxicated offenders, it simply allows the intoxication to be taken into account when assessing the element of fault, potentially then preventing a conviction.

This allows a compromise between the absolutist and the subjective approach. The absolutist approach is used for basic intent crimes, allowing for convictions to be attained in order to protect the public, and the subjective rule is used for specific intent crimes in order to protect the importance of taking culpability into account. This is however only how the doctrine works with violent offences that have committed when offenders have been voluntarily intoxicated.

Generally, the relationship between intoxication and violent offences works in a consistent and fair manner. Considering the *Majewski*[219] rule was created with violent offences in mind, it works as a concept in theory and in practice. The doctrine works in a way that offers the public an element of safety, as well as fairness for offenders. The manner in which it works should be extrapolated and applies to other areas of criminal law in order to improve their relationship with intoxication.

The manner of codification suggested by the Law Commission would also add an element of consistency. As the *Majewski*[220] rule works well in practice, codifying it would ensure fairness. The method incorporated in Australia should also be looked at if the *Majewski*[221] rule was ever to be codified. This would allow for offenders to use their intoxication to evade liability in relation to specific intent crimes *unless* they have committed an offence whilst intoxicated before. This would add another element of public safety to legislation.

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[218] *DPP v Majewski* [1977] A.C. 443
[219] Ibid
[220] ibid
[221] *DPP v Majewski* [1977] A.C. 443

Involuntary intoxication should and tends to be immune from the rule set in *Majewski*[222]. When an offender commits an offence without the requisite mens rea in *any* type of crime, and the failure to establish the mens rea has arisen from an involuntary intoxication, no conviction will be granted. The reasons for this are relatively clear. The issues with involuntary intoxication arose in the case of *Kingston* [223]. This case set a dangerous precedent, as it takes an absolutist approach in regard to involuntary intoxication.

It was decided that even though the offender, in this case, did not choose to become intoxicated, however, was still held to be liable for all that occurred thereafter. This was a very controversial decision, as his drugged intent was held to be intent. It seems very unfair to equate an involuntary and drugged intent with a sober intent. The suggested recommendations by the Law Commission, if they were ever to be enacted, may reduce the effects of the precedent set in *Kingston*. It would potentially allow for intoxication to be taken into consideration, even if the fault element could be proved by the prosecution. If it were ever to be codified, this would offer a far superior form of culpability assessment for offenders that have committed crimes whilst involuntarily intoxicated.

One the face of it, the property offences discussed in Section II, namely theft, burglary, aggravated burglary and robbery, seem similar to the offences discussed above. Theft and burglary require a lower level of fault than robbery and aggravated burglary as well as resulting in a lower sentence if convicted. Theft also has corresponding actus reus elements with robbery, and burglary has corresponding actus reus elements with aggravated burglary. The issue, however, remains that all four offences are ones of specific intent, therefore providing no basic intent offences that the prosecution can prosecute the offender for when intoxication has prevented them from proving the mens rea required. This is clearly a public policy concern.

[222] ibid
[223] *Kingston* [1995] 2 AC 355

The *Ivey* case suggests the way theft and other property offences may work in the future, could mimic the format that offences discussed in Section I work in practice. Instead of being seen offences of ulterior intent, they may instead be seen as basic intent offences. As long as all of the actus reus elements of theft can be established, offenders may be able to be prosecuted for theft, even if they were deemed to be so intoxicated that they did not know what they were doing. If an individual awoke from an intoxicated state and they realised that they had taken something that did not belong to them; if they decided not to return such property, they could potentially still be liable for theft. This is due to the fact an 'intention to permanently deprive' can occur after the original appropriation[224]. The only element left to establish would be the dishonesty. Due to the new test in *Ivey v Gentings Casinos,* this may now be possible to establish, even in cases involving intoxication. If an offender were to appropriate property belonging to another whilst intoxicated, it would be down to the tribunal of fact to determine whether the offender was doing so dishonestly. This test would not take into account the subjective opinion of the offender himself, only the objective opinion as to whether the offender was dishonest compared to the standard of a reasonable person. Theft, may therefore, still be prosecuted when an offender is intoxicated, as long as the property is not returned.

In a case where an individual awakes from an intoxicated state and they realise they have appropriated property belonging to another; and they return that property as soon as is reasonably practicable, it is unlikely they would be prosecuted for theft. This is due to the fact all five elements of theft have to be established, including an intention to permanently deprive. Although the definition of dishonesty has changed, this will not impact the prosecution where they are unable to prove beyond reasonable doubt, all of the other elements to the offence. This does however continue to highlight the fault of individuals and how that fault should impact on their sentence or lack thereof. This would add an additional level of deterrence, as any intoxicated offender would be encouraged to return any property once they awake from their intoxicated state.

[224] Theft Act 1968, s.6(1)

This would work in a similar way when the offender is charged with burglary. This is due to the breakdown of the elements of burglary being possible to prove by the prosecution individually. As recklessness is possible to establish even when the offender is intoxicated, the prosecution would only then be required to prove the additional element of theft, GBH, or criminal damage. Using the analysis of the *Ivey* case, theft may be possible to prosecute even when the offender is intoxicated. This is also the case for s.20 GBH[225] and for criminal damage[226] as they both stand as basic intent offences. This also slightly mirrors the method suggested by The Law Commission, by assessing each element of an offence individually in cases involving intoxication.

Incorporating the Law Commissions reform proposals into the law in England and Wales would allow only integral fault elements of offences to be immune from the *Majewski*[227] rule. This would therefore allow each mens rea element to be dealt with separately, rather than each crime being labelled either specific or basic intent. This would then transpire into elements of theft and burglary being subject to the *Majewski*[228] rule. This would allow the offences to be judged on a case-by-case basis by the jury, making it so the offences in Section II would be analysed in a much more succinct and consistent way.

This method would also allow for the relationship between intoxication and the offences described in Section II to mimic the relationship between intoxication and the offences described in Section I. This would allow the prosecution to charge offenders with both theft and burglary when intoxicated as they would for s.20 GBH and manslaughter. This would also provide a method of being able to prosecute an offender that has committed either robbery or aggravated burglary, with theft or burglary instead. An in-depth analysis of the effects of *Ivey* therefore seem to create corresponding crimes for both robbery and aggravated burglary, making it so the prosecution are still able to attain convictions when an

[225] Offences Against the Person Act 1861, s.20
[226] Criminal Damage Act 1971, s.1(1)
[227] *DPP v Majewski* [1977] A.C. 443
[228] Ibid

offender is intoxicated. This would mimic the method used between murder and manslaughter and s.18 GBH and s.20 GBH. This method has been described as working well in practice with few moral objections[229].

Although the analysis of *Ivey* in this manner would see to resolve such a heavily disputed area in law, it remains only a theory of a more appropriate practical format. Until codified, it is unknown as to how effective this change would be and how many more prosecutions would result.

[229] Law Commission, *Intoxication and Criminal Liability* (Law Com No 314, 2009 paras 1.28 and 5.29

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AN ALTERNATIVE APPROACH TO SOLVING THE DILEMMA OF LITIGATION AND LIABILITY DISPUTES IN OUTER SPACE

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Name: **Mert Evirgen**

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Student No: **15016789**

Research Declaration

I confirm that I have already submitted my Project Synopsis and Ethical Approval Form, which has been signed by my supervisor. I further confirm that this project is entirely my own work and that the research undertaken for the completion of this project was based entirely on secondary material or data already in the public domain (case law, journal articles, published surveys etc). It did not involve people in data collection through empirical research (eg, interviews, questionnaires or observation).

Signed: **Selcuk Mert Evirgen**

Dated: **14/05/2019**

Acknowledgement

To my grandfather, Cetin Evirgen.
For your ongoing support on this Earth
And from the Stars.

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Introduction: The Eagle has landed

The aim of this paper is to address the issues that hinder efficient and effective liability dispute resolution in Outer Space and to create proposals to solve the dilemma based on the factors explored throughout this work. It is also to depict the fragility of the balance that currently exists in the utilised part of Space. There are many parties with a vested interest in Space but there is a lack of adequate provisions for solving disputes. This paired with the fact that Space is a hostile environment where incidents are likely to occur (and as shown throughout this work, do occur). This is an issue that is likely to raise international tensions. Another aim of this work is to establish that this is a matter of urgency and to implement ADR so that this problem may be avoided.

Ambassador Gregory L. Schulte[1] spoke about the term of the "three C's" of Space and described the current environment as: Congested, Contested and Competitive.[2] This, in essence, is why this particular area of research is important. It is an area with a rapidly growing interest from across the international theatre. For example, the current valuation of the Space industry is at $350 billion and predicted to $1 trillion or more by 2040.[3] Moreover, the sector has witnessed a huge increase in new stakeholders investing in Space projects,[4] the arena is no longer dominated by the cold war superpowers as it was when the Outer Space Treaties were originally drafted. Therefore, the combinations of a tense environment, economic advantages of Space and increase in participants will naturally result in disputes. In particular, disputes in which litigation is not a practical solution. Space is a swiftly developing sector with constant technological innovations and commercial competition ensuring that the industry does not stagnate. However, the complication of such expeditious development is the difficulty in providing a framework to govern the processes of the sector. Because of this, litigators cannot provide a thorough system of dispute resolution that can match the progress

[1] Ambassador Gregory L. Schulte stated this phrase while acting as deputy assistant secretary of defence for space policy for the US Department of Defence

[2] Space Foundation, 'Schulte: Space is Congested, Contested, Competitive' (Space Foundation, 1 June 2011) <https://www.spacefoundation.org/news/schulte-space-congested-contested-competitive> accessed on 12 May 2019

[3] Jeff Frost, 'A trillion-dollar Space industry will require new markets' (Space News, 5 July 2018) <https://spacenews.com/a-trillion-dollar-space-industry-will-require-new-markets/> accessed on 12 May 2019

[4] Violetta Orban, 'New Global Space Actors: Issues and Perspectives' (Space Safety Magazine, 3 December 2015) <http://www.spacesafetymagazine.com/space-on-earth/national-space-programs/new-global-space-actors-issues-and-perspectives/> accessed on 12 May 2019

of the Space industry. Space is also an international matter, it is not as simple as a government passing a law for its citizens to adhere to. This raises the question, how can disputes of matters in Outer Space be resolved?

This paper will begin with the relevant law in place for liability in Space. This will be demonstrated with the example of the Iridium Cosmos collision and applying the relevant law to the facts of the incident, which will highlight the relevant international procedures for dealing with realistic threats in the current Space environment. Then the discussion will continue by exploring ways in which liability may occur in Space operations. This will include a variety of examples of incidents in Outer Space where claims for liability may become a reality. The aim of this is to provide an understanding of the complexity of liability in this area of law and to emphasise why an efficient dispute system is crucial for further positive development in Space. Afterwards the paper will focus on the use of ADR and why it is preferable to litigation. To demonstrate the importance of ADR two examples will be relied upon, which are the Iridium/Cosmos incident as well as introducing the Cosmos 954 incident to provide examples of where issues can arise in orbit and on the surface of the Earth. Once these issues are discussed, the uses of ADR will be explored. Finally, this paper will begin to implement the previous discussions and combine their findings, in order to reform the current Claims Commission and to present viable alternatives of ADR.

Relevant law for liability in Space

Space is a congested, contested and commercialised arena, governed by a set of international Treaties. Governed is used in a loose term, because they set a series of guidelines which nations adhere to and have become customary international law. They are often criticised for lacking detail and being ineffective, although the effectiveness depends on individual interpretation. There are contrasting schools of thought on this matter, which will be discussed in this paper.

It is crucial to be cognisant of the fact that the wide range of actors in this arena is one of the main reasons as to why setting a form of governance is so difficult. This matter is not of state and citizen where the state governs, and the citizen abides. Each actor is a powerful entity and their aims, more than often, clash. Furthermore, there is a direct correlation between the

increase of parties in space[5] as space becomes more accessible. Space is no longer a contest between two superpowers of the cold war, vying for prestige, it is a hotbed of entrepreneurs who are aware of its economic potential. It is an investment, albeit a risky one, as will be discussed later on. This risk is essentially why liability often arises, the economic viability is why we must protect the environment and find a suitable system of dispute resolution. With the aforementioned increasing presence of entrepreneurs and the amount invested, human activity in space is developing at unprecedented rates. Litigation cannot keep up with this. Therefore, to ensure that we do not stifle our development, ADR is the most current and effective solution.

The current focus will be on the international Treaties and how matters of liability are affected by them. This will be achieved through the use of a case study; the Iridium Cosmos collision. To demonstrate that accidents/collisions in space are a reality and a pressing concern. As well as to apply the law to a practical scenario, so that the vague black letter law of the Treaties can be clarified.

An inactive Russian military communications satellite, Cosmos 2251, collided with a US (based Iridium Satellite LLC) active commercial communications satellite.[6] This collision took place at 800km (497 miles) above Siberia and produced nearly 2000 pieces of debris, at ten centimetres diameter as well as thousands more smaller pieces.[7] This debris will remain in orbit for decades and pose a collision risk to other objects in Low Earth Orbit (LEO).[8]

As mentioned briefly above, the Outer Space Treaties are the by-product of two factors: the cold war and both parties involved in the cold war being the only ones that could access Space.[9] The mistake of many critics of the Treaties is that most overlook or understate the biggest success of the Treaties, which is that space cannot house nuclear missiles or weapons

[5] UNITED NATIONS Office for Outer Space Affairs, 'A/RES/68/74' (UNOOSA) <http://www.unoosa.org/oosa/oosadoc/data/resolutions/2013/general_assembly_68th_session/ares6874.html> accessed 26 April 2019

[6] Secure World Foundation, 'The Persistent Problem of Orbital Debris' (Secure World Foundation, October 17 2018) <https://swfound.org/space-sustainability-101/the-persistent-problem-of-orbital-debris/> accessed 2 May 2019

[7] Brian Weeden, '2009 Iridium-Cosmos Collision Fact Sheet' (Secure World Foundation, November 10 2010) <https://swfound.org/media/6575/swf_iridium_cosmos_collision_fact_sheet_updated_2012.pdf> accessed on 2 May 2015

[8] Ibid

[9] Hertzfeld HR, 'Developing Issues in the Law of Outer Space.' (2015) 3(1) Penn Undergraduate LJ 1

of mass destruction and the moon as well as celestial bodies must be used for peaceful purposes.[10] Although critics claim that "while no state wants to be the first to openly weaponise Space, many are investing in dual-use technology"[11] (Dual-use technology refers to satellites which may be used for civilian and military purposes) and "It is clear that the distinction between military and non-military uses of outer space, is becoming increasingly blurred".[12] They fail to recognise the severity of a crisis which these Treaties avoided. The effective de-militarisation and peaceful intentions of the Treaties stopped two superpowers competing to use Space as the next venue for their nuclear power struggle. As a result, we can now experience the commercial boom and liability matters which naturally follow that. The Treaties may not be well equipped to solve disputes but they played a large part in calming tensions. The issue of the latter is something that this paper will attempt to address. There are four international Treaties to examine, the Outer Space Treaty (OST),[13] the Rescue Agreement (RA),[14] the Liability Convention (LC)[15] and the Registration Convention (RC).[16] The Moon Treaty (MT)[17] is the final and controversial international Treaty. However, it will not be

[10] Article IV of the OST, can be found at http://www.unoosa.org/oosa/en/ourwork/spacelaw/treaties/introouterspacetreaty.html

[11] Quinn AG, 'The New Age of Space Law: The Outer Space Treaty and the Weaponisation of Space.' (2008) 17(2) Minn J Int'l L 475

[12] Ferreira-Snyman A, 'Selected Legal Challenges Relating to the Military Use of Outer Space, with Specific Reference to Article IV of the Outer Space Treaty.' (2015) 18(3) Potchefstroom Elec LJ 488

[13] Exploration and Use of Outer Space, including the Moon and Other Celestial Bodies (Herein referred to as the Outer Space Treaty or OST) was adopted by the General Assembly of the UN on 19 December 1966 by virtue of Resolution 2222 (XXI). It was opened for signature on 27 January 1967 and entered into force on 10 October 1967. It can be found here: http://www.unoosa.org/oosa/en/ourwork/spacelaw/treaties/introouterspacetreaty.html

[14] The 1968 Treaty on Agreement on the Rescue of Astronauts, the Return of Astronauts and the Return of Objects Launched into Outer Space (Herein referred to as the Rescue Agreement or RA) was adopted by the General Assembly of the UN on 19 December by virtue of Resolution 2345 (XXII). It was opened for signature on 22 April 1968 and entered into force on 3 December 1968. It can be found here: http://www.unoosa.org/oosa/en/ourwork/spacelaw/treaties/introrescueagreement.html

[15] The 1972 Treaty on Convention on International Liability for Damage Caused by Space Objects (Herein referred to as the Liability Convention or LC) was adopted by the General Assembly of the UN by virtue of Resolution 2777 (XXVI) and was opened for signature on 29 March 1972. It entered into force on 1 September 1972. It can be found here: http://www.unoosa.org/oosa/en/ourwork/spacelaw/treaties/introliability-convention.html

[16] The 1976 Treaty on Convention on Registration of Objects Launched into Outer Space (Herein referred to as the Registration Convention or RC) was adopted by the General Assembly of the UN in 1974 by virtue of Resolution 3235 (XXIX). It was opened for signature on 14 January 1975 and entered into force 15 September 1976. It can be found here: http://www.unoosa.org/oosa/en/ourwork/spacelaw/treaties/introregistration-convention.html

[17] Agreement Governing the Activities of States on the Moon and Other Celestial (Herein referred to as the Moon Treaty or MT) was adopted by the General Assembly of the UN on 1979 by virtue of Resolution 34/68. It was opened for signature on December 18 1979 and entered into force on 11 July 1984. It can be found here: http://www.unoosa.org/oosa/en/ourwork/spacelaw/treaties/intromoon-agreement.html

included in this explanation because of its lack of ratification and lack of international support in comparison to the previous Treaties. The major issue for the MT stems from the fact that "the space-faring States and the majority of developing countries decided not to become Parties to the Moon Agreement".[18] Whereas the previous Treaties are customary international law because of the international consensus and practice, the MA has been unable to achieve a similar status.

Applying the Treaties to the Iridium/Cosmos Collision, in the case of Iridium

Article I of the OST requires that Space be the 'province of all mankind' and in doing so be free for peaceful use and exploration by all states. The Iridium satellite belonged to a private company that is based in the US so we must assert whether they are afforded the right conferred by Article I. A private company, as provided by Article VI, may operate in Space. Space as stated previously is the province of all mankind and is not limited to nation states. However, as stated in Article VI, nation states are liable for the actions of the private actors. Therefore, the US could be held liable for the collision if liability was ascertained. It is important to keep in mind that this does not mean that private actors cannot be held liable but that the onus is on nation states to enforce this (which will be discussed in detail later on).

For the satellites to be allowed they must also not be an attempt to appropriate or lay claim of sovereignty to Outer Space, in accordance with Article II. Furthermore, the satellites must operate in conjunction with international law as required by Article III.

Article IV states that parties to this Treaty cannot place nuclear weapons, weapons of mass destruction or military installations in Space. As Iridium is a commercial satellite these provisions do not affect it, but it will be addressed later in this discussion as Cosmos is a military communications satellite.

Article V is important in regard to astronauts, but as the satellites do not have any personnel on board it is not relevant for this explanation. This also applies to the RA, although it does have relevance because of the definitions it provides for Space objects.

[18] Tronchetti F, 'The Moon Agreement in the 21st Century: Addressing Its Potential Role in the Era of Commercial Exploitation of the Natural Resources of the Moon and Other Celestial Bodies.' (2010) 36(2) J Space L 489

As mentioned at the start, Article VI places international responsibility on the nation state, even when it is a private actor from within that state. It also states that private actors require authorisation and continuing supervision by the state they reside in. Which is essentially the principle of state responsibility. This principle is the corollary of a triumvirate of articles: Article VI, VII and VIII. For a satellite to be sent into orbit it must fulfil these requirements. Article VII concerns the liability criteria. It provides that a state that launches, procures a launch or allows its territory or facility to be used for a launch is liable building on the requirements of Article VI. Article VII is crucial for the purposes of this scenario as it provides that if an object is launched into Outer Space on a state party's registry, the state party retains jurisdiction and control over that object. On this basis, the Iridium satellite is an active satellite under the direct control of the US.

Articles VI and VII are the foundation on which the LC was developed, similarly the RC was based on Article VIII.

To further analyse the legal positions of the satellites these two further Treaties must be considered as well.

While the LC plays a large role in ascertaining liability, it is important to use them in conjunction with the OST and RC. Article I defines the following: damage, launching, launching state and Space object. Damage is "loss of life, personal injury or other impairment of health; or loss of or damage to property of States or of persons, natural or juridical, or property of international intergovernmental organisations". Launching is defined as "The term 'launching' includes attempted launching". A launching state is "(i) A State which launches or procures the launching of a Space object (ii) A State from who territory or facility a space object is launched". A space object is "component parts of a Space object as well as its launch vehicle and parts thereof". On this basis it is certain that there is damage to the satellites, that the satellites were considered to be launched, and that the launching state for Iridium is the US.

In accordance with Article II of the LC, nation states will be held under absolute liability, for damage caused by their Space objects on the surface of the planet or to aircraft in flight. In essence, if the damage does not occur in Space then there is absolute liability upon the nation state who causes the accident.

The difficulty in determining liability is if the damage is caused in Space, as shown in Article III. It is stated that "In the event of damage being caused elsewhere than on the surface of the earth to a space object…shall be liable only if the damage is due to its fault or the fault of persons for whom it is responsible". This place a fault based liability system, in an environment where fault is incredibly hard to determine. For this reason, the fault in the collision is hard to determine as it raises the issues of, which nation state is at fault for the collisions? Cosmos was an inactive satellite, what is the implication of this? (

Articles IV and V provide provisions for the involvement of third parties and joint liability, respectively, as they are not a part of this case study these Articles will not be discussed.

Articles VI and VII present exonerations from liability. The former Article presents an exoneration from absolute liability, which is only applicable under the basis that the damage has resulted wholly or partially from gross negligence or from an act to cause damage on the part of a claimant state. However, exoneration will not be granted if cases where damage is a result of an activity where a nation state is not in conformity with international law (Article VI(2)). The latter Article applies if damage is caused by a Space object to nationals of that launching state or foreign nationals at a time that they are participating in the operation of that Space object at the time of its launch, or any stage following on from that until its descent then liability shall not apply.

Articles VIII to XXI of the LC provide a compensation procedure, it can be divided into two separate forms of claim. The initial claim which is found in Articles VII to XIV, which governs how states may claim from each other in the case of a liability dispute. Articles XV through to XXI discuss the creation and powers of a Claims Commission (CC). The provisions of claim and the CC will be discussed towards the end of this paper, as the LC has not been invoked[19] and therefore do not apply to this collision.

This Treaty was created to provide nationally and internationally maintained registers in order to identify Space objects (Article II), with relative[20] ease. The importance of the RC lies in several reasons. Firstly, as objects can be traced more efficiently, liability is easier to ascertain.

[19] R Jakhu, "Iridium-Cosmos Collision and its implications for space operations", ESPI Yearbook on Space Policy. 2008/2009: Setting New Trends. Wien: Springer Wien, NewYork: 2010. pp 254-275

[20] Emphasis on relative, Space is notoriously difficult to track objects in, but this treaty has provided a good starting point to be able to keep track of the objects placed in Space and to ascertain liability.

Secondly, it establishes a connection between a Space object and a state for the purpose of jurisdiction, which enables control of the object as well for the return of an Astronaut (Which can be found in Article VIII and Article V respectively). Article I of RC provides definitions, like the LC, in particular 'state of registry'.[21]

The RC provides a register for Space objects. This register requires that:

In accordance with Article IV, the following information is provided to the secretary general of the UN as soon as is practicable. The name of the launching state/states (Article IV 1(a)). An appropriate designator of the space object or its registration number (Article IV 1(b)). Date and territory or the location of launch (Article IV 1(c)). Basic orbital parameters[22] (Article IV 1(d)). General function of the Space object (Article IV 1(e)).

Article II (2) of the RC requires that the launching states decide amongst themselves who will be the state of registry for a Space object.

The difficulty for Iridium arises from the fact that the there is uncertainty in regards to which nation is its launching state as it was not registered as required by the RC. In contrast Cosmos' launching state was Russia.

<u>Applying the Treaties to the Iridium/Cosmos Collision, in the case of Cosmos</u>

All the provisions in the Treaties stated above apply to Cosmos as well, the main differences between the two satellites (which required a separate discussion) is that Cosmos is a Russian military communications satellite. Furthermore, it is inactive. What implications do these factors have?

It was explained that Article I of the OST requires that Space belongs to all of mankind and the use of it must be peaceful. In addition Article IV limits the use and presence of the military in space. The conundrum for this case study is that Cosmos is a military communications satellite, because of this, does it have a right to be in space?

[21] It is defined in Article I(c) as a "launching state on whose registry a space object is carried in accordance with article II.

[22] This includes nodal period inclination, apogee and perigee.

It is important to consider that most satellites have military capabilities.[23] Crucially, Article IV does not specifically ban conventional arms or the military from Space, it just restricts their activities.[24] More importantly, as previously mentioned, these Treaties are predominantly the product of the two superpowers at the time, the US and the USSR. While these Treaties were in their drafting phase, they both had military satellites already in orbit,[25] it would not have been in either states interests to place an absolute ban on the use of military satellites. Furthermore, many satellites are dual-use, they can provide communications for civilian and military installations on Earth. As a result of this, the use of a military communications satellite does not contravene the Treaties.

Inactive Satellites are an academic grey area, specifically opinions on their relation to the Treaties. While there is a school of thought that states "it is questionable whether a state will be liable for a satellite which has ceased functioning or has disintegrated"[26] in contrast, there is also the opinion that "there seems to be no great difficulty in designating inactive satellites [as]…space debris".[27] The International Institute of Space Law define a category of Space debris as "inactive payloads, which cannot be controlled by their operators".[28] Based on the last two definitions and the previous discussion on the LC, Russia could be held to be liable for their inactive Cosmos satellite's collision.

The implications of Iridium/Cosmos

The LC was not invoked in the settling of this collision, which is important as the Treaty is not being used for its intended purpose, one of the reasons why this paper will seek to reform the CC. Furthermore, this collision created the second largest (Cosmos) and fourth largest break up (Iridium) recorded in orbit.[29] This collision is the perfect example of the Treaties

[23] R Lee and S.L. Steele, 'Military Use of Satellite Communications, Remote Sensing and Global Positioning Systems in the War on Terror' (2014) 79 J.Air L. & Comm. 69-112
[24] Larsen, P., & Lyall, F., Space Law: A Treatise, 2nd Ed (Ashgate 2017), (Ch 16)
[25] Ibid
[26] IH Ph Diederiks-Verschoor & V Kopal *An Introduction to Space Law* (3rd Edn, 2008, Alphen aan den Rijn: Kluwer Law International)
[27] L Viikari, *The Environmental Element in Space Law: Assessing the Present and Charing the Future,* Studies in Space Law, Vol 3 (2008)
[28] International Institute of Space Law, '2007 Proceedings of the International Institute of Space Law – 50th Colloquium on the Law of Outer Space 275-276' (IISL, September 2007) <http://iislweb.org/publications/proceedings/> accessed 3 May 2019
[29] NASA, 'Orbital Debris Quarterly News' (*NASA*, July 2010) <https://orbitaldebris.jsc.nasa.gov/quarterly-news/pdfs/odqnv14i3.pdf> accessed 3 May 2019

working, to a certain extent. But also of the ineffectiveness of the Treaties. This collision is a vital example of how liability will arise and increasingly so in the future if action is not taken to remedy the state of Debris. However, it is not the only way liability may arise, whilst it is an important case study and a prime example of how liability does occur, it is not the only way.

Causes of Liability in Space: The Three Stages

There are three main and separate stages where liability can be ascertained, which are the following: pre-launch, at launch and in orbit. This explanation will provide the basis for why there is an urgent need for a solution to the problem of solving disputes in Space. In essence, not only is the Space environment hostile, attempting to reach it is as equally difficult. Each stage provides its own unique challenges and will require innovative solutions to be tailored specifically to resolve the dispute which may arise from them

Often overlooked, this process adds many dimensions to how liability may be ascertained if a rocket launch does not go according to plan. As will be discussed further on, a launch can happen in four separate ways, which is evidenced in Article I (c(i)+(ii)) of the LC as: Through launch, procurement of a launch or if a territory/facility is used for the launch. It is important to highlight how a launch may take place as this effects the pre-launch requirements. The first pre-launch insured satellite was Intelsat-1.[30] During the time of Intelsat-1 (1960's), this insurance covered the issues of construction, transit, storage and testing of the satellite.[31]

The difficulty of the pre-launch is deciding when pre-launch ends.[32] It is usually dependent upon the individual contract prepared for the launch. Because as explained previously, the method of launch can alter how a satellite is to be launched, which in turn will alter what the pre-launch phase is. There is an argument that technically pre-launch is not a part of the liability in Space, specifically that Space insurance starts "not earlier than with the lift off of

[30] Benito Pagnanelli, 'Tracking Take-off of Space Insurance' (2007) <http://www.pagnanellirs.com/downloads/id281107.pdf> accessed 4 May 2019
[31] Ibid
[32] Katarzyna Malinowska, *Space Insurance: International Legal Aspects* (13th volume, Kluwer Law International BV 2017)

the launch".[33] However, it is intricate in the process of a satellites launch and therefore for the purposes of this proposal will still be considered as a stage.

To understand how the launch process can result in a matter of liability, it is important to define which point a rocket is deemed to have begun the launch process and where space begins.

To begin to explain this process it is important to define a launch activity and space object. Launch activities are described by Bin Cheng as 'the act of launching a space object'.[34] Furthermore, the LC defines in its Article 1(b) that the term 'launching' includes attempted launching. A space object in current practice is a generic term used to "cover spacecraft, satellites, and in fact anything that humans launch or attempt to launch into space".[35] The LC and RC provide in an identical fashion that the term Space objects includes component parts of a space object as well as its launch vehicle and parts thereof. These definitions give an ambiguous explanation into the launch process but a reliable foundation. On the other hand, there have been more recent definitive definitions, such as the Ariane 5 LV rocket which its launch is defined as "ignition of the solid propellant boosters".[36] Another definition used in practice is based on the practicality of the physical action of realising the clamps which hold the satellite.[37] Based on the previous definitions, a launch shall begin when the space objects launch procedure begins, then it shall be deemed to have launched and in concurrence with the LC's Article 1(b), an attempted launch will be regarded as a launch. Albeit a subjective definition, it is clear mechanical process and once the definition is applied a test of reasonableness can be applied to pin-point when the launch begins.

In asserting liability in the launching process, the first potential cause of liability is in the failure of the rocket in the launch or during the launch process before the rocket reaches its intended destination. The launch phase is regarded the shortest,[38] but the most dangerous stage.[39]

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[33] K Malinowska, 'Insurance of Risks in Space Activities' (Prawo Asekuracyjne, 2016) <http://prawoasekuracyjne.pl/wp-content/uploads/2017/08/pdf_malinowska_4_2016.pdf> accessed 4 May 2019

[34] Bin Cheng, *Studies in International Space Law* (Claredon Press 1997)

[35] Ibid

[36] n32

[37] n32

[38] C Brunner and A Soucek, *Outer Space in Society, Politics and Law* (Springer, 2012)

[39] Frans von der Dunk with Fabio Tronchetti, *Handbook Of Space Law* (Edward Elgar 2015)

Without belabouring the obvious, every true Space activity requires a launch[40] and it is this mandatory process, along with the insurance requirements, that encompasses the majority of current liability issues in Space. By 2010, 5,038 rockets had been launched, with 4,621 succeeding, thus a success rate of 92%.[41] This is statically succesful, but by 2010, 417 satellites had failed in the launch process. While the success rates have improved since 2010, this is still an explicit sign of how dangerous launches are. Although these statistics have improved recently, in 2018 there have been a total of 114 launches with only 3 failures.[42]

The boundary that marks the end of the atmosphere and start of Space s is currently a highly contested academic matter. This is because there is no internationally agreed definition for where our atmosphere ends, and Space begins, it is often described as gradually fading from the atmosphere into Space as both are interlinked. It is not as simple as a territorial boundary to be declared as separate boundaries. However, attempts to define the boundary have been made. The Von Karman line, at 100km (62.1371 miles), is most commonly accepted as the air Space boundary. The Fédération Aéronautique Internationale (FAI) is an example of an organisation that accepts the Von Karman line as the boundary.[43] The FAI has been working with the International Astronautical Federation (IAF) to create an international workshop, to be held in 2019, that would explore the issue of where the boundary begins.[44] This workshop, if it is created, could be the start of an academically agreed definition for the boundary, but until then this research shall rely upon the distance of 80km to 100km. This boundary will be relied upon because of the Von Karman line, but also because of organisations such as the US air force's practice on the matter. The US grants astronaut wings to any pilot who flies above 80.4572km (50 miles).[45] On this basis, it is pertinent to rely upon a combination of practice and theory where there is not an internationally agreed definition.

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[40] Frans von der Dunk, 'Commercial Space Activities: An Inventory Of Liability – An Inventory Of Problems' (1994) Space, Cyber, and Telecommunications Law Program Faculty Publications 46

[41] Claude Lafleur, 'Spacecraft stats and insights' (The Space Review, 5 April 2010) <http://www.thespacereview.com/article/1598/1> accessed on 5 May 2019

[42] Ed Kyle, 'Space Launch Report: Orbital Launch Summary by Year' (Space Launch Report, 31 December 2018) <https://spacelaunchreport.com/logyear.html> accessed 5 May 2019

[43] STATEMENT ABOUT THE KARMAN LINE, 'FAI ASTRONAUTIC RECORDS COMMISSION (ICARE)' (30 November 2018) <https://www.fai.org/news/statement-about-karman-line?type=node&id=22863> accessed 25 April 2019

[44] Ibid

[45] Federal Aviation Administration, 'Commercial Astronaut Wings Program' (5 February 2019) <https://www.faa.gov/about/office_org/headquarters_offices/ast/programs/astronaut_wings/> accessed 25 April 2019

If a rocket can overcome the most dangerous stage and enter orbit, then it enters an environment where it is susceptible to many dangers. There are natural and artificial hazards that render many satellites inoperative. Any individual with interests in Space must bear these in mind to take the necessary precautions, liability is possible at every stage in this precarious arena.

Once a rocket has reached Space and released its cargo, the first possible form of liability is if the satellite is released incorrectly or is unresponsive upon deployment. This stage is known as Post Separation Phase (PSP). This phase is defined as being from the release of the Launch Vehicle (LV),[46] to the start of the satellites operational service.[47] The period of insurance cover for this phase can include, the satellite orbit settling, for example the use of its own propulsion system to reach its intended orbit.[48] In addition, in-orbit testing to ensure it is operational as well as the initial period of the satellite operational life.[49]

The in-orbit phase can be defined as starting once the PSP has ended. Fundamentally this is when the satellite has taken its intended orbit and is providing its intended purpose.[50] Insurance in this phase tends to last in the 'in-orbit' stage until the end of the satellite's lifetime.[51] It is important to define when a Space object is in Space and when insurance is active for the intended purpose so that liability may be ascertained. The LC, as discussed previously places liability in Space on a 'fault basis', therefore once a satellite is in Space based on the boundary between the atmosphere and Space and positioned in-orbit then parties may know when and how they can claim liability.

Once satellites have begun their operational stage, after a successful PSP, they face numerous challenges. The natural hazards include issues such as Electrostatic Discharge, Solar Storms

[46] The Launching Vehicle (LV) has been referred to as the "rocket" previously
[47] Andrea Harrington, 'Legal and Regulatory Challenges to Leveraging Insurance for Commercial Space' (31st Space Symposium, April 2015) <http://2015.spacesymposium.org/sites/default/files/downloads/A.Harrington_31st_Space_Symposium_Tech_Track_Presentation.pdf> accessed 5 May 2019
[48] Oliver Schoffski and Andre Georg Wegener, 'Risk Management and Insurance Solutions for Space and Satellite Projects' (1999) 24 Geneva Papers on Risk and Insurance – Issues and Practice.
[49] Ibid
[50] n33
[51] David Wade, 'Insurance for Spaceflight' (Royal Aeronautical Society, 3rd February 2016) <https://www.aerosociety.com/Assets/Docs/Events/Conferences/2016/803/David_Wade.pdf> accessed 5 May 2019

and Meteor Showers. The artificial hazards, which are a result of human activity in Space, include problems such as a loss of fuel and Space Debris.

This is one of the most prevalent PSP and in-orbit hazards experienced by satellites. This Electrostatic Discharge is either as a result of solar activity or through the formation of plasma clouds due to the ionisation of meteoroids which collide with satellites.[52] The plasma can be split into two separate categories, low altitude plasma found at Low Earth Orbit (LEO) and high-altitude plasma which is a problem at Geostationary Earth Orbit (GEO), polar orbits and radiation belts.[53] The impact of this phenomena ranges from supressing satellite capabilities to resulting in loss of spacecraft.[54] An example of this is the Aniks E1, E2 and Intelsat K which suffered electronic discharge as a result of a geomagnetic storm, which caused them to malfunction.[55]

Space weather encompasses various natural occurrences in orbit. This covers solar winds, flares and storms. Solar wind is a constant in Space, although the intensity of it changes.[56] The real hazard in Space is from solar flares and storms, labelled as single-event upsets (SEUs) as they can change spacecraft components performance abruptly,[57] usually damaging it beyond repair. When a solar storm erupts they "can bombard a satellite with highly charged particles and increase the amount of charging on a spacecraft's surfaces".[58]

These events are a danger which play a large role in insurance policies, more than often affecting the extent to which a satellite is insured. Insurance and these matters are vital for matters involving liability. Telstar 401, a satellite positioned in GEO, is an example of a total loss of a satellite as a result of a solar storm.[59] The complications that arise as a result of solar

[52] Sarah Goddard, 'Satellite Owners Take Precautions For Meteor Storm' (Business Insurance, 25 October 1998) <https://www.businessinsurance.com/article/19981025/STORY/10006244?template=printart> accessed on 5 May 2019
[53] John B. Bacon, 'Electrostatic Discharge Issues in International Space Station Program EVAs' (NASA) <https://ntrs.nasa.gov/archive/nasa/casi.ntrs.nasa.gov/20110014828.pdf> accessed on 5 May 2019
[54] Ibid
[55] Flight Global, 'Solar storm is suspected in Telstar 401 satellite loss' (Flight Global, 29 January 1997) <https://www.flightglobal.com/news/articles/solar-storm-is-suspected-in-telstar-401-satellite-loss-1534/> accessed on 5 May 2019
[56] Intelsat, 'Space Weather' (Intelsat) <http://www.intelsat.com/tools-resources/library/satellite-101/space-weather/> accessed on 5 May 2019
[57] Ibid
[58] Ibid
[59] n55

weather and electronic discharge are greater than admitted by satellite manufacturers,[60] this emphasises the true danger of Space and the numerous ways liability may occur.

A hazard exclusive to operations in Space, a meteor shower can be described as "a blizzard of meteor particles, some the size of sand, but mostly smaller".[61] One of the small grains in the meteor shower at the speed they travel, can have the same destructive capability of a .22 calibre bullet.[62] A range of US satellites, military and civilian faced this danger through the Leonid meteor storm in 1998.[63] More recently in 2016, the European Space Agency's (ESA) Copernicus Sentinel-1A satellite suffered damage as a result of a collision with a Space particle, which was believed to be a micro-meteorite.[64]

Loss of fuel is an area that is linked to a successful launch. If a launch is carried out successfully and a satellite does not require re-positioning through the use of fuel. If the satellite does not reach the intended orbit and has to use fuel to reach it, this can be regarded as a partial failure in the launch. This is because, a loss of fuel can correlate to a shorter life span for the satellite.

An example of this is the loss of IS-29e satellite. A loss suffered this year, was the result of fuel leak after three years in orbit, while most geostationary communications last 15 years.[65] The uninsured satellite's loss has resulted in the estimated loss of $45 million and $50 million in revenue for Intelsat.[66]

Space Debris is one of the greatest environmental dangers faced in Space and for the future of humanity, if not acted upon. The Kessler syndrome is the theory that the increasing amount of Space debris, if allowed to accumulate will eventually hinder and possibly prohibit human

[60] n55
[61] Paul Recer, 'INTENSE METEOR SHOWER THREATENS DAMAGE TO SATELLITE FLEET' (The Washington Post, 15 November 1998) <https://www.washingtonpost.com/archive/politics/1998/11/15/intense-meteor-shower-threatens-damage-to-satellite-fleet/444d98ad-58b2-4c03-9ac5-7b37be183bfb/?noredirect=on&utm_term=.333e26738e7d> accessed 8 May 2019
[62] Ibid
[63] Ibid
[64] ESA, 'COPERNICUS SENTINEL-1A SATELLITE HIT BY SPACE PARTICLE' (ESA, 31 August 2016) <https://m.esa.int/Our_Activities/Observing_the_Earth/Copernicus/Sentinel-1/Copernicus_Sentinel-1A_satellite_hit_by_space_particle> accessed 8 May 2019
[65] Caleb Henry, 'Intelsat-29e declared a total loss' (Space News, 18 April 2019) <https://spacenews.com/intelsat-29e-declared-a-total-loss/> accessed 8 May 2019
[66] Caleb Henry, 'Intelsat still searching for cause of IS-29e loss, replacement satellite TBD' (Space News, 30 April 2019) <https://spacenews.com/intelsat-still-searching-for-cause-of-is-29e-loss-replacement-satellite-tbd/> accessed 8 May 2019

activity in Space.[67] There are measures such as the Inter-Agency Space Debris Coordination Committee's (IADC) Space Debris Mitigation Guidelines (SDMG) as adopted by the United Nations Committee for the Peaceful Uses of Outer Space (UNCOPOUS), which are voluntary guidelines that are enforced in a manner by major Space powers that create the impression of a mandatory regulations, the problem is that these guidelines only apply to Debris that are created after the guidelines came into effect.[68] However, the threat of Space Debris is apparent from the ESA's 2017 Space Debris Conference where it was determined that current guidelines to deal with Space Debris are inadequate and need to be strengthened[69] in order to avoid making the Kessler Syndrome a reality.

The IADC guidelines have set two categories for Debris, one is a short-term Debris that resides in LEO, which must be deorbited in 25 years and the other is long-term Debris which is situated in GEO. The long-term Debris cannot be de-orbited, instead it is sent to a graveyard orbit before it is inoperative.[70]

The current threat of Space Debris is that it is a more dangerous form of meteor showers. Where its natural equivalent tends to be smaller than sand, Space Debris can range from school bus sizes to fragments of paint, both which at the speed they travel can have serious implications for activity in Space.[71] The case study of Iridium/Cosmos is a good example of the effects of Space Debris and how easy it is to cause it. The defunct Cosmos[72] collided with the operational Iridium and created the second and fourth largest causes of Space Debris.

Another example of this threat is the loss of the satellite Cerise to a discarded Ariane rocket body.[73] The significance of this collision is that it highlights the problem that Space faring

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[67] Donald J. Kessler and Burton G. Cour-Palais, 'Collision Frequency of Artificial Satellites: The Creation Of A Debris Belt' (1978) Journal of Geophysical Research 83

[68] Paul B Larsen, 'Solving the Space Debris Crisis' (2018) 83(3) J Air L & Com 475

[69] ESA, '7th European Conference on Space Debris' (ESA) <https://conference.sdo.esoc.esa.int/proceedings/list?search=&conference=2&publishing-year=All&title=&author-name=&author-organisation=&abstract-full-text=&field_keywords_value=> accessed on 8 May 2019

[70] Matt Williams, 'Eye-opening numbers on space debris' (Phys Org, 21 March 2017 <https://phys.org/news/2017-03-eye-opening-space-debris.html> accessed on 8 May 2019

[71] Aerospace, 'Danger: Orbital Debris' (Aerospace, 4 May 2018) <https://aerospace.org/story/danger-orbital-debris> accessed on 8 May 2019

[72] Cosmos can be arguably referred to as Space Debris for this purpose as it had been abandoned.

[73] Mark Ward, 'Satellite Injured in Space Wreck' (New Scientist, 24 August 1996) <https://www.newscientist.com/article/mg15120440-400-satellite-injured-in-space-wreck/> accessed on 8 May 2019

nations face regarding Space Debris and it is one of the recorded insurance losses as a result of a satellite colliding with Space Debris.

There is currently no effective form of remediation,[74] although there are attempts to create a viable system of remediation.[75] This is discussed because the problem of Debris currently is a growing concern and as a result of this will have a large impact upon liability disputes in Space.

The Iridium/Cosmos case study is the best example of how liability may occur when a satellite reaches the end of its operational period. In relation to that example, a satellite reaching the end of its life-span is a potential source of liability. Cosmos was abandoned once it served its purpose and it resulted in the collision with Iridium. As discussed previously a collision in Space has far reaching implications, the creation of extra Space Debris which could negatively affect other Spacecraft is a serious concern. The IADC set a non-binding standard of dealing with satellites that reach the end of their operation. The descent of satellites positioned in LEO can be potential causes of liability.

While the satellites in GEO positioned into a graveyard orbit are an environmental concern and require thorough provisions to remedy the inefficient and unsustainable solution, they will not be a part of the discussion, as the focus is on liability disputes that are likely to and are occurring in Space currently.

De-orbiting satellites can break up, this is where satellites split off into smaller parts which descend in an uncontrollable manner. Although smaller parts of Debris burn up in the atmosphere during the descent, larger parts can reach the surface of the Earth.

For example, Kosmos 482, a satellite designed to land on Venus which could not make the journey as a result of the craft malfunctioning, is predicted to land back on Earth and survive the journey as it was designed to survive on Venus,[76] a much harsher environment. The two separate ways liability is determined is either in the Earth's atmosphere which is a definite

[74] Remediation is the second proposed limb to dealing with the problem of Space Debris. It is the principle of removing the Debris in Space.
[75] Mike Wall, 'Meet OSCaR: Tiny Cubesat Would Clean Up Space Junk' (Space.com, 24 April 2019) <https://www.space.com/space-junk-cleanup-cubesat-oscar.html> accessed 8 May 2019
[76] Michelle Starr, 'A Failed Space Probe Meant for Venus Might Soon Come Crashing Down to Earth' (Science Alert, 27 February 2019) <https://www.sciencealert.com/a-1972-space-probe-meant-for-venus-never-left-earth-orbit-it-could-come-tumbling-back-this-year> accessed on 9 May 2019

fault basis and in Space which is a on a fault basis. The descent of Space objects can have serious implications for liability.

Skylab was a US space station launched in 1973 which was abandoned in 1974. In 1979 NASA became aware that Skylab began to break up in-orbit and started to re-enter the atmosphere.[77] Skylab crashed in Australia, scattering debris across Nullarbor[78] (An area in Western Australia).[79]

Another space station, Tiangong-1, started its descent in 2018. This event caused international concern in regard to where it would land,[80] it eventually landed in the Pacific Ocean.[81] Space objects descending to Earth is a much more common phenomenon then would be usually perceived, on average "a total of 200-400 traced objects enter Earth's atmosphere every year".[82] While the possibility of these objects hitting populated areas is low, it is still an important consideration in a way liability may be formed as a result of activities in Space.

It is evident that liability can occur in a multitude of ways. What does remain to be answered in terms of the aims of this paper is how ADR may be implemented to avoid litigation and ensure that disputes of liability are resolved efficiently. This paper will answer this question by further discussing the case study of Iridium/Cosmos and the principles of Alternative Dispute Resolution (ADR). Furthermore, there will be an examination of the wide range of possible methods of ADR and their uses, in order to ascertain the most applicable methods to solving disputes in Outer Space.

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[77] Emma Wynne, 'When Skylab fell to Earth' (ABC Goldfields, 9 July 2019) <http://www.abc.net.au/local/photos/2009/07/09/2621733.htm> accessed on 9 May 2019

[78] Ibid

[79] The town council of Nullarbor fined NASA $400 for littering as a light hearted joke, but interestingly NASA did not pay the fine. This raises an interesting question of whether NASA should be held liable for the damage debris of Skylab.

[80] Elizabeth Howell, 'Chinese Space Station Tiangong-1 Falling to Earth Now, But Where?' (Space.com, 2 April 2018) <https://www.space.com/40164-chinese-space-station-crash-last-day.html> accessed on 9 May 2019

[81] Matt Williams, 'Did you know that a satellite crashes back to earth about once a week, on average?' (Phys org, 4 April 2018) <https://phys.org/news/2018-04-satellite-earth-week-average.html> accessed on 9 May 2019

[82] NESDIS, 'Does Space Junk Fall from the Sky?' (NESDIS, 19 January 2019) <https://www.nesdis.noaa.gov/content/does-space-junk-fall-sky> accessed on 9 May 2019

How ADR can benefit development in space: a comparison with current practice

Humanities use of space is fraught with danger and hazards. It is an environment alien to our own and one that requires extensive resources and capabilities to manage successfully, which we do not possess currently. This extends to a very basic requirement, the ability to observe. While it is unusual to be unable to view the Earth now, due to satellite technology and the utilisation of Space, it is the opposite for outer space. It is this inability to know what is happening in this environment that causes such a risk of liability and legal action. We cannot pin point when a satellite might collide with another or Space debris, or when it may fall prey to the hostile environment. An educated guess may be made, but we are limited by the current technology. Cosmos 964 and Iridium 33/Cosmos 2251 are two examples of worst-case scenarios that are a current certainty for Space. These examples raise liability concerns as well as a question that the industry is unsure on how to proceed with. The same question that this paper will answer. What is the best solution for when the inevitable worst case scenario does happen? Space is developing too quickly for litigation, which is a slow and costly process. When a company has finished litigation, other competitors may advance during that time.[83] This is one of the fundamental reasons as to why ADR is better suited as a solution for disputes in outer Space.

Cosmos 954 Accident, liability on Earth

In 1978 a USSR satellite, Cosmos 954, crashed in Canadian territory and spread radioactive material. The US-Canadian joint clean-up operation, "Operation Morning Light", resulted in an expenditure of 14 million Canadian dollars and 2-2.5 million American dollars.[84] The compensation that Canada received in 1981 was 3 million Canadian dollars, whereas the US received no compensation.[85] As this was one of the first incidents of its kind, both in the nature of the accident and its resolution, it set a standard of norms, such as the duty of notification, relaying information to facilitate damage control, assisting political allies in clean-up operations and sharing the cost of compensating the injured state, regardless of causation or fault.[86] The fact that norms were set is essential in the development of dispute resolution

[83] Schaefer M, 'The Contours of Permissionless Innovation in the Outer Space Domain.' (2017) 39(1) U Pa J Int'l L 103
[84] Cohen AF, 'Cosmos 954 and the International Law of Satellite Accidents.' (1984) 10(1) Yale J Int'l L 78
[85] Ibid
[86] Ibid

and understanding the lack of codified practice in Space law. For example, the LC requires that an incident causes damage for liability to exist. Based on the LC's definition of damage, a strict interpretation would cast doubt as to whether there was any damage caused by the Cosmos 954 incident because there was no loss of life, personal injury or other impairment of health.[87] The lack of uniformity and codified practice results in an ambiguous interpretation of the international Treaties. In this case, Canada received minimal compensation for the damages incurred.

Iridium 33/Cosmos 2251 Accident, liability in Orbit

In 2009, Iridium 33, a US telecommunications satellite collided with a defunct Russian military telecommunication satellite, Cosmos 2251. The issue faced by the US in this incident was whether a reasonable standard of care had been applied. The US had the most advanced tracking capability of any state at the time, therefore it was argued that it had a responsibility to inform Iridium, which is a US company.[88] The question of Russian liability was related to the failure to dispose of the satellite at the time it became defunct. Although there were no binding international agreements at the time which required disposal, the Russian government was aware of the threat posed by this piece of Space debris because of their involvement in the Inter-Agency Debris Co-ordination Committee.[89] These are examples of the many issues raised by this incident, but they highlight the complexity of problems faced in Space law for resolving matters of liability. As an increasing number of actors are entering the Space sector and accidents in Space are now realistic concerns as opposed to hypothetical scenarios,[90] the use of ADR in Space must adapt to counteract the difficulty in evaluating the standards for fault and negligence in liability.

In this case, it may be argued that, similarly to Cosmos 954 in which a standard of norms was set, there was a positive development in practice to ensure that these accidents can be avoided in the future. For example, the US military stated that the monitoring of operational

[87] Dembling PG, 'Cosmos 954 and the Space Treaties.' (1978) 6(2) J Space L 129
[88] Hertzfeld HR and Basely-Walker B, 'Legal Note on Space Accidents, A / Juristische Anmerkungen zu Weltraumunfallen / Annotations Juridiques Relatives aux Accidents Spaitaux.' (2010) 59(2) ZLW 230
[89] Ibid
[90] Ibid

satellites had been implemented to avoid collisions.[91] However, the size and hazardous nature of Space requires more than minor and gradual developments to deal effectively with the issues faced. Furthermore, owing to the scale and congestion of Space in areas that currently host human activities, there is a greater risk of accidents occurring. The Grand Sky theory no longer applies to this area of Space.[92] Therefore, resolutions for liability must be addressed and dealt with effectively to ensure that humanity's progress in Space is not inhibited.

The in-orbit and on earth collision incidents raise the question of where ADR may have been utilised to avoid the amount of time taken to find a solution as well as the disproportionate remedies. The current practice unequivocally does not provide an adequate solution.

While there are international Treaties in place to attempt a form of governance and unification for cooperation Space, there is not any substantive law. Reynolds states that the increase in activity in outer Space will require more expansive laws and regulations to deal with damage and liability in Space.[93] What Reynolds omits is the use and importance of ADR where there are multiple parties involved in an area. If humanity was united under one banner or organisation the use of a codified system of rules would be practical. However, this is not the case. Although Shin's work is older than Reynolds, it successfully takes into consideration the importance of ADR. ADR is more flexible than a judicial proceeding, not only can the arbitrators be chosen for their expertise but they can also incorporate time constraints that can speed the proceedings or compensation for the winning party, time is of the essence for Space, the efficient management of time is something that ADR can ensure more successfully than litigation.[94] A further strength of ADR is the potential for a panel of arbitrators to exercise jurisdiction over both parties. The Outer Space Treaties do not provide exact provisions for when more than one state enforces jurisdiction.[95] Furthermore, as there

[91] Andrea Shalal-Esa, 'U.S. Military Vows to Track 800 Satellites by October 1' REUTERS, March 31, 2009, <https://uk.reuters.com/article/us-usa-satellites/u-s-military-vows-to-track-800-satellites-by-october-1-idUKTRE52U0MR20090331?sp=true> accessed 21 February 2019

[92] Bressack L, 'Addressing the Problem of Orbital Pollution: Defining a Standard of Care to Hold Polluters Accountable.' (2011) 43(4) Geo Wash Int'l L Rev 741

[93] Reynolds G, 'Space Law in the 21st Century: Some Thoughts in Response to the Bush Administration's Space Initiative.' (2004) 69(2) J Air L & Com 413

[94] Shin H, 'Oh, I have Slipped the Surly Bonds of Earth: Multinational Space Stations and Choice of Law.' (1990) 78(5) Calif L Rev 1375

[95] Ibid

is no court or legal process to deal with matters of liability arising in Space, ADR is less likely to create a concern of bias over the use of a certain sovereignties court over another's to settle a dispute,[96] law jurisprudentially aims to offer a objectively fair and impartial solution to disputes, which in this context ADR can provide more than traditional litigation. Space is an area which no state may claim sovereignty over. This creates complications in the implementation of rules. Just as we must adapt to be able to survive in Space, we must adapt our solutions for disputes to be able to develop further. Much like maritime law, Space law must be its own separate and distinct area of law, until we can implement legal provisions to guide human activity in Space successfully, ADR will be far more successful[97] and potentially the foundation of a legal system for outer Space in the future.

Moreover, the challenges faced by merely forming a comprehensive system of litigation prove why ADR is currently a practical and efficient solution for dispute resolution.

While this paper focused on the benefits of ADR, it will now focus on the problems that we would face in an attempt to implement litigation. In 'Recent Developments in Litigation'[98] Trinder correctly points out that "It is often space law litigation that appears the most daunting to both legal practitioners and those involved in space activities.'. Litigation is commonly linked with two undesirable factors; length of proceedings and it being an expensive process. However, Trinder identifies a range of issues in successfully implementing litigation. The four main areas of focus are; Environmental concerns, contractual issues and sovereign immunity.

Environmental concerns in the utilisation of Space re-emerged in the 1990's, the time of the publication of Trinder's article. However, it is now at the forefront of concerns for parties involved in Space. The Space environment is more fragile than Earth's and currently nearly impossible to remedy any damage inflicted upon the alien environment.[99] Any litigation will need to encapsulate environmental concerns as all parties in Space must be vigilant in the preservation of such a vital environment. The Outer Space Treaties have received criticism for

[96] Ibid

[97] Wong K, 'Collaboration in the Exploration of Outer Space: Using ADR to Resolve Conflicts in Space.' (2006) 7(2) Cardozo J Conflict Resol 445

[98] Trinder RB, 'Recent Developments in Litigation.' (1990) 5 JL & Tech 45 – Although this article was published in 1990, the points it makes are so pertinent that it makes it relevant and current.

[99] B SandeepaBhat, 'Application of Environmental Law Principles for the Protection of the Outer Space Environment: A Feasibility Study.' (2014) 39 Annals Air & Space L 323

their lack of environmental provisions, while the Treaties can be argued to have attempted to set a foundation for future development, any further litigation will have to integrate this topic. The success of ADR is its flexibility. When resolving a dispute between parties, ADR can include and create further provisions, whereas litigation cannot react as quickly.

Space is increasingly becoming a commercial entity. With new methods of utilising it for this method increasing. While in Trinder's article there is, understandably, a focus on the issues that arise from satellite launches, new litigation cannot focus on that alone. Space Tourism, Space Mining and new Space Stations are becoming a reality. Space Tourism developed from a wild dream to an actual enterprise, with the first successful test flight of Virgin Galactic.[100] It is important to consider that the areas to litigate for Space are only increasing and will continue to develop, while litigation might be a necessity in the future, it would struggle to encapsulate the varied requirements and interests of such an international theatre, for the moment. Contractual issues in Space also offer the added dimension of ascertaining fault, which depends on where the accident or issue occurred, on Earth it is full liability whereas in Space it depends on a basis of negligence. The time taken to assert fault via litigation can cripple a company, which in the current development of Space is counterproductive as Space is already difficult to access, putting further barriers in that process in the form of litigation would slow progress in all aspects, technological and legal.

Perhaps the most pertinent point raised by Trinder; sovereign immunity is one of the biggest challenges faced by the international community. The interlocking relationships between governments and commercial parties can often present problems which courts may struggle to address. The defence of sovereign immunity, although eroded, can still cause complications as it protects nation states from suits in domestic and foreign courts without consent. For example, the US, a major nation state in Space, invokes sovereign immunity and it is correctly defined as deciding "unless it deigns otherwise, the federal government cannot be sued – even by citizens seeking redress for government-inflicted harms – a privilege belonging so clearly to the sovereign that it is labelled 'sovereign immunity.'".[101]

[100] Alex Knapp, 'With Virgin Galactic's Latest Flight, Has Space Tourism Finally Arrived? (*Forbes*, 14 December 2018) <https://www.forbes.com/sites/alexknapp/2018/12/14/with-virgin-galactics-latest-flight-has-space-tourism-finally-arrived/#31ec2d4143d9> accessed 23 April 2019

[101] Brinton SL, 'Three-Dimensional Sovereign Immunity.' (2014) 54(2) Santa Clara L Rev 237

Sovereign immunity, as a principle, causes issues. In accordance with the Outer Space Treaty, nation states are liable for any negligence either from them or their citizens, how can that system work efficiently in litigation with clauses such as sovereign immunity? Moreover, that is not the only concern. It is the matter of sovereignty which causes friction. Where two states fall into dispute, which court can host the litigation without bias?

ADR is the current solution. It can provide an independent solution and address the shortcomings of litigation. However, that does not mean that litigation will never be a possibility or should be ruled out. As a side note, when litigation is a possibility it would beneficial to implement the recommendations of Trinder. These recommendations are universally applicable in all forms of resolution and would be valuable for ADR. In particular involving lawyers at the start of a project so both sides may be well versed and advise each other to avoid a potential dispute. As well as the recommendation for lawyers involved in these Space related matters to be educated on the technological aspects, law and Space utilisation are two different industries and must learn to understand one another to succeed.

As outlined above, there is a lack of clarity in the international Treaties. However, the future risks of Space exploration and commercialisation were considered in the drafting processes of these Treaties. The vagueness in the drafting of the Treaties may be considered to be intentional, as human activity in space is developing at a rate that the law which governs it cannot meet. Therefore, it is vital that the need develop the legal framework which governs human activity in space, in this case the effective resolution of disputes, is acknowledged. There are several proposals on ways to create a suitable framework. These are referred to as 'Muddling through it', 'A more elaborated normative regime',[102] 'Strict Liability Amendment to the Liability Convention', 'Improved System of Fault Liability' and 'A Multilateral Approach'.[103]

This principle encompasses the continuation of current practice within the international community, namely operating under the shared but vague interpretations of the international Treaties.[104] The creation of rules is ad hoc and piecemeal, without a focus on comprehensive

[102] The first two proposal are suggested in the article n108. While they are valid suggestions, they are not the most successful solutions.
[103] The last three proposals are from n104.
[104] Tannenwald N, 'Law versus Power on the High Frontier: The Case for a Rule-Based Regime for Outer Space.' (2004) 29(2) Yale Int'l L 363

rules to govern human activities in Space. This is the current position of many countries, such as the US.[105] While this system is currently sufficient, it operates under the assumption that the Space environment will remain constant. However, this assumption is no longer tenable.[106] Thus, an effective international system of ADR must be created. ADR is not only flexible and able to meet the needs of a fluctuating environment, but it can also present an attractive option to nation states, such as the US, that wish to avoid codified rules governing national activity in Space.

This approach involves a concentrated effort by the international community to negotiate rules to secure commercial, security and scientific interests in Space. It does this while emphasising international cooperation through focusing on peace and widespread participation in the negotiations, which would also include non-state actors.[107] This proposal places a preference on principles of comprehensive security and equity in Space rather than one of operational regime.

There are strong contentions amongst commentators of the LC that article III should be amended, from fault-based liability to strict liability.[108] While there are arguments in favour of a strict liability amendment, such as the weaknesses in the current fault-based system, there are also many rationales against a strict liability system. The main weakness in the current system are the vague definitions of fault, the difficulty of proving culpability and the problem of foreseeability.[109]

However, it is unlikely that nation states will be prepared to accept the standard of strict liability.[110] Therefore, the implementation of this proposal is improbable and impractical.

Another proposal is to improve the system that is currently used. The highlighted areas of improvement are an improved definition of care, a change in the burden of proving

[105] Ibid
[106] n92
[107] n104
[108] Lampertius J, 'The Need for An Effective Liability Regime for Damage Caused by Debris in Outer Space', (1992) 13 Mich. J. Int'l L. 447
[109] Ibid
[110] Robert Q. Quentin-Baxter 'Preliminary report on international liability for injurious consequences arising out of acts not prohibited by international law' (UN, 1980) <legal.un.org/docs/?path=../ilc/documentation/english/a_cn4_334.pdf&lang=EFS> accessed 22 February 2019 This source is used based on its description of each states "natural prolongation" which determines the delimitation of their individual rights and obligations to other states.

negligence and a reduction in the identification procedures. While an improvement of the current system is in theory resourceful and practical, Lampertius fails to consider the international reluctance in relation to signing new Treaties, evidenced by the lack of nation states which have ratified the latest Treaty, the Moon Agreement.[111] Conversely, it is argued that although the Moon Agreement is not a successful Treaty because the main space actors have not ratified it, through the ratification and use of minor Space actors it can become customary law[112], although unlikely. The principle of an amendment to a Treaty is viable.

While there is an opportunity for customary law[113] to resolve dispute matters in Space, as explained earlier, it is implausible to rely upon an assumption of a constant Space environment. Similarly, customary law cannot be expected to compensate the ambiguity of the LC.[114] The Multilateral Approach proposes a unified approach to resorting contentions in Space.

Tannaweld's 'A more elaborative normative regime' and Lampertius' 'A Multilateral Approach' share a focus on combining the relevant parties to resolve an issue. They successfully consider the increased presence of actors in Space and the need for alternative approaches to solving disputes.

To summarise the creation of new law to remedy the issues faced within the LC is doubtful. Furthermore, as the major Space actors are reluctant to ratify Treaties or reduce the presence they have in Space, the most effective solution is to produce an efficacious system of ADR to govern disputes in Space.

In order to analyse the role of ADR in Space, it is important to review the basis of current dispute resolution in Space. The Outer Space Treaty 1967 (OST) and Liability Convention 1972 (LC) are the main international Treaties which set a form of governance for the resolution and remediation of liability in Space. The first stage set out in the LC is to initiate diplomatic

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[111] n19 – The 1984 Agreement Governing the Activities of States on the Moon and Other Celestial Bodies (Herein referred to as the Moon Treaty or MT) was adopted by the General Assembly on the UN in 1979 by virtue of Resolution 34/68 was opened for signature on 18 December 1979 and entered into force July 11 1984 It can be found here: http://www.unoosa.org/oosa/en/ourwork/spacelaw/treaties/intromoon-agreement.html

[112] Michael Listner, 'The Moon Treaty: failed international law or waiting in the shadows?' (The Space Review, 24 October 2011) <www.thespacereview.com/article/1954/1> accessed 22 February 2019

[113] Ibid

[114] n108

negotiations, which, if unsuccessful, are followed by the creation of a claims commission[115] with authority to recommend an award unless the parties agree otherwise.[116] This procedure is a variation of ADR but the outcome of past cases, such as Cosmos 954, may cast doubt in the effectiveness of this system. The uncertainty derives from several issues, one of them being the lack of uniform international procedure. The OST enables and encourages states to create their own legislation to tackle the issues of state activity and liability in Space. Whereas most countries have created their own legislation, such as the UK's Outer Space Act 1986 (OSA)[117] and Space Industry Act 2018 (SIA),[118] Germany, which is a major European space-faring nation, still does not have its own national legislation.[119] This lack of uniformity creates competing views and standards on the best solutions for disputes. Therefore, while ADR is currently used, it is not always effective. Which is why a uniform implementation of ADR could create a more effective system and encourage further developments in Space.

There is no agreed definition of ADR, although in academic texts it is often assigned as a "full range of alternatives to litigation that might be available to a lawyer and client to resolve a civil dispute".[120] The aforementioned definition of ADR will be relied upon. There are two distinct branches of ADR, adjudicative and non-adjudicative. Adjudicative involves the presence of an impartial third party who makes the decision on the case. This involves options such as Arbitration, Expert Determination and Adjudication. Whereas non-adjudicative ADR also involves a third party, the purpose of its involvement is to investigate options and encourage settlements, while leaving the outcome of the process in the control of the affected parties. This can range from options such as Negotiation, Mediation, Early Neutral and/or Expert Evaluation and Inter-client discussion.[121]

ADR is becoming increasingly popular as a form of settling disputes. The legal system of England and Wales implements an active encouragement of the use of ADR before a case is brought to court. This is evident from Civil Procedure Rule 1.4.11, which is titled "Encouraging

[115] As explained at the start of the paper, once a claim is made, both parties have a year to settle their dispute. If a settlement cannot be reached, then a claims commission will be established at the request of either party.
[116] Gorove S, 'Liability in Space Law: An Overview.' (1983) 8 Annals Air & Space L 373
[117] Outer Space Act 1986
[118] Space Industry Act 2018
[119] Schladebach M, 'Fifty Years of Space Law: Basic Decisions and Future Challenges.' (2018) 41(2) Hastings Int'l & Comp L Rev 245
[120] S Blake, J Browne and S Sime, *A Practical Approach to Alternative Dispute Resolution* (5th edn, OUP 2018)
[121] Ibid

the use of alternative dispute resolution"[122] and encourages parties to undertake ADR before approaching the courts. ADR is not only restricted to state practice; it is also used to settle disputes in many international contexts. The International Chamber of Commerce (ICC)[123] and World Intellectual Property Organisation (WIPO)[124] all use or provide forms of ADR to settle disputes. The International Tribunal for the Law of the Sea (ITLOS)[125] acts in the capacity of an international court but it can also act in an advisory capacity in proceedings, which is a form of ADR. ADR has several advantages over litigation which may account for its increasing popularity. These range from lower costs, quicker settlements, a client-focused control of proceedings, wider discussion of potential issues, greater flexibility of the process, a wider range of potential outcomes and an increase in confidentiality for the respective clients. One of the main concerns that face litigants in any legal proceedings is the expense. Litigation is a time-consuming process; there is a propinquity between the length of a case and the increase in costs. Essentially, ADR is more cost effective and it resolves disputes faster while ensuring that an appropriate measure of formality is upheld.[126] However, ADR also has several disadvantages. While it is used both nationally and internationally, there is a lack of consistency concerning the rules that govern its procedures. This inconsistency may result in a lack of efficacy similar to that inherent in litigation.[127] In spite of this disadvantage it is nevertheless a useful and important tool. Not only can be an alternative to litigation, it can also be a supplement. If the use of ADR results in reducing delays, costs or producing quicker resolutions in vital determinations for legal cases, it has a served a useful purpose.[128] Ultimately it is the flexible nature of ADR which makes it a crucial asset in any legal proceeding and potentially as a successful solution for solving disputes in Space.

To be able to implement ADR it is pertinent to explore the different available forms.

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[122] Sir Geoffrey Vos, *Civil Procedure Rules The Whitebook* (Vol 1, Sweet and Maxwell 2018)
[123] ICC, 'International Centre for ADR' <https://iccwbo.org/dispute-resolution-services/mediation/icc-international-centre-for-adr/> accessed 19 February 2019
[124] WIPO, 'World Intellectual Property Organisation Alternative Dispute Resolution' <https://www.wipo.int/amc/en/> accessed 19 February 2019
[125] ITLOS, 'International Tribunal for the Law of the Sea' <https://www.itlos.org/the-tribunal/> accessed 19 February 2019
[126] Harvey PE, 'ADR: an Evolutionary Process.' (1998) 56(4) Advocate (Vancouver) 545
[127] Ibid
[128] Debelle BM, 'Arbitration, Expedition and ADR' (1990) 3(1) Corporate & Bus LJ 69

'ADR Principles and Practice'[129] differentiates Arbitration from ADR on the basis that firstly, while both systems involve a choice for parties as to whether they join the process, Arbitration unlike most forms of ADR, results in a legally binding and enforceable award. Secondly because, in Arbitration it is the duty of the arbitrators to work in accordance with the rules of natural justice (as known in English Law) or due process (as known in American Law).[130] However, despite the aptly described distinction, the ultimate decisions of the authors will be relied upon, which is the following, "the prevalent view is that we should regard arbitration as part of ADR".

Arbitration is a process which rests on an agreement between the two parties and binds them to the decision of the arbitrator. In principle, ordinary courts may not hear a dispute which is to be referred to arbitration and proceedings are stayed to allow the arbitration process to proceed. The parties appoint the arbitrators, but the tribunal has a duty to act impartially.[131] Another unique feature of Arbitration is the procedural freedom, the parties may organise the proceedings in such a way that would benefit them.

Expert Determination is normally opted for if both parties are divided by a technical question. Usually a contractual agreement is entered between the parties and an expert is picked to either make a decision or provide an opinion, mostly in the form of a valuation.[132] Because this is only a valuation, the courts view it as having different legal characteristics and remedies from an arbitral award.[133] The distinction between this form and Arbitration is that the expert is not acting as an arbitrator, the opinion of the expert is not reviewable by courts. Expert Determinations are becoming used more often as there is substantial literature and case law on how experts may proceed in various jurisdictions.[134]

Adjudication is a process that should be agreed between the parties and is finalised by a contract so that both parties are bound to the process in case of dispute in the proceedings. An example of this is in the UK which can be found in the Construction Act,[135] this process is

[129] H Brown and A Marriott, *ADR PRINCIPLES AND PRACTICE* (3rd edn, Sweet & Maxwell 2011)
[130] Ibid
[131] Article 12 of the (UNCITRAL) United National Commission on International Trade Law (1985) It can be found here: http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/1985Model_arbitration.html
[132] K Mackie, D Miles, W Marsh, T Allen, *The ADR Practice Guide Commercial Dispute Resolution* (3rd edn, Tottel publishing 2007)
[133] Ibid
[134] n129
[135] Housing Grants, Construction and Regeneration Act 1996, s 118

extensively used to settle construction disputes as governed by the aforementioned statute.[136] The key elements of this process are normally similar to arbitration but they are adapted to the needs of the industry which can lead to quicker resolutions, primarily why it is popular in construction disputes. If agreed, the adjudication can lead to a binding decision, or one that can only be binding on the agreement of both sides.[137] However, it is important to note that the process of adjudication and adjudicative processes in ADR are two separate entities. Where the former is a form of ADR, the latter encompasses a group of solutions that can have a binding effect.

Negotiations are, as expected because of this being a defining feature of ADR, truly flexible. They range from relatively informal processes to more formal settlement meetings.[138] The process can work in many formats; in person, by letter, email, over telephone or conference call. It is dependent on the severity and complexity of the dispute. That is one of the better functions of negotiations, they can be tailored to requirements of the parties. They can also take place during any point of a trial and can be used to deal with certain issues rather than the whole dispute.[139] A negotiation can deal with the entire dispute or be a supplement for a case. On the other hand, negotiations are flexible and can be used at any point in litigation or dispute resolution, but the timing is vital. The procedure must be allowed time to be thoroughly evaluated and researched before negotiations may begin. The main advantages of negotiation, apart from flexibility are; the low costs, the control they offer clients in the proceedings as they decide the instructions given to the negotiators and the confidentiality aspect.[140]

Mediation can be described as "simply as a negotiation conducted with the assistance of a third party".[141] A specially trained mediator (although there is not a requirement for a mediator to be trained, parties tend to opt for those who have received appropriate training) will construct a process to provide both parties with an opportunity to create inventive solutions, which go beyond the usual remit of courts.[142] In contrast to arbitrators, mediators

[136] n131
[137] n120
[138] n120
[139] n120
[140] n120
[141] H Abramason, *MEDIATION REPRSENTATION* (2nd edn, OUP 2011)
[142] Ibid

do not have decision making powers but can involve clients deeply in the process of the settlement.[143] Similarly they maintain strict confidentiality. Furthermore, UK government policy is increasingly encouraging the use of mediation when it is more cost effective than litigation,[144] this is a clear sign as to the effectiveness of ADR.

Mediation does not have a set procedural system, a provider of mediation services may offer a standard process, but it is often dependant on a written mediation agreement between parties.[145] This written agreement becomes an enforceable contract between the parties. Procedures such as these tend to be successful because there is facilitation of co-operation between the parties, unlike court the parties can agree whether they want to take part. Parties that tend to attend ADR procedures such as mediation, do so because they intend too or are open too, resolving the issue. A criticism of mediation is that the success of the process partially relies upon the capability of the mediator,[146] but this criticism is a broad one which can be applied to any form of resolution. In the same light, successful litigation requires competent lawyers and judges.

Early Neutral Evaluation and Expert Evaluation is essentially an assessment of some, or all issues in a case by an independent third party.[147] While it is similar to Expert Determination, this is a non-adjudicative form of ADR and therefore is not binding on the parties. This is particularly useful in cases which require a particular expertise or interpretation on bespoke issues. An agreed expert provides an opinion for both parties to evaluate their cases with, in the aims of reaching a solution. However, for this form of ADR to be successful, it should be undertaken as soon as possible, as when parties evaluate the case themselves and form their own, often entrenched opinion, the opinion of an expert which is not binding, may not have the desired effect.[148]

There are examples of the legal system adopting this method and a judge giving their own evaluation of the case, but it can cause tensions if a judge offers an evaluation before giving judgement, as noted in the case of *Seals v Williams*.[149] Nonetheless, this is a good example of

[143] Ibid
[144] n120
[145] n120
[146] n120
[147] n120
[148] n120
[149] *Seals v Williams* [2015] EWHC 1829 (Ch)

how ADR plays a large role in litigation and how it can influence legal systems, as judiciary can see the merit in the procedure to implement it themselves.

This form of resolution is unique as it, more often than not, will not involve other parties than those involved in the dispute. The parties may contact their legal teams to seek advice but the essence of this procedure is to settle a dispute personally. It is a useful demonstration of the versatility of ADR and the spectrum of possibilities it offers, from the strict binding system of arbitration to the personal system of Inter-client discussion.

It is important to highlight that the LC does create a provision for the use of ADR, the effected parties enter negotiations for a year and if the negotiations are unsuccessful, a claims commission can be created at the request of either party. Although these provisions are a competent foundation, the Space environment has developed significantly since the formalisation of the original Space Treaties. This requires a new approach in the use of ADR so that matters may be dealt with in a way which would counteract the ambiguity of the LC.

There are various international bodies that benefit from their use of Alternative Dispute Resolution. It would be concurrent for the theatre of Space to take advantage of this resourceful tool. As Space is becoming increasingly commercial, large disputes will undoubtedly arise in the future.[150] ADR should be implemented by the Space industry to resolve matters and promote further co-operation between Space actors.[151]

An understanding of the Iridium/Cosmos incident is crucial in the process of creating a system that is practical and attractive to Space powers and it is a fundamental case with regard to liability in Space.

A proposal to resolve disputes in Space

In order to begin this proposal, it is important to outline the findings of the past paper which can be divided into three findings.

The first finding is that the current law requires reform. It showed that, while using Iridium/Cosmos as an example, the Treaties are not as effective as they should be, the lack of

[150] Bostwick PD, 'Going Private with the Judicial System: Making Use of ADR Procedures to Resolve Commercial Space Disputes.' (1995) 23(1) J Space L 19
[151] Ibid

enforceability of the Treaties along with the vague provisions does not provide nation states with enough of an incentive to invoke them, an issue which this paper will seek to amend.

The second finding provides that liability is a complex matter that can arise in a variety of ways which can also affect multiple parties. This finding is vital in highlighting the requirement for a viable alternative to the current system.

The final finding shows that ADR is a viable alternative. It was also found that there are methods in national legislation that can be incorporated to provide a reformed Claims Commission with a level of enforceability required to make it a viable alternative for nation states.

To ensure a successful proposal, it is important to examine the current system in the LC. It provides a claims procedure from Articles VIII to XXII. These allow nation states that have suffered damage at the hands of another nation state an opportunity to claim damages as long as fault can be ascertained. Specifically, there are two limbs to this branch of the LC. The first is the Claim Procedure (CP) and the second is the Claims Commission (CC). Although the Iridium/Cosmos case did not invoke the LC and use the provisions it provides, in order to explain the Treaty, this paper will present the provisions in the style of if the LC had been invoked by the Iridium/Cosmos collision.

For the hypothetical explanations, the party which suffered the damage will be Iridium and Russia will be regarded as having fault for the collision because they have control over Cosmos (as in the actual scenario it had been abandoned and therefore state that they do not have control).

In this situation the US, who contracted Iridium's satellite and, the party that suffered the damage would bring a claim against Russia as they are the launching state of Cosmos. The US would present their claim for damages to Russia through diplomatic channels. If the two states, for whatever reason could not keep their diplomatic channels open with each other, then the US could ask another state which has open diplomatic channels with the launching state to present the claim on their behalf, for the purposes of this explanation that state can be the United Kingdom (UK). The US may also present its claim through the Secretary General of the UN.

The US would have to present their claim to Russia no later than one year after the occurrence of the damage or the identification of the launching state which is liable. As Cosmos is Russia's satellite, the time of expiration for the US would begin when Cosmos collided with Iridium. If the US did not know of the damage or was unable to identify the launching state of Cosmos, then the year period would begin on the date that they became aware of either requirement. If the US was not fully aware of the damage to Iridium and applied for a claim of damages and then realised the damage was worse than initially inspected, the one-year expiration still applies. However, the US can revise their claim and submit extra documentation, until one year after the date of full knowledge of the damage.

In accordance with the LC the US would not need "prior exhaustion of local remedies"[152] while bringing their claim to Russia. The compensation that Russia would have to pay the US would be determined in "accordance with international law and the principles of justice and equity".[153] The crucial part of the compensation is that the amount Russia would have to pay the US would be so that the US would find itself in the position it would have been, before the Iridium/Cosmos collision. Russia, unless asked for an alternative form of currency by the US, would have to pay the US in dollars.[154]

If neither party can reach a settlement through diplomatic channels one year from the moment that the US notified Russia of the submission of the documentation of their claim, then the parties shall establish a CC, at the request of either the US or Russia.

A CC is composed of three members. One that is appointed by the claimant state, which in this scenario is the US, on by the launching state which is Russia and the third member, the Chairman, which is chosen by the US and Russia jointly. Each party makes their appointment in two months of the request of either party for a CC. If the US and Russia were unable to choose a Chairman in four months of the request for establishment for a CC, then the US or Russia may ask the Secretary General of the UN to appoint a Chairman. The Secretary General will have a further two months to appoint a Chairman.

[152] n15
[153] n15
[154] As the LC requires that the party that caused the damage pay the claimant party in the currency used by the claimant party, unless specified otherwise.

If either the US or Russia failed to make an appointment within the provided time frame the Chairman shall, at the request of the US or Russia, create a single member CC.

The CC determines its own procedure to solve the dispute as well as determining the place(s) where it shall preside. For example, the Chairman may decide to carry out its obligations in the UK as a neutral ground for both parties.

Unless the CC is formatted on a single member basis, all decisions and awards will be decided by a majority vote. In the context of this hypothetical scenario, if the US and Russia entered a CC and outcome was decided, the decision would be based on a majority vote between appointed officials by the US and Russia as well the Chairman.

Importantly, the decisions of the CC are only binding if the parties agree, otherwise the award is recommendatory. If the US and Russia could not agree on a sum, then the CC would provide both parties with a recommended amount. Any expense incurred through this process would be shared equally by the US and Russia, unless the CC decided otherwise.

If the collision of Iridium/Cosmos created a "large-scale danger to human life, caused interference with living conditions or the functioning of vital centres"[155] then the nation states, in particular Russia as the launching state, "shall examine the possibility of rendering appropriate and rapid assistance to the State which has suffered the damage, when it so requests".[156] If a large piece of Space Debris from the collision descended onto a nation state, the UK in this scenario, and caused damage to either of the aforementioned criteria, there would be an expectation of the US and Russia, as well as other nation states to provide assistance to the UK.

First and foremost a change must be made because the LC has never been invoked, even in the case of Iridium/Cosmos.[157] Liability disputes resulting from Space activity are not a myth. If a set of provisions set to deal with these disputes are not being used by the parties to the Treaty, then there is an issue in the Treaties which must be addressed.

[155] n15
[156] n15
[157] Michael Listner, 'Revisiting the Liability Convention: Reflections on ROSAT, Orbital Space Debris, and the future of Space Law' (The Space Review, 17 October 2019) <http://www.thespacereview.com/article/1948/1> accessed on 10 May 2019

Furthermore, if there is not a practical and useful process set by the LC that nations states would want to adhere too, it will only thwart the purpose of the LC[158] by pushing states to compromise between a use of the LC and other remedies. If the process is refined and the use of it would be beneficial for nation states then this would set a precedent, a much-needed form of unified procedure to govern disputes in Space.

The aim is not to create the only system of governance, instead it is to create a system that is useful and reliable to ensure that disputes are dealt with effectively, efficiently and quickly so that the Space industry may avoid unnecessary litigation.

The range and variety of parties involved in Space has grown exponentially[159] since the creation of the Treaties. This change coupled with the reluctance of the international community to accept further binding Treaties as witnessed by the final Treaty, the Moon Treaty (MT),[160] are factors which must be considered while preparing this proposal. Furthermore, successful templates used for Space governance and in current legal practices must be examined. The Space Debris Mitigation Guidelines (SDGM) and the integration of ADR with legal practice in English Civil law are examples of this.

In comparison with the other Treaties the MT is largely thought of as a failure and the end of binding Treaties on the International community. This is because none of the major Space powers have signed or ratified the Treaty.[161] For example, the agreement concerning the International Space Station (ISS), the Space Station Intergovernmental Agreement acknowledges the OST, RA, LC and RC but not the MT.[162] Moreover, there have been 18 ratifications and 4 signatures to the MT to date.[163] which when compared with the OST's 109

[158] Joseph A Burke, 'Convention on International Liability For Damage Caused By Space Objects: Definition And Determination of Damages After The Cosmos 954 Incident' (1984) 8 Fordham International Law Journal
[159] Dave Baiocchi and William Welser IV, 'The Democratization of Space' (Foreign Affairs, May/June 2015) <https://www.foreignaffairs.com/articles/space/2015-04-20/democratization-space> accessed on 11 May 2019
[160] n17
[161] n112
[162] US Department of State, 'Agreement among the Government of Canada, Governments of Member States of the European Space Agency, the Government of Japan, the Government of the Russian Federation, and the Government of the United States of America Concerning Cooperation on the Civil International Space Station' (US Department of State, 29 January 1998) <https://www.state.gov/documents/organization/107683.pdf> accessed 11 May 2019
[163] UNCOPOUS, 'Status of International Agreements relating to Activities in Outer Space' (UNCOPOUS, 1 April 2019) <http://www.unoosa.org/documents/pdf/spacelaw/treatystatus/AC105_C2_2019_CRP03E.pdf> accessed 11 May 2019

ratifications and 23 signatures[164] portrays why the MT is viewed as a failure. It is also argued that the MT failed to receive ratifications as it was viewed to be premature,[165] understanding these factors are crucial in presenting a viable proposal to reform the Claims Commission.

A relatively new alternative method to the traditional form of Space governance, created to face the "challenge of space sustainability and security".[166] The guidelines are non-binding. The International community currently complies with the recommendations[167] of the IADC SDGM.[168] The real success of this non-binding method is shown in the fact that IADC first published the guidelines in 2002 as a body of 12 principal governmental Space agencies. By 2014 these guidelines achieved consensus among 77 nations[169] represented by UNCOPOUS.[170]

It is the lack of enforceability faced by the international Treaties which dissuades the international community from using them. The solution to that problem is to grant more power to the CC, while retaining the non-binding feature. The example relied upon previously will be used again, the integration of ADR with English Civil law. In this example, the use of ADR is optional but on the other hand, the party which avoids using it can receive a form of punishment once the dispute reaches court, usually in the form of costs. It is clear that new guidance and legal frameworks in the theatre of Space need to be non-binding in order to gain international support, therefore a combination of the system in English Civil law with the CC would create an enforceable and internationally agreeable version of the CC.

Space law is a conglomeration of many components. The varied participants, international diplomacy and law, national law and economic factors are some of the main elements to it. In the preparation of any new form of governance or regulation it is vital for its success that these factors are taken into consideration. Crucially, distinguishing the failure of the MT and

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[164] Ibid
[165] Gennady M. Danilenko, 'International law-making for outer space' (2016) Space Policy 37, 179 - 183
[166] Sergio Marchisio, 'Security in Space: Issues at stake' (2015) Space Policy 33, 67 - 69
[167] Joana Ramos Ribeiro, Luciele Cristina Pelicioni, Ilmo Caldas, Carlos Lahoz, Mischel Carmen Neyra Belderrain, 'Evolution of Policies and Technologies for Space Debris Mitigation Based on Bibliometric and Patent Analyses' (2018) Space Policy 44-45, 40-56
[168] Inter-Agency Space Debris Coordination Committee, 'IADC Space Debris Mitigation Guidelines' (IADC, September 2007) <http://www.unoosa.org/documents/pdf/spacelaw/sd/IADC-2002-01-IADC-Space_Debris-Guidelines-Revision1.pdf> accessed 11 May 2019
[169] Dave Finkleman, 'Rethinking Space Debris Mitigation' (Space News, 25 August 2014) <https://spacenews.com/41659rethinking-space-debris-mitigation/> accessed on 11 May 2019
[170] UNCOPOUS stands for United Nations Committee on Peaceful Uses of Outer Space

success of the IADC SDGM and the factors that have contributed to their respective positions in the international theatre will influence the correct development of the proposal for a reformed CC.

We will now discuss the proposed reforms for the CC. This will be done by stating each article in the LC that would be reformed and the proposed change. Afterwards the hypothetical Iridium/Cosmos scenario will be applied to the amended CC. The hypothetical scenario will be applied in order to depict how the proposed changes would work.

Article XIV of the LC

The proposed change: 'If no settlement of claim is arrived at through diplomatic negotiation as provided for in Article IX, within six months from the date on which the claimant State notifies the launching State that it has submitted the documentation of its claim, the parties concerned shall establish a Claims Commission at the request of either party.'

The change from the original document is halving the amount of time required to invoke the CC. Space is a quickly developing arena and if an alternative to litigation is sought it is important that it not be encumbered by lengthy procedures. This theme will carry on through the proposal.

Article XV of the LC

The first proposed change: 'Each party shall make its appointment within one month of the request for the establishment of the Claims Commission'.

The second proposed change: 'Either party may request the Secretary-General of the United Nations to appoint the Chairman within a further month.

The proposed change is to half the time given to each party, while these matters may require time to carry out efficiently, too much of it will allow the risk of delaying procedures.

Article XIX of the LC

The first proposed change: 'The commission shall give its decision or award as promptly as possible and no later than six months from the date of its establishment'.

The second proposed change will be a time limit placed of XIX (3). In this proposal further time may be granted in the interests of a fair and just outcome, however, in the interests of

an efficient procedure these extensions will not go past three months. The extension given, within the limit, is at the discretion of the Chairman.

The addition to this Article would be Article XIX (5): 'If parties choose to litigate instead, the Claim Commission may be considered as an attempted form of Alternative Dispute Resolution. Accordingly, avoidance of this procedure may be considered as not attempting Alternative Dispute Resolution and carry any penalties which the national legislation may place.'.

The aim of this addition is to provide the enforceability to the CC whilst ensuring that it still remains true to the principles of ADR and requirements of the Space arena and as a result, is voluntary.

Article XX of the LC

The addition to this Article: 'The expenses in regard to the Claims Commission shall be borne equally by the parties, unless otherwise decided by the Commission. Furthermore, if either party wish to pursue litigation for the relevant dispute, the conduct of each party throughout the Claims Commission may be considered when deciding how costs should be paid.'.

The main difference would be both the US and Russia would have less time to appoint and complete the requirements of the CC. Furthermore, if either party decided to pursue litigation, for the sake of neutrality, the US filed their case against Russia in the UK then the implications would be the following.

If Russia avoided the use of the CC and provided the English courts accepted the new proposal, once liability is ascertained and the case is decided, no matter which party is found to be liable Russia could face costs sanctions such as being required to pay the costs of the procedure. This would apply to either party that attempted to avoid using a form of ADR or the CC.

The provided proposal and amendments to the CC is a hypothetical proposition endeavouring to answer the question of finding a viable solution to dispute resolution in Space. However, its success is not guaranteed. It is a proposal that should be considered in conjecture with the most effective form of ADR for Space disputes.

Mediation would be the most effective form of resolution for any dispute. The proposal to reform the CC relies on a similar Civil legal system to that of the UK, which while it can be implemented, would require either other states adopting similar laws, adapting their own or avoiding partnerships with UK if they decide that system of resolution is unfavourable.

Mediation provides a non-binding and efficient system that the international community requires for solving disputes. It would also be relatively simple to form into an international agreement, like the IADC SDMG. This non-binding agreement could be used to supplement[171] existing Space Treaties. Therefore, the use of the Treaties and an ADR agreement as a supplement could be another viable alternative to solving the issue at hand.

Expert Determination would be a successful appendage to the proposal of a mediation agreement. As described previously, this form of ADR is opted for when the parties involved are divided by a technical matter. It is that quality that makes it a valuable addition to mediation, as technical matters are a constant when solving disputes in satellite collisions such as Iridium/Cosmos.

The solution

The proposals are suggestions and potential templates for a solution to dispute resolution. It is evident ADR can play a large role in creating an efficient system. This paper aims to create a step forward rather than the final statement on the matter. Space is a fragile environment in terms of human participation and international politics, as made clear by the failure of the MT any attempt to create new frameworks of governance will require careful planning and being fully aware of all the factors involved in the process.

Specifically, the main question this paper seeks to answer is: how can we solve the dilemma of disputes in Space? This discussion provides several answers to that question. To summarise, the reformed CC can provide a quick and relatively simple solution, it would be an amendment or addition to a current Treaty which is customary international law and as it does not seek to or could be construed to limit the power of states, there is a high chance of its success. However, as this paper recognises that the international Treaties are not currently as successful as their non-binding agreement counterparts, the current analysis will take that

[171] n27

into consideration. The solution of a mediation/expert-determination hybrid has been determined to be the most effective form of ADR available to the Space environment. It is voluntary, non-binding and effective.

Conclusion: From out here on the Moon, International politics looks so petty[172]

The dilemma presented by the research question in this paper, as presented throughout is: How can issues of litigation and liability be solved by ADR?

To conclude it is important to review the findings once again.

The first finding is that the current law requires reform. It showed that, while using Iridium/Cosmos as an example, the Treaties are not as effective as they should be, the lack of enforceability of the Treaties along with the vague provisions does not provide nation states with enough of an incentive to invoke them, an issue which this paper will seek to amend.

The second finding provides that liability is a complex matter that can arise in a variety of ways which can also affect multiple parties. This finding is vital in highlighting the requirement for a viable alternative to the current system.

The third finding shows that ADR is a viable alternative. It was also found that there are methods in national legislation that can be incorporated to provide a reformed Claims Commission with a level of enforceability required to make it a viable alternative for nation states.

Through a detailed analysis of the legal, liability and ADR situations, viable alternatives could be provided. As witnessed at the end of the paper, the proposed reform used the Iridium/Cosmos incident, but this time with pre-determined conditions[173] to explain the process of the claim procedure and claims commission. In answering the research question, it is crucial to combine the conclusions of this paper. Which were an amended claims commission and the most effective forms of ADR to either implement with the reformed claims commission or to use separately. The forms of ADR presented are a combination of mediation and expert determination for the flexibility and effectiveness of the procedures as

[172] Quote from NASA Astronaut Edgar Mitchell

[173] Such as fault assigned to a party, which did not happen in the actual Iridium/Cosmos incident, this change was made to present the two systems of resolution

well as the likelihood of acceptance they would receive from the international community. Subsequently, this system would present a voluntary, non-binding yet efficient system as based on the findings of this paper.

The proposals created suggestions based on the findings throughout this work, it is clear ADR can fix the presented issue. However, these proposals are not a definitive statement and in order to succeed require international participation and understanding of the developed principles. The solution does not have to be a reformed claims commission or mediation. In this precarious environment an acknowledgement of the need for reform or the creation of an efficient dispute resolution system with the use of ADR is a success. The question posed throughout this paper is: How may the dilemma of litigation and disputes in Space be resolved? The answer to this, is through the use of Alternative Dispute Resolution. It is a viable solution, because of its flexibility, efficiency, speed, non-binding and voluntary nature. These elements found in ADR are vital for success in the dangerous and tense Space environment.

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