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Editorial

My Call was Answered!

Rachel Dunn, Northumbria University

In my last editorial, I called on more students, from any university, to send their work to the journal. The response to this has been amazing and the journal is expanding to all corners of the globe! This issue shows some of those submissions, and there have been more submitted. The work in this issue showcases the unique work which is being undertaken by students in various universities, and has been a pleasure to read and put together. The diversity doesn't end there: we also have different methods of communicating research in this issue and I hope you enjoy the variety.

There are two articles in this issue. Claudia Man-yiu Tam, from the University of Hong Kong, has written an excellent and engaging piece on the need for animal protection to be included in the school curricula in Hong Kong. It is a fascinating piece, exploring the effect this can have on children later in life, drawing on philosophy and ethics. As an animal law specialist, I thoroughly enjoyed reading this and thank Claudia for introducing me to some new literature!

Jade Potot-Warren, from Northumbria University, has written an excellent article, exploring the Yazidi Massacre, specifically focusing it in the context of the Convention on the Prevention and Punishment of Genocide 1948. It highlights what acts of Genocide actually are and challenges of identifying 'protected groups'. Jade concludes that acts committed by ISIS against the Yazidis satisfy the statutory definition of genocide, and should be recognised as such. A thought-provoking piece, which is very well delivered.

We have three dissertations for you to read. Susan B O'Brien, a student who has completed our LLM Employment Law in Practice, looks at reasonable responses versus proportionality in employee dismissal cases. It is a rigorous and fascinating dissertation, arguing that the

relationship between reasonableness and proportionality in cases of employer dismissal is not yet fully settled within case law.

Jaxon Hind, a recent graduate of Northumbria University, focused his dissertation on part payment of a debt, promissory estoppel and no oral modification clauses. The recent case of *Rock Advertising v MWB Business Exchange Centres [2018] UKSC 24 (SC)* considered all of the above mentioned principles, which have been 'developed in a way where one principle is pitted against another'. Jaxon calls for clarity of promissory estoppel and its place next to No Oral Modification Clauses, with the hope that a future Supreme Court decision may resolve ambiguity surrounding the variation of contracts. This is a complex and well analysed dissertation, when there was little academic research already available around the *Rock* decision.

You may remember Felicity Adams from our previous issue, who published an article exploring the relationship between law and music. She's back! Felicity's dissertation argues that the Feminist Judgments Project represents a valuable approach, which reimagines judicial decision making in line with female interests and reinforces the idea it is a more responsive form of judgement. This is particularly so, Felicity argues, for vulnerable and marginalised women 'whom regularly experience and are subjected to traditional judicial approaches' and uses the feminist re-judgment of *R v Dhaliwal [2006] EWCA Crim 1139* for a deeper analysis of this issue. An excellent dissertation, which made me love Lady Hale even more!

As is my tradition in the first issue of the year (it can be a tradition if it has happened twice, right?) we display the highly commended posters from the Poster Conference at Northumbria Law School. This conference includes students from our MLaw and LLB programmes, and the Solicitor Apprenticeship Degree. Many topics are explored, including immigration, knife crime and sex workers. My particular favourite looks at the evolution of sexual offences, using 1950's adverts! Please remember that these are first year students undertaking independent

research projects, so whilst not everything may be completely correct, it is a huge effort and weeks of work on their part.

Finally, we have a beautiful addition to the journal. For the first time we have a voice recorded conference paper, presented by Mohsen Nagheeby, PhD Candidate, Northumbria University. Mohsen first presented this at our annual staff Christmas Conference, and colleagues thought it was too special to keep to ourselves. Mohsen's thesis focuses on water law and this paper, entitled 'The Ghosts Around the Coasts: Anarchy and Equity in Transboundary River Basins', took him to the Helmand River in Afghanistan. Please do have a listen, it really does take one on a journey.

I would like to end on a note of thanks. Thank you to the staff who have helped me review and source work for this issue. Thank you to the library staff who put all of this together for you to view. And finally, thank you to our students, who put in an enormous amount of work, and have to deal with me, during the review process. This is only possible due to your passions and dedication to your fields.

Enjoy, and I'll see you in the summer!

The Case For Animal Protection Curricula in Schools in Hong Kong

Claudia Man-yiu Tam, The University of Hong Kong

Abstract

In a city like Hong Kong where animal protection laws replicate outdated British legislation from the early 1900s, extensive educational measures must be taken to raise students' collective awareness of animal welfare and rights, in order to meet the pressing environmental, social, and moral demands of a rapidly developing society. This article argues that the study of animal protection in Hong Kong school curricula is essential to raising future generations of responsible and empathetic community leaders and members. Not only can such curricula encourage students to make well-informed, healthy, and environmentally-conscious choices as consumers, it also challenges the speciesist "hidden curricula" perpetuated in schools, developing students' critical and independent thinking skills and empowering them to regain ownership over and accountability for their decisions. It instils empathy in students towards animals, as well as vulnerable groups in society that share a similar narrative of oppression and exploitation, such as women and ethnic minorities. This article refutes the critique of animal protection curricula being a form of indoctrination by challenging the notion that any education system can be truly value-free.

Keywords: Animal law; animal protection curricula; humane education; speciesism; Hong Kong school curricula

Introduction

The study of animal protection in Hong Kong school curricula is crucial to ensure students receive an education which gives them the moral and intellectual tools to challenge their assumptions, partake in active citizenship and democratic action, take ownership over their everyday choices, and maximise their physical, mental, and moral wellbeing. It targets the inadequate state of animal protection education in the status quo, which legitimises the objectification of animals and ignores the systemic, institutionalised violence towards them, as evidenced through the consumption of animal products in school catering outlets and experimentation on animal bodies in school laboratories.[1] Not only does the current state of education jeopardise students' physical wellbeing, as their bodily health may be partially compromised by the excessive consumption of meat, eggs, and dairy products[2], it also harms students' mental and moral wellbeing by nurturing a reductionist view of other species and emotionally desensitising students to harm-inflicting and violent behaviour from a young age.[3] For the present purposes, animal protection is interpreted broadly to mean protection of animal welfare, that is guaranteeing an animal's physical and psychological wellbeing from their point of view.[4] It would encompass all interspecies educational activities at any level of schooling that strive to protect animal welfare and promote animal rights.

Why Hong Kong?: The Significance of Hong Kong

Dire Shortcomings of Hong Kong's Animal Protection School Curricula

As primary providers of education, schools in Hong Kong are a crucial part of a societal order that wield the ability to promote ethical, sustainable development and improve the capacity of students to address animal, environmental, and development issues.[5] However, schools are currently

[1] Helen Pederson, 'Schools, Speciesism, and Hidden Curricula: The Role of Critical Pedagogy for Humane Education Futures' (2004) 8 Journal of Futures Studies 1, 2.
[2] Julie Andrzejewski, Marta P. Baltodano, and Linda Symcox (eds), *Social Justice, Peace and Environmental Education: Transformative Standards* (Routledge 2009) 138.
[3] Pederson (n 1).
[4] SPCA, 'What is Animal Welfare?' (*SPCA*, 2019) <https://www.spca.org.hk/en/animal-welfare/what-is-animal-welfare> accessed 30 May 2019.
[5] Richard Kahn, 'Towards Ecopedagogy: Weaving a Broad-based Pedagogy of Liberation for Animals, Nature, and the Oppressed People of the Earth' (2003) 1 Animal Liberation Philosophy and Policy Journal 26, 32.

institutions where the objectification of animals is socially acceptable; they are breeding grounds where routine violence towards animals takes place in an organised, deliberate form.[6] Although evidence continues to show that human wellbeing is interdependent with animal and environmental wellbeing, school curricula in Hong Kong tend to justify human maltreatment of animals in line with aspects of Western science[7], and therefore continue to engender a speciesist "hidden curricula"[8] which espouses "a prejudice or bias in favour of the interests of members of one's own species and against those of members of other species"[9]. Students learn in an environment which views animals only for their instrumental value, rather than intrinsic worth. This in turn legitimises human-animal domination structures, sustaining students' misguided, singular worldview of animal abuse and objectification as "normal, natural, or inevitable".[10] Thus, students continue to treat animals as cheap commodities, inexhaustible production units, renewable natural resources, and research experimentation subjects for human diseases, even after they have graduated from school, but rarely unique and sentient individual beings in and of themselves.[11]

School curricula in Hong Kong are obliged to follow the Hong Kong Government Centre for Health Protection's "Healthy Eating Food Pyramid". This Food Pyramid mandates that children aged 2-5[12], 6-11[13], and 12-17 should eat "meat, fish, egg, and alternatives" to maintain a healthy diet, thereby indoctrinating children with a false narrative that meat, eggs, and dairy are a necessity for adequate protein.[14] Although the EatSmart@school.hk Campaign - a healthy eating program for primary schools - is supposed to provide suitable meat alternatives in vegetarian school lunches[15], the Student Health Service discourages a vegetarian diet through misinformation and

[6] Pederson (n 1).
[7] Andrzejewski, Baltodano, and Symcox (n 2) 137.
[8] Pederson (n 1) 6.
[9] Peter Singer, *Animal Liberation* (Avon Books 1975) 7.
[10] Pederson (n 1).
[11] ibid.
[12] Centre for Health Protection, 'Health Eating Food Pyramid for Children: 2-5 years old' (*Department of Health*, 2018) <https://www.chp.gov.hk/files/her/exn_nutp_027bp.pdf> accessed 30 May 2019.
[13] Centre for Health Protection, 'Health Eating Food Pyramid for Children: 6-11 years old' (*Department of Health*, 2018) <https://www.chp.gov.hk/files/her/exn_nutp_028bp.pdf> accessed 30 May 2019.
[14] Centre for Health Protection, 'Health Eating Food Pyramid for Adolescents: 12-17 years old' (*Department of Health*, 2018) <https://www.chp.gov.hk/files/her/exn_nutp_029bp.pdf> accessed 30 May 2019.
[15] Centre for Health Protection, 'Nutritional Guidelines on Lunch for Students: For Use in Primary and Secondary Schools' (*Department of Health*, June 2017) <https://school.eatsmart.gov.hk/files/pdf/lunch_guidelines_bi.pdf> accessed 30 May 2019.

fear-mongering.[16] Its "Health information" explains what a vegetarian diet is and states that it has become more popular due to health-conscious eating, religious reasons, and "special beliefs such as environmental protection and animal rights protection". It claims that a vegetarian diet can cause nutrient deficiency, malnutrition, tiredness, and anaemia, since "some nutrients are only found in meat, eggs, and dairy products". Bizarrely, it mentions that vegetarian food "[does] not have a strong taste and is not particularly appetizing". Although it is unclear whether the aforementioned Government Departments have based their health information on sound evidence, given that no scientific studies are cited, it is possible to surmise that vested interests of animal product companies may influence its policies so as to ensure the pro-meat, pro-dairy propaganda continues, although there has been no evidence of this yet.[17] What is certain is that the Hong Kong government and its schools purposefully omit the human, animal, and environmental costs of eating meat, eggs, and dairy products.[18] Extensive scientific research has proven that meat, eggs, and dairy products contribute to cancer, cardiovascular disease, heart disease, and diabetes.[19] Specifically, the World Health Organization classifies red meat in Group 2A (probable carcinogens) and processed meat in Group 1 (carcinogenic to humans).[20]

While this scientific evidence provides a sound anthropocentric basis for avoiding, or at least minimising, animal product consumption for the sake of human health, it masks the moral and environmental arguments for adopting a plant-based diet. Singer convincingly makes the moral argument that the purposeful exclusion of animals from the moral circle does not give equal consideration to their capacity to suffer, in the same way as humans have the capacity to suffer.[21] With regards to the environment, animal agriculture causes deforestation and desertification as forests are cut down and land is shifted from growing food crops to feeding animals, and it also contributes directly to global warming through animals' methane emissions.[22] Given that the UN

[16] Student Health Service, 'Health Information: Diet & Nutrition' (*Department of Health*, 2014 <https://www.studenthealth.gov.hk/english/health/health_dn/health_dn_vdn.html> accessed 30 May 2019.
[17] OpenSecrets.org, 'Dairy' (*Center for Responsive Politics*, 2019) <https://www.opensecrets.org/industries/indus.php?ind=A04++> accessed 30 May 2019.
[18] Andrzejewski, Baltodano, and Symcox (n 2).
[19] ibid.
[20] World Health Organization, 'Q&A on the carcinogenicity of the consumption of red meat and processed meat' (*WHO*, October 2015) <https://www.who.int/features/qa/cancer-red-meat/en/> accessed 30 May 2019.
[21] Peter Singer, 'Speciesism and Moral Status' (2009) 40 Metaphilosophy 3-4, 572.
[22]Andrzejewski, Baltodano, and Symcox (n 2).

Intergovernmental Panel on Climate Change found that humans only have 12 years to limit climate change, and global warming beyond 1.5°C would significantly worsen the risks of extreme heat, floods, drought, and poverty for hundreds of millions of people, animal agriculture becomes a dire threat to animal and human species alike.[23]

Despite these findings, Hong Kong schools - in the same way as schools in other countries including the United Kingdom and United States - continue to endorse the habitual and unconscious consumption of animal products, skirting their responsibility to equip students with the knowledge to make well-informed, conscious choices as consumers and citizens who will face the impacts of climate change in their lifetime. Under the existing paradigm, not only are schools threatening students' physical wellbeing as a result of a lack of animal protection education in school curricula, students are also unable to decide for themselves whether they want to opt-out of an entrenched system of animal oppression and environmental destruction. They cannot identify whether these cruel and unsustainable behaviours are congruent with their espoused values, as they take speciesism and the division between man and animal as a given social construct. Their lack of knowledge allows ethical gerrymandering to thrive.[24] In the long-term, schools are encouraging the continuance of anthropocentrism behaviour which contributes to the worsening of climate change. This type of irresponsible education has led Hong Kong people on average to eat 664 grams of meat per day, which is more than three times the daily recommended amount of meat [25]; in fact, it is primarily meat consumption that has led Hong Kong to become the seventh highest emitter per capita in the world[26], especially given that 90% of Hong Kong's total food supply is imported, with 94% of fresh pork and 100% of fresh beef imported from Mainland China.[27]

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[23] Jonathan Watts, 'We have 12 years to limit climate change catastrophe, warns UN' (*The Guardian*, 8 October 2018) <https://www.theguardian.com/environment/2018/oct/08/global-warming-must-not-exceed-15c-warns-landmark-un-report> accessed 31 May 2019.

[24] Lori Marino, 'Ethical Gerrymandering in Science'(2011) 1 Journal of Animal Ethics 2, 119.

[25] Emily Tsang, 'Why Hong Kong's love affair with meat is leaving planet paying price through carbon emissions' (*South China Morning Post*, 9 June 2018) <https://www.scmp.com/news/hong-kong/health-environment/article/2149793/why-hong-kongs-love-affair-meat-leaving-planet> accessed 13 August 2019; Y. Y. Yau, B. Thibodeau, and C. Not, 'Impact of cutting meat intake on hidden greenhouse gas emissions in an import-reliant city' (2018) 13 Environmental Research Letters 6.

[26] ibid.

[27] Food and Health Bureau, 'Frequently Asked Questions on Food Supply of Hong Kong' (*The Government of the Hong Kong Special Administrative Region*, 11 March 2018) <https://www.fhb.gov.hk/download/press_and_publications/otherinfo/110318_food_supply_faq/e_food_supply_faq.pdf> accessed 24 August 2019.

Untapped Potential of Animal Protection Curricula in Hong Kong's Future

Although the status quo is far from ideal, there is great potential for animal protection curricula in schools to alleviate the problems canvassed above. Hong Kong is uniquely positioned for the introduction of animal protection curricula, as its animal welfare laws are in the midst of development. A three-month public consultation launched by the Hong Kong Agriculture, Fisheries, and Conservation Department was running until mid-July of 2019, and new animal welfare laws aiming to introduce the legal concept of a duty of care to animals are expected to come into force in 2021.[28] During this renewal of Hong Kong society's commitment to animals, students have the potential to be agents in the evolution of a complete reform of Hong Kong animal protection laws.[29] However, in order to do so, they must have the knowledge and skills to advocate for change, which is the gap that animal protection curricula aims to fill.

Moreover, Hong Kong is advantaged by its transnational, cross-cultural elements of thinking. It prides itself on being a bridge between Eastern and Western cultures, as a result of its Chinese roots and colonial history.[30] Students in Hong Kong are well-positioned to question why it is legitimate in most Western countries to eat pigs, while Hong Kong citizens are banned from dog and cat meat.[31] Such analysis encourages Hong Kong students to think critically about whether animal protection laws should be adapted to fit the local context, and if so, how it may be done effectively. It may lead students to recognise that food may be an instance of Gramsci's cultural hegemony, whereby the cultural norms of the West have manipulated the culture of Hong Kong

[28] SCMP Editorial, 'New animal welfare law must have bite' (*South China Morning Post*, 6 May 2019) <https://www.scmp.com/comment/insight-opinion/article/3009083/new-animal-welfare-law-must-have-bite> accessed 31 May 2019; Ng Kang-chung, 'Thousands march for animal rights in Hong Kong with protesters demanding abusers get 10 years behind bars' (*South China Morning Post*, 19 May 2019) <https://www.scmp.com/news/hong-kong/health-environment/article/3010854/thousands-march-animal-rights-hong-kong> accessed 31 May 2019.

[29] Andrew Jensen Kerr, 'Pedagogy in Translation: Teaching Animal Law in China' (2014) 1 Asian Journal of Legal Education 33, 39-40.

[30] Chi-yue Chiu, 'Crossing borders and mixing cultures spark innovation; students must learn to think 'outside the box' (*Hong Kong Free Press*, 15 October 2017) <https://www.hongkongfp.com/2017/10/15/crossing-borders-mixing-cultures-spark-innovation-students-must-learn-think-outside-box/> accessed 5 November 2019.

[31] Dogs and Cats Ordinance (Cap. 167).

and Chinese society, so that a Western worldview is now the accepted cultural norm.[32] These thought processes are conducive to culturally universal thinking, as students are able not only to learn about and critically evaluate their own traditional heritage, but also become more well-informed on other countries' practices.

Finally, as a pioneer in Asia and a leading international city, the inclusion of animal protection curricula in Hong Kong schools would send a clear message to other countries to place greater focus on strengthening their own domestic animal laws, so as to ensure that animals are well-protected from exploitation.[33] This is especially pertinent in Asia, where animal brutality remains rampant, bear bile extraction and elephant rides being two of many examples. Taiwan's recent introduction of a 12-year compulsory animal protection education to its national school curriculum in January is an important step forward in Asia, and Hong Kong should follow Taiwan's initiative in order to establish its place as a champion in animal welfare in the region.[34]

Why Animal Protection Curricula is Important: Benefits to Students

Building Active Citizenship Skills

Animal protection curricula in Hong Kong can develop students' active citizenship skills, as they are prompted to take ownership and agency over their individual choices. Such curricula is beneficial to all students, since vegetarian or vegan students also lack the information to support or defend their decision not to eat meat when challenged by others.[35] Knowledge of animal welfare gives students complete control over their choices[36], so that they have an opportunity to actively align their consumption habits with their own beliefs and provide evidence-based and logical

[32] Kerr (n 29) 37-38.
[33] Luisa Tam, 'As a pet-loving city, Hong Kong should step up efforts against animal abuse' (*South China Morning Post*, 7 January 2019) <https://www.scmp.com/news/hong-kong/society/article/2180967/pet-loving-city-hong-kong-should-step-efforts-against-animal> accessed 1 June 2019.
[34] ibid.
[35] Julie Andrzejewski, 'Teaching Animal Rights at the University: Philosophy and Practice' (2003) 1 Animal Liberation Philosophy and Policy Journal 16, 18.
[36] Andrzejewski (n 35) 24.

justifications for doing so.[37] Ideally, this information-exchange would create a butterfly effect, whereby through word-of-mouth or actions, students would share their knowledge with their communities, compelling those around them to regain control over their consumption habits. There is evidence that environmental education received by children indirectly influences their parents' recycling habits[38]; similarly, students who study animal protection may also be able to influence their parents' consumption choices.

However, whether students ultimately change their diet to vegetarianism or veganism and become more environmentally-friendly is not the only aim of the curricula. Instead, what is most important is that each students' preconceived notions, which previously reinforced man-made systems of ecological destruction and unnecessary brutality towards animals, are subject to in-depth deliberation and scrutiny.[39] Even if students decide after careful thought to continue their habits of animal consumption, they are at least doing so with pointed thoughtfulness. They are aware of the consequences of their actions and may even account for the negative effects of their consumption in other ways.

In this sense, they take more responsibility for their actions than someone who is completely unaware of how their actions are impacting the environment, animals, and other humans, because they are not intentionally excusing their behaviour and ignoring challenging ethical questions, but instead have confronted their own moral conscience in making their lifestyle choices.[40] Even a small change in each student's animal consumption habits could have a large positive impact: a recent study found that as long as Hong Kong people limit their meat consumption to the recommended daily amount of 180 grams of meat, fish, and eggs per day, Hong Kong's livestock-related emissions could drop by 67%.[41]

[37] Andrzejewski (n 35) 28.
[38] S. M. Evans, M. E. Gill, and J. Marchant, 'Schoolchildren as educators: the indirect influence of environmental education in schools on parents' attitudes towards the environment' (1996) 30 Journal of Biological Education 243, 243-248.
[39] Bradley D. Rowe, 'Animal Rights and Human Growth: Intellectual Courage and Extending the Moral Community' (2009) 40 Philosophical Studies in Education 153, 161.
[40] Rowe (n 39) 162.
[41] Tsang (n 25)

On the contrary, students who feel moved to take personal actions to improve animal welfare have the opportunity to cultivate a compassionate and harmonious lifestyle, based on an informed and nuanced choice.[42] This curriculum would be a powerful form of experiential learning, as students see first-handed that they are capable of being agents of change through their everyday actions. It could include a multidisciplinary study of intersecting issues between all species cohabiting Earth, while covering policies and practices that respect animals, and ethical and socially responsible everyday habits of respect and advocacy for all people, animals, and the environment. Students could also be given the chance to interact directly with animals, which has been shown to be an important contributing factor to animal protection and welfare knowledge acquisition.[43] The knowledge that their actions can and do make a difference can generate feelings of empowerment and hope, which may catalyse leadership, active citizenship, and initiative-taking as the students grow to become community leaders of Hong Kong.

Encouraging Critical Thinking and Challenging Assumptions

Animal protection curricula can prompt critical thinking about speciesism and sustainability, as students are encouraged to re-evaluate their closely-held moral beliefs and behaviours towards animals that they have been taught by their parents, schools, and the society to practice and accept passively.[44] Rather than perceiving animals as a subjugated classes who are helpless to the strong will of mankind, curricula covering animal protection and welfare would challenge the prevalent assumptions and ignorance surrounding animal sentience and intelligence, thereby creating visibility and closeness between students and animals and giving students the chance to question news sources which endorse animal exploitation.[45] For instance, students may have assumed that language set humans apart from animals, while in fact, animal behaviour research has shown that animals use language to communicate amongst each other as well.[46] Additionally, rather than elevating themselves from non-human species and the rest of nature through an instrumental,

[42] Andrzejewski (n 35) 29.
[43] Virginio Aguirre and Agustín Orihuela, 'Assessment of the impact of an animal welfare educational course with first grade children in rural schools in the state of Morelos, Mexico' (2010) 38 Early Childhood Education Journal 27, 30.
[44] Andrzejewski (n 35) 27.
[45] Andrzejewski (n 35) 24.
[46] Anne C. Bell and Constance L. Russell, 'Beyond human, beyond words: anthropocentrism, critical pedagogy and the poststructuralist turn' (2000) 25 Canadian Journal of Education 188, 194.

exploitative lens and viewing nature as a mere resource to be exploited for human gain, such curricula would encourage students to acknowledge their embeddedness in, and dependence on nature, and act as a catalyst for them to see that human sustainability is part and parcel of environmental and animal sustainability.[47]

An animal protection curricula would improve students' willingness to critique prevailing discourses and consider alternative representations in the media, thus allowing students to identify and challenge instances of animal and environmental exploitation in their everyday lives.[48] The ability to think critically and challenge assumptions would no doubt also benefit students in other areas of learning, as they learn not to take news at face-value and find alternative sources of information before coming to well-informed conclusions. Students would be well-equipped to form their own opinions on contentious issues, rather than blindly trust what their teachers, elders, or peers say, making them independent thinkers who are able to engage in critical debates with one another to broaden their perspectives.

Creating Social Change to Combat Exploitation of Human Groups

Apart from giving students the tools to resist the exploitation of animals and our natural environment, introducing animal protection curricula in schools in Hong Kong can also empower students to resist exploitation between and among human groups, since many forms of domination are intimately connected and mutually reinforcing, regardless of species.[49] To this end, it is worthwhile to note the cross-section between human and animal suffering in animal philosophy. Rousseau argued if one is obliged to do no harm to fellow men, it is because men are sentient beings; since sentience is a quality common to both animals and men, it should at least give animals the right not to needlessly be mistreated by men.[50] Similarly, Bentham famously asked, "The question is not can they reason, nor can they talk, but can they suffer?".[51] From Rousseau and Bentham's philosophising, to the works of modern philosophers such as Singer, it becomes clear

[47] Bell and Russell (n 46) 196.
[48] Bell and Russell (n 46) 191.
[49] ibid.
[50] Rowe (n 39) 155.
[51] ibid.

that the same idea of sentience that is used to prevent human suffering is similarly used to prevent animal suffering, and thus the basis not to abuse animals and fellow men are theoretically dependent. The paramountcy of animal sentience has been picked up in law as well, representing a step forward in animal welfare, at least in theory: Regionally, Article 13 of the Treaty on the Functioning of the European Union provides that animals are sentient beings, thus conferring a duty on member states to consider animal welfare in implementing policies.[52] Domestically, states may also pass legislation that recognise animal sentience; for instance, the section 53 of the 1988 Swedish Animal Welfare Ordinance refers to the requirement of anaesthesia for vertebrate animals who may undergo "physical or mental suffering".

Therefore, it is no surprise that the language used to justify animal suffering has also been employed to validify human suffering, especially to target vulnerable minority groups in society. Simply put, the victimisation of animals has acted as a model and an inspiration for the victimisation of devalued humans.[53] In fact, the use of animals for human purposes without any consideration of their individual interests is so pervasive that it has become invisible to us, in the same way that the exploitation of racial and sexual minorities and women continues to be invisible in many countries around the world.[54]

An obvious example is the intersectionality of speciesism and racism. Racist propaganda has compared groups of people to animals to suggest that they belong to a subhuman species, for example, in the case of slavery. However, it would be erroneous to claim that such rhetoric is no longer utilised; even today, Hong Kong is not immune to this phenomenon. As one of the most homogenous international cities, with more than 92 percent of Hong Kong's population being Han Chinese, prejudice against ethnic minorities remains a problem; in fact, 6 in 10 Hong Kong residents think prejudice against ethnic minorities is common.[55] The 2012 Kong Qingdong

[52] Steven P. McCulloch, 'Brexit and Animal Welfare Impact Assessment: Analysis of the Threats Brexit Poses to Animal Protection in the UK, EU and Internationally' (2019) 9 Animals (Basel) 117, 7.
[53] Andrzejewski, Baltodano, and Symcox (n 2) 143.
[54] Pederson (n 1) 4.
[55] Mandy Zheng and Rachel Leung, 'Is Hong Kong racist? Prejudice against ethnic minorities, especially Africans, undermines city's claim to be truly international' (*South China Morning Post*, 21 July 2018) <https://www.scmp.com/news/hong-kong/community/article/2156199/hong-kong-racist-prejudice-against-ethnic-minorities> accessed 31 May 2019; Raquel Carvalho, 'Racism is alive and well in Hong Kong, but there's growing sympathy for refugee children' (*South China Morning Post*, 19 April 2018

incident, where a Peking University professor called Hong Kong people "dogs"[56] following which a Hong Kong advertisement retaliated by referring to Chinese Mainlanders as "locusts"[57], is an illustration of how racist propaganda uses animalistic language to dehumanise people and enlarge societal divisions.

Another example of the intersectionality between social justice and animal issues is speciesism and sexism. The role of women and animals are similar in the patriarchal social order, that is to be exploited for their femaleness and serve as docile objects for the possession, use, and pleasure of men.[58] Female animals are doubly abused in animal husbandry: their reproductive capacities are first exploited in order to produce milk and eggs for human consumption; then, when their reproductive efficiencies end, they are brutally slaughtered for their flesh. For instance, dairy cows face appalling treatment by the dairy industry, as they are forced to serve as industrial milking machines. Starting at 15 months old, dams are forced into a "rape rack", where they are artificially inseminated.[59] This sexual violence is a form of "systematic cruelty"[60] and is part of a greater problem of the sexualised violence of the powerful over the vulnerable, of men over women.[61]

Similarly, women in Hong Kong are objectified because of their femaleness: 1 in 7 women will experience sexual violence in her lifetime.[62] Women are overexploited in the workplace also: they

<https://www.scmp.com/news/hong-kong/law-crime/article/2142397/racism-alive-and-well-hong-kong-theres-growing-sympathy> accessed 24 August 2019.

[56] Jonathan Watts, 'Chinese Professor calls Hong Kong residents 'dogs of British imperialists'' (*South China Morning Post*, 24 January 2012) <https://www.theguardian.com/world/2012/jan/24/chinese-professor-hong-kong-dogs> accessed 30 May 2019.

[57] BBC News, 'Hong Kong advert calls Chinese mainlanders 'locusts'' (*BBC*, 1 February 2012) <https://www.bbc.com/news/world-asia-china-16828134> accessed 30 May 2019.

[58] Andrzejewski, Baltodano, and Symcox (n 2) 142.

[59] Mackenzie L. April, 'Readying the Rape Rack: Feminism and the Exploitation of Non-Human Reproductive Systems' (2019) 8 Dissenting Voices 1, 51-61.

[60] Chas Newkey-Burden, 'Dairy is scary. The public are waking up to the darkest part of farming' (*The Guardian*, 30 March 2017) <https://www.theguardian.com/commentisfree/2017/mar/30/dairy-scary-public-farming-
calves-pens-alternatives> accessed 30 May 2019.

[61] Corey Lee Wrenn, 'Fifty Shades of Oppression: Unexamined Sexualized Violence against Women and Other Animals' (2014) 2 Relations: Beyond Anthropocentrism 1, 135-140.

[62] Hong Kong Lawyer, 'Let's Talk About Harassment' (*Hong Kong Lawyer*, June 2018) <http://www.hk-lawyer.org/content/let%E2%80%99s-talk-about-harassment> accessed 31 May 2019.

are paid HKD$15 less than men for doing the same work.[63] On top of that, women are expected to perform many hours of housework to serve their husbands and children. This type of "shadow labour" is not remunerated as the work is done in the private sphere of the house, and so does not have the same status as paid work. Taking a strong stance against speciesism could conceivably have a knock-on effect on sexism given their conceptual dependence, as it may send a message that women, both animal and human, are not objects to be abused and exploited.[64]

A final example is the intersectionality of speciesism and classism. Historically, meat production and consumption were symbols of social status and was a tool for capital accumulation.[65] This trend continues today, as agribusiness industries continue to function in the interests of elite, wealthy business owners and exploit humans and animals for profit-maximisation. Animals' bodies are often modified to optimise their productivity, through artificial insemination, mutilation, and genetic manipulation. For example, dairy cows' tails are often docked, that is a partial amputation of up to two-thirds of the cow's tail[66], supposedly because it prevents disease and conveniences milkers, despite the vast evidence that tail docking causes distress and pain of chronic levels due to common inflammations and infections at the lesion.[67]

Similarly, workers in these agribusiness industries are exploited and made to work in unsanitary and dangerous conditions. In the United States, most farm work is performed by undocumented immigrants, who are paid subsistence wages and have to endure long hours of taxing work in subhuman conditions, with little or no rest days, no health insurance, and no benefits; since most farm work is unregulated by the Government, there is nothing that the immigrant workers can do

[63] Edmund Ho, 'On average, women in Hong Kong still earn less than men in the same roles' (*Young Post*, 28 July 2018) <https://yp.scmp.com/news/hong-kong/article/110007/average-women-hong-kong-still-earn-less-men-same-roles> accessed 31 May 2019.
[64] Jason Wyckoff, 'Linking Sexism and Speceisism' (2014) 29 Hypatia 4, 721.
[65] Andrzejewski, Baltodano, and Symcox (n 2) 144.
[66] American Veterinary Medical Association, 'Welfare Implications of Tail Docking of Cattle: Literature Review' (*AVMA*, 29 August 2014) <https://www.avma.org/KB/Resources/LiteratureReviews/Pages/Welfare-Implications-of-Tail-Docking-of-Cattle.aspx> accessed 31 May 2019.
[67] American Veterinary Medical Association, 'Welfare Implications of Tail Docking of Dairy Cattle' (*AVMA*, 25 April 2006) <http://dairy.mercyforanimals.org/AVMA_Welfare_Implications_of_Tail_Docking_of_Dairy_Cattle.pdf> accessed 31 May 2019.

to enforce their labour rights.[68] Although no evidence of similar abusive practices in Hong Kong has emerged, Hong Kong imports a percentage of its eggs (19%) and frozen pork (6%), chicken (23%), and beef (16%) from the United States[69], thereby generating a demand for animal products tainted with such exploitative labour practices, so the problem faced by farm workers is not completely alien to Hong Kong consumers. Resistance to cruelty to animals is therefore simultaneously resistance against corporate power and the classist economic system that allows abusive, exploitative practices towards both humans and non-human animals to continue without any end in sight.[70]

These three perverted paradigms reflect how time-old, oppressive human-animal relations from which racism, sexism, and speciesism arise are grounded in capitalist economic systems of greed and profit-maximisation, whereby human labour and animal bodies are exploited to grow the wealth of the elite 1%.[71] It is inevitable that human exploitation of animals directly enables and fuels exploitation of human victims. If we feel that we can exploit non-human animals because we are more powerful than they are, and we judge that we can benefit from their exploitation, the same logic can and will be used to justify discrimination other disadvantaged groups; discrimination against other humans becomes that much easier.[72] The introduction of animal protection curricula would fundamentally challenge exploitative human practices towards animals, developing higher levels of empathy towards animal species, and in turn, towards humans.[73]

Encouraging Human Moral Growth

Animal protection curricula allows students to achieve Dewey's conception of human moral growth, defined as the constant expansion of horizons to welcome "alien" points of view, and consequently, to form new purposes and responses based on new perspectives.[74] As students

[68] Sadhbh Walshe, 'Field work's dirty secret: agribusiness exploitation of undocumented labor' (*The Guardian*, 31 January 2013) <https://www.theguardian.com/commentisfree/2013/jan/31/agribusiness-exploitation-undocumented-labor> accessed 31 May 2019.
[69] Food and Health Bureau (n 27).
[70] Andrzejewski, Baltodano, and Symcox (n 2) 145.
[71] Andrzejewski, Baltodano, and Symcox (n 2) 142.
[72] Andrzejewski, Baltodano, and Symcox (n 2) 146.
[73] Kelly L. Thompson and Eleonora Gullone, 'Promotion of Empathy and Prosocial Behaviour in Children Through Humane Education' (2003) 38 Australian Psychologist 1.
[74] Rowe (n 39) 153.

question their consumption habits which force animals to make the ultimate sacrifice of their lives and ask themselves how these patterns of exploitation have been and are still applied to brutalise humans and Mother Nature, their mental processes are deeply challenged and their lives disrupted. This creates a transformative and educative venue for self-discovery, development, and improvement, in which lies the opportunity for human moral growth.[75] Once students have the knowledge to think critically about their own practices of animal use, they are in a better position to confront their cognitive dissonance of, on the one hand reliance and enjoyment of animal products, and on the other hand the suffering and exploitation which is inseparable from the production processes.[76] They are able to make conscious, deliberate actions and live an intentional and active life instead of being possessed by "unthinking habits", which marks an ascent of human moral growth.[77]

Furthering the Ideals of Humane Education as a Whole

The introduction of animal protection curricula play an instrumental role in humane education, by contributing to the role that humane education should occupy to promote compassion and respect for "the other", be they human or non-human animals.[78] Humane education has been revisited by schools recently, due to increased calls for students to receive character education.[79] It focuses on individual traits including tolerance, honesty, and kindness, and an ability to think independently, which have been described as the "best qualities of human beings".[80] Animal protection curricula achieve the four broad aims of humane education: to develop a life-affirming ethic for both human and non-human animals, raise consciousness of how humans, animals, and nature are interconnected and mutually interdependent, encourage critical discernment of different value systems, and engage in democratic principles and active citizenship.[81] Thus, animal protection

[75] Rowe (n 39) 158-159.
[76] ibid.
[77] ibid.
[78] Pederson (n 1) 5.
[79] Lydia S. Antoncic, 'A new era in humane education: How troubling youth trends and a call for character education are breathing new life into efforts to educate our youth about the value of all life' (2003) 9 Animal Law 183, 185; Thompson and Gullone (n 73) 15.
[80] Antoncic (n 79) 189.
[81] Pederson (n 1) 5.

curricula are an unavoidable part of character education, in order to bring out valuable human traits in students.

Another important function of humane education in the form of animal protection curricula is that it raises the level of discourse among Hong Kong students to generate increased awareness of the "violence link", which states that animal abuse has a desensitising effect and leads to violence towards humans.[82] More importantly, such curricula also acts as a vehicle to prevent this "violence link" from perpetuating continually, by fostering traits of empathy, mutual respect, and responsibility in students towards all forms of life and the environment.[83] Studies have found that children who are routinely exposed to animal protection curricula and humane education over a period of time, for instance through learning about companion animals in their school curricula, have higher levels of empathy[84], improved social skills and self-esteem, and are also less prone to violence, as they can demonstrate usage of non-violent conflict resolution methods.[85]

Interspecies Education and Peace

What makes interspecies education through animal protection and welfare curricula in Hong Kong schools even more powerful is that it fosters peace. As an extension of the "violence link" argument, philosophers including Mohandas Gandhi, Mildred Norman, and Anna Kingsford have argued that widespread animal exploitation breeds the necessary mindset for domination of others and waging of wars.[86] The acute level of violence required to abuse and slaughter an animal to turn it from a living, sentient animal into the edible "meat" we see on our plates is synonymous to the violence and bloodshed required to turn a living man into a dead soldier on the battlefield. The mental processes and logic that one uses to justify harming innocent animals can equally be used

[82] Frank R. Ascione, Claudia V. Weber, and David S. Wood, 'The abuse of animals and domestic violence: A national survey of shelters for women who are battered' (1997) 5 Society and Animals 205-218; Frank R. Ascione, 'Battered Women's Reports of Their Partners' and Their Children's Cruelty to Animals' (1998) 1 Journal of Emotional Abuse 119-133; Clifton P. Flynn, 'Animal Abuse in Childhood and Later Support for Interpersonal Violence in Families' (1999) 7 Society & Animals 161-172; Pederson (n 1) 9; Thompson and Gullone (n 73) 9.
[83] Antoncic (n 79) 195.
[84] R. Arbour, T. Signal, and N. Taylor, 'Teaching Kindness: The Promise of Humane Education' (2009) 17 Society and Animals 136-148.
[85] Antoncic (n 79) 196; Thompson and Gullone (n 73) 16.
[86] Andrzejewski, Baltodano, and Symcox (n 2) 147.

to justify war against an "enemy", who is often first demonised, vilified, and put on par with animals. Indeed, as Tolstoy wrote, "As long as there are slaughterhouses, there will be battlefields".[87] Therefore, the value of introducing animal protection and welfare curricula in Hong Kong is that students will feel empowered to model non-violent values in their daily lives, thereby taking concrete steps towards preventing violence and wars in the future.

Critiques of Introducing Animal Protection Curricula in Hong Kong Schools: A Reply

Brainwashing Students and Exploits Their Growing Social Awareness

One critique is that animal protection curricula which cover animal welfare exploits the growing social awareness of teenagers and their concern for the helpless. Such curricula are not usually tempered with knowledge of the invaluable part that animals play in improving human health, for example, through animal testing, or students' personal experiences with disease and death. Instead, teachers of the subject often go too far, by promoting an animal rights agenda during unrelated class activities, for instance during a discussion of civil rights.[88] Students are therefore misguided into making premature, rash decisions; they are effectively brainwashed into supporting the animal protection and welfare agenda.

A simple reply to this objection is that no single Hong Kong school curriculum is value-free.[89] Anthropocentrism is itself a value which brainwashes students, manifesting itself in silence and omissions in current school curricula.[90] From the way that schools separate humans and animals in value education, to the absence of animal ethics and welfare in textbook materials or choice of study visits, the selective focus is itself a manifestation of anthropocentrism.[91] One example is that an exclusive focus on human language in the human-centred epistemological framework in schools

[87] ibid.
[88] Deborah Runkle and Ellen Granger, 'Animal Rights: Teaching or Deceiving Kids' (1997) 277 Science 1419.
[89] Andrzejewski (n 35) 21.
[90] Bell and Russell (n 46) 191.
[91] Pederson (n 1) 8.

"forgets" the nonverbal communication of animals and their own linguistic capabilities[92]; here, an apparently neutral study in fact supports a "hidden curriculum" of speciesism.[93]

Another example is that animals are dealt with almost entirely within the natural sciences, where they are studied in terms of biological facts.[94] This distinction between human and animal is illustrated through a Primary Two curriculum proposed by the Curriculum Development Council in 1994: "Animal world" and "weather" are labelled under the "Natural world", as opposed to "people who serve us" and "my friends" which are nested under "Living environment".[95] Even when animals are discussed in Secondary classrooms, learning exercises focus exclusively on protecting endangered plants and animal species[96] which, despite being a pressing issue, is exclusionary towards farm animals. Rarely, if ever, do teachers discuss the reality of factory farming or animal sentience.[97]

As a result of this, animals are seen primarily as species representatives, rather than sentient, feeling beings.[98] Thus, it is clear that Hong Kong school curricula are themselves exploiting students' growing social awareness, by keeping them in the dark about the impact of widespread animal and ecological exploitation on their future livelihoods and pushing a one-sided anthropocentric agenda. To eliminate bias and ensure that students gain a rounded perspective, it is necessary for schools to include animal protection in their curricula, so as to balance the anthropocentric perspective that is currently dominating the curricula.

Shifting the Focus from Human to Non-human Problems

[92] Bell and Russell (n 46) 190.
[93] Pederson (n 1) 3.
[94] John Chi Kin Lee, 'Environmental Education in Schools in Hong Kong' (1997) 3 Environmental Education Research 359, 364.
[95] ibid 365.
[96] ibid 366.
[97] Antoncic (n 72) 188.
[98] Pederson (n 1) 7.

Another critique is that animal protection curricula in Hong Kong schools would shift the focus of students from pressing human problems to unimportant non-human problems, when in fact students should be trying to solve human problems before worrying about non-human problems that do not affect them.[99] This is a false dilemma, as the discussion of the moral standing of animals is part of a larger project of human moral growth, and part of the troubling status quo of oppression, exploitation, and abuse of power exhibited towards all minorities, human and non-human animals alike.[100] As such, problems associated with the moral standing of animals are not only problems for non-human animals but for humans as well.[101]

Moreover, the human moral consciousness is not limited. As our collective consciousness expands with increased human moral growth and rapid technological expansion, all ethical problems should receive renewed urgency and should not be prioritised according to whether it involves humans or non-human animals.[102] Such a prioritisation is artificial, as humans are intricately linked with animals and the environment. As human activity continues to destroy the Earth, students must start to consider sustainability as not only the continued existence of the human race, but also the sustenance and flourishing of the ecosystems of plants and animals, all of which are necessary to support human development. A mindset that is capital-focused and driven by artificial shortage and competition is precisely what the exploitation of animals and minorities has nurtured over time, and students must take a proactive approach to subvert this mindset.

Conclusion

To conclude, it is apparent that animal protection curricula would bring many benefits to students in terms of their physical, mental, and moral growth. Although the SPCA Education Department gives talks on the topic of "Love and Concern for Animals"[103] and offers a Humane Education

[99] Evans, Gill, and Marchant (n 38) 154.
[100] ibid.
[101] ibid.
[102] ibid.
[103] SPCA, 'Education Tours & Talks – all are Welcome!' (SPCA, 2019) <https://www.spca.org.hk/en/education-and-outreach/education> accessed 5 November 2019.

Package, which includes lesson plans and activities for teachers to integrate into their school curricula[104], there has been no formal push by the Hong Kong government to integrate animal welfare into school curricula at a city-wide level. This is clearly inadequate, as it is the role of Hong Kong schools as educational institutes to shape the thinking processes of students to be more inclusive, environmentally friendly, and engaged, in order to solve the impending environmental and socio-economic problems of the 21st century. Ideally, through such a forward-thinking curriculum, our society's future leaders will grow into more humane, peaceable, and caring global citizens, who make a conscious effort to ensure that no beings, whether human or animal, are harmed for their profit or comfort. As a species, mankind will have an attitudinal shift away from violence and towards non-violent coexistence. This will benefit our livelihoods in the long-term, as our Earth becomes a more sustainable place. It is now time for Hong Kong to catch up with countries such as Taiwan, and legislate for the inclusion of animal protection education in school curricula.

A potential path for introducing such animal protection curricula is by including it in the well-established Liberal Studies curriculum in the The Hong Kong Diploma of Secondary Education, which is meant to focus on raising students' awareness of current affairs. Teachers could also be given training on animal attributes, philosophies, and practices of peace and non-violence, so that they would be well-trained to instruct students on how they can make a positive difference to the lives of animals and their natural habitats.

[104] SPCA, 'Humane Education Package' (SPA, 2019) <https://www.spca.org.hk/en/education-and-outreach/education/humane-education-package> accessed 5 November 2019.

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Identifying Genocide: The Yazidi Massacre in the Context of the Convention on the Prevention and Punishment of Genocide 1948

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In August 2014 ISIS conducted a coordinated attack on the Yazidi population of the Mount Sinjar area. As a result, the entirety of this Yazidi population was displaced[1], and an estimated total of 3,100[2] Yazidis were killed (approximately half were executed, and the rest died whilst fleeing[3]) and 6,800[4] were kidnapped and subjected to numerous abuses, including torture and forced religious conversion. The "genocide" is ongoing[5] and as of August 2014, there are an estimated 3,200[6] women and girls still in ISIS captivity.

This article will explore these events in the context of the elements of genocide and with references to the findings of the Report of the Independent International Commission of Inquiry on the Syrian Arab Republic and the Report of the Office of the United Nations High Commissioner for Human Rights on the human rights situation in Iraq in the light of abuses committed by the so-called Islamic State in Iraq and the Levant and associated group. This article will critically examine if, and to what extent, these attacks constitute a genocide within the meaning of the Convention on the Prevention and Punishment of Genocide ('Genocide Convention') 1948.

[1] Valeria Cetorelli, Isaac Sasson, Nazar Shabila, Gilbert Burnham'Mortality and kidnapping estimates for the Yazidi population in the area of Mount Sinjar, Iraq, in August 2014: A retrospective household survey' (2017) PLOS Medicine https://doi.org/10.1371/journal.pmed.1002297 accessed 4 May 2019
[2] Ibid.
[3] Ibid.
[4] Ibid.
[5] OHCHR, 'Report of the Independent International Commission of Inquiry on the Syrian Arab Republic' (15 June 2016) A/HRC/32/CRP.2
[6] Ibid.

Background

The Yazidis are a longstanding ethnic and religious community, the majority of whom live in Northern Iraq[7] in the Mount Sinjar area (approximately 400,000[8] people), where the Islamic State of Iraq and Syria (ISIS) had been systematically targeting minority groups in the region in a brutal drive to "purify" it of non-Islamic influences[9].

On 3 August 2014, ISIS launched an attack specifically targeting the Yazidis and advanced convoys into the Sinjar area, surrounding the neighbouring towns and villages, and thus forcing Yazidis to seek refuge on Mount Sinjar, which ISIS subsequently encircled leaving the Yazidis trapped without supplies or shelter[10]. Men and older women who were unable to flee in time were executed by means of shooting or beheading[11]. Young women, girls and boys were kidnapped[12]: the women and girls who had attained the age of 9[13] were used and/or sold into sexual or domestic slavery and the young boys who had attained the age of 7[14] were sent to training camps to be indoctrinated into ISIS as fighters or suicide bombers[15].

[7] Dave van Zoonen, Khogir Wirya,'Yazidis: Perceptions of Reconciliation and Conflict' (2017) Middle East Research Institute <www.usip.org/sites/default/files/Yazidis-Perceptions-of-Reconciliation-and-Conflict-Report.pdf> accessed 4 May 2019

[8] Valeria Cetorelli, Isaac Sasson, Nazar Shabila, Gilbert Burnham'Mortality and kidnapping estimates for the Yazidi population in the area of Mount Sinjar, Iraq, in August 2014: A retrospective household survey' (2017) PLOS Medicine https://doi.org/10.1371/journal.pmed.1002297 accessed 4 May 2019

[9] Amnesty International 'Ethnic cleansing on a historic scale: Islamic State's systematic targeting of minorities in Northern Iraq' (2014) <www.es.amnesty.org/uploads/media/Iraq_ethnic_cleansing_final_formatted.pdf > accessed 4 May 2019

[10] Valeria Cetorelli, Isaac Sasson, Nazar Shabila, Gilbert Burnham'Mortality and kidnapping estimates for the Yazidi population in the area of Mount Sinjar, Iraq, in August 2014: A retrospective household survey' (2017) PLOS Medicine

[11] ibid

[12] Yazda and the Free Yezidi Foundation, 'ISIL: Nationals of ICC states parties committing genocide and other crimes against the Yazidis' (*Free Yezidi Foundation, 2015*) <www.freeyezidi.org/wp-content/uploads/Corr-RED-ISIL-commiting-genocide-ag-the-Yazidis.pdf> accessed 5 May 2019

[13] OHCHR, 'Report of the Independent International Commission of Inquiry on the Syrian Arab Republic' (15 June 2016) A/HRC/32/CRP.2

[14] Ibid.

[15] Jewish World Watch, 'Iraq (The Yazidis)' (*Jewish World Watch, 2019*) <www.jww.org/conflict-areas/iraq-yazidis/> accessed 4 May 2019

United States humanitarian aid airdrops and helicopter rescue missions between 8 – 13 August 2014 enabled most of the trapped Yazidis to be evacuated into the Kurdistan region where the majority of the displaced population (300,000[16] Yazidis) now reside in displaced persons camps. Others from the evacuated population are reportedly in refugee camps in Syria (around 15,000[17]), or have crossed into Turkey (at least 30,000[18]), whilst some (an estimated 10,000[19]) remain in makeshift camps on Mount Sinjar[20].

The Elements of Genocide

The Acts of Genocide

Genocide can be committed in various forms[21]: killing members of a group; causing serious bodily or mental harm to members of the group; deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part; imposing measures intended to prevent births within the group; or forcibly transferring children of the group to another group.

[16] Board of Relief and Humanitarian Affairs, 'Report on IDP camps in Duhok' (*BRHA Duhok, 2015*) <www.brha-duhok.org/wpcontent/uploads/Report%20on%20the%20IDP%20camps%20in%20Dohuk-June%202015.pdf> accessed 8 May 2019

[17] Maha Sidky, Ariane Rummery, 'UNHCR steps up aid as Yazidis stream into Syria from Iraq's Mount Sinjar' (*UNHCR, 14 August 2014*) <www.unhcr.org/uk/news/latest/2014/8/53ecb7a29/unhcr-steps-aid-yazidis-stream-syria-iraqs-mount-sinjar.html> accessed 10 May 2019

[18] Tulin Daloglu, 'How will Turkey React to Stream of Kurdish Refugees?' (*Al-Monitor, September 22 2014*) <www.al-monitor.com/pulse/originals/2014/09/turkey-syria-iraq-kobani-isis-kurds-pkk.html> accessed 8 May 2019

[19] Editorial Staff, 'One doctor for 10,000 people in Iraq's Yazidi Mount Sinjar' (Ekurd Daily, 2015) <https://ekurd.net/one-doctor-for-10000-people-in-iraqs-yazidi-mount-sinjar-2015-01-13> accessed 10 May 2019

[20] REACH Initiative, 'REACH overview: Displacement from Sinjar, 3-14 August 2014' (2014) <www.reach-initiative.org/wp-content/uploads/2014/08/REACH_IRQ_InternalDisplacement_Briefing_August2014_Sinjar.pdf> accessed 4 May 2019

[21] Convention on the Prevention and Punishment of Genocide (opened for signature 9 December 1948, entered into force 12 January 2002), 78 UNTS 277, Art 2

The above acts were clearly committed during the ISIS attack on the Yazidis. In addition to the killings, members of the Yazidi community suffered serious bodily or mental harm due not only to the trauma executions and kidnappings themselves, but also as a result of the starvation, dehydration and exposure they suffered whilst surrounded on Mount Sinjar by ISIS forces. The execution of adults, the sexual slavery of women and the indoctrination of the children are all measures intended to prevent births within the group and thus compromise the sustainability of the Yazidi community. Similarly, the children who were kidnapped for sexual slavery or to fight were forcibly transferred from the Yazidi group to the ISIS group, which both destroyed their identities as Yazidi people and prevented them from continuing or rebuilding their Yazidi community. Furthermore, the siege of Mount Sinjar and the treatment of the kidnapped women and children constitute conditions of life deliberately imposed to bring about the physical destruction of the group, as these measures ensured that the entire Yazidi community was either killed or displaced.

By their very nature, the acts committed by ISIS amount to genocidal acts. However, the fact that the requisite act(s) are committed does not in itself amount to a genocide within the meaning of the Genocide Convention. The question, therefore, is in fact not whether these are genocidal acts, but rather whether these genocidal acts will amount to a genocide by reason of having been carried out against a protected group and with the required intent. Accordingly, the determination of the status of the Yazidi community and an exploration of ISIS' intent in carrying out these acts are central to identifying whether the Yazidi massacre constitutes a genocide.

Identifying a 'Protected Group'

A protected group within the meaning of the Rome Statute is one which is religious (consisting of individuals who "share the same religion, denomination or mode of worship"[22]), ethnic ("individuals who share a common language or culture"[23]), racial (conventionally meaning "the hereditary physical traits often identified with a geographical region, irrespective of linguistic, cultural, national or religious factors"[24]) or national (individuals "perceived to share a legal bond based on common citizenship, coupled with reciprocity of rights and duties"[25])[26].

Whilst this definition may be prima facie clear and definite, the identification of a group may present a challenge where the conflict arises within what an individual external to the situation would likely objectively consider one group. In these circumstances, the application of the convention definition becomes more uncertain. The determination of the composition of a group must therefore be made on a case-by-case basis[27], and thus it is crucial to take a more subjective approach and consider the cultural context in which the conflict began - although some judgements support the view that a group must nonetheless have some objective existence[28]. Particularly important here, is the notion that "collective identities … are by their very nature social constructs"[29], meaning that a group may also be identified by how the group distinguishes itself or how the group is perceived by others (including the perpetrator)[30].

The Yazidis follow rules and customs governing their quotidian lives and view themselves very much external to those outside their community which may suggest they are a distinct

[22] *Prosecutor v Akayesu* (Judgment) ICTR-96-4-T (2 September 1998)
[23] Ibid.
[24] Ibid.
[25] Ibid.
[26] Rome Statute of the International Criminal Court 1998, Article 6
[27] *Prosecutor v Brđanin* (Judgement) IT-99-37-T (1 September 2004)
[28] *Prosecutor v Rutaganda*, (Judgement) ICTR-96-3-T (December 6 1999).
[29] Guglielmo Verdirame, "The Genocide Definition in the jurisprudence of the ad hoc tribunals", (2000) 49 International and Comparative Law Quarterly 592.
[30] *Prosecutor v. Kayishema and Ruzindana* (Judgement) ICTR-95-1-T (May 21 1999)

national group. However, this is also a somewhat more tenuous identification, as they also share common citizenship, a reciprocity of rights and duties with the rest of the Iraqi population, and certainly with neighboring communities. It is therefore quite unlikely that the Yazidis could be properly considered a separate national group.

The Yazidi people believe that they were created first before any other race of people, as they are descended from Adam only, whilst the rest of humanity was later created and descended from both Adam and Eve[31]. Therefore, insofar as a group may be defined by its self-perception and self-identification, it may be argued that the Yazidi people are indeed a distinct racial group. However, it should be noted that this is perhaps a more tenuous distinction in comparison to identifying the Yazidis as a religious or ethnic group, as it may be argued that, geographically (notwithstanding their language, culture, religion or nationality as suggested in *Akayesu*), the Yazidis belong to the wider Kurdish racial group and therefore are not a distinct racial group.

Moreover, the fact that ISIS appear to have viewed and targeted the Yazidis as a distinct group on the grounds of their cultural and religious identity, as opposed to their racial identity, would also suggest that it is unlikely that the Yazidis could be properly considered a distinct racial group within the meaning of the Genocide Convention. This is particularly unlikely in light of the fact that the perception of the perpetrator and his subjective belief that the individuals in question are part of a distinct group is a more persuasive and arguably appropriate means by

[31] Who, What Why, 'Who are the Yazidis?' (*BBC, 8 August 2014*) < http://www.yeziditruth.org > accessed 9 May 2019

which a protected group should be identified[32] - indeed, the perpetrator's intent is inevitably "a decisive element in the crime of genocide" [33].

One may also consider that the Yazidis in fact speak the same Kurdish language as other Kurds, and many also speak Arabic due to their proximity to Arab neighbourhoods[34], and therefore the Yazidis are arguably not a distinct ethnic group from other Kurds or Arabs. However, the definition of 'ethnic' encompasses "language or culture", and whilst they may share a common language, they evidently do not share broader Kurdish culture. For example, contact with outsiders is discouraged and so Yazidis often seek to avoid formal education and military service[35]. The Yazidi people also follow specific rules, such as the prohibition of blue clothing, certain foods and the pronunciation of the word '*Shayṭān'* (Satan). It would therefore be appropriate to consider the Yazidi people as a distinct ethnic group.

Perhaps most saliently, the Yazidis are also a distinct religious minority, as they hold particular and unique beliefs and customs which combine elements of Islam, Zoroastrianism, Christianity and Judaism spanning thousands of years'[36] and differ from neighbouring groups. Moreover, Yazidis do not allow conversions into or out of the Yazidi community further demonstrating that the Yazidi people view themselves as a distinct group which is not only religious, but ethnic as well. ISIS on their part have branded the Yazidi people as "devil worshippers"[37] and

[32] *Prosecutor v Jelisić* (Judgement) IT-95-10-T (14 December 1999)

[33] William A. Schabas, 'Was Genocide Committed in Bosnia and Herzegovina? First Judgments of the International Criminal Tribunal for the Former Yugoslavia' (2001) 25 Fordham International Law Journal 23

[34] Dave van Zoonen, Khogir Wirya,'Yazidis: Perceptions of Reconciliation and Conflict' (2017) Middle East Research Institute <www.usip.org/sites/default/files/Yazidis-Perceptions-of-Reconciliation-and-Conflict-Report.pdf> accessed 7 May 2019

[35] The Editors of Encyclopaedia Britannica 'Encyclopaedia Britannica: 'Yazīdī' (*Encyclopaedia Britanica inc. 2018*) <www.britannica.com/topic/Yazidi > accessed 4 May 2019

[36] OHCHR, 'Report of the Independent International Commission of Inquiry on the Syrian Arab Republic' (15 June 2016) A/HRC/32/CRP.2

[37] Simon-Skjodt Center for the Prevention of Genocide, '"Our Generation is gone." The Islamic State's targeting of Iraqi minorities in Ninewa' (2015) <https://www.ushmm.org/m/pdfs/Iraq-Bearing-Witness-Report-111215.pdf> accessed 5 May 2019

"infidels"[38], demonstrating that as perpetrators, they also perceive the Yazidis as a distinct group.

However, although the subjective approach is an important contextual consideration, it cannot always be properly regarded as the only consideration in the identification of a protected group. Arguably, the objective existence of the group must also be determined to ensure that the law does not "permit the crime to be defined by the offender alone"[39].

This being said, a protected group will most often be apparent in the specific context of each case[40]. Indeed, in the case of the Yazidi massacre, it appears evident that the Yazidis constitute a religious and ethnic group, both objectively and from their own, and crucially, the perpetrator's own, subjective perspective. As such, the Yazidis clearly fall within the scope of 'protected group' under both the statutory and case law definitions.

A Group 'in Whole or in Part'

International case law has made clear that a 'part' of the group amounts to a "substantial part"[41] or a "considerable number of individuals"[42] - though not necessarily a "very important part"[43] of the group. It is also suggested that 'in part' indicates "a reasonably significant number, relative to the total of the group as a whole, or else a significant section of a group such as its

[38] OHCHR, 'Report of the Independent International Commission of Inquiry on the Syrian Arab Republic' (15 June 2016) A/HRC/32/CRP.2
[39] William A. Schabas, 'Was Genocide Committed in Bosnia and Herzegovina? First Judgments of the International Criminal Tribunal for the Former Yugoslavia' (2001) 25 Fordham International Law Journal 23
[40] Max van der Stoel, 'Prevention of Minority Conflicts', in Louis B. Sohn (ed) The CSCE and the Turbulent New Europe (Friedrich-Naumann-Stiftung 1993)
[41] *Prosecutor v Semanza* (Judgement) ICTR-97-20-T (15 May 2003)
[42] Prosecutor v *Kayishema and Ruzindana* (Judgement) ICTR-95-1-T (21 May 1999)
[43] *Prosecutor v Jelisić* (Judgement) IT-95-10-T (14 December 1999)

leadership"[44]. The Yazidi population is estimated at less than 1.5 million[45], with communities primarily located across Iraq, Syria, Turkey, and Armenia. Therefore, whilst the attack on the Yazidis of the Sinjar area evidently targets only part of the population, crucially, it targets the largest community of that population – and moreover, 400,000 out of 1.5 million Yazidis (nearly one third) clearly amounts to a 'significant part' of the group relative to the total.

Furthermore, it may be pertinent to consider the United States' implementation of the Genocide Convention in its domestic legislation, in which 'substantial part' is defined as "a part of a group of such numerical significance that the destruction or loss of that part would cause the destruction of the group as a viable entity within the nation of which such group is a part."[46] By attacking the Sinjar community specifically - the largest and culturally most significant Yazidi community - whether by means of killing, preventing the continuation of births, religious practices or the rebuilding of the community, it was inevitable that there would be lasting repercussions on not only this specific community, but also the Yazidi people as a whole.

Genocidal Intent – '*Dolus Specialis*'

Aside from consideration of the acts and the protected parties themselves, the presence of genocidal intent is the crux of identifying a genocide, as it is this element of 'surplus intent'[47]

[44] Ben Whitaker, 'Revised and Updated Report on the Question of the Prevention and Punishment of the Crime of Genocide', UN Doc. E/CN.4/Sub.2/1985/6

[45] Valeria Cetorelli, Isaac Sasson, Nazar Shabila, Gilbert Burnham'Mortality and kidnapping estimates for the Yazidi population in the area of Mount Sinjar, Iraq, in August 2014: A retrospective household survey' (2017) PLOS Medicine

[46] Genocide Convention Implementation Act 1987, s.1093 (8) (US)

[47] *Prosecutor v Stakić* (Judgement) IT-97-24 (31 July 2003)

that decisively sets apart the crime of genocide from other lesser crimes[48], such as crimes against humanity or war crimes. Genocidal intent is a *'dolus specialis'* (special intent) which imposes a requirement that the perpetrator specifically intends to produce the act charged. It is two-fold[49] in that Genocidal intent requires both the criminal intent to commit the underlying crime (for example, causing grievous bodily harm) and the specific intent 'to destroy in whole or in part' the targeted group[50]. Importantly, the genocide must target the group 'as such' meaning as a "separate and distinct entity"[51], as opposed to only one or several individuals for a particular reason. The victims must have been targeted because of the fact that they belonged to a particular group, and as a means of destroying the group to which they belong[52].

In the absence of direct evidence of genocidal intent, it may be inferred from a number of facts and circumstances, for instance the general context, the deliberate and systematic targeting of members of a group whilst sparing non-members, the scale of atrocities committed[53], the physical targeting of the group or their property, the number or proportion of the group affected and the derogatory language used towards them[54]. Furthermore, it is for the court to determine the appropriate requirement to be met for establishing a mental element regarding knowledge of the circumstances on a case-by-case basis[55] and, whilst the 'existence of a plan or policy is not a legal ingredient of the crime'[56], it may go to evidence genocidal intent.

[48] International Law Commission, 'Draft Code of Crimes Against the Peace and Security of Mankind with commentaries', 1996
[49] International Commission of Inquiry on Darfur, 'Report of the International Commission of Inquiry on Darfur to the United Nations Secretary-General' (25 January 2005)
[50] Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia v. Serbia)
[51] International Law Commission, 'Draft Code of Crimes Against the Peace and Security of Mankind with commentaries', 1996
[52] *Prosecutor v. Rutaganda* (Judgment) ICTR-96-3 (6 December 1999)
[53] *Prosecutor v Akayesu* (Judgment)ICTR-96-4-T, T Ch I (2 September 1998)
[54] *Kayishema and Ruzindana* (Judgement) ICTR-95-1-T (21 May 1999)
[55] Elements of Crimes, Article 6
[56] *Prosecutor v Jelisić* (Appeal Judgement) IT-95-10 (5 July 2001)

Most indicative of ISIS' genocidal intent is the specific type of attacks carried out and the way in which they were conducted. The attacks were tailored to the religious and cultural customs of the Yazidi people so as to efficiently target and undermine them and cause the community to collapse. The killing of older men and women ensured that families could rarely be rebuilt and that military aged men could not aid in the defence of the community. It also meant that many women who survived and were able to re-join their families - particularly women with limited education (as was the case for many) or those from rural areas – struggled to survive, as they lacked personal and financial independence and had relied heavily on their husbands for communication beyond their own families.[57] The abduction and indoctrination of the children - whether as slaves or as fighters – worked to destroy the culture and religion that the younger generation would have grown up around and continued, as well as preventing them from trying to return to their community and rebuild it.

The sexual slavery of the young women was also designed to be destructive in a unique way in this cultural context, as until recently, children born as a result of ISIS rapes would not be allowed into the Yazidi faith/culture due to the fact that Yazidism requires a child to have two Yazidi parents[58] and Iraqi law dictates that children should be registered under the religion of their fathers. Therefore, women were required to give up their child before being allowed to re-join the community - it only as of 24 April 2019 that the Yazidi Supreme Spiritual Council have decreed that they will accept both the ISIS rape survivors and their children back into the community[59].

[57] OHCHR, 'Report of the Independent International Commission of Inquiry on the Syrian Arab Republic' (15 June 2016) A/HRC/32/CRP.2

[58] OHCHR, 'Report of the Independent International Commission of Inquiry on the Syrian Arab Republic' (15 June 2016) A/HRC/32/CRP.2

[59] Martin Chulov, 'Yazidi leaders to allow Isis rape survivors to return with children' The Guardian (27 April 2019)

The specific choice to target the Sinjar region further goes to evidence the intent to destroy the Yazidi community. This is not only the largest Yazidi community, but importantly the Nineveh-Dohuk and Sinjar region is home to their shrines, holy places and ancestral lands[60] which are central to the Yazidi cultural and religious identity, particularly the main temple in Lalesh as they believe this is where creation began[61]. Arguably, the choice to attack the most prominent Yazidi community, one that is "emblematic of the overall group"[62] is a deliberate choice not only in terms of the significant number of potential victims, but also in terms of threatening, weakening or terrorising the other, smaller Yazidi communities and the Yazidi faith and ethnic group as a whole.

Moreover, these attacks were carried out on civilians of all ages, genders and professions[63] (as opposed to military forces only). Although civilians "undoubtedly are capable of bearing arms, they do not constitute the same kind of military threat as professional soldiers"[64], and therefore the indiscriminate nature of the attack demonstrates a disregard the rules of war and strongly suggests that this was not solely a military attack but a distinct attempt to target and destroy the group itself.

However, there is scope to argue that the attack on the Yazidis was 'ethnic cleansing' as opposed to genocide. Whilst both horrific crimes, genocide requires the intent to destroy,

[60] Practice Lab Report, 'Executive Summary' (*Vanderbilt Law School*) <https://law.vanderbilt.edu/academics/academic-programs/international-legal-studies/Yazidi_Genocide_Opinion_KRG_4.15.pdf> accessed 9 May 2019

[61] Dave van Zoonen, Khogir Wirya,'Yazidis: Perceptions of Reconciliation and Conflict' (2017) Middle East Research Institute <www.usip.org/sites/default/files/Yazidis-Perceptions-of-Reconciliation-and-Conflict-Report.pdf> accessed 8 May 2019

[62] *Prosecutor v. Popovic* (Judgement) IT-05-88-T (10 June 2010)

[63] Valeria Cetorelli, Isaac Sasson, Nazar Shabila, Gilbert Burnham'Mortality and kidnapping estimates for the Yazidi population in the area of Mount Sinjar, Iraq, in August 2014: A retrospective household survey' (2017) PLOS Medicine

[64] *Prosecutor v Krstić* (Judgment) ICTR-98-33-A (19 April 2004)

whereas ethnic cleansing instead refers to the intent to displace a group, "a purposeful policy designed by one ethnic or religious group to remove by violent and terror-inspiring means the civilian population of another ethnic or religious group from certain geographic areas".[65] ISIS very clearly regarded the attack as a means of 'purifying', and has specifically targeted the Sinjar area. Furthermore, the Yazidis were in fact one of several persecuted non-Islamic minorities in the area[66], and whilst this particular attack specifically targeted the Yazidi people, one may argue that it was not carried out with the genocidal intent to destroy the Yazidi group but rather one attack in a series of attacks intended to displace *any* group that was not ISIS. Therefore, the ISIS attack on the Yazidis is arguably one aimed at ethnic cleansing, and as such may amount to crimes against humanity or war crimes, but not genocide[67].

Genocide versus Crimes Against Humanity

It has been argued that 'crimes against humanity' would be more appropriate to define crimes such as those carried out during the Yazidi massacre, with some even going on to posit that the concept of 'genocide' does little, if anything, to add to international criminal law except create a "discrimination between protected groups that has no grounding in legal theory"[68], and therefore there should be "sole reliance on crimes against humanity"[69] which already provides for the underlying acts of genocide.

[65] United Nations Security Council, 'Report of the Commission of Experts on the evidence of grave breaches of the Geneva Conventions and other violations of international humanitarian law committed in the territory of the former Yugoslavia' (27 May 1994) S/1994/674

[66] Simon-Skjodt Center for the Prevention of Genocide, '"Our Generation is gone." The Islamic State's targeting of Iraqi minorities in Ninewa' (2015) <https://www.ushmm.org/m/pdfs/Iraq-Bearing-Witness-Report-111215.pdf> accessed 5 May 2019

[67] Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia v. Serbia)

[68] Dov Jacobs, 'Moving Past the Genocide Debate: Mass Atrocities and the International Community', Theory vs. Policy? Connecting Scholars and Practitioners, (ISA Annual Convention 2010, New Orleans

[69] ibid

However, the majority of jurisdictions "recognize degrees of the crime based on differences in the mental element alone"[70] even where the act(s) committed are identical[71]. This could equally apply to the crime of genocide, which, despite the elements of actus reus it shares with crimes against humanity[72], is differentiated and aggravated by the genocidal intent element[73] which is omitted from crimes against humanity[74]. Therefore, the term 'genocide', should not be conflated with 'crimes against humanity'[75], despite the potential definitional overlap[76]. In the instance of the Yazidi massacre, ISIS' genocidal intent is readily inferred, and thus the crimes take on "a further degree of seriousness"[77], and surpass the threshold required for crimes against humanity. To label them as such would therefore be inaccurate and inappropriate, as it would not properly acknowledge the exact nature of the crimes that took place and undermine the true severity of this case.

The Wider Implications of a Finding of 'Genocide'

The label 'genocide' is important not only in terms of its accuracy in describing the crimes but also because of the political significance and legal implications attached to the term. The importance of the correct terminology becomes particularly apparent when consideration is given to the correlation between the type of crime and the measures required.

[70] William A. Schabas, *Genocide in International Law: The Crime of Crimes* (Cambridge University Press, 2009) 241

[71] ibid

[72] Rome Statute of the International Criminal Court 1998, Article 7

[73] Akhavan P, Reducing Genocide to Law: Definition, Meaning, and the Ultimate Crime (Cambridge University Press, 2012)

[74] Prosecutor v Akayesu (Judgment) ICTR-96-4-A (1 June 2001)

[75] Schabas W A., Genocide in International Law: The Crime of Crimes (Cambridge University Press, 2009) 15

[76] Dov Jacobs, 'Moving Past the Genocide Debate: Mass Atrocities and the International Community', Theory vs. Policy? Connecting Scholars and Practitioners, (ISA Annual Convention 2010, New Orleans

[77] Wibke K. Timmermann, Book Review (2013) 72 Journal of International Criminal Justice 485

Genocide is widely regarded one of the gravest crimes, and as such, there are implications for the kind of response and attention it receives. For example, the term is often perceived to have the "ability to motivate public opinion and mobilize international consensus"[78]. In theory, the label 'genocide' also has the "legal power to bind states to take action to halt genocide"[79]. It is true, however, that in practice, it may at times be counterproductive and lead to states avoiding the use this label to evade any obligation they may have to intervene[80]. In fact, even where the conclusion has been reached that a genocide has occurred, action has not always been forthcoming - the United States' inaction during the conflict in Darfur being an example of this[81].

This being said, despite the shortcomings to date in addressing these issues, the use of the term genocide nonetheless carries "the heaviest stigma in the popular and in the diplomatic world"[82], and is potentially very powerful in determining "how we react to and prevent the gravest of international crimes"[83]. Therefore, though the primary importance of defining the Yazidi massacre a 'genocide' lies it its legal distinction from other crimes, it is evident that the ramifications of such a finding would extend beyond the legal system.

Conclusion

[78]Mark Kersten, 'You Say Genocide, I Say Genocide: Some Thoughts on the Genocide Debate', (*Justice in Conflict*, 5 June 2011) <https://justiceinconflict.org/2011/06/05/you-say-genocide-i-say-genocide-some-thoughts-on-the-genocide-debate-2/> accessed 17 November 2019

[79] ibid

[80] ibid

[81] Secretary Colin L. Powell, 'The Crisis in Darfur' (US Department of State Archive, 9 September 2004) <https://2001-2009.state.gov/secretary/former/powell/remarks/36042.htm> accessed 17 November 2019

[82] Patricia M. Wald, 'Genocide and Crimes against Humanity' (2007) 6 Washington University Global Studies Law Review 621

[83] Mark Kersten, 'You Say Genocide, I Say Genocide: Some Thoughts on the Genocide Debate', (*Justice in Conflict*, 5 June 2011) <https://justiceinconflict.org/2011/06/05/you-say-genocide-i-say-genocide-some-thoughts-on-the-genocide-debate-2/> accessed 17 November 2019

In conclusion, the acts committed by ISIS against the Yazidis satisfy the statutory definition of genocide as set out by the Genocide Convention of 1948: genocidal acts were committed, the Yazidis constitute a protected group, and ISIS appear to have the requisite genocidal intent to destroy, at least in part, the Yazidi community.

Both killing and causing serious bodily or mental harm as genocidal act require proof of a result[84]. The sheer scale of the atrocities which targeted one third of the global Yazidi population evidences not only the commission of the acts themselves but the destructive intent of the perpetrators[85]. The mental and bodily harm suffered (though not necessarily permanent and irreversible[86]) goes "beyond temporary unhappiness, embarrassment or humiliation", and has resulted "in a grave and long-term disadvantage to a person's ability to lead a normal and constructive life"[87] as required by case law.

The conditions of life imposed on those subjected to the siege of Mount Sinjar were clearly intended to ultimately bring about the physical destruction of the Yazidis due to the lack of supplies and medical care[88]. With regards to the conditions of life imposed on those kidnapped for slavery and indoctrination, it may be argued that they were calculated to dissolve (but not destroy) the group which would constitute a crime against humanity, but not a genocidal act[89]. However, the conditions of life were nonetheless measures which prevented births within the group and forcibly transferred children. Ultimately, whilst a plan or policy is not required to establish genocidal intent[90], the range of acts that ISIS committed against the Yazidis during the attack and the way in which they were carried out demonstrates a "context of a manifest

[84] *Prosecutor v Brđanin* (Judgement) IT-99-36-T (1 September 2004)
[85] *Prosecutor v* Karadžić (Judgement) MICT-13-55 (24 March 2016)
[86] *Prosecutor v Tolimir* (Judgement) IT-05-88/2-T (12 December 2012)
[87] *Prosecutor v Krstić* (Judgment) ICTR-98-33-A (19 April 2004)
[88] *Prosecutor v Musema* (Judgment) ICTR-96-13-A (27 January 2000)
[89] *Prosecutor v Brđanin* (Judgement) IT-99-36-T (1 September 2004)
[90] *Prosecutor v Jelisić (Judgement)* IT-95-10-A (5 July 2001)

pattern of conduct aimed at the destruction"[91] of the Yazidi group specifically. Therefore, the ISIS attack on the Yazidis does indeed constitute a genocide and it is important that it be recognised as such. Despite this, and despite the fact that the International Criminal Court (ICC) has jurisdiction over crimes of genocide[92] and that arguably, universal jurisdiction may also apply (considering the severity of the crime and the involvement of ISIS which is of global concern), individual perpetrators - or indeed co-perpetrators - have yet to be prosecuted. Meanwhile, several thousand Yazidis are still in ISIS captivity and thus the genocide is ongoing[93].

[91] OHCHR, 'Report of the Office of the United Nations High Commissioner for Human Rights on the human rights situation in Iraq in the light of abuses committed by the so-called Islamic State in Iraq and the Levant and associated groups (ISIS)' (13 March 2015) A/HRC/28/18

[92] Rome Statute of the International Criminal Court 1998, Article 5

[93] OHCHR, 'Report of the Independent International Commission of Inquiry on the Syrian Arab Republic' (15 June 2016) A/HRC/32/CRP.2

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Reasonable responses versus proportionality in employee dismissal cases:

A comparison between the Employment Rights Act 1996, s 98(4) and the Equality Act 2010, s 13(2), s 15(1)(b), and s 19(2)(d).

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Declaration

I declare that the work contained in this project is my own and that it has not been submitted for assessment in another programme at this or any other institution at postgraduate or undergraduate level. I also confirm that this work fully acknowledges the opinions, ideas and contributions from the work of others.

I confirm 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 (e.g. interviews, questionnaires or as a result of observation). The ethical risk is low.

Signed: Susan B O'Brien

Dated: 10th May 2019

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Introduction

What, if any, are the differences between a dismissal that is reasonable and one that is a proportionate means of achieving a legitimate aim? That is the question at the centre of this dissertation. To answer it we start by placing both legal tests within the overall context of statute, then assess and analyse both separately. From that point the two can be fully compared. The structure of this dissertation is thus as follows:

Chapter one outlines statutory provisions regulating dismissal from employment in both the Employment Rights Act 1996 (ERA) and Equality Act 2010 (EqA). It identifies the key role of section 98(4) of the ERA in deciding unfair dismissal claims; and the likewise key roles of sections 13(2), 15(1)(b), and 19(2)(d) of the EqA in deciding some categories of discrimination claim.

Chapter two examines the application of ERA s 98(4) in depth to identify its interpretation, its impact on claimants and employers, and the likelihood of future legal developments in this area. Chapter three carries out a similar exercise for sections 13(2), 15(1)(b), and 19(2)(d) of the EqA.

Having identified the central concepts of reasonable responses and proportionality, chapter four compares them directly. It focuses particularly on dual claim situations where both tests are necessarily applied side by side to the same facts. Overall conclusions are made about both differences and similarities found. It is argued that the relationship between reasonableness and proportionality in cases of employee dismissal is not fully settled within case law, and further clarification will likely be necessary in the future. Such clarification could go to the heart of distinctions between unfair dismissal and discrimination in UK law.

Chapter 1:
An overview of unfair dismissal and discrimination law

1.0 Introduction

This chapter summarises key aspects of legislation relating to dismissal from employment and identifies the particular legal tests to be explored later within the dissertation.

1.1 Background to legislation

Under common law, an individual has limited rights of redress if they are dismissed from employment.[1] This is because under the law of contract, one party may give notice to another to terminate an agreement, subject to its specific terms.[2] Therefore, even if an employee makes a wrongful dismissal claim based on breach of contract, the maximum amount of damages awarded will be the sum of wages and/or other benefits that they would have been entitled to during the contractual period of notice.[3]

The Industrial Relations Act 1971 extended the law significantly with its introduction of a right not to be unfairly dismissed.[4] The deceptively simple wording of that statute has continued in law under various forms since, most recently within the ERA.[5]

By contrast, anti-discrimination legislation is designed for a broader range of claims in various settings.[6] Dismissal from employment has always been included in this.[7] As

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[1] H Collins, *Justice in Dismissal: The Law of Termination of Employment* (OUP 1992) 31.
[2] D Brodie, *The Contract of Employment* (W Green & Son 2008) 225.
[3] Ibid.
[4] Collins (n 1) 23, 35.
[5] S Deakin & G Morris, *Labour Law* (6th edn, Hart Publishing 2012) 594.
[6] B Hepple, *Equality: The New Legal Framework* (Hart Publishing 2011) 25.
[7] See for example the Sex Discrimination Act 1975, s 6(2)(b) and Race Relations Act 1976, s 4(2)(c).

such, since the mid 1970s it has been theoretically possible for a dismissed employee to bring dual claims of both unfair dismissal and discrimination. Importantly, the drive towards the latter statutory regulation came from the European Union (EU) in the form of various Equal Treatment Directives.[8] This has given anti-discrimination legislation a distinctly European construction as compared to that of unfair dismissal.[9]

The EqA was designed to consolidate, standardise and replace most previous anti-discrimination legislation.[10] It provides protection against discrimination for those in or seeking employment.[11] This again includes situations where an employee is dismissed.[12]

1.2 Purposes behind statutory regulation of dismissal

Collins has conducted an analysis of the purpose behind unfair dismissal legislation.[13] His conclusion is that statutory regulation of an employer's decision to dismiss is connected to a desire for autonomy and human dignity in the workplace.[14] Losing a job has not only an economic impact – which can be remedied by a flexible labour market – but also has a psychological and emotional impact on the individual.[15] This, Collins argues, is why unfair dismissal legislation regulates the behaviour, actions, and processes of employers when they consider dismissal.[16] Other commentators have supported this assessment.[17] The legislation seeks to promote fairness in the workplace, whilst limiting any restriction on the ability of employers to make business

[8] The most recent of these is Council Directive 2006/54/EC of 5 July 2006 on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation (recast) [2006] OJ L204/23.
[9] M Connolly, *Discrimination Law* (2nd edn, Sweet & Maxwell 2011) 183.
[10] Ibid 16.
[11] Equality Act 2010 (EqA 2010) s 39.
[12] EqA 2010, s 39(2)(c).
[13] Collins (n 1) 11-22.
[14] Ibid 22.
[15] Ibid 16.
[16] Ibid 17.
[17] T Brodtkorb 'Employee Misconduct and Unfair Dismissal law: Does the range of reasonable responses test require reform?' (2010) 52 Int JLM 434.

decisions.[18]

The purpose of anti-discrimination law has likewise been linked to notions of individual human dignity.[19] However, anti-discrimination law also has a more general societal purpose.[20] Commentators view this broader motivation through different perspectives such as ethical (equal opportunities), political/democratic (free participation in society), or economic (benefits of merit-based recruitment and advancement);[21] but all ultimately regard statutory intervention to prevent workplace discrimination as fulfilling a societal, as well an individual, need.[22] Because of this over-arching purpose, anti-discrimination law positively requires employers 'to operate employment practices that are sufficiently sensitive to the needs of the vulnerable group to eradicate unequal treatment caused by prejudice, stereotyping and other tangible and intangible barriers to the workplace'.[23] As such, it potentially involves greater judicial input in the way that employers run their businesses than unfair dismissal law.[24]

1.3 Defining dismissal

The ERA and EqA define dismissal in similar terms. This includes dismissal by notice (or otherwise), non-re-engagement of a fixed-term contract, and constructive dismissal.[25] The latter occurs when an employee resigns in circumstances where they would have been entitled to terminate the contract without notice due to employer conduct.[26] In other words, where an employer's actions constitute a repudiatory breach of contract and the employee resigns in response to this breach, this will be

[18] Deakin & Morris (n 5) 597.
[19] K Monaghan, *Monaghan on Equality Law* (2nd edn, OUP 2013) 16.
[20] Hepple (n 6) 16.
[21] Deakin & Morris (n 5) 601; Monaghan (n 19) 13-16.
[22] Hepple (n 6) 17.
[23] J Davies, 'A Cuckoo in the nest? A "range of reasonable responses" justification and the Disability Discrimination Act 1995' (2003) 32 ILJ 164, 177.
[24] Ibid 178; Deakin & Morris (n 5) 596-7.
[25] Employment Rights Act 1996 (ERA 1996) s 95(1); EqA 2010, s 39(7).
[26] ERA 1996, s 95(1)(c); EqA 2010, s 39(7)(b).

classed as a dismissal under both pieces of legislation.[27]

1.4 Entitlement to claim

In order to claim unfair dismissal, the individual must be working under a contract of employment.[28] Defining a contract of employment is a complex area of law beyond the immediate scope of this dissertation, but it excludes both the self-employed, and those who work on contracts that do not involve a close mutuality of obligation in terms of hours offered or accepted.[29] Individuals working under an employment contract must have had (in most circumstances) at least two years' service prior to their dismissal.[30]

There is no length of service requirement for a discrimination claim, and the EqA's definition of employee is considerably wider than that of the ERA; encompassing those on casual or 'zero hour' contracts, though still excluding the genuinely self-employed.[31] The protected characteristics under which protection from discrimination is potentially provided are race, age, disability, sex, sexual orientation, pregnancy, marital status, religion or belief, and gender reassignment.[32]

1.5 Stages of an unfair dismissal claim

Despite the large amount of case law it inspires, unfair dismissal is at its heart a statutory concept and any claim must meet the tests laid out in what is today ERA s 98.[33] Section 98(1) requires the employer to show the reason for the dismissal, and demonstrate that it fell within one of the prescribed categories listed in section

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[27] *Western Excavating (ECC) Ltd v Sharp* [1978] QB 761 (CA).
[28] ERA 1996, s 230(1).
[29] For further discussion on this point, see I Smith & others, *Smith and Wood's Employment Law* (13th edn, OUP 2017) 47-54.
[30] ERA 1996, s 108. This service requirement is removed in some limited circumstances; usually where the dismissal is directly connected to the employer's assertion of a statutory right.
[31] EqA 2010, s 83(2)(a).
[32] EqA 2010, s 4.
[33] Smith & others (n 29) 511.

98(2).[34] If it does, and the tribunal is satisfied that this was the genuine reason, then the dismissal is considered potentially fair.[35]

1.5.1 Potentially fair reasons for dismissal

The precise categories of potentially fair dismissals are; conduct of the employee, capability or qualifications, redundancy, contravention of statute, or some other substantial reason.[36] They are broadly defined and it is rare that any reason for dismissal other than those directly forbidden in sections 98-104F of the ERA will fail this first stage.[37] However, if more than one reason is given, or the employee disputes that the reason given is correct; the tribunal will consider what was the chief motivating factor of the employer when making the decision to dismiss.[38]

A conduct dismissal occurs where an employee has breached the employer's rules or procedures; or has otherwise behaved in a manner that is incompatible with the employer's business interests.[39] Such a dismissal may be summary in nature, caused by a single act of gross misconduct that creates a repudiatory breach of contract.[40] Alternatively the employee may have carried out numerous smaller acts of misconduct prior to dismissal.[41]

For an employer to dismiss for capability or qualifications, they need to demonstrate a genuine belief that the employee's lack of ability, skill, knowledge or formal qualification justifies a decision to end their employment in that role.[42] This is often the case if an employee has been absent due to sickness for a prolonged period and

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[34] ERA 1996, s 98(1) & (2).
[35] *Beedell v West Ferry Printers Ltd* [2000] ICR 1263 (EAT); Deakin & Morris (n 5) 525-26.
[36] ERA 1996, s 98(1) & (2).
[37] ERA 1996, s 98(6).
[38] *Maund v Penwith District Council* [1984] ICR 143 (CA); Smith & others (n 29) 517.
[39] S Honeyball, *Honeyball & Bower's Textbook on Employment Law* (14th edn, OUP 2016) 178-81.
[40] Smith & others (n 29) 534-35.
[41] Ibid 536.
[42] ERA 1996, s 98(3).

there is little likelihood of them returning in the near future.[43] It can also cover situations where poor performance of an employee has a negative impact on the employer's business, or where the employer has genuine reasons to believe that the holding of a particular qualification is necessary for the employee's job role.[44]

Redundancy arises when an employee's role is no longer required by their employer's business due to either a reduction in available work or the closure of a work location.[45] In practice, redundancy situations can be complicated due to re-structuring of particular departments, locations or roles.[46] Where the employer has dismissed for reason of redundancy, a tribunal must be satisfied that the circumstances fit within definitions given in ERA s 139.

Should an employee's continued employment in a job role contravene another statute, the dismissal is also potentially fair.[47] This might occur for example if the employee did not have the right to work legally within the UK.[48]

Some other substantial reason (SOSR) is the remaining category of potentially fair dismissals and has been defined widely in case law; so much so, that some argue that it removes any check on employers imposed by ERA s 98(1).[49] SOSR has been judged to cover economic motivations of the employer to re-structure work,[50] refusal to accept a restrictive covenant,[51] rejection of the employee by a major client,[52] and many other situations that have led to an employee's (intentional or constructive) dismissal.[53]

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[43] Honeyball (n 39) 175-76.
[44] Honeyball (n 39) 173.
[45] ERA 1996, s 139.
[46] Smith & others (n 29) 583.
[47] Honeyball (n 39) 188.
[48] *Kelly v University of Southhampton* [2008] ICR 357 (EAT).
[49] Deakin & Morris (n 5) 525-6.
[50] *Chubb Fire Security Ltd v Harper* [1983] IRLR 311 (EAT).
[51] *RS Components Ltd v Irwin* [1974] 1 All ER 41 (NIRC).
[52] *Henderson v Connect (South Tyneside) Ltd* [2010] IRLR 466 (EAT).
[53] See Honeyball (n 39) 189 for further examples.

1.5.2 The significance of section 98(4)

Once the dismissal has met the criteria for being potentially fair, section 98(4) requires the tribunal to determine whether it is fair or unfair overall.[54] This decision should take aspects of the employer's business, including size and administrative resources, into consideration.[55] Then, being mindful of equity and the substantial merits of each case, the tribunal decides whether the employer's actions were reasonable or unreasonable.[56] This assessment is the critical point in most unfair dismissal claims.[57] Chapter two of this dissertation will examine its interpretation in detail.

1.6 Stages of a discrimination claim

Under the EqA, the first stage of a discrimination claim is to identify the protected characteristic under which discrimination occurred.[58] The second stage identifies the type of discriminatory conduct.[59] The third step is to place this conduct within the context of one or more of the specifically prohibited circumstances outlined within the EqA.[60]

This creates a wide range of potential routes for a discrimination claim. This dissertation will focus on those that can both relate to dismissal from employment and be potentially justified by an employer on grounds of proportionality.[61] The three categories of potentially discriminatory conduct that meet these criteria are indirect discrimination,[62] discrimination arising from disability,[63] and direct discrimination on

[54] ERA 1996, s 98(4).
[55] ERA 1996, s 98(4)(a).
[56] ERA 1996, s 98(4)(a) & (b).
[57] Deakin & Morris (n 5) 505-06.
[58] EqA 2010, pt 2 ch 1.
[59] EqA 2010, pt 2 ch2.
[60] EqA 2010, pt 5 ch 1.
[61] Other forms of discrimination that do not meet this criteria such as direct discrimination that is not age-related, or failure to provide reasonable adjustments for a disabled employee, will not be considered within this dissertation.
[62] EqA 2010, s 19.
[63] EqA 2010, s 15.

grounds of age.[64]

1.6.1 Indirect Discrimination

The prohibition of indirect discrimination is intended to promote equality of outcomes rather than merely equal treatment.[65] It can occur where an employer applies an apparently neutral provision, criterion or practice (PCP) to the employee.[66] This could be an organisational rule, policy, performance target, or less formal expectation of conduct or appearance in the workplace.[67] For a claim to succeed, the employee must demonstrate that this PCP places both them, and other members of a (real or hypothetical) group with whom they share a protected characteristic at a particular disadvantage.[68] This requires comparison with a different group who do not share the same characteristic.[69] Examples of indirect discrimination in dismissal situations often relate to an employee's refusal to comply with standard organisational policies including working hours[70] or dress codes.[71] However, if the employer successfully argues that the PCP was a proportionate means of achieving a legitimate aim, no unlawful discrimination will have occurred.[72]

1.6.2 Discrimination arising from disability

Discrimination arising from disability is a separate category of prohibited conduct that was created by the EqA, though it has origins in a similar claim for disability-related discrimination formerly within the Disability Discrimination Act 1995.[73] Here the focus is on the disabled employee as an individual and there is no requirement for a

[64] EqA 2010, s 13(1) & (2).
[65] Hepple (n 6) 64.
[66] EqA 2010, s 19(1).
[67] Honeyball (n 39) 258.
[68] EqA 2010, s 19(2)(b) & (c).
[69] EqA 2010, s 19(2)(a).
[70] *Mba v Merton London Borough Council* [2013] EWCA Civ 1562; [2014] 1 WLR 1501.
[71] *Ladele v Islington London Borough Council* [2009] EWCA Civ 1357; [2010] 1 WLR 955.
[72] EqA 2010, s 19(2)(d).
[73] Smith & others (n 29) 344.

comparator.[74] Instead the employee must demonstrate that their treatment by the employer was unfavourable, and that this is due to something arising in consequence of their disability.[75]

Tribunals have applied a loose test of causation between the employee's disability and the treatment they have received, meaning that it can be a powerful and wide-ranging claim for a dismissed employee to make.[76] However, again, if the employer successfully argues that their actions were a proportionate means of achieving a legitimate aim, no unlawful discrimination will have occurred.[77]

1.6.3 Direct age discrimination

Direct discrimination occurs when an employee is treated unfavourably in comparison with others because of a protected characteristic.[78] A justification defence is unavailable unless the discrimination is based on age.[79] In situations involving the latter, the employer may argue that their actions were a proportionate means of achieving a legitimate aim.[80]

1.6.4 Significance of a justification defence

Indirect discrimination, discrimination arising from disability, and direct age discrimination claims can all potentially be applied to workplace dismissals.[81] It is not necessary to prove any deliberate intention of the employer to discriminate when a *prima facie* case for discrimination is made by the employee.[82] An employer is likely to argue that their PCP or other actions were instead motivated by factors such as

[74] Hepple (n 6) 74.
[75] EqA 2010, s 15(1)(a).
[76] For example, in *Risby v Waltham Forest London Borough Council* (EAT, 18 March 2016) an employee successfully argued that their dismissal for shouting at colleagues using racist and inappropriate language was related to pain and frustration caused by his disability.
[77] EqA 2010, s 15(1)(b).
[78] EqA 2010, s 13(1).
[79] EqA 2010, s 13(2).
[80] EqA 2010, s 13(2).
[81] EqA 2010, s 39(2)(c).
[82] Connolly (n 9) 154.

business need.[83] For these reasons, the justification defence (under which the burden of proof shifts to the employer) is highly significant to the operation of the law in this area.[84] Chapter three will examine it further.

1.7 Chapter conclusion

This chapter has attempted to summarise the law on unfair dismissal, indirect discrimination, discrimination arising from disability, and direct age discrimination as they relate to dismissal from employment. Methods for justification applying to these claims have been identified as pivotal aspects of an employer's defence. Therefore, even if an employee has the right to protection against unfair dismissal, they may still be lawfully dismissed so long as the employer's actions are considered reasonable. Likewise, even if an employee is able to demonstrate that their dismissal was indirectly discriminatory, arose from reasons connected to disability, or was direct age discrimination, the employer will not have acted unlawfully if their actions were a proportionate means of achieving a legitimate aim. The following chapters will examine these tests closely.

This chapter has also looked briefly at the underlying purposes behind these areas of statutory protection. The concepts of individual dignity and autonomy are crucial to all. However, anti-discrimination law is also based on concepts of broader societal benefit that are wider than and go beyond the aims of unfair dismissal. This may prove an important point of consideration further on in this dissertation when the tests of reasonableness and proportionality are compared.

[83] Deakin & Morris (n 5) 645.
[84] Connolly (n 9) 182.

Chapter 2:
Unfair dismissal and the test of reasonableness

2.0 Introduction

Chapter one highlighted the pivotal importance of ERA s 98(4) in deciding claims for unfair dismissal. That subsection will be examined in depth here to identify the legal tests it creates, understand how these are applied in different types of dismissal, and to evaluate criticisms. The chapter will also explore the implications of recent comments from the Supreme Court in *Reilly v Sandwell Metropolitan Borough Council*.[85]

2.1 Established interpretations of section 98(4)

When adjudicating on the fairness or unfairness of any dismissal, a tribunal will make an error of law if it does not explicitly bear in mind the wording of this subsection as follows: [86]

> Where the employer has fulfilled the requirements of subsection (1), the determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer)-
>
> (a) depends on whether in the circumstances (including the size and administrative resources of the employer's undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee, and
>
> (b) shall be determined in accordance with equity and the substantial merits of the case.[87]

This wording has remained substantially unchanged since the Industrial Relations Act 1971 and as such, case law dating from that Act and its successors can still be relevant

[85] *Reilly v Sandwell Metropolitan Borough Council* [2018] UKSC 16; [2018] 3 All ER 477.

[86] *Conlin v United Distillers* [1994] IRLR 169 (IH).

[87] Employment Rights Act 1996 (ERA 1996) s 98(4).

today.[88] The burden of proof is neutral.[89]

Firstly of note is the interaction between sections 98(1) and 98(4).[90] Simply put, section 98(1) requires the employer to establish a reason that potentially justifies dismissal of an employee.[91] It is the purpose of section 98(4) to establish whether that reason justified the dismissal of the particular employee in question.[92]

Moving on to paragraph (a), this demands that the tribunal asks itself whether the employer acted reasonably or unreasonably.[93] Focus is thus laid on the employer's actions and its justification for them, rather than considering matters from the employee's perspective.[94] This is emphasised by the highlighting of employer size and administrative resources as relevant concerns, without any explicit mention of matters such as injustice to the individual employee.

The use of the phrase 'reasonably or unreasonably' at first might suggest a simple dichotomy of response in which the tribunal decides whether the employer's behaviour fell into one or other category.[95] However, when interpreting these words, judges must apply a high degree of restraint in their decision-making, and this makes the test less straightforward. As Phillips J in *Watling & Co Ltd v Richardson* explained:

> [T]he fairness or unfairness of the dismissal is to be judged not by the hunch of the particular industrial tribunal, which (though rarely) may be whimsical or eccentric, but by the objective standard of the way in which a reasonable employer, in those circumstances, in that line of business, would have behaved. It has to be recognised that there are circumstances where more than one course of action may

[88] A full summary of developments in wording for this subsection is given in *Orr v Milton Keynes Council* [2011] EWCA Civ 62; [2011] 4 All ER 1256, Appendix to judgement.

[89] *Hackney London Borough Council v Usher* [1997] ICR 705 (EAT).

[90] ERA 1996, s 98(1) & s 98(4).

[91] ERA 1996, s 98(1); *Gilham v Kent County Council (No. 2)* [1985] ICR 233 (CA).

[92] ERA 1996, s 98(4); *Orr* (n 88).

[93] ERA 1996 s 98(4)(a).

[94] *Orr* (n 88).

[95] ERA 1996, s 98(4)(a).

be reasonable.[96]

This concept, later described in *British Leyland v Swift* as the 'band of reasonableness',[97] means that employer actions ranging from informal warning to summary dismissal in the same set of circumstances can potentially be seen as reasonable. [98] As this quote from the above case describes:

> An employer might reasonably take the view, if the circumstances so justified, that his attitude must be a firm and definite one and must involve dismissal in order to deter other employees from like conduct. Another employer might quite reasonably on compassionate grounds treat the case as a special case.[99]

Reasonableness within the context of ERA s 98(4) is therefore a flexible, rather than static concept. This has had a far-reaching impact on the development of unfair dismissal law that will be explored further in this chapter.

In the House of Lords case, *W Devis & Sons v Atkins,* the exact meaning of the 'it' in section 98(4)(a) was settled as referring to the reason decided on in section 98(1).[100] This is significant because it forces the tribunal to consider the reasonableness of the employer's actions at the time the dismissal took place, rather than allowing for consideration of later evidence or events.[101]

It is also worthwhile noting section 98(4)(a)'s use of the phrase 'sufficient reason for dismissing the employee'.[102] There is no suggestion here that an employer must have found dismissal necessary under the circumstances, or even that dismissal is the best option available to them. All that is required is that the employer's reasoning for the decision is not insufficient overall.

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[96] *Watling & Co Ltd v Richardson* [1978] ICR 1049 (EAT) 1056 (Phillips J).

[97] *British Leyland (UK) Ltd v Swift* [1981] IRLR 91 (CA) [11] (Lord Denning MR).

[98] *Rolls-Royce v Walpole* [1978] IRLR 343 (EAT).

[99] *British Leyland* (n 97) [17] (Ackner LJ).

[100] *W Devis & Sons Ltd v Atkins* [1977] AC 931 (HL).

[101] Ibid.

[102] ERA 1996, s 98(4)(a).

Section 98(4)(b) sets the tone by which the rest of this subsection is measured.[103] According to the Court of Appeal, the terms 'equity and substantial merits of the case' signify that reasonableness is not to be measured by technical argument or legal jargon, but in straightforward analysis of each individual situation.[104] In addition, the word 'equity' can be viewed as implying an expectation of reasonable consistency in employer behaviour.[105]

2.2 Summarising the test

Section 98(4) is thus deceptively complex in its formation and impact. Its key concepts were summarised by Browne-Wilkinson J in *Iceland Frozen Foods Ltd v Jones* as follows:

> (1) [T]he starting point should always be the words of [the] section […] themselves; (2) in applying the section an industrial tribunal must consider the reasonableness of the employer's conduct, not simply whether they (the members of the industrial tribunal) consider the dismissal to be fair; (3) in judging the reasonableness of the employer's conduct an industrial tribunal must not substitute its decision as to what was the right course to adopt for that of the employer; (4) in many, though not all, cases there is a band of reasonable responses to the employee's conduct within which one employer might reasonably take one view, another quite reasonably take another; (5) the function of the industrial tribunal, as an industrial jury, is to determine whether in the particular circumstances of each case the decision to dismiss the employee fell within the band of reasonable responses which a reasonable employer might have adopted. If the dismissal falls within the band the dismissal is fair: if the dismissal falls outside the band it is unfair.[106]

This particularly powerful breakdown of principles has proven so significant within the field of unfair dismissal law that it is often referred to simply as the *Iceland* test and

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[103] *Orr* (n 88).

[104] *Union of Construction, Allied Trades and Technicians v Brain* [1981] ICR 542 (CA) 550 (Donaldson LJ); *Orr* (n 88).

[105] *Post Office v Fennell* [1981] IRLR 221 (CA).

[106] *Iceland Frozen Foods Ltd v Jones* [1983] ICR 17 (EAT) 24-25 (Browne-Wilkinson J).

has been explicitly approved by the Court of Appeal on multiple occasions.[107]

The Court of Appeal is also of the opinion that, where appropriate, the test from *British Homes Stores v Burchell*[108] similarly forms an aspect of section 98(4) in identifying the reasonableness of an employer's decision to dismiss.[109] *Burchell* considered the level of proof required by an employer when dismissing for misconduct and set a three-stage test as follows:

1. Did the employer have a genuine belief in the employee's misconduct?
2. Was this belief based on reasonable grounds?
3. Had a reasonable level of investigation been carried out in order to discover these grounds?[110]

Where these three questions are answered in the affirmative, dismissal will usually be considered a reasonable response in the circumstances.[111] The cases of *Iceland* and *Burchell* therefore form the foundation of tribunals' interpretation of ERA s 98(4), and have impacted significantly on unfair dismissal law.

Firstly, they give wide-ranging power to tribunals, as the question of reasonableness will depend on findings of fact that can rarely be challenged on appeal.[112] The reasonable responses test is based purely upon an analysis of hypothetical employer behaviour by first instance judges.[113]

Secondly, because both *Iceland* and *Burchell* stress the importance of judging the employer by its own actions at the time of dismissal, this has led to a great focus on

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[107] *Post Office v Foley; HSBC Bank Plc (formerly Midland Bank Plc) v Madden* [2001] 1 All ER 550 (CA); *Orr* (n 88); I Smith & others, *Smith and Wood's Employment Law* (13th edn, OUP 2017) 527.
[108] *British Home Stores Ltd v Burchell* [1980] ICR 303 (EAT).
[109] *Post Office; HSBC* (n 107).
[110] *Burchell* (n 108).
[111] Ibid.
[112] Smith & others (n 107) 522.
[113] Ibid 529.

procedural fairness.[114] The leading case on procedural matters, *Polkey v AE Dayton Services Ltd,* considered the problem of inadequate employer procedure preceding a dismissal.[115] It concluded that even if following a fair procedure would have led to the employee's dismissal, dismissing without proper procedure is still unfair in most cases. Subsequent cases have clarified that all such internal employer procedures and investigations must be judged as part of the reasonable responses test.[116] This potentially reduces industrial conflict by promoting opportunities for conciliation and internal review of decisions.[117] However, as will be discussed further in this chapter, some argue that it has led to insufficient emphasis on substantive justice for employees.[118]

As interpreted, ERA s 98(4) therefore contains a mixture of both objective and subjective elements.[119] For example, in *Alidair Ltd v Taylor* the Court of Appeal argued that it was a subjective test, focussing on the employer's right to decide its own standards of acceptable competence at work,[120] whereas *Post Office v Foley* highlighted the objectivity of the tribunal when assessing whether such a decision was within the band of reasonable responses.[121]

2.3 Application of the reasonable responses test

The reasonable responses (or *Iceland*) test has been applied to all categories of dismissal contained within sections 98(1) and (2), meaning that the principles of unfair

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[114] S Honeyball, *Honeyball & Bower's Textbook on Employment Law* (14th edn, OUP 2016) 197; Smith & others (n 107) 522.

[115] *Polkey v AE Dayton Services Ltd* (1988) AC 344 (HL).

[116] *Whitbread Plc (t/a Whitbread Medway Inns) v Hall* [2001] EWCA Civ 268; [2001] ICR 699; *Sainsbury's Supermarkets Ltd v Hitt* [2002] EWCA Civ 1588; [2003] ICR 111.

[117] Honeyball (n 114) 196-7.

[118] S Deakin & G Morris, *Labour Law* (6th edn, Hart Publishing 2012) 546.

[119] Smith & others (n 107) 525.

[120] *Alidair Ltd v Taylor* [1978] ICR 445 (CA).

[121] *Post Office; HSBC* (n 107). It could be argued alternatively that the employer's need to act on evidence gained by investigation is an objective aspect of the test, and the tribunal's assessment of whether their decisions were reasonable is subjective – Smith & others (n 107) 525-6.

dismissal remain similar whether that dismissal is for conduct, capability, redundancy, contravention of statute, or SOSR. Some general areas of consideration for tribunals have been established. The need to comply with proper procedure, as established in the section above, is one of these. Issues such as organisational consistency, length of service of the dismissed employee, and the size of the employer, are all likewise relevent.

Employers are expected to act consistently towards their workers. Parallel actions that attract a minor sanction towards one employee should not normally lead to the dismissal of another without good reason.[122] Arbitrary decisions and behaviour by employers cannot be supported by the reasonable responses test.[123] However, given the need to consider dismissal situations from the perspective of an employer, tribunals place significant weight on their reasoning behind any such inconsistency.[124] Thus, so long as motives for inconsistency (including individual instances of mitigation, or conscious recognition that previous organisational decisions have been unduly lenient) fit within the band of reasonable responses, the dismissal may still be fair.[125]

As required by statute, tribunals will also consider an employer's individual size and resources.[126] For example, expectations of proper investigation, procedure, or consultation for a small business will be different from those applied to a large-scale multinational organisation.[127] This highlights how unfair dismissal law rarely sets out restrictive rules or expectations for all employers.[128]

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[122] *Hadjioannou v Coral Casinos Ltd* [1981] IRLR 352 (EAT); *Post Office* [n 105].

[123] *Securicor Ltd v Smith* [1989] IRLR 356 (CA).

[124] *Hadjioannou* (n 122).

[125] *Proctor v British Gypsum Ltd* [1992] IRLR 7 (EAT); *Conlin* [n 86].

[126] ERA 1996, s 98(4)(a).

[127] *MacKellar v Bolton* [1979] IRLR 59 (EAT); *Royal Naval School v Hughes* [1979] IRLR 383 (EAT).

[128] It is important to note though, that even the smallest of employers will be judged by the reasonableness of their actions in each circumstance - *Henderson v Granville Tours Ltd* [1982] IRLR 494.

Another, more employee-focussed consideration for the tribunal relates to length of service, which should be taken into account when an employer contemplates dismissal. [129] An employee who has given loyal service for many years may expect to be treated with particular consideration. [130] In redundancy situations for example, tribunals generally have approved measures to place them at an advantage compared with employees with lesser service. [131]

However, the Scottish Inner House case of *BS v Dundee City Council* has recently downplayed the importance of length of service. [132] It argues the primary purpose of such consideration is to assist an employer in assessing the likelihood of future instances of misconduct or ill health, rather than being connected to any intrinsic concept of justice. This is hard to reconcile with earlier decisions such as *Dobie v Burns International Security Service (UK) Ltd* that did highlight the consideration of individual justice in these matters, [133] but it is perhaps closer in line with general principles of the reasonable responses test outlined in the previous section.

2.3.1 Conduct

When a conduct dismissal has occurred, the tribunal is required to consider guidelines set out in the ACAS Statutory Code of Practice for Disciplinaries and Grievances. [134] These are mostly concerned with procedural fairness: emphasising the rights of the employee to know conduct expectations in advance, for allegations to be fully investigated, opportunities for employees to argue their case, and procedures to

[129] *Dobie v Burns International Security Service (UK) Ltd* [1984] 1 WLR 43 (CA) 47 (Donaldson MR); *Strouthos v London Underground Ltd* [2004] EWCA Civ 402; [2004] IRLR 636.

[130] *Taylor v Parsons Peebles NEI Bruce Peebles Ltd* [1981] IRLR 119 (EAT).

[131] *Thomas & Betts Manufacturing Ltd v Harding* [1980] IRLR 255 (CA).

[132] *BS v Dundee City Council* [2013] CSIH 91; 2014 SC 254.

[133] *Dobie* (n 129).

[134] Trade Union and Labour Relations (Consolidation) Act 1992, s 207A. Consideration of the code is mostly relevant for assessing appropriate compensation in successful claims, but undoubtedly has some influence over how tribunals interpret section 98(4).

appeal decisions made.[135]

Thus, employers should have clear policies setting out expected conduct in the workplace, and the potential consequences for breaches of this.[136] However, behaviour from an employee that is obviously inappropriate (such as theft or violence) can in some cases fairly lead to dismissal without a specific organisational policy in place.[137]

When an allegation of misconduct has been made, employers should apply the standards of *Burchell* prior to making any decision to dismiss.[138] This, as previously described, means holding a genuine belief in the misconduct based on reasonable grounds, revealed by reasonable investigation. Such investigation and belief do not need to reach the standards of criminal prosecution,[139] and instead only need to be sufficient to fall within the band of reasonable responses.[140] This means that expectations of sufficient investigation will vary between cases. Tribunals are wary of criticising the conclusions of employer investigations.[141] For them to re-examine the facts of a case from their own perspective rather than that of the employer is an error of law.[142] This includes interpreting witness statements or drawing conclusions from evidence not presented.[143] However, if the investigation is so clearly inadequate as to be outside of what can be considered reasonable, then dismissal will be unfair, even if a fuller investigation would have likely produced the same outcome.[144]

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[135] ACAS, *Statutory Code of Practice on Grievance and Disciplinary Procedures* (TSO 2009) 7-8.
[136] *Meyer Dunmore International Ltd v Rogers* [1978] IRLR 167 (EAT).
[137] Deakin & Morris (n 118) 537.
[138] *Burchell* (n 108).
[139] Ibid.
[140] *Sainsbury's* (116).
[141] See for example, *Slater v Leicestershire Health Authority* [1989] IRLR 16 (CA).
[142] *Morgan v Electrolux Ltd* [1991] ICR 369 (CA); *London Ambulance Trust v Small* [2009] EWCA Civ 220; [2009] IRLR 563.
[143] *Orr* (n 88).
[144] *Brent London Borough Council v Fuller* [2011] EWCA Civ 267; [2011] ICR 806.

In some cases this focus on process has led to the fair dismissal of multiple employees, despite the employer knowing that not all were guilty of misconduct, because reasonable levels of investigation had failed to identify who the true perpetrator was.[145] Hence, the quality of employer investigation and process prior to dismissal has a larger bearing on fairness than whether or not the employee actually carried out the conduct accused of.[146] This again highlights how the reasonable responses test focuses on justifications for employer behaviour, rather than justice for those disadvantaged by it.[147]

Regarding such cases where substantive rather than procedural injustice is the main issue, guidance issued from higher courts on this subject sets a low bar for employers to argue that their actions fell within the band of reasonable responses. In *Post Office v Foley*, when attempting to describe a misconduct situation where dismissal would be clearly unreasonable, Mummery LJ used the example of an employee saying 'good morning' to his line manager.[148] He argued that in any less extreme case 'there is room for reasonable disagreement among reasonable employers as to whether dismissal for the particular misconduct is a reasonable or unreasonable response'.[149] Tribunals are thus in practice unlikely to find that an employer has responded overly harshly to an incident,[150] and where this occurs, such decisions are often overturned at appeal on grounds that they have substituted their own judgment for that of a reasonable employer.[151] Overall, a dismissal for conduct is unlikely to be found unfair purely on

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[145] *Monie v Coral Racing Ltd* [1981] ICR 109 (CA); *Parr v Whitbread & Co Plc (t/a Threshers Wine Merchants)* [1990] ICR 427 (EAT).

[146] *Da Costa v Optolis* [1976] IRLR 178 (EAT).

[147] *Devis* (n 100) 952 (Viscount Dilhorne); *Polkey* (n 115) 363 (Lord MacKay); Smith & others (n 107) 542.

[148] *Post Office; HSBC* (n 107) [50] (Mummery LJ).

[149] Ibid.

[150] See for example, *Tesco Stores Ltd v Othman-Khalid* (EAT, 10 September 2001) where the dismissal of an employee for one instance of stealing items worth approximately £1.50 was held to be within the band of reasonable responses.

[151] See for example, *Anglian Home Improvements Ltd v Kelly* [2004] EWCA Civ 901; [2005] ICR 242 where the Court of Appeal overturned a verdict of unfair dismissal. The original tribunal had previously judged the employee's failure to follow correct

grounds of substantive injustice.[152]

However, this argument should not be taken too far. For minor acts of misconduct, the ACAS code makes clear that employers are expected to issue warnings rather than move straight towards summary dismissal.[153] Likewise, the recent case of *Newbound v Thames Water Utilities Ltd* reminded tribunals that to conclude that an employer's decision to dismiss was outside the band of reasonable responses does not necessarily mean that the judge has substituted their views for that of the employer.[154] In that case, an employee's dismissal for certain health and safety breaches was found to be substantially unfair on the facts. Tribunals are still theoretically entitled to make such conclusions; there just appears to be little clarity on when they should.

2.3.2 Capability

Capability dismissals tend to fall into two different categories: those relating to prolonged sickness absence, and those relating to substandard work performance. This results in different issues being considered, but the reasonable responses test applies to both.

Dismissals relating to substandard performance appear, similar to conduct, more likely to be found unfair on procedural rather than substantive grounds.[155] Case law focuses on the importance of reasonable training, clear procedures, and fair warnings in advance of dismissal.[156] The employer should do its best to support the employee to carry out their role successfully before dismissal is considered.[157] However, where belief can be evidenced that the poor performance has a significant enough impact

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banking procedures a matter too minor to warrant gross misconduct.

[152] T Brodtkorb 'Employee Misconduct and Unfair Dismissal law: Does the range of reasonable responses test require reform?' (2010) 52 Int JLM 429, 436.

[153] ACAS (n 135) 12.

[154] *Newbound v Thames Water Utilities Ltd* [2015] EWCA Civ 677; [2015] IRLR 734.

[155] Honeyball (n 114) 173-5.

[156] *Winterhalter Gastronom Ltd v Webb* [1973] ICR 254 (NIRC); *Post Office v Mughal* [1977] ICR 763 (EAT).

[157] *Steelprint Ltd v Haynes* (EAT, 1 July 1996).

(such as safety concerns) then tribunals will not always consider a full performance management procedure necessary for the dismissal to be within the band of reasonable responses.[158]

In long-term sickness absence situations, the employer should attempt to gain accurate information regarding the employee's condition via a medical report,[159] to consult with the employee about opportunities for them to return to work,[160] and consider redeployment to other roles if appropriate in the circumstances.[161] Whilst each case will be considered on its own merits, failing to carry out these actions means that the dismissal may be considered outwith the band of reasonable responses. Procedural fairness, therefore, is highly important.[162]

It could be argued though, that concepts of substantive fairness have a somewhat higher profile in absence cases, with the question of how long should an employer wait before dismissing being an important consideration in the case law on this subject.[163] This goes to the heart of the conflict between an employer's economic interests and humanitarian concerns for the employee.[164] However, if the employer is able to argue that there are reasonable business reasons why they are unable to support the employee's absence any further, the dismissal will usually be fair.[165]

2.3.3 Redundancy

Redundancy is different in that it is defined and regulated by a number of specific statutory rules separate to ERA s 98(4). This means for example, that issues of overall employer justification when dismissing will often be considered as part of the

[158] *Turner v Pleasurama Casinos Ltd* [1976] IRLR 151 (EAT); *Alidair* (n 120).
[159] *East Lindsey District Council v Daubney* [1977] ICR 566 (EAT).
[160] *Spencer v Paragon Wallpapers Ltd* [1977] ICR 301 (EAT).
[161] *Merseyside and North Wales Electricity Board v Taylor* [1975] ICR 185 (EAT).
[162] Deakin & Morris (n 118) 544.
[163] *East Lindsey* (n 159); *Spencer* (n 160); *BS* (n 132).
[164] Honeyball (n 114) 175.
[165] *Lynock v Cereal Packaging Ltd* [1988] ICR 670 (EAT); *Spencer* (n 160).

statutory definition of redundancy, rather than the band of reasonable responses.[166] Likewise, for dismissals of over twenty employees within a three-month period, expectations of reasonable procedures will be largely set by separate statutory provisions.[167]

However, for smaller redundancy situations, the band of reasonable responses test still plays a significant part in assessing the adequacy and fairness of an employer's procedures before dismissal takes place.[168] *Williams v Compair Maxam Ltd* laid down a list of considerations for tribunals in this situation, which include union consultation, fair 'pooling' and selection of affected employees, and the offer of alternative employment where available and appropriate. [169]

2.3.4 Contravention of statute

Case law is limited on the role of ERA s 98(4) in dismissals for contravention of statute. Due to the necessity of the employer taking decisive action to prevent unlawful behaviour, expectations of procedural fairness can be lower than in other types of dismissal.[170] However, if there is reasonable opportunity for the affected employee to be redeployed into another role where the contravention of statute would not occur, or the employer's belief in any illegality is mistaken, then dismissal could still be unfair.[171]

2.3.5 SOSR

As described in chapter one, this category of dismissal has been defined widely by tribunals, [172] and as such, it is difficult to make general conclusions about the role that ERA s 98(4) plays.

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[166] ERA 1996, s 139.
[167] Trade Union and Labour Relations (Consolidation) Act 1992, s 188.
[168] *Watling* (n 96); *Wrexham Golf Co Ltd v Ingham* (EAT, 10 July 2012).
[169] *Willams v Compair Maxam Ltd* [1982] ICR 156 (EAT); *Grundy (Teddington) Ltd v Plummer* [1983] ICR 367 (EAT).
[170] *Kelly v University of Southampton* (EAT, 6 July 2010).
[171] Ibid; Honeyball (n 114).
[172] *RS Components Ltd v Irwin* [1974] 1 All ER 41 (NIRC).

In terms of substantive justice, a tribunal is entitled to examine the reason for dismissal, but must do so from the perspective of the employer.[173] In the case of dismissals - whether constructive or dictated by the employer - caused by changes to terms and conditions, the tribunal may conclude that the employer's actions were potentially fair under section 98(1), and separately consider whether the individual dismissal(s) fell within the band of reasonable responses under section 98(4).[174] A breach of contract by an employer can thus still be considered reasonable in these circumstances,[175] despite some commentators' arguments that this goes against the very principles of unfair dismissal legislation.[176] The tribunal must ask itself if the employer reasonably considered that advantages to itself outweighed the negative impact on the employee.[177] However, the tribunal's ability to criticise an employer's business plan is limited and thus, such dismissals are often fair.[178] For example, in *Chubb Fire Security Ltd v Harper*, the employer's decision to unilaterally change a salesperson's areas of work was considered reasonable on overall business grounds, despite them knowing that this would cause a noticeable decrease in the commission the employee earned.[179]

Likewise, if an employer can successfully prove that retaining an employee could lead to the loss of a significant customer or client, dismissal is likely to be reasonable.[180] Whilst the balancing out of employee and business needs should form part of a tribunal's reasoning in all SOSR dismissals,[181] the needs of the employer will regularly

[173] *Gilham* (n 91).
[174] Ibid; *St John of God (Care Services) Ltd v Brooks* [1992] ICR 715 (EAT).
[175] *RS Components* (n 172).
[176] Deakin & Morris (n 118) 575.
[177] *Chubb Fire Security Ltd v Harper* [1983] IRLR 311 (EAT).
[178] ACL Davies, 'Judicial Self-Restraint in Labour Law' (2009) 38 ILJ 278, 304; Deakin and Morris (n 118) 575-6; Honeyball (n 114) 189-191.
[179] *Chubb* (n 177).
[180] *Scott Packing & Warehousing Co Ltd v Paterson* [1978] IRLR 166 (EAT).
[181] *Dobie* (n 129).

overrule the question of justice for an individual employee.[182]

Regarding procedural fairness, failure to follow an appropriate procedure will make an SOSR dismissal unfair.[183] However, what is considered reasonable will be shaped by exact circumstances. Reference to disciplinary procedures, for example, is not necessary.[184] In some cases, the test laid out in *Burchell* will be appropriate,[185] and in others it might be something closer to consultation exercises used for redundancy.[186] This perhaps exemplifies both the flexibility and complexity of the reasonable responses test.

2.4 Criticism of the reasonable responses test

Despite its favour with judges, the reasonable responses test has been heavily criticised. It is accused of not being in line with the wording of ERA s 98(4), being akin to a perversity test in practice, and offering more power to employers then was intended by the legislation. These arguments will be examined in turn.

2.4.1 Misinterpretation of statutory wording

There are two ways in which the reasonable responses test is argued to have subverted the wording of ERA s 98(4). The first is its refusal to accept a fixed standard of reasonableness in employer behaviour. [187] Reasonableness according to the test, as already seen, consists of the entire continuum of behaviour that might be observed of reasonable employees as a whole. Only employer behaviour that is totally outside this continuum can be judged as unreasonable. This contrasts with stark statutory

[182] *Henderson v Connect (South Tyneside) Ltd* [2010] IRLR 466 (EAT); *Ssekisonge v Barts Health NHS Trust* (EAT, 2 March 2017).
[183] *Willow Oak Developments Ltd (t/a) Windsor Recruitment v Silverwood* [2006] EWCA Civ 660; [2006] ICR 1552.
[184] *Ezsias v North Glamorgan NHS Trust* [2011] IRLR 550 (EAT).
[185] *Perkin v St Georges Healthcare NHS Trust* [2005] EWCA Civ 1174; [2006] ICR 617.
[186] *Ellis v Brighton Co-operative Society Ltd* [1976] IRLR 419 (EAT).
[187] H Collins, *Justice in Dismissal: The Law of Termination of Employment* (OUP 1992) 38; A Freer, 'The Range of Reasonable Responses Test – From Guidelines to Statute' (1998) 27 ILJ 336.

wording that categorises employer behaviour as either 'reasonable or unreasonable'.[188]

The Court of Appeal in *Post Office* argued that Parliament must always have intended for a range of reasonableness to be applied, for otherwise the tribunal would act on its own personal opinions rather than viewing matters from the mindset of a reasonable employer.[189] However, Freedland and Davies counter that given the wording of the statute, it is more likely that Parliament intended employer behaviour to be judged objectively based on the tribunal bench's own perspective.[190]

The second area in which standard judicial interpretations of ERA s 98(4) have been criticised is regarding the phrase 'equity and substantial merits of the case'.[191] As already described, under the reasonable responses test this is interpreted as promoting an approach to judgment that eschews legal technicalities or jargon.[192] However, Freer argues that it also implies an even-handed approach that seeks to balance the competing interests of employers and employees in a fair way, and this is not included in the reasonable responses test.[193]

2.4.2 Perversity

Some, including Freer, argue that application of the reasonable responses test has thus turned section 98(4) into a perversity test.[194] This argument deserves careful attention. *Wednesbury Corp v Ministry of Housing and Local Government (No. 2)* sets out the standard test for perversity in public law.[195] Courts can overturn decisions by

[188] ERA 1996, s 98(4)(a); Deakin & Morris (n 118) 529.
[189] *Post Office; HSBC* (n 107); *Orr* (n 88).
[190] M. Freedland, 'Finding the Right Direction for the "Industrial Jury"' (2000) 29 ILJ 288, 290-1; Davies (n 178) 289.
[191] ERA 1996, s 98(4)(b)
[192] *Orr* (n 88).
[193] Freer (n 187) 341.
[194] Ibid 339; Davies (n 178) 293.
[195] *Wednesbury Corp v Ministry of Housing and Local Government (no. 2)* [1966] 2 QB 275 (CA).

public authorities in situations in circumstances where those decisions are manifestly unreasonable, or perverse in nature.[196] Public law is not the same as employment law and *Wednesbury* does not apply directly to employment tribunals, but the latter are accused of applying similar levels of restraint to their decision-making.[197] A significant source for these concerns lies within the Employment Appeal Tribunal (EAT) decision in *Vickers Ltd v Smith,* which decreed an employer's actions could only be seen as unreasonable if 'no sensible or reasonable management' would have taken them.[198] Such a line of thinking, it is argued, prevents employer actions from being challenged unless they are perverse in nature.[199] An example often cited to support this is *Saunders v Scottish National Camps Association* where the claim of an employee dismissed for being homosexual was unsuccessful as judges felt that the employer's actions could be supported by some reasonable employers at the time.[200]

Attempts have been made to distinguish the reasonable responses test from the *Wednesbury* test. In *Iceland*, for example, Browne-Wilkinson J wrote:

> The statement in Vickers Ltd v Smith is capable of being misunderstood so as to require such a high degree of unreasonableness to be shown that nothing short of a perverse decision to dismiss can be held to be unfair within the section. […] This is not the law. The question in each case is whether the industrial tribunal considers the employer's conduct to fall within the band of reasonable responses.[201]

Clearly there are differences in wording between 'no sensible or reasonable management' and 'the band of reasonable responses' but it is difficult to see how

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[196] *Wednesbury* (n 195); Davies (n 178) 278.

[197] Freer (n 187) 345; Davies (n 178) 293.

[198] *Vickers Ltd v Smith* [1977] IRLR 11 (EAT) [2] (Cumming-Bryce J).

[199] Freer (n 187) 339; Davies (n 178) 293.

[200] *Saunders v Scottish National Camps Association Ltd* [1981] IRLR 277 (IH). It should be noted that this decision took place before discrimination based on sexual orientation was made unlawful.

[201] *Iceland* (n 106) 25 (Browne-Wilkinson J). This argument was later approved by the Court of Appeal in *Post Office; HSBC* (n 107).

these approaches are distinguished in the context of ordinary tribunal cases. Logically, if an employment judge cannot assume that their own interpretations of a case will cover all possible reasonable outcomes within the range, then they must shift their own expectations of reasonable employer behaviour downwards.[202] Yet, given that no evidence will be led in court of how other reasonable employers manage their staff in practice, it will be impossible for the judge to know the exact limits of how low to set those expectations to keep them in line with a purely hypothetical reasonable employer.[203] *Brent London Borough Council v Fuller* for example - a gross misconduct case in which the Court of Appeal clearly struggled with semantics, and eventually produced a split decision - shows the considerable difficulties in establishing whether a tribunal has substituted its own judgment when it shows any criticism of the employer's case.[204]

The fact that the reasonable responses test is worded differently to that of *Wednesbury* thus does not mean that its results will always be distinct in practice. [205] As noted earlier in this chapter, when the Court of Appeal asked itself what definitely would <u>not</u> fall within the band of reasonable responses of an employer, the only answer given was dismissal for saying 'good morning' to a line manager.[206] Given such guidance, it is likely that the reasonable responses test has, at least on some such occasions, become a perversity test in reality.[207]

Furthermore, even if the reasonable responses test is not entirely akin to *Wednesbury*, this is largely because of its unpredictability. It is subjective reasoning masked by a veneer of objectivity.[208] As described by Smith;

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[202] Smith & others (n 107) 527-9.

[203] Collins (n 187) 78; Smith & others (n 107) 529.

[204] *Brent* (n 144). On reading this case, one is left with a distinct impression that much of the reasonable responses test lies in the exact phrasing of tribunal judgements, rather than the overall opinions they express.

[205] Freer (n 187) 340; Brodtkorb (n 152) 442.

[206] *Post Office; HSBC* (n 107) [50] (Mummery LJ).

[207] Brodtkorb (n 152) 431, 438 & 442.

[208] J Davies, 'A Cuckoo in the nest? A "range of reasonable responses" justification and

> The range or band test, therefore, does not magically allow tribunals to apply an objective standard whilst not substituting their own judgment for that of the employer; instead it allows them (a) to apply no meaningful objective standard, (b) arbitrarily to imagine a lower limit that is lower than their own to give effect to the band fiction, or (c) simply to apply their own lower limit and call it the band.[209]

Different tribunals can therefore potentially make different findings of fact on very similar circumstances, with the result that the same dismissal might legitimately be judged either fair or unfair.[210] The Court of Appeal has stated this inconsistency is a natural result of the legislation and not necessarily an error of law.[211] However, it places doubt on claims that the reasonable responses test is objective in nature.[212]

2.4.3 Power to employers

The above arguments imply that ERA s 98(4) has been interpreted to presuppose fairness on the part of the employer. Judges have restrained their own ability to apply reasoned analysis. Instead, the reasonable responses test requires that they only intervene in extreme cases where the employer's actions are very clearly in the wrong.[213] Collins describes how this occurs:

> In the middle range of cases, where the dismissal was clearly neither fair nor unfair, if the tribunal asks whether the employer's decision was reasonable, the question tends to lead to a negative response and a finding of unfairness. If, on the other hand, the tribunal asks whether the employer's decision was unreasonable, the question tends to shift the middle ground into the realm of fair dismissals. […] In short, the effect […] is to create a presumption of fairness and

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the Disability Discrimination Act 1995' (2003) 32 ILJ 164, 175-6.

[209] Smith & others (n 107) 529.

[210] Honeyball (n 114) 195-6.

[211] *Gilham* (n 91) 240 (Griffiths LJ).

[212] For examples of such claims being made, see *Brent* (n 144) 805 (Mummery LJ) & *Turner v East Midlands Trains Ltd* [2012] EWCA Civ 1470; [2013] 3 All ER 275 [19] (Elias LJ).

[213] Davies (n 178) 291; Deakin & Morris (n 118) 546.

> excuse for non-intervention.[214]

Freer argues similarly:

> By implementing the range of reasonable responses test, the question effectively becomes 'is it possible that the employer is acting reasonably, or is the employer acting wholly unreasonably?' Given that the answer must be one or the other, the outcome in the majority of cases is inevitable.[215]

These arguments should not be overstated. Clearly, the reasonable responses test does not prevent employees from winning unfair dismissal cases regularly. However, as found earlier in the chapter (with possible exceptions for dismissals for long-term sickness absence or SOSR) this is most likely to happen in situations of procedural unfairness, where it can objectively be argued that an employer has not followed its own policies, practices, or external codes of practice. Findings of unfair dismissal for reasons of substantive injustice – where the employer's actions may be procedurally correct but still unreasonable – appear less common.[216]

The 1999 case of *Haddon v Van Den Bergh Foods Ltd* attempted to move away from the reasonable responses test for these reasons.[217] It involved a catering employee dismissed for refusing to complete the last one and a half hours of his shift at his own long-service awards event after drinking alcohol provided free by the employer. The original tribunal had found dismissal in these circumstances within the range of reasonable responses and thus fair. On appeal, the employee successfully argued that judges should consider their own sense of reasonableness rather than solely rely on that of the hypothetical reasonable employer, as to do latterly produced a test of unfairness by perversity alone.[218] This EAT case was followed swiftly by others,

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[214] Collins (n 187) 39.

[215] Freer (n 187) 341.

[216] Deakin & Morris (n 118) 546.

[217] *Haddon v Van den Bergh Foods* Ltd [1999] ICR 1150 (EAT).

[218] Ibid.

including *Midland Bank Plc v Madden.*[219] Yet in a joint Court of Appeal judgment for the latter case, such arguments against the reasonable responses test were swiftly dispensed with as being incompatible with previous authorities and the opposing *Iceland* approach directly approved.[220]

Why courts should place so much value on employer expertise and judgment can be questioned.[221] Unlike in public law, there should be no assumption that employment dismissals have been motivated by overall public benefit.[222] Employers have their own vested business interests to consider, and these are often at odds with protecting the employment rights of individual staff.[223] Neither can all employers be assumed to have expertise in best practice human resources.[224] Simply because a practice is common within the business world, it does not mean that it is sensible, reasonable, or fair.

Courts have often articulated the importance of considering matters from an employer's rather than employee's perspective, but relatively little time has been taken to explain why such an approach makes for fairer judgments.[225] In *Watling*, Phillips J described how:

> [I]f an industrial tribunal equates its view of what itself would have done with what a reasonable employer would have done, it may mean that an employer will be found to have dismissed an employee unfairly even though many perfectly good and fair employers would have done as that employer did.[226]

The counterpoint to this argument - that an employee could have been fairly dismissed even though many employers would consider that unreasonable - goes

[219] *Midland Bank Plc v Madden* [2000] 2 All ER 741 (EAT).
[220] *Post Office; HSBC* (n 107).
[221] Davies (n 178) 304.
[222] Ibid 293.
[223] Ibid 290.
[224] Ibid.
[225] Ibid 305.
[226] *Watling* (n 96) 1056-57 (Phillips J).

unrecorded. One possible argument though, is that as it is employers who bear the legal penalties for unfairly dismissing an employee, it is Parliament's intention that they be judged solely by standards over which they have control.[227] Thus overall, it could be argued that the reasonable responses test allows employers to create their own rulebooks, and so long as these rules are adhered to, there is often little that a dismissed employee can do to challenge this, except in the most obviously arbitrary and unfair of circumstances.[228]

2.5 Potential developments in the reasonable responses test

Despite criticism, interpretation of ERA s 98(4) has appeared settled for many years. A further attempt to review the test in *Orr v Milton Keynes Council* in 2011 was dispelled by the Court of Appeal.[229] Therefore, recent comments by Lord Wilson and Baroness Hale of the Supreme Court in *Reilly* have caused surprise.[230] The case was not expected to have had any impact on the interpretation of ERA s 98 and neither party argued thus. However, in a judgment approved by the majority of the bench, Lord Wilson made several *obiter* remarks to state that the accepted view of *Burchell*'s tripartite test forming part of section 98(4) was false. Instead, the test should fall within sections 98(1) and (2).[231] In a separate judgment, Baroness Hale agreed with this reasoning.[232]

Setting the entire *Burchell* test within sections 98(1) and (2) contradicts the existing authority of *Post Office.*[233] It means that arguments regarding grounds for belief in misconduct and the reasonableness of the investigation that created those grounds become attached to the reason for the employee's dismissal, rather than the reasonableness of it.[234] In a technical sense, this changes the two-stage test for unfair

[227] Brodtkorb (n 152) 430.
[228] Ibid 443-44 & 446-47.
[229] *Orr* (n 88).
[230] *Reilly* (n 85); S Levinson, 'Burchell and judicial jostling' (2018) 168 NLJ 10.
[231] *Reilly* (n 85) [20]-[21] (Lord Wilson JSC).
[232] Ibid [33] (Baroness Hale JSC).
[233] *Post Office; HSBC* (n 107).
[234] *Burchell* (n 108).

dismissal that was outlined in chapter one. Instead of having a 'low-bar' first stage where the employer is required simply to demonstrate a genuine belief in the employee's misconduct in order to establish a potentially fair reason for dismissal, this aspect of the test becomes more demanding for the employer. The fairness of the investigation and the employer's interpretation of its findings would have to be successfully proven prior to any consideration of whether the decision to dismiss on those grounds was reasonable.

This could alter the outcome of some tribunal cases for two reasons. Firstly, that whereas ERA s 98(4) has a neutral burden of proof,[235] sections 98 (1) and (2) place the burden of proof on the employer, and this could make an employer's case more difficult to establish. Secondly, it was argued in the (later overruled) EAT decision in *Midland* that if the *Burchell* test was only relevant to sections 98(1) & (2), then the reasonable responses test would no longer apply to it, potentially allowing for less restraint in a tribunal's reasoning.[236] The reasonable responses test would still apply to section 98(4), but the number of matters to be decided under it would be fewer. Deakin and Morris have argued previously that there is 'clear authority in the statutory scheme' for such separation in the questions of reason for and reasonableness of dismissal.[237]

The significance of any shift to the burden of proof should not be overstated, as *Burchell* itself was initially decided before the burden of proof for ERA s 98(4) became neutral[238] and that later shift is not considered to have had a great impact on unfair dismissal law.[239] However, the potential dilution of the reasonable responses test is a more important matter to consider.

Lord Wilson's judgment in *Reilly* does not suggest significant change to the scope of

[235] *Hackney* (n 89).
[236] *Midland* (n 219).
[237] Deakin & Morris (n 118) 529. See also Freedland (n 190) 293.
[238] Honeyball (n 114) 182.
[239] Smith & others (n 107) 521; Deakin & Morris (n 118) 526.

the reasonable responses test, stating that 'no harm has been done' by misinterpretation of the *Burchell* decision by lower courts:[240]

> In effect it has been considered only to require the tribunal to inquire whether the dismissal was within a range of reasonable responses to the reason shown for it and whether it had been preceded by a reasonable amount of investigation. Such requirements seem to me to be entirely consonant with the obligation under section 98(4) to determine whether, in dismissing the employee, the employer acted reasonably or unreasonably.[241]

Baroness Hale takes a slightly different view, noting in her judgment that the misapplication of *Burchell* could potentially make unfair dismissals fair, and fair dismissals unfair.[242] However, despite this, she argues that to change settled law without very good reason would be 'irresponsible' and judges must note that Parliament has made no attempt to correct any previous errors in statutory interpretation.[243] She ends her judgment with the words that 'the law remains as it has been for the last 40 years and I express no view about whether that is correct.'[244]

It is helpful to consider *Reilly* in the context of previous House of Lords decisions such as *Smith v Glasgow District Council* and *Polkey* as these are binding authority for the Supreme Court on unfair dismissal.[245] The former may be particularly relevant as it considered the relationship between reasons for the dismissal, and its overall reasonableness. [246] The House of Lords was asked to consider whether a dismissal could still be fair if one of the conduct accusations behind it was not sufficiently evidenced. Its decision was no, stating that the employer's reasons for dismissal have to be considered in both stages of the test for unfair dismissal. If they are not sufficiently established, then the decision to dismiss for those reasons can never be

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[240] *Reilly* (n 85) [22] (Lord Wilson JSC).

[241] Ibid.

[242] Ibid [33] (Baroness Hale JSC).

[243] Ibid [34] (Baroness Hale JSC).

[244] Ibid [35] (Baroness Hale JSC).

[245] *Smith v City of Glasgow District Council* 1987 SC (HL) 175; *Polkey* (n 115).

[246] *Smith* (n 245).

reasonable. Despite being post-*Burchell*,[247] the *Smith* judgment does not reference that case and the exact question of which section of the ERA its tripartite test fits within does not arise. [248] However, instead it suggests (similarly to the comments of Lord Wilson in *Reilly*) that such technical considerations may be irrelevant as the sufficiency of grounds for belief in misconduct will be relevant for s 98(1), (2) and (4).

Polkey can also be read as minimising the risk of *Burchell's* reconsideration having any significant impact on tribunal decisions.[249] Whilst a case about redundancy rather than conduct, it approves the view that the tribunal must consider the decision to dismiss from the perspective of a reasonable employer, and also states that 'it is not correct to draw a distinction between the reason for dismissal and the manner of dismissal as if these were mutually exclusive'.[250] Given this authority, it is hard to see how *Burchell* could be considered as exempt from the reasonable responses test.

Overall, despite some excited commentary suggesting it marks the Supreme Court's antipathy to the reasonable responses test,[251] *Reilly* is unlikely to have startling impact. Given Justices' obvious reluctance to make sweeping changes, and the previous authorities of *Smith* and *Polkey*, it is likely that the reasonable responses test will escape relatively unscathed.

2.6 Chapter conclusion

This chapter has examined the origin, application, and criticism of ERA s 98(4)'s reasonable responses test. It emerges as a conceptually problematic, but resilient and staple provision of unfair dismissal law. It forces issues of procedural integrity to the fore, whilst arguably minimising aspects of substantive justice for employees who lose their livelihoods. Whilst statute remains the same, this is unlikely to change.

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[247] *Burchell* (n 108).
[248] *Smith* (n 245).
[249] *Polkey* (n 115).
[250] Ibid 362 (Lord Mackay).
[251] Levinson (n 230).

Next, this dissertation will conduct a similar analysis of the role of proportionality in the EqA when relating to dismissal from employment.

Chapter 3:
Objective justification within the EqA

3.0 Introduction

Having examined the concept of reasonableness within unfair dismissal law, we now similarly analyse objective justification within the EqA, focussing particularly on dismissal from employment. This will demonstrate how objective justification is a developing, and in many situations, uncertain aspect of law.

3.1 Justification Defences

As chapter one described, dismissal from employment in discriminatory circumstances is unlawful under EqA s 39(2)(c). However, certain types of discrimination allow a defence of justification for employers. If this is successful, the employee will no longer have a valid claim.[252]

The three relevant defences are almost identical, consisting of the following:

- For indirect discrimination, section 19(2)(d) allows justification where the employer demonstrates the PCP to be 'a proportionate means of achieving a legitimate aim'.[253]

- For discrimination arising from disability, section 15(1)(b) allows justification where 'the treatment is a proportionate means of achieving a legitimate aim'.[254]

- For direct discrimination on grounds of age, section 13(2) states that 'A does not discriminate against B if A can show A's treatment of B to be a proportionate means of achieving a legitimate aim'.[255]

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[252] I Smith & others, *Smith and Wood's Employment Law* (13th edn, OUP 2017) 274.
[253] Equality Act 2010 (EqA 2010) s 19(2)(d).
[254] EqA 2010, s 15(1)(b).
[255] EqA 2010, s 13(2).

Interpretation of the phrase 'proportionate means of achieving a legitimate aim' is applied consistently across all three types of claim.[256] As the same phrase was used in pre-2010 equality legislation, case law from earlier statutes is still relevant today.[257]

3.2 The European Background

The EqA codifies UK obligations on equality legislation placed by various EU directives.[258] These directives use the phrase 'objectively justified' rather than 'a proportionate means of achieving a legitimate aim'.[259] However, case law from the European Court of Justice (ECJ) and Court of Justice of the European Union (CJEU) in this area is still binding on UK courts and tribunals.[260] It is therefore important to understand the EU's interpretation of objective justification in the context of equality.

The leading case is *Bilka-Kaufhaus GmbH v Weber von Hartz*, which concerned a dispute over pensions for part-time workers who were disproportionately female.[261] The ECJ ruled that objective justification in an equality context meant that the measures chosen by the employer must 'correspond to a real need on the part of the undertaking, are appropriate with a view to achieving the objectives pursued and are necessary to that end'.[262] This judgment has been consistently highlighted within EU decisions regarding objective justification since.[263]

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[256] K Monaghan, *Monaghan on Equality Law* (2nd edn, OUP 2013) 315.
[257] Smith & others (n 252) 274.
[258] Council Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin [2000] OJ L180/22; Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation [2000] OJ L303/16; Council Directive 2006/54/EC of 5 July 2006 on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation (recast) [2006] OJ L204/23.
[259] S Deakin & G Morris, *Labour Law* (6th edn, Hart Publishing 2012) 642.
[260] JA Lane & R Ingleby, 'Indirect discrimination, justification and proportionality: are UK claimants at a disadvantage?' (2018) 47 ILJ 531, 547.
[261] Case 170/84 *Bilka-Kaufhaus GmbH v Weber von Hartz* [1986] ECR 1607.
[262] Ibid para 36.
[263]A Baker 'Proportionality and Employment Discrimination in the UK' (2008) 37 ILJ 305, 310.

This legal test set out in *Bilka* places interpretation of objective justification squarely within the European legal tradition of proportionality.[264] As described by Lord Hoffman, this principle consists of three elements, namely:

> (1) [S]uitability: an administrative or legal power must be exercised in a way which is suitable to achieve the purpose intended and for which the power was conferred; (2) necessity: the exercise of the power must be necessary to achieve the relevant purpose and (3) proportionality in the narrower sense: the exercise of the power must not impose burdens or cause harm to other legitimate interests which are disproportionate to the importance of the object to be achieved.[265]

By comparing this definition of proportionality with the *Bilka* test, we see that the elements of suitability (or appropriateness) and necessity are listed in both. Where *Bilka* differs from the classic formulation of proportionality is in its replacement of 'proportionality in the narrower sense' with a strict edict of 'real need' on the part of the employer.[266] The result of this is to demonstrate that EU law gives discrimination significant weight in the balancing of proportionality.[267] For acts of discrimination to be justified by an employer, their overall objectives in pursuing such means cannot merely be convenient or advantageous. They must instead constitute a real need related to business or organisational efficacy.[268] Substantive justice for the employee must therefore be at the forefront of a court's reasoning.

Such is the strict legal test that the phrase 'a proportionate means of achieving a legitimate aim' must correspond to.[269] Whether judicial interpretation of the phrase

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[264] TK Hervey, 'Justification for indirect sex discrimination in employment: European Community and United Kingdom Law compared' (1991) 40 ICLQ 807, 823-4.
[265] Lord Hoffman 'The Influence of the European Principle of Proportionality upon UK Law' in E Ellis (ed) *The Principle of Proportionality in the Laws of Europe* (Hart Publishing 1999) 107, 107.
[266] Baker (n 263) 309-10.
[267] Ibid 310; Smith & others (n 252) 277.
[268] Smith & others (n 252) 277.
[269] Ibid.

achieves this is a matter of debate, and requires close analysis of UK case law. To start, this will include consideration of a wide range of cases in order to ascertain legal principles. Further on in the chapter, we will consider how these principles have been applied to cases involving dismissal from employment.

3.3 Legitimate Aim

According to the EqA Statutory Code of Practice, the phrase 'legitimate aim' denotes that the treatment or PCP 'should be legal, should not be discriminatory in itself, and must represent a real, objective consideration'.[270] This guidance applies the approach of *R (Elias) v Secretary of State for Defence*, a Court of Appeal judgment that stressed the importance of *Bilka.*[271] Therefore the objective sought 'must correspond to a real need'[272] that is 'sufficiently important to justify limiting a fundamental right'.[273] It is for the tribunal to establish whether a legitimate aim has been demonstrated in each case, rather than relying on the subjective opinion of the discriminator.[274]

In practice, it seems incidents where the respondent fails to demonstrate a legitimate aim are rare. Accepted aims within case law are wide-ranging and have included for example; the promotion of equal opportunities,[275] the provision of Orthodox Jewish education to those of that faith,[276] compensating redundant employees for lost earnings,[277] and the efficient provision of care services.[278] However, one example of where an aim was not accepted as being legitimate is *Allonby v Accrington and*

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[270] Equality and Human Rights Commission (EHRC), *Equality Act 2010 Code of Practice: Employment Statutory Code of Practice* (EHRC 2011) para 4.28.
[271] *R (Elias) v Secretary of State for Defence* [2006] EWCA Civ 1293; [2006] 1 WLR 3213; later approved by the Supreme Court in *Homer v Chief Constable of West Yorkshire Police* [2012] UKSC 15; [2012] 3 All ER 1287.
[272] *Elias* (n 271) [151] (Mummery LJ).
[273] Ibid [165] (Mummery LJ).
[274] Ibid.
[275] *Ladele v Islington London Borough Council* [2009] EWCA Civ 1357; [2010] 1 WLR 955.
[276] *R (on the application of E) v JFS Governing Body* [2009] UKSC 15; [2010] 2 AC 728.
[277] *Barry v. Midland Bank Plc* [1999] 1 WLR 1465 (HL).
[278] *Mba v Merton London Borough Council* [2013] EWCA Civ 1562; [2014] 1 WLR 1501.

Rosendale College.[279] This involved the dismissal of part-time workers following legislative changes that would have given them the same entitlement to employee benefits as full-time workers. Here, the Court of Appeal noted how:

> [I]f the aim of the dismissal was itself discriminatory (as the applicant contended it was, since it was to deny part-time workers, a predominantly female group, benefits which Parliament had legislated to give them) it could never afford justification.[280]

This appears to demonstrate a fairly clear approach to defining a legitimate aim. Yet questions remain. For example, the *Elias* judgment emphasised the need to distinguish aims and means when considering justification.[281] This implies that the legitimate aim must be a separate thing from the means that carry it out. However, in the later Court of Appeal case, *Woodcock v Cumbria Primary Care Trust*, where a high-level employee complained of being made redundant without appropriate consultation shortly before his 49th birthday in order to reduce the financial payment due to him, it was accepted that making the claimant redundant was in itself a legitimate aim.[282] It seems difficult to reconcile that the act of dismissal from which the discrimination claim flowed, could itself constitute a legitimate aim for that very act. It seems more likely that the aim that the respondent sought to achieve would be the running of a cost-efficient organisation, and the dismissal of a redundant employee in the most cost-effective of circumstances would be a means towards that.[283] The *Woodcock* approach to legitimate aim was followed in *Crime Reduction Initiatives (CRI) v Lawrence* whereby dismissal of an absent employee was classed as a legitimate aim in itself.[284] So far this surprising interpretation of the legislation does not appear to have been challenged.

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[279] *Allonby v Accrington and Rosendale College* [2001] EWCA Civ 529; [2001] 2 CMLR 27.
[280] Ibid [29] (Sedley LJ).
[281] *Elias* (n 271) [145] (Mummery LJ).
[282] *Woodcock v Cumbria Primary Care Trust* [2012] EWCA Civ 330; ICR 1126.
[283] It should be noted that following *Seldon v Clarkson Wright & Jakes* [2012] UKSC 16; [2012] 3 All ER 1301, cases of direct age discrimination such as this would require an even stricter identification of legitimate aim. See text to n 287 below.
[284] *Crime Reduction Initiatives (CRI) v Lawrence* (EAT, 17 February 2014).

The reason why courts may be reluctant to see cost-efficiency as a legitimate aim is the hesitancy with which the higher courts have allowed costs or economic reasons to be classed as such. Cost savings by themselves cannot constitute a legitimate aim, unless they are combined with other legitimate factors,[285] which can include an absence of means.[286] This is a developing and somewhat uncertain area of law.[287] Questions remain as to what precisely constitutes a costs justification (as opposed to any other aim based on business efficiency or absence of means) and how tribunals should weigh up the different factors to decide whether cost considerations have been too high a factor in the discriminator's mind.[288] These issues are often particularly relevant to cases involving dismissal, and so will be considered further in that context later in the chapter.

Finally on legitimate aim, it is noted that direct age discrimination requires a more stringent interpretation of this than in other claims. This means that the aim must correspond with certain social policy objectives in the public interest such as inter-generational fairness or dignity for older workers.[289]

3.4 Proportionate Means

Deriving the correct test for the phrase 'proportionate means' in UK law is complex. The Code of Practice lists two separate ways in which proportionality is judged. The first involves a balancing exercise during which a tribunal 'may wish to conduct a proper evaluation of the discriminatory effect of the provision, criterion or practice [or treatment] as against the employer's reasons for applying it, taking into account all relevant facts'.[290] Secondly, the code follows on to describe how 'EU law views treatment as proportionate if it is "an appropriate and necessary" means of achieving

[285] *Cross v British Airways Plc* [2005] IRLR 423 (EAT); *Woodcock* (n 282).
[286] *Heskett v Secretary of State for Justice* (EAT, 25 June 2019).
[287] See for example, the recent decision of *Heskett* (n 286).
[288] Monaghan (n 256) 351-52.
[289] *Seldon* (n 283).
[290] EHRC (n 270) para 4.30.

a legitimate aim'.[291]

The balancing approach to adjudging proportionality mentioned above was initially developed in *Hampson v Department for Education and Science*.[292] Balcombe LJ wrote how justification 'requires an objective balance between the discriminatory effect of the condition and the reasonable needs of the party who applies the condition'.[293] This was argued to be an equivalent test to *Bilka,*[294] and was approved by the House of Lords in *Webb v EMO Air Cargo (UK) Ltd.*[295] Lord Hoffman has previously argued that there is an English legal tradition of considering proportionality in a less structured manner to that of the EU, but which nevertheless produces the same results.[296] The *Hampson* balancing exercise could be interpreted as one such example. Other commentators however, see it merely as a proportionality-avoidance tactic.[297]

The House of Lords came to its decision in *Barry v Midland Bank Plc* using a similar balancing approach.[298] Here, a redundant part-time female employee argued that her severance payment should take into account her many years of full-time work for the company prior to becoming a parent. Their lordships agreed that it was indirect discrimination, but could potentially be justified. They described the legal test as follows:

> [T]he ground relied upon as justification must be of sufficient importance for the national court to regard this as overriding the disparate impact of the difference in treatment, either in whole or in part. The more serious the disparate impact […], the more cogent must be the objective justification.[299]

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[291] Ibid para 4.31.

[292] *Hampson v Department for Education and Science* [1990] 2 All ER 25 (CA).

[293] Ibid 34 (Balcombe LJ).

[294] *Bilka* (n 261).

[295] *Webb v EMO Air Cargo (UK) Ltd* [1993] 1 WLR 49 (HL).

[296] Hoffman (n 265) 113.

[297] Baker (n 263) 308.

[298] *Barry* (n 277).

[299] Ibid 1475 (Lord Nicholls).

Such consideration of the need to measure objective against impact reflects the European principle of 'proportionality in the narrower sense' explained earlier, but does not match the structured test set out in *Bilka*.[300] The latter was cited in judgment however, suggesting that law lords considered theirs to be an equivalent approach.[301] The result in this case was that the bank's aim of compensating employees for lost income was of sufficient importance to justify any disproportionate impact on female staff. No valid suggestion had been made of how the bank could achieve this same aim through any less discriminatory means.[302] Other cases have concluded that the remit of any balancing exercise can also include the interests of society overall, such as discrimination in the wider community.[303]

As the Code of Practice implied earlier however, this balancing approach no longer sits alone as the correct test for proportionate means. In *Elias* the Court of Appeal extended the test to bring it closer in line with the language of *Bilka.*[304] As such 'the objective of the measure in question must correspond to a real need and the means used must be appropriate with a view to achieving the objective and be necessary to that end.'[305] Further on in the judgment this last aspect is clarified as requiring that the PCP or treatment be 'no more than is necessary to accomplish the objective.'[306]

The inclusion of objective criteria such as appropriateness and necessity strengthens the *Hampson* balancing approach and brings the overall test of 'proportionate means of achieving a legitimate aim' closer in line with EU law.[307] *Elias* suggested that balancing detriment against seriousness of the objective is part of understanding

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[300] M Connolly, 'Justification and Indirect Discrimination' (2001) 44 Emp LB 4; Baker (n 263) 310.
[301] *Barry* (n 277) 1476 (Lord Nicholls); M Connolly, *Discrimination Law* (2nd edn, Sweet & Maxwell 2011) 184.
[302] *Barry* (n 277).
[303] *Ladele* (n 275).
[304] *Elias* (n 271); *Bilka* (n 261); Lane & Ingleby (n 260) 535.
[305] *Elias* (n 271) [151] (Mummery LJ).
[306] Ibid [165] (Mummery LJ).
[307] Deakin & Morris (n 259) 643-4.

whether or not the means employed are necessary and reflect a real need.[308] The Supreme Court has approved this approach. [309] However, some commentators argue that the full range of considerations included in the conjoined tests are rarely reflected in judgments of the EAT and Court of Appeal.[310] This point will be considered in more detail later in the chapter.

Part of this confusion may lie in the debate whether 'necessary' in the proportionality test is to be qualified by 'reasonably'; and if so, what this means in the context of individual cases. The term 'reasonably necessary' appears in a number of Court of Appeal judgments including *Allonby* and *Hardy and Hansons Plc v Lax*.[311] In the latter it was qualified that in this context, 'reasonably' does not imply a test of reasonable responses or margin of appreciation for the discriminator. Instead:

> The principle of proportionality requires the tribunal to take into account the reasonable needs of the business. But it has to make its own judgment, upon a fair and detailed analysis of the working practices and business considerations involved, as to whether the proposal is reasonably necessary.[312]

The phrase 'reasonably' therefore appears to be an aspect of the balancing exercise between objective and impact. Some significant cases such as *Elias* have discarded it as a qualifier, given that it does not appear in the *Bilka* judgment.[313] However, the Supreme Court in *Homer v Chief Constable of West Yorkshire Police* and *Seldon v Clarkson Wright & Jakes* added an almost hesitant '(reasonably)' before the term 'necessary', and thus, the qualifier is likely to remain.[314]

This shift of language is potentially significant, for the questions of whether a

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[308] *Elias* (n 271) [151] (Mummery LJ).
[309] *JFS* (n 276); *Homer* (n 271).
[310] Lane & Ingleby, (n 260) 531.
[311] *Allonby* (n 279); *Hardy and Hansons Plc v Lax* [2005] EWCA Civ 846; [2005] ICR 1565.
[312] *Hardy* (n 311) [32] (Pill LJ).
[313] *Elias* (n 271).
[314] *Homer* (n 271) [23] (Lady Hale); *Seldon* (n 283) [55] (Lady Hale).

particular treatment or PCP is necessary to achieve the aim, and whether possible alternatives were sufficiently considered have remained common points by which discrimination claims succeed or fail.[315] Usually, *Bilka* is interpreted as meaning that where an alternative, non-discriminatory means is possible, the measure cannot be justified.[316] This is reflected in the Code of Practice.[317] The judgment in *Homer* appeared to agree, so where a question arises about the justification of a particular means, 'to some extent, the answer depends upon whether or not there were non-discriminatory alternatives available'.[318] However, the qualifier of 'to some extent' has allowed other cases such as *Kapenova v Department of Health* to conclude that the existence of non-discriminatory alternatives does not always prevent a particular means from being reasonably necessary.[319] The Supreme Court recently re-affirmed the importance of considering alternative means in *Naeem v Secretary of State for Justice* and so it appears that cases where this applies less strictly are possible, but will be rare.[320]

In cases regarding disability discrimination, this general expectation to consider alternative measures is amplified by the separate duty for organisations to make reasonable adjustments under EqA s 20. The Code of Practice makes clear that whilst fulfilling an obligation to make reasonable adjustments for a disabled person will not necessarily mean that further discrimination cannot be justified, any failure to do so will make justification in discrimination arising from disability cases very difficult.[321] *York City Council v Grosset* is one such example, whereby a disabled teacher successfully claimed that a failure to provide him with reasonable adjustments in the workplace was linked to later misconduct, for which he had been dismissed.[322] This

[315] Lane & Ingleby (n 260) 541.
[316] Hervey (n 264) 823-24.
[317] EHRC (n 270) para 4.31.
[318] *Homer* (n 271) [25] (Lady Hale).
[319] *Kapenova v Department of Health* [2014] ICR 884 (EAT).
[320] *Naeem v Secretary of State for Justice* [2017] UKSC 27; [2017] 1 WLR 1343.
[321] EHRC (n 270) para 5.21-5.22.
[322] *York City Council v Grosset* [2018] EWCA Civ 1105; [2018] 4 All ER 77. This must be distinguished from *Monmouthshire County Council v Harris* (EAT, 23 October 2015)

case is discussed further in chapter four.

It is often important to consider in individual cases whether the balancing exercise requires justification of a general policy, or whether it is the application of that policy to a particular individual that must be justified. This point was clarified in *Seldon* as depending on whether the policy is a general one that is applied equally to all individuals, or whether it is one that allows treatment to be tailored to individual circumstances.[323] In the former, only the policy itself requires justification against its impact. In the latter, such as in the application of absence or disciplinary policies, the treatment towards the individual in question must be justified.[324]

GMB v Allen cautioned against the danger of including matters of remedy within a proportionality analysis.[325] Thus, the proposition that a particular act of discrimination caused no or little loss to the claimant is not relevant to justification and should instead be reserved for a remedy hearing.[326] Despite this guidance, issues of potential loss have occasionally been included within the balancing exercise of other cases.[327]

Finally, the question of proportionality in cases where the legitimate aim of a particular PCP or treatment is only identified by the discriminator after its implementation has been raised on various occasions, including on appeal to the CJEU in *Cadman v Health and Safety Executive*.[328] The settled response to this is that a justification defence in such circumstances can be successfully made, but is more difficult to prove and will be more carefully scrutinised.[329]

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where the failure to make reasonable adjustments was a time-barred claim that did not directly relate to the later dismissal.

[323] *Seldon* (n 283).
[324] Ibid.
[325] *GMB v Allen* [2008] EWCA Civ 810; [2008] ICR 1407.
[326] Ibid.
[327] See for example *Woodcock* (n 282) [71] (Rimer LJ).
[328] Case C-17/05 *Cadman v Health and Safety Executive* [2006] ECR I-9583.
[329] *Seldon* (n 283).

3.5 Level of appropriate scrutiny

As implied above, a high level of scrutiny is applied to the arguments of both claimant and respondent in cases involving proportionality.[330] 'This is an appraisal requiring considerable skills and insight. […] [A] critical evaluation is required and is required to be demonstrated in the reasoning of the tribunal.'[331] The tribunal is entitled to make its own interpretation of the evidence before it, including witness statements.[332] The burden of proof is on the respondent to establish justification, but unlike in a reasonable responses test, the tribunal is not bound to respect their subjective viewpoint.[333]

3.6 Application of proportionality to dismissal situations

Prior to the EqA, dismissal situations that involved proportionality under equalities legislation were rare.[334] Those that did occur related to indirect discrimination such as in redundancy situations, or where an employee refused to comply with a standard rule or policy.[335] However, following the introduction of the section 15 claim for discrimination arising from disability, the term 'a proportionate means of achieving a legitimate aim' is now regularly applied to dismissals due to long-term absence or misconduct.[336] Interpreting the proportionality test in these new situations has posed challenges, and it is likely to take time for consistent precedents to develop.[337] The following analysis attempts to suggest directions in which the law is heading.[338]

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[330] *York* [n 322].

[331] *Hardy* (n 311) [33] (Pill LJ).

[332] Ibid [37] (Pill LJ); *GMB* (n 325).

[333] *Homer* (n 271).

[334] A previous justification clause in the Disability Discrimination Act 1995 for disability-related discrimination was worded differently and case law related to this is no longer valid. See Connolly, *Discrimination Law* (n 301) 413.

[335] Examples of this include *Hardy* (n 311) and *McFarlane v Relate Avon Ltd* [2010] EWCA Civ 880; IRLR 872.

[336] A Lawson, 'Disability and employment in the Equality Act 2010: Opportunities seized, lost, and generated' (2011) 40 ILJ 359, 365.

[337] Smith & others (n 252) 275.

[338] It is noted that not all case law considered below involved the actual dismissal of the employee as in some occasions the claimant has resigned or brought

There is relatively little evidence of structured proportionality analyses being applied by the EAT as regards dismissal situations.[339] Analysis is more likely to consist of *Hampson*-style balancing exercises that do not mention terms associated with more structured *Bilka*-eque analyses such as appropriateness and necessity.[340] It is surprising, for example, how rarely the Supreme Court's judgment in *Homer* is directly cited given that it is the clearest and highest authority for proportionality analysis in the UK.[341] Instead, judgments often do not cite any authority for proportionality at all, or use older, less vigorous authorities.[342] Where an employer's aim is decided to be legitimate, judgments often move very swiftly to a conclusion that dismissal was proportionate.[343]

However, it is acknowledged that amongst cases examined, even amongst those that cite a balancing approach, there are examples of courts or tribunals embracing a critical and stringent approach to proportionality in dismissal cases. This includes re-interpreting evidence, disagreeing with witnesses, and rejecting conclusions that do not adequately weigh up the perspectives of either employer or employee.[344]

It has not yet been fully resolved whether courts may take into account medical or other evidence that was not available to the employer at the time of dismissal in their proportionality analyses. The EAT in *Reid v Lewisham London Borough Council* held

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proceedings whilst in employment, but they are all situations where dismissal would clearly have been a likely outcome in the near future.

[339] Lane & Ingleby (n 260) 536.

[340] Ibid 538.

[341] *Homer* (n 271).

[342] See for example, *Chivas Brothers Ltd v Christiansen* (EAT, 19 May 2017), or *Baldeh v Churches Housing Association of Dudley and District Ltd* (EAT, 11 March 2019). It is also interesting to note how even the Court of Appeal judgment in *McFarlane* (n 335) made no mention of the same court's earlier judgment in *Elias* (n 271) even though doing so might have significantly changed the direction of argument.

[343] See for example, *Mba* (n 278) or *McFarlane* (n 335).

[344] *Asda Stores Ltd v Raymond* (EAT, 13 December 2018); *Chivas* (n 342); *Hensman v Ministry of Defence* [2014] Eq LR 650 (EAT).

that this was an error of law, yet the Court of Appeal explicitly took such post-dismissal evidence into account in *York* a month later.[345] It is unclear whether *Reid* is therefore overruled on that point, or if the cases could be distinguished on the facts. The answer to this question could have significant implications for employers and their liability for discrimination.

3.6.1 Conduct

Relevant cases involving misconduct can be broken down into two main categories: those that involve an employee refusing to obey an instruction from their employer (usually on grounds that the instruction is indirectly discriminatory), and those that involve more traditional misconduct that was fully or partly caused by their disability.

In the former, employers who demonstrate a significant legitimate aim for the instruction are usually able to successfully justify their decision to dismiss. Therefore in *Azmi v Kirklees Metropolitan Borough Council* the employer successfully justified their requirement for an employee to remove her veil when working directly with children on the grounds that it hindered their learning.[346] This decision has been criticised for a lack of scrutiny given to alternative arrangements suggested by the claimant, and failure by the EAT to consider the wider discrimination which Muslim women experience in employment.[347]

The exact legitimate aim identified by the tribunal can have significant implications for how likely dismissal is seen to be proportionate in these situations. For example, in *Ladele v Islington London Borough Council* the decision by that employer to insist that all its registrars were registered to perform civil partnerships as part of their equal opportunities policy was seen as its legitimate aim, rather than the means of upholding that policy.[348] Therefore the suggestion that an alternative means for the

[345] *Reid v Lewisham London Borough Council* (EAT, 13 April 2018); *York* (n 322) [29] (Pill LJ).
[346] *Azmi v Kirklees Metropolitan Borough Council* [2007] ICR 1154 (EAT).
[347] Lane & Ingleby (n 260) 542-3.
[348] *Ladele* (n 275).

council would have been not to require all registrars to register to conduct civil partnerships, was discounted as irrelevant. By contrast, the accepted aim in *Pendleton v Derbyshire County Council* was simply to safeguard children in a school environment.[349] The decision to dismiss the employee for remaining with her husband after he was convicted of a sexual offence was the means towards this. This allowed the EAT to consider alternative methods by which the employer could have achieved their aim, and the decision to dismiss was hence disproportionate.

As regards other types of misconduct, we see a more consistent application of the need to consider alternative options than dismissal, and the relationship between dismissal and the employer's aims is likewise often challenged. The *Bilka* requirements of appropriateness and necessity seem to be regularly applied, even if not often explicitly stated in judgments.[350] This can be seen in cases such as *Burdett v Aviva*, *Risby v Waltham Forest London Borough Council*, *Chivas Brothers Ltd v Christiansen*, and *Asda Stores Ltd v Raymond.*[351] In *Chivas Brothers* for example, the EAT agreed that application of the employer's health and safety policy was a legitimate aim, but given that questioning of the employer's witnesses revealed how the employee's misconduct did not give rise to any particular health and safety risk, dismissal was found to be disproportionate on the facts.[352]

However, the tribunal must still give significant consideration to the employer's aims when deciding to dismiss. Therefore, in *Hensman v Ministry of Defence* the employer was successful in appealing a disability discrimination claim because the original tribunal had not applied enough consideration to its reasons to dismiss the employee.[353]

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[349] *Pendleton v Derbyshire County Council* [2016] IRLR 580 (EAT).
[350] *Bilka* (n 261)
[351] *Burdett v Aviva Employment Services Ltd* (EAT, 14 November 2014); *Risby v Waltham Forest London Borough Council* (EAT, 18 March 2016); *Chivas Brothers* (n 340); *Asda Stores Ltd v Raymond* (n 344).
[352] *Chivas Brothers* (n 342).
[353] *Hensman v Ministry of Defence* (n 344).

3.6.2 Capability

Case law relating to justification of long-term absence dismissal has grown rapidly in recent years. Tribunals generally agree that dismissal following long-term absence (where there is no evidence suggesting a likely return to work in the near future) is proportionate.[354] However, the process by which such conclusions are reached varies. In particular, there is inconsistency in the identification of legitimate aim for these dismissals, even when circumstances are very similar. Examples of legitimate aims accepted in long-term absence situations include dismissal of absent employees,[355] efficient and/or high quality running of the workplace,[356] safeguarding of public funds,[357] consideration of the impact on other staff members,[358] supporting absent employees as much as reasonable,[359] having a workforce that attends and carries out work required,[360] and financial obligations to the overall organisation.[361] To some extent we would expect a level of variation based on individual employer circumstances. However, it still could be argued that objective justification for long-term absence would be more transparent if a more consistent approach to legitimate aim and proportionality was adopted by judges. Of course, an issue with this may be that absence management is often concerned with the saving of financial costs, which as previously discussed, cannot by itself be a legitimate aim.[362]

The Court of Appeal attempted to provide some clarity in *Bolton St Catherine's Academy v O'Brien*, emphasising that:

> In principle the severity of the impact on the employer of the

[354] See for example *Monmouthshire* (n 322); *obiter* comments in *General Dynamics Information Technology Ltd v Carranza* [2015] ICR 169 (EAT) [47] (Richardson J).
[355] *CRI* (n 284) [6].
[356] *Bolton St Catherine's Academy v O'Brien* [2017] EWCA Civ 145; [2017] ICR 737 [27]; *Ali v Torrosian & others (t/a Bedford Hill Family Practice)* (EAT, 2 May 2018) [11].
[357] *Monmouthshire* (n 322) [51].
[358] Ibid.
[359] *Buchanan v Commissioner of Police of the Metropolis* [2017] ICR 184 (EAT) [56].
[360] *Awan v ICTS UK Ltd* (EAT, 23 November 2018) [22].
[361] *Reid* (n 345) [9].
[362] See section 3.3.

> continuing absence of an employee who is on long-term sickness absence must be a significant element in the balance that determines the point at which their dismissal becomes justified, and it is not unreasonable for a tribunal to expect some evidence on that subject.[363]

Therefore, where an employer can demonstrate that the absence is causing a negative impact on their business, and the situation is unlikely to change, then dismissal will normally be proportionate.[364] However, if evidence arises that indicates a likely return to work, or reasonable adjustments that might enable the individual to return, it will be much harder for the employer to justify dismissal.[365]

In terms of absence management procedures prior to dismissal, if procedural error does not in itself cause discriminatory impact, it will not be relevant to justification.[366] However, employers are expected to interpret absence management procedures in the light of the EqA and individual circumstances. If failure to do so causes detriment to the employee, then this will make justifying treatment towards them more difficult.[367]

In terms of dismissals for poor performance in the workplace, there is not currently enough case law to make general conclusions about how proportionality is applied. However, the very recent decision of *Baldeh v Churches Housing Association of Dudley and District Ltd* (which cited no case law authority for proportionality at all) suggested that a balancing exercise between the employer's legitimate aim and impact of dismissal on the employee was the appropriate test.[368] This reasoning, once again, seems closer to *Hampson* than to *Homer.*[369]

3.6.3 Redundancy

[363] *Bolton* (n 356) [45] (Underhill LJ).
[364] *Awan* (n 360).
[365] *Bolton* (n 356).
[366] *CRI* (n 284).
[367] *Buchanan* (359).
[368] *Baldeh* (n 342).
[369] *Hampson* (n 292); *Homer* (n 271).

In redundancy situations, establishing legitimate aim should theoretically be problematic due to the normal association of redundancy exercises with saving costs. However, tribunals have shown themselves very willing to accept this category of dismissal as potentially justifiable in practice. Proportionality analysis can be short and swift.[370] *Magoulas v Queen Mary University of London* suggests a pragmatic approach to the consideration of alternative means in the context of genuine and lengthy periods of consultation prior to dismissal.[371] However, if the tribunal is dissatisfied with an employer's explanations of a redundancy situation or lack of alternative work, then dismissal will not be proportionate.[372]

3.6.4 Other reasons for dismissal

The Supreme Court has established that despite it being a clear example of direct age discrimination, compulsory retirement for employees of a certain age may be justifiable in individual situations if implemented for legitimate aims connected with overall social policy, and where the precise details of policy are seen as reasonably necessary and appropriate.[373]

However, both *Allonby* and *Redfearn v Serco Ltd* demonstrate that when other reasons for dismissal are considered, tribunals will apply a critical scrutiny of both legitimate aim and its appropriateness to the circumstances.[374] Such attempts by employers to construct artificial reasons for dismissal in order to avoid direct discrimination claims will fail the test of proportionality.

3.7 Criticisms of the UK's approach to proportionality

As demonstrated, the correct test for proportionality in the UK has proven hard to grasp and patchy in its implementation. Some commentators have argued that this means that the UK is failing in its obligation to implement an approach that is, even if

[370] *Woodcock* (n 282).
[371] *Magoulas v Queen Mary University of London* (29 January 2016, EAT).
[372] *Hardy* (n 311).
[373] *Seldon* (n 283).
[374] *Allonby* (n 279); *Redfearn v Serco Ltd (t/a West Yorkshire Transport Service)* [2005] IRLR 744 (EAT).

not the same as *Bilka*, at least as effective in its results.[375] As Connolly comments, 'there is a difference between requiring that the challenged practice goes no further than necessary to achieve the aim and requiring a balance of interests.'[376]

It is thus argued that the loose replacement of 'reasonably necessary' for 'necessary' and 'legitimate aim' for 'real need' means that the UK's test is weaker than it should be, and hence does not provide claimants with adequate protection.[377] Davies suggests that this particularly affects the judicial analysis of economic dismissals whereby too much weight is applied to the perspective of business rather than employee.[378] This chapter's findings on inconsistent and sketchy approaches to proportionality in redundancy and absence dismissals could support such an argument.

The UK's approach to proportionality is also criticised for failing to take wider societal issues of discrimination into sufficient consideration in cases like *Azmi*.[379] This, alongside the concerns above, means that legislative policy objectives of the EqA are weakened.[380] As Baker writes,

> When an employer pleads a justification defence […], the employer claims that its policy is not the kind of situation the statutes seek to prevent. Proportionality does the job of sorting acceptable situations from unacceptable ones. If the impact is proportionate, the measure is by definition not the kind on whose prevention society has placed an overriding priority. Why should this determination not involve consideration of whether this rule or practice, which the employer claims should receive exceptional treatment, brings about the kinds of effects that the statute seeks to eliminate or minimise?[381]

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[375] Smith & others (n 252) 277; Lane & Ingleby (n 260) 531.
[376] Connolly, *Discrimination Law* (n 301) 184.
[377] Ibid 184-85; Smith (n 252) 276; Lane & Ingleby (n 260) 547
[378] ACL Davies, 'Judicial Self-Restraint in Labour Law' (2009) 38 ILJ 278, 301.
[379] *Amzi* (n 346); Lane & Ingleby (n 260) 542-3.
[380] Connolly, *Discrimination Law* (n 301) 185-86.
[381] Baker (n 263) 325.

The UK's preference for balancing exercises rather than structured proportionality tests, it is argued, makes judicial decisions on these matters less transparent.[382] Lane and Ingleby go so far as to suggest that it has inadvertently allowed a unfair ranking system of protected characteristics to develop in case law that puts claimants of religious discrimination at particular disadvantage.[383] Lack of clarity in legal tests could thus have serious consequences.

However, the same authors also acknowledge that structured proportionality tests such as *Bilka* can be inflexible and do not always act in the interests of society overall.[384] On the subject of what makes a perfect objective justification test, there are no easy answers.

3.8 Potential developments in proportionality

It is clear that areas of uncertainty remain in this area of the law. Given judges' reluctance to consistently apply *Bilka*, it is possible that the UK's planned exit from the EU and the potential end to any obligation to comply with its judgments will have a significant impact on the direction in which concepts of proportionality develop. As Ingleby and Lane point out, 'if the UK courts failed to fully apply the jurisprudence of the CJEU prior to "Brexit", it is unlikely that they will succumb to it now.'[385]

3.9 Chapter conclusion

This chapter has demonstrated that despite being a clearly vigorous and stringent concept, it is hard to pinpoint the exact nature of objective justification within the UK,

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[382] Ibid 330.

[383] Lane & Ingleby (n 260) 546-47. This argument is based on analysis of case law including *Azmi* (n 346) and *Ladele* (n 275). A counterargument would be that rather than this being an issue of prejudice, the application of justification defences to religious discrimination is affected by the fact claimants are more likely to want different, as opposed to equal treatment - Connolly, *Discrimination law* (n 301) 199. Where this goes against rules intended to prevent discrimination against other protected groups, it is unlikely to be justified - Monaghan (n 256) 353. However, a lack of clarity and structure regularly shown in proportionality analyses undoubtedly fuels this debate.

[384] Ibid 549.

[385] Ibid 549-50.

especially as it applies to dismissal situations. Substantive justice is clearly more significant than procedural matters, but the exact application of the justification test appears to vary. Judicial interpretation is often inconsistent due to the challenges of combining English notions of 'balance' with strict European interpretations of proportionality. Because of these opposing influences, the UK's likely exit from the EU in late 2019 may have significant long-term consequences for how the phrase 'a proportionate means of achieving a legitimate aim' is understood in the future.

Chapter four will directly compare the test of proportionality with that of reasonable responses as it attempts to assess how increasingly regular interaction between the two may further shape UK law relating to dismissal.

Chapter 4:
Interactions between reasonable responses and proportionality

4.0 Introduction

The previous two chapters have outlined the tests of reasonable responses and proportionality as they relate to unfair dismissal and discrimination claims. Traditionally it was rare that these two separate claims would be applied to the same dismissal situation. However, as discrimination law evolves, this has started to become more common.[386] This chapter compares the nature of reasonable responses and proportionality, and attempts to assess how they interact at tribunal level in dismissal situations. Such assessment is based on limited case law evidence, but indicates that this is a developing area that potentially could make managing dismissal a more complex process for employers; or alternatively could lead to changes in the tests themselves.

4.1 Comparisons between reasonable responses and proportionality

It is accepted generally that both tests are distinct.[387] The reasonable responses test condones employer behaviour that lies within a normal range.[388] It applies no higher standard than to compare the actions of one employer with those of (usually hypothetical) alternatives.[389] By contrast, proportionality is a much stricter, value-laden test that enables the court to judge the legitimacy of an employer's actions, and to assess whether aims could have been achieved through less discriminatory means.[390] Chapters two and three have highlighted these differences; the detail of

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[386] The author's search for relevant case law found none prior to 2014, but a small and steadily increasing number after that including four in 2017, and five in 2018. All are referred to in the course of this chapter.

[387] I Smith & others, *Smith and Wood's Employment Law* (13th edn, OUP 2017) 275; ACL Davies, 'Judicial Self-Restraint in Labour Law' (2009) 38 ILJ 281-82.

[388] J Davies, 'A Cuckoo in the nest? A "range of reasonable responses" justification and the Disability Discrimination Act 1995' (2003) 32 ILJ 164, 178.

[389] Smith & others (n 387) 525-6.

[390] S Deakin S & G Morris, *Labour Law* (6th edn, Hart Publishing 2012) 642.

which can be summarised in the following ways.

4.1.1 Intention and focus

The intention behind the reasonable responses test is to promote fairness and reasonable behaviour by employers.[391] Considerations of impact on the individual employee are secondary to these overriding concerns.[392] It focuses on judging the employer's behaviour based on knowledge they had at the time of dismissal, rather than any facts that emerge after that date.[393] Case law thus centres on attempts by the employer to act fairly at the time of dismissal, at the expense of consideration for the individual employee, who may be treated unjustly.[394]

By contrast, the proportionality test in its purest form applies a different approach. Discriminatory impact on the employee lies at the core of the tribunal's concerns, and it is for the employer to argue that their legitimate aim is justification against this.[395] Chapter three described how the tribunal's treatment of relevant evidence that arises after the dismissal itself is not yet set out fully in case law.[396]

4.1.2 Alternative actions to dismissal

It is accepted that a reasonable response by an employer can take various forms, and so long as an individual's dismissal falls within this band, tribunals will not judge whether or not it was the most appropriate response for the circumstances.[397] This is in contrast to the *Bilka* requirement that an employer must demonstrate that their actions when dismissing an employee constituted the least discriminatory method of upholding the legitimate aim in question.[398]

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[391] *Orr v Milton Keynes Council* [2011] EWCA Civ 62; [2011] 4 All ER 1256.
[392] *W Devis & Sons Ltd v Atkins* [1977] AC 931 (HL).
[393] Ibid.
[394] See for example, *Monie v Coral Racing Ltd* [1981] ICR 109 (CA).
[395] *R (Elias) v Secretary of State for Defence* [2006] EWCA Civ 1293; [2006] 1 WLR 3213.
[396] See section 3.6.
[397] *Iceland Frozen Foods Ltd v Jones* [1983] ICR 17 (EAT).
[398] Case 170/84 *Bilka-Kaufhaus GmbH v Weber von Hartz* [1986] ECR 1607.

4.1.3 Level of judicial restraint

Under the reasonable responses test, judges must not allow their own opinions about the facts of any case to influence the overall judgment.[399] Instead, evidence is viewed from the perspective of a hypothetical reasonable employer.[400] This includes for example, the interpretation of witness statements, over which the employer's view can only be disregarded if it is seen to be entirely unreasonable in nature.[401]

Proportionality as described in *Bilka* has no such restriction on judicial interpretation of the facts.[402] Judicial analysis should be objective and meaningful.[403] Tribunals are entitled to interpret evidence as they see fit, and to challenge employer (or claimant) assertions where appropriate.[404]

4.1.4 Procedural fairness

ERA s 98(4)'s emphasis on fairness and reasonable behaviour by employers has led to a large focus on procedural fairness.[405] Employers should only make decisions to dismiss against a background of fair, consistent, and transparent organisational procedure.[406] Failure to provide this is likely to lead to a finding of unfair dismissal, even if the employer can demonstrate that the dismissal itself was not unjust.[407] Case law on proportionality shows a lower degree of deference to procedural fairness, so long as any irregularity in employer behaviour is not connected to the discrimination itself.[408]

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[399] *Watling & Co Ltd v Richardson* [1977] AC 931 (HL).
[400] *Orr* (n 391).
[401] Ibid.
[402] *Bilka* (n 398).
[403] *Hardy and Hansons Plc v Lax* [2005] EWCA Civ 846; [2005] ICR 1565.
[404] Ibid; *GMB v Allen* [2008] EWCA Civ 810; [2008] ICR 1407.
[405] Smith & others (n 387) 522.
[406] *British Home Stores Ltd v Burchell* [1980] ICR 303 (EAT).
[407] *Polkey v AE Dayton Services Ltd* (1988) AC 344 (HL).
[408] *Crime Reduction Initiatives (CRI) v Lawrence* (EAT, 17 February 2014).

4.1.5 Substantive Justice

The reasonable responses test thus places little weight on substantive justice.[409] Where it occasionally does (such as in some cases of long-term absence and SOSR), the employer's needs usually take priority,[410] as only 'sufficient' reason to dismiss is required.[411] By contrast, proportionality's focus on the interests of the claimant means that substantive justice is a more significant aspect.[412]

4.1.6 Power balance between employer and employee

Both the reasonable responses and proportionality tests have been criticised for allowing the power balance in tribunals to shift towards employers rather than employees.[413] Such criticisms levelled against the former test, which is held to be intrinsically imbalanced as an approach, have been especially fierce.[414] By contrast, criticisms of imbalance in discrimination cases are usually triggered by a perceived misapplication of the principle of proportionality, rather than being something that inevitably flows from it.[415] Where correctly applied, the *Bilka* test is considered to give greater power to employees than employers.[416]

4.1.7 Objectivity

Chapter two described how the reasonable responses test in theory contains objective

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[409] T Brodtkorb 'Employee Misconduct and Unfair Dismissal law: Does the range of reasonable responses test require reform?' (2010) 52 Int JLM 429, 443.
[410] See for example, *Lynock v Cereal Packaging Ltd* [1988] ICR 670 (EAT); *Henderson v Connect (South Tyneside) Ltd* [2010] IRLR 466 (EAT).
[411] Employment Rights Act 1996 (ERA 1996) s 98(4)(a).
[412] *Bilka* (n 398).
[413] See for example, Davies (n 388) 304-05.
[414] H Collins, *Justice in Dismissal: The Law of Termination of Employment* (OUP 1992) 38; A Freer, 'The Range of Reasonable Responses Test – From Guidelines to Statute' (1998) 27 ILJ 335, 335.
[415] A Baker 'Proportionality and Employment Discrimination in the UK' (2008) 37 ILJ 305, 328; JA Lane & R Ingleby, 'Indirect discrimination, justification and proportionality: are UK claimants at a disadvantage?' (2018) 47 ILJ 531, 547.
[416] Baker (n 415) 310.

elements, but is mostly subjective in reality.[417] Chapter 3 established that the proportionality test is much more objective in nature, but that case law suggests it is regularly applied in a somewhat subjective manner.[418]

4.1.8 Future direction

The reasonable responses test is longstanding and well-established.[419] Analysis in chapter two argued how it is unlikely that the test and its application will be significantly altered in the near future.[420] The proportionality test in discrimination claims lacks this settled status, particularly in how it is applied to dismissal.[421] Various areas of uncertainty were identified in chapter three.[422]

4.2 Interaction between both tests in dual claim situations

In situations where a dismissed employee has brought claims of both unfair dismissal and discrimination arising from disability, tribunals may be required to apply both reasonable responses and proportionality tests separately to the same evidence. We now assess occasions where such cases have been considered by either the EAT or Court of Appeal. However, due to a limited amount of case law available, analysis will be restricted to dismissals based on long-term sickness absence or misconduct.

4.2.1 Sickness absence

An early dual claim case involving dismissal for sickness absence to reach the EAT was *Crime Reduction Initiatives (CRI) v Lawrence*.[423] This established the separate nature of both tests, finding that an error in procedure by the employer was enough to take dismissal outside of the band of reasonable responses, yet did not impact on proportionality. This resulted in the employee losing their case for discrimination, despite the success of their unfair dismissal claim.

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[417] See section 2.2.
[418] See section 3.6.
[419] *Orr* (n 391).
[420] See section 2.5.
[421] Lane & Ingleby (n 415) 549-50.
[422] See sections 3.3 and 3.4 in particular.
[423] *CRI* (n 408).

However later case law emphasises that where obvious procedural errors are not present, the issues with which tribunals must concern themselves are very similar for both reasonableness and proportionality. The Court of Appeal in *Bolton* gave the following guidance:

> I accept that the language in which the two tests is expressed is different and that in the public law context a 'reasonableness review' may be significantly less stringent than a proportionality assessment (though the nature and extent of the difference remains much debated). But it would be a pity if there were any real distinction in the context of dismissal for long-term sickness where the employee is disabled within the meaning of the 2010 Act. The law is complicated enough without parties and tribunals having routinely to judge the dismissal of such an employee by one standard for the purpose of an unfair dismissal claim and by a different standard for the purpose of discrimination law.[424]

The judgment went on to explain that differences between the tests of reasonableness and proportionality should not be over-emphasised, as both allowed respect for the actions of the decision-maker and as such, should not usually lead to different results in this context.[425] Quite how such argument can be squared with the contrasting theoretical doctrines of reasonable responses and proportionality as discussed earlier in this chapter is unclear.[426]

However, what is clear is that the Court of Appeal believes that factors such as impact of sickness absence on the employer, and the question of how long they should wait before dismissing, are common matters for both unfair dismissal and discrimination claims.[427] Other case law from the EAT has established similarly that issues such as the

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[424] *Bolton St Catherine's Academy v O'Brien* [2017] EWCA Civ 145; [2017] ICR 737 [53] (Underhill LJ).

[425] Ibid.

[426] The *Homer* decision (*Homer v Chief Constable of West Yorkshire Police* [2012] UKSC 15; [2012] 3 All ER 1287) was cited in argument during *Bolton*, but notably, was not referred to in the final judgment.

[427] *Bolton* (n 424).

consideration of alternative methods of working,[428] and the presence of implied terms regarding contractual sickness benefits,[429] will likewise be considered under both tests. It is unsurprising therefore, that other than *CRI*,[430] all dual claims for sickness absence dismissal considered for this dissertation have resulted in the same result – either success or failure – for both claims.[431] In practice, the tests of reasonable responses and proportionality are very similar when applied to sickness absence situations. In *Birmingham City Council v Lawrence* for example, the EAT felt bound by *Bolton* to conclude that if a tribunal's findings on proportionality were unsafe, then this meant that findings on reasonable responses must be unsafe also.[432]

4.2.2 Conduct

At first glance, case law on dual claims involving conduct dismissals appears to follow a similar pattern. In the majority of cases considered for this dissertation, the results of reasonable responses and proportionality tests have likewise produced the same result – whether success or failure – for each claim. Sometimes, such as in the cases of *Hensman* and *Asda,* these results are based on very similar analysis for each claim by the tribunal.[433] In *Risby,* the EAT described a 'substantial degree of overlap between the two statutory questions' which meant that a proportionality decision on alternative options to dismissal could potentially change the result of a reasonable responses analysis.[434]

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[428] *Ali v Torrosian & others (t/a Bedford Hill Family Practice)* (EAT, 2 May 2018).
[429] *Awan v ICTS UK Ltd* (EAT, 23 November 2018).
[430] *CRI* (n 408).
[431] *Monmouthshire County Council v Harris* (EAT, 23 October 2015); *obiter* remarks in *General Dynamics Information Technology Ltd v Carranza* [2015] ICR 169 (EAT); *Bolton* (n 424); *Birmingham City Council v Lawrence* (EAT, 2 June 2017); *Reid v Lewisham London Borough Council* (EAT, 13 April 2018); *Ali* (n 428); *Awan* (n 429).
[432] *Birmingham* (n 431).
[433] In *Hensman v Ministry of Defence* [2014] Eq LR 650 (EAT), both unfair dismissal and discrimination awards were successfully appealed on grounds that the original tribunal had not given enough consideration to the employer's reasons for dismissal. In *Asda Stores Ltd v Raymond* (EAT, 13 December 2018), the employee's success in both unfair dismissal and discrimination claims was based on health considerations and errors in the employer's reasoning.
[434] *Risby v Waltham Forest London Borough Council* (EAT, 18 March 2016) [9] (Mitting J).

However, at other times the EAT has considered issues of reasonableness and proportionality in quite separate ways. For example, in *Burdett v Aviva Employment Services,* where an employee with schizophrenia had committed very significant misconduct as a result of not taking prescribed medication, success in his unfair dismissal claim was largely based on the employer's failure to consider the lack of wilful culpability involved.[435] By contrast, the success of his claim for discrimination arising from disability arose principally because the employer did not consider alternative methods of achieving their legitimate aim other than dismissal.

The recent Court of Appeal judgment in *York* was a significant development in this subject. [436] Here, a disabled teacher was dismissed after showing pupils an inappropriate film in class. Crucial factors affecting both claims were the perceived relationship between the employee's disability and his conduct, and the level of remorse and reflection shown by him afterwards. The unfair dismissal claim failed because the tribunal decided that the employers' opinions on these matters were within the band of reasonable responses and as such, could not be further questioned. However the discrimination claim succeeded because the tribunal applied its own proportionality assessment of the relevant evidence (including medical evidence unavailable to the employer when dismissing), which led it to disagree with the employer's views. The Court of Appeal approved of both approaches, emphasising that the tests of proportionality and reasonableness were 'plainly distinct'. [437] Contradictory guidance from *Bolton* discussed above was considered by Sales LJ, but was distinguished on the facts of the case.[438] Given the quote from Underhill LJ in section 4.2.1 above, these distinguishing facts presumably must relate to the reason for dismissal.[439]

[435] *Burdett v Aviva Employment Services Ltd* (EAT, 14 November 2014).
[436] *York City Council v Grosset* [2018] EWCA Civ 1105; [2018] 4 All ER 77.
[437] Ibid [55] (Sales LJ).
[438] Ibid.
[439] See text to n 423.

4.3 Potential future directions for dual claims

The Court of Appeal thus appears of the opinion that comparisons between the tests of reasonableness and proportionality will depend on the employer's reason for dismissing the employee. In sickness absence cases, the tribunal's analysis will be very similar for each test, yet in conduct situations they are likely to be quite different.[440] Given the substantial theoretical differences between reasonableness and proportionality explored so far in this dissertation, this guidance may be considered as lacking in principle. It is not easy to see why the interaction between the two tests should differ so markedly when sickness absence and conduct situations are compared. In other words, if a dismissal for conduct can be reasonable but not proportionate, why should it be different for a dismissal due to absence? It is likely that further clarification on this point will be required from the higher courts in the future.

A particular area of note to consider will be how the tests differ in terms of evidence tribunals can consider, and how they use it. For example, *York* implies that evidence obtained post-dismissal will be acceptable for a discrimination claim, but not an unfair dismissal one.[441] Likewise, it implies that the opinions in an employer's witness statement must be respected for the latter, but not necessarily for the former.[442]

If different standards are applied to unfair dismissal and discrimination claims, this may create additional complexity for employers when dismissing staff. That is possibly a driver for some courts and tribunals to deliberately ensure that dual claim situations do not create two different results.[443] Indeed, it could be argued that in cases such as *Asda* (where the EAT unusually upheld a tribunal's decision to reject some employer interpretation of evidence under the unfair dismissal claim), the tests of either reasonableness or proportionality have been softened in order to ensure consistent

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[440] *York* (n 436).
[441] Ibid.
[442] Ibid.
[443] *Bolton* (n 424) [53] (Underhill LJ). See also comments within Sedley LJ's dissenting opinion in *Orr* (n 391) [18] (Sedley LJ).

outcomes for both claims.[444] If this was indeed the case, and it continued over time, then this could affect the long-term development of one, or both areas of the law.

Another interpretation of the Court of Appeal's position would be that it reflects general inconsistency in the application of the reasonable responses test. As chapter two demonstrated, it is much rarer for dismissals in conduct situations to be found unfair on grounds of substantive fairness than it is for dismissals in long-term absence situations.[445] Tribunals are rarely able to argue that dismissal for a particular act of misconduct would be outside of the band of reasonable responses without any procedural concerns to draw on. Yet the similar question of whether the employer waited long enough before dismissing someone for long-term absence (in procedurally correct circumstances) is not only accepted as legitimate under the test, but is at the forefront of case law in that area. Therefore when both types of dismissal are considered under a proportionality analysis, sickness absence cases will often produce the same result as in unfair dismissal, whilst conduct cases could be quite different. Again, it is possible that the highlighting of this inconsistent trend could result in developments in how one or both tests are applied in the longer term.

4.4 Chapter Conclusion

Theoretically the tests of reasonable responses and proportionality are distinct in law. However, in practice the relationship between them proves to be complex, and likely to develop over time. It is possible that the on-going interaction between unfair dismissal and discrimination claims may result in long-term changes into how courts apply the tests of proportionality and reasonableness. Even if this is not the case, employers may find unravelling the law of dismissal a much more complex process in the future. Thus, it is an area of law that deserves continued observation.

[444] *Asda* (n 433).

[445] See sections 2.3.1 and 2.3.2.

Conclusion

5.0 Summary of findings

This dissertation began with the aim of identifying exact differences between a dismissal that was reasonable, and one that was a proportionate means of achieving a legitimate aim. The former is relevant for unfair dismissal claims under the ERA, and the latter is relevant for some discrimination claims under the EqA. The preceding analysis has demonstrated that such differences are easier to describe in theory than in practice.

Chapter one explained the background to both unfair dismissal and anti-discrimination law, and how both might offer legal protection to those dismissed from employment. Yet the underlying statutes are distinct. The ERA sought to provide avenues for individual dignity and autonomy in the workplace. The EqA was designed to provide more than this: to enforce societal expectations of equality and thus positively shape the behaviour of organisations. From the start, it was clear that claims of unfair dismissal and discrimination, though potentially overlapping, are different in various ways. Many individuals will meet the criteria for one but not the other. Where someone meets the criteria for both, they could hypothetically bring a dual claim.

Chapter two examined ERA s 98(4) and its pivotal importance to unfair dismissal claims. Interpretation of this subsection has been consistently in line with the *Iceland* reasonable responses test.[446] This is, that tribunals must consider the decision to dismiss from the perspective of a reasonable employer and not substitute its own opinion for that. Reasonableness is therefore a wide concept with few boundaries, other than those posed by procedural expectations. The test has been criticised for limiting the power of employees to challenge dismissal, but is ultimately a settled concept that is likely to survive the challenge of *Reilly*.[447]

[446] *Iceland Frozen Foods Ltd v Jones* [1983] ICR 17 (EAT).

[447] *Reilly v Sandwell Metropolitan Borough Council* [2018] UKSC 16; [2018] 3 All ER 477.

Next, chapter three carried out a similar analysis of proportionate means and legitimate aim within the EqA. Due to European legislation and case law, this theoretically requires a strict test of proportionality in relevant dismissal cases. However, UK courts and tribunals have been historically reluctant to apply this. This may be partly because proportionality as defined, with its limitations on cost as an acceptable legitimate aim, poses intrinsic difficulties in situations such as redundancy and absence dismissals. Whilst over time the direction of case law has gradually moved closer to the *Bilka* test,[448] less structured balancing exercises are still regularly used in practice and this arguably weakens protection for dismissed employees. It is likely that interpretations of this area of law will continue to develop, and the UK's planned exit from the EU may impact on this.

Finally, in chapter four, the tests of reasonable responses and proportionality were directly compared. In theory they are very different. However, analysis of dual claim situations for unfair dismissal and discrimination demonstrated inconsistent and confusing interactions between them in practice. Court of Appeal guidance in conduct and sickness absence dismissals appears contradictory, and no clear reason has been provided for this. It was suggested though, that the explanation may lie either in judges' reluctance to make different conclusions on each claim when applied to the same facts, or historical inconsistencies in the application of the reasonable responses test. In either case, it seems likely that future dual claim situations will eventually force higher courts to confront this inconsistent reasoning, and, as such, may develop the application of one, or both, legal tests.

5.1 Implications

As has been argued, the reasonable responses test is settled law with authority extending all the way to the House of Lords. Therefore, it is hard to imagine any significant change to its application in the future. However, given the level of inconsistency within existing applications of the proportionality test, combined with likely uncoupling of UK case law on equality from that of the CJEU caused by 'Brexit',

[448] Case 170/84 *Bilka-Kaufhaus GmbH v Weber von Hartz* [1986] ECR 1607.

it seems more probable for future developments to occur in that area. Thus, one possibility is an eventual softening of the proportionality test to bring it more in line with notions of reasonableness. This, reflecting the Court of Appeal thinking in *Bolton*, would help to ensure that dual claims for both unfair dismissal and discrimination did not lead to two different results at tribunal, giving greater certainty and clarity for employers when managing their workforce.[449] Its impact on equality in those workforces might be less positive.

However, higher courts in the future may alternatively prefer to adopt a *York* approach that highlights the distinctiveness of both ERA and EqA, allowing for their differing underlying purposes, and explicitly sanctioning the concept that claims under each will involve separate legal tests.[450] Such a result would make managing dismissal more complex for employers, but would be advantageous for claimants and disadvantaged groups in general.

5.2 Final remarks

Overall, it could be said that this dissertation has not been entirely successful in its quest to identify precise differences between reasonable responses and proportionality when applied to dismissal situations. However, it does instead suggest that the relationship between both legal tests is fascinatingly complex, and deserving of study.

[449] *Bolton St Catherine's Academy v O'Brien* [2017] EWCA Civ 145; [2017] ICR 737.
[450] *York City Council v Grosset* [2018] EWCA Civ 1105; [2018] 4 All ER 77.

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Wednesbury Corp v Ministry of Housing and Local Government (no. 2) [1966] 2 QB 275 (CA)

Western Excavating (ECC) Ltd v Sharp [1978] QB 761 (CA)

Whitbread Plc (t/a Whitbread Medway Inns) v Hall [2001] EWCA Civ 268; [2001] ICR 699

Willams v Compair Maxam Ltd [1982] ICR 156 (EAT)

Willow Oak Developments Ltd (t/a) Windsor Recruitment v Silverwood [2006] EWCA Civ 660; [2006] ICR 1552

Winterhalter Gastronom Ltd v Webb [1973] ICR 254 (NIRC)

Woodcock v Cumbria Primary Care Trust [2012] EWCA Civ 330; ICR 1126

Wrexham Golf Co Ltd v Ingham (EAT, 10 July 2012)

X v Y [2004] EWCA Civ 662; [2004] ICR 1634

York City Council v Grosset [2018] EWCA Civ 1105; [2018] 4 All ER 77

Glossary of abbreviations used

CJEU: Court of Justice of the European Union

EAT: Employment Appeal Tribunal

ECJ: European Court of Justice

EqA: Equality Act 2010

ERA: Employment Rights Act 1996

EU: European Union

PCP: Provision, criterion, or practice

SOSR: Some other substantial reason

Has the Supreme Court condemned the rule from Pinnel's Case to irrelevancy? An Examination of Rock Advertising v MWB Business Exchange Centres and its effect on the Part Payment of Debt Rule, Promissory Estoppel, and No Oral Modification Clauses.

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This project was submitted for the qualification of MLaw at Northumbria University.

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Introduction

Varying a contract in English law has many unclear aspects. The law has developed in a way where one principle is pitted against another. Whether it is the practical benefit rule or promissory estoppel against the part-payment of debt rule, or No Oral Modification ("NOM") clauses against promissory estoppel. *Rock Advertising v MWB Business Exchange Centres*[1] considered all of these issues. The part-payment rule receives greater focus in this dissertation. The law is more unclear when compared to the position of NOM clauses, both before and after this decision. Further, promissory estoppel receives more attention as it affects both the part-payment rule and NOM clauses. This dissertation evaluates the state of promissory estoppel and the part-payment rule before this decision and it will reveal that *Rock* has left them ambiguous. It also examines the position of NOM clauses following *Rock*.

Chapter 1 explains the origin of promissory estoppel and how it became significant. Its importance was enhanced when it was first used to undermine the part-payment rule. It will then be explored how its effect on the rights of promisors remains ambiguous. Its alleged extinctive nature undermines the part-payment rule, but it provides insight on why it is regarded as important. In chapter 2, the position of the part-payment rule before *Rock* will be analysed. Whilst the rule was preserved, the validity of the part-payment rule was severely undermined by the practical benefit rule and promissory estoppel. Chapter 3 will explore the reasoning of each court leading up to the Supreme Court in *Rock*, before evaluating the academic response. Interestingly, whilst the Supreme Court overruled the decision on NOM clauses, it appears to leave the Court of Appeal judgment on consideration intact. Its indication that the part-payment rule needs re-examining, combined with the Court of Appeal judgment, significantly doubts it. It will also be seen the Supreme Court's ruling on NOM clauses contains some ambiguity. Chapter 4 will explore the effect this ruling had on the part-payment rule; chapter 5 will explore its effect on NOM clauses. Promissory estoppel is addressed in both chapters 4 and 5.

Chapter 4 has three main arguments: The part-payment rule is not good law; the law is trying to evolve towards the practical benefit rule; and promissory estoppel should be relied upon until this evolution. It concludes that the law underpinning the part-payment rule should be

[1] [2018] UKSC 24 (SC) (*Rock*).

overruled. Chapter 5 will explore the arguments against the Supreme Court. It will be seen, however, that despite the Court of Appeal's ruling, many still favoured and recommended using NOM clauses. The arguments for NOM clauses are then explored, before evaluating if Briggs' approach should be preferred over Sumption's. A key aspect to this analysis is the practicality of NOM clauses, therefore, this chapter draws on the opinions of legal practitioners alongside academics.

Methodology

Rock was decided in May 2018 and I commenced this dissertation the following June. Much of the academic discussion on the case was not released until late 2018. This impacted my research approach. First, I gained an overview of the law on promissory estoppel and the part-payment rule, using textbooks *Chitty on Contracts*[2] and *Cheshire, Fifoot and Furmston's Law of Contract*.[3] It should be noted this is not the newest edition of *Chitty*, as the newest was published 24 October 2018 but did not become available to me until January 2019. However, the newest edition did not substantially change my research findings and only added to my discussion in chapter 3. These books provided key cases and issues to examine for chapters 1 and 2. Using Lexis Nexis, I was able to access a list of cases that had considered these key cases. This expanded my parameters providing a firm notion of the law to write chapters 1 and 2. However, I researched academic debate for chapter 2. Databases Westlaw and Lexis Nexis provided many journal articles, alongside the textbooks *Furmston* and *Great Debates in Contract Law*.[4] Whilst writing these chapters, some articles on *Rock* started to release. Some were already in the New Law Journal, but now I had more substantive pieces to inform my writing at the end of chapter 3. My research developed as more articles were released at the end of 2018. These articles informed my analysis in chapters 4 and 5. Finally, I reference economic points, but these arguments are supported by legal scholars.

[2] H G Beale (ed), *Chitty on Contracts Volume 1, General Principles* (31st edn, Sweet & Maxwell 2012) (*Chitty*).
[3] M Furmston, *Cheshire, Fifoot, & Furmston's Law of Contract* (17th edn, OUP 2017) (Furmston).
[4] J Morgan, *Great debates in contract law* (2nd edn, Basingstoke 2015).

Chapter 1

When forming contracts in English law, there are three important aspects: An agreement,[5] consideration, and an intention to create legal relations. A key component of English contract law is consideration. Consideration is not only required for forming contracts however. Variations of a contract also require consideration. Without it, any agreement to vary a contract would be unenforceable.[6] Yet, some contractual variations are not supported by consideration, but can still have legal effects. Under the common law, such variations without consideration may 'arise because the promise by a party to relinquish… his rights under a contract amounts to a "waiver".'[7] This approach of waiver under the common law is said to be less satisfactory than the approach developed in equity.[8]

Equity is a concept that can be traced back to the Court of Chancery.[9] This court is known for developing the doctrines of equity,[10] it being a court of equity itself[11] some of which still exist.[12] The Court of Chancery, however, was dissolved and its function became part of the Chancery Division of the High Court by way of the Supreme Court of Judicature Acts 1873 and 1875.[13] High Court judges could now rule on what was equitable. Their decisions, however,

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[5] Of which consists of a legally valid offer and acceptance.

[6] Consideration is one of the requirements for a validly held contract: The others being offer and acceptance, an intention to create legal relations, capacity, and legality. For further discussion of the need for consideration to vary a contract see, *Chitty* (n 2) 342-345.

[7] *Chitty* (n 2) 345 at 3-081: Waiver can refer to variations supported by consideration however; for further discussion as to the nature of variations under the common law, see *Chitty* (n 2), 345-347.

[8] *Ibid* 347 at 3-085; the reason for the unsatisfactory common law approach is due to the distinction between waiver and forbearance: *Chitty* (n 2), 345-346 particularly the discussion at 3-084; although, there is an argument made to the contrary, see A J Phillips, 'Resurrecting the doctrine of common law forbearance' (2007) 123 LQR 286, 313.

[9] A H Marsh, *History of the Court of Chancery and of the Rise and Development of the Doctrines of Equity* (accessible via HeinOnline, Carswell & Co 1890) 12 (Marsh); for a discussion on how the Court of Chancery first originated see also 6-17.

[10] Courts and Tribunals Judiciary, 'The Chancery Division: History' (Courts and Tribunals Judiciary website) <https://www.judiciary.uk/you-and-the-judiciary/going-to-court/high-court/the-chancery-division/history-cd/> lasted accessed 14 December 2018. The constituent doctrines being: Estoppel by representation, see S Bower and Turner*, Estoppel by Representation* (3rd edn, LexisNexis 1977) (Bower and Turner); estoppel by convention, see *Chitty* (n 2) 367-371 at 3-107; and proprietary estoppel see *Chitty* (n 2) 391ff starting at 3-137.

[11] This is somewhat self-explanatory as the Court of Chancery was set up alongside the Courts of Common Law, see Marsh (n 9) 12-13; for reference to it as such, see also The Editors of Encyclopaedia Britannica, 'Encyclopaedia Britannica' (Last updated 19 October 2018) <https://www.britannica.com/topic/Chancery-Division> last accessed 14 December 2018 (Editors of Britannica).

[12] See Editors of Britannica (n 11). Although they are limited to commonwealth jurisdictions.

[13] These Acts have been repealed since. The legislation repealing the 1873 Act: the Statute Law Revision (No. 2) Act 1893 (repealed); the Supreme Court of Judicature (Consolidation) Act 1925, s.226 and sch. 6 (repealed in part); the Limitation Act 1939, s. 34(2) and (4) (repealed in part); the Administration of Justice Act 1965, s. 34(1) (repealed in part); the Rules of the Supreme Court (Revision) SI 1962/2145, sch. 5 (repealed); and the Rules of

were subject to the higher courts. The satisfactory approach that equity provides on contractual variations is promissory estoppel.

Promissory Estoppel

There is debate on what the true naming of this doctrine should be.[14] It was first referred to as a 'principle of Equity' or a 'relief in Equity'.[15] Reference to it as an estoppel was not seen until *Central London Property Trust v High Trees House*.[16] It was subsequently referred to as 'quasi-estoppel' or 'equitable estoppel' [17] and it had various names in *Tool Metal Manufacturing Co v Tungsten Electric Co*.[18] It was first called promissory estoppel in *Dean v Bruce*,[19] by Lord Denning. Judicial support exists for calling it promissory estoppel, because "equitable" may refer to two different estoppels.[20] However, its naming is still potentially misleading given its analogy with estoppel by representation. [21] Nevertheless, this dissertation will call it promissory estoppel. [22]

Promissory estoppel centres on the notions of fairness and equity in the context of contractual variations. The courts look to the conduct of one party and whether its effect on the position of the other party is inequitable. Such conduct concerns the rights and duties of

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the Supreme Court (Revision) SI 1965/1776, sch. 2. The 1875 Act was repealed by the Supreme Court of Judicature (Consolidation) Act 1925, s. 226 and sch. 6 (repealed in part).

[14] Furmston (n 3) 135.

[15] *Hughes v Metropolitan Railway Co* (1877) 2 App Cas 439 (HL) 447 (Lord Cairns LC) and 452 (Lord Selborne) respectively (*Hughes*).

[16] [1956] 1 All ER 256 (KBD) 258 and 259 (*High Trees*).

[17] See *Combe v Combe* [1951] 1 All ER 767 (CA) (*Combe*); also see *Société Italo-Belge pour le Commerce et l'Industrie SA v Palm and Vegetable Oils (Malaysia) Sdn Bhd (The Post Chaser)* [1982] 1 All ER 19 (QBD) 25 (Goff J) (*The Post Chaser*).

[18] [1955] 2 All ER 657 (HL) 661-662 (Viscount Simonds) (*Tool Metal*): equitable arrangement; equitable principle and an equitable doctrine; see also *Emmanuel Ayodeji Ajayi v R T Briscoe (Nigeria) Ltd* [1964] 3 All ER 556 (PC) 559 (Lord Hodson) (*Briscoe*): '[T]he principle, which has been described as quasi estoppel and perhaps more aptly as promissory estoppel'.

[19] [1951] 2 All ER 926 (CA) 928 (Lord Denning): 'I ought perhaps to explain that I was there only considering what is sometimes called a promissory or equitable estoppel'; see also, *Durham Fancy Goods Ltd v Michael Jackson (Fancy Goods) Ltd* [1968] 2 QB 839 (QBD) 847 (Donaldson J): 'In my judgment the principle of equity upon which the promissory estoppel cases are based'; further evidence can be seen in *Brikom Investments Ltd v Carr* [1979] QB 467 (CA) 471 at 472, 477, 478 (Lord Denning), and 489-490 (Roskill LJ) (*Brikom*).

[20] See, *Re Vandervell's Trusts, White v Vandervell Trustees Ltd (No 2)* [1974] 1 All ER 47 (ChD) 73-74 (Megarry J).

[21] *Chitty* (n 2) 361-363 at 3-103.

[22] Following many academics, for example see Bower and Turner (n 10) 383-384: 'Lord Denning… canvassed… the doctrine of promissory estoppel'; see *Chitty* (n 2) 347 at 3-086: 'referred to as "promissory" … estoppel'.

a relationship arising from a contract.[23] The leading case is *Hughes* v *Metropolitan Railway Co*.[24]

> [If one party leads the other] to suppose that the… rights arising under the contract will not be enforced… the person who… might have enforced those rights will not be allowed to enforce them where it would be inequitable.[25]

Hughes provides a foundation for promissory estoppel. The key function is that resorting back to the previous contractual terms would be "inequitable" given the promisee's reliance on the new promise. The doctrine hinges on this requirement for a reliance.[26]

Whilst the requirements for the doctrine to apply were yet to be set in stone, what was clear was that where one party promised another that they would refrain from doing something, the promisor is prevented from reverting back to the original promise, because it would be inequitable given the promisee's reliance.[27] Promissory estoppel is best explained as an equitable 'forbearance'[28] or 'relief'[29] from the enforcing of an original promise, because of the inequitable circumstances it would put the promisee in for relying on the new promise.

The History of Promissory Estoppel

Promissory estoppel gained much attention when the *obiter* of Denning J,[30] in *Central London Property Trust v High Trees House*,[31] appeared to question the part-payment of debt rule.[32] Controversy stemmed from the fact that this rule came from the House of Lords. Its notoriety for questioning the highest court in the land is clear from subsequent reaction to it. It was

[23] E Peel, *Treitel: The Law of Contract* (14th edn, Sweet & Maxwell 2015) 119, para. 3-077 (*Treitel*).
[24] *Hughes* (n 15).
[25] *Ibid* 448.
[26] See chapter 4 of this dissertation argues the requirement for reliance should necessitate the existence of a detriment.
[27] The common example is, of course, not to enforce their existing contractual agreement, however there are other instances of this doctrine in effect. See the example given in J Glister, 'Twinsectra v Yardley: trusts, powers and contractual obligations' (2002) 4 TL 223, 229: 'If a borrower relies to his detriment on a lender's contractual promise not to revoke the borrower's licence, and the lender does so revoke, then a promissory estoppel may arise.'
[28] As per the sub-heading title choice of words in *Chitty* (n 2) 347 at 3-085.
[29] As per the submissions of Mr Southgate QC and Mr Bowen, on behalf of the appellant, in *Hughes* (n 15).
[30] As he then was; he later became a Lord Justice of Appeal and then the Master of the Rolls.
[31] *High Trees* (n 16).
[32] This principle is discussed at length in chapter two. It is not this chapter's scope to analyse the principle.

named amongst the fifteen most important cases in the last 150 years.[33] It was described as a 'ground-breaking ruling'.[34] However, its validity is open to debate.

In *Combe v Combe*,[35] Asquith LJ thought '[i]t… unnecessary to express any view as to [its] correctness.'[36] He remained neutral on whether it was good law.[37] However, overall *Combe* seemed to regard *High Trees* as good law, albeit, most of this treatment came from Denning.[38] It has been applied in many cases since,[39] most notably in *The Post Chaser*.[40] Denning was described as 'breath[ing] new life into… [promissory] estoppel.'[41] His *obiter* was welcomed and, arguably, became good law in *Collier v P & MJ Wright*.[42] It was described as 'brilliant' by Arden LJ.[43] Clearly, what began as no more than a mere principle of equity now has a firm basis in contract law. Yet, much is to be said about it still. Lord Hailsham LC stated:

> The time may soon come when the whole sequence of cases… on promissory estoppel…, beginning with *High Trees*, may need to be review[ed]… I do not mean to say that any are to be regarded with suspicion. But as is common with an expanding doctrine they do raise problems of coherent exposition which have never been systematically explored.[44]

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[33] As of 2015. See, Lord Neuberger, 'Reflections on the ICLR Top Fifteen Cases: A Talk to Commemorate the ICLR's 150th Anniversary' (6 October 2015), para. 9, available at <https://www.supremecourt.uk/docs/speech-151006.pdf>.

[34] G Bindman, 'A Rare Judge' (2018) 168 New Law Journal 22; he may, however, have drawn inspiration from earlier case law indicating he was not as bold and controversial as would seem, see M Hughes, 'Contracts, Consideration and Third Parties' 3 JIBFL 79 where Hughes indicated Denning may have drawn inspiration from *Hirachand Punamchand* v *Temple* [1911] 2 KB 330 (CA): '[it was a] short step from [this case] to the concept of promissory estoppel in High Trees.'

[35] *Combe* (n 17).

[36] *Ibid* 225.

[37] See also his subsequent remarks that the case does not help the plaintiff at *ibid*: 'But assuming, without deciding, that it is good law, I do not think, however, that it helps the plaintiff at all.'

[38] Who, of course, also presided over *High Trees*; see, *Combe* (n 24) 769 (Denning LJ): '… I am inclined to favour the principle stated in the *High Trees case*…'

[39] See: *Re Wyvern Developments Ltd* [1974] 1 WLR 1097 (Ch); *Argy Trading Development Co Ltd* v *Lapid Developments Ltd* [1977] 3 All ER 785 (QBD); *Brikom* (n 19); *Syros Shipping Co SA* v *Elaghill Trading Co (The Proodos)* [1981] 3 All ER 189 (QBD); *Smith* v *Lawson* [1997] NPC 87 (CA); it also received application outside England and Wales, see the case of the India Supreme Court *State of Arunachal Pradesh* v *Nezone Law House* [2008] INSC 553 (SC of India); and, most recently *Dunbar Assets plc* v *Butler* [2015] EWHC 2546 (Ch).

[40] *The Post Chaser* (n 17).

[41] *Ibid* 27 (Goff J).

[42] [2008] 1 WLR 643 (CA) (*Collier*).

[43] *Ibid*, para. 42.

[44] *Woodhouse AC Israel Cocoa Ltd SA* v *Nigerian Produce Marketing Co Ltd* [1972] AC 741 (HL) 758; the validity of these words in even more apparent after the discussion in chapter 5.

The appraisal of *High Trees* come from no higher than the Court of Appeal; whereas, the principle *High Trees* doubted has authority in the House of Lords.[45] Hailsham provides valuable insight to the standing of *High Trees*. No doubt it is a doctrine to be welcomed, but its expansion has introduced uncertainty to other areas of law,[46] alongside casting uncertainty on its own effect.

The Effect of Promissory Estoppel

It could be questioned whether promissory estoppel prevents the promisor from reviving their original rights forever, or whether it merely prevents them for a conditional period of time. The importance of this question is seen if it is forever, meaning the doctrine is extinctive. If it *extinguishes* rights and does not *suspend* them, it potentially undermines the part-payment rule.[47]

Denning thought promissory estoppel extinguished rights.[48] Whilst holding this belief, it was clear from *High Trees* that the doctrine only suspended the landlord's right to rent. It was suspensory because the conditions on which the promise was made, those which estopped the landlord,[49] had ceased to exist. The parties found themselves in the same position before the promise was made. Similar was stated long before *High Trees* by Bowen LJ in *Birmingham and District Land Co. v London and North Western Railway Co*:[50]

> The truth is that the proposition [in *Hughes*] is wider than cases of forfeiture… [I]f persons [meet *Hughes*] those persons will not be allowed… to enforce the rights until such time has elapsed, without at all events placing the parties in the same position as they were before.[51]

When a new promise is made in light of events placing the promisee in a different position, if they cease to exist, then the right to rely on the new promise ceases too. Denning appears to mean the doctrine is extinctive if certain circumstances prevail. This is simply another way of saying the doctrine is suspensory. The doctrine can suspend indefinitely, if the circumstances

[45] Discussion as to which way the law ought to reflect is seen in chapter two.
[46] As seen in chapter 2 and 5.
[47] That which is already mentioned in the above discussion on *High Trees* (n 16).
[48] *High Trees* (n 16) 259; he repeated this view, in *D&C Builders Ltd* v *Rees* [1966] 2 QB 617 (CA).
[49] I.e., the war-time conditions, see *High Trees* (n 16) 259.
[50] (1888) All ER 620 (CA).
[51] *Ibid*, at pg. 268.

prevail indefinitely. *Ogilvy* v *Hope-Davies*,[52] however, supports the extinctive side to promissory estoppel in which it was held that 'withdrawal of the waiver was impossible'.[53] The same is clear in *Brikom Investments* v *Carr.*[54] Treitel argues that the right in this case was extinguished because the variation prevented the landlord's right to compel the tenants to contribute to the costs of repairs.[55] It is submitted these decisions are irrelevant, as they are cases of waiver.[56] Arden made it clear that '[it] has the effect of extinguishing'.[57] However, it is submitted the rights would and should only be extinguished to the extent that the inequitable circumstances prevail.

The case for it being suspensory has greater backing from the House of Lords. In *Tool Metal*,[58] it was seen that the original rights could be resumed given that a reasonable notice was provided.[59] Similar was held in *Banning* v *Wright*.[60] The doctrine was stated as suspensory when the promisee can resume their original position.[61] This fits perfectly with Denning's judgment, as if the parties cannot resume their original position arguably the inequitable conditions prevail. *Snell's Equity* provides insight:

> The effect of the doctrine of promissory estoppel can be either [suspensory] or [extinctive]. But it is usually [suspensory]. [T]he promise will only become final and irrevocable if [the promisee] cannot resume his… former position. In this sense… promissory estoppel has much in common with the principle of waiver… which permits a party to revoke any waiver upon reasonable notice to the other party.[62]

Attempts have been made to construe the doctrine in a flexible manner. Promissory estoppel, at the least, suspends rights from being enforced where the promisee cannot resort back to their original position. Conditions creating this position are the inequitable circumstances to

[52] [1976] 1 All ER 683 (ChD).
[53] *Ibid*, 689.
[54] Brikom (n 19).
[55] *Treitel* (n 23), 150-151, see his discussion at 3-115 on pgs 150-151.
[56] *Ibid*; see also, *Brikom* (n 19) 48: 'there was a plain waiver by the landlords…' where Roskill LJ considers as such and he does not resort to the doctrine of promissory estoppel, see *Brikom* (n 19).
[57] *Ibid*, para. 42.
[58] *Tool Metal* (n 18).
[59] As per *Tungsten Electric Co Ltd and Tungsten Industrial Products Ltd* v *Tool Metal Manufacturing Co Ltd* (1954) 71 RPC 273 (QBD) (Delvin J), which Lord Cohen refers to, see *Tool Metal* (n 18) 681.
[60] [1972] 2 All ER 987 (HL) 991ff.
[61] See, *Briscoe* (n 18); in other words, the doctrine is effective until the inequitable conditions no longer persist.
[62] J McGhee (ed), *Snell's Equity* (32nd edn, Sweet & Maxwell 2010), para. 12-014.

which promissory estoppel applies.[63] However, it is submitted the law should distance promissory estoppel from cases of waiver, so it avoids the decisions of *Ogilvy* and *Brikom*. After all, promissory estoppel was developed as a more satisfactory approach than that of waiver to contractual variations. Despite the suggestion in *Snell's Equity* and the ruling of *Collier*, the law should simply resolve that promissory estoppel is suspensory. It can be suspensory for a long time thus achieving the extinctive aspect. Describing it as extinctive, however, has only led to confusion. This is desirable because, ironically, it introduces an equitable outcome to the promisor by allowing the restoration of the original agreement when the new one is too favourable to the promisee. An extinctive effect would open promissory estoppel to exploitation.

The Significance of Promissory Estoppel

One significant aspect is that it is a shield and not a sword:[64] It is a defence only. The other aspect is its effect. The significance arises from the shifted focus of the doctrine on to the part-payment rule; of which *High Trees* questioned. Contrary to the position taken in this dissertation, Arden stated the doctrine extinguished the creditor's right and cited the *obiter* of Denning.[65] If it can be taken to extinguish a creditor's right to the full debt, this potentially undermines *Pinnel's Case*[66] and *Foakes* v *Beer*.[67]

[63] *Ibid*: The prevailing war-time conditions made it inequitable to revert back to the original agreement.
[64] *Combe* (n 17) 772.
[65] *Ibid*, 659 at para. 42.
[66] *Pinnel's Case, sub nom Penny* v *Core* [1558-1774] All ER Rep 612 (Court of Common Pleas) (*Pinnel's*).
[67] (1884) 9 App Cas 605 (HL) (*Foakes*).

Chapter 2

The part-payment of debt rule may seem like an ordinary legal principle, justifying its transition to becoming obsolete as a mere part of legal evolution.[68] It was seen how *Central London Property Trust v High Trees House*[69] may facilitate this. However, the year of *Collier v P & MJ Wright (Holdings)*,[70] frames the part-payment rule in greater importance and attaches more weighting to it over other legal principles. In 2008, western economies faced financial crisis. If a decision in *Collier* favoured debtors, undermining the part-payment rule, it would attract controversy and attention because it would discourage creditors from lending. Creditors would lose the full amount owed when accepting any lesser amount; which during the crisis would have been appropriate for commercial reasons.[71] Any decision impacting creditors and the economy during economic recession would therefore follow the part-payment rule, as *Collier* did. The part-payment rule is more important than the average legal principle. However, it will be seen that its economic role has led to the adoption of a harsh principle, alongside the oversight of the reasoning behind it in *Pinnel's Case*.[72]

In *Pinnel's*, an action of debt was brought by Pinnel against Cole. The debt was on a bond of £16, which was conditional for the payment of £8. Cole argued Pinnel had accepted payment of £5 in full satisfaction of the £8. When faced with the proposition that the payment of smaller sum can be satisfactory to a creditor for the whole debt, Lord Coke created the part-payment rule: '[P]ayment of a lesser sum… cannot be a satisfaction for the whole, because it appears to the judges that by no possibility a lesser sum can be a satisfaction… for a greater sum.'[73] However, the reasoning behind this can be questioned, as will be seen. There are three exceptions to this rule. The gifting of a 'horse, hawk, or robe [can be satisfactory]',[74] the

[68] This is prevalent in other disciplines. Consider the concept of mens rea in criminal law. Its evolution has gone from considering the subjective standpoint of the defendant to disregarding this and considering the objective standards of society. See the overruling of *R* v *Ghosh* [1982] QB 1053 (CA) (which concerns subjectivity) in *Ivey* v *Genting Casinos (UK) Ltd* [2017] UKSC 67 (SC) (*Ivey*).
[69] *High Trees* (n 16) 258 and 259.
[70] *Collier* (n 42).
[71] Those reasons being that it is commercially viable, at least in the housing context, to accept a lesser payment of rent than to forfeit a tenant and seek a new one; see also M Byrne 'Estoppel and Rent Reductions: What are the implications of rent reductions in order to retain valued tenants during the economic downturn? – Issues to Consider' (2014) 19(1) CPLJ 9.
[72] *Pinnel's* (n 66).
[73] *Pinnel's* (n 66).
[74] *Pinnel's* (n 66).

reasoning being anything other than money 'might be more beneficial'.[75] A smaller payment made before the day it is due can be satisfactory and payment at a different location than that initially agreed upon is also satisfactory.[76] The latter has not aged well however. During the 1600s, it was common for debt payments to be made at a specified location, however, now for obvious reasons this is obsolete.

Cole had merely claimed he made a smaller payment in general and that Pinnel had accepted it as satisfactory. Irrespective of whether Pinnel had done that, this did not prevent him from claiming for the remaining amount, because Cole did not fall within any of the exceptions. Therefore, Pinnel was entitled to recover the entire amount. Two centuries later this principle was enshrined in the law.

The House of Lords, in *Foakes v Beer*,[77] affirmed *Pinnel's*. Foakes owed Beer approximately £2090. Foakes requested that Beer give him time to pay the debt and it was agreed that Foakes would pay £500 as part-satisfaction of the £2090[78] and Beer undertook to not take proceedings. Beer, however, claimed interest on the debt. The court of first instance found in favour of Foakes, finding that by reason of the agreement Beer was not entitled to claim interest. The Court of Appeal overruled this due to the lack of consideration. Beer was free to claim interest. However, the initial £500 could have constituted consideration and, in the House of Lords, Lord Blackburn recognised this because a 'prompt payment… may be more beneficial to them than… enforc[ing] payment of the whole.'[79] Despite this, he upheld the Court of Appeal's decision. The £500 was not sufficient consideration. *Foakes* affirmed that a part-payment cannot be satisfactory of a whole debt. But it is worth examining its reasoning.

<u>The Validity of Foakes v Beer</u>

Through critique of *Foakes*, there is critique of *Pinnel's*. The most prominent issue is that the rule is harsh. This is clear when comparing the position of a creditor to a debtor in the context of a leasing; the creditor clearly has the advantageous position. A debtor has two options.

[75] *Ibid*.
[76] *Ibid* 612: 'So if I am bound in 20 pounds to pay you 10 pounds at Westminster and you request me to pay you 5 pounds at the day at York, and you will accept it in full satisfaction of the whole 10 pounds it is a good satisfaction for the whole for the expense to pay it at York, is sufficient satisfaction.'
[77] *Foakes* (n 67).
[78] Alongside paying £150 twice a year until the remaining debt was paid.
[79] *Foakes* (n 67).

They can make a part-payment, but risk the creditor asking for the rest. Or they can incur arrears and risk falling behind on future payments. They also risk losing their occupational rights. It is potentially a lose-lose situation. On the other hand, the creditor can profit from both scenarios. If the debtor makes a part-payment, the creditor, knowing they cannot pay the rest without financial setbacks elsewhere, can profit by pursuing arrears on the amount outstanding. They could go a step further and seek reoccupation. Even if a part-payment is not made, they still benefit since they can pursue arrears and reoccupation. Ferson argues '[*Foakes*] is not only… absurd but it is inconvenient in commercial dealings, and… distasteful to the courts.'[80] This explains why Roberts believes 'many may be uncomfortable… follow[ing] *Foakes'*.[81] This uncomfortableness exists beyond English law too. US law has a rule similar to *Foakes*.[82] US case law has expressed the rule as unjust and oppressive.[83] Further, Ames states that the rule adopts a narrow definition of consideration.[84] It is no wonder why Blackburn recognised a 'prompt payment may be more beneficial'.[85] The problematic nature of the rule can be traced back to *Pinnel's*.

Coke's reasoning for the part-payment rule was that 'it appears to the Judges that by no possibility, a lesser sum can be [satisfactory for]… a greater sum.'[86] Coke might be indicating that it cannot be satisfactory for a particular reason. But it appears instead that he is stating the law is a particular way, because it appears to be so. Simply stating the law is a certain way, because it appears 'by no possibility'[87] that it could not be any other way is not convincing. It would be similar to a judge claiming a defendant should be acquitted for his crime, because it appears to be the case to the judge without giving specific reasons. The reasoning is based on subjectivity, rather than objectivity and public policy consideration. Therefore, whilst Coke likely had the issue of debt satisfaction in mind, it can only be assumed with certainty that his

[80] M L Ferson, 'The Rule In Foakes v Beer' (1921) 31(1) Yale Law Journal 15 (Ferson).
[81] M Roberts, 'Foakes v Beer: Bloodied, Bowed, But Still Binding Authority?' (2018) 29 King's Law Journal 344, 354 (Bloodied).
[82] *Ludington v Bell* (1879) 77 NY 138 (NYCA) 143: 'The doctrine that payment by the debtor of a less sum than the whole amount of the debt will not extinguish the debt… is well established by abundant authority. It is beyond the scope of this dissertation to consider the US law in detail; however, it supports that the part-payment rule is problematic since it is in other jurisdictions. Nevertheless, for further discussion of the US law see Ferson, (n 80).
[83] *Seymour v Goodrich* [1885] 80 Va. 303 (SC of Pennsylvania) 304: 'This rule, being highly technical in its character, seemingly unjust, and often oppressive in its -operation, has been gradually falling into disfavour.'
[84] J B Ames, 'Two Theories of Consideration' (1899) 12 Harvard Law Review 515, 521.
[85] *Foakes* (n 67) 622.
[86] *Pinnel's* (n 66) 613.
[87] *Ibid*.

reasoning is that a part-payment is not satisfactory because it seems to be so. Perhaps Coke thought no benefit could be derived. Blackburn, however, states that 'Coke made a mistake of fact'[88] and refers to a situation where the creditor does stand to benefit from a part-payment. The Lords in *Foakes*, appear to only follow Coke's reasoning out of respect.

Coke is no doubt an esteemed judge, but this renders the reasoning of *Foakes* potentially fallacious. Lord Watson states 'I do not think it… open to this House… to overrule *Pinnel's*, because I am not prepared to disturb that doctrine.'[89] Lord Fitzgerald admits 'it would have been wiser… if the resolution in *Pinnel's* had never been come to',[90] but because it has been 'accepted… for a great length of time… it is not now within our province to overturn it.'[91] Blackburn considered dissenting, but did not because it 'was not satisfactory to the other noble and learned Lords'.[92] The majority of the Lords' reasoning to follow *Pinnel's* is based on the fact they did not wish to disturb the rule or because it has been accepted for a long time. In Blackburn's case, it is because his fellow Lords think these things. These two reasons are founded on respect for Coke, but this simply means it is an appeal to authority fallacy. *Pinnel's* is only affirmed because it was devised by Coke, despite its unconvincing nature. Many cases, of course, are settled by appealing to an authority. This is the nature of case law; however, other reasons exist alongside it. The Lords rely on Coke's reasoning alone. Coke's reasoning is not convincing and the Lords in *Foakes* knew this, evident in the hesitancy of Blackburn and the fact Fitzgerald thought it was wiser it had not been come to. Nevertheless, out of respect for Coke, they followed it. Even the academic Burton, who supports *Foakes*, recognises this: 'the core argument was that… *Pinnel's* ought not to be disturbed due to its history'.[93] This legal principle is undesirable. Not only is it harsh, but its initial reasoning is unconvincing and its affirmation is based on a fallacy.

It makes sense then why the unanimous reasoning in *Foakes* was ignored in *Williams v Roffey Bros*[94] and why it did not prevent Denning from curtailing its authority in *High Trees*.[95]

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[88] *Foakes* (n 67) 617.
[89] *Foakes* (n 67) 623-624.
[90] *Foakes* (n 67) 630.
[91] *Foakes* (n 67) 630; Fitzgerald refers to the fact it has been adopted for 282 years, Foakes 629.
[92] *Foakes* (n 67) 623.
[93] M Burton, 'Practical benefit rides again: MWB business exchange in comparative perspective' (2017) 46(1) Common Law World Review 69, 73 (Burton).
[94] [1991] 1 QB 1 (CA) (*Williams*).
[95] See chapter 1 on the discussion of *High Trees*.

The Practical Benefit Rule

Performance of an existing contractual duty is generally insufficient consideration for a promise. *Stilk v Myrick*[96] held that a promise to pay sailors extra wages for the performance of their 'ordinary [duty] in navigating the ship' cannot be enforced.[97] Making it enforceable would allow a promisee in any situation to underperform their role to the promisor's detriment, unless they agreed to pay them more. Such performance was sufficient in *Hartley v Ponsonby*.[98] Performance was dangerous to their lives, thus exceeding their original contractual duty and constituting consideration.[99] *Williams v Roffey Bros*[100] introduces the concept of a practical benefit.

Glidewell LJ stated consideration can exist for the promise of an additional payment to perform existing contractual duties, where a practical benefit is obtained by the promisor or they avoid a detriment.[101] Where the promisor has received any form of benefit from the completion of the contract, consideration exists for the new promise to pay more. Completion of the contract may seem insufficient and problematic, given that the promisee could simply underperform to ransom for more money, as warned in *Stilk*. Glidewell rebuts this possibility by requiring the absence of economic duress.[102] He considered that *Stilk* and its tie to the Napoleonic wars necessitated its refinement and limitation via the practical benefit rule.[103] Russel LJ added that the rigidity found in *Stilk* is no longer necessary or desirable.[104] Knight is critical of the practical benefit rule, however, because of its consideration of *Stilk*. He claims there is a real danger this rule imports an intention that simply was not there.[105] In particular, the practical difference between *Williams* and *Stilk* is negligible. In *Williams*, it was the performance of a contract, which is exactly what happened in *Stilk*.[106] Such performance was allowed in *Harris v Watson*,[107] but Knight states the seaman in *Harris* were not performing

[96] (1809) 2 Camp 317 (NP) (*Stilk*).
[97] *Ibid*, 318.
[98] (1857) 7 E & B 872 (pre1874).
[99] *Ibid* 877; see also, *North Ocean Shipping Co Ltd v Hyundai Construction Co Ltd* [1979] QB 705 (QB) 714.
[100] Williams (n 101).
[101] The precise words used were to 'obviate a disbenefit', *ibid* 16.
[102] *Williams* (n 101) 16: 'B's promise is not given as a result of economic duress or fraud on the part of A'.
[103] *Ibid* 16.
[104] *Ibid* (n 101) 18.
[105] C Knight, 'A plea for (re)consideration' (2006) Cambridge Student Law Review 17, 18 (Knight).
[106] Ibid.
[107] [1775-1802] All ER Rep 493 (Ct of KB).

what they were contracted to do, hence why it distinguished from *Stilk*.[108] Nevertheless, it was within the remit of *Williams* to limit its application.[109] This criticism is weaker than Knight's other point.

The most powerful argument against the practical benefit rule, Knight argues, is that it damages the fundamental idea of contract. One should perform what they agreed or be made to pay for it. Being awarded something for doing what was already agreed runs contrary to the bargain principle, Knight argues.[110] However, Knight is missing the fact that another fundamental idea of contract is that parties are free to renegotiate their contracts. This aspect is more desirable, because circumstances can change quickly. Kane convincingly states there are economic reasons for settling a debt for less than its face value.[111] It enables the avoidance of statutory proceedings.[112] Whilst this is important, Kane argues it is not economically optimal, as it leads to companies going into administration which decreases productivity.[113] He continues that the law should accommodate transactions that are mutually beneficial, because it accords to an important economic principle.[114] This argument makes commercial sense. Kane's alternative undermines Knight. A practical benefit should apply to a part-payment of a debt, enabling consideration to be found. The courts have done this, indirectly, at the expense of casting more doubt on *Foakes*.[115] The law should depart from *Foakes* completely, as opposed to casting more doubt on it.

There is support for *Williams*. *Furmston* welcomes the decision, arguing there are good commercial reasons to promise more money to ensure performance; finding a new, reliable party is harder and less sensible than maintaining a current one.[116] Yet, equally it seems *Foakes* prevails. A High Court case[117] suggested *Williams* is inconsistent with the principle that consideration must move from the promisee.[118] Further, *Williams* did not refer to *Foakes*. It

[108] Knight (n 105) 18.
[109] *Stilk* (n 97) was decided in the King's Bench Court, its modern-day equivalent being the High Court.
[110] Knight (n 105) 18.
[111] J Kane, 'The rule in Pinnel's Case: the case for repeal, a mistaken preponderance and finding consideration in debt renegotiations' (2014) Dublin University Law Journal 79, 82 (Kane).
[112] Kane (n 111), 82.
[113] Ibid.
[114] The Pareto Optimality principle. It is beyond the scope of this dissertation to explain the Pareto Optimality principle, but nonetheless see Kane (n 111), 82.
[115] As to be seen in chapters 3 and 4.
[116] *Furmston* (n 3) 125.
[117] *South Caribbean Trading Ltd v Trafigura Beheever BV* [2004] EWHC 2676 (CommlCt).
[118] *Tweddle v Atkinson* (1861) 25 JP 517 (Ct of QB).

can be argued it would be unconvincing to extend the practical benefit rule to the part-payment rule. To do so is directly contrary to *Foakes*. It is no surprise then, that in *Re Selectmove*[119] a differently constituted Court of Appeal held that it is 'impossible to extend… *Williams* to any circumstances governed by [*Foakes*].'[120] 'It would in effect leave the principle… without any application.'[121] Whilst *Williams* has been held to not concern the part-payment of debts, it extremely doubts *Foakes*. The fact a Court of Appeal decision can undermine a House of Lords ruling, albeit indirectly,[122] indicates problems with *Foakes* like those explored. Until 2018, the part-payment rule remained perfectly intact through *Selectmove*.

Promissory Estoppel

In *High Trees*, Denning notes how *Foakes* had not considered *Hughes v Metropolitan Railway Co*.[123] This is also recognised in *Collier*.[124] It could be argued *Foakes* is per incuriam for this reason. However, it concerned debts whilst *Hughes* concerned house repairs. Further, this argument is difficult, because Lord Selborne and Blackburn both sat on *Hughes* and *Foakes*. These decisions can exist side by side as expressed in *Collier*; promissory estoppel would be an exception.[125] The promissory estoppel cases instead show that *Foakes* is undesirable. The rule was created in the 1602 and, in 1937, the Sixth Interim Report of the Law Revision Committee expressed the principle must be reconsidered.[126] This was recognised by Denning 10 years later in *High Trees*[127] where its effect was considered. It was submitted it only suspends rights.[128] Promissory estoppel therefore is only a partial answer. However, it does 'provide a way out of the culde-sac created by *Foakes*.'[129]

[119] [1995] 2 All ER 531 (*Selectmove*).
[120] *Ibid* 538.
[121] *Ibid* 538.
[122] *Pinnel's* and *Foakes* were never mentioned in *Williams*.
[123] *Hughes* (n 15); *High Trees* (n 16) 135.
[124] *Collier* (n 42), 656.
[125] *Ibid* 655.
[126] Lord Wright MR, 'Sixth Interim Report on The Statute of Frauds and the Doctrine of Consideration' (1937) Cmnd 5449, paras 33 to 35.
[127] *High Trees* (n16) 135.
[128] *Tool Metal* (n 18); W Swain, 'Contract as promise: the role of promising in the law of contract. An historical account' (2013) Edinburgh Law Review 1, 21 (Swain).
[129] Swain (n 128) 20.

The Position Now

The effect of promissory estoppel makes the part-payment rule seem like an ordinary legal principle and this should be welcomed. *Foakes* has faced similar testing in *Williams*, but it appears intact through *Selectmove*. Perhaps the ambiguity surrounding it is its last armour. An opportunity to the remove this ambiguity was presented to the Supreme Court in *Rock Advertising v MWB Business Exchange Centres*.[130]

[130] *Rock* (n 1)

Chapter 3

Rock Advertising v MWB Business Exchange Centres[131] ruled on two fundamental issues of contract law.[132] It considered No Oral Modification ("NOM") clauses and the tension between the part-payment of debt rule and the practical benefit rule. The practical benefit rule had never reached the Supreme Court until *Rock*.[133] 'The decision was… eagerly awaited [as] it… provide[d] the opportunity for the law to be clarified… [however,] the Court decided the case on other grounds.' [134] These other grounds being on NOM clauses. Interestingly, the consideration point was discussed at length by the Court of Appeal in *MWB Business Exchange Centres v Rock Advertising*.[135] These two issues are complicated. However, ironically, the facts of the case 'are straightforward.'[136]

MWB[137] had an office space and rented a suite to Rock.[138] The terms of the licence gave Rock occupation for a fixed term of 12 months starting on 1 November 2011 and Rock was to pay a fee of £3500 per month for the first three months. After that, they were to pay £4,333.44 for the remaining months. By February 2012, Rock had accumulated arrears exceeding £12,000. Rock proposed to MWB a revised schedule of payments, which meant MWB received payment that would be worth slightly less: It would be a part-payment of a debt. Rock and MWB had further telephone discussions. Rock claimed MWB had agreed to vary the licence according to its proposal during these discussions. MWB rejected this and stated they treated it as 'a proposal in a continuing negotiation'.[139] Higher management in MWB later rejected the proposal. The key issue is that the alleged agreement took place orally. Clause 7.6 of the licence agreement contained a NOM clause.[140]

[131] *Rock* (n 1).
[132] *Rock* (n 1) para. 1.
[133] Bloodied (n 81) 350.
[134] S Foster and A Reilly, 'Show a little consideration: the Supreme Court's refusal to address the rule on part payment of a debt' (2018) Coventry Law Journal 1. (Show a little).
[135] [2016] EWCA Civ 553 (CA). (*MWB*).
[136] *MWB* (n 135) 555.
[137] The proposal was made to a credit controller employed by MWB, Natasha Evans.
[138] Which was represented by the company's sole director, Mr Idehen.
[139] *Rock* (n 1), para 3.
[140] *Rock* (n 1), para. 2: 'This Licence sets out all of the terms as agreed between MWB and [Rock]… All variations to this Licence must be agreed, set out in writing and signed on behalf of both parties before they take effect.'

It required that any changes to the licence must be made in writing and signed by both parties. Its purpose is to prevent any changes being made orally. MWB contended no valid oral variation had been made, because of clause 7.6. MWB later locked Rock out of the premises due to its arrears. Subsequently, it terminated the licence and pursued the arrears, but Rock counterclaimed for wrongful exclusion.[141] Both claims depended on whether the agreement was legally effective,[142] which depended on three issues.

The first concerned NOM clauses. Rock relied on the principle of party autonomy.[143] Despite the NOM clause, parties are free to vary orally with each other's consent. They relied on the judgment that courts are not always required to give effect to a contractual term which specifies a particular format of variation, as in *World Online Telecom v I-Way*.[144] MWB relied on *United Bank v Asif*.[145] The parties must have shown that the oral agreement was inconsistent with the original licence and that they also agreed to waive the requirement for a variation to be in writing. This second aspect was missing.[146] They made further arguments against *Globe Motors Inc v TRW LucasVarity Electric Steering*,[147] which favoured Rock's case.

The second was the consideration point. Rock argued that the new agreement brought practical advantages to MWB, therefore it was supported by consideration.[148] On the other hand, MWB contended there could be no consideration, because of the rule in *Foakes v Beer*.[149]

Arguments were also made in relation to promissory estoppel.[150] These arguments attach onto both the first and second issues. It was used as a defence to the assertion of a NOM clause and the part-payment rule. However, each court found that Rock could not claim this defence as they took only 'minimal steps'[151] and Rock could not say it 'suffered any prejudice

[141] *Rock* (n 1), 3.
[142] *Rock* (n 1), 3.
[143] *MWB* (n 135), 607 at G.
[144] [2002] EWCA Civ 413 (CA). See also, *Spring Finance Ltd v HS Real Co LLC* [2011] EWHC 57 (Comm); *Energy Venture Partners Ltd v Malabu Oil and Gas Ltd* [2013] EWHC 2118 (Comm) (*Malabu Oil*); *Virulite LLC v Virulite Distribution Ltd* [2014] EWHC 366 (QB) and *Globe Motors Inc v TRW LucasVarity Electric Steering Ltd* [2016] EWCA Civ 396 (CA) (*Globe*).
[145] (unreported) 11 February 2000 (United).
[146] *MWB* (n 135) 607 at A.
[147] *Globe* (n 144).
[148] *MWB* (n 135) 608; *Williams* (n 94).
[149] *Foakes* (n 67).
[150] See *MWB* (n 135) 607-608.
[151] *Rock* (n 1), 16.

by relying [on the agreement].'[152] This doctrine formed a more integral part of the two lower courts' discussions; the Supreme Court's ruling depended on NOM clauses and small discussion was given to consideration and estoppel.[153]

County Court

Judge Moloney found in favour of MWB. Interestingly, he ruled the variation agreement was supported by consideration, as MWB had the practical benefit of the increased prospect of eventually being paid.[154] This goes against *Foakes* and favours Rock, as the oral agreement was legally effective. However, Moloney also ruled that the NOM clause was effective. Therefore, the variation was ineffective, because it was not recorded in writing.[155] Whilst there was consideration, there was also a legally effective NOM clause.

Court of Appeal

On appeal, the case was decided in Rock's favour. Kitchin LJ gave the leading judgment on the NOM clause issue. Kitchin, with whom McCombe LJ agrees, and Arden LJ led the discussion in relation to the consideration point.

NOM Clauses

Kitchin states how the law on NOM clauses is uncertain.[156] It was caused by the opposing cases *United Bank* and *World Online*. *United Bank* found that NOM clauses were effective;[157] *World Online* found the law was unsettled, but nevertheless was against NOM clauses.[158] Both of these cases, Kitchin notes, were considered in *Globe Motors*. At first instance, it was decided that it was possible to orally vary the agreement in that case, despite the existence of a NOM clause.[159] Party autonomy enabled this. On appeal, *Globe Motors* found that the issue surrounding the NOM clause was unnecessary to the case due to an error from the trial

[152] *MWB* (n 135) 63.
[153] See *Rock* (n 1) 16 and 18.
[154] *Rock* (n 1) 4.
[155] *Rock* (n 1) 4.
[156] *MWB* (n 135) 611.
[157] *United* (n 145).
[158] *Ibid*.
[159] *Globe* (n 144).

judge.[160] Nevertheless, the Court of Appeal expressed their views on it and favoured party autonomy over NOM clauses.

Beatson LJ main reason focused on the existing authorities, namely *United Bank* and *World Online*. Drawing on Australian authority, Beatson considered *World Online* good law for oral variations despite NOM clauses.[161] However, in *World Online* there was room for debate and it did not consider *United Bank*. The fact *United Bank* was unreported might explain this however. Beatson acknowledges this in his third reason concerning precedent, that he was not bound by either case. Although they were inconsistent with each other, he preferred *World Online*.[162] Underhill LJ appeared hesitant on this issue, but nevertheless agreed with Beatson's reasons.[163] Moore-Bick LJ also agreed, but likened the principle of freedom of contract to Parliament being unable to bind its successors.[164] This analogy is problematic. It is true Parliament cannot bind its successors, but the way it departs from them follows a set procedure: One analogous with NOM clauses. Generally, Parliament must undo an Act in the same way it made it, through creating a repealing Act. NOM clauses achieve the same thing. They recognise the agreement does not bind the parties' future selves, but to depart from an aspect of the contract they have to follow a set procedure like Parliament.

Globe Motors influenced Kitchin[165] and held *World Online* to be the correct statement of the law. Party autonomy was cited in a New York case[166] and this reinforced Kitchin's decision that the NOM clause was not effective. Arden agreed. The reasons of Kitchin are logical, but his reliance on *Globe Motors*, which relied on *World Online*, is dubious. *World Online* overlooked *United Bank*; if it had not, it may have decided in favour of NOM clauses which would have reversed the decisions of *Globe Motors* and consequently Kitchin in *MWB*.

Consideration

Kitchin and Arden agree on this point too. Kitchin argued there was 'a commercial advantage to both MWB and Rock'.[167] MWB received several practical benefits: They would recover

[160] *MWB* (n 135) 611; *Globe* (n 144).
[161] *Globe* (n 144) 629.
[162] *Ibid* 630.
[163] *Ibid* 632.
[164] *Ibid* 632.
[165] Despite being urged by counsel for MWB, they did not accept his submissions.
[166] *Beatty v Guggenheim Exploration Co* (1919) 225 NY 380 (NYCA) (*Beatty*).
[167] *MWB* (n 135) 620.

£3500 immediately; Rock would remain as a licensee, so they would not need to seek a new one;[168] and, it would be likely to recover more from Rock than if it enforced the terms of the agreement.[169] Kitchin stated the benefits 'conferred on MWB… were [not all] benefits of a kind contemplated… in *Foakes* and in *Re Selectmove*.'[170] Therefore, it was a case where *Williams v Roffey Bros*[171] applied. Kitchin held the immediate payment of £3500 and the agreement to perform its future obligations conferred this benefit. Arden also found the agreement to perform the existing obligation constituted consideration. This seems contrary to *Stilk v Myrick*,[172] which found performance of an existing contractual obligation does not constitute valid consideration. However, they applied *Williams*, which limited and refined *Stilk*.[173] Arden continues by drawing support from other cases considered in *Williams*[174] and also draws support from *Chitty*.[175] However, the newest edition states *Foakes* is binding on the lower courts.[176]

Arden reasoned MWB did not have to find a new occupant, which meant they were 'avoiding the void'[177] of an unoccupied property. Her second reason was more unexpected however. It should be noted this is not the first time Arden has addressed the part-payment issue. She also addressed it in *Collier v Wright*.[178] In *MWB*, Arden follows the part-payment rule, but tweaks it slightly. In chapter 2, it was seen that an exception to it is 'a gift of a horse, hawk or robe'.[179] *Corpn of Drogheda v Fairtclough*,[180] stated a hawk 'is no different from the conferral of an [sic] benefit or advantage'.[181] Arden notes how *Foakes* approves *Drogheda*.[182] Arden therefore 'replac[ed] the words "the gift of a horse, hawk or robe" with a more modern equivalent in line with [*Williams*]'.[183] This refined and limited the common law but left 'the

[168] This can be likened to 'obviating a disbenefit': *Williams* (n 94) 10.
[169] *MWB* (n 135) 620.
[170] *Ibid*.
[171] *Williams* (n 94).
[172] *Stilk* (n 96).
[173] *Williams* (n 94) 10.
[174] *Ward v Byham* [1956] 2 All ER 318 (CA); *Pao On v Lau Yiu Long* [1980] AC 614 (PC).
[175] *Chitty* (n 2) para. 4-070; see *MWB* (n 135), 628.
[176] H G Beale (ed), *Chitty on Contract Volume 1, General Principles* (33rd edn Sweet & Maxwell 2018) para. 4-070.
[177] *MWB* (n 135) 627.
[178] *Collier* (n 42).
[179] *Pinnel's* (n 66) 613.
[180] (1858) 8 Ireland CLR 98 (Ireland).
[181] *Ibid* (Lefroy CJ) 110 and 114.
[182] *MWB* (n 135) 85; *Foakes* (n 64) 629.
[183] *MWB* (n 135) 85.

principle… in *Pinnel's* unscathed.'[184] She stated her judgment may create a satisfactory balance between creditors and debtors.[185] However, both of her reasons could be inflicted with bias against the part-payment rule. She was very favourable of Denning,[186] whose *obiter* she described as 'brilliant'.[187] Also, as will be seen in chapter 4, her tweaking of *Pinnel's* seems forced. Perhaps the reason for Arden's bias relates to her previous writings. The part-payment rule is traditional and Arden has written on how the law should keep up with social change.[188] Evidently, she would view the part-payment rule unfavourably. This is not to say her background detracts from her given reasons, but it does explain why her judgment in *MWB* is influenced by Denning. The Court of Appeal found there was consideration and no legally effective NOM clause. The Supreme Court, however, did not decide the case on the consideration point.

Supreme Court

The Supreme Court found, in favour of MWB, that the NOM clause was legally effective, overruling the Court of Appeal on this point. Whether or not they overruled the Court of Appeal's decision on the consideration point is unclear, as they did not deal with consideration.[189]

NOM Clauses

Lord Sumption states there is longstanding support for NOM clauses in other jurisdictions, such as New York,[190] Australia,[191] and Canada.[192] However, he recognised how English law is 'equivocal'.[193] In addition to *World Online*, other cases indicated 'that such clauses were ineffective.'[194] Sumption referred to only *United Bank* as case law in support of NOM clauses.

[184] *MWB* (n 135) 85.
[185] *MWB* (n 135) 87.
[186] See *High Trees* (n 16).
[187] *Collier* (n 42).
[188] See The Supreme Court, 'Biographies of the Justices' (Supreme Court UK, 2019) <www.supremecourt.uk/about/biographies-of-the-justices.html> last accessed 12 May 2019; see also M Arden, *Common Law and Modern Society: Keeping Pace with Change (Shaping Tomorrow's Law)* (1st edn OUP, 2015).
[189] See discussion in Bloodied (n 81) 6-7.
[190] *Beatty* (n 166).
[191] *Liebe v Molloy* (1906) 4 CLR 347 (High Court); *Commonwealth v Crothall Hospital Services (Aust) Ltd* (1981) 54 FLR 439, 447; *GEC Marconi Systems Pty Ltd v BHP Information Technology Pty Ltd* (2003) 128 FCR 1 (Aus).
[192] *Shelanu Inc v Print Three Franchising Corp* [2003] 173 OAC 78 (Ontario Court of Appeal).
[193] *Rock* (n 1) 9.
[194] *Rock* (n 1) 9; see: *Malabu Oil* (n 144) and *Globe* (n 144).

He combined this unreported case with the cases from alternative jurisdictions and 'the substantial body of… academic writing in support[ing] [NOM] clauses.'[195] Sumption stated 'the law… does give effect to [NOM clauses].'[196] The counter-argument of party autonomy is a fallacy.[197] True party autonomy is to decide how they bind themselves; trying to assert party autonomy is the real offence to that principle.[198] Sumption states NOM clauses are logical and he disregards the argument that NOM clauses are conceptually impossible.[199]

The position that NOM clauses are conceptually impossible puts forward that parties agreeing to not vary their contract orally is impossible, because such an agreement would automatically be destroyed upon agreeing as such.[200] This is not the case Sumption argues, as apparent in international law and opinions.[201] Further, this argument overlooks the fact that the agreement to not orally vary the contract could have been made in writing, thus agreeing upon it would not destroy itself. It is logical to have NOM clauses, because it prevents any attempt to undermine a written agreement by raising a defence of a summary judgment; further, oral discussions can easily give rise to misunderstandings.[202] For example, Rock believed MWB had agreed to his schedule, whereas MWB claimed they had not accepted it. Oral variations are not alone. Oral formations also have issues in contract law. Denning, in *Entores v Miles Far East Corporation*,[203] highlights the ambiguity in forming a contract orally. It might not be known when the contract was formed, since an aircraft flying overhead might drown the person's acceptance to form the contract.[204] It is clear why Sumption states 'oral discussions can easily give rise to misunderstandings'.[205] NOM clauses also allow corporations to better police its internal rules on who can make such variations, as they would be recorded

[195] *Rock* (n 1) 9.
[196] *Ibid* 10.
[197] *Ibid* 11.
[198] *Ibid* 11.
[199] *Ibid* 13.
[200] *Ibid* 13.
[201] The United Nations Convention on Contracts for the International Sale of Goods 1980, article 29(2) (Vienna Convention); Unidroit Principles of International Commercial Contracts 2010 (Unidroit); *Rock* (n 1) 13.
[202] *Ibid* 12.
[203] [1955] 2 QB 327.
[204] *Ibid* 332.
[205] *Rock* (n 1) 12.

in writing.[206] All of these are clearly logical and are also 'legitimate commercial reasons'[207] for upholding NOM clauses.

Sumption continues that the assertion the oral variation intended to dispense with the NOM clause does not seem to follow.[208] The first logical inference to be drawn is that the parties simply overlooked it, [209] which makes sense given the usual density of contractual agreements. Further, in practice, parties rarely consult the contract prior to making a business move. They may consult a lawyer, if they thought an issue was apparent. No doubt this case will make future lawyers emphasise the meaning of NOM clauses to their clients. The second inference is that the parties who did know about the NOM clause 'court[ed] invalidity with… open eyes.'[210] This makes sense, because 'it is not difficult to record a variation in writing'[211] therefore it does not inhibit commercial practice. However, Lord Briggs differs and argues that NOM clauses can be orally dispensed with if the parties acknowledge it. Nevertheless, Sumption's view is the law.

NOM clauses could result in a party acting on an invalid variation and Sumption notes how estoppel is a safeguard against this. [212] However, estoppel did not require any further discussion, as Rock did not meet the minimal requirements to rely on an estoppel defence.[213] Sumption gave a similar length of discussion to consideration, but it had greater ramifications.

Consideration

This forms the controversial part of the Supreme Court's judgment. '[T]he decision was… eagerly awaited',[214] as it was the opportune moment to provide overdue clarity. However, Sumption stated his ruling on NOM clauses 'ma[d]e it unnecessary to deal with consideration.'[215] He continued that it was undesirable, because the 'issue was a difficult one.'[216] Sumption states MWB might have received practical benefits pursuant to *Williams*,

[206] *Ibid* 12.
[207] *Ibid* 12.
[208] *Rock* (n 1) 15.
[209] *Ibid*.
[210] *Ibid*.
[211] *Ibid.*
[212] *Ibid* 16.
[213] MWB (n 135) 620.
[214] Show a little (n 134) 2.
[215] *Rock* (n 1) 18.
[216] *Ibid*.

but these benefits are the very thing *Foakes* prevented.[217] He does not expand on this or provide any further guidance. He simply notes that *Foakes* 'is probably ripe for re-examination.'[218] The Supreme Court did not re-examine *Foakes*, because it would require a larger panel and the decision must be more than *obiter*.

Roberts states the Supreme Court missed an opportunity to clarify law.[219] This is the first time the tension between *Williams* and *Foakes* has been put before the Supreme Court.[220] Roberts is correct to identify the missed opportunity. Any re-examination of *Foakes* will indeed require the Supreme Court. However, it seems unlikely this type of issue will reach the Supreme Court soon. It had been 27 years since *Williams* and Sumption said 'modern litigation rarely raises truly fundamental issues in the law of contract.'[221] The attempts of the lower courts to distinguish from the part-payment rule might encourage appeals; however, in situations concerning debt, creditors are unlikely to chase a bad debt and debtors are unlikely to pursue litigation given their bad financial circumstances. The Supreme Court could have given some guidance.[222] Roberts claims despite the discussion being *obiter* it would be useful for the lower courts,[223] but Davies considers that any guidance may have created more confusion.[224] However, it is submitted some guidance would have been more constructive than what it did.[225] Fisher correctly states the Supreme Court has departed from pre-existing law through *obiter* remarks before in *Ivey v Genting Casinos*.[226] Further, in *Ivey* and *R v Jogee*,[227] the Supreme Court changed the law with a panel of five judges:[228] The same as *Rock*. It was within the Court's capacity to re-examine *Foakes*, therefore 'it is odd that it did not decide to sit in an enlarged panel'.[229]

[217] *Ibid.*
[218] *Rock* (n 1) 18.
[219] Bloodied (n 81) 5.
[220] Ibid 6.
[221] Ibid 7; *Rock* (n 1) 1.
[222] Show a little (n 134) 8.
[223] Bloodied (n 81) 7.
[224] P S Davies, 'Varying Contracts in the Supreme Court' (2016) 75(3) Cambridge Law Journal 455, 456-457 (Varying).
[225] J C Fisher, 'Contract variation in the common law: A critical response to Rock Advertising v MWB Business Exchange' (2018) 47(3) Common Law World Review 196, 202. (Critical Response).
[226] *Ivey* (n 68) para. 35; Varying (n 224) 202.
[227] [2013] EWCA Crim 1433 (CA).
[228] Critical Response (n 225) 201.
[229] Ibid 202.

The Supreme Court appeared to not overrule the Court of Appeal on the consideration point.[230] If *Foakes* was clearly the correct law, Sumption should have overruled *Williams*. Fisher identifies a subtle point. By indicating *Foakes* is ripe for re-examination, 'perhaps [it is] intimating that it will ultimately side with the preponderance of academic opinion and restore coherence by consigning *Foakes*, rather than [*Williams*], to legal history.'[231] Parliamentary intervention could be necessary, since the next case on this issue may take a long time to arise. However, the next case to deal with the consideration issue will likely reach the Supreme Court rendering Parliamentary intervention unessential. The academic opinion has flown once again following *Rock*, in relation to both the consideration point and NOM clauses.

[230] See discussion in Bloodied (n 81) 6-7.
[231] Critical Response (n 225).

Chapter 4

Foakes v Beer[232] may well be ripe for re-examination,[233] but the fact the Supreme Court did not address the part-payment of debt rule in *Rock Advertising v MWB Business Exchange Centres*[234] (the Supreme Court hearing is referred to as "*Rock*") has reignited the academic debate surrounding it. This chapter will consider the position of *Foakes*, and consequently that of *Pinnel's case*,[235] following the Supreme Court's remarks on the part-payment rule. The arguments both for and against the validity of this rule will be evaluated. These arguments will be addressed throughout the following points. First, how *Foakes* is valid law, but it is not necessarily good law. Second, that the law is trying to move forward and that the practical benefit rule is the first step to this. Third, that the doctrine of promissory estoppel is often overlooked in academic debate, however, it is the most legally valid way future lower courts can avoid *Foakes*. Finally, alternative models of what the law could look like are considered. The most suitable will be suggested, alongside the assertion that *Foakes* should be overruled.

Foakes Is Not Necessarily Good Law

Foakes continues to be challenged, albeit indirectly, by the Court of Appeal. The Supreme Court in *Rock* did not resolve the case via the consideration point. Whilst it did throw doubt on the reasoning behind it,[236] it did not overrule it; therefore, the Court of Appeal decision still has some weighting against *Foakes*. Nevertheless, there is plenty academic support for *Foakes*. Many argue it is still valid law that "should" be followed, but what is required in theory does not always follow in practice. Therefore, whilst in theory *Foakes* should be followed, in practice it is not. The main reason it is not adhered to is the practical benefit rule from *Williams v Roffey Bros*.[237] Academic support for *Foakes* depends on critique of *Williams*.

Roberts provides that *Williams* is not secure in the common law landscape, one reason being because it has not yet been given 'a reasoned endorsement in a final court of appeal.'[238] Aside from a lack of endorsement in the Supreme Court, he refers to the fact the Canadian Supreme

[232] *Foakes* (n 67).
[233] *Rock* (n 1) 1
[234] *Ibid*.
[235] *Pinnel's* (n 66).
[236] See *Chitty* (n 2), 4-125, pg. 504: 'dicta in the Supreme Court… throw doubt on the reasoning in the cases'.
[237] *Williams* (n 94).
[238] Bloodied (n 81) 4.

Court has not yet spoken of the appropriate place of *Williams* in the law of Canada. This has led to a disparity of views in its jurisdictional provinces.[239] The High Court of Australia has not considered it in detail either, as well as the Supreme Court of New Zealand; further, the Supreme Court of Singapore did discuss the potential role of *Williams*, but reached no conclusion since it was only *obiter*.[240] Until the case of *Rock*, however, *Williams* had never reached the Supreme Court.[241] This could explain why none of the other mentioned final courts of appeal have addressed *Williams*, as Australia, Canada, and Singapore are all Commonwealth countries. UK law is very persuasive in their decision-making and they look to the UK Supreme Court for guidance. It makes sense, then, why they have not addressed *Williams*: Neither has the UK Supreme Court. Roberts is correct to note, however, that the reach of the practical benefit test is unclear. Its extension to situations concerning a part-payment of debt could not sit alongside *Foakes*, hence *Re Selectmove*.[242] A part-payment cannot be both capable and not capable of consideration. Roberts notes how the lower courts in Australia and New Zealand have extended *Williams* at the earliest opportunity, because they believed *Foakes* could be distinguished or ignored.[243] These Commonwealth cases do illustrate that the practical benefit rule and part-payment rule are unlikely to sit well together, given lower court cases appear to ignore *Foakes*. This theme is more apparent than ever following *Rock*, since it did not overrule the Court of Appeal's decision on the consideration point. Therefore, arguably the Court of Appeal in *MWB Business Exchange Centres v Rock Advertising* [244] (the Court of Appeal hearing is referred to as *MWB*) is mirroring the Commonwealth courts by ignoring *Foakes*. However, a subsequent case does not follow suit of the Court of Appeal, vouching instead for the validity of *Foakes*.

In *Simantob v Shavleyan*,[245] a High Court decision following *Rock*, Kerr J stated the practical benefit rule does not provide consideration in cases involving a part-payment of a debt by way of *Selectmove*. It is a matter of precedent. *Williams* gave its ruling, which *Selectmove* limited. One Court of Appeal can overrule or limit the ruling of a previous Court of Appeal.

[239] Bloodied (n 81) 4.
[240] Ibid 4.
[241] Ibid 6.
[242] *Selectmove* (n 119) 127.
[243] Bloodied (n 81) 5; see *Musumeci v Winadell* (1994) 34 NSWLR 723 (NSWSC) and *Machirus Properties Ltd v Power Sport World (1987) Ltd* (1999) NZ ConvC 193,066 (NZ).
[244] *MWB* (n 135).
[245] [2018] EWHC 2005 (QB) (*Simantob*).

Therefore, *MWB* arguably had some effect on *Selectmove*, like *Selectmove* did on *Williams*. It is unclear if this is the case, since it only distinguished from it, but Davies notes how Kerr avoids the tension between *Selectmove* and *MWB*[246] perhaps for this reason. The tension in the law remains. Davies argues Kerr's reiteration of *Selectmove* was done with reluctance.[247] Kerr, being the first to rule on this area of law since *Rock*, might have been unsure of the standing of *MWB*. Kerr notes how after the hearing before him, he was only just informed of the decision in *Rock*;[248] whilst he did invite brief written submissions on this,[249] the submissions likely assumed the consideration point in *MWB* bore no relevancy. They did not have time to consider the effect the ruling in *MWB* had on *Selectmove*. It could be argued *MWB* removes the limits place on *Williams* by *Selectmove*. In *Simantob*, focus was solely on the Supreme Court's ruling, which through its refusal to address the consideration point, preserved the current state of the law.[250] I would agree with Kerr's decision that *Foakes* is still the correct approach, however, it is submitted the reasoning in *MWB* on the consideration point stands strong and that the doubt it casts is relevant. The Supreme Court could have clarified *Foakes*, but instead by leaving the reasoning of *MWB* intact, it hinted it had some validity to it. After all, Sumption said *Foakes* is 'ripe for re-examination'[251] and not *Williams*. This reflects that the law is trying to change but cannot due to *Foakes.* In other words, *Foakes* is no longer good law, but must be adhered to by way of stare decisis. In accordance with that principle, it is no surprise that the methods used in *MWB* to distinguish from *Foakes* are creative and, unfortunately, as a consequence appear 'untenable'.[252]

Lord Sumption, in *Rock*, identifies how the rule in *Williams* is the very thing *Foakes* provided was not adequate consideration.[253] This was the concern of Gibson LJ in *Selectmove*. If *Williams* or (as Roberts notes)[254] *MWB* is followed, then it is difficult to see when *Foakes* would apply.[255] Roberts considers Gibson to be correct and argues the attempts to distinguish

[246] Varying (n 224) 4.
[247] Ibid.
[248] *Simantob* (n 245) 124.
[249] *Ibid* 125.
[250] Cf. to the discussion in Chitty (n 2) 4-125, pg. 504: '[the] dicta in the Supreme Court… throws doubt on the reasoning in the [*MWB*]'.
[251] *Rock* (n 1) 18.
[252] Bloodied (n 81) 350.
[253] *Rock* (n 1) 18; *Foakes* (n 67) 622 (Blackburn).
[254] Bloodied (n 81) 351.
[255] *Selectmove* (n 119).

from *Foakes* and *Selectmove* are 'untenable'.[256] As seen, Arden LJ argues one of the practical benefits obtained was 'avoiding the void'[257] of having no licensee. Roberts states that the Court of Appeal's logic means that the 'promise to release a debt [is] binding if it is given in return for practical benefits which have not yet eventuated, but are hoped to arise due to a promise of part-payment.'[258] He makes the following convincing argument. If *Foakes* is problematic because it is better to have the certainty of a small thing than to risk it for something greater, i.e., it is better to accept a part-payment than risk receiving it by waiting for the whole debt, then it is much less problematic than *MWB*, which provides it is better to have the certainty of a "promised" small thing than to risk it for something greater.[259] This logic reveals that the law cannot have such two decisions side by side. Roberts explains that the law would be incoherent if actually paying a part of a debt is not worthy of consideration, but promising to pay part of a debt is. The current uncertainty in the law provides all the needed of evidence to support this. Further support comes from Roberts on the way *MWB* distinguished from *Foakes* and *Selectmove*. He argues the benefits Arden and Kitchin LJJ identify are 'less distinctive than they appear.'[260] The distinction is one without difference to *Foakes*, where Lord Blackburn rejected the practical benefit of receiving more money than adhering to the original contract. This would be the case when deciding to accept £50 as satisfaction of £100, the creditor receives £50 more than they would otherwise. Roberts unravels the blurred nature of the Court of Appeal's distinction. MWB gained more money from the fact they retained a licensee; in other words, they obtained a practical benefit of more money.[261] Roberts argues this is exactly what *Foakes* rejected as good consideration.[262] However, gaining more money from retaining a licensee is not payment of a debt. It is likely to be received alongside a part-payment, but Roberts combines it with a part-payment itself which is not the case. Nevertheless, the obscurity he unravels is indicative of a need for the law to evolve.

[256] Bloodied (n 81) 350.
[257] MWB (n 135) 627.
[258] Bloodied (n 81) 351.
[259] Ibid.
[260] Ibid.
[261] Ibid.
[262] Ibid.

Roberts is supported by Burton. Burton similarly argues the reasons for distinguishing from *Selectmove* are 'narrow and unconvincing'.[263] The first purported benefit of an upfront payment is clearly rejected by *Foakes*.[264] Secondly, keeping a licensee, or in the words of Glidewell obviating a disbenefit,[265] was also considered to provide a practical benefit; however, Burton argues there was reasonable doubt Rock would have been able to pay future payments.[266] Therefore, there is no real practical benefit, as MWB would eventually lose a licensee. The final purported benefit of recovering some of the arrears, again similar to the first benefit, is rejected in *Selectmove*. Burton and Roberts support one another and clearly have a similar train of thought. Roberts also notes how if such benefits were allowed, it would be easy to argue a creditor received a practical benefit in most situations. One could simply claim, for example, that the agreement to accept a part-payment enhanced the creditor's reputation as a reasonable creditor. Another example, in *Selectmove*, is that the new agreement encouraged other debtors to come forward voluntarily with repayment proposals, which meant it increased the Revenue's efficient use of limited time and resources. Examining the practical benefit rule from this perspective shows how it exposes creditors. There is always business sense in accepting a smaller payment on a debt, because it is better to receive something and retain a licensee/tenant, than to pursue arrears and sue for the outstanding amount. Roberts states that on the basis of *Williams* and *MWB* there is a low bar to claim such a benefit; all a party need do is argue there is some benefit to the creditor over and above the part-payment, which essentially can be achieved by rewording the fact that they will get more money.[267] Yet, equally debtors are significantly exposed because of this rule. A creditor could easily accept a part-payment, and with the debtor in a weak position, decide to pursue the remaining amount. Clearly, the part-payment rule is unbalanced.

Fisher follows a logical argument in his support for *Foakes*. He asserts that *Foakes* precludes *Williams*, which means *Williams* is wrongly decided, thus per incuriam and explains why *Selectmove* distinguished from it. Fisher presents three options that a future Supreme Court can do to restore clarity to English law. One is to abolish consideration; the other to declare contract variations different to contract formations, so they do not require consideration;

[263] Burton (n 93) 74-76.
[264] Burton (n 93) 6.
[265] Williams (n 94) 16.
[266] Burton (n 93) 7.
[267] Bloodied (n 81) 352.

lastly, they could overrule *Williams*. It is wrong to think these are the only options available. The Supreme Court can depart from its own decision if it appears right to do so. This includes *Foakes*. The above are convincing arguments and it is agreed that the practical benefits found in *MWB* were forced to an extent. Foster and Reilly consider that it must be the case that *Foakes* continues to be followed below the Supreme Court and, for that reason, the Court of Appeal in *MWB* must be considered trumped by *Selectmove*.[268] It is clear in theory that *Foakes* is the law to be followed. Yet, it seldom is in practice. Foster and Reilly indicate that the triumph of *Selectmove* is subject to *Foakes* being overruled.[269] They seem to be suggesting it could be overruled in the future. Given its practical notoriety compared to its theoretical standing, this is not far-fetched and it is submitted to be desirable.

The 'Supreme Court's failure to clarify the law… will not… end speculation or deter academic analysis.'[270] From the above arguments, it is abundantly clear that *Foakes* should be followed. It is recognised in *Chitty* that:

> until the decision in *Foakes v Beer* is… reversed by the Supreme Court, a promise… to accept part-payment… is to be treated as made without consideration, even if the creditor gets a practical benefit. In the meantime, its operation is mitigated… at common law and in equity.[271]

Yet, it is peculiar that a House of Lords decision can be so easily undermined by the Court of Appeal in *Williams* and *MWB*. The law surrounding *Foakes* stabilised following the ruling of *Selectmove*, but its stability was rocked again in *MWB*. One might expect that the Supreme Court would clarify and re-assert *Foakes*, quashing the rebellion of the practical benefit rule. But, it did not. It said it is ripe for re-examination.[272] Clearly there is something appealing about *Williams*. Perhaps it is a preferred rule to the harshness of *Foakes* and the lower courts think the existing law needs changing. Gibson in *Selectmove* appears to show sympathy towards *Williams*. Similarly, Blackburn in *Foakes* showed unease with his ruling, because his alternative was 'not satisfactory to the other noble and learned Lords'.[273] It is submitted that

[268] Show a little (n 134) 4.
[269] Ibid.
[270] Ibid.
[271] *Chitty* (n 2) 4-119, pg. 501.
[272] *Rock* (n 1) 18.
[273] *Foakes* (n 67) 115-116.

whilst *Foakes* is still valid in theory, its treatment demonstrates it is not good law. Hence, why it has little been followed in practice[274] irrespective of its binding nature on the lower courts. Ignoring Foakes would be, as explored through Roberts, contrary to stare decisis. However, a part of stare decisis is distinguishing cases. This is why *MWB* tried to distinguish in the way it did. Whether the benefits found were valid is irrelevant. What matters is that it is a symptom that the law is trying to evolve, but it cannot because of *Foakes*. There are numerous reasons for this.

The Law Is Moving Forward

With the critique in chapter 2 in mind, it is obvious then why *MWB* sought to distinguish from *Foakes*. Perhaps the lower courts are trying to encourage litigants to appeal to the Supreme Court by distinguishing.[275] They are indirectly suggesting to the Supreme Court *Foakes* needs overruling. Gibson in *Selectmove* recognises it may need reconsidering, despite following it.[276] Nevertheless, as Roberts correctly states, in line with stare decisis, until the Supreme Court actually overturns or substantially modifies *Foakes*, the lower courts are bound to follow it.[277] Undoubtedly, like in *MWB*, the lower courts will continue to find ways to distinguish it. This is in accordance with stare decisis. Arden and Kitchin have been promoted to the Supreme Court; Roberts speculates they may now make attempts to overturn *Foakes*.[278] Whilst 'modern litigation rarely raises truly fundamental issues in the law of contract', the awaited discussion and likely overruling of *Foakes* is on the horizon.

Williams and *MWB* are attempts to move the law away from the harshness of *Foakes*. In addition to the chapter 2 arguments against *Foakes*, Shaw-Mellors and Poole argue English law develops inadequate principles in relation to the renegotiation of contracts. For example, they argue 'the relationship between consideration and duress in the context of [variation] promises… is far from clear.'[279] These unclear principles are created, because of the law's

[274] It was followed in *Simantob* (n 245), but the reasons for this have already been discussed.
[275] This would work, since the creditors would have to appeal and they are more likely to do so than a debtor because of their stronger financial position.
[276] *Selectmove* (n 119) 537: 'Mr Nugee submitted that although Glidewell LJ in terms confined his remarks to a case where B is to do the work for or supply goods or services to A, the same principle must apply where B's obligation is to pay A, and he referred to an… which suggests that Foakes v Beer might need reconsideration.'
[277] Bloodied (n 81) 353.
[278] Bloodied (n 81) 353 in footnote 43.
[279] A Shaw-Mellors and J Poole, 'Recession, changed circumstances, and renegotiations: the inadequacy of principle in English law' (2018) 2 Journal of Business Law 101, 103 (Recession).

response to the enforceability of contracts that were varied due to dramatic circumstances.[280] Such circumstances might be an economic recession, or a sub-contractor no longer being able to meet a performance deadline, as was the case in *Williams*.[281] A point of interest are economic recessions. The law's response to contracts changed because of this event is argued to be inadequate, but I take this one step further. The law's response to variation contracts has been influenced by economic recessions, whether or not the contract was changed because of such circumstances. Consider the year of *Foakes*. In 1884, the UK was still in a period of depression and economic turmoil. It was decided 11 years after the Panic of 1873 financial crisis.[282] During economic recession, one way to stimulate economic activity is through the borrowing of money. It seems likely, therefore, that a legal decision affecting creditors and consequently the economy, would be decided in a manner that encourages them to lend. The part-payment rule ensures they will lend, as they do not stand to lose anything upon accepting a smaller repayment. Whilst this was not the only influence on the House of Lords in *Foakes*, it is likely the economic climate factored into favouring the decision of *Pinnel's Case*.[283] It might explain too how they oversaw *Hughes v Metropolitan Railway Co*.[284]

The Overlooked Doctrine

Following *Rock*, there is some consensus that the application of *Williams* to part-payment of debt situations is wrong. Doing so would result in forced arguments of distinction. The academics against accepting *Williams* argue it would mean abandoning *Foakes*.[285] Interestingly, Foster and Reilly argue this would also mean abandoning 'the exceptions to it created by promissory estoppel.'[286] Clearly, there are other ways to avoid the harshness of the rule in *Foakes*, but it is an overlooked aspect in academic debate. Indeed, the primary focus of the debate is the relationship between *Williams* as an exception to *Foakes*, but the real purpose of the debate is the practicality of *Foakes*. It may be interesting to debate how

[280] Recession (n 279) 101.
[281] Ibid 101.
[282] For some discussion around this see A E Musson, 'The Great Depression in Britain, 1873-1896: A Reappraisal' (1959) 19(2) The Journal of Economic History 199.
[283] *Pinnel's* (n 66).
[284] *Hughes* (n 15); see chapter 2 for further discussion on this point.
[285] See the above arguments in Bloodied (n 81), Burton (n 93), and Critical Response (225).
[286] Show a little (134) 5.

Williams does, or does not, sit well with *Foakes*, but the central issue is should it be departing from this House of Lords decision and will the law work. The real overlooked purpose of the debate is to uncover how the law can move on from the part-payment rule. In *Collier v Wright*,[287] Arden states how 'the doctrine of promissory estoppel… was developed to meet the hardship created by the rule in Pinnel's case.'[288] She made it clear that it can be used in situations of part-payment as a defence: 'promissory estoppel has the effect of extinguishing the creditor's right to… the debt.'[289] This appears to render *Foakes* inapplicable, but other cases state it merely suspends such rights[290] and it was submitted in chapter 2 these cases are correct. *Collier* was unusual in that it applied both *Pinnel's* and promissory estoppel. No consideration was found, but estoppel could be relied upon. Despite its cautionary treatment, it demonstrates promissory estoppel can be used as an exception to *Foakes*.

MWB, in seeking to distinguish from *Foakes*, ironically curtails the attempts of promissory estoppel to achieve a similar thing. Burton argues *MWB* reignited the debate around the prerequisite of a detriment.[291] He submits it 'has taken the wind of the sails of… *High Trees*, leaving it in a state of limited application.'[292] This is because if there was a detrimental reliance, i.e. taking on extra obligations, there would be no need to consider *Foakes*. But, as Burton notes, these conclusions are *obiter* and it is unclear if the Court of Appeal was unanimous on this.[293] It is submitted the requirement of a detriment would provide some protection to creditors, as it limits the situations where the defence can apply to those where the debtor suffers a detriment. However, it is hard to conceptualise when the debtor would not be putting themselves at a detriment. Much of what this doctrine could cover, Arzandeh and McVea argue is more easily covered by the practical benefit rule.[294] For now, however, promissory estoppel is the best answer the law has to avoiding *Foakes* without resorting to a forced application of *Williams*, especially since its usage remains unclear. Collins convincingly

[287] *Collier* (n 42).
[288] *Ibid* 655.
[289] *Ibid* 659 at 42.
[290] *Tool Metal* (n 18).
[291] Burton (n 93) 9.
[292] Ibid.
[293] Ibid, 10
[294] A Arzandeh and H McVea, 'Refining Consideration: RIP Foakes v Beer?' (2017) 1 Lloyd's Maritime and Commercial Law Quarterly 7, 12 (RIP Foakes).

states 'what appears clear is that [*Foakes*] is no longer inviolate, and promissory estoppel… offer[s] a significant counterweight'.[295]

Alternative Models

It is clear the law is trying to move away from *Foakes*, but what is not so clear is what it is striving to. The earlier arguments of Roberts explored the treatment of *Williams* and *Foakes* in Commonwealth countries. Although concluding in favour of *Foakes* in English law, he notes:

> there is… a wide divergence of views between the Canadian provinces. The positions range from upholding the pre-existing duty rule for variations as it stood prior to *Roffey*… to doing away with the requirement for consideration for variation contracts entirely.[296]

The Canadian Court of Appeal in British Columbia followed the latter, more radical approach. The remainder of this chapter will explore this alternative model and another that the law should use to replace *Foakes*.

The Radical Model

The Court of Appeal's radical approach was taken in *Rosas v Toca*.[297] Rosas won the lottery and loaned Toca $600,000. Rosas requested they pay it back after one year. When that time came, Toca said they can pay it back the next year and Rosas agreed to not file a claim. This request for a deferred payment by Toca repeated for several years and eventually Rosas claimed. At first instance, it was held the promise to repay was unenforceable, due to a lack of consideration, and because the original loan term expired thus the claim was statute barred. However, Rosas' appeal was allowed. The Court of Appeal stated *Williams* shows 'support for an evolution in the law'.[298] The scenario in *Rosas* is of course different to the one explored here, since no part-payment was made. Nevertheless, the Court of Appeal modified what was required in the variation of contracts: 'the variation should be enforceable without fresh consideration, absent duress, unconscionability, or other public policy concerns'.[299] It is unlikely English law will do away with consideration, hence the case's radical nature.

[295] D M Collins, 'Part-payment of debt: a variation on a theme?' (2018) (forthcoming), 9 (On a theme).
[296] Bloodied (n 81) 346.
[297] [2018] BCCA 191 (CA of British Columbia) (*Rosas*).
[298] *Ibid* 121.
[299] *Ibid* 183.

Consideration is what makes it unique. But there are parallels between this remark and the English common law. It is submitted it reflects the model I argue the law should take.

An Alterative

Debtors should have two avenues of protection to avoid being taken advantage of when paying a lower amount as satisfaction of a debt. Both ways, however, should be subject to a proviso that equally protects creditor from also being taken advantage of. The first avenue is that consideration can be found if there is a practical benefit. This entails extending *Williams* to part-payment situations. Shaw-Mellors and Poole think *Williams* is a two-way process. The first question to be asked should be is there any sign of economic duress, like in *Rosas*; if not, then steps should be taken to identify practical benefit(s) for consideration.[300] The requirement for economic duress is the proviso. This protects both parties and ensures a fair outcome. If a debtor tries to coerce a creditor into accepting less, the creditor is protected by duress; on the other hand, if a creditor knows a debtor can only pay so much and accepts this, but tries to pursue the rest subsequently, the debtor is also protected. The practical benefit rule is not unfair on the creditor, because they can still pursue the standard procedure of filing a claim or charging arrears. The preferred option of accepting less, which arguably makes commercial sense, is still available but can no longer be exploited. The law is nearly in this position. Clarification of what constitutes a practical benefit is needed. The test is too vague,[301] hence the conflict between *Selectmove* and *MWB*. *Williams* may be able to sit next to *Foakes* as an exception, like Arden argued. However, *Foakes* no doubt would apply in only limited circumstances. It may only apply 'where there is no evidence of consideration over and above that of simply accommodating the debtor.'[302] It might be desirable of future Supreme Court justices to preserve it out of respect for Coke, but nevertheless the rule is a harsh one and this clarification of the practical benefit rule might condemn *Foakes* to irrelevancy.[303] The alternative is to depart from *Foakes*, because it seems right. *Foakes* may

[300] Recession (n 279) 107-108.
[301] Show a little (n 134) 6.
[302] RIP Foakes (n 294) 12.
[303] Roberts argued the Supreme Court's refusal to address might have done this, Bloodied (n 81) 352.

have been per incuriam, via overlooking *Hughes*.[304] It is submitted it should be overruled. It is the better option than to render it irrelevant through neglect[305] and not clarify the law.

The second avenue for debtors is promissory estoppel. Its current use already enhances the irrelevancy of *Foakes*. The small margin of situations not covered by *Williams* would be swept up by this doctrine. This only serves to strengthen the case for overruling *Foakes*, as more than one aspect of the law conflicts with it. Promissory estoppel may sweep up the remains, but creditors should still have a protection. By insisting on the prerequisite of a detriment, this serves to balance the law. A debtor could not simply claim this defence, because they relied on the fact the creditor said they would accept less. They must have suffered a detriment. Clarity would exist for judges, who could decide on a balance of facts. Faced with a part-payment situation, a judge can determine if there is a practical benefit obtained by the creditor absent of economic duress. If there is no benefit, they can look to promissory estoppel and apply the defence assuming a detriment exists. It gives them, and the law, space to breath. The practical benefit rule is the sword to the shield of promissory estoppel.

A future Supreme Court reaching any decision will be difficult, as Lord Sumption says it is 'truly a fundamental issue'.[306] Chief Justice Bauman, of British Columbia's highest court, stated:

> It has been famously said that "hard cases make bad law"; sometimes, however, hard cases make new law. Or, at least, they very much encourage the court to do so lest we give credence to Mr. Bumble's lament in Oliver Twist: "If the law supposes that…the law is a ass".[307]

Sumption's indication that *Foakes* is ripe for re-examination, as seen in chapter 3, is 'intimating that [the Supreme Court] will ultimately side with the preponderance of academic opinion and restore coherence by consigning *Foakes*, rather than [*Williams*], to legal history.'[308] Nevertheless, when the issue next reaches the Supreme Court, the case will be a hard one. The overruling of a principle that has existed since 1602 will no doubt be difficult, but it cannot come soon enough.

[304] As explored in chapter 2, but this argument comes with some flaws.
[305] Bloodied (n 81).
[306] *Rock* (n 1) 1.
[307] *Rosas* (n 297) 1.
[308] Critical Response (n 225) 202.

Chapter 5

Much of the focus throughout this piece has been on the part-payment of debt rule and how promissory estoppel relates to it. In *Rock Advertising v MWB Business Exchange Centres*,[309] however, Lord Sumption said the case raised two fundamental issues of contract law.[310] The other is that of No Oral Modification ("NOM") clauses. This is a term that specifies an agreement cannot be amended orally and usually can only be amended if it is done in writing. It was unclear if NOM clauses were legally effective if parties had orally agreed to vary the contract contrary to it, because of the principle of party autonomy. Further, it was unclear what bearing promissory estoppel had on the validity of such clauses. It was seen in chapter 3, that the Supreme Court held NOM clauses to be legally effective where the parties tried to orally vary a contract. However, some degree of ambiguity remained in situations where parties orally agreed to dispense of the NOM clause. Sumption said they could not; Lord Briggs stated *obiter* that the parties could potentially dispense of a NOM clause orally but, like Sumption stated, they cannot orally vary the contract in any other way. The law is settled nonetheless, as Briggs' view was only *obiter*. But this has not prevented academic debate over which perspective is to be preferred. Despite the clarity, there may be a possibility that the lower courts adopt Briggs' *obiter*. The academic debate also rages against the Supreme Court ruling, although it is little in volume.

Little Critique of NOM Clauses

Those against the legal effectiveness of NOM clauses cite party autonomy. This argument was dispelled in the Supreme Court. Nevertheless, academics and practitioners have raised other arguments against NOM clauses. Calnan argues NOM clauses are disadvantageous, because it can allow a party to escape an oral variation since it does not comply with the underlying contract.[311] He continues that a fundamental part of English law is that effect is given to agreements with consideration.[312] Therefore, it cannot be assumed NOM clauses will work in every situation, because such formalities will eventually lead to problems as in the case of

[309] *Rock* (n 1).
[310] *Ibid* 1; As explored the first was whether there can be consideration for the part-payment of a debt.
[311] R Calnan, 'Contractual Variation Clauses' (2018) Butterworths Journal of International Banking and Financial Law 487, 489 (Calnan).
[312] Ibid.

Actionstrength v International Glass Engineering.[313] However, Calnan does recognise estoppel helps mitigate this situation. Calnan also argues there will still be a great deal of pressure on the courts to enforce oral variations, where parties have agreed and acted upon an oral variation: *Rock* welcomes litigation as opposed to welcoming certainty.[314] However, this dissertation contends the alternative is equally likely to welcome litigation. The whole purpose of NOM clauses is to prevent false assertions of oral variations. *Rock* is a perfect example of this. Parties are equally likely to litigate over alleged oral variations of a contract, rather than just the fact a party went back on an oral variation. NOM clauses instead introduce certainty. Parties now know they cannot orally vary the contract where such clauses exist. Instead the cause for future litigation is not NOM clauses, it is the chance of promissory estoppel. Consider a situation similar to *Rock*. If the parties, whose contract contains a NOM clause, orally agree to a lower payment of a debt and the creditor goes back on this promise and demands the full debt, under the Supreme Court ruling the debtor is unlikely to succeed in a claim. Notwithstanding that there may be consideration under the practical benefit rule, they know this because of the certainty of NOM clauses. However, they could refuse to pay the remaining debt, in which case the creditor will likely sue. In these circumstances, the debtor can now rely on promissory estoppel. This is not certain however, because the applicability of promissory estoppel in the context of NOM clauses remains vague.[315]

Waal argues the 'certainty [of a NOM clause] would [mean] certain injustice'.[316] He states that 'the [Court of Appeal] decision reflects the flexibility of the common law and is to be applauded.'[317] It can be said Waal's thinking mirrors the Court of Appeal's, because he does not give his own reasons against the legal effectiveness of NOM clauses. Whilst this does not detract from his assertion, his view is subject to the same criticisms on the Court of Appeal. The main problem with its ruling is that it did not translate to practice. Many practitioners still recommended the use of NOM clauses. Some recognised that NOM clauses still had obvious benefits, as it encourages parties to have a written record of changes to a contract and this helps 'avoid future disputes about any subsequent variations.'[318] Using NOM clauses is

[313] [2003] AC 541 (HL) (*Actionstrength*); this case is explained below, at pg. 52; also see ibid.
[314] Calnan (n 311) 489.
[315] This is analysed in greater detail below, see pg. 51.
[316] J Waal, 'Mind What You Say' (2016) 160(40) Solicitors Journal 160(40) 15, 17.
[317] Ibid, 17.
[318] Baker & McKenzie, 'Anti-oral variation clauses' (2016) 27(7) PLC Mag. 46.

regarded 'as a matter of good practice'.[319] They are also more in line with how the construction industry traditionally operates, according to legal experts in that sector.[320] Mather states the Court of Appeal ruling was useful for property lawyers, as property-related contracts can be altered orally, but the decision increased the prospect of false or frivolous claims of oral variations.[321] This is dangerous given the 'widespread use [of NOM clauses] in commercial practice'.[322] Clearly its commercial use is desirable, because it will help avoid litigation on allegations of oral variations. *Rock* is an example contrary to this, but this case resolved the issue. Moving forward it is apparent that future attempts to litigate over NOM clauses will be heavily discouraged, unless one party can vouch for promissory estoppel, in which case they may deliberately hope a claim arises to rely on the defence as discussed. Many considered that the Court of Appeal stance 'cause[d] a great deal of consternation in commercial circles.'[323] Foster and Reilly also argued great confusion would persist in the commercial world, if parties could abandon the express terms of a contract by merely agreeing to the contrary.[324] Purkis and Callaway, however, correctly recognised that the Supreme Court has now laid to rest the confusion created by the Court of Appeal.[325] Evidently, the critique of NOM clauses is heavily outweighed by practical considerations.[326] The arguments in favour of such clauses are more convincing and greater in number.

The Supreme Court Is Right

Before the Supreme Court case, Morgan recognised the error the Court of Appeal made.[327] His arguments were convincing enough for Sumption to cite in his judgment.[328] Morgan argued the controversy of formality requirements subsides when 'the parties tie their own

[319] S Underhill and A Sandiforth, 'Contracting out of waiver? Court of Appeal provides guidance on "no variation" and "anti-oral variation" clauses', (2016) F. & C.L. 7.
[320] J Starr, 'Mods and Rockers' (2018) Property Law Journal 363 (Mods).
[321] K Mather, 'You have my word' (2016) 166(7718) New Law Journal 12.
[322] E McKendrick, 'The legal effect of an anti-oral variation clause' (2017) 32(10) Journal of International Banking Law and Regulation 439 (McKendrick).
[323] RIP Foakes (n 294) 5.
[324] Show a Little (134) 3.
[325] S Purkis and L Callaway, 'Be careful what you say no longer' (2018) 168(7801) New Law Journal 13 (Be careful).
[326] In addition to the criticisms explored, the only other academic against NOM clauses is Stuart Pemble, 'Why the Supreme Court is wrong on NOM' (2018) 63 Estates Gazette. However, due to licencing restraints, his article cannot be accessed.
[327] J Morgan, 'Contracting for self-denial: on enforcing "no oral modification" clauses' (2017) 76 Cambridge Law Journal 589 (Morgan).
[328] *Rock* (n 1) 9.

hands.'[329] He likened NOM clauses to a dilemma presented to Ulysses' crew.[330] Having tied their captain to the ship before sailing past an island, the captain urgently wished to be untied. However, earlier the captain had told them to ignore his later wishes to be released. '[C]onctracting parties may sensibly wish to limit their later freedom and insert a term requiring the court to enforce that restraint.' [331] Not enforcing NOM clauses would be inconsistent with other formality rules like entire agreement clauses,[332] therefore, it suggests the Court of Appeal decision against the effectiveness of NOM clauses erred. Morgan continues that the fact English does not usually require formalities for contractual variations is irrelevant. If parties want to depart from the default position of the law and make variations more onerous, then so be it; they have demonstrated the unsuitability of the law for their situation.[333] In addition, Morgan argues it is difficult to see how it can be reasonable to rely on an informal variation when parties have agreed to a NOM clause.[334] It is clear from Christou's *Boilerplate: Practical Clauses*,[335] that the rationale of NOM clauses is to prevent variations being made informally or by accident.[336] Parties who do not want their relationship to be governed by contractual agreements, Morgan argues, should simply not include NOM clauses.[337] The only exception to this are consumers and potentially less sophisticated commercial parties, who can override NOM clauses via unfair terms legislation.[338] Big commercial players should be held to their word, as preventing an oral variation where a NOM clause exists beneficially extends freedom of contract.[339]

Morgan's view, which influenced Sumption, makes sense. A true argument of freedom of contract would not validate oral variations, it would instead see that the parties initially agreed to bind themselves in a particular way. Like Ulysses' crew, at the time of the initial agreement the parties had reason to bind their future conduct. For whatever reason held to them, they considered oral variations to be undesirable. A change in circumstances might

[329] Morgan (n 327) 590.
[330] From the famous western literature Homer, *The Odyssey* (Translated by E V Rieu, Penguin Books 1946).
[331] Morgan (n 327) 590.
[332] Rock (n 1) 14.
[333] Ibid, 590-591.
[334] Ibid, 612.
[335] R. Christou, *Boilerplate: Practical Clauses* (7th edn, London 2015).
[336] Ibid 10-072.
[337] Morgan (n 327) 614.
[338] Ibid 615.
[339] Ibid 615.

make them overlook this, like it did for the captain. It is the role of the courts to enforce what the parties' original clear intentions are. Subsequent oral variations could later be distasteful to the parties. If the variation was truly desirable by the parties, then they would seek to follow the formalities prescribed in the NOM clause. It could be argued they would not if the desired variation was minimal, but the formalities to follow were onerous. Onerous formalities are rare however. Yet, Briggs' approach would allow the possibility of defeating NOM clauses. Understandably some parties might overlook the clause, however, as Morgan states these situations should not receive sympathy for big commercial players. Other users of NOM clauses might receive sympathy via unfair terms legislation. Another avenue potentially available is the defence of promissory estoppel. This provides insight on Briggs' approach. Perhaps the enforceability of NOM clauses should depend on its users, when they know and orally agree to dispense of the clause. Big commercial players should be held to the clause, but it could be reasonable to think smaller commercial parties might believe they can orally dispense of the NOM clause and subsequently act on their variation. They might operate on the assumption that they can change their contract in any way they want, because it is their contract. To enforce otherwise would inhibit their commercial practice. However, the disadvantage of requiring parties to comply with a minor formality requiring variations to be in writing, is better than the disadvantage of false allegations of oral variations and the uncertainty surrounding the contractual document. If a dispute did arise, clear evidential barriers exist as to the actual state of the contract since variations were not recorded in writing.

Sumption's reasoning was also influenced by McKendrick, who discusses the Vienna Convention[340] and the UNIDROIT principles,[341] which Sumption refers to in his judgment.[342] McKendrick states these international laws offer a better balance of the parties' interests than the Court of Appeal judgment, since it gave too little weight to NOM clauses.[343] All that would be required to effect an oral variation under the Court of Appeal ruling is proof on a balance of probabilities that the agreement was made and it was intended to be binding.[344] However, it has been seen that NOM clauses are undoubtedly the preferred option. The crucial issue

[340] Vienna Convention (n 201).
[341] Unidroit (n 201).
[342] Rock (n 1).
[343] McKendrick (n 322) 446.
[344] Ibid.

that McKendrick recognised even before the Supreme Court ruling, is what are the steps parties can take to depart from NOM clauses.[345] Logically, one step is to depart in writing, as there would be no inconsistency with the NOM clause.[346] This is what Sumption finds.[347] Whether or not the parties can agree orally to depart from a NOM clause is one of the issues that separates Sumption and Briggs.[348]

Departing from NOM Clauses

In addition to departing from NOM clauses in writing, McKendrick presents two alternatives. One entails parties orally dispensing of the NOM clause and they expressly addressed its existence. The other scenario is where parties enter into an oral variation without knowledge of it, but this is analysed under the next heading concerning promissory estoppel. Although he notes dispensing of a NOM clause orally is inconsistent with the clause itself, he states it can be argued that effect should be given to it assuming the parties expressly addressed it is there and have agreed to delete it.[349] Of course, this is contrary to what Sumption stated thus arguably contrary to the law. But there is the *obiter* of Briggs of which Harris supports strongly for similar reasons to McKendrick. Harris argues doing away with NOM clauses orally is the more cautious and desirable approach, as it ensures a balance between the parties.[350] It also preserves party autonomy as it allows parties to release themselves from the inhibition.[351] Harris considers that Sumption's view would 'amount to an absurd restriction of party autonomy', especially since the directors of the contracting parties often change.[352] However, if the directors often change, then it would be better to keep a written record. This way the future directors of the business would know when, and perhaps why, the NOM clause was dispensed with. Not only does this introduce certainty within businesses, but it may have been the intention of the original directors. This method upholds party autonomy for the old directors and the new ones of each party. The claim that Sumption's view leads to an absurd

[345] McKendrick (n 322) 446.
[346] Ibid 446-447.
[347] *Rock* (n 1) 15.
[348] The other is the analogies they use to liken NOM clauses to other formalities in contracts. Sumption refers to entire agreement clauses, as discussed, see also *Rock* (n 1) 14; Briggs refers to negotiations subject to contract, *Rock* (n 1) 29.
[349] McKendrick (n 322) 437.
[350] R Harris, 'MWB: Modifications, Wrangles, and Bypassing' (2018) Lloyd's Maritime and Commercial Law Quarterly 441 (Wrangles) 445.
[351] Ibid.
[352] Ibid.

restriction rests on Harris' argument in relation to onerous conditions. He questions what the courts would do when faced with more stringent requirements under a NOM clause.[353] Some stringent requirements could be mitigated by public policy considerations, if for example a variation was required to be signed in blood.[354] However, some might require extremely difficult formalities; Harris gives the examples of signing the variation on top of Mount Snowdon, that it be approved by 95 per cent of the parties' shareholders, or that it must be signed on goatskin vellum.[355] Nothing could mitigate these requirements, therefore Sumption's view is only persuasive if the formalities required are to be in writing and signed; any other formalities rendered his perspective defective, according to Harris.[356] There are issues with this argument.

The examples given are indeed onerous, and even if the original directors had good reason for including them, it would be unreasonable to expect any new directors to follow them too. Departing from it would be extremely difficult and it would greatly inhibit freedom of contract. However, it is unusual for businesses to require such formalities other than for it to be in writing and signed by both parties. This aspect dominates contractual agreements in both formation and variation.[357] Harris openly admits Sumption's view would work if not for the onerous conditions that can exist. The better approach for the law then is not to side with Briggs, but instead to adopt a proviso that allows the departure from NOM clauses where its conditions are clearly, and objectively, onerous. This upholds the flexibility of NOM clauses, because the courts can decide on a factual basis what conditions are and are not onerous. It allows the courts to give effect to the genuine and sensible intentions of the parties by assessing what makes business sense. Calnan also recognises that more elaborate conditions, other than the simple one that variations must be in writing and signed, are likely to cause more problems than it solves.[358] A court, therefore, should be able to find that a NOM clause can be departed from orally if the written conditions are onerous. Contrary to Harris' critique, Sumption actually recognises this. He states recording a variation in writing is not difficult,

[353] Wrangles (n 350).
[354] Ibid.
[355] Ibid.
[356] Ibid.
[357] Consider deeds in property contracts, where it is a necessity: Law of Property (Miscellaneous Provisions) Act 1989, s. 2.
[358] Calnan (n 311) 489.

except 'in cases where the variation is so complex that no sensible businessman would do anything else.'[359] Sumption's approach is best, as Reid-Thomas and Myles recognise the safest approach is to record variations in writing.[360]

However, it arguably needs clarifying that parties can depart orally if the written conditions are onerous, since Sumption recognised the need for this but did not elaborate on it. That does not merit departing from the current position of the law and siding with Briggs as Harris would suggest. Future lower courts are likely to recognise this in Sumption's judgment. The proviso set out is not the current law, as Sumption did not elaborate on this point: Hence the academic debate. Future courts will perhaps use Briggs' *obiter* to refine the law as suggested. When adopting his *obiter* however, it is submitted that they should emphasise that NOM clauses can only be departed from orally where the conditions are onerous. This keeps the law in line with Sumption's reasoning and avoids re-introducing ambiguity. However, Starr argues this is the final word on NOM clauses.[361] Even if the courts decide against this and choose to assert NOM clauses with onerous conditions, the law is better off this way since it reaffirms the certainty of them. After all, Sumption states party autonomy justifies them.[362] Instead, in these onerous circumstances, parties could rely on promissory estoppel. Thompson captures the crux of the debate. She states that contractual certainty is desirable, but so is a world where oral promises given for consideration cannot be avoided.[363] It is very common for parties to agree to minor variations 'to oil the wheels of commerce'.[364] But, ultimately she notes that where two principles collide, certainty will win unless there are rare grounds for estoppel.[365] It is submitted any reaffirmation of NOM clauses, or polishing of it to allow departure in face of onerous conditions, upholds certainty. This is why NOM clauses prevailed.

[359] *Rock* (n 1) 15.
[360] D Reid-Thomas and D Myles, 'Contract variation: does it need to be in writing?' (2018) 29(5) PLC Mag 4-5.
[361] Mods (320) 5-7.
[362] *Rock* (n 1) 11.
[363] E Thompson, 'Supreme Court favours certainty over flexibility (and honour?)' (Irwin Mitchell Solicitors, 2018) accessible at <https://imbusiness.passle.net/post/102exdj/supreme-court-favours-certainty-over-flexibility-and-honour> last accessed 13 May 2019.
[364] Ibid.
[365] Ibid.

Promissory Estoppel

It has been seen that NOM clauses can only be removed in writing. However, where parties expressly address its onerous existence, there is scope for it to be removed orally. These are two of the situations in which a NOM clause may be removed. The other concerns where parties make an oral variation unaware of a NOM clause. In this instance, McKendrick argues the NOM clause still applies, because the parties have not exercised their contractual freedoms to remove it.[366] Merely acting inconsistently with their contract is not enough to remove the NOM clause agreed to.[367] However, McKendrick notes that in some circumstances the parties reliance on the non-compliant oral variation should be legally effective in spite of the NOM clause. 'To refuse to do so would give rise to an unacceptable degree of unfairness'.[368] Whilst reliance on estoppel may generate uncertainty, he states there is a balance to be struck between the competing policies of NOM clauses and estoppel.[369] Although McKendrick does not refer to a specific estoppel, it is submitted promissory estoppel is the most appropriate; further, it is presumed Sumption is referring to promissory estoppel or estoppel by conduct.[370] McKendrick argues the balance struck under the Vienna Convention and UNIDROIT principles is optimal, as it is designed with limits that give effect to parties' reliance on their non-compliant variation.[371] However, whether promissory estoppel could prevent resorting to a NOM clause was left open by the Supreme Court,[372] despite Sumption following what McKendrick states on international law. Sumption only made reference to *Actionstrength* and its stipulations.

In *Actionstrength*, Actionstrength agreed to do work for the first defendant Inglen. When Inglen started to make late payments, Actionstrength threatened to remove its workforce. However, the second defendant, St-Gobain, promised them if they did not remove their workforce, they would ensure Inglen paid the amount due. This agreement was made orally

[366] McKendrick (n 322) 447.
[367] Ibid.
[368] Ibid.
[369] Ibid.
[370] See *MWB* (n 135) and also *Rock* (n 1); see D Sedghi, 'The Supreme Court's decision in Rock Advertising is a mixed blessing' (Macfarlanes LLP) accessible at <https://www.lexology.com/library/detail.aspx?g=482e18dd-d3d5-4894-bb38-11e70002ac3a> last accessed 12 May 2019.
[371] McKendrick (n 322) 447.
[372] As noted in Farrand and Clarke, *Emmet and Farrand on Title* (Bulletin 2018, 19th edn, Sweet and Maxwell 2018).

and invoked the Statute of Frauds 1677, which required any such variations to be made in writing. For that reason, the House of Lords held estoppel could not be raised, unless two circumstances persisted. The first was that St-Gobain must have been led by the words or conduct of Actionstrength that the promise would be honoured; secondly, 'there must be something more, such as additional encouragement, inducement or assurance.' [373] This mirrors the typical requirements for promissory estoppel, but it beats around the bush on the need for a detriment. The circumstances they detail seem to indicate the defence succeeds if the relying party was deceived. The requirement for the promise to be believed to be honoured, and for something more like an encouragement, suggests a deliberate attempt by the other party to entice an agreement but to later go against it. St Gobain, however, had done nothing which would foster either of these things.[374]

Morgan argues the courts should be cautious of estoppel, as its full acceptance would mean many informal variations would be enforced. [375] He notes in particular how relying on estoppel through analogy of the *Actionstrength* case should fail, as in that case its use would have been contrary to what was required in statute, therefore the same would be contrary to NOM clauses.[376] Morgan notes if estoppel was allowed in a generous manner, many drafters would try to prevent any variation via estoppel.[377] It is key then, as Sumption says, that 'the scope of estoppel cannot be so broad as to destroy the whole advantage of [the] certainty [that comes with NOM clauses.]'[378] However, the concern over estoppel might be for naught. Future cases concerning NOM clauses and alleged oral variations will likely contain one party that was severely disadvantaged by relying on the oral variation, whereas the other party's position would be relatively intact. It follows that the disadvantaged party will most often be the one filing a claim. Assuming most cases pertain to this example, the party who is disadvantaged, due to their reliance on the oral variation, cannot rely on promissory estoppel

[373] *Actionstrength* (n 313) para. 35.
[374] *Ibid*.
[375] Morgan (n 327) 611
[376] Ibid 611-612.
[377] Ibid 612; he provides an example of this, the italics being newly inserted wording: 'No variation of this Agreement shall be valid or effective, *whether by contract, estoppel, or otherwise,* unless made by instruments in writing signed by the parties to this Agreement, and *action in reliance on any such informal variation shall not estop either party from resiling from it*'".
[378] *Rock* (n 1) 16.

for the very fact that they are the one filing a claim. Promissory estoppel can only be used as a defence.[379] To get rid of this aspect, is to get rid of the doctrine of consideration.

It seems promissory estoppel will remain as a safeguard according to Purkis and Callaway.[380] This is a sensible perspective. They argue there will still be circumstances where English law recognises the commercial need to make decisions quickly and will therefore provide protections via estoppel; however, only if there is the requisite degree of reliance.[381] The ramifications estoppel could have on NOM clauses undermines it significantly, hence why many treat estoppel with caution. Sumption's reference to *Actionstrength* is unsatisfactory. Harris is correct to state his using of it as a safety valve is unsatisfactory, because it is difficult to see what might suffice for his borrowing of 'something more'[382] from *Actionstrength*. What is required for estoppel to trump a NOM clause needs clarification. The first point from *Actionstrength* is a good start, as it pertains to the principle of party autonomy. Sumption leaves the second point wide open. It is submitted, to fill the gap, clarity is required on what degree of reliance is needed. As argued in chapter 4, the doctrine should require the promisee suffers a detriment. *Actionstrength* appears to allude to this requirement, but whether or not it is a definitive requirement is obscure. It is not surprising its effect on NOM clauses is ambiguous: The doctrine itself is filled with ambiguity. Clarity on promissory estoppel is required to fully settle the effectiveness of NOM clauses, however, overall their enforceability is clear.

[379] *Combe* (n 17).
[380] Be careful (n 325) 13.
[381] Ibid.
[382] *Rock* (n 1) 16.

Conclusion

Rock Advertising v MWB Business Exchange Centres[383] considerably doubts *Foakes v Beer*.[384] It was appropriate for it to do so, as clearly there are fundamental issues in the part-payment of debt rule. The Supreme Court felt it was unnecessary and undesirable to deal with *Foakes*, unless it is before an enlarged panel and the decision would be more than *obiter*. Deciphering the conflicting aspects of the law reveals it is moving away from *Foakes* and will settle instead on the practical benefit rule. For *Foakes* to have any future application, the practical benefit rule would have to be overruled, as it is used too often to distinguish from it and *Re Selectmove*.[385] It would have been easy for the Supreme Court to overrule the practical benefit rule and the doubt it places on *Foakes*, but it did not. Clearly, the overruling of *Foakes* is preferable. The Supreme Court, understandably, was not comfortable with taking a decision to overrule *Foakes* when it would only have been *obiter*. Perhaps the law is not ready to move on, after all common law decisions seem to be affected by economic considerations and the last recession was in 2008. In the eyes of the law, this is not that far away considering only 10 years had passed since economic crisis in *Foakes*. In *Rock*, only 10 years had passed too. However, since Arden and Kitchin LJJ were promoted to Supreme Court judges, the overruling of *Foakes* appears inevitable.[386] The next time a case reaches the Supreme Court, with the central issue being a part-payment of a debt, *Foakes* will either be substantially modified and limited or overruled. It is only a matter of when, but the latter is preferred.

Want for the practical benefit rule is evident throughout the law. The concerns of Lord Blackburn and the *obiter* of Denning are prime examples.[387] Preference for something other than the part-payment rule was apparent before *Foakes* in *Hughes v Metropolitan Railway Co*.[388] Further, Denning stated the fusion of law and equity existed before *Foakes*.[389] Whilst the concept of ruling on equity was relatively new to the judges in *Foakes*, since its fusion only came about 10 years earlier in the Supreme Court of Judicature Acts 1873 and 1875, Denning suggests if equity was considered in *Foakes* it would have been decided differently and more

[383] *Rock* (n 1).
[384] *Foakes* (n 67).
[385] *Selectmove* (n 119).
[386] As recognised by Roberts in Bloodied (n 81).
[387] See *Foakes* (n 67) and *High Trees* (n 16).
[388] *Hughes* (n 15).
[389] *High Trees* (n 16) 135.

akin to *Hughes*.[390] Perhaps Denning is right to hint that *Foakes* was per incuriam through oversight of *Hughes*, but this is mitigated by the fact that the cases had two of the same judges.[391] Further, *Hughes* concerned house repairs and not debts. *Foakes* might have enshrined the part-payment rule in the law due to its the economic desirability at the time. A court ruling favouring debtors in a time of economic recession is unlikely. It could never be challenged directly afterwards, because debtors would be extremely unwilling to go to the Supreme Court, given they are already in bad financial circumstances. *Foakes* only served to discourage them further. Hence, the law has seen several indirect attempts of the lower courts to cast doubt or distinguish from it.[392]

Foakes' replacement needs to be much more tenable. *Foakes* should be overruled and contract variations should be valid through the practical benefit rule. To achieve this stability, the courts must balance the interests of debtors and creditors. Debtors should be able to resort to the practical benefit rule, but protection from exploitation will exist for creditors via economic duress. For debtors not rich enough to pursue a (counter-)claim, the courts must provide an extra layer of protection through promissory estoppel. However, to ensure it is not exploited against creditors too, they should assert the need for a detriment that results in inequitable circumstances. They must allow the lower courts room to breathe, by stressing the factual dependency of what constitutes such a detriment and inequity. A future Supreme Court should clarify the practical benefit rule and promissory estoppel would protect debtors and the exploitation of these principles is mitigated by economic duress and the need for a detrimental inequity. The practical benefit rule is the much-needed sword to the shield of promissory estoppel.

Clarity should not stop here. Promissory estoppel and its place next to NOM clauses requires clarification. Academic debate might exist over which approach is to be preferred, but Briggs' perspective was only *obiter* and Sumption's view is the law.[393] There is scope for NOM clauses to be removed orally if its formalities are onerous. He leaves the scope of promissory estoppel unclear. However, by saying it should not be so wide as to destroy the certainty of NOM

[390] *Ibid*.
[391] Lord Blackburn and Lord Selbourne, as he then was.
[392] Perfect examples are that of *High Trees* (n 16) and *MWB* (n 135).
[393] His points were agreed to by the other judges.

clauses,[394] he paves the way for future cases to explore the circumstances in which estoppel can be relied upon.[395] However, this is likely the last we will hear from the Supreme Court on NOM clauses[396] and, at least for a long time, on the part-payment rule too. With any luck a future case might be paired with both issues, but it would be one where the consideration point formed the central matter of the case. Then, the Supreme Court can finally resolve the ambiguity surrounding the variation of contracts.

[394] *Rock* (n 1).

[395] McDonald et al, 'No oral modification clause held to be legally effective' (Mayer Brown, Legal Update 2018) accessible at < https://www.mayerbrown.com/-/media/files/perspectives-events/publications/2018/05/no-oral-modification-clause-legally-effective-uk-s/files/update_no-oral-modification_may18/fileattachment/update_no-oral-modification_may18.pdf> last accessed 13 May 2019, see pg. 2.

[396] Mods (n 320).

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Feminist Judicial Decision-Making as *Judicial Decision-Making*: A Legitimate and Valuable Approach?

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[1] R v D [2006] EWCA Crim 1139

Abstract

Feminist legal scholars argue that the rigid, formalist approach towards judicial decision-making is potentially harmful to the lives, experiences, and interests of women. In critically analysing a feminist re-judgement within *Feminist Judgments From Theory to Practice*, this dissertation argues that the Feminist Judgments Project represents a legitimate and valuable approach, which effectively re-imagines judicial decision-making in line with women's interests. This dissertation reinforces feminist judicial decision-making as a more responsive form of judgment making particularly for vulnerable and marginalised women whom regularly experience and are subjected to traditional judicial approaches. Further, the dissertation argues that feminist judicial decision-making constitutes a legitimate and valuable approach despite considerable criticism levelled at this methodology and judges who openly hold feminist beliefs. The dissertation positions the Feminist Judgments Project within the context of the legal realist approach to judicial decision-making, which serves as a critique of the formalist approach to judicial decision-making. The dissertation's analysis of the feminist re-judgment of *R v Dhaliwal* (*R v D*)[2] aims to promote the Feminist Judgments Project's methodological approach as a mode of judicial best practice. This dissertation concludes that feminist judicial decision-making is a legitimate and valuable approach which recognises social inequalities and amplifies marginalised communities, whilst also remaining faithful to legal conventions.

Keywords:

Judicial decision-making, Legal Formalism, Legal Realism, Feminist Judicial Decision-Making, Feminism, Legal Realism, Legitimacy, Justice.

[2] *R v D [2006] EWCA Crim 1139*

Chapter 1

Introduction – 'A grievous judicial backsliding on equality…the burning need for action'.[3]

'Although the rhetoric of substantive equality continues, the promise of genuine substantive equality is fading and the voices of equality advocates are being muted.'[4]

'What if a group of feminist scholars were to write the 'missing' feminist judgment in key cases?'[5]

'Dissenting opinions…have encouraged a blossoming of legal conceptions and solutions, without going so far as to cast a pall of dysfunctional dissonance over the courts'.[6]

1.1 Background and the Problem

In recent years, the disparity between the numbers of men and women appointed to the judiciary has evoked concern within and beyond the legal system; advancing judicial diversity to the top of the Judicial Appointments Committee's (JAC) and the wider judiciary's agenda.[7] The diversity of the judiciary is viewed as being 'constitutionally significant' by the House of Lords especially in terms of maintaining public confidence in the judiciary, developing the law, and discussions around justice.[8] Although the Lord Chief Justice of England and Wales reports a 3% increase in the numbers of women appointed to the bench from 2018-2019, progress to establish an equal representation of women from all backgrounds within the judiciary remains slow.[9] By promoting the appointment of judges from more diverse backgrounds, the JAC aspire to ensure that both the visible exterior of the common law and the more ambiguous

[3] Diana Majury, 'Introducing the Women's Court of Canada' (2006) 18 Canadian Journal of Women and the Law 1
[4] Ibid
[5] Rosemary Hunter, Clare McGlynn, and Erika Rackley, *Feminist Judgments From Theory to Practice* (Hart Publishing, 2010) P 3
[6] Claire L'Hereux-Dubé, 'The Dissenting Voice of The Future' (2000) 38 Osgoode Hall Law Journal 496
[7] Constitutional Reform Act 2005, Section 64 ;Equality Act 2010, Section 149 (1); Baroness Brenda Hale of Richmond, 'Judges, Power and Accountability Constitutional Implications of Judicial Selection' (Belfast, Constitutional Law Summer School, 2017) 4
[8] House of Lords Select Committee on the Constitution, *Judicial Appointments Report* (2012, House of Lords) 26
[9] Lord Chief Justice of England and Wales and Senior President of Tribunals, 'Judicial Diversity Statistics 2019' (Lord Chief Justice of England and Wales and Senior President of Tribunals, 2019) 1

nature of the judicial decision-making process in England and Wales is upheld as being 'legitimate, qualitative, fair' and valuable by wider society.[10] Although many initiatives aim to ameliorate the external image of the law by diversifying the judiciary, similar such efforts aimed at addressing the internal issues within the judicial decision-making process, which threaten to undermine public confidence in the common law are extremely limited.

Indeed, the restricted focus upon the inherent structural issues within the judicial decision-making process is reinforced by feminist scholars who highlight the consistent production of 'unjust', 'gendered', 'incorrect', and 'wrong' judicial decisions which negatively and disproportionately impact upon the lives and experiences of women and marginalised people.[11] MacKinnon who argues that the law's legitimacy is 'based on force at women's expense' reinforces these observations of judicial decision-making.[12] These findings by feminist scholars are particularly concerning when the legitimacy of the common law and the subsequent societal compliance with judge made law is dependent upon the 'just' treatment of all people before the court by the judiciary.[13] Fundamentally, these findings by feminist scholars exacerbate wider concerns that the existing formalist, rigid approach to judicial decision-making renders the common law an ineffective tool to respond to the social issues it is invoked to adjudicate.[14] Crucially, this research demonstrating the coercive application of the law towards selected and vulnerable groups also erodes the significant level of trust placed in the judiciary to produce fair, just, and equitable outcomes for all.

The focus on promoting a greater level of diversity, accommodating the notion of difference, and diminishing bias within the judiciary to ensure that the common law maintains

[10] House of Lords Select Committee on the Constitution, *Judicial Appointments: follow up* (House of Lords, 7th Report of Session 2017–19, November 2017) 33; Justice, 'Increasing Judicial Diversity' (Justice, April 2017) 5

[11] Rosemary Hunter, 'The Power of Feminist Judgments' (2012) 20 Feminist Legal Studies 137; Mairead Enright, Julie McCandless and Aoife O'Donoghue, *Northern/Irish Feminist Judgments: Judges' Troubles and the Gendered Politics of Identity* (Hart Publishing, 2017) P 3; Bridget J Crawford, Anthony C Infanti, *Feminist Judgments: Rewritten Tax Opinions* (CUP, 2017) P 45

[12] Catherine A Mackinnon, *Toward a Feminist Theory of the State* (HUP, 1989) P 249

[13] Johnson, Maguire and Kuhns, 'Public Perceptions of the Legitimacy of the Law and Legal Authorities: Evidence from the Caribbean' (2014) 48 Law and Society Review 984

[14]Rosemary Hunter, 'The Power of Feminist Judgments' (2012) 20Feminist Legal Studies 137; Adam Gearey and John Gardner, *Law and Aesthetics* (Hart Publishing, 2001) P 2

its external image of legitimacy is commended.[15] However, while securing a more diverse judiciary may go some way to ensuring that the common law is perceived as being-outwardly legitimate, Hunter demonstrates that these efforts do not automatically prevent or remedy the production of injustices produced by traditional approaches towards judicial decision-making.[16] Ultimately, diversifying the judiciary is essential in reducing experiences of unjust legal outcomes, however this must be in undertaken in conjunction with a number of additional initiatives.[17] This is significant, as a growing global portfolio of evidence by feminist scholars and activists highlights a trend of 'unjust' and 'wrong' judicial decisions despite the slow increase in the number of women and BAME judges appointed to the judiciary in England and Wales.[18]

The continued production of unjust legal decisions despite an increase in diversity within the judiciary highlights the failure to properly address the lack of judicial diversity and to repair the inadequacies at the core of traditional judicial decision-making.[19] Not only are efforts to re-dress the injustices produced at the root of the judicial decision-making process seemingly non-existent, but scholars indicate that the judiciary actively avoid discussing the process of judging openly and honestly with their peers or larger audiences.[20] Worse still, as the traditional manner of judicial decision-making is so engrained there is increasing resistance directed towards potential fresh approaches.[21] Thus, in light of these multi-layered issues Posner highlights the study of judging as being 'challenging [yet] indispensable'.[22]

[15] Justice, 'Increasing Judicial Diversity' (Justice, April 2017) Executive Summary, 1, 20
[16] Rosemary Hunter, 'More than Just a Different Face? Judicial Diversity and Decision-making' [2015] Current Legal Problems 22-23
[17] Ibid
[18] There are Feminist Judgments Projects within Canada, England and Wales, Scotland, Northern Ireland, Australia, USA, India, New Zealand, and Africa.; Rosemary Hunter, 'The Power of Feminist Judgments' (2012) 20 Feminist Legal Studies 137; Lord Chief Justice of England and Wales and Senior President of Tribunals, 'Judicial Diversity Statistics 2018' (Lord Chief Justice of England and Wales and Senior President of Tribunals, 2018) 1;Lord Chief Justice of England and Wales and Senior President of Tribunals, 'Judicial Diversity Statistics 2019' (Lord Chief Justice of England and Wales and Senior President of Tribunals, 2019) 1
[19] Rosemary Hunter, 'The Power of Feminist Judgments' (2012) 20 Feminist Legal Studies 137
[20] Richard A Posner, *How Judges Think* (HUP, 2010) P 6
[21] Sharon Elizabeth Rush, 'Feminist Judging: An Introductory Essay' (1993) 2South California Review of Law and Women's Studies 613
[22] Richard A Posner, *How Judges Think* (HUP, 2010) P 6

However, rather than studying, re-examining, critically appraising, and remodelling their existing approaches towards judicial decision-making in response to the injustices highlighted by feminist scholars, the judiciary in England and Wales prefers to 'fetishize' the rich history of the common law.[23] In simply romanticising its history, the judiciary merely maintains its traditional approach to judicial decision-making.[24] The idealisation of traditional judicial approaches facilitates the privileging of sameness and the culture of hostility towards the notion of difference at the heart of the judicial ideology.[25] Similarly, the opposition towards difference is cemented by the treatment of judges who hold feminist beliefs and opinions by the media and the wider public.

Inevitably, in merely maintaining the judicial decision-making status quo with little to no modification, the various injustices identified by feminist scholars as existing within judicial decisions remain unchallenged and are perpetuated.[26] Fundamentally, this means that women and other marginalised groups are left exposed to additional experiences of injustice by an institution purporting to be bound by the Rule of Law and thus subjecting all in society to the law equally.[27] Therefore, the impact of the judiciary's failure to respond critically to the findings by feminist scholars and activists regarding the disproportionate level of injustice faced by women within original judicial decisions is two-fold: 1) women's lives, experiences, and best interests are relegated to the secondary division by an institution purporting to equally serve all people 2) Arguably, in subordinating lay women's life experiences within judicial

[23] Hunter, Rosemary, 'Contesting the dominant paradigm: Feminist critiques of liberal legalism' in, Professor Margaret Davies and Professor Vanessa E Munro, *The Ashgate research companion to feminist legal theory (Ashgate*, 2013)
Leslie J Moran, 'Reviewed Work: *Feminist Judgments: From Theory to Practice* by Rosemary Hunter, Claire McGlynn, Erica Rackley' (2012) 75 The Modern Law Review 287
[24] Hunter, Rosemary, 'Contesting the dominant paradigm: Feminist critiques of liberal legalism' in, Professor Margaret Davies and Professor Vanessa E Munro, *The Ashgate research companion to feminist legal theory (Ashgate*, 2013); Leslie J Moran, 'Reviewed Work: *Feminist Judgments: From Theory to Practice* by Rosemary Hunter, Claire McGlynn, Erica Rackley' (2012) 75 The Modern Law Review 287
[25] Rosemary Hunter, 'More than Just a Different Face? Judicial Diversity and Decision-making' (2015) 68 Current Legal Problems 127
[26] Carol Smart, *Feminism and the Power of Law* (Routledge, 2002) P 5; John Dewey, 'Logical Method and Law' [1924] The Cornell Law Quarterly 26
[27] Tom Bingham, *The Rule of Law* (Penguin, 2011) Ch 1; A V Dicey, *Introduction to the Study of the Law of The Constitution* (MacMillan and Co Ltd, 1962) P 193 'no man is above the law… that here every man, whatever be his rank or condition, is subject to the ordinary aw of the realm'.

decisions, the judiciary relinquishes the very legitimacy it seeks to uphold by appointing a more diverse judiciary.

The failure by the judiciary to critically appraise the legitimacy of its existing approach towards judicial decision-making continues despite their collective awareness of the distinct experiences of women as 'victims, witnesses, and offenders' within the legal system.[28] The reluctance to re-evaluate its existing approach towards judicial decision-making remains even when the '*Equal Treatment Bench Books'* explicitly demonstrate that the judiciary have the capacity to ensure that women's distinct experiences are recognised, addressed, and 'protected' to some degree.[29] Legal realists also reinforce the considerable flexibility available to judges to reach socially just conclusions within their judicial decisions.[30] Although the judiciary are in the position to protect and safeguard women from the unique disadvantages that they face within the judicial decision-making process, the majority of judges not only fail to capitalise on this potential, but they also deny the existence of this opportunity to protect women at the first instance.[31] This dissertation demonstrates that the judiciary's failure to recognise and act upon their capacity to respond effectively to the distinct experiences of women has resulted in what the Women's Court Canada (WCC) has termed 'a grievous judicial backsliding on equality' in England and Wales.[32]

The judiciary prioritises maintaining its existing approach towards judicial decision-making or in other words they privilege the 'niceties of its internal structure and the beauty of its logical processes' above constructing a more specific approach to safeguard and protect women's interests.[33] This is despite research reinforcing that the legitimacy of the judicial system is not a) undermined by the incorporation of feminist belief or b) conditional upon

[28] Judicial Studies Board, *Equal Treatment Bench Book* (Judicial Studies Board, September 2008) 6-1
[29] Ibid
See also: Rosemary Hunter, 'Feminist Judgments and Feminist Judging: Feminist Justice?' (Feminist Justice Symposium, University of Ulster, June 2010) 14
[30] Hanoch Dagan, 'The Realist Conception of Law' (2007) 57 University of Toronto Law Journal 613
[31] Rosemary Hunter, Claire McGlynn, Erica Rackley, *Feminist Judgments From Theory to Practice* (Hart Publishing Ltd, 2010) P 9
[32] Diana Majury, 'Introducing the Women's Court of Canada' (2006) 18 Canadian Journal of Women and the Law 1
[33] Roscoe Pound, 'Mechanical Jurisprudence' Columbia Law Review (1908) 8 605

absolute unanimity.[34] In essence, the legitimacy of the judicial decision-making process lies in a fluid and varied approach which celebrates difference, rather than an absolutely unified and identical approach. Conversely, the integrity of the judicial decision-making process is 'safeguarded' through dissenting and divergent approaches, as these differences require that judges and courts reflect upon the implications of their decisions and justify the rationale behind their decisions more rigorously.[35] These challenges to the traditional judicial approach are said to generate a higher degree of rigour, or in other words an improved quality of judicial decision.[36] This is precisely the aim sought by the JAC in their appointment of a more diverse judiciary.[37]

However, while practitioner guides, legal realists, and feminist legal scholars reinforce that women's interests may be authentically accommodated within the judiciary's approach to decision-making without sacrificing the legitimacy or the value of the common law, it appears that the compulsion to preserve the prestigious status of the traditional judicial decision-making approach trumps these realities.[38] Ultimately, in preserving its existing formalist approach, the judiciary eschew the plethora of injustices identified by feminist scholars and activists within the judicial decision-making process as being inevitable and constitutive elements of judicial decision-making rather than addressing the issues at the core of existing approaches to judicial decision-making.[39]

1.2 The "Gap"

Thus far, the predominant practical focus has been dedicated to ensuring that the outward legitimacy of the law is visibly upheld by supporting efforts to increase judicial

[34] Rosemary Hunter, Clare McGlynn, and Erika Rackley, *Feminist Judgments From Theory to Practice* (Hart Pubishing, 2010) P 30 – 31; Claire L'Hereux-Dubé, 'The Dissenting Voice of The Future' (2000) 38 Osgoode Hall Law Journal 495
[35] Ibid 497
[36] William J Brennan Jr, 'In the Defense of Dissents' (1986) 37 The Hastings Law Journal 430
[37] Justice, 'Increasing Judicial Diversity' (Justice, April 2017) 5
[38] William J Brennan Jr, 'In the Defense of Dissents' [1986] 37 The Hastings Law Journal 430
[39] Ibid

diversity.[40] While the importance of ensuring judicial diversity remains undisputed, in their continued depiction of unjust and inequitable judicial decisions, the Feminist Judgments Projects highlight the need for greater receptiveness towards practical and academic efforts to improve the law's internal legitimacy.[41]

The Feminist Judgments Project is committed to ensuring the law's holistic legitimacy by promoting a more diverse and different approach to judicial decision-making by re-writing key original judicial decisions from a selected feminist standpoint.[42] Unlike traditional judicial decision-making approaches, the Feminist Judgments Project mirrors the legal realist conception of judgment writing, as the authors illuminate the considerable flexibility available to judges to reason differently because of the law's innate indeterminacy.[43] The project illustrates the potential for original judicial decisions to be decided differently in order to generate fairer, just, and equitable results for individuals within the cases and for members of. wider society .[44] Pioneers of the project undermine the supposedly fixed and inevitable nature of the common law by adopting a feminist, legal realist stance to re-centre the distinct concerns of women and other marginalised groups within judicial decision-making.[45]

Although the Feminist Judgments Project provides a realistic re-imagination of how judicial decision-making may be performed in the future in order to generate true 'equal justice for all', these collective approaches continue to be side-lined as an 'alternative' to traditional judicial approaches.[46] This dissertation argues that articulating the feminist judicial decision-making approaches as 'alternative' unduly limits their scope and applicability within the 'real

[40] House of Lords Select Committee on the Constitution, *Judicial Appointments: follow up* (House of Lords, 7th Report of Session 2017–19, November 2017) 33; Courts and Tribunals Judiciary, *Judicial Diversity Committee of the Judges' Council – Report on Progress and Action Plan 2018* (Courts and Tribunals Judiciary, 2018); Professor Kate Malleson, 'Judicial Diversity Initiative' (*Judicial Diversity Initiative*, 2018) < https://judicialdiversityinitiative.org > 1st September 2018
[41] Rosemary Hunter, 'More than Just a Different Face? Judicial Diversity and Decision-making' (2015) 68 Current Legal Problems 140 - 141
[42] Rosemary Hunter, Clare McGlynn, and Erika Rackley, *Feminist Judgments From Theory to Practice* (Hart Publishing, 2010) P 6
[43] Rosemary Hunter, Clare McGlynn, and Erika Rackley, *Feminist Judgments From Theory to Practice* (Hart Publishing, 2010) P 5
Hanoch Dagan, 'The Realist Conception of Law' (2007) 57 University of Toronto Law Journal 613
[44] Rosemary Hunter, Clare McGlynn, and Erika Rackley, *Feminist Judgments From Theory to Practice* (Hart Publishing, 2010) P 6, 9
[45] Rosemary Hunter, Clare McGlynn, and Erika Rackley, *Feminist Judgments From Theory to Practice* (Hart Publishing, 2010) P 5
Hanoch Dagan, 'The Realist Conception of Law' (2007) 57 University of Toronto Law Journal 613
46 Sally Jane Kenney, *Gender and Justice: Why Women in the Judiciary Really Matter* (Routledge, 2013) P 15;
See: Rosemary Hunter, 'The Feminist Judgments Project' (*UKSC Blog*, 17th January 2010) < http://ukscblog.com/the-feminist-judgments-project/> accessed September 1st 2018

world' and confines them to alternative-dom forever.[47] Given their diminishment of gender and social inequalities, the dissertation submits that confining the feminist judicial decision-making approaches to mere 'alternatives' is unnecessary, illogical, and paradoxical to the aim of the judiciary to uphold the integrity and legitimacy of judicial decision-making.[48]

Therefore, in the hope of establishing feminist judicial decision-making as a mode of judicial best practice, this thesis seeks to address the following research question: **To what extent does feminist judicial decision-making constitute a valuable and legitimate approach to judgment writing?**[49] In order to address this question, the dissertation will analyse the feminist re-judgment *of R v Dhaliwal* (*R v D*)[50] contained within the England and Wales Feminist Judgments Project - *Feminist Judgments From Theory to Practice*. In undertaking an analysis of this judgment and commentary, the dissertation will highlight the issues arising from the rigid, formalist approaches of the judges in the original court and will and examine the value and legitimacy of feminist judicial decision-making in responding to these issues. Despite the fact that this text considers the legitimacy and value of feminist judicial decision-making, thus far there has been little attention dedicated to examining its legitimacy and value within the context of formalist and realist conceptions of judicial decision-making. Thus, the dissertation responds to the lacuna within the Feminist Judgments Project and makes an original contribution to the literature centring on Feminist Judgment Projects.

1.3 The Significance

The importance of critically appraising the legitimacy of the feminist judgment writing approach is heightened because of the increasing number re-judgments by feminist scholars

47 Ibid
48 Claire L'Hereux-Dubé, 'The Dissenting Voice of The Future' (2000) 38 Osgoode Hall Law Journal 496
49 Rosemary Hunter, Clare McGlynn, and Erika Rackley, *Feminist Judgments From Theory to Practice* (Hart Publishing, 2010) P 43
50 R v D [2006] EWCA Crim 1139

and activists which highlight flaws in current judicial approaches globally.[51] Fundamentally, feminist scholars reinforce that:

> *We need more feminist judges: judges who understand women's experiences and take seriously harm to women and girls, who ask the gender question, 'How might this law, statute, or holding affect men and women differently?; who value women's lives and women's work; who do not believe women to be liars, whores, or deserving of violence by nature; who question their own stereotypes and predilections and listen to evidence; and who, simply put, believe in equal justice for all.*[52]

Ultimately then, there is a pressing need to respond to the distinct experiences of women at various levels within the justice system, and the continued failure by the judiciary to uptake this opportunity.[53] As traditional approaches towards judicial decision-making operate as the normative standard for judgment writing, a great deal of resistance towards the possibility of fresh approaches remains.[54] Therefore, a critical appraisal of the Feminist Judgment Project is pivotal in order to explore whether this approach to judgment writing constitutes a legitimate and valuable judicial decision-making avenue. In critically analysing the feminist judgments project methodology, it is hoped that the dissertation may uproot the normative conceptions of judicial decision-making, and in the process facilitate an opportunity for the imaginative and innovative approaches constructed by the Feminist Judgment Project to be utilised by scholars and practitioners as a mode of best practice.

More broadly, the importance of undertaking a critical evaluation of the Feminist Judgments methodology is cemented by the need for England and Wales to honour their

[51] Rosemary Hunter, 'The Power of Feminist Judgments' (2012) 20 Feminist Legal Studies 137
[52] Sally Jane Kenney, *Gender and Justice: Why Women in the Judiciary Really Matter* (Routledge 2013) P 15
See also: Catherine A Mackinnon, *Toward a Feminist Theory of the State* (HUP, 1989) P 249
[53] Judicial Studies Board, *Equal Treatment Bench Book* (Judicial Studies Board, September 2008) 6-1
[54] Sharon Elizabeth Rush, 'Feminist Judging: An Introductory Essay' (1993) 2 Californian Review of Law and Women's Studies 613

commitment to ending gender inequality and further women's equality by 2030.[55] The critical evaluation of feminist judicial decision-making is also vital 'to avoid feminist alternative accounts becoming equally oppressive and constraining' as the traditional approach in which the project seeks to depart.[56] It is hoped that evaluating the legitimacy of feminist judicial decision-making will support Hunter's desire for feminist judgment writing to be used more frequently within academia and within the judicial realm.[57]

1.4 Chapter Outline

This dissertation evaluates the value and legitimacy of the Feminist Judgments Project to explore if this feminist, realist method may operate as the mode of best practice for judicial decision-making in England and Wales. This chapter briefly outlines the background to and significance of the issue addressed by the dissertation and demonstrates the limited practical focus upon re-dressing the internal injustices created by the traditional judicial decision-making approach. The chapter highlights the reluctance by the judiciary to deviate from the traditional, formalist approach to judgment writing. Simultaneously the dissertation highlights that while the Feminist Judgments Project outlays the potential impacts and value of feminist re-judgments, authors have not undertaken a specific analysis of these re-judgments in view of and with the aim of ingraining feminist judicial decision-making as the conventional approach towards judgment writing.

The following chapter provides an extended review of the literature centring upon judicial decision-making. The chapter undertakes a realist critique of formalist approaches towards judicial decision-making and identifies media pressure for the judiciary to conform to formalist judicial decision-making approaches. In considering the various flaws inherent within the formalist approach to judicial decision-making and the barriers that this approach seeks to

[55] British Council, *Gender Equality and Empowerment of Women and Girls in the UK* (British Council, 2016) Foreword, 7 British Council, 'What are the SDGs?' (*British Council*) <https://www.britishcouncil.org/sustainable-development-goals/what-are-they> last accessed 1st September 2018
[56] Rosemary Hunter, 'The Power of Feminist Judgments' (2012) 20 Feminist Legal Studies 145
[57] Rosemary Hunter, Clare McGlynn, and Erika Rackley, *Feminist Judgments From Theory to Practice* (Hart Pubishing, 2010) P 43

place between the judge and the social inequalities that they are invoked to adjudicate, the dissertation criticises the continued promotion of judgment writing in the traditional, formalist sense. It is pivotal to analyse the literature from these lenses to understand the present inadequate approach to judicial decision-making and the promise held by feminist judicial decision-making.

The dissertation will then analyse the case *R v Dhaliwal* (*R v D*) from the Feminist Judgments Project with the support of these respective lenses.[58] This analysis is undertaken to support the assessment of whether feminist judicial decision-making promotes fairness and fundamentally an 'equal justice for all'.[59]

The final chapter concludes by evaluating whether feminist judicial decision-making may legitimately operate as the mode of best judicial practice in England and Wales. This is achieved through a reflection upon the case analysis and the review of formalist, realist, and feminist legal scholarship.

[58] R v D [2006] EWCA Crim 1139
[59] Ibid

Chapter 2 - Literature Review – An Analysis of Judicial Decision Writing: A Mirage of Logic, Objectivity and Impartiality and an Extension of Inequality

> *'Like other tools [rules] must be modified when they are applied to new conditions and new results have to be achieved. Here is where the great practical evil of the doctrine of immutable and necessary antecedent rules comes in. It sanctifies the old; adherence to it in practise constantly widens the gap between current social conditions and the principles used by the courts. The effect is to breed irritation, disrespect for law, together with virtual alliance between the judiciary and entrenched interests that correspond most nearly to the conditions under which the rules of law were previously laid down.'* [60]

2.1 Overview

A literature review is expressed as being integral to the structure of academic writing and paramount in the formation of new knowledge.[61] There are many discussions about what constitutes an effective 'literature review' and its overarching purpose.[62] However, generally scholars describe a literature review as being an exercise undertaken by the author who provides a summary, interpretation, and synthesis of the existing body of literature within and closely tied to the authors' selected area of research.[63] Its purpose is three-fold: to assist the reader in understanding the wider body of literature around the author's chosen subject area, to enable the author to situate their personal research approach within the existing body of literature, and to enable the author to signify how their approach reflects and differs from existing research.[64] Although this description may present a literature review as a jigsaw-like exercise in which the author is simply tasked with mechanically selecting pieces of the puzzle to slot into place in relation to the other pieces, scholars highlight the need for a more engaged

[60] John Dewey, 'Logical Method and Law' (1924) 10 The Cornell Law Quarterly 26
[61] **Paul Oliver,** *Succeeding With Your Literature Review: A Handbook For Students: A Handbook* **(**McGraw-Hill Education, 2012**)** P 1
[62] See: Rowena Murray, *How To Write A Thesis* (McGraw-Hill Education, 2011) P 122 onwards;
David N Boote and Penny N Beile, 'Scholars Before Researchers: On the Centrality of the Dissertation Literature Review in Research Preparation' (2005) 34 Educational Researcher 3
[63] Andrew S Denvey and Richard Tewksbury, 'How to Write a Literature Review' (2013) 24 Journal of Criminal Justice Education 218
[64] Christine Susan Bruce, 'Research students early experience of the dissertation literature review' (1994) 19 Studies in Higher Education 217 -218

and creative approach by the author within this exercise.[65] Fundamentally, Murray highlights the active role played by the researcher in crafting and interpreting their own version of the existing body of literature.[66]

Thus, this section seeks to provide a synthesised and interpretive review of the existing literature on judicial decision-making from the standpoints of legal formalism, legal realism, and feminist jurisprudence. Beginning an analysis of judicial decision-making from the perspective of legal formalism may appear to be counter-productive within a dissertation that seeks to persuade a shift away from more archaic and rigid approaches towards judicial decision-making in favour of a more fluid approach.[67] However, providing an interpretation of the key themes and ideas developed through formalist conceptions of judicial decision-making is paramount in order to trouble dominant formalist conceptions of judicial decision-making, to identify the flaws and inadequacies with the existing formalist approach to judicial decision-making, and to illuminate the possibility for judicial decision-making to be remoulded in order to increase its value and legitimacy without sacrificing its integrity as 'law'.[68] In other words the analysis of judicial decision-making from the perspective of legal formalism and legal realism is pivotal as a deconstructive exercise to assist the 'other' in this case, feminist judicial decision-making in becoming the judicial mode of best practice.[69]

This review will illuminate the multiple falsehoods promoted by formalist approaches towards judicial decision-making and the damaging impact of encouraging these formalist approaches in practice, particularly in terms of the perceived legitimacy and value of the common law.[70] In doing so, the analysis will highlight both the opportunity and the need to rescue judicial decision-making from being delegitimised by society in light of its production

[65] Rowena Murray, *How To Write A Thesis* (McGraw-Hill Education, 2011) P 122-123
[66] Ibid
[67] Rosemary Hunter, Clare McGlynn, and Erika Rackley, *Feminist Judgments From Theory to Practice* (Hart Pubishing, 2010) P 43
[68] Hanoch Dagan, 'The Realist Conception of Law' (2007) 57 University of Toronto Law Journal 611
[69] A deconstructive exercise in the sense that this review hopes open up the possibility for the 'other', the 'other' being feminist judicial decision-making to move from the periphery to the centre. Jacques Derrida, *Deconstruction in a Nutshell a Conversation with Jacques Derrida* (Fordham University Press, 1997)
[70] John Dewey, 'Logical Method and Law' (1924) 10 The Cornell Law Quarterly 26

of 'unjust' legal decisions.[71] Deconstructing judicial decision-making in this way demonstrates the emancipatory promise held by feminist judicial decision-making, as a tool to further social equality and to ensure the production of just and legitimate legal decisions. Ultimately this literature review aims to convey the existing approaches to judicial decision-making as a mirage of logic, objectivity, and impartiality. Finally, the literature review highlights the potential for feminist judicial decision-making as a realist approach to redress the injustices and inequalities produced by formalist approaches towards judicial decision-making.

2.2 Judicial Decision-Making as Pure 'Logic'?

Legal formalists express the common law as being constructed by judges who perform judicial decision-making in a purely 'mechanical', 'prescriptive', and 'rigorously structured doctrinal[ly] scientific' manner.[72] Formalists argue that judges undertake judicial decision-making in a very strict manner because they perceive the legitimacy of the common law as being dependent on the pure application of legal logic and rules within an autonomous legal world.[73] Articulating the production of common law decisions as reliant solely upon the narrow and mechanical application of legal logic suggests that judges must undergo a systematic, highly restrictive, inductive, and contained application of legal rules to complex and different cases in order for the common law to retain its legitimacy.[74] In other words, all cases, without taking into account their complexity and varying facts and demands, should be decided by applying the same rigid, mechanical approach to judicial decision-making.

[71] Ibid
[72] Hanoch Dagan, 'The Realist Conception of Law' (2007) 57 University of Toronto Law Journal; Richard H Pildes, 'Forms of Formalism' (1999) 66 The University of Chicago Law Review 608, 609
Shai Dezinger et al, 'Extraneous factors in judicial decisions' (2011) 17 PNAS 6889;Antony Kronman, 'Jurisprudential Responses to Legal Realism' (1998) 73 Cornell Law Review 335
[73] C Guthrie, 'Blinking on The Bench: How Judges Decide Cases' (2007) 93 Cornell Law Review 2; Thomas C Grey, 'The New Formalism' [1999] Stanford Law School Public Law and Legal Series 5
[74] Hanoch Dagan, 'The Realist Conception of Law' (2007) 57 University of Toronto Law Journal 612; Richard H Pildes, 'Forms of Formalism' [1999] The University of Chicago Law Review 608, 609; Shai Dezinger et al, 'Extraneous factors in judicial decisions' (2011) 17 PNAS 6889

; Antony Kronman, 'Jurisprudential Responses to Legal Realism' (1998]) 73 Cornell Law Review 335; Thomas C Grey, 'The New Formalism' [1999] Stanford Law School Public Law and Legal Series 5

In recent years the seeming departure from strict formalist conceptions of judicial decision-making as a strictly rule-based exercise has provoked distrust towards judges and the common law more broadly. The level of distrust directed towards judges who are seen as deviating from the formalist conception of judicial decision-making is effectively highlighted within recent media coverage centring on the role and ambit of judicial decision-makers in the UK. Indeed, President of the UK Supreme Court, Baroness Hale of Richmond has been described as an 'Enem[y] of the People', 'A Radical feminist who is a long-running critic of marriage', 'A hardline feminist', 'The judge happy for law to be seen as an ass', and 'Out of touch' by the media.[75] These descriptions depict Hale and judges collectively who openly identify as 'feminist' as dubious, and as committed to making a mockery of the legal system in England and Wales.[76] Ultimately, these perceptions are borne out of formalist misconceptions of judicial decision-making as a solely rule-based exercise. By openly drawing upon feminist beliefs when writing judgments, these feminist judges are seen as violating formalist conceptions of judgment making as an 'impartial application of determinate existing rules of law in the settlement of disputes'.[77]

These media sources indicate that mainstream conceptions of judicial decision-making are informed by core tenets of legal formalism, as these sources dismiss and discredit judges who openly hold and reflect upon personal beliefs within their judgment writing as untrustworthy and as undermining the legitimacy of the common law.[78] Ultimately these

[75] The Daily Mail, 'Enemies of the people: Fury over 'out of touch' judges who have 'declared war on democracy' by defying 17.4m Brexit voters and who could trigger constitutional crisis' *The Daily Mail* (3rd November 2016) <http://www.dailymail.co.uk/news/article-3903436/Enemies-people-Fury-touch-judges-defied-17-4m-Brexit-voters-trigger-constitutional-crisis.html> accessed October 2018
Baroness Hale is a self-identifying 'soft feminist'. See: First 100 Years, *The Life and Legal Career of Baroness Hale* (LexisNexis, 2017, https://www.youtube.com/watch?v=ZokbQ4e312M)

[76] The Daily Mail, 'Enemies of the people: Fury over 'out of touch' judges who have 'declared war on democracy' by defying 17.4m Brexit voters and who could trigger constitutional crisis' *The Daily Mail* (3rd November 2016) <http://www.dailymail.co.uk/news/article-3903436/Enemies-people-Fury-touch-judges-defied-17-4m-Brexit-voters-trigger-constitutional-crisis.html> accessed October 2018
Caoilfhionn Gallagher QC, 'The Daily Mail's latest insult: a Supreme Court Justice who is "a feminist" and was instrumental in the crafting of the Children Act 1989'(https://insights.doughtystreet.co.uk/post/102dsgk/the-daily-mails-latest-insult-a-supreme-court-justice-who-is-a-feminist-and-w, Doughty Street Chambers, November 2016)

[77] HLA Hart, 'American Jurisprudence Through English Eyes The Nightmare and the Noble Dream' (1977 11 Georgia Law Review 971

[78] The Daily Mail, 'Enemies of the people: Fury over 'out of touch' judges who have 'declared war on democracy' by defying 17.4m Brexit voters and who could trigger constitutional crisis' *The Daily Mail* (3rd November 2016) <http://www.dailymail.co.uk/news/article-3903436/Enemies-people-Fury-touch-judges-defied-17-4m-Brexit-voters-trigger-constitutional-crisis.html> accessed October 2018

headlines echo formalist views that judges should be completely autonomous and that they must deny their feminist beliefs so that they can simply perform their job: to apply the law.[79]

However, this is an unrealistic and reductive depiction of the role of the judge which diminishes the uniquely complex interpretation and navigation involved in judicial decision-making. Legal realists demonstrate that judicial decision-makers are not simply tasked with 'applying the law', their role requires that judges go beyond the realms of simply applying legal logic.[80] Indeed, although the formalist image of judicial decision-making as a systematic and mechanical application of legal logic may appeal to some due to the seeming ease with which legal problems may be resolved or 'pigeonholed', legal realists demonstrate that positioning judicial decision-making as a purely logical exercise is 'deceptively simple'.[81] This is because these formalist approaches deny the judge's active role within the 'complex interaction between rules and facts', a relationship that necessitates judges to go beyond simply applying legal logic and instead calls upon judges to actively reshape case facts to correspond each legal situation with the most fitting legal rule.[82] Despite attempts by formalists to present judicial decision-making as mechanical, realists expose the reality that no legal system can 'signify rules so rigid that they can be stated once for all and then be literally and mechanically adhered to'.[83] Ultimately, the judge will always be called upon to do more than simply apply legal logic because legal rules are to some degree indeterminate.[84]

Arguably, the projection of judicial decision-making as an endeavour involving the pure sole application of legal rules to cases fuels the fictitious image of judges as being passive

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Caoilfhionn Gallagher QC, 'The Daily Mail's latest insult: a Supreme Court Justice who is "a feminist" and was instrumental in the crafting of the Children Act 1989'(https://insights.doughtystreet.co.uk/post/102dsgk/the-daily-mails-latest-insult-a-supreme-court-justice-who-is-a-feminist-and-w, Doughty Street Chambers, November 2016)

[79] Erika Rackley, 'How feminism could improve judicial decision-making' The Guardian (Nov 2010) < https://www.theguardian.com/law/2010/nov/11/feminism-improve-judicial-decision-making > accessed 1st September 2018

[80] Hanoch Dagan, 'The Realist Conception of Law' (2007) 57 University of Toronto Law Journal 614

[81] Richard A Posner, 'Formalism, Realism, and Interpretation' (1986) 37 Case Western Reserve Law Review 181

[82] Karl Llewellyn, 'The Case Law System in America' (1988) 88 Columbia Law Review 991; Benjamin Cardazo, *The Nature of the Judicial Process* (Courier Corporation, 2005) P 99; Hanoch Dagan, 'The Realist Conception of Law' (2007) 57 University of Toronto Law Journal 616

[83] John Dewey, 'Logical Method and Law' (1924) 10 The Cornell Law Quarterly 25

[84] Hanoch Dagan, 'The Realist Conception of Law' (2007) 57 University of Toronto Law Journal 614

in their creation of law.[85] Indeed, Rackley articulates that the presentation of judicial decision-making as involving a pure application of logic illustrates judges as acting somewhere between a 'demigod' and a 'legal pharmacist, dispensing the correct rule prescribed for the legal problem presented.'[86] In other words, the formalist lens through which judges are often viewed facilitates the image of a far-removed judge who simply applies legal rules in isolation. Llewellyn firmly refutes any attempt to demonstrate judicial decision writers as passive, instead evidencing lawmakers' instrumentality in the production of law.[87] Judge Posner develops this important argument, as he holds that judicial decision-makers are actually complicit in the continued pretence of judicial decision writing existing as a purely autonomous exercise supported by esoteric resources.[88]

Despite the rejection of this inaccurate portrayal of judging by many scholars, Rackley asserts that our perceptions of effective and efficient judgment writing remains bound to these prevailing conceptions of judgment writing.[89] Thus, at this stage it is important to state that an authentic account of judicial decision-making reflects a complex, indeterminate process requiring the judge to select between a multiplicity of legal rules to be applied within difficult legal issues.[90] The sheer multiplicity of legal rules available for selection by the judge within any given case creates ambiguity, which then necessitates for the judge to draw upon more than legal logic to construct their decisions.[91]

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[85] Margot Stubbs, 'Feminism and Legal Positivism' (1986) 3 Australian Journal of Law and Society 63; Leslie Green, 'Harts Message' in HLA Hart *The Concept of Law* (OUP Oxford, 2012) P 15; Sir William Blackstone, *Blackstone's Commentaries Part 1 Book 1* (1803) P 41

[86] Erika Rackley, *Women, Judging and the Judiciary: From Difference to Diversity* (Routledge, 2013) P 130; William Brennan, 'Reason, Passion, and the Progress of the Law' [1998] Cardazo Law Review 4

[87] Karl Llewellyn, *The Bramble Bush: On Our Law and Its Study. (*Quid Pro Books, 2012) P 38
'the judge has sifted through these 'facts' again, and picked a few which he puts forward as essential - and whose legal bearing he then proceeds to expound'.

[88] Richard A Posner, *How Judges Think* (Harvard University Press, 2008) P 3

[89]Duncan Kennedy, *A Critique of Adjudication* (HUP, 1992) P 192; Erika Rackley, *Women, Judging and the Judiciary: From Difference to Diversity* (Routledge, 2013) P 135

[90] Karl Llewellyn, *The Bramble Bush: On Our Law and Its Study. (*Quid Pro Books, 2012) P 40 – 48;
Karl Llewellyn, 'The Case Law System in America' (1988) 88 Columbia Law Review 990,995; Hanoch Dagan, 'The Realist Conception of Law' (2007) 57 University of Toronto Law Journal 611; Erika Rackley, 'How feminism could improve judicial decision-making' *The Guardian* (11th November 2010) <https://www.theguardian.com/law/2010/nov/11/feminism-improve-judicial-decision-making> accessed February 2018

[91] Hanoch Dagan, 'The Realist Conception of Law' (2007) 57 University of Toronto Law Journal 611-617

Ultimately, the formalist conception of judicial decision-making as pure 'logic' presents judicial decision writing as providing what Marx terms an 'unreal universality.'[92] In other words, formalist conceptions of law produce the false impression that the application of legal rules by judicial decision writers is undertaken in a pure and removed manner; in a way that disqualifies bias towards individual characteristics or idiosyncrasies, and instead privileges a supposedly 'neutral' and 'universal response'.[93] Stubbs cautions against this wholly unrealistic illustration of law.[94] While the aesthetic of judicial decision writing as a mechanical, syllogistic, and systematic application of rules by decision makers to legal issues may appeal to some because the appearance of absolute consistency and uniformity, ultimately this is antithetical to the authentic account of judging as detailed above.[95]

Legal Realist, Benjamin Cardozo emphasises the need to depart from the untruth of treating judicial decision-making as solely logic-based exercise in the interests of upholding the legitimacy of the common law. Indeed, he emphasises that the judicial decision-making process must be approached as 'the end which the law serves, and fitting its rules to the task at service.'[96] In other words, in the interests of fairness, rules cannot and ought not be simply 'applied' to legal cases because the complex nature of judicial decision-making necessitates a more intuitive, considered approach by judges towards each case.[97] This is paramount to recognise because the 'final cause of law is the welfare of society' and in attempting to treat legal cases as mere scientific issues with a correct and incorrect outcome, judges actively neglect the very real social inequalities and welfare issues faced by those seeking legal redress.[98] Scholars emphasise that formalist conceptions of law enforce a barrier between the

[92] Karl Marx, 'On the Jewish Question' in Robert Tucker (eds) *The Marx-Engels Reader* (Norton & Company, 1978) P 34
[93] Ibid P 34
Richard H Pildes, 'Forms of Formalism' (1999) 66 The University of Chicago Law Review 608
[94] Margot Stubbs, 'Feminism and Legal Positivism' (1986) 2 Australian Journal of Law and Society 69, 70
[95] Contrary to Sir Edward Coke's conception of the law and judicial decision writing: 'reason is the life of the law; nay, the common law itself is nothing else but reason.'; Douglas Edlin, *Common Law Theory* (CUP, 2007) P 174
[96] Ibid
[97] Ibid
[98] Richard Polenberg, *The World of Benjamin Cardozo: Personal Values and the Judicial Process* (HUP, 1999) P 87; Hanoch Dagan, 'The Realist Conception of Law' [2007] The University of Toronto Law Journal 7

common law and 'social goals and human values'.[99] In essence, because formalists perceive legal rules as being 'determinate' and thus infallible, judges are isolated from, and are actively barred from engaging with, the social inequalities that they adjudicate beyond a strictly rule-based application of the law.[100] Thus, the privileging of formalist conceptions of judicial decision-making is particularly alarming considering that the perceived legitimacy of the common law is not only derived from 'just' judicial decision-making, but also from the public's perceptions as to how 'in touch' the judge appears to be with wider social issues faced by individuals before the court.[101] In short, if the judge is not perceived as being 'in touch' with these issues by the wider public, the legitimacy and value of judicial decision-making and the law more widely is threatened.[102]

Therefore, in seeking to maintain judicial decision-making in the formalist sense as a pure application of legal logic, the media and the judiciary actively neglect the complexity of judicial decision-making, overly simplify the judicial decision-making process, construct barriers around social inequalities within wider society, and present a romanticized, fabricated image of judicial decision-making. The consistent idealisation of formalist approaches is reflected in the public sphere, where media criticism of realist and feminist judges accuses these members of the judiciary of threatening the very fabric of the law and society itself. However, the formalist approach itself leads to a separation between the law and contemporary societal issues, which in itself exacerbates the popularity of the formalist approach.

2.3 Judicial Decision-Making as Determinate?

As noted above, the rejection of the reductionist conception of judicial decision-making as a purely logic-based exercise is at the heart of the legal realist critique of judicial decision-making.[103] This is because legal realists perceive that the 'indeterminacy' of legal doctrine

[99] Hanoch Dagan, 'The Realist Conception of Law' (2007) 57 University of Toronto Law Journal 611
[100] Morton J Horwitz, *The Transformation of American Law 1780-1860* (Harvard University Press, 2009) P 15
[101] Kate Warner, Julia Davis, Maggie Walter, and Caroline Spiranovic, 'Are Judges out of Touch?' (2014) 25 Current Issues in Criminal Justice
[102] Ibid
[103] Hanoch Dagan, 'The Realist Conception of Law' (2007) 57 University of Toronto Law Journal 611

'renders pure doctrinalism a conceptual impossibility'.[104] They perceive that the sheer multiplicity and manipulability of legal rules in any given legal case creates ambiguity and this necessitates that judges draw upon more than legal logic in order to: a) make a decision between two or more competing legal rules, or to b) fit legal facts to these legal rules in any judicial decision.[105] Ultimately, they recognise the multiple factors at play in judicial decision-making because of the law's inherent indeterminacy unlike the legal formalists who maintain the superlative role played by legal logic.[106]

However, Hart asserts that the realist argument regarding the indeterminacy of law is overstated because there are 'plain cases constantly recurring in similar contexts to which general expressions are clearly applicable'.[107] While realists concede that some cases will involve a less complex decision-making process, and that the nature of legal doctrine 'impose[s] certain limitations in the [court's] application' they maintain that 'a gap will always exist between doctrinal materials and judicial outcomes.'[108] Thus, realists hold that the ambiguity generated by the law's indeterminacy not only facilitates, but requires judges to make personal choices which are informed beyond the realms of legal logic in order 'to reformulate the victorious trend, more narrowly or broadly than espoused by the attorney.'[109] Fundamentally, the indeterminacy generated by the multiplicity of legal rules available to the judge combined with the considerable discretion extended to judicial decision-makers when constructing their final decisions necessitates that they draw upon multiple factors to assist in their choice between legal rules.[110] These factors may include but are not limited to: 'life experience, educational and professional background, personal beliefs, and the social

[104] Hanoch Dagan, 'The Realist Conception of Law' (2007) 57 University of Toronto Law Journal 613
[105] Hanoch Dagan, 'The Realist Conception of Law' (2007) 57 University of Toronto Law Journal 611-14
[106] Ibid
[107]HLA Hart, *The Concept of Law* (3rd Edn, OUP, 2012) P 130, P 145, 147
[108] Hanoch Dagan, 'The Realist Conception of Law' (2007) 57 University of Toronto Law 620; Max Radin, 'Statutory Interpretation' [1930] Harvard Law Review 878
[109] Baroness Hale of Richmond, 'A Minority Opinion? Maccabean Lecture in Jurisprudence' (British Academy Lecture, 2007) 320; Karl N. Llewellyn, Paul Gewirtz and Michael Ansaldi, 'The Case Law System in America' (1988) 88 Columbia Law Review 1017; Hanoch Dagan, 'The Realist Conception of Law' (2007) 57 University of Toronto Law Journal 611-614
[110] Karl Llewellyn, 'The Case Law System in America' (1988) 88 Columbia Law Review 997; Hanoch Dagan, 'The Realist Conception of Law' (2007) 57 University of Toronto Law Journal

context'.[111] That is not to say that we venture into a 'Frankified' version of judicial decision-making whereby the judge has unfettered discretion to reach the conclusion that most aptly reflects their personal beliefs, instead we merely recognise the reciprocity between the indeterminacy of legal doctrine and the discretion possessed by judges to fill the gap created by this doctrinal indeterminacy.[112]

The active involvement of a judge's personal beliefs, background, and values when authoring their judicial decisions runs counter to formalist and more generalised accounts of judicial decision writing as absolutely 'impersonal [and] objective'.[113] Indeed, Llewellyn illustrates the perceived dichotomy between the reality of judicial decision-making as being informed by human life experiences and its clash with the illusion of judges providing 'absolute certainty'.[114] Although Llewellyn demonstrates the need to balance various human and legal factors when constructing legal judgments, some continue to be motivated by reductive, formalist perspectives which attempt to strictly separate and polarise these factors.[115]

For example, some scholars criticise the inclusion of feminist beliefs within judgment writing, as they assert that 'feminism in a judge is… evidence of partiality [and] a threat to judicial independence.'[116] However, Hunter refutes the suggestion that the inclusion of judges' feminist principles damages or conflicts with the production of approved judicial decision writing.[117] Instead she demonstrates that they represent a springboard by which to inform rather than to prejudice legal judgments.[118] Thus, in demonstrating the important role played by judges' discretion and personal values within the judicial decision-making process, the

[111] Bridget J. Crawford, 'Feminist Judging Matters: How Feminist Theory and Methods Affect the Process of Judgment' University of Baltimore Law Review [2018] 186; Rosemary Hunter, Clare McGlynn, and Erika Rackley, *Feminist Judgments From Theory to Practice* (Hart Publishing, 2010) P 5, 31
[112] Brian Leiter, 'Toward a Naturalized Jurisprudence' (1997) 76 Texas Law Review 269
[113] John Dewey, 'Logical Method and Law' (1924) 10 The Cornell Law Quarterly 24
[114] Karl Llewellyn, 'The Case Law System in America' (1988) 88 Columbia Law Review 995
[115] Joseph Bingham, 'What is Law? Part II' [1912] Michigan Law Review 113; Brian Tamanaha, 'Understanding Legal Realism' (2009) 87 Texas Law Review 732
[116] Wendy Baker, 'Women's Diversity: Legal Practice and Legal Education – A View from the Bench' (1996) 45 University of New Brunswick Law Journal 199
[117] Rosemary Hunter, Clare McGlynn, and Erika Rackley, *Feminist Judgments From Theory to Practice* (Hart Publishing, 2010) P 31, 43
[118] Ibid

respective realist and feminist approaches expose the false dichotomy between the application legal logic and the incorporation of these values. In so doing, they also undermine dominant formalist conceptions of judicial decision-making which aim to problematise the inclusion of any other factors outside legal logic.

2.4 Judicial Decision-Making: Legal Realism as 'fundamentalist'

Despite the provision of a more authentic and nuanced account of judgment writing by legal realists, prominent scholars such as HLA Hart and Lind characterise the respective realist and formalist schools of thought as extremist.[119] Thus, they prefer to adopt what they term a midway approach between embracing logical legal reasoning and recognising the limits of logic. [120] However, this is precisely the balance struck by legal realism indicating misconceptions of legal realism. [121] In articulating legal realism as fundamentalist, these scholars do a disservice to realism by illuminating realist conceptions as potentially dangerous and harmful.[122] Not only do they provide an inaccurate account of realism, but arguably in doing so they also limit the opportunities for realist conceptions of law to be considered as legitimate legal approaches. Thus, in illustrating realist conceptions of law as being extremist the shrouding of law and judicial decision writing behind the indestructible shields of 'objectivity' is permitted to continue. Subsequently, this supports a double-denial: firstly, a denial of the reality of law and a denial of judicial decision writing as being partisan and as facilitating inequality in practice. [123] This then denies the potential for legal realist re-conceptions of these tools, which demonstrate what lawmakers *'ought'* to do to be considered as legitimate.[124]

The denial resulting from the inaccurate portrayals of legal realism is particularly

[119] HLA Hart *The Concept of Law* (OUP Oxford, 2012) P ; D Lind, 'Logic, Intuition, and the Positivist Legacy of H.L.A. Hart' (1999]) 52 SMU Law Review 137
[120] Ibid
[121] Hanoch Dagan, 'The Realist Conception of Law' (2007) 57 University of Toronto Law Journal
[122] D Lind, 'Logic, Intuition, and the Positivist Legacy of H.L.A. Hart' (1999) 52 SMU Law Review 137
[123] Bertha Wilson, 'Will Women Judges Really Make A Difference' (1990) 28 Osgoode Hall Law Journal 509
[124] Roscoe Pound, 'Calls for A Realist Jurisprudence' (1931) 44 Harvard Law Review 700

important to recognise, as Fuller depicts the implications arising from the continued distortion of the reality of law. [125] Ultimately, scholars warn that these misrepresentations become ingrained as reality. [126] However, despite concerns regarding the protraction of formalist conceptions of judicial decision-making, some scholars identify resentment to a challenge to the prevailing formalist image of judicial method. [127]

2.5 Judicial Decision-Making as Male: The Myth of 'Objectivity'

While legal formalists are concerned with maintaining the image of judicial decision-making as an autonomous and objective logical exercise, in comparison, realist and feminist legal scholars uncover that this very quest results in the subjectivity and subsequent unfairness inherent within traditional judicial decision-making. Although legal formalists characterise traditional judicial decision writing by its supposedly pure, objective and autonomous nature, feminist scholars mirror legal realists in that they uncover the falsity of this image. [128] Mackinnon illuminates the manipulation of the value of 'objectivity' in its pure form by the judiciary as a means of privileging the voices of men and marginalising women's experiences. [129] She demonstrates that 'objectivity' in its distorted sense is then established as the universal standard under which the law, the judiciary, and society operate. [130] Inevitably, this means that in maintaining the existing approach to judicial decision-making, judges will subconsciously or otherwise inclined to prioritise the interests of men above women in legal cases. [131]

Ultimately, MacKinnon demonstrates that the marginalisation of women's experiences by the law is permitted because the values of neutrality and objectivity are synonymous with

[125] Lon Fuller, 'Positivism and Fidelity to Law-A Reply to Professor Hart' (1958) 71 Harvard Law Review 631
[126] Ibid
[127] Ibid 631, 632
[128] Richard H Pildes, 'Forms of Formalism' (1999) 66 The University of Chicago Law Review 608, 609; Emily Jackson, 'Catherine MacKinnon and Feminist Jurisprudence: A Critical Appraisal' (1992) 19 Journal of Law and Society 195
[129] Catherine A MacKinnon, *Toward a Feminist Theory of the State* (Harvard University Press, 1989) P 114
[130] Catherine A MacKinnon, *Toward a Feminist Theory of the State* (Harvard University Press, 1989) P 237
[131] Ibid

maleness.[132]The law's role in the distortion of these values in their pure form is invisible because male perspectives dominate within wider society and are reinforced by the judiciary within the common law. [133] Thus, the manipulation of these values goes largely unquestioned. Instead, judicial decision-makers and the common law more broadly is commended for its retention of this distorted value of objectivity.[134] In essence, law is routinely commended for its gendered and sexist approaches towards women under the guise of 'objectivity'.

In upholding the sham of absolute 'judicial objectivity', MacKinnon expresses the proclivity of the law to exclude marginalised social groups. Simultaneously, she uncovers the lip service paid to the value of objectivity by the judiciary in practice. [135] Therefore, although the notion that 'subjective decision-making based on political or social or philosophical beliefs leads to unpredictable and arbitrary results' is true, the current traditional judicial approach reflects these sentiments because these traditional approaches are weighted heavily in favour of men's interests.[136]

In light of the common law's consistent privileging of male interests under the guise of objectivity, Mackinnon cements the need for a distinctly feminist legal approach. In doing so she indirectly highlights the promise held by the Feminist Judgments Project as an imaginative and promising feminist legal method that engages with real world judgment writing.[137] She argues that:

> *Women have never consented to [law's] rule – suggesting that the system's legitimacy needs repair that women are in a position to provide. It will be said that feminist law cannot win and will not work. But this is premature. Its*

[132] Catherine A MacKinnon, *Feminism Unmodified: Discourses on Life and Law* (Harvard University Press, 1987) P 55
[133] Catherine A MacKinnon, *Toward a Feminist Theory of the State* (Harvard University Press, 1989) P 237
[134] Ibid
[135] Catherine A MacKinnon, *Toward a Feminist Theory of the State* (Harvard University Press, 1989) P 166, P 221; Anne Bottomley, *Feminist Perspectives on The Foundational Subjects of Law* (Cavendish Publishing, 1996) P 61
[136] D IPP, 'Maintaining the Tradition of Judicial Impartiality' (2008) 12 Southern Cross University Law Review 95
[137] Rosemary Hunter, Clare McGlynn, and Erika Rackley, *Feminist Judgments From Theory to Practice* (Hart Publishing, 2010) 3-4

> *possibilities cannot be assessed in the abstract but must engage with the world. A feminist theory of the state has barely been imagined; systematically, it has never been tried.*[138]

This dissertation argues that the Feminist Judgments Project responds to the production of gendered judicial decisions and offers a viable opportunity for change.[139] The Feminist Judgments Project is a hybrid feminist-legal methodological approach requiring activists and scholars to undertake feminist re-judgments of unjust, inequitable, troubling cases that are pertinent to feminist legal scholarship.[140] The method requires that scholars select important cases that they feel would benefit from feminist analysis.[141] The feminist re-analysis must be undertaken in line with existing judgment writing conventions and constraints such as the judicial oath.[142] In constructing the judgments, scholars are not confined to a set feminist approach to reflect the fluid and expansive nature of feminism. However, Hunter also highlights the key techniques shared by all of the judgments contained within the collection; including 'asking the woman question', 'seeking to remedy injustices and to improve the conditions of women's lives', 'promoting substantive equality' 'story-telling' and a reliance on contextual materials.[143]

Despite their collective adherence to the judicial oath and conventions, suspicion towards the open and active inclusion of feminist perspectives within judicial decision-making continues. Lord Bingham of Cornhill emphasises that judicial decisions must be 'legally motivated' meaning that decisions are to be generated from a consultation with established legal doctrine or common law principles rather than from the assistance of untruthful legal

[138] Catherine A Mackinnon, *Toward a Feminist Theory of the State* (Harvard University Press, 1989) P 249
[139] Rosemary Hunter, Clare McGlynn, and Erika Rackley, *Feminist Judgments From Theory to Practice* (Hart Publishing, 2010) P 3-4
[140] Rosemary Hunter, Clare McGlynn, and Erika Rackley, *Feminist Judgments From Theory to Practice* (Hart Publishing, 2010) P 3-4
[141] Ibid
[142] Rosemary Hunter, Clare McGlynn, and Erika Rackley, *Feminist Judgments From Theory to Practice* (Hart Publishing, 2010) P 3
[143] Rosemary Hunter, Clare McGlynn, and Erika Rackley, *Feminist Judgments From Theory to Practice* (Hart Publishing, 2010) P 35, 36

means.[144] Within his keynote address, Bingham characterises judicial decisions which are written in view of factors other than common law principles or doctrinal sources as being inauthentic legal decisions.[145] Arguably, in illustrating judicial decision writing in this narrow way, Bingham underlines the need for judicial decisions to be written in isolation of all other influences in order to retain their status as legitimate legal decision.[146]

Despite efforts to present judges who openly draw upon external influences as part of their decisions as being somehow unfaithful to the true judicial role, other commentators work to normalise this as part of the process.[147] Lord Justice Etherton exposes the reality of judicial decision writing in practice and simultaneously expresses the impossibility for a complete divorce between judicial decisions and the personal bias and life experiences of judges.[148] As such, Etherton undermines the image of the judge exercising a totally unfettered and unharnessed discretion, and instead demonstrates a careful and holistic consideration by judicial decision makers to author just and fair decisions for parties.[149] Arguably, Baroness Hale of Richmond advances Etherton's argument by asserting that the creation of judicial decisions and deeply held personal beliefs are not incompatible with one another.[150] Rather, the beliefs and life experiences of judges actively inform the judicial decision writing process and these personal beliefs support the invention of what will eventually come to be known as "the law".[151]

Indeed, Rackley reflects upon the opposition towards the inclusion of feminist values within legal judgment writing.[152] She asks the fundamental question: 'given that judges will, sometimes, have no choice but to fall back on their own values and perspectives, why shouldn't

[144] T Bingham, 'The Judges: Active or Passive?' (British Academy Lecture, 2005) 70
[145] Ibid
[146] Ibid
[147] Rosemary Hunter, Clare McGlynn, and Erika Rackley, *Feminist Judgments From Theory to Practice* (Hart Publishing, 2010) P 3
[148] Terence Etherton, 'Liberty, the archetype and diversity: a philosophy of judging' [2010] Public Law 8, 9
[149] Baroness Hale of Richmond, 'A Minority Opinion? Maccabean Lecture in Jurisprudence' (British Academy Lecture, 2007) 320
[150] Baroness Hale of Richmond, 'A Minority Opinion? Maccabean Lecture in Jurisprudence' (British Academy Lecture, 2007) 320
[151] Baroness Hale of Richmond, 'A Minority Opinion? Maccabean Lecture in Jurisprudence' (British Academy Lecture, 2007) 320
[152] Erika Rackley, 'How feminism could improve judicial decision-making' *The Guardian* (11th November 2010) <https://www.theguardian.com/law/2010/nov/11/feminism-improve-judicial-decision-making> accessed February 2018

feminist values and perspectives be included?'[153] Indeed, the media headlines and formalists treat the presence of feminism within judgment writing with contempt in comparison to the plethora of other beliefs that may also be invoked by judges when authoring their judgment.[154] 'The Secret Barrister' strengthens Rackley's challenge to the issue with the invocation of feminist values as they ask 'all lawyers are members of legal societies. I'm a member of Criminal Bar Association - should that stop me being a crim[inal] judge?'[155] Ultimately, both questions directly challenge the mainstream resistance towards the incorporation of personal beliefs and biases within judicial decision-making. Moreover, the strong opposition towards the reflection upon feminist beliefs within judicial decision-making raises the question: what makes feminist beliefs distinct from all other beliefs so as to justify the treatment of these values with such arbitrary suspicion?

Similarly, the treatment of feminist views within the traditional judicial decision writing process as being suspicious or devious is reflected across the globe in Australia, as the Sydney Morning Herald reported on a 'female judge [who was] asked to disqualify herself due to suspected "feminist" and "leftist" views.'[156] The justice was asked to step down by her male colleague on the basis that he 'suspected that as a female judge, I was a feminist with leftist leanings, who would not give him a fair hearing'. [157] Regardless of the judges' personal views, the sub-text of this accusation is that (1) judges holding feminist views cannot be trusted to

[153] Erika Rackley, 'How feminism could improve judicial decision-making' *The Guardian* (11th November 2010) <https://www.theguardian.com/law/2010/nov/11/feminism-improve-judicial-decision-making> accessed February 2018

[154] Rosemary Hunter, Clare McGlynn, and Erika Rackley, *Feminist Judgments From Theory to Practice* (Hart Publishing, 2010) P 32 as Hunter demonstrates these may include but are not limited to: faith, religion, and political beliefs. For example, within the short Daily Mail media piece, the author does not at any point make reference to any of the Supreme Court Justices political or philosophical beliefs, but makes explicit reference to Hale's subscription to feminist beliefs. The Daily Mail, 'Enemies of the people: Fury over 'out of touch' judges who have 'declared war on democracy' by defying 17.4m Brexit voters and who could trigger constitutional crisis' *The Daily Mail* (3rd November 2016)< http://www.dailymail.co.uk/news/article-3903436/Enemies-people-Fury-touch-judges-defied-17-4m-Brexit-voters-trigger-constitutional-crisis.html> accessed October 2017

[155] The Secret Barrister is an anonymous practitioner at the Bar and the author of the Sunday Times Bestseller, *Reasonable Doubts: Stories of the Law and How It's Broken* (Pan MacMillan, 2018) https://twitter.com/BarristerSecret/status/794319131105513482

[156] Michaela Witborn, 'Female judge asked to disqualify herself due to suspected 'feminist' and 'leftist' views' *Sydney Morning Herald* (October 2014) < https://www.smh.com.au/national/nsw/female-judge-asked-to-disqualify-herself-due-to-suspected-feminist-and-leftist-views-20141012-114vrj.html > accessed 1st September 2018

[157] Michaela Witborn, 'Female judge asked to disqualify herself due to suspected 'feminist' and 'leftist' views' *Sydney Morning Herald* (October 2014) < https://www.smh.com.au/national/nsw/female-judge-asked-to-disqualify-herself-due-to-suspected-feminist-and-leftist-views-20141012-114vrj.html > accessed 1st September 2018

perform their job without bias and (2) by default judges who identify as women decide cases in line with feminist principles.[158]

Firstly, these various instances reflect a double standard in relation to the specific incorporation of feminist beliefs as opposed to other beliefs. Secondly, while a judges' gender may influence the way that they judge, Somiline et al underline the problematic and inaccurate assumption that women judges will instinctively undertake a feminist approach to judgment writing.[159] Ultimately, while in England and Wales 'nemo iudex in causa sua' and 'justice must not only be done but be seen to be done', Hunter demonstrates that invoking feminist beliefs within judgment making does not conflict with these principles and the need to uphold judicial impartiality.[160] Rather, Hunter underlines the Feminist Judgments Project as representing an ideal fusion between feminism and legal principles, both of which are fluid and unfixed to some degree and also assist in the construction of variable and indeterminate outcomes.[161]

The irony inherent within the notion that judges who hold or reflect upon feminist beliefs are in some way prejudiced is effectively encapsulated by MacKinnon in her text in *Towards a Feminist Theory of the State*. She hypothesizes about the critical reception of feminist law operating in practice:

> *To the extent feminist law embodies women's point of view, it will be said that its law is not neutral. But existing law is not neutral. It will be said that it undermines the legitimacy of the legal system. But the legitimacy of existing law is based on force at women's expense*.[162]

[158] Ibid
[159] Michael E Somiline and Susan E Wheatley, 'Rethinking Feminist Judging' (1995) 70 Indiana Law Journal 898, 900
[160] Mengiste v Endowment Fund for the Rehabilitation of Tigray [2013] EWCA Civ 1003 [3]
Law v Chartered Institute of Patent Agents [1919] 2 Ch 276; Rosemary Hunter, Clare McGlynn, Erika Rackley (eds) *Feminist Judgments: From Theory to Practice* (Bloomsbury Publishing, 2010) P 31
[161] Rosemary Hunter, Clare McGlynn, and Erika Rackley, *Feminist Judgments From Theory to Practice* (Hart Pubishing, 2010) 43
[162] Catherine A Mackinnon, *Toward a Feminist Theory of the State* (Harvard University Press, 1989) P 249

This passage reaffirms the double standard applied to feminist approaches in comparison to the current 'objective' or more aptly, male approach, as she demonstrates that maleness continues to be accepted as the objective and correct mode of operation.[163]

Conversely, the law's insistence upon maintaining its pretence of absolute objectivity and impartiality within judicial decision writing results in the perpetuation of the very inequalities that decision writers seek to distance themselves from.[164] Indeed, Dewey demonstrates that in portraying and attempting to engrain judicial decision writing as syllogistic and mechanical scholars further entrench inequality, as 'adherence to it in practise constantly widens the gap between current social conditions and the principles used by the courts.'[165]Dewey argues that adhering to formalist conceptions of judicial decision-making to inspires 'irritation, disrespect for law, together with virtual alliance between the judiciary and entrenched interests that correspond most nearly to the conditions under which the rules of law were previously laid down.'[166] Ironically then, continuing the pretence of judicial decision-making as an autonomous, purely impartial, and objective process appears to damage the reputation, legitimacy and aesthetic of the common law.[167] Not only does the continued portrayal of judicial decision-making in formalist terms damage the reputation of the common law, but as Dewey demonstrates it also extends greater distance between the judiciary and those experiencing the law within wider society.

2.6 Feminist Judicial Decision-Making as Judicial Decision-Making: 'An Equal Justice for All'?

Hunter suggests that the methodological approach contained within the Feminist Judgments Project may assist in more effectively addressing the multiple and intersecting

[163] Ibid P 249
[164] John Dewey, 'Logical Method and Law' (1924) 10 The Cornell Law Quarterly 26
Margot Stubbs, 'Feminism and Legal Positivism' (1986) 2 Australian Journal of Law and Society 70
D Lind, 'Logic, Intuition, and the Positivist Legacy of H.L.A. Hart' (1999) 52 SMU Law Review 137
[165] John Dewey, 'Logical Method and Law' (1924) 10 The Cornell Law Quarterly 26
[166] Ibid
[167] William Shakespeare, *Hamlet* (Prestwick House, 2005) P 73

social inequalities and injustices produced by traditional approaches towards judicial decision-making.[168] She demonstrates that 'feminist judges are likely to be concerned to make decisions that correct perceived injustices, improve women's lives and promote substantive equality.'[169] Moreover, she reinforces that feminist judges are likely to exhibit a higher degree of consciousness about their beliefs when writing their judicial decisions than the 'traditional judge.'[170]

Indeed, while Hunter concedes that the approach adopted by authors within the Feminist Judgments Project is similar to that undertaken by traditional judicial decision-makers because of its adherence to judicial conventions and constraints, she emphasises that judges undertaking a distinctly feminist approach will be more likely to be 'well-schooled in gender issues, feminist theoretical concerns, and to have a particular commitment to gender justice'.[171] Arguably then, feminist judges are more likely to be aware of the historic privileging of male interests under the normative male standard of objectivity which operates within existing judicial decision-making.[172]

Thus, the potential for a greater awareness of the inequalities produced at the root of the common law may also assist in dismantling the male-centred approach towards judicial decision writing.[173] This is pivotal given the consistent production of the 'unjust' and 'gendered' judicial decisions by the existing judicial approach and the threat that these decisions pose towards the perceived value and legitimacy of the law.[174] The following analysis demonstrates that the greater awareness and consideration by those undertaking feminist judicial decision-making cements the Feminist Judgments Project methodology as an

[168] Rosemary Hunter, Clare McGlynn, and Erika Rackley, *Feminist Judgments From Theory to Practice* (Hart Publishing, 2010)) P 32
[169] Ibid
[170] Ibid P 31
[171] Ibid P 43
[172] Catherine A MacKinnon, *Feminism Unmodified: Discourses on Life and Law* (Harvard University Press, 1987) P 55
[173] Rosemary Hunter, Clare McGlynn, and Erika Rackley, *Feminist Judgments From Theory to Practice* (Hart Publishing, 2010)) P 31
[174] Rosemary Hunter, 'The Power of Feminist Judgments' (2012) 20 Feminist Legal Studies 137
Mairead Enright, Julie McCandless and Aoife O'Donoghue, *Northern/Irish Feminist Judgments: Judges' Troubles and the Gendered Politics of Identity* (Hart Publishing, 2017) P 3; Bridget J Crawford, Anthony C Infanti, *Feminist Judgments: Rewritten Tax Opinions* (CUP, 2017) P 45

ideal approach towards judicial decision-making.

Despite the potential held by the Feminist Judgments Project to redress various social inequalities created by existing approaches towards judicial decision-making, it is precisely this attempt to construct a reciprocal relationship between law with feminism which angers some feminist scholars.[175] In her thesis *Feminism and the Power of Law*, Smart expresses the impossibility for a mutual relationship between feminism and law to exist because of the law's status as an exclusionary masculine and hegemonic discourse, which invalidates all other forms of knowledge.[176] Indeed, Smart remarks that court and judicial decision-making will always preclude alternative visionary approaches to the law from emerging.[177] Thus, Smart specifically cautions feminists against resorting to law for the resolution of women's issues because of the law's 'malevolence' to women.[178] Although Smart recognises the value inherent within feminist critiques of the law, she believes the product of this research should be used to challenge masculine power at the root of law, rather than attempting to reform the law with a hybrid feminist-legal method.[179]

Similarly, Mossman mirrors Smart's thesis illustrating that the structure of the law means that it is 'impervious' towards other discourses such as feminism because of the innate power of existing approaches towards judicial decision-making and its resistance towards alternatives deviating from tradition.[180] Mossman's thesis also alludes to the pedestrian nature of existing feminist legal approaches and thus further reducing the potential scope of future feminist legal scholarship.[181] Mossman remains dubious as to the potential for feminism and law to co-exist and cautions that a relationship may only be possible if future feminists provide

[175] Carol Smart, *Feminism and the Power of Law* (Routledge, 2002) P 2-5; Mary Jane Mossman, 'Feminism and Legal Method: The Difference It Makes' [1987] Wisconsin Women's Law Journal (now Wisconsin Journal of Law, Gender and Society)
[176] Carol Smart, *Feminism and the Power of Law* (Routledge, 2002) P 4
[177] Carol Smart, *Feminism and the Power of Law* (Routledge, 2002) P 5, P 88
[178] Carol Smart, *Feminism and the Power of Law* (Routledge, 2002) P 2
[179] Ibid
[180] Mary Jane Mossman, 'Feminism and Legal Method: The Difference It Makes' (1987) 3 Wisconsin Women's Law Journal (now Wisconsin Journal of Law, Gender and Society) 167, 168
[181] Mary Jane Mossman, 'Feminism and Legal Method: The Difference It Makes' (1987) 3 Wisconsin Women's Law Journal (now Wisconsin Journal of Law, Gender and Society) 168

imaginative and powerful alternatives to traditional legal method.[182]

Ultimately, Smart and Mossman's positions in the late 1980s highlight the law's coerciveness; simultaneously confining feminism to a subservient position because of its perpetual yielding to the law's demands.[183] Smart and Mossman's respective theses demonstrate the illegitimate coupling of law as a brute power and feminism as a weaker and subservient alternative.[184] In their eyes, feminism is 'immobilized' by traditional judicial method, which silences all alternative approaches to law.[185] Majury also reflects upon the initial feelings of hopelessness expressed by the Women's Court of Canada because of the difficulty in understanding where their combined voices and alternative legal approaches would be taken seriously.[186]

Smart and Mossman's unwillingness to accept the potential of a collaboration between feminism and traditional judicial method is understandable when considering the law's consistent homogenisation and marginalisation of minority groups.[187] However, scholars demonstrate that a credible relationship between law and feminism is achievable without sacrificing the law's structural integrity and feminism's reputation as an instrument of equality, justice, and fairness.[188] Indeed, while Hunter concedes that feminism must perform a secondary role to judicial conventions and constraints in order to uphold the feminist judicial decision-making as a 'real-life' legal exercise, in engaging with judicial decision-making in an authentic way with the support of feminism, she also reinforces realist arguments that the law is indeterminate to some degree.[189] By enabling feminist beliefs to be incorporated within judicial decision-making, Hunter highlights the considerable space available for judicial

[182] Ibid
[183] Carol Smart, *Feminism and the Power of Law* (Routledge, 2002)) P 5
[184] Carol Smart, *Feminism and the Power of Law* (Routledge, 2002) P 5
[185] Carol Smart, *Feminism and the Power of Law* (Routledge, 2002) P 5, P 88
[186] Diana Majury, 'Introducing the Women's Court of Canada' (2006) 18 Canadian Journal of Women and the Law 1
[187] See: Hilaire Barnett, *Introduction to Feminist Jurisprudence* (Routledge, 2013) P 7; Katharine Bartlett, 'MacKinnon's Feminism: Power on Whose Terms?' [1987] 1559
[188] Rosemary Hunter, 'The Power of Feminist Judgments' (2012) 20 Feminist Legal Studies 143
[189] Rosemary Hunter, Clare McGlynn, and Erika Rackley, *Feminist Judgments From Theory to Practice* (Hart Publishing, 2010) P 5

decision writers to draw upon non-legal factors to assist them in selecting between competing legal rules and interests.[190] Thus, Hunter argues that the indeterminacy at the core of judicial decision writing extends considerable discretion to judges, which in turn heightens the potential for feminism to play a significant role in judicial decisions in practice.[191]

The degree of freedom available to judicial decision makers when writing their decisions is accurately encapsulated by the Feminist Judgment Project, as some of the re-judgments provide the same decision as the original judgments but adopt different styles of feminist legal reasoning, while others reach entirely different legal conclusions.[192] Therefore, although Smart would undoubtedly disapprove of the subservient role played by Feminist Judgments Project, Hunter and fellow pioneers of the project strongly advocate that feminist judging represents a legitimate and effective method of judicial decision-making. Working with traditional judicial conventions, the feminist judgment methodology capitalises on the gap created by the indeterminacy inherent within practical judicial decision-making to produce more just, equitable, and feminist decisions.[193]

Ultimately, in combining traditional judicial conventions and constraints with feminist scholarship and praxis, the methodology contained within the Feminist Judgments Project facilitates an opportunity to actively confront and respond effectively to multi-layered issues such as: inequality within the law, substantive equality, and women's live experiences from within the law's borders.[194] Thus, although Smart and Mossman's dissolution with law and their aversion to an engagement between traditional legal method and feminism is understandable, ultimately their approaches unduly limit the potential for feminist alternatives to make a difference.[195]

[190] Ibid P 5
[191] Ibid P 31-32
[192] Ibid
[193] Ibid P 6
[194] Ibid P 35
[195] Susan M Armstrong, 'Is Feminist Law Reform Flawed? Abstentionists & Sceptics (2004) 20 Australian Feminist Law Journal 62

Indeed, Hunter argues that Smart's belief that the law and judicial decision-making is 'fundamentally anti-feminist' is 'too absolutist'.[196] MacKinnon reinforces this belief, as arguably within the following excerpt she emphasises the potential inherent within an approach such as that contained within the Feminist Judgments Project as a method created by women scholars who recognise and attempt to support the need to reform the current common law system:

> *Women have never consented to [law's] rule – suggesting that the system's legitimacy needs repair that women are in a position to provide. It will be said that feminist law cannot win and will not work. But this is premature. Its possibilities cannot be assessed in the abstract but must engage with the world. A feminist theory of the state has barely been imagined; systematically, it has never been tried.*[197]

MacKinnon's faith in the potential for feminist law to work in practice and even 'win' reinforces the central argument made by this dissertation that feminist judicial decision-making features as a transformative and therefore, valuable and legitimate judicial approach.[198] Indeed, the potential for this method to operate as an emancipatory tool for the traditional judicial system is of increased importance, as Gordon explains that because the law is 'profoundly paralysis-inducing because they make it so hard for people (including the ruling classes themselves) even to imagine that life could be different and better… people come to 'externalize' [it], to attribute to [it] existence and control over and above human choice; and, moreover, to believe that these structures must be the way they are.'[199]

[196] Carol Smart, *Feminism and the Power of Law* (Routledge, 2002) P 160; Hunter, 'The Power of Feminist Judgments' [2012] Feminist Legal Studies 142
[197] Catherine A Mackinnon, *Toward a Feminist Theory of the State* (Harvard University Press, 1989) P 249
[198] Ibid
[199] Robert W. Gordon, 'New Developments in Legal Theory' in David Kairys, *The Politics of Law A Progressive Critique* (2010)

Thus, because the Feminist Judgments Project re-imagines the seemingly unimaginable in an accessible and practical manner, arguably the method represents hope in that it demonstrates that a different and viable legal approach is possible. President of the Supreme Court, Baroness Hale of Richmond echoes these sentiments, as she expresses that the Feminist Judgments Project demonstrates that 'a different perspective can indeed make a difference'.[200]

[200] First 100 Years, *The Life and Legal Career of Baroness Hale* (LexisNexis, 2017, https://www.youtube.com/watch?v=ZokbQ4e312M)

Chapter 3 Feminist Judicial Decision-Making - A legitimate hybrid critique-reform tool to generate legal change: *R v Dhaliwal* (*R v D*)[201]A Case Analysis

While scholars such as Smart and Mossman seek to dissuade others from the seemingly futile exercise of reforming the law with feminism, the Feminist Judgments Project requires that contributors undertake a 'kind of hybrid form of [academic] critique and law reform project'.[202] This hybrid critique-reform project is achieved by scholars who actively engage in a feminist critique of original judicial decisions and then practically reform these decisions with the assistance of the findings from their feminist critiques and traditional judicial decision-making conventions.[203]

Feminist critiques play a fundamental role in the feminist judgment critique-reform hybrid. However, as Hunter demonstrates, the feminist re-judgments are not performed 'simply as an academic exercise or for an academic audience'.[204] Rather, part of the justification for engaging in a hybrid academic critique-law reform approach to judicial decision-making is driven by the desire for feminist judicial decision-making to be perceived as a serious and legitimate way to instil practical legal change within the 'real world'.[205] Fundamentally, Hunter et al demonstrate that the feminist re-judgments are employed with an extended vision in mind: to generate further feminist judgment writing within academia, to induce sustained change within the courtroom by judges and advocates, and to change the lives of those disadvantaged by law.[206] Thus, Hunter demonstrates that the desire for feminist judicial decision-making to be appreciated as a serious and legitimate way of generating sustained legal change across a number of spheres necessitates that the project must strike an intricate balance

[201] R v D [2006] EWCA Crim 1139
[202] Rosemary Hunter, 'The Power of Feminist Judgments' (2012) 20 Feminist Legal Studies 137
[203] Ibid
[204] Rosemary Hunter, 'The Power of Feminist Judgments' (2012) 20 Feminist Legal Studies 137
[205] Diana Majury, 'Introducing the Women's Court of Canada' (2006) 18 Canadian Journal of Women and the Law 6; Rosemary Hunter, Claire McGlynn, Erica Rackley, *Feminist Judgments From Theory to Practice* (Hart Publishing Ltd, 2010) P 27-28
[206] Rosemary Hunter, Claire McGlynn, Erica Rackley, *Feminist Judgments From Theory to Practice* (Hart Publishing Ltd, 2010) P 43

between providing an academic feminist critique of existing decisions and practical legal reform.[207]

Hunter is reflexive about the reality that an academic feminist approach alone is unlikely to make a substantial impact within the lives of those most in need within society.[208] However, she and fellow contributors to the Feminist Judgment Project reject Smart's more reductionist belief that the power of law completely precludes a relationship between law and feminism.[209] In this sense those engaging in feminist judicial decision-making reflect a more realist approach because they believe that the indeterminacy of judicial decision-making facilitates an opportunity for feminist approaches to be legitimately incorporated with the law to create social change.[210] Thus, to ensure that the Feminist Judgments Project is understood as an authentic tool for legal reform in practice, contributors illustrate the relationship between a more academic feminist critique and practical legal reform as being reciprocal.[211] I.e. law reform is dependent on a feminist critique of law in its existing state and vice versa: a feminist critique of law is redundant without an attempt to reform the existing law.[212]

However, one may challenge the value of a feminist judicial decision operating as a 'hybrid form of critique-reform' because Lord Rodger asserts that the proximity between academic writing and judgment writing is now non-existent.[213] In fact Lord Rodger articulates that the judiciary are producing glorified academic articles rather than legal judgments.[214] Thus, Lord Rodger's perception of judicial decision-making as a form of academic writing undermines claims by the Feminist Judgments Project of 'feminist judgments' operating as a critique-reform hybrid.[215] His criticism creates the possibility that feminist judicial decision-

[207] Rosemary Hunter, 'The Power of Feminist Judgments' (2012) 20 Feminist Legal Studies 138
[208] Rosemary Hunter, Claire McGlynn, Erica Rackley, *Feminist Judgments From Theory to Practice* (Hart Publishing Ltd, 2010) P 17
[209] Carol Smart, *Feminism and Power of Law* (Routledge, 2002) P 49
[210] Carol Smart, *Feminism and Power of Law* (Routledge, 2002) P 49; Rosemary Hunter, Claire McGlynn, Erica Rackley, *Feminist Judgments From Theory to Practice* (Hart Publishing Ltd, 2010) P 5
[211] Introducing the Women's Court of Canada' (2006) 143
[212] Ibid
[213] Lord Rodger, 'The Form and Language of Judicial Opinions' (2002) 118 Law Quarterly Review 237
[214] Lord Rodger, 'The Form and Language of Judicial Opinions' (2002) 118 Law Quarterly Review 237
[215] Rosemary Hunter, 'The Power of Feminist Judgments' (2012) 20 Feminist Legal Studies 143

making is actually an abstract, academic exercise under the guise of being a practical method of legal reform. While this sceptical view of feminist judicial decision-making may appear to be legitimated by Lord Rodger who illuminates the perceived proximity between academic writing and judgment writing, conversely, Rackley restates the distinctiveness of the practice of judgment writing and the drive by the Feminist Judgments Project to exploit and harness this distinctiveness.[216] Ultimately, it is precisely this reciprocal relationship between academic critique and legal reform that underpins the value and legitimacy of feminist judicial decision-making as a socio-legal tool for change and as a method of best judicial practice.[217]

The value generated by the Feminist Judgments Project as a hybrid academic critique-legal reform tool is exemplified by its move beyond rigid, formalist judicial decision-making approaches towards embracing the realist, indeterminate nature of judicial decision-making. The power of feminist judicial decision-making to protect the legitimacy and the value of judicial decision-making through radical doctrinal, policy, and conceptual reform is demonstrated within the re-judgment of the landmark case *R v Dhaliwal (R v D)*[218].

The feminist re-judgment in *R v D* highlights the opportunity missed by the court in the original case to widen the scope of the law under the Offences Against the Person Act 1861 (OAPA) to ensure that perpetrators of domestic violence are subjected criminal sanctions for their abusive conduct.[219] The case *R v D* concerned the victim who took her own life after being subjected to sustained psychological and physical abuse by the perpetrator, her husband.[220] Upon the victim's death, the perpetrator was charged with committing Manslaughter and Grievous Bodily Harm contrary to the OAPA 1861.[221] Despite evidence by experts that the

[216] Erika Rackley, 'The Art and Craft of Writing Judgments: Notes on the Feminist Judgments Project' in Rosemary Hunter, Clare McGlynn, and Erika Rackley, *Feminist Judgments From Theory to Practice* (Hart Publishing, 2010) P 56
[217] Rosemary Hunter, 'The Power of Feminist Judgments' (2012) 20 Feminist Legal Studies 137
[218] R v D [2006] EWCA Crim 1139
[219] Mandy Burton, 'Commentary on *R v Dhaliwal'* in Rosemary Hunter, Clare McGlynn, and Erika Rackley, *Feminist Judgments From Theory to Practice* (Hart Publishing, 2010) P 255
[220] R v D [2006] EWCA Crim 1139 [1][3]
[221] Offences Against The Person Act 1861
R v D [2006] EWCA Crim 1139 [1]

‘“overwhelming primary cause” for the [victim’s] suicide “was the experience of being physically abused by her husband in the context of experiencing many such episodes over a very prolonged period of time”’, the CoA decided that the perpetrator could not be held accountable for either offence.[222]

The court’s decision to acquit the defendant within the case was underpinned by evidence from medical experts invoked by the Crown, Dr Chesterman and Dr Agnew-Davies who held that there was insufficient evidence to demonstrate that the victim suffered from a diagnosable psychological issue.[223] However, the expert evidence by Chesterman and Agnew-Davies was undermined by Dr Mezey who claimed that there was “sufficient evidence” to demonstrate that the victim within the case suffered from a psychological condition.[224] Although Mezey’s evidence suggests that the victim could have been suffering from a psychological condition and the court made explicit reference to the evidence found after the victim’s death detailing her attempts to self-harm and consume large quantities of alcohol, the court relied upon the conclusions made by Chesterman and Agnew-Davies.[225] Thus, the court acquitted the defendant on the basis that the jury could not properly conclude that the defendant was guilty due to the scope of the concept ‘bodily harm’ under OAPA 1861. This statute ‘does not allow for un-diagnosed psychological symptoms caused in domestic violence to be classified as ‘bodily harm’.[226]

The approach by the court in the original decision in *R v D* is highlighted by Shah, Munro, and Burton as being unjust; ineffective, and thus in need of an intervention by feminist judicial decision-makers.[227] They articulate that in emphasising the need for medical evidence to affirm the psychological state of mind of the victim, the court privileges medical knowledge

[222] Ibid [14]
[223] R v D [2006] EWCA Crim 1139 [16]
[224] R v D [2006] EWCA Crim 1139 [14]
[225] R v D [2006] EWCA Crim 1139 [3] [4] [5]
[226] R v D [2006] EWCA Crim 1139 [1] [6] [12 -17] [32][33]
[227] Mandy Burton, ‘Commentary on *R v Dhaliwal’* in Rosemary Hunter, Clare McGlynn, and Erika Rackley, *Feminist Judgments From Theory to Practice* (Hart Publishing, 2010) P 258

above drawing upon a wide body of social science research.[228] Indeed, the original decision was made with no reference made to the established body of research on domestic violence which demonstrates a clear correlation between the subjection of women to sustained periods of domestic violence and their increased experiences of psychological conditions such as depression.[229]

In the original decision, the court emphasised a need for medical evidence in the interests of ensuring 'certainty' for future cases.[230] However, as Burton effectively highlights even the medical experts within the original case decision could not unanimously agree on whether the victim was experiencing a psychological condition, thus generating the very uncertainty that the court sought to avoid by relying upon expert medical knowledge.[231] In their feminist re-judgment, Shah and Munro argue that by prioritising medical knowledge above social science research the court in the original decision excludes victims of domestic violence who do not have a medically recognised psychological condition from the possibility of legal redress.[232] The exclusion of victims/survivors of domestic violence from the opportunity of accessing justice is reinforced by research by social scientists who demonstrate that victims of domestic violence are highly unlikely to seek medical assistance.[233] Thus logically in light of this research, the majority of domestic violence victims will never be able to access justice and accountability, as existing psychological conditions will remain undiagnosed.

In light of the injustice produced by the approach of the court in the original decision of *R v D*, Burton highlights the need to reform key concepts such as 'bodily harm' contained

[228] Ibid
[229] Cathy Humphreys and Ravi Thiara, 'Mental Health and Domestic Violence: 'I Call it Symptoms of Abuse' (2003) 33 The British Journal of Social Work 209
[230] R v D [2006] EWCA Crim 1139 [31]
Mandy Burton, 'Commentary on *R v Dhaliwa*l' in Rosemary Hunter, Clare McGlynn, and Erika Rackley, *Feminist Judgments From Theory to Practice* (Hart Publishing, 2010) P 258
[231] Mandy Burton, 'Commentary on *R v Dhaliwal'* in Rosemary Hunter, Clare McGlynn, and Erika Rackley, *Feminist Judgments From Theory to Practice* (Hart Publishing, 2010) P 258
[232] Mandy Burton, 'Commentary on *R v Dhaliwal'* in Rosemary Hunter, Clare McGlynn, and Erika Rackley, *Feminist Judgments From Theory to Practice* ((Hart Publishing, 2010) P 258
[233] Anna Taket et al, 'Routinely asking women about domestic violence in health settings' [2003] BMJ 673

within the OAPA 1861. [234] Burton demonstrates that the reform of this concept is imperative to ensure that undiagnosed psychological symptoms can fall under this category without the need for a formal medical examination of the victim's state of mind. [235] Reforming this approach to 'bodily harm' in practice could ensure that the law provides greater accountability for those affected by domestic violence. [236]

Similarly, Burton also emphasises the need for a shift in policy around the approach towards causation in manslaughter cases where individuals have been subjected to domestic violence. [237] This is because when causation is followed rigidly, traditional judicial decision-makers have a tendency to focus on the victim's 'voluntary' act of suicide as the intervening act breaking the chain of causation, rather than emphasising this act within the context of the catalogue of abuse experienced by the victim. [238] Burton highlights that this rigid formalist approach towards causation is also flawed in domestic violence proceedings because the 'voluntary' act of suicide by the victim, who has usually been systematically controlled and manipulated for a sustained period is judged by the law on the basis that they are an 'autonomous person', rather than acting in light of this period of abuse. [239] Arguably, the court's consideration of causation within the original decision is formalist because the court did not contextualise causation within the context of the domestic violence which evidently impacted on the victim's conduct and state of mind. [240] Rather, it seeks to apply causation in a rigid and mechanical fashion when there are clear issues necessitating a more flexible approach to causation.

[234] Mandy Burton, 'Commentary on *R v Dhaliwal'* in [234] Rosemary Hunter, Claire McGlynn, Erica Rackley, *Feminist Judgments From Theory to Practice* (Hart Publishing Ltd, 2010) P 258
[235] Mandy Burton, 'Commentary on *R v Dhaliwal'* in Rosemary Hunter, Clare McGlynn, and Erika Rackley, *Feminist Judgments From Theory to Practice* (Hart Publishing, 2010) P 258
[236] Mandy Burton, 'Commentary on *R v Dhaliwal'* in Rosemary Hunter, Clare McGlynn, and Erika Rackley, *Feminist Judgments From Theory to Practice* (Hart Publishing, 2010) P 258
[237] Mandy Burton, 'Commentary on *R v Dhaliwal'* in Rosemary Hunter, Clare McGlynn, and Erika Rackley, *Feminist Judgments From Theory to Practice* (Hart Publishing, 2010) P 258- 259
[238] Ibid
[239] Ibid
[240] Ibid

The value of the feminist judgment methodology is reinforced by Shah and Munro who attempt to move beyond the parameters of the unjust doctrinal and policy approaches of the court within the original decision within the feminist re-judgment of *R v D*.[241] Indeed, Shah and Munro respond to the need to broaden the concept of 'bodily harm' and revise the traditional approach to causation within domestic violence proceedings as highlighted by the original approach of the court in *R v D*.[242] Within their re-judgment, they illustrate that the definition of 'bodily harm' contained within OAPA 1861 could be legitimately reformed to better support victims and survivors of domestic violence where the abuse committed by the perpetrator does not fall strictly under the existing category of 'bodily harm'.[243] To this end, Shah and Munro attempt to provide a more open, flexible interpretation of 'bodily harm' in order to ensure that the perpetrator is held accountable for their actions.[244] In doing so, the feminist re-judgment transcends the parameters of the existing concept of 'bodily harm' and re-centres its focus upon supporting victims and survivors of domestic violence; rather than upon continuing their punitive treatment of victims in seeking for evidence of their psychological conditions.[245]

The re-approach proposed by Munro and Shah could result in a higher degree of flexibility afforded to courts around the concept of 'bodily harm' in practice to ensure that victims/survivors of domestic violence who are subjected to 'non-fatal' offences, but who cannot be protected under the OAPA 1861 due to the present narrow definition of 'bodily harm' are still supported.[246] Burton articulates this specific approach to 'bodily harm' and causation

[241] Mandy Burton, 'Commentary on *R v Dhaliwal'* in Rosemary Hunter, Clare McGlynn, and Erika Rackley, *Feminist Judgments From Theory to Practice* (Hart Publishing, 2010) P 255; *R v D* [2006] EWCA Crim 1139, [2006] 2 Cr. App R 24 (CA)
[242] Mandy Burton, 'Commentary on *R v Dhaliwal*' in Rosemary Hunter, Clare McGlynn, and Erika Rackley, *Feminist Judgments From Theory to Practice* (Hart Publishing, 2010) P 255*; R v D* [2006] EWCA Crim 1139, [2006] 2 Cr. App R 24 (CA)
[243] Mandy Burton, 'Commentary on *R v Dhaliwal*' in Rosemary Hunter, Clare McGlynn, and Erika Rackley, *Feminist Judgments From Theory to Practice* (Hart Publishing, 2010) P 255; *R v D* [2006] EWCA Crim 1139, [2006] 2 Cr. App R 24 (CA)
[244] Mandy Burton, 'Commentary on *R v Dhaliwal'* in Rosemary Hunter, Clare McGlynn, and Erika Rackley, *Feminist Judgments From Theory to Practice* (Hart Publishing, 2010) P 260
[245] Mandy Burton, 'Commentary on *R v Dhaliwal'* in Rosemary Hunter, Clare McGlynn, and Erika Rackley, *Feminist Judgments From Theory to Practice* (Hart Publishing, 2010) P 259
[246] Mandy Burton, 'Commentary on *R v Dhaliwal'* in Rosemary Hunter, Clare McGlynn, and Erika Rackley, *Feminist Judgments From Theory to Practice* (Hart Publishing, 2010) P 260

as assisting in the wider goal set by feminist scholars to ensure that the criminal justice system adequately responds to both the perpetrators and victims/survivors of domestic violence.[247]

Therefore, in considering the positive impact generated by the interaction between a feminist critique of existing judgments and the subsequent feminist re-judgment of the original decision in *R v D*, arguably the distinct value of the feminist judgment methodology lies in the reciprocal relationship between legal critique and legal reform. Indeed, in operating between critique and reform, the Feminist Judgments Project may be said to adopt a 'sceptical pragmatist' approach to judgment writing in that they 'embrace legalism as a tool of necessity' but they also 'stand outside the courtroom door'.[248] In other words, contributors strike the balance between critiquing the law from a more theoretical, feminist critical standpoint 'outside the courtroom door' and then recognising the need to engage with this law from the 'inside' by reforming judicial decisions from a feminist standpoint.[249] Thus, rather than mirroring the 'absolutist' recommendations to cease from engaging with law to reform by Smart, feminist judicial decision-making works to bridge the gap between more engaging with abstract feminist principles and practical forms of legal reasoning in the hope of generating more fair and just results for society.[250] As re-affirmed by Hunter, this approach is taken not because feminist judicial decision-makers neglect the limitations of law reform, nor do they accept the operation law in its entirety.[251] Rather, contributors to the Feminist Judgments Project recognise the reality that the law plays a pivotal role in the lives of women and sometimes an engagement with law is necessary to achieve wider social justice objectives.[252]

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[247] Mandy Burton, 'Commentary on *R v Dhaliwal'* in Rosemary Hunter, Clare McGlynn, and Erika Rackley, *Feminist Judgments From Theory to Practice* (Hart Publishing, 2010) P 260

[248] Susan M Armstrong, 'Is Feminist Law Reform Flawed? Abstentionists & Sceptics' (2004) 20 Australian Feminist Law Journal 44; Mari J Matsuda, 'When the First Quail Calls: Multiple Consciousness as Jurisprudential Method' (1989) 1 Women's Rights Law Reporter

[249] Susan M Armstrong, 'Is Feminist Law Reform Flawed? Abstentionists & Sceptics (2004) 20 Australian Feminist Law Journal 44; Rosemary Hunter, 'The Feminist Judgments Project: Legal Fiction as Critique and Praxis' (2015) 5 International Critical Thought 501

[250] Rosemary Hunter, 'The Power of Feminist Judgments' (2012) 20 Feminist Legal Studies 142 - 143

[251] Ibid 143; Susan M Armstrong, 'Is Feminist Law Reform Flawed? Abstentionists & Sceptics (2004) 20 Australian Feminist Law Journal 44

[252] Rosemary Hunter 'The Power of Feminist Judgments' (2012) 20 Feminist Legal Studies 143; Susan M Armstrong, 'Is Feminist Law Reform Flawed? Abstentionists & Sceptics (2004) 20 Australian Feminist Law Journal 44; Ralph Sandland, 'Between '"Truth" and "Difference": Poststructuralism, Law and The Power of Feminism' (1995) 3 Feminist Legal Studies 47

In inhabiting the role of the 'sceptical pragmatist' and approaching legal reform through some traditional judicial means, Shah and Munro transform the courtroom as a forum previously identified by Smart as a sphere in which to 'silence' women into a tool in which to centralise women's specific issues and concerns, particularly within the realm of domestic violence.[253] Indeed, in facilitating the re-interpretation of 'bodily harm', Shah and Munro can be said to effectively 'challenge the majority's story and weaken its hold on our collective imagination' in the context of domestic violence.[254] In other words, they utilise feminist knowledge and the traditional legal system to critique and challenge the traditional approach to judgment writing within proceedings concerning domestic violence and in doing so they open our collective minds to the prospect of a new approach.[255] Ultimately, in balancing legal reform with a critique of law from a feminist perspective within their re-judgment of *R v D*, Shah and Munro reinforce Hunter's belief that a genuine engagement with the law from the inside holds great potential for transformative practical legal change.[256]

Arguably, the potential for the Feminist Judgments Project to modify established legal doctrine and policy in order to create more 'just' judicial outcomes cements feminist judicial decision-making as the mode of best judicial practice. This is because the feminist re-judgments provide an opportunity to rectify the various injustices identified by feminist scholars within original judicial decisions; and as such these reduce the threat that these injustices pose to the perceived legitimacy and value of the law.[257]

[253] Carol Smart, *Feminism and Power of Law* (Routledge, 2002) P 88
[254] Erika Rackley, 'Difference in the House of Lords' (2006) 15 Social and Legal Studies 163,181
[255] Ibid
[256] Carol Smart, *Feminism and Power of Law* (Routledge, 2002) P 6; Rosemary Hunter, Claire McGlynn, Erica Rackley, *Feminist Judgments From Theory to Practice* (Hart Publishing Ltd, 2010) P 4; Susan M Armstrong, 'Is Feminist Law Reform Flawed? Abstentionists & Sceptics (2004) 20 Australian Feminist Law Journal 44
[257] Johnson, Maguire and Kuhns, 'Public Perceptions of the Legitimacy of the Law and Legal Authorities: Evidence from the Caribbean' (2014) 48 Law and Society Review 984; Hunter, 'The Power of Feminist Judgments' (2012) 20 Feminist Legal Studies 137; Mairead Enright, Julie McCandless and Aoife O'Donoghue, *Northern/Irish Feminist Judgments: Judges' Troubles and the Gendered Politics of Identity* (Hart Publishing, 2017) P 3; Bridget J Crawford, Anthony C Infanti, *Feminist Judgments: Rewritten Tax Opinions* (CUP, 2017) P 45

Chapter 4 Conclusion - Feminist Judicial Decision-Making as *Judicial Decision-Making*: A Legitimate and Valuable Approach?

This dissertation commended the commitment of the judiciary and the JAC to improving the external legitimacy of the common law by appointing a more diverse judiciary.[258] However, while this was praised, this dissertation identified the active failure and neglect by judges to engage with and to analyse their existing and formalist approaches towards judicial decision-making. The dissertation emphasised that the reluctance by the judiciary to engage critically with their decision-making approaches continued, even as feminist scholars unearthed the judiciary's production of 'unjust' and 'wrong' judicial decisions.[259]

The dissertation demonstrated two of the main implications arising from the judiciary's failure to critically engage with their approaches to judicial decision-making. Firstly, in failing to engage with their approaches towards judicial decision-making and by avoiding discussions about judicial decision-making more widely, the judiciary was identified as endangering women and minority groups to further levels of injustice.[260] Secondly, the judiciary's continued treatment of women in an 'unjust' manner was depicted as undermining the legitimacy and the value of the common law because as recognised, the legitimacy of the law is inextricably linked with perceptions of the law as an arbiter of justice and fairness.[261] In compromising the legitimacy of the common law, the judiciary was identified as diminishing the status of the law more widely, and even creating the potential for disobedience and unrest within wider society.[262] As demonstrated in treating women in a disproportionately 'unjust'

[258] Constitutional Reform Act 2005, Section 64; Rosemary Hunter, 'More than Just a Different Face? Judicial Diversity and Decision-making' (2015) 68 Current Legal Problems 22-23
[259] Rosemary Hunter, 'The Power of Feminist Judgments' (2012) 20 Feminist Legal Studies 137
Mairead Enright, Julie McCandless and Aoife O'Donoghue, *Northern/Irish Feminist Judgments: Judges' Troubles and the Gendered Politics of Identity* (Hart Publishing, 2017) P 3
Bridget J Crawford, Anthony C Infanti, *Feminist Judgments: Rewritten Tax Opinions* (CUP, 2017) P 45
[260] Richard A Posner, *How Judges Think* (HUP, 2010) P 6
[261] Johnson, Maguire and Kuhns, 'Public Perceptions of the Legitimacy of the Law and Legal Authorities: Evidence from the Caribbean' (2014) 48 Law and Society Review 984
[262]William A. Bogart, *Consequences: The Impact of Law and Its Complexity* (University of Toronto, 2002) P 45

and 'wrong' manner, the judiciary was depicted as disadvantaging the needs, experiences, and interests of women.[263]

In addition, the dissertation highlighted the judiciary's complicity in damaging the legitimacy of the common law and its wider value because of the judiciary's awareness of the distinct experiences and needs of women within the judicial decision-making system.[264] Not only did the dissertation highlight the judiciary's awareness of the distinct experiences of women in the judicial decision-making process, but it also highlighted the discretion available for judges to respond to these needs.[265] Ultimately, the treatment of women in this way was highlighted as reinforcing the inadequacy of the present formalist approach to judicial decision-making.[266]

The dissertation provided a realist critique of present formalist approaches towards judicial decision-making and identified the promotion of formalist approaches towards judicial decision-making by the wider public and media. The project identified the inherent contradictions, mistruths, and reductionist conceptions of judicial decision-making from the perspective of formalism.[267] The deconstruction of formalist approaches towards judicial decision-making facilitated the illustration of the methodology contained within the Feminist Judgments Project as a realist approach to judicial decision-making. This was achieved by dismantling formalist conceptions of judicial decision-making as a completely autonomous and rule-based exercise and the problems arising from promoting the pretence of a formalist approach to judicial decision-making. [268] In evaluating the formalist approach to judicial decision-making combined with the inequalities arising from an attempt to maintain a formalist

[263] Rosemary Hunter, 'The Power of Feminist Judgments' (2012) 20 Feminist Legal Studies 137
Mairead Enright, Julie McCandless and Aoife O'Donoghue, *Northern/Irish Feminist Judgments: Judges' Troubles and the Gendered Politics of Identity* (Hart Publishing, 2017) P 3
Bridget J Crawford, Anthony C Infanti, *Feminist Judgments: Rewritten Tax Opinions* (CUP, 2017) P 45
[264] Judicial Studies Board, *Equal Treatment Bench Book* (Judicial Studies Board, September 2008) 6-1
[265] Ibid and Hanoch Dagan, 'The Realist Conception of Law' (2007) 57 University of Toronto Law Journal 656
[266] Rosemary Hunter, 'The Power of Feminist Judgments' (2012) 20 Feminist Legal Studies 137
Adam Gearey and John Gardner, *Law and Aesthetics* (Hart Publishing, 2001) P 2
[267] Hanoch Dagan, 'The Realist Conception of Law' (2007) 57 University of Toronto Law Journal 611
[268] Terence Etherton, 'Liberty, the archetype and diversity: a philosophy of judging' [2010] Public Law 8, 9

approach to decision-making in practice, the literature review highlighted the potential for the Feminist Judgments Project to rectify these issues in a more considered and 'just' way.[269] The dissertation identified feminist judicial decision-making as a realist project because it discerns and embraces the gap generated by the indeterminacy of the law and seeks to plug this gap with feminist reasoning techniques in order to create more just outcomes.[270] The literature review considered the views of Smart and Mossman and the counter-arguments provided by Hunter et al regarding the possibility for the Feminist Judgments Project to feature as a legitimate and distinctive approach towards judicial decision-making.[271]

In response to the judiciary's production of 'unjust' judicial decisions as a result of the formalist tendencies of judicial decision-makers, the dissertation placed its focus on calls by feminist legal scholars for a distinctly feminist approach to judicial decision-making.[272] This dissertation analysed a feminist re-judgment contained within the Feminist Judgments Project in the interests of promoting fairness, and fundamentally an 'equal justice for all' within the judicial decision-making process. [273] This analysis was undertaken because of the disproportionate levels of criticism aimed at judges who appear to be, or who are openly incorporating feminist beliefs into their judicial decision-making approach and the continued 'fetishization' of the legal status quo by the judiciary.[274] The analysis identified the invaluable nature of feminist judicial decision-making because of its response to the distinct needs and interests of vulnerable women as in *R v Dhaliwal*.[275] In responding to the distinct issues faced

[269] Rosemary Hunter, Clare McGlynn, and Erika Rackley, (eds) *Feminist Judgments From Theory to Practice* (Hart Publishing, 2010) P 31
[270] Rosemary Hunter, Clare McGlynn, and Erika Rackley, (eds) *Feminist Judgments From Theory to Practice* (Hart Publishing, 2010) P 5
Hanoch Dagan, 'The Realist Conception of Law' (2007) 57 University of Toronto Law Journal 613
[271] Carol Smart, *Feminism and Power of Law* (Routledge, 2002) P 2
[271] Mary Jane Mossman, 'Feminism and Legal Method: The Difference It Makes' (1987) 3 Wisconsin Women's Law Journal (now Wisconsin Journal of Law, Gender and Society) 167, 168
Rosemary Hunter, 'The Power of Feminist Judgments' (2012) 20 Feminist Legal Studies 143
[272] Sally Jane Kenney, *Gender and Justice: Why Women in the Judiciary Really Matter* (Routledge 2013) P 15
Catherine A Mackinnon, *Toward a Feminist Theory of the State* (HUP, 1989) P 249
[273] Ibid
[274] Leslie J Moran, 'Reviewed Work: *Feminist Judgments: From Theory to Practice* by Rosemary Hunter, Claire McGlynn, Erica Rackley' (2012) 75 The Modern Law Review 287
[275] R v D [2006] EWCA Crim 1139
Mandy Burton, 'Commentary on *R v Dhaliwal'* in Rosemary Hunter, Clare McGlynn, and Erika Rackley, (eds) *Feminist Judgments From Theory to Practice* (Hart Publishing, 2010)

by *Dhaliwal* through the means of a hybrid feminist-judicial decision-making, the analysis demonstrated that feminist judicial decision-making might be recognised as a legitimate form of judicial decision-making.[276] This is because in responding to these issues in *Dhaliwal*, feminist judicial decision-making moves beyond an academic feminist critique to provide a more 'just' outcome for a variety of people who are neglected by existing judicial approaches. Thus, in light of the greater sense of justice produced by feminist judicial decision-making, the feminist judicial decision-making approach was identified as an appropriate way of saving the legitimacy and value of the common law.[277]

Overall, this dissertation argues that feminist judicial decision-making represents a legitimate and valuable approach to judicial decision-making because of its considered approach towards the distinct needs of women within the boundaries of existing judicial conventions and constraints. Although the analysis of the approach within the Feminist Judgments Project is limited due to the length of this piece, the findings demonstrate the potential for this judicial decision-making approach to be ingrained as a mode of judicial best-practice. This is because the project remains faithful to existing judicial conventions, however in discerning the gap available within the judicial decision-making process, contributors identify a way to incorporate a more academic feminist critique and knowledge.

In future research, it is suggested that a larger scale review of feminist re-judgments ought to be conducted across all of the published global Feminist Judgments Projects with the aim of cataloguing the key impact(s) of feminist judicial decision-making upon the law and society more broadly. The findings from this research could then be compiled into a policy document to highlight the seriousness of unjust judicial decision-making with regards to undermining the legitimacy and value of the law, and the ability of feminist judicial decision-

[276] Rosemary Hunter, 'The Power of Feminist Judgments' (2012) 20 Feminist Legal Studies 137
[277] Johnson, Maguire and Kuhns, 'Public Perceptions of the Legitimacy of the Law and Legal Authorities: Evidence from the Caribbean' (2014) 48 Law and Society Review 984

making to support the common law's legitimacy. This could then assist in shifting feminist judicial decision-making from the realms of 'alternative-dom' towards a normative approach to judicial decision-making in turn reflecting Hunter's wider objective for feminist judicial decision-making to feature more in academic and practical spheres.[278]

To conclude, feminist judicial decision-making is reinforced as a legitimate and valuable socio-legal and realist approach to judicial decision-making because of its potential to generate genuine legal change and to reduce unfair, 'unjust' and gendered judicial decisions. Ultimately, where existing judicial decision-making approaches fail, the Feminist Judgments Project responds. Although the accommodation of feminism and law may be initially difficult, the Feminist Judgments Project demonstrates that judicial decision-making may legitimately incorporate a more academic feminist critique of law into judicial decision-making in order to generate a viable path for change and justice.

[278]Rosemary Hunter, Clare McGlynn, and Erika Rackley, (eds) *Feminist Judgments From Theory to Practice* (Hart Publishing, 2010) P 43

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APPROACHES TO LAW 19/20 POSTER CONFERENCE HIGHLY COMMENDED

THESE POSTERS HAVE BEEN SELECTED TO APPEAR IN THE

STUDENT JOURNAL OF PROFESSIONAL PRACTICE AND ACADEMIC RESEARCH

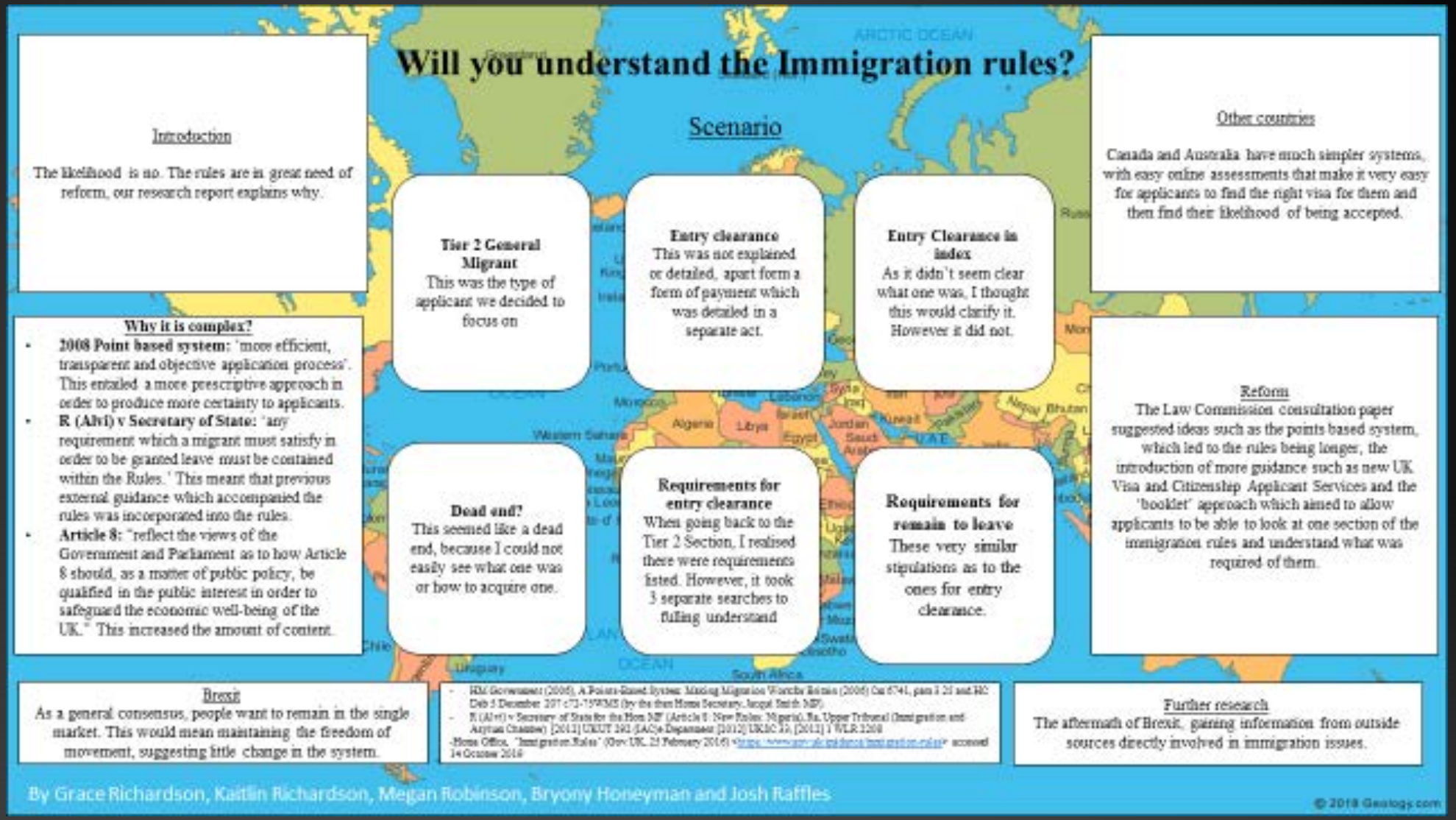
Josh Raffles

Kaitlin Richardson

Grace Richardson

Megan Robinson

Bryony Honeyman

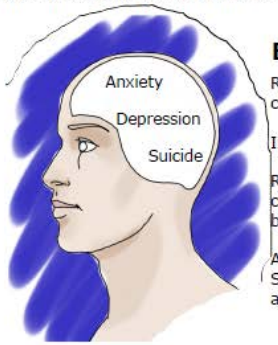


Alex Wilson
Ashley Shepard
Leah Plews
Rachel Armstrong
Rebecca Warwick

Ashley Shephard, Alex Wilson, Leah Plews, Rachel Armstrong, Rebecca Warwick

Does Social Media need Statutory Regulation?

Social media is a worldwide obsession, with over 2.4 billion Facebook users, 1 billion Instagram users and 330 million Twitter users. Our report looks at the negative effects of social media, such as cyber bullying and online grooming, that could be addressed through statutory regulation.



Effects and cases

Researchers from Universities of Oxford and Birmingham found that cyber bullying victims are more than twice as likely to self-harm.

In 2009, Keeley Houghton was jailed for cyber bullying.

Research conducted by the NSPCC indicates that "nearly a third (31%) of counselling sessions were from children and young people experiencing bullying on a gaming or social networking site".

A high profile prosecution linked to online gaming is the case of United States v. Barriss (6:18-cr-10065) in 2018, wherein the "swatting" of another player lead to a fatal shooting.

Current legislation

Malicious Communications Act 1988

Harassment Act 1997

Communications Act 2003

Companies' Responsibilities

Setting up a social media account generally requires entering personal details to sign up. Using Facebook as an example, the user must confirm their email address or mobile phone number, but there are no processes in place which check whether the rest of the personal details are genuine.

Proposed reform

Regulation could be implemented by:

- Requiring companies to carry out ID checks when setting up accounts.
- Verification photos, similar to methods employed by Badoo or Blume.
- Improve the accessibility of terms and conditions.
- Making it easier to report abusive or unwelcome behaviour from others online.
- The use of AI to search for trigger phrases in posts and comments.

The need for substantial reform of the law on harassment and cyber bullying is clearly needed. The potential side effects of proposed reform include, the limiting of essential internet access for people who don't have a form of ID, like homeless people, people in deprived areas, or young people. Also, trigger phrases may be difficult to implement as Artificial Intelligence doesn't have the ability to understand context, or relationships between people.

Currently, there is no independent regulatory body governing online safety measures. However, Government's White Paper proposes regulation and legislation to place a duty of care on social media companies, and to discourage harmful behaviour by users.

Destinee Ellis
Molly Doyle
Neave Douglas
Lucy Crabtree
Libby Duncan
Millie Eason

Adam Doyle
Orlagh Croskery
Georgia Fleming
Sinead Finneran
Rebecca Douglass
Natalia Flis
Jonathan Williams

How Effective Is The Defamation Act 2013?

By Orlagh Croskery, Georgia Fleming, Natalia Flis, Adam Doyle, Jonathan Williams, Rebecca Douglass, Sinead Finneran

CASE LAW

- Thornton v Telegraph Group Limited (2010)
- Lachaux v Independent Print Ltd (2017)
- Reynolds v Times Newspapers (2001)
- Defamation Act 1952
- Defamation Act 1996
- Defamation Act 2013

INTRODUCTION

The turn of the 21st century created an abundance of issues arising from it's outdated defamation law. Our group conducted research on the law surrounding defamation and technology's increasing impact on the spread of information.

NEGATIVES

- S.1(b) states harm to the reputation of a body that trades for profit is not "serious harm" unless it has caused or is likely to cause the body serious financial loss'
- Amendment no longer allows minor financial losses to be brought, this causes an injustice as the claimant will not be penalised for the severity of their claim.

POSITIVES

- Raised the "threshold of seriousness" for when a defendant can be held accountable.
- Allowed perpetrators to be branded with committing 'serious harm' instead of 'substantial harm'.
- Prevented small cases, which do not cause 'serious harm' being brought to court.
- Solidifies the human right of free speech; enables people to have confidence when speaking out.
- Introduction of s.4's principles avoids confusion, and gives it Parliamentary authority that makes it applicable to all courts, therefore allowing it to be used as a legal act rather than as the Reynolds Test precedent.

CITATIONS

-Thornton v Telegraph Media Group, [2009] EWHC 2863 (QB)
-Lachaux V Independent Print Limited, [2017] EWCA Civ 1334
-Reynolds v Times Newspapers Ltd, [2001] 2 A.C. 127

CONCLUSION

The changes made to the 1996 Act on Defamation made greatly positive impacts due to the period of evolvement between itself and the 2013 Act, which has to be recognised as a step in the right direction. However, the fact that there are still issues brings attention to the point that perhaps more reform is necessary.

Abby Kelley
Daniel Livingstone
Mariam Lydon
Phoebe Lister
Sofia Kitson
Pang Choon Yue
Georgina Keeton-Williams

IS YOUR DNA PRIVATE?

Introduction:

- DNA profiling was invented by Sir Alex Jefferies in the 1980s as a way to analyse, gather and store DNA.
- DNA profiling is used to help in the identification of perpetrators at the designated crime scenes.
- Protection of a persons private life is a Human Right.
- It is a controversial topic whether DNA retention affect an individual's Article 8 human rights.

What is Article 8?

- Article 8 is a **conditional right:**

  right to a persons private and family life
- It can be removed in certain circumstances such as criminal investigations as directed in PACE.
- DNA is stored on a shared EU database.
- The statistic of **0.36%** displays a very small margin of crimes detected using the National DNA database even after **1.5 million** additions it remained un-changed.
- Due to the seriousness of the crime and difficulties to inform a individual of each search carried out this re-mains proportionate.

What is PACE?

- **PACE** (the police criminal evidence act) is the main legislation that guides the storage and collection of DNA.
- Many individual cases state **PACE infringes upon the Article 8 Rights.**
- The PACE act has been edited and amended to en-sure that it complies with the article 8 rights—Protections of Freedoms Act 2012.

What is a DNA sample?

A DNA sample is defined by the Police and Criminal Evidence Act known as PACE as:

'any material that has come from a human body and consists of or includes human cells.'

This definition was used throughout the research report to main-tain consistency and in the interests of parliamentary supremacy.

Summary:

- It is inevitable that PACE will interfere with an individual's private life because of the intimacy required to collect DNA samples.
- This interference remains proportionate for the prevention of future crimes or the ease of future DNA matches.
- This is to ensure that individual's who commit crimes are rightfully convicted for justice and rehabilitation.

How has the law developed?

- Since a **2002 Court of Appeal** ruling there has been many changes to the ways in which DNA can be retained, stored and used.
- The ruling allowed the police to retain any DNA collected from those who faced prosecution even if a conviction was not given.
- This was upheld with a 2004 ruling from The House of Lords (Supreme Court)
- However, the 2008 European Court of Human Rights case of **Marper** determined that this was an **infringement of peoples' Article 8 rights**
- This case leads to the **Protections of Freedoms Act** an important amendment to PACE, allowing it to **proportionately infringe upon Article 8.**
- A more recent Supreme Court ruling from the controversial case of **Gaughran** 2012 indicates that the current laws surrounding the retention of DNA are now **justified** and satisfied **the principle of pro-portionality** in terms of Article 8 Human Rights.

References:

Gaughran v Chief Constable of Northern Ireland [2015] UKSC 29

S and Marper v United Kingdom [2008] ECHR CoE 30562/04 and 30566/04

Criminal Justice Act [2003] s 142(1)(C)

Police and Criminal Evidence Act 1984

Protection of Freedoms Act 2012

ECHR 1998 article 8

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WHAT DO YOU MEAN YOU DON'T WANT TO HAVE SEX WITH ME?

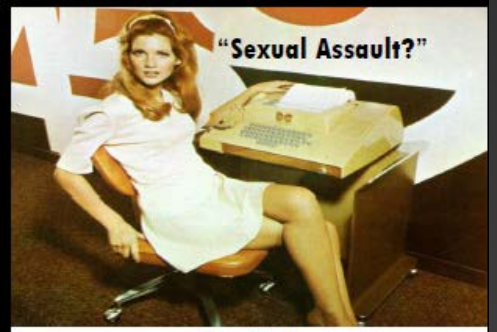
THE EVOLUTION OF SEXUAL OFFENCES

Nina Kennett, Jack King, Abi Laverick, Poppy Lawson, Kirsten Lowes, Ayla Hakeem

"I married such a sourball!"

"What do you mean you don't want to have sex with me? You're my wife!"

The Sexual Offences Act 1956 was used to establish Marital Exemption through Common Law, where a husband could legally rape his wife because they are married. Now, thanks to the ruling in R v R, it is illegal to rape your wife under the act. The removal of the defense of marital exemption in 1991 shows that there has been an evolution of the law on sexual abuse in both a parliamentary and judicial approach. Due to the constant need to update the law, most of the outdated legislation has been repealed as well as the courts removing the defense of marital exemption to help protect women in sexual abuse cases.



It's a thing!

Introducing the *new* Sexual Offences Act 2003!

Our updated legislation makes it possible for a person to be convicted of sexual touching without consent. Sexual assault and causing a person to engage in sexual activity without consent are triable either-way offences, the gravity of the situation is reduced, therefore invalidating the severity of the incident when compared to the offence of rape covered in the same act!

Sexual Assault is not just for women! Men can be victims too as shown in the case of Beedall. We're stepping into the future of Sexual Offences courtesy of UK Parliament!

"What do you mean it's sexual harassment? It's just a joke!"

"Don't be so uptight!"

"I was only being friendly!"

"You're being so sensitive!"

"Don't be so dramatic!"

"It's a compliment."

"It just means they're interested!"

Workplace sexual harassment used to be a rife issue with no way to punish the perpetrators. With the help of UK law makers, the Equality Act 2010 makes anyone who acts in an unwanted, sexual way guilty of sexual harassment and therefore liable to prosecution. It is reported that 52% of women experience some kind of sexual assault in the workplace and 35% of women have heard sexual comments being made in the workplace. These statistics show that the current legislation is not expansive enough to reduce the amount of harassment in the workplace.

The Future Is Here!

Introducing the newest reform, suggested by The People! No longer can a woman escape the offence of rape.

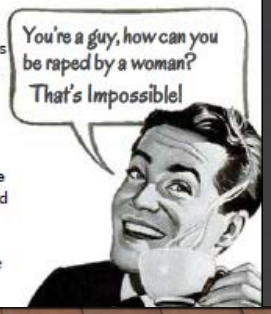
Current Definition:

A person (A) commits an offence if he intentionally penetrates the vagina, anus or mouth of another person (B) with his penis, (b) B does not consent to the penetration, and (c) A does not reasonably believe that B consents

New Definition:

To remove the need for there to be penile penetration, only penetration.

The current definition only allows for male perpetrators due to the need for penile penetration. By changing the definition of rape to encapsulate the idea of forced penetration, it will allow for there to be female offenders of rape. This could be done by removing the need for the penile penetration for the offence to be considered rape



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Do *I* Get a Say?!

Are we satisfied that the current laws on Children Transitioning between Genders are fair?

What Does "Transgender" Mean?

- *Transgender refers to those people who are born as one gender but don't feel that they fit the gender and body that they were born into, they are then able to transition to the other gender as this will enable them to lead a more comfortable and fulfilling life.*
- *Gender Dysphoria is the condition which those who experience feelings of discomfort within their own body, which may lead to them feeling trapped and isolated causing severe mental issues.*

If you suffer with Gender Dysphoria, your reflection doesn't match your own self-image.

Current Laws for Minors Wishing to Transition

- *As of now, a person must be 18 years old before they can apply for a Gender Recognition Certificate, under the Gender Recognition Act, 2004*
- *The age of consent for surgery is also 18 years old for a gender transition.*
- *The Law currently does nothing to recognise children who feel they are living in the wrong body.*

We Can Help...
The Option of Hormone Treatments

- *Puberty-slowing hormones can be applied to the child, which stop the process of puberty to prevent sexual organs from developing, making the eventual transition easier for the person.*
- *These are useful as they simply pause natural processes, allowing the child to return to natural puberty should they decide not to transition. Thus, they allow the child greater consideration of the issue.*
- *However, we must accept that there may be side effects so use of these must be contained to children with genuine gender dysphoria which must be diagnosed by psychiatrists.*

We can do better...
How to reform the current law:

- *Gender recognition should be available at age 16, just not surgery.*
- *Clearer guidelines should be set out regarding how to demonstrate that you are living as the opposite gender.*
- *Less intrusive process into the person before they can transition, crucially do not force large amounts of tests upon the person; physical ones are not necessary as gender dysphoria is not a physical illness.*
- *Minors should not be allowed surgery under any circumstance until they are 18 and have made their own decision, however, treatments like hormone therapy must be available to them from the start of puberty to help with the beginning of the transition.*
- *Access to hormone blockers for all children diagnosed with gender dysphoria, with laws in place to ensure that they are all able to have access.*

Do Mum and Dad Get a Say? How Current Legislation Treats Parental Influence.

- *Unlike with a hernia, for example, even with parental consent, a minor may not undergo gender altering surgery.*
- *This is because the decision needs to be the child's - not influenced by an outside source.*
- *Some parents encourage their child to live as the opposite gender, even if this isn't the child's wishes; the age of consent protects against this.*

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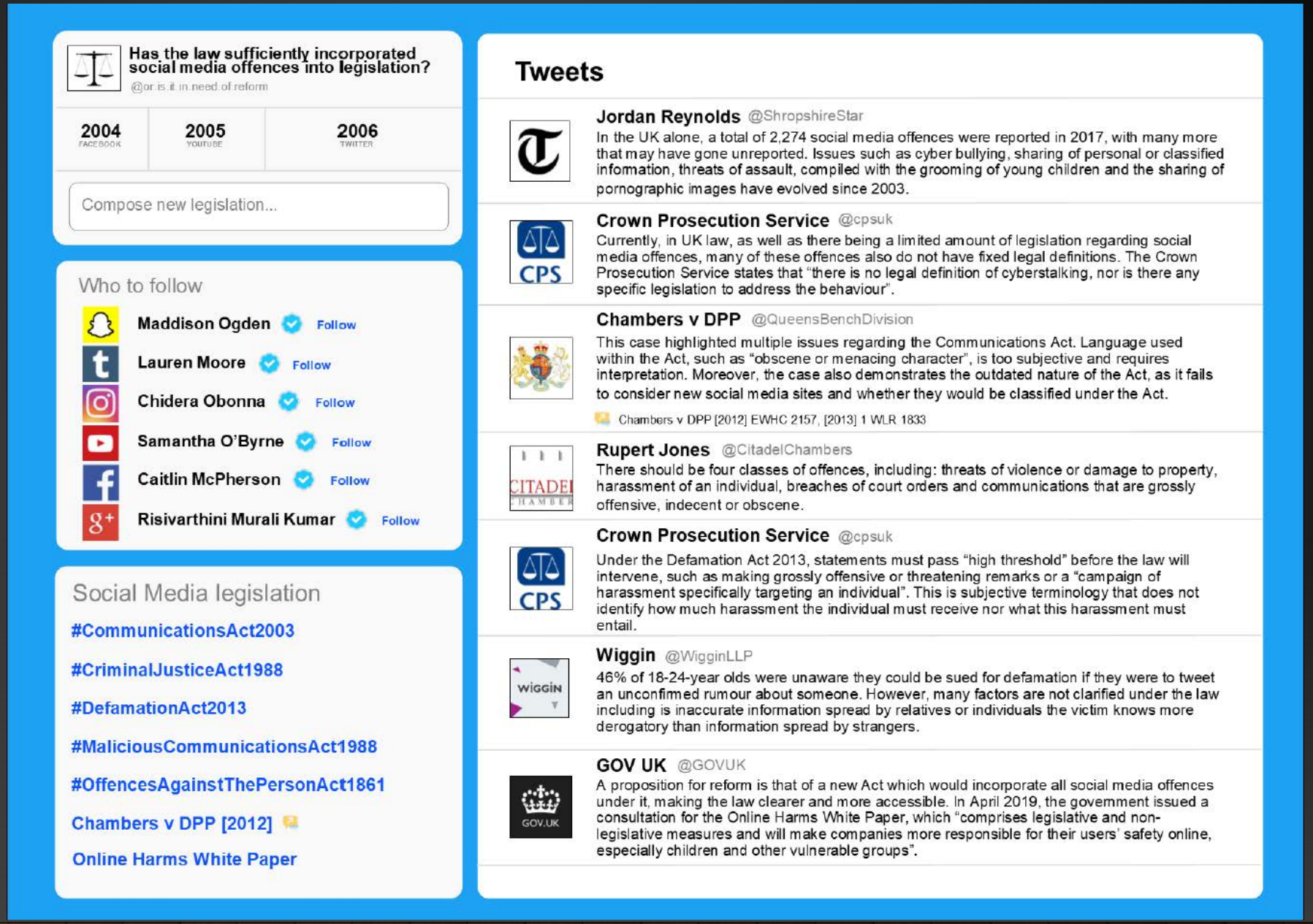

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Prostitution

'How effective is the law in England and Wales in reducing and safe regarding prostitution.'

What is the current law in England and Wales?

As the law stands, the exchange of sexual services itself is legal but (in accordance with various statutes) many associated activities are illegal

Street Offences Act 1959 s.1- made loitering or soliciting in a street or public place for the purposes of prostitution an offence

Sexual Offences Act 2003 s.59(a) introduced sex trafficking as a specific offence

The Policing and Crime Act 2009- introduced a strict liability offence which is committed if someone pays or promises payment for sexual services from a prostitute who has been subject to exploitative conduct

What are the current proposals for reform?

Ideas for reform have been proposed by the All-Party Parliamentary Group. These ideas aim to decriminalise those who sell sexual services, which would mean that prostitutes would no longer face prosecution.

Alongside this, the APPG have also proposed that buying sex services should be made illegal, which would mean the consumer would be prosecuted. The aim of this is to reduce the number of cases involving sexual exploitation and modern-day slavery.

What are the contemporary issues surrounding sex work?

Section 2 of the modern slavery Act 2015 includes the offence of arranging or facilitating the travel of another person for the purposes of sexual exploitation.

A person commits the offence of sex trafficking when he arranges to travel the victim, or transfer the victim, or maybe harboring the victim.

For these purposes, exploitation involves the commission of an offence under part 1 of the Sexual Offences Act 2003, or section 1(1) Protection of Children Act 1978. it also incorporates all sexual offences of prostitution.

What are other models of the law in other countries?

Prostitution in the Netherlands is legal and regulated so that all sex workers are kept safe from sex trafficking. Criminal Code Articles 250 and 432 was removed on October 2000, making pimping and brothels legal.

The Nordic Model is a proposed model to control prostitution. It is the idea that prostitution itself will not be illegal but those buying the services will be criminalised. This model is in force in Ireland but England are yet to adopt this approach.

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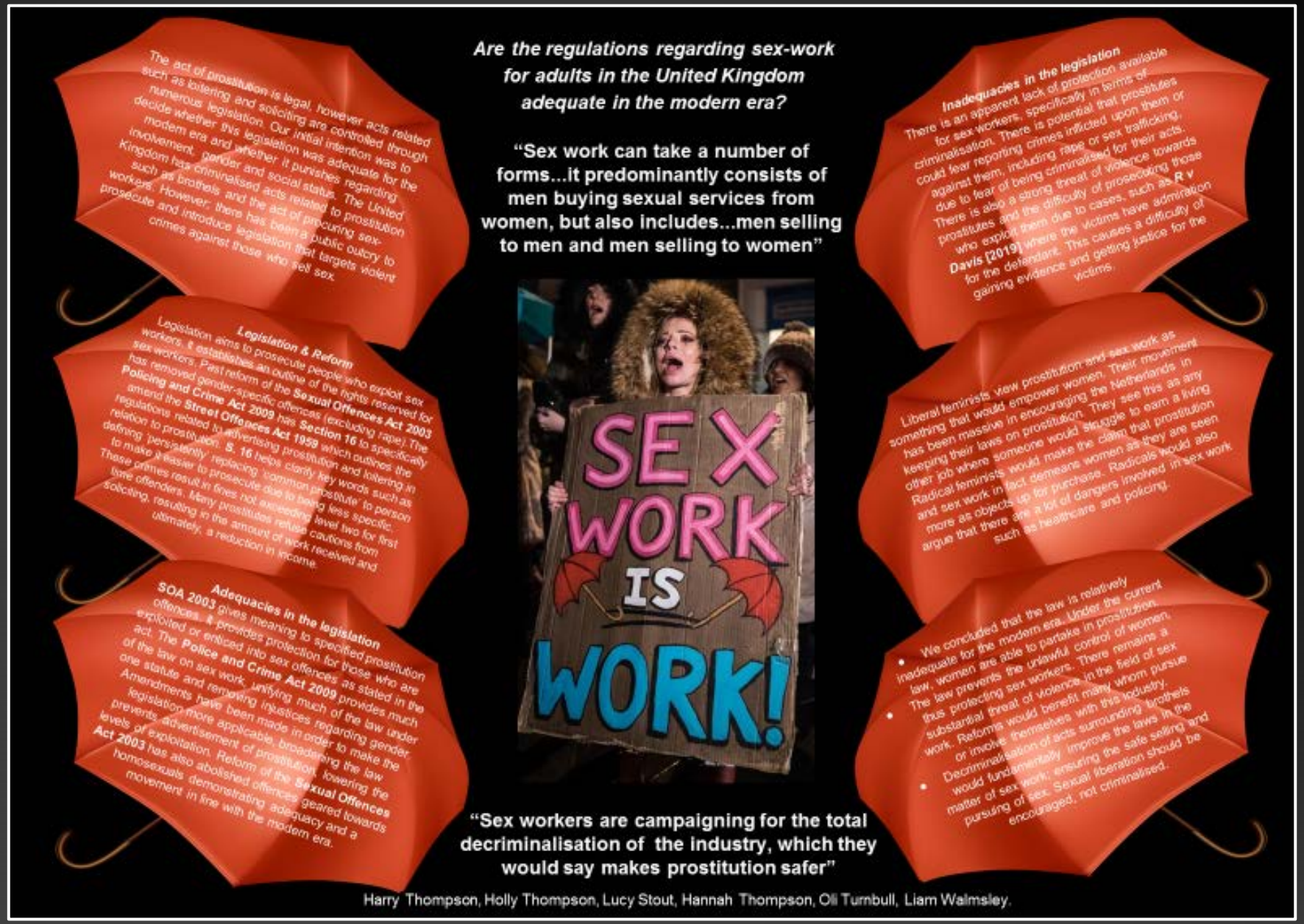

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In the modern day, how effective is the law in dealing with knife crime in England and Wales?

Key Statistics

In the year ending March 2019, there was an overall average of 47,100 knife crimes involving a pointed or bladed article recorded by the police throughout England and Wales. This is the highest number in the ten years documented statistics on knife crime.

Across the country 43 out of 44 police databases recorded a rise in knife crime since 2011.

Young Offenders

Knife Crime is increasing amongst young people. The government is attempting to deal with this issue with the "tackling knives , saving lives action programme".

Similarly sentencing has become harsher as seen in section 42(1) of the Violent Crime Reduction Act 2006. However, young offenders are likely to evade imprisonment and receive fines instead.

Modern Day Knife Crime Prevention (The Offensive Weapons Act 2019)

Part 2 of the Offensive Weapons Act 2019 lays out the variety of provisions that will be enforced to prevent knife crime. For example, Knife Crime Prevention Orders (KCPOs) aim to deter the potential and previous offenders from committing further offences.

Conclusion

The law is ineffective in relation to young offenders due to most punishments being regarded as short term. The purpose of punishment and rehabilitation has potentially been overlooked due to the high statistics of reoffending.

The offensive Weapons Act 2019 and Knife Crime Prevention Orders have been adapted so that they effectively deal with modern day knife crime.

It is clear that any offender involved in will be convicted; however this is in the review stage on whether this is a permanent solution to reduce knife crime.

The law around the possession of a bladed or pointed article needs to be reformed due to the high statistics of offending and reoffending.

Threats with an Offensive Weapon

Reforms made under the Offensive Weapons Act 2019, aim to reduce the level of threat perceived by a potential victim, in order for someone wielding a knife to commit an offence. This will allow for a more effective way of dealing with knife crime in the modern day.

Possession of Knives and Other Bladed Articles

It is a criminal offence under the Prevention of Crime Act 1953 to be in the possession of a bladed or pointed article without any lawful authority or reasonable excuse (such as work purposes) in a public place. However, many of the punishments that are applied are more often suspended sentences and fines.

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Oral Presentation

The Ghosts Around the Coasts: Anarchy and Equity in Transboundary River Basins, *Mohsen Nagheeby, Northumbria University*

https://figshare.northumbria.ac.uk/articles/Northumbria_Law_Journal-Mohsen_012020_3_1_mp4/11791611